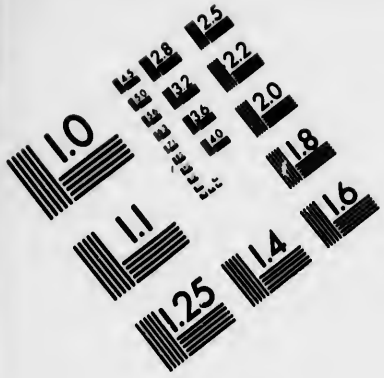

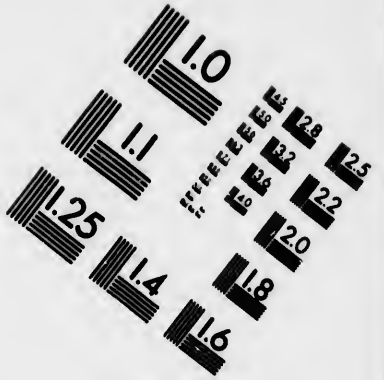

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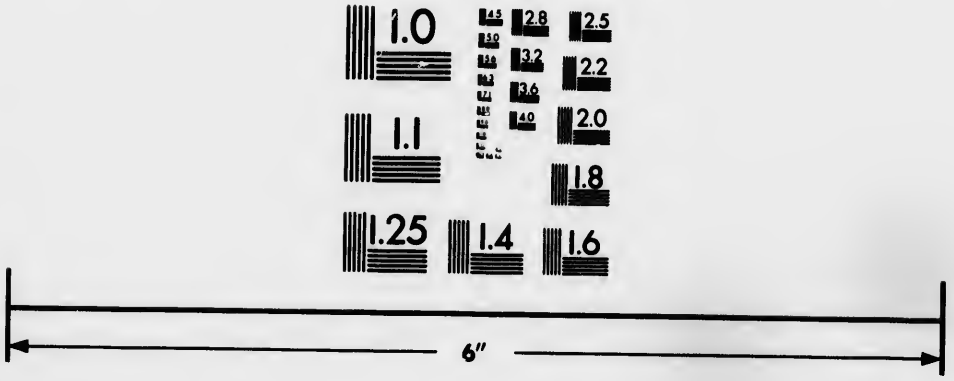

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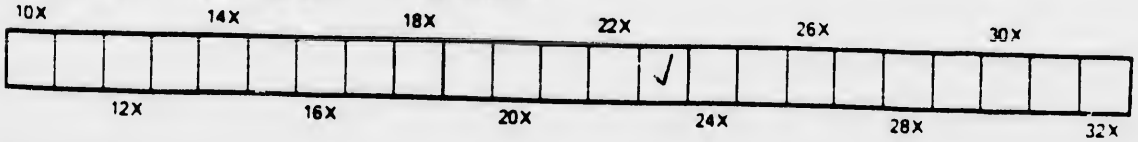

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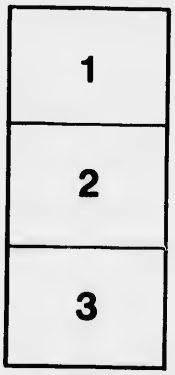

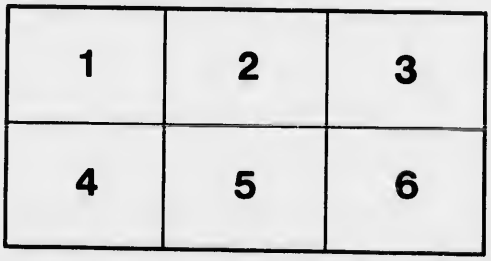

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REPORTS OF CASES

ADJUDGED

IN THE

COURT OF CHANCERY

OF

UPPER CANADA:

COMMENCING IN DECEMBER, 1851.

BY
ALEXANDER GRANT, ESQUIRE,
BARRISTER-AT-LAW.

REPRINTED.

VOLUME III.

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

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

" " WILLIAM HUME BLAKE, *Chancellor.*

" " JAMES BUCHANAN MACAULEY, *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.*

" " ROBERT BALDWIN SULLIVAN, *Judge of the Court of Common Pleas.*

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

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

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

" " WILLIAM B. RICHARDS, *Attorney General.*

" " JOHN ROSS, *Solicitor General.*

A

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OF

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Versus is always put after the name of the plaintiff.

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TABLE

OF

CASES CITED IN THIS VOLUME.

REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING IN DECEMBER, 1851.

IN APPEAL.

[*Before the Hon. the Chief Justice of Upper Canada, the Hon. the Chief Justice of the Common Pleas, the Hon. Mr. Justice McLean, the Hon. Mr. Justice Draper, and the Hon. the Vice-Chancellors*].

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

GREENSHIELDS v. BARNHART.*

Parol Evidence—Mortgage.

Where a party made an assignment of his estate by way of mortgage, but the instrument creating the incumbrance purported to be absolute, and no change of the possession ever took place, the tenant of the mortgagor continuing to hold possession: *Held per Curiam*, that this was not such a possession by the mortgagor as would affect a purchaser from the mortgagee, with notice of the interest of the mortgagor.—(ESTEN, V. C., *dissentiente*). February 27 and 28, and July 10.

LeTarge v. DeTuyll, ante vol. 1, page 227, approved of.

The doctrine of the admissibility of parol evidence on the question of mortgage or no mortgage, considered.

This was an appeal from a decree of the Court of Chancery, made in the case of *Robert George Barnhart*, plaintiff (one of the respondents here), and Statement.

* This case is reported here, although decided several months ago, it having been found impossible to do so at the time of its decision.

1851. Greenshields v. Patterson. *James Blackwood Greenshields*, (the apellant here), *William H. Patterson*, *Lewis Moffatt* and *Robert Beekman*, (three others of the respondents here), defendants: see the case reported *ante* vol 1, page 459.

Mr. *Mowat* and Mr. *Turner* for *Greenshields*.

Mr. *Morrison* and Mr. *McDonald* for *Barnhart*.

Mr. *Morphy* for the other parties.

Argument. The following, amongst other cases, were cited by the appellant's counsel:—*Woolam v. Hearn* (*a*); *Montacute v. Maxwell* (*b*); *Townsend v. Stangroom* (*c*); *Jones v. Smith* (*d*); *Hanbury v Litchfield* (*e*); *Forster v. Hale* (*f*); *White v. Wakeford* (*g*); *Jolland v. Stainbridge* (*h*).

Counsel for the respondent *Barnhart* referred to:—*Floyd v. Buckland* (*i*); *Butcher v. Butcher* (*j*); *Pyke v. Williams* (*k*); *Frame v. Dawson* (*l*); *Fitzgerald v. O'Flaherty* (*m*); *Lyster v. Foxcraft* (*n*).

July 10. Judgment. ROBINSON, C. J.—On the 2nd October 1830, the Corporation of King's College contracted to sell to *Robert G. Barnhart* lot 6 in the 5th concession of Toronto (200 acres), for 250*l*. It is recited in the contract that he had paid the Corporation 25*l*., and he engaged to pay the residue of the 250*l*. in nine equal instalments, on 2nd October in each year, with interest to be paid each year on the whole sum due.

On the 27th March 1832, *Robert G. Barnhart* paid the second instalment and interest on his purchase.

(*a*) 7 Ves. 219.
(*b*) 1 P. W. 618.
(*c*) 6 Ves. 328.
(*d*) 1 Hare, 43.
(*e*) 2 M. & K. 633.
(*f*) 3 Ves. 713.
(*g*) 7 Sim. 401.
(*h*) 3 Ves. 478.
(*i*) 2 Freem. 268.
(*j*) 1 Vern. 363.
(*k*) 2 Vern. 455.
(*l*) 14 Ves. 386.
(*m*) 1 Moll. 347.
(*n*) White's Leading Cases, 507.

1851.

Greenshields v. Patterson.

On the 4th April 1834, *Robert G. Barnhart* executed a deed (witnessed by *George Duggan, jun.*, and *John Duggan*), whereby, in consideration of 400*l.* to him in hand paid by *William H. Patterson*, "he bargained, sold, assigned and set over to the said *Wm. H. Patterson*, his heirs, executors, administrators and assigns, as well the within written deed (namely, the above contract of sale from King's College, on which this latter instrument is written), and the land therein mentioned; as also all his right of action on the within covenant (viz. the covenant by the Corporation of King's College to convey the land to him in fee), and all his estate, right, title, interest, claim, property and demand whatsoever to the land described in the said deed—also to the deed itself; and he thereby authorized the said *Patterson* to enter into and upon the land therein described (viz. the said lot), to have, hold, occupy, possess and enjoy the same, and to take the rents, issues and profits thereof; and he "authorized and appointed the said *Wm. H. Patterson* to receive from the Corporation a good and sufficient title in fee simple forever of the said lands and premises, either in his own name or in the name of such person as he shall appoint, upon payment to the Corporation of all sums which ought to be paid by him, the said *Robt. G. Barnhart*;" and he further authorised the Corporation of King's College, and their successors, "to transfer and convey all the land premises aforesaid to the said *Wm. Patterson*, his heirs and assigns, forever, or to such person as he or they shall appoint."

Judgment.

There is not a word in this deed to intimate that it was intended to be in fact anything but what on the face of it it appears to be—an absolute sale of all *Barnhart's* interest, placing *Patterson* to all intents and purposes in his situation as purchaser from the College, leaving him to make the remaining payments, and to receive from them an absolute title in fee.

1851.

Greenshields v. Patterson.

There is no agreement, memorandum or minute of any kind endorsed on this deed, or annexed to it, nor anything in writing shewn upon any other paper, to indicate that *Patterson* stood in any other situation respecting these premises than as the absolute purchaser of all *Barnhart's* interest.

It has not been proved, and is not indeed complained of or alleged, that there was any accident or mistake, or that any fraud was practised which prevented the transaction from appearing otherwise than in its true light; there is no charge against *Patterson* that he promised to execute any bond to reconvey, or that he engaged to execute or sign any condition or acknowledgment, or has omitted to do anything that he engaged to do.

Then, *Patterson* having received from *Barnhart* this absolute assignment of all his interest as purchaser of the fee, was thereby enabled to hold himself out to others as the absolute owner, and to enter into any treaty for sale of the land, or to mortgage it for its value to his creditors for any debt he might owe, or to pledge it as security for any new advances.

Judgment.

The use he did make of it was, that after he had held this title for more than five years, he did on 11th December 1839, execute a deed, whereby, in consideration of 400*l.* paid by *James Blackwood Greenshields* of Montreal, merchant, he bargained, sold, assigned and set over to *Greenshields*, his heirs, executors, administrators and assigns, the said lot of land, and the contract for the sale thereof by the College to *Robert G. Barnhart*, following in all respects the words of the assignment which *Patterson* had himself taken from *Barnhart*.

On 14th December 1839, the Corporation of King's College, by their deed, conveyed this lot of land to *Greenshields* in fee simple, for the consideration of

250*l.* acknowledged to have been paid to them by *Greenshields* in full; the balance of the purchase money having been discharged by him. 1851. Greenshields v. Patterson.

And on 9th March 1841, *Greenshields*, gave his bond to *Patterson*, in the penalty of 10,000*l.*, in which he recites that *Patterson* then stood indebted to the firm of *Gillespie, Moffatt & Co.* in a large sum of money; that he was desirious of obtaining from them further advances in the way of his trade; and that as security for the repayment of the amount then due, and of all further advances to be made by *Gillespie, Moffatt & Co.*, he had conveyed in fee to *Greenshields* for and on behalf of *Gillespie, Moffatt & Co.* the lots of land and premises thereinafter mentioned (among which is the lot number 6 in the 5th concession of the township of Toronto, now in question), which said lands and premises are to be re-conveyed to him, *Patterson*, upon payment by him of all sums of money due from him to *Gillespie, Moffatt & Co.*, on settlement of accounts between them, either by mortgage, bill, bond, book account, or otherwise, and whether as principal or endorser, or surety, or guarantee for any other person whatever, and as well upon past as upon all future transactions between the said parties; and the condition of this bond is, that if *Greenshields*, his heirs, &c., shall, after such payment by *Patterson* of all such moneys as aforesaid, re-convey, at the costs and charges of *Patterson*, all the said lands and premises to the said *Patterson*, his heirs or assigns, in fee simple forever, then the obligation to be void. Judgment.

On 12th October, 1841, *Robert G. Barnhart* filed a bill against *Patterson & Greenshields*, alleging that the conveyance by him to *Patterson* was by way of security for a debt due, and not upon an absolute sale, and praying that he might be allowed to redeem on payment of what should appear to be due to *Patter-*

1851.

Greenshields v. Patterson.

son; or, in case it should appear that *Greenshields* had advanced money to *Patterson* on security of the said land, without notice or fraud, then on payment of what might be found due to *Greenshields* on such security.

On 9th January, 1844, he filed an amended bill, in which he set forth in substance that he had formerly carried on business as a merchant in the village of Streetsville; that in the winter of 1833 his affairs became disordered, and he was obliged to discontinue business; that being indebted to *Fisher & Hunter* in Montreal in 206*l.* 0*s.* 3*d.*, he applied in 1834 to *Patterson*, then a merchant in Streetsville, and his brother-in-law, to assume that debt—to which *Patterson* assented; that, being desirous to secure *Patterson* against loss, in consequence of his assumption of the debt to *Fisher & Hunter*, he proposed to

Judgment.

Patterson to assign to him his contract with King's College for the purchase of the land now in question; that the did accordingly, by the deed of assignment dated 4th April, 1834, convey to *Patterson* all his interest in the said contract; that the assignment was made solely with a view of securing *Patterson* from loss in assuming the debt to *Fisher & Hunter;* and that it was understood and fully agreed between him and *Patterson* that the said contract should be re-assigned to him as soon as he should repay to *Patterson* the amount assumed by him to *Fisher & Hunter*, and interest, together with all such sum or sums of money (if any) as *Patterson* should in the meantime pay to King's College under the contract of sale; or in case *Patterson* should obtain a conveyance of the land from the College, then that upon re-payment as aforesaid he should convey the land to the plaintiff *Barnhart*; that *Patterson* has frequently admitted such agreement; that *Patterson* never entered into possession of the land or any part of it; that he *Barnhart* by himself, his tenants and

agents, has been in possession of the said lot of land from the date of the assignment to the time of filing the bill, and has during that period made great and expensive improvements on the property; that in consequence of the residence and improvements of him, *Barnhart*, and other circumstances, the property has become of very great value, being worth in his estimation 2,000*l.*; that he had from time to time paid *Patterson* sums of money, and delivered to him flour and other merchandize towards re-payment of what he had advanced to him, *Barnhart*, on the security of the said assignment—and has requested him to come to an account of the moneys advanced to *Fisher & Hunter*, and to King's College, so that he, *Barnhart*, might redeem by paying any balance due; that about the 1st October, 1849, *Patterson* assigned the contract to *Greenshields*, to secure a debt due by him; that such assignment was taken by *Greenshields* without inquiry of him, *Barnhart*, his agent or tenant, respecting the possession of the lot, though it was notorious that he, *Barnhart*, was in possession and entitled thereto, and this fact might have been easily ascertained if *Greenshields* had made any inquiry of *Patterson*, or otherwise; that *Greenshields* after this assignment, and after he had notice of his (*Barnhart's*) claim, paid the unpaid balance of purchase money to the College, and obtained a conveyance to himself, and surrendered the said contract; that *Patterson* charged him, *Barnhart*, in account with moneys paid by him to *Fisher & Hunter*, and with instalments paid to the College on account of the land, and with the taxes paid by him thereon; that before *Patterson* assigned to *Greenshields*, and before *Greenshields* had advanced any money on the security of the assignment, and before he paid any purchase money, if he did purchase, he, *Greenshields*, "*had some* note or intimation, or some reason to suspect or believe that the assignment from him, *Barnhart*, to *Patterson* was an assignment upon con-

Judgment.

1851.

Greenshields v. Patterson.

dition, and that *Patterson* was in fact only a trustee;" that *Greenshields* has frequently been on the land, and has seen and must have known that *Patterson* was not in possession; that *since 11th December*, 1839, *Greenshields* has frequently visited the land and conversed with *John Barnhart*, plaintiff's father, who was then in possession thereof, but never informed plaintiff or his father of the assignment which he had received from *Patterson* (who is son-in-law of the said *John Barnhart*); that *Greenshields* had never demanded possession from plaintiff or from *John Barnhart*, nor the rents or profits of the land, or intimated any right to make such demand; that when *Greenshields* first had notice of plaintiff's claim upon the land, he had only a small debt against *Patterson*, which was secured on other property—but after he had such notice he and his partners made advances, which he now wishes to charge upon the premises; that the sum which *Greenshields* now claims against *Patterson* became due subsequent to his having notice of plaintiff's claim; that the other lands given in security by *Patterson* to *Greenshields* are more than sufficient to cover whatever claim he or his partners have against *Patterson*—or that if they are not sufficient, they should be first sold and this land only held liable to secure any deficiency.

Judgment.

And the plaintiff, *Robert G. Barnhart*, prays that he may be allowed to redeem on paying any balance due by him to *Patterson*, and any money paid by *Greenshields* to the College on account of the land; or on paying besides to *Greenshields* any balance of moneys advanced by him to *Patterson* without notice or fraud, after sale of other lands mortgaged by *Patterson* to *Greenshields*; or, if *Greenshields* shall be found to be the absolute purchaser, without notice of plaintiff's equity of redemption, or without notice that *Patterson* was out of possession, then that *Patterson* may be decreed to purchase lands of equal

value, and to hold them upon the same trusts as the land in question.

Patterson, Greenshields, and *Gillespie, Moffatt & Co.* were made defendants in this suit.

Patterson answered, and admits his assuming the debt to *Fisher & Hunter;* says that he paid it; that in the beginning of 1834 he was liable to the Sheriff of the Home District on a judgment against him and plaintiff *Robert G. Barnhart,* as bail for *John Barnhart,* plaintiff's father; that he paid on that judgment 195*l.*; that the assignment by plaintiff to *Patterson* was made for securing the 296*l.* 0*s.* 3*d.* paid to *Fisher & Hunter,* and *this* 195*l.*; that it "was agreed that he should re-assign the contract with the College—or in case he obtained a title from the College, that he should convey the land in fee to plaintiff, upon plaintiff paying him what should be due of the 296*l.* 0*s.* 3*d.*, *and* 195*l.* and interest, and all sums paid for the land to the College; that soon after he received the assignment "he gave leave to plaintiff's father, *John Barnhart,* as agent to the plaintiff, to occupy or let the said land," and that he put his (*Patterson's*) own cattle to pasture therein; that he, *Patterson,* has paid all the taxes accruing on the land since the assignment; that he never personally occupied or entered into possession of any part of the land; that *John Barnhart,* about May, 1834, leased the land to one *Freedy,* who has ever since continued in possession, and now occupies the land; that *he* has kept sundry accounts touching this land, charging the complainant with the sums paid to *Fisher, Hunter & Co.,* with moneys paid to the College, and for taxes, and rendered such accounts to plaintiff; he admits that plaintiff paid him moneys and goods on account of the advances made by him for plaintiff, and requested him to come to a settlement; that when he executed the assignment to *Greenshields* to secure

Judgment.

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Gillespie, Moffatt & Co., in December, 1839, he owed them about 3,000*l.*; that *Greenshields* has, both before and after he received the assignment, been at Streetsville near the land in question, but never upon the land; that he believes *Greenshields* always supposed that he, *Patterson*, was in possession of the land—and never to his knowledge before the filing of the bill knew or suspected, or had any reason to know or suspect, that the plaintiff or *John Barnhart*, or any person on behalf of plaintiff, was in possession of the land; he denies that *Greenshields* to *his* knowledge knew or believed, or had reason to suspect at any time in the bill mentioned that the assignment by plaintiff to him (*Patterson*) was upon any condition, or that it was otherwise than absolute, entitling him to all the benefit of the contract; and swears that he, *Patterson*, believed the plaintiff would never redeem the estate by paying the sums advanced for him.

Judgment.

In a further answer (22nd March, 1844), *Patterson* states that *Greenshields* never inquired who was in possession; that when this bill was filed he owed *Greenshields* and his partners 5,768*l.* 7*s.* 2*d.*, reduced since to 2,359*l.* 5*s.* 11*d.* with interest; that he believes *Greenshields* had no notice of plaintiff's claim till the bill was filed; that on 22nd January, 1841, he owed 3,252*l.* 13*s.* 9*d.*; that lands have been accepted from him by *Gillespie, Moffat & Co.* in part liquidation of his debt; but that the debt due by him exceeds the value of all the lands on which he has given security.

Greenshields answers, denying unequivocally all knowledge, up to the time of filing the bill, that the assignment to *Patterson* was made upon any condition, and swears that he believed it to be absolute and unconditional, and that he had not heard or been informed to the contrary; that he was always informed and believed that *Patterson* had entered into possession immediately upon the assignment, and had

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continued in possession, but has no knowledge how the facts were; denies all knowledge of accounts between plaintiff and *Patterson*, or of the transactions between them; that *Patterson*, on the 1st October, 1839, owed *Gillespie, Moffatt & Co.* 1,418*l.*, and, wishing to have further advances, proposed, among other things, to assign this land as security, on the express understanding that *Gillespie, Moffat & Co.* should pay the balance due to the College, and that the deed should issue in his (*Greenshields'*) name, on their behalf; that *Gillespie, Moffat & Co.* accordingly paid to the College 193*l.* 19*s.* 7*d.*, being the amount due, and the College made their deed to him, *Greenshields;* that this land was to remain in his hands as a continuing security, and upon the understanding between them that he should convey this land to *Patterson* upon his settling up his accounts in full at any future period; that afterwards, in 1840 and 1841, *Patterson* required further advances, and transferred other real estates to him as security—and on 9th March, 1841, he made the bond to him to re-convey all the lands assigned, on his paying off his debt; that since that *Gillespie, Moffat & Co.* had advanced to *Patterson* about 9,000*l.*, of which about 2,000*l.* remained due at the time of his answering, no certain day being fixed for payment; that he never visited the land in question to his knowledge; he denies all knowledge that *Patterson* was not in possession, or that plaintiff or *John Barnhart* was in possession; but says he always believed that *Patterson* was in possession up to the time of this bill being filed; that he made no inquiries about the possession, because he took it for granted that *Patterson* was in possession, inasmuch as he held the contract of purchase; he confirms *Patterson's* statement as to the amounts due by *Patterson* at the several times mentioned.

Judgment.

Aftewards, plaintiff filed a supplemental bill, setting forth that in January, 1845, *Patterson* became

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bankrupt, and *Lewis Moffatt* and *Robert Beekman* were appointed his assignees; and prays relief against them.

The plaintiff has produced this evidence in support of his case:—

One *Bennett*, a blacksmith, now living in the State of New York, and examined there upon interrogatories, swore that he formerly lived in Streetsville; that about the end of September, 1839, he saw *Greenshields* there, and conversed with him about these premises; that *Greenshields* asked him what the property was worth, and witness could not tell him; that *Greenshields* said he was going to buy them of *Patterson;* that he told *Greenshields Patterson* did not own them, but that Mr. *Barnhart* did; that *Greenshields* replied that *Patterson* owed him, and he wanted to have his debt; that he told *Greenshields* that *Patterson* had no deed of the land, that the deed had not been taken from the College office; that *Greenshields* replied if he could get the deed he did not care who owned it, or *something to that effect*, that the *Barnharts* and *Patterson* were a bankrupt set, and they might all go to the devil together; that he should go immediately and get the deed, that he had money enough in his pocket to do it; he swore that from 1830 to 4th April, 1837, the plaintiff, *Robert George Barnhart*, was in possession of this land, and from 4th April, 1837, till July, 1845, *John Barnhart*, the father of *Robert*, had been in possession—after which time he knew nothing on that subject; on what footing *John Barnhart* occupied he could not say, whether as owner or not; till witness left in 1845, it was generally understood in the neighborhood that plaintiff, *R. G. Barnhart*, was the owner; witness lived near the land; there was an ordinary dwelling-house on it, two frame houses, and the farm well-fenced; 160 acres cleared and in good cultivation; the witness lived near the place from 1825 to 1845; the

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improvements were all made by plaintiff and his father; that he had often seen *Greenshields* in Streetsville, but never on or about these premises; that *Greenshields* in 1837 & 8, and *till the fall of* 1839, was often at *Patterson's* residence, about half a mile from this land, where *Patterson* has lived since 1828; that he never knew *Patterson* to be in possession, or ever to use or pretend to use the premises; he admitted that when he had the conversation with *Greenshields* he knew nothing whatever of the transaction between plaintiff and *Patterson* about the land, nor of the footing on which plaintiff or his father may have stood with *Patterson* in regard to the possession; he says he heard *Patterson*, in 1840, admit that he had no right to dispose of the premises, in a conversation with *John Barnhart*; he swore that he knew nothing about the true state of things in regard to the title or the right to possession, and had no authority to make any statement to *Greenshields*; he merely said what he did of his own accord, and because *Greenshields* had inquired of him if he knew the premises and what they were worth.

Judgment.

This witness, *Bennett*, was described by other witnesses as a man of very indifferent character for veracity.

John Barnhart, the father of plaintiff, proved that before 1830 he owned the lot in question, having bought the right of a person who had previously been lessee of it; that he sold it in 1830 to plaintiff, who allowed him to remain in possession; that in 1831 he, as plaintiff's agent, agreed to let it to one *Proctor*, who occupied as tenant till 1834, when he (the witness) let it to one *Freedy*, who continued tenant till 1841, paying 50*l.* a year for the first two years, and 75*l.* a year afterwards; that *he* received the rents as plaintiff's agent; that since 1841 he (the witness) has been in possession, working the farm, though not

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living on it; that *Patterson* was never in possession; that he, the witness, induced *Patterson* to become security to *Fisher & Hunter* for the plaintiff, and told him the plaintiff would secure him; that 400*l.* was inserted in plaintiff's assignment to *Patterson*, at witness's suggestion, to cover any loss *Patterson* might incur from giving security; that both plaintiff and *Patterson* informed him the assignment was made for the purpose of indemnifying *Patterson*; that he (witness) was to pay the instalments to the College out of the rents—and if he omitted it, and *Patterson* paid them, then the assignment was to stand as security to *Patterson* till they were repaid, but that agreement was made after the assignment to *Patterson* was executed; that he had often seen *Greenshields* at Streetsville, at *Patterson's* store, which is half-a-mile from this land, and in sight of it; saw him there in 1839 and before, and believes he has since; that he the witness paid to *Patterson* all the instalments which fell due on the land, except 100*l.* 3*s.* 10*d.*, and in August, 1840, offered to pay him that balance if he would make a deed; and often applied to him between 1835 and 1840 to come to a settlement of their mutual dealings, wishing whatever *Patterson* owed him to be applied to paying for the land; that *Patterson* insisted on advancing charges which had nothing to do with this land, and so they came to no settlement; he produced a paper which he swore was a true copy of entries made in a ledger of *Patterson's*, and which he had compared with the entries in *Patterson's* handwriting; he swore that he had seen also entries made in a memorandum book in *Patterson's* possession of an account kept by him against this lot, and produced a copy of these entries, which he says he took in 1846; these charges are against lot number six, and consist of sums paid the sheriff in 1834, paid *Fisher & Co.* in 1836, and paid the College office in 1835—in all 463*l.* 8*s.* 1*d.*; and the lot is credited with sums

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received by *Patterson* from different persons to the amount of 75*l.*; he says about 1839 *Patterson* became liable for him to the sheriff as bail in two suits for about 140*l.*, part of which he, witness, settled through a third party, and *Patterson* paid the rest—but the witness said he did not know that *Patterson* meant to charge these against the land till August, 1840; *Patterson*, he says, at his request, paid the taxes on the land; he did not assent to charge them to the witness in account, but charged them against the lot; *Patterson* never in his communications with the witness treated the land as his own, and was never in actual occupation; the plaintiff *was only in possession through witness as his agent*; that the clearing and other improvements were all done by the witness as plaintiff's agent, and by his authority, and witness charged plaintiff therewith—and this was so both before and after the assignment to *Patterson*; that plaintiff did not charge *Patterson* with the cost of any improvements; he swore that he was remunerated for his trouble in managing the farm, under a written agreement which he had not then to produce; that he had come to no settlement with plaintiff respecting the management of the farm; that he had made him no payments on account of the profits; that the tenants treated him (the witness) as landlord, and paid him the rents, and that *Patterson* knew it.

Judgment.

Oliver Hammond—Had been a clerk of *Patterson* at Streetsville; kept his books from 1832 to 1836; *Patterson* dealt with *Gillespie, Moffatt & Co.*, of Montreal, of which firm *Greenshields* was at first an agent and afterwards a partner. Upon one occasion, as he believed in *September*, 1839, after he had left *Patterson*, he saw *Greenshields* at Trafalgar, when he asked witness some questions about this lot; he asked "whether *Patterson* owned it or *Barnhart?*" witness told him he always thought *Barnhart* owned it; that he had rented it to *Freedy*,

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and appeared to be in possession of the place; he asked as to the amount of rent; the witness did not know which of the *Barnharts* owned the place, the plaintiff or his father; thinks they lived in the same house; the father had let the place as landlord; thinks *Greenshields* inquired also as to the value of the land; he *knows* he told *Greenshields* that he considered *Barnhart* was the owner of the place and in possession, *by which he meant John Barnhart*, plaintiff's father, and that this conversation took place in September, 1839; that plaintiff was not then in Streetsville, and witness believed he was absent from the country. He confirmed *John Barnhart's* evidence as to the accounts kept by *Patterson* against the lot, and proved the entries to be some in witness's own writing by *Patterson's* directions, and some in *Patterson's*; and he remembered *John Barnhart* calling and asking *Patterson* about the account, and about the instalments payable on the lot; he says he only supposed *John Barnhart* owned the land from seeing him exercise acts of ownership over it; that he knew nothing of the plaintiff having anything to do with it, and that he had no authority from any of the *Barnharts*, nor from *Patterson*, to say who owned it.

Judgment.

Then, *Charles Barnhart*, an uncle of plaintiff and brother of *John Barnhart*, swore that *John Barnhart* was then (in 1848) in possession of this lot, but not living on it; he had possessed it in 1825 or 6. He said that *in September*, 1839, he met *Greenshields* in the city of Toronto, and he asked witness about this lot, what it was worth; witness said 1000*l.* or more, and inquired of *Greenshields* whether the *Barnhart's* were obliged to sell; he said he was not going to get it of them, but of *Patterson*; witness told him it did not belong to *Patterson*, and that plaintiff had purchased it of the College or the clergy; he then said "*Patterson* tells me he has a title for it, and I

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said I do not believe it; *I told him also that John Barnhart had a lease of the place from Robert* (plaintiff), *that I was witness to it;*" he says he saw *Greenshields* again in February, 1846, and spoke with him about this lot; went to him to buy his title to it; he said he could not sell it, but would write to witness, which he did not do; he swore that plaintiff was absent from Canada for several years before 1839, coming occasionally to Streetsville; does not know whether he was in Canada in 1839; that he did not return finally to Canada till two or three years ago; that the lease of this land from plaintiff to his father was made, he thinks, in 1835, *and was for a term of eighteen or nineteen years*; the most of the rent was to be spent in fencing, clearing and improving the farm; that he (witness) knew after that lease was made that plaintiff was the purchaser; that he (witness) had no authority from plaintiff or his father to say to *Greenshields* that the land belonged to the plaintiff.

Judgment.

Then a witness, *Phillips*, swore that in August or September, 1839—when the witness, by his own account, must have been sixteen or eighteen years old—he casually heard *Greenshields* and *Bennett*, the first witness, talking together at a tavern in Streetsville; did not hear the beginning of their conversation; heard *Greenshields* ask *Bennett* whether the farm No. 6 did not belong to *Patterson? Bennett* said "No, it was *Barnhart's;*" the farm was in sight; was present accidentally; did not join them—stood near; did not pay much attention to what was said; there was more conversation, but don't recollect what it was.

It was shewn that on 24th January, 1835, *Patterson*, as transferee, paid 94*l.* 10*s.* to the College, being for 3rd, 4th and 5th instalments and interest.

The defendant, *Greenshields*, produced witnesses

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who gave an extremely bad character of *Bennett*, in regard to his credibility.

And, on the other hand, several witnesses were called who gave him a better character; those who impeached him were most of them persons who had had disputes with him.

The defendant, *Greenshields*, also called witnesses to prove that *John Barnhart* was not worthy of implicit credit; and his credit was supported by other witnesses called by the plaintiff.

On the 26*th April*, 1850, a decree was made that *Patterson* was mortgagee, and plaintiff entitled to redeem; that *Greenshields* is to be repaid what he has paid to the College, and the land is to be considered charged with what remains due from plaintiff to *Patterson* of the moneys secured on this land, disallowing any payments made by plaintiff to *Patterson* after notice to him of the assignment to *Greenshields*.

Judgment

The plaintiff's case is this:—that on the 4th April, 1834, he made a deed, under his hand and seal, executed not by any attorney in his name, but by himself in person, by which he declared himself to sell and convey an absolute estate in fee in these premises to one *Patterson* (who is his brother-in-law) for a consideration expressed in the deed, of 400*l.*; he does not allege that there was any accident or mistake which occasioned the deed to be drawn in other terms than was intended; or that any fraud was practised upon him; or that any bond or agreement to re-convey was to have been executed by *Patterson* or that *Patterson* has refused or neglected or omitted to give him any writing that he promised to give him; and now seven years after this deed was made, and after *Patterson* dealing with the property as his own, which had been thus absolutely conveyed to him, had

mortgaged it to a third party as security for an existing debt, and for advances to be afterwards made to him; and after some thousands of pounds had been advanced to *Patterson* in reliance upon a mortgage given by him upon this and other lands, the plaintiff files a bill alleging that the transaction between him and *Patterson* was one of mortgage only, and not one of sale, as it is expressed to be in the deed which he gave; and praying that he may be allowed to get back the property on paying the balance of his debt to *Patterson*, which he says the deed was given to secure, and paying further whatever has been paid to the College as the purchase money of the lot, leaving it thus as to any further amount wholly useless to *Greenshields*, the third party, as a security for the money he has advanced.

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He has two difficulties to encounter in supporting such a case:—1st. He has to convince us that after he has deliberately set his hand and seal to a deed in the presence of a subscribing witness—whom by the way he has not called and examined as to the transaction—we can, consistently with the principles of the common law, allow him to say that the transaction which he really had with *Patterson* on that day was one altogether different in its nature from that which his deed imports: in other words, that he can be allowed to control and vary by parol evidence the effect of a written instrument, and this too without alleging that there was any fraud or mistake in the matter, or that he was in any respect deceived, but desiring simply to give evidence of a verbal understanding as existing between them at the time of making the deed, at variance with the terms of the deed, and in the absence of all explanation how it happened that this alleged verbal understanding was not in any shape reduced to writing.

Judgment.

The next difficulty is that created by the Statute

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of Frauds. If there never had been any written contract or minute of any kind between the plaintiff and *Patterson* regarding this land, and the plaintiff should desire to give evidence for any purpose of an actual contract or agreement between them respecting it, he would find himself as a general rule disabled by the statute from enforcing any such alleged agreement, because he would have nothing in writing to shew; and this difficulty created by the statute cannot be less where there is this written evidence of a transaction between him and *Patterson* respecting the land, which on the face of it distinctly contradicts his account of what that transaction was.

Then again, the plaintiff does not pretend that he can prove the defendant *Greenshields* to have actually had any knowledge when he took his security of the fact now alleged—namely, that *Patterson* stood in a wholly different situation with regard to this land from what the deed which the plaintiff had given to him would import; but he says he might have found that out if he had made diligent enquiry; "he had some notice or intimation (he says), or some reason to suspect it;" and on that ground, if he did not make such inquiries as he might have made, he must be treated as if he had known the fact.

Judgment.

Now, this matter of constructive notice is one about which courts of equity have felt it necessary to be scrupulously careful. When by mistake or accident, or by some imposition practised upon him, a man is under the necessity of resorting to a court of equity for protection, he comes with an equitable claim to relief; and in some such cases it may be with a very strong claim, as indeed it ought to be when the object is nothing less than to obtain relief against the express provisions of an act of parliament. But here the plaintiff, for all that appears in his own statement (and certainly there is no proof to the

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contrary), never expected or intended, or contemplated, to have anything in writing at variance with the deed which he voluntarily and advisedly gave to *Patterson*; he conveys the land absolutely in fee and without any condition, and as if upon a sale; and, for all that appears, deliberately chooses and intends, or at all events is content to rest upon a verbal understanding between him and his brother-in-law *Patterson*, which is quite inconsistent with his deed. He does not pretend that they made any subsequent agreement; but now, many years after, he comes to a court of equity and asks to have the verbal understanding established against his deed. This is not only prohibited by the Statute of Frauds, but is opposed to the plainest principles of evidence. And he asks this to be done, not as between him and *Patterson*—which, I take it, would, under such evidence as has been given in this case, be impossible—but as between him and a person to whom *Patterson* has assigned.

Judgment.

Greenshields does not pretend to be the absolute purchaser of the fee from *Patterson*; he took it, he says, in security for large advances of money intended to be made to *Patterson*, and which there is no doubt he has actually made, relying on this and other security, and giving a bond to reconvey the whole when the money lent should be repaid to him. What this plaintiff now desires would have the effect of letting him in to redeem the property on paying what remains due of his debt to *Patterson*, without regard to the debt between *Patterson* and *Greenshields*, which *Patterson's* deed was intended to secure. In other words, it would cut *Greenshields* out of his security so far as this property is concerned; which, for all we can tell, may have been the best part of that security; and without which, his debt, it appears, would be by no means covered. This is not a question between the plaintiff and the defendant *Green-*

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shields, occasioned by *Greenshields'* claiming the fee under a conveyance which the plaintiff contends was meant only to operate as a security. If it were, and if the evidence, though inadmissible under the Statute of Frauds, was yet such as to produce a strong conviction that the fact really was so, then the Court might feel it difficult to exclude altogether the influence of that bias in favor of justice which it must be confessed has frequently led to decisions hard to be reconciled with the positive enactments of the Statute of Frauds, though the tendency of later decisions has been to give a fuller effect to the statute.

If we should take this case on the ground most favorable to the plaintiff, and should assume, what he contends for, that the defendant *Greeshields* must be treated as holding the estate in question subject to all the equities in favor of the plaintiff to which it would be subject if it were still in the hands of *Patterson*, we must then consider what there is in the evidence, applying it on that principle, which would warrant us in cutting down the absolute interest professed to be assigned by the plaintiff's deed to *Patterson* to an estate upon condition, liable to be defeated on the plaintiff paying the remainder of his debt to *Patterson*, or indemnifying him against certain claims (*a*). In speaking of the evidence, I leave out of view what *Greenshields'* co-defendant *Patterson* may have stated or admitted in his answer to the plaintiff's bill. Indeed, if these statements and admissions could be received in evidence against *Greenshields*, who has had no opportunity of cross-examining upon them, we should then have to consider that though *Patterson* does in his answer make such statements as would shew him unequivocally to have taken the assignment only as a security, yet

Judgment.

(*a*) Wyatt's Pr. Reg. 188; Jacomb v. Harwood, 2 Ves. 629; Jones v. Turberville, 2 Ves. jr. 11; Anonymous, 1 P. W. 300.

he does as unequivocally state that he does not know or believe that *Greenshields* knew or believed, or suspected, or had any reason to know or believe, or suspect, when he took the assignment from him, *Patterson*, that the assignment which the plaintiff had made to *Patterson*, was subject to any condition, or was anything else but what it purported to be—an absolute assignment, entitling *Patterson* to the whole benefit of the contract for purchase.

If there were no objection in the way, upon practice and the principles of evidence, against reading *Patterson's* answer against *Greenshields*, it would still be as inconsistent with equity as anything well could be, if a decree for relief against *Greenshields* should be in any degree founded upon the statements or admissions of *Patterson*, who in effect tells us that holding what was upon the face of it an absolute assignment of a valuable property, he made use of it as such, and obtained from *Greenshields* (or from his firm) advances of large sums of money upon that and other securities, allowing him to believe that his title was really such as it appeared to be, but that in truth he was all the time under an engagement, which he concealed from *Greenshields*, to restore the property to the plaintiff on his paying him a certain sum of money.

Judgment.

The only way in which *Patterson* accounts for his conduct, in dealing with this property as if it were absolutely his own, is by saying that he never thought the plaintiff would redeem it. It would be strange if the plaintiff, who, by giving *Patterson* an absolute conveyance for reasons which he does not at all explain, enabled him to act this part, could afterwards make use of *Patterson's* statements to deprive *Greenshields* of his security.

Then, independently of *Patterson's* answer, what is

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there to entitle us to say that the deed which he took from the plaintiff should be treated as anything different from what it professes to be? Nothing in writing, certainly, to contradict or vary the clear import of the deed in a single particular. There is nothing in *Greenshields'* answer which supports the plaintiff's bill. He denies expressly any knowledge of the plaintiff's continued possession of the property, or any knowledge or intimation whatever before the bill was filed of *Patterson's* title being otherwise than an absolute unconditional assignment of the plaintiff's contract for purchase.

Of the witnesses, not one professes to know anything of the real nature of the transactions between the plaintiff and *Patterson*, except the plaintiff's father, *John Barnhart*. If it could be material to enquire whether the consideration for the deed was really what is stated in the deed—that is, a payment of 400*l.* from *Patterson* to the plaintiff—none of the witnesses, except *John Barnhart*, states anything on that point. If parol evidence could have been properly received from them of any intention or understanding contrary to what the deed expresses, they do not give any such evidence. If there is anything on which the plaintiff can rest his case, it must be founded on the evidence of *John Barnhart*—anything, I mean, to enable us to look upon *Patterson* as the mortgagee and not as the vendee of the plaintiff; for none of the other witnesses pretend to know what the facts in that respect were; nor do they prove any collateral fact that has a bearing on that point. They give a vague account indeed, and not a very consistent one, as to who was in possession before 1830, when the plaintiff first became (nominally at least) the purchaser of this lot, and from that time to the day when they were examined. If anything turns upon that—I mean, if the plaintiff is to be understood as resting his case wholly or in part on the fact of an actual possession

Judgment.

held by himself after April, 1834, and were relying on that as an evident part performance of some agreement, inconsistent with the face of the deed which he gave on that day to *Patterson*, and as proving that there must have been a different contract, of which he is entitled to prove the particulars by parol evidence, and to have them fully carried out, notwithstanding the Statute of Frauds;—I say, if we are to look upon the evidence respecting possession for the purpose I have just mentioned, I cannot take it as sufficient to establish anything to our satisfaction. It is inconsistent as well as inconclusive; and the witnesses declare themselves to have known so little of the real truth of the matter as to what right any body was holding or was claiming, that in my opinion nothing can be safely inferred from it as the foundation of a decree which would be in truth (as remarked by the court in *Tull v. Owen* (a) "*setting the deed aside*," and this after an interval of seven years, which elapsed between the making of the deed and the filing of the bill. *Bennett*, the plaintiff's first witness, swears that the plaintiff, *Robert Barnhart*, was in possession of the premises from 1830, to April, 1837, (which may be a mistake for 1834); that he occupied them during that time apparently as owner; that then *John Barnhart* came into possession, but on what footing he occupied *Bennett* swears he does not know. *John Barnhart* himself, on the contrary, swears that the plaintiff was not in the actual occupation of the premises at any time; and that from 1831 to 1841, neither the plaintiff nor he was in actual possession, but persons to whom he, *John Barnhart*, had made leases as tenants. The rents, he says in one part of his evidence, were paid to him as the plaintiff's agent.

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The plaintiff, he says, was never in possesion

(a) 4 Y. & Col. 191.

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except through him, the witness, as his agent; and this possession of himself as the plaintiff's agent he explains to have been of this description, that the tenants treated him as their landlord, and paid him the rent; that he was to have remuneration from the plaintiff for his trouble in managing the farm, under a written agreement, which he did not produce; but he had come to no settlement with the plaintiff in respect to his management of the place, and had not made him any payment on account of the profits.

Another witness, *Hammond*, swears that he thought *John Barnhart* was really the landlord and owned the farm. He evidently had heard nothing of his being in occupation as the agent of the plaintiff; and *Charles Barnhart*, brother to *John Barnhart*, swears that in 1835, or about that time, the plaintiff made a lease to *John Barnhart* of the property for eighteen or nineteen years; that most of the rent was to be expended in improvements, and that he was a subscribing witness to that lease; and that he (the witness) told this fact to the defendant *Greenshields* in September, 1839.

Judgment.

These are all the plaintiff's witnesses; and this is the varied account they give of the possession.

One of them, we see, thought *John Barnhart* was occupying as owner, by his tenants; another, that he was himself tenant to the plaintiff for a long term of years, while *John Barnhart's* own account is, that he was occupying as agent of the plaintiff, but letting the place as if he was himself the landlord, receiving the rents and profits, but paying nothing over and rendering no account.

The plaintiff's statement on this point in his bill is, that he, by himself and his tenants and agents, has

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been in possession of this land from the date of the assignment (4th April, 1839), to the filing of the bill (1844), and by his residence and improvements had made the land of great value; "that the fact of his possession could have been easily ascertained by *Greenshields*, if he had inquired who was in possession, or if he had inquired of *Patterson* respecting the same." But in regard to this statement, it is to be remarked that the plaintiff's own witness, *John Barnhart*, swears that during the very time spoken of he made no payments to the plaintiff on account of the profits, and that the persons in possession were his lessees, and treated him as landlord and paid him the rent, and that *Patterson* knew such to be the case. Taking that to be so, any enquiry made by *Greenshields* from *Patterson* would hardly have procured for him the information that the plaintiff was the person in actual occupation either in person or by his tenants or agents; and there is the further fact apparent in the evidence, that though the plaintiff in another part of his bill says it was notorious that he was the person in possession and entitled to possession, yet in truth he was absent from the province for several years before 1839. *Charles Barnhart*, one of the plaintiff's witnesses, who states this, swears that the plaintiff came to Streetsville more than once during that time; that he does not know that he was in this province in 1839; and that he did not return finally to the province till two or three years ago, which would be after or about the time of filing the bill.

Judgment.

When we look at these statements, and add to them the facts that *John Barnhart* was in possession of the property, as appears by the evidence, for some years before the plaintiff, his son, had any concern whatever with it; that he continued in possession or in the receipt of the rents and profits, acting as owner and taken to be owner by his tenants and neighbors

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during the whole period from 1834 downward, so that no difference was observable in this respect in the state of things as they existed before the plaintiff had made his bargain with the college council, and while he held that contract, and after he assigned it and until he filed his bill, how can we possibly say that there is anything in that kind of possession from which anything distinct can be inferred, or which we possibly rely upon for taking the case out of the Statute of Frauds ?

We are told on the very highest authority, and it is the common language of our books, "that it is a governing rule in cases of this sort, that nothing is to be considered a part performance to take a case out of the Statute of Frauds which does not put the party into a situation that it is a fraud upon him, unless the agreement is fully performed :" and further—"that in order to make the acts such as a court of equity will deem part performance of an agreement within the statute, it is essential that they should clearly appear to be done solely with a view to the agreement being performed; for if they are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part performance of the agreement : that acts of an equivocal character and capable of double interpretation will not do ; for to be deemed a part performance they must be so clear, certain and definite in their object and design, as to refer exclusively to a complete and perfect agreement, of which they are a part execution." I refer on this point to *Frame v. Dawson* (*a*), and *Story's* Equity Jurisprudence, sections 761-4.

Judgment.

How is it possible to say to what a possession points, which is of such a doubtful and uncertain

(*a*) 14 Ves. 386.

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character upon the plaintiff's own evidence? How can we hold that it is clear proof of any agreement; and what agreement does it prove? Any contract too, we are told, respecting lands of which we are at liberty to entertain other than written evidence, upon clear proof of a part performance, must be a contract established to be clear, definite and unequivocal in all its terms, for that a court of equity cannot act upon any other; and if the terms are uncertain or ambiguous, or not made out by satisfactory proofs, a specific performance will not, and on principle ought not, to be decreed." Now, to what can we *certainly* refer the possession, not of this plaintiff, but of *John Barnhart*, or his tenants? What can we say that it satisfies us of? Surely of nothing certain. And to what could the defendant *Greenshields* have referred it, if he had been aware of it, which he swears he was not? If it were true, as the plaintiff's witness, *Charles Barnhart*, swears, and as he states he informed *Greenshields*, that *John Barnhart* had a written lease of the land for eighteen years, made by the plaintiff four years before *Greenshields* took his security, and possibly before the deed to *Patterson*, for he speaks very loosely as to time (he says he thinks in 1835, but no written lease is produced), then he would be in as tenant, and possibly not at all inconsistently with *Patterson's* title under the deed (*a*). So also, if he merely claimed to be in upon such a footing (or for his own benefit on any footing), there would be an end of all pretence for referring his possession to any supposed agreement such as the plaintiff endeavors to set up here. But, whether *John Barnhart* was in possession by the plaintiff's assent, and from what time, or on his own account, or wherefore, or upon what understanding, it is impossible to conclude from the testimony; and yet I do not see what other ground for relief is afforded by the

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(*a*) Whitbread v. Brockhurst, 1 Br. C. C. 409; Wills v. Stradling, 3 Ves. 378.

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evidence, except this one of the plaintiff's alleged possession after making his deed of April, 1834. The mere fact that *Patterson* did not himself take possession, is nothing positive, which we can take as part of an unknown agreement.

The intimate connection of the parties increases the difficulty of drawing inferences, from their neglecting to enforce their rights. If the plaintiff was content to let his father make use of the place for ten years, during which it seems he had it without paying or accounting to any one, how can he expect it to be taken for certain proof that his brother-in-law *Patterson* did not consider himself the owner of the property, that he did not turn out his father-in-law as soon as the contract was assigned to him ?

Judgment.

Besides what was stated respecting the possession, I find nothing in the evidence of any of the witnesses on which I can suppose it to have been imagined by the plaintiff that he could expect us to hold the case to be taken out of the Statute of Frauds, unless it be what is said by *John Barnhart*. We cannot act upon what *he* said he was told in May, 1834, or at any time, about the object of giving the deed, and that it was to be a security. If the Statute of Frauds had never been passed, the deed could not be allowed to be affected by such evidence. A plaintiff suing on a bond for 1,000*l.* might be as well met by evidence that he had been heard to say he was never entitled to claim more than 500*l.* under it ; and why should not a mortgage for 2,000*l.* be cut down to a mortgage for 1,000*l.* by parol evidence, as well as an absolute estate reduced to one that is redeemable ? There must be evidence of some fact ; something done that cannot be accounted for otherwise than by inferring a new and different agreement than the deed imports. I see nothing here, unless we should consider that what is said by *John Barnhart* about entries which

he had seen in *Patterson's* books (and which books were not produced) could be taken to constitute evidence of that kind. It cannot be so taken, I think. Supposing those entries in *Patterson's* books to have been made by *Patterson* or his clerk, there is no proof as to the time when they were made, and it does not stand clear of doubt for what purpose they were made. They would only shew that at some time *Patterson* had opened an account against the land now in question, which he had taken the assignment of from the plaintiff. What he may have chosen (we know not when) to write in his own books can never be taken to be decisive against the rights of his assignee. He may have kept such an account for various reasons, none of them inconsistent with the fact of his being the legal and equitable owner of the lot. He may have intended, as men of business often do, to keep an account of his outgoings on account of the land, in order to see what it stood him in; or he may, as a matter of indulgence, and without engagement or obligation to do so, have always entertained an intention not to be hard with his brother-in-law, but to let him have the land again in any reasonable time if he could pay him all he had laid out; and he may have kept his account so that he might always be able to shew what he should in that case exact, in order to be no loser; or he may have written that, for all we can be certain of, in order to give an appearance at a future day different from the actual facts and to the prejudice of any third party to whom he might assign, and to the advantage of his relation. He shews, indeed, no unfair disposition in his answer; but how, without knowing the time when or the view with which he made those entries, can we draw from them an inference which should prevail over his own solemn deed? They are not entries charging the plaintiff as his debtor. And when we see them first brought to light seven years after he has obtained money upon the security of the

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property, which security he must well have known would not have been accepted if it had been imagined by the person with whom he was treating that his only claim was under a mortgage which had been in part paid off, we certainly, I think, could not act on these entries as affording clear and certain evidence of such an agreement as we are asked to enforce.

The case of *Cripps v. Jee* (*a*) was referred to on the argument, as bearing upon this feature in the case; but an examination of that decision shews that it would by no means warrant us in taking such evidence as was given here to be decisive. There is no proof by any witness that after the plaintiff assigned to *Patterson* he received back from *Patterson* any of the money which stands in the deed as the price of the land; and, on the whole, I cannot say that I see anything which any authority whatever would warrant us in holding as admissible proof, still less sufficient proof, that notwithstanding the words of the deed of 4th April, 1834, *Patterson* did not take as absolute assignee of the contract of purchase, but upon condition to re-assign or to convey if certain things should be done.

Judgment.

Equity has taken so wide a range in the long course of its administration, that we cannot venture to say that some judge, at some time, may not in some case have said something that may have the appearance of supporting this plaintiff's bill. The case was ably argued, and the most was made of whatever can be found that may seem to have that tendency. But I did not hear any case referred to in the argument that has gone anything like the length of supporting this bill upon the evidence that we have before us, and I have found no such case.

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

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There is another point, to which I have not before thought it necessary to advert, though it may be very material, and that is, the situation in which the plaintiff stood with respect to this property when he made the assignment. He held then no title to it, and he never had held any; it belonged to the corporation of King's College, which had only contracted to sell it to him, and he had made some small payments on account.

After he had executed the assignment to *Patterson*, by which he made over to him all his interest in the land, and all his right of action on the covenant, and authorised him "to demand of the College Council a deed in fee simple of the land, either in his own name or in the name of any other person whom he should appoint," on their receiving the remainder of the purchase money; and when the College Council, on the production of this intrument by *Greenshields*, *Patterson's* assignee, made a title to him for the lot, what estate, legal or equitable, could remain in the plaintiff *Barnhart?* What foundation was there for an equity of redemption in him? What had he to redeem? Could he, in the nature of things, have any claim that could follow the land, or any remedy, if there really was such an understanding between him and *Patterson* as he states there was, other than a special action against *Patterson* for not doing what he had engaged to do?—that is, if he had preserved any evidence of such an agreement which the law could recognize? I am aware that the argument on the plaintiff's side is, that the promise to re-assign to him if he should make certain payments, if not made in such form as to be available in law, would constitute an equity in his favor resembling that in *Butcher v. Butcher* (*a*); that his continuing to occupy the land after the assignment was evidence of some

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(*a*) 1 Vern. 363.

1851. such equity; and that *Greenshields* having, as the bill states, "some note or intimation, or some reason to believe," when he took the assignment, that the transfer to *Patterson* was made upon condition, is bound by the equity as much as *Patterson* himself could be. This brings up the question of notice of the alleged condition, which must have formed an indispensable part of the plaintiff's case, in the most favorable view that could be taken of it.

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Without fixing *Greenshields* with notice, there could be no pretence for a decree against him; and this part of the case, therefore, was the most dwelt upon in the argument. It opens a wide field of investigation; and in the almost infinite number of cases that have been determined upon this question of what shall constitute constructive notice to a purchaser, something may be found that gives apparent countenance to almost anything that it may be necessary to contend for. This has been unavoidable from the varied combination of circumstances, and the mixed nature of the question to be determined upon them. If the same judge had determined every one of the cases, and determined them all correctly, there could hardly have failed to be some apparent inconsistencies in the language used in some of the cases. This is easily accounted for. In the particular case before them the Court may see their way to a right decision so clearly that the very clearness of the view may sometimes tempt them to extend their sight so far as to overlook a number of intervening objects, which in a minuter survey they would find it necessary to take into account; and for which, whenever they have been driven to a minuter survey, they will be found to have made a due allowance.

Judgment.

Looking at the leading cases on this subject, and referring among others, to *Hanbury v. Litchfield* (*a*),

(*a*) 1 Mylne & Keen, 629.

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Jones v. Smith (*a*), and to the manner in which Mr. *Sugden* states the doctrine in his treatise on vendors, &c. (*b*), I do not think that anything is proved in this case that could be held to be constructive notice to *Greenshields* that the plaintiff after his assignment to *Patterson* retained or claimed any interest in his former contract with the College. It is said that in a great variety of cases it must be matter of no inconsiderable doubt and difficulty to decide what circumstances are sufficient to put a party upon inquiry; that vague and indeterminate rumors or suspicion is quite too loose and inconvenient in practice to be admitted to be sufficient; that there will be found almost infinite gradations of presumption between such rumor or suspicion, and that certainty as to facts which no mind could hesitate to pronounce enough to call for further inquiry, and to put the party upon his diligence. No general rule, therefore, we are told, can be laid down to govern such cases. Each must depend upon its own circumstances. There is no case which goes the length of saying that a failure of the utmost circumspection shall have the same effect of postponing a party as if he were guilty of fraud or wilful neglect, or had positive notice (*c*).

Judgment

When we consider how scrupulous a court of equity is, never to grant relief unless when they can do it without prejudice to a *bona fide* purchaser for valuable consideration without notice, I can see nothing in this evidence that could warrant us, as I think, in holding that *Greenshields* had notice of anything inconsistent with the deed under which he derived title, or such notice as made it his duty to inquire further at his peril. He was only a mortgagee, and did not pretend to be ever anything more; he gave openly a bond to re-convey upon condition;

(*a*) 1 Hare, 43.
(*b*) 3rd vol. 452 to 480.
(*c*) Jolland v. Stainbridge, 3 Ves. 478.

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such a bond as this plaintiff should have taken from *Patterson* if he wished his transactions to be safe and their purpose apparent. Holding only a mortgage, and especially for advances to be made, he could not be expected, according to the common course in such cases, to take notice who was in possession, as he would have no intention to disturb him; accordingly, it seems, he never went upon the place, though he was often in sight of it; but, according to the evidence, he did make some inquiries, and we see what it resulted in. He was given to understand that *John Barnhart* was supposed to be in possession; one person thought as tenant under a lease given to him by the plaintiff—another thought as owner; and the most, I think, that could be made of what the witnesses say they told him is, that *Greenshields* had such intimation of *John Barnhart* being in possession; that if he (*John Barnhart*) had really an equity as against *Patterson*, which he was now claiming the benefit of, *Greenshields* might be found unsafe in having acted in disregard of it, and taking his deed without inquiry.

Judgment

But it would be to no purpose for me to enter into any further discussion of the evidence of constructive notice; for, as I do not think we can hold it to be clearly made out by the evidence that *Robert Barnhart*, the plaintiff, was in actual possession in 1839, which is what they rely upon for taking his case out of the Statute of Frauds, I need not inquire whether *Greenshields* can be said, on the evidence, to have had notice of a fact in 1839, which fact I do not find to be established by the evidence; that is, not established certainly, clearly and indisputably, as it ought to be, before any relief can be founded upon it.

The case being an important one, not merely to the parties concerned in it, but in its bearing on a class of cases which may frequently present them-

selves, I wish that the grounds of my opinion should be understood; and after the view I have given of the pleadings and evidence, I will state in order the conclusions which I have formed upon them. 1851. Greenshields v. Barnhart.

1. The difficulty of dealing with this case satisfactorily is increased by the near relation in which the plaintiff, *Robert Barnhart*, his assignee, *Patterson*, and the principal witness, *John Barnhart*, all stand with respect to each other, and by the manner in which the property has been occupied and used from the first that we hear of it (in 1826) to the present time, which is very much out of the ordinary course, both combining to weaken the confidence in inferences which in general would be drawn from the fact and appearances, and to lead us to ascribe them to other motives than we are asked to ascribe them to.

2. Considering that the plaintiff held only an agreement for the purchase of the property which he had not nearly paid for, that he made an absolute assignment of this property and his interest in it to his brother-in-law, *Patterson*, for an expressed consideration of 400*l.* acknowledged by the deed to be paid to him; that he does not pretend that any fraud has been practised upon him by *Patterson*, or that he was under mistake as to the tenor of the deed, or that he did not act advisedly or knowingly in executing it as it stands, or that he took or intended to take, or expected to receive, or was promised any writing of any kind to shew that the assignment was merely a security, or was on any ground to have a privilege to redeem; that for all that appears, he may have deliberately intended for some purpose of his own, or of some other party, to make the deed precisely what it is; that by giving such a deed he enabled *Patterson* to deal with the property as his own, and to draw in others to buy from him and to Judgment

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trust him on the security of the land. Considering all this, I say, and that *Patterson*, taking that deed in his hand, did borrow money largely from *Greenshields* upon faith in that security, when the plaintiff comes seven years after he made his absolute deed to *Patterson*, and two years after *Patterson* had mortgaged the property to *Greenshields*, and seeks to deprive the other of his security, upon the allegation that his transaction with his brother-in-law, *Patterson*, was not what his deed described it to be, he comes with the equity of the case very strongly against him.

3. The court, I think, should not, under these circumstances, run the slightest risk of doing wrong to *Greenshields* by going out of its way in order to give the plaintiff the advantage of an alleged understanding which he was content to allow to rest upon uncertain oral testimony, taking no care to preserve any written evidence of it, however informal.

Judgment.

4. There should therefore be no decree in the plaintiff's favor which would deprive *Greenshields* of his clear legal rights derived from the plaintiff's own solemn and unimpeached deed, unless the court can see clearly and certainly (by which I mean that they are to be free from all doubt), that the deed to *Patterson* was made upon such condition for redemption as the plaintiff alleges; and secondly, that *Greenshields*, when he took his mortgage from *Patterson*, knew this; or that if he did not know it, it was his own fault.

5. As to the first of these points—that is, whether the deed to *Patterson* was given only as a security and with an understanding that he might redeem—I have no impression that it was not so; my impression is rather that it was. I do not disbelieve *Patterson's* statement on oath. I dare say, if we could certainly know the truth, we should find that

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he was always willing while he kept the property to have given it up on receiving what was due to him, and being indemnified for what he had assumed. But speaking now merely of moral conviction, I do not feel certain whether he expected to be paid by *Robert Barnhart* or by his father, or whether, if he was to give it up, he supposed it would be for the benefit of the one or the other of them; nor do I feel certain he was ever under engagement, even verbal, to do either, or had merely expressed a willingness to do so.

6. But what may be the persuasion of our minds is not the question. *Greenshields* may stand in the first place on the legal effect of his deeds, whatever may be our convictions; and he has a right to ask us what there is in the evidence before us that on the authority of any adjudged case can entitle the plaintiff to prevail against the principle of law which gives to the plain language of writings, and especially of deeds, preference over oral testimony; and what there is to deprive him of the protection of the Statute of Frauds where no fraud is complained of nor any accident or mistake alleged. Judgment.

7. Mere parol evidence, such as the plaintiff's father swearing that both parties told him that the assignment was meant to be only a security, can never of itself be allowed to unsettle the title under the deed. As was remarked by the learned Chancellor in *LeTarge v. DeTuyll* (*a*), text writers may seem to go so far as to affirm that the question of mortgage or not may be decided upon parol evidence alone, contrary to the written evidence, and in the absence of all proofs *aliunde* of fraud or mistake, but it is impossible to reconcile such a position with cases that meet us in all the books of reports from

(*a*) Ante vol. 1, p. 227.

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the 29 *Car.* II. to this day Lord *Irnham v. Child* (*a*), Lord *Portmore v. Harris* (*b*), *Hare v. Sherwood* (*c*), shew how Lord *Thurlow*, Lord *Kenyon* and Mr. Justice *Buller* treated this precise question while sitting in equity; and cases without end might be cited to the same effect.

8. Neither do I consider that the mere fact of its not appearing otherwise than by the deed that 400*l.* was paid as the price of the land, or how much was paid, or that anything was paid, would invalidate *Greenshields'* security.

Consideration is not in question between these parties, in the absence of any charge of imposition. The plaintiff, if he pleased, might have given *Patterson* the land for nothing more than the accommodation, considering that the greater part of the price had yet to be paid to the college: and if he did so, and *Patterson* sold or mortgaged the land, the plaintiff could not reclaim his gift after it had been transferred to another.

Judgment.

This leaves untouched, however, the question as to what might be the effect of shewing that the plaintiff had paid back to *Patterson* the price, or any part of it, which formed the consideration of the deed or the interest of it; or that he had been asked to do it; or that it had been charged against him. Neither of these things was, in my opinion, proved. The learned judge, in deciding the case, did not consider that any such fact could be said to be established by the evidence.

10. Then this leaves no other ground on which a decree in the plaintiff's favor could be supported than the allegation attempted to be proved, that after

(*a*) 1 B. C. C. 92.
(*b*) 2 Br. C. C. 219.
(*c*) 1 Ves. Jur. 241.

the plaintiff made his deed to *Patterson* he continued for some years in possession, and had not even given up possession when *Patterson* mortgaged to *Greenshields*. The learned Vice-Chancellor did, it appears, take that to be the only ground that could be said to be established, and did upon that ground decree relief, and in effect re-form the deed to *Patterson*.

11. I am sorry that I cannot say that the ground thus taken by the decree is in my judgment supported by the evidence. I mean, I cannot say that a possession was certainly shewn to be held by plaintiff after he assigned to *Patterson*; and such a possession as unequivocally shewed the existence of some agreement contrary to the effect of the deed, to which agreement the possession must be referred; and the principle of part performance, as deduced from possession, can in no other event apply (*a*).

Judgment.

12. We are prevented, I think, from drawing this precise and certain conclusion, by the circumstance that the plaintiff was not in actual visible possession of this property, and never had been; and that *John Barnhart* alone, either by himself or his tenants, is shewn ever to have had actual possession. He held possession in 1826, before any of transactions which are now in question; he continued such possession after the plaintiff made the agreement with the College Council, to all appearance, just as before, and so also during all the period that the plaintiff held the contract and after he assigned it, and till this bill was filed. If we compare *John Barnhart's* evidence with the other evidence, or some parts of his own testimony with other parts, with all the light we have from whatever has been proved, I think no person can say, with confidence, that he sees upon

(*a*) Morphett v. Jones, 1 Swans. 172; White's Lea. Eq. Ca. 511 note.

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what footing *John Barnhart* was in possession, or that he can infer, from the mere fact of his possession, with certainty—and, as courts of equity have said, unequivocally—some agreement between the plaintiff and *Patterson* inconsistent with the deed.

13. I cannot say that the bare fact of *John Barnhart* not going out of possession in 1839 of the farm which he is shewn to have occupied in 1826 and through all the changes till 1845, proves to me unequivocally that there must have been an agreement between *Patterson* and *Robert Barnhart* which it would be a fraud on the latter not to carry out (*a*). I see nothing more certain in it than this, that *John Barnhart* either held all the time some position in regard to this property not defined or known to us, though understood by him, his son, and his son-in-law; or, that he was content with that precarious hold on the property which their good nature had conceded to him, and that one did not choose to disturb this any more than the other. We look in vain in the evidence for any certain information on the point.

Judgment.

Mr. *John Barnhart's* evidence leaves it not very clear whether he allowed himself to be generally looked upon as agent, or landlord, or tenant; and his brother *Charles Barnhart* tells us that he held a term of eighteen years by deed, beginning about 1835, while *John Barnhart* himself mentions nothing of the kind, nor makes any allusion to such a term or such a writing.

14. The books, in treating of possession, in such cases, as pregnant evidence of an agreement of which it is a part performance, rest upon the fact that if it were not so interpreted, the person applying for

(*a*) Frame v. Dawson, 14 Ves. 386.

specific performance would, by the fraud of the other, be exposed to be treated as a trespasser, in holding the possession which he had received from him; but this evidence does not shew that either *Patterson* or *Greenshields* ever gave possession to *Robert Barnhart*. The doubt is whether *Robert Barnhart* ever held possession; and I do not see on what foundation an action of trespass would lie against him by any person, whether we should recognize some unknown agreement or not.

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15. Taking this view of the only point on which it may be thought that a decree could be made in the plaintiff's favor, I need not proceed to the question of notice, which I said would be the second point; for until some fact has been clearly established which would entitle the plaintiff to be considered as mortgagor, it is useless to enquire whether *Greenshields* had notice of such fact, or might have had it if he had used all the diligence that was incumbent on him. I must say, however, that I think the plaintiff's case would at any rate have failed there if the other difficulties had been overcome: and for reasons which I have in some measure stated, though not fully, I will add on this point a reference to *White v. Wakefield* (*a*), where the plaintiff, being in possession, had a lien for part of the purchase money not paid, and defendant's attorney had notice that plaintiff was in possession, which it was contended was notice to his principal; and so it would be. The court however, said, "the only fact of which they could have notice was, that the money was not paid; but as *White* had declared by the conveyance in the most solemn manner that he had received all the money, no man could be expected to inquire whether the purchase-money had been paid."

Judgment.

(*a*) 7 Sim. 401.

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Here, *Greenshields* had no notice that the plaintiff was in possession, but only that his father was; and those he heard speak of it spoke of *him* as the owner. *Greenshields* knew better than that; because he had seen the deeds from the contract with the college downward; he knew it had been the plaintiff's, and he saw that the plaintiff had, by his solemn deed, assigned it unconditionally to *Patterson*. Why need he inquire further? If he had been told that the plaintiff claimed still to possess an equity of redemption, his own deed, which he had seen, would have convinced him that could not be true; and why need he have enquired into the truth of a rumor which the deed disproved, if there was such a rumor.

On these grounds which I have stated, I am of opinion that the decree for specific performance should have been withheld; for I see no legal evidence of an agreement to be performed, nor any such notice of it as should make the defendant subject to the equity, if there were any.

Judgment.

The value of the estate which the plaintiff hoped to regain by this suit is, I believe, large; the interest the defendant has in the litigation is probably much less, though it may be very considerable.

For this reason, partly, I have felt it necessary to state grounds of my opinion fully; and partly because it is but proper that I should do so when I have the misfortune to differ from the view which the learned judge in equity took of this case, which, from particular circumstances, it was thrown on him to deal with without assistance from his brother judges.

I am sure he did not make up his mind upon it without the most diligent and anxious research, and the greatest desire to come at a correct conclusion

upon authorities which he is in the constant habit of consulting and is well able to appreciate. 1851. Greenshields v. Barnhart.

If he should have happened to have come to an unsound conclusion in the judgment in which his opinions are very clearly expressed, it would not, I am sure, surprise him nor any one so familiar as he is with the fact, that in questions of this complicated kind, judges of the greatest experience come frequently to opposite conclusions upon the same facts, and judges so eminent that their memory will be regarded with reverence so long as any trace remains of the principles of English law or equity in our courts—which indeed (such is the prevailing disposition for change) may not be so long as we might some time ago have imagined.

But if, on the other hand, I should be in error in differing from the learned Vice-Chancellor—which I should have reason to think much more likely but for the circumstance that the same view of the case in effect is taken, as I believe, by some of my learned brothers, in whose judgments we all have confidence —I should much regret it; though our opinion, if it prevails, need not, I believe, be final; for I think the value of the property in litigation would admit of the case being taken to a higher tribunal. I ought not to omit to notice that we had the subject lately before us in *Howland v. Stewart* (*a*); and I think nothing was said in that judgment which is not in accordance with the view I take of this case. Judgment.

In *LeTarge v. DeTuyll* the learned Chancellor had occasion to investigate the same subject, and he did so very fully, and has stated his views with great force and clearness. It appears to me that his

(*a*) Ante vol. 2, p. 61.

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deductions from the authorities, and his estimate of their tendency, are reasonable and correct. In that case the plaintiff was entitled to relief upon the merits, though there was unfortunately a defect in his proceedings. That judgment, however, contains nothing that appears to me to go by any means the length necessary for sustaining this plaintiff's case.

Cotterell v. Purchase (a) was much relied upon (though relief was refused it it) on account of an expression of Lord *Talbot's* contained in it, "that if the plaintiff had continued in possession any time after execution of the deeds he would have been clear that it was a mortgage." That is perhaps too broadly put; for it would seem almost as if the fact of the continued possession would be deemed incontrovertible evidence and incapable of being explained away. But, admitting tha to have been meant, and that so decisive an effect would be given to the mere fact of the grantor in the deed continuing in possession, then surely such possession of the grantor must be made out clearly, and in a manner not in the least doubtful or equivocal. It would be difficult to conceive anything further removed from that than the evidence given respecting the plaintiff's possession in this case.

Judgment.

MACAULAY, C. J.—As to the admissibility and sufficiency of the parol evidence to shew that the assignment from *Robert Barnhart* to *Patterson* was by way of security only, and redeemable:

The question is to be considered mediately, as between the appellant and *Robert Barnhart*—assuming that the former had notice thereof and is bound thereby; and not immediately, as between *Barnhart* and *Patterson*.

(a) Ca. Temp. Talbot, 63; S. C. 1 Atk. 290.

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From the numerous cases on the subject, I infer that irrespective of the Statute of Frauds requiring certain agreements to be evidenced in writing (*a*), it is a fundamental rule in equity as well as at law, that when used in support of and not against the relief or performance prayed, parol (oral) testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument (*b*), in order to guard against the uncertainties of slippery memories (*c*), subject, however, to modification under circumstances peculiar to courts of equity as distinguished from the courts of law (*d*).

Fraud express may may be proved by parol evidence either at law or in equity (*e*).

Fraud in the eye of equity, may, however, be presumed, and therefore exist and be proved under circumstances not amounting to fraud in law or express fraud; and when, as stated in *Clifford v. Turrell* (*f*), a deed is attacked for fraud, sufficient in equity to set it aside, or on such ground to affect its operation as a security in opposition to its purport as an absolute conveyance, parol or oral evidence may alone suffice; but not by mere proof of breach of promise, or refusal to adhere thereto; not merely that kind of implied fraud which is imputed to every breach of contract. Further, when a deed cannot be impeached as fraudulent in equity, then, as explained in *Davis v. Symonds* (*g*), an

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(*a*) Dixon v. Parker, 2 Ves. Sr. 225; Parteriche v. Powlet, 2 Atk. 384.
(*b*) Montacute v. Maxwell, 1 P.W. 618; Lee on Abstracts, 266; Goss v. Lord Nugent, 5 B. & Ad. 64.
(*c*) Leman v. Whitley, 4 Russ, 423; Preston v. Merceau, 2 W. Bl. 1249; Adams v. Wordsley, 1 M. & W. 374.
(*d*) 1 Mad. Chancery, 2nd ed. 405-6 & 7.
(*e*) Townsend v. Lowfield, 1 Ves. Sen. 37; Bennet v. Musgrove, 2 Ves. Sen. 52; Chesterfield v. Janssen, ib. 155; How v. Weldon, ib. 516.
(*f*) 1 Y. & C. C. C. 138.
(*g*). 1 Cox. 402.

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equity may be raised *aliunde* by proof of collateral facts; such facts as stated in *Dale v. Hamilton* (*a*), shewing that the deed, though absolute in terms, was only so made for a special purpose; as to secure a debt, &c. (*b*): or that some agreement existed not embodied in the conveyance; so that there are two descriptions of fraud in equity, one impeaching the validity of an instrument and subverting it *in toto*, as in cases of actual deceit or imposition—*suggestio falsi* or *suppressio veri;* the other not invalidating the deed in itself, but shewing that it would be inequitable and virtually a fraud on the party to be affected thereby, to suffer it to operate contrary to what is proved to have been the special purpose contemplated at the time of its execution; in other words, raising an equity *aliunde* in consistency with the deed, subject only to such equity. But in such cases the facts must exist and be proved *dehors* the deed, and not consist of mere parol or oral proof of concurrent understandings not incorporated therein.

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It may also be added that the date of an instrument may be varied by proof of the actual time of its execution as a substantive fact, and that additional considerations consistent with that expressed in a deed may be proved, of which the case of *Clifford v. Turrell* is a strong instance.

Questions of this kind may arise out of transactions of mortage or security through the medium of absolute conveyances, when the sufficiency of the collateral evidence must depend upon the circumstances of each case. It is said that considerations expressed cannot be *contradicted;* but that, admitting the absolute nature of a deed to have been intended, a specific object may (under circumstances) be

(*a*) 5 Hare. 369. (*b*) Clarke v. Grant, 14 Ves. 519.

established in connection with such deed, shewing it to be fraudulent or inequitable to suffer it to stand absolute:

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That this, however, cannot be accomplished without in effect varying an absolute conveyance, is obvious; for the consideration is different: the one expressed importing an absolute payment for the purchase of the land; the other that the object was only to secure the ostensible price, as a debt to be paid. At law, the one would import a fee simple absolute; the other, a conditional estate only, and liable to be defeated upon performance of the condition. In equity, a conveyance unconditional passes the estate; if conditional, to secure a debt, the estate remains in the mortgagor, and the instrument only operates as a security or lien upon the estate. In one case there exists the relation of trustee and *cestui qui trust*—not in the other. In the one, the vendor would have a lien on the estate for unpaid purchase-money, and might file a bill therefor; in the other, he would be entitled to redeem the estate itself, and file a bill for that purpose. In equity, a security may be created by an absolute conveyance, if its defeasible character can be proved by unexceptional or sufficient evidence; but then it would follow that the estate did not pass; so that the operation and effect of a conveyance is materially affected by evidence that reduces it from an absolute transfer to a mere security. This forms the point of the present consideration.

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It is not *additional* consideration, for that should be consistent with and accumulative upon what is stated as an executed consideration, and should not abridge, qualify, or in any other respect influence the instrument in its operation. Nor does it come within the cases whence the doctrine of part performance is derived; for they decide that an agree-

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ment cannot be made partly in writing and partly not in writing—that is, orally—without infringing upon one of the first principles of evidence above stated, as well as in some instances upon the Statute of Frauds; and an agreement that a conveyance about to be executed in absolute terms shall be defeasible or redeemable contrary to its intended import, or such terms being concurrently understood and accompanying the execution of the deed, seems clearly to fall within the purview of the rule.

I take it therefore to be clear, that it is not competent to the respondent, *Robert Barnhart*, in this case, to prove by mere parol evidence, upon the footing of the assignment to *Patterson*, being only in part performance of a pre-existing oral contract on the subject, or upon any other ground short of fraud, actual or presumed, that such assignment was not to be absolute, but was only to operate as a security and to be redeemable, however oral or parol evidence may be made available as auxiliary or explanatory when an equity is first raised *aliunde* and irrespectively.

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Consequently, it depends upon the consideration whether facts and circumstances *dehors* the assignment and not mere oral statements, exist, and are shewn sufficient to raise the equity alleged, according to what I take to be the true principle, as admirably expressed by Lord Chief Baron *Eyre*, in *Davis v. Symonds* (*a*).

The prominent or proximate facts not purely oral to shew the purpose or object of the assignment to have been that alleged by the respondent, seem to me to be, that about the date of the deed, *Patterson* was requested to become security to Messrs. *Fisher*

(*a*) And see also Hartopp v. Hartopp, 17 Ves. 162.

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& Co. for *Robert Barnhart*, and did so (whether at that period he had also become bail for *John Barnhart* not being clear); that no payment of money or other consideration for the assignment was proved; and that the possession continued as before (*a*).

In the above state of facts there arises for consideration what is not proved, and what is proved; and the question is, whether together they show the purpose of the assignment to have been other than an absolute one (*b*)—that is, merely a security to *Patterson* in consequence of his becoming guarantee or surety for *Robert Barnhart*; not that it was given in security for a subsisting debt, to be paid at any fixed time, but to secure *Patterson* and indemnify him against loss by reason of his so becoming responsible; in which event no debt could arise until he (*Patterson*) had paid such debt, or been otherwise damnified in the premises.

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In weighing the circumstances, I can infer nothing from the state of the possession as in evidence; not perceiving, except by some oral assertion, that the possession had any reference to this transaction (*c*); and the same difficulty exists in other respects. Nothing contemporaneous appears in writing referring *Patterson's* going security for *Robert Barnhart* or bail for *John Barnhart*, to this assignment; and it affords no internal evidence connecting them together, and this presents an obstacle of more force when, as here, the question is not between the immediate parties. The only proof on that head is derived from alleged statements or admissions of *Patterson* after receiving the assignment and before his transfer to the appellant, *Greenshields*, and the *entries* extracted from *Patterson's* ledger, &c. The objection to the last is, that the entries (as proved)

(*a*) Wills v. Stradling, 3 Ves. 378. (*b*) Duffield v. Elwes, 1 Bl. N. R. 605. (*c*) Gregory v. Mighell, 18 Ves. 328; Dale v. Hamilton, *supra*.

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are principally not original, but transcribed from other books, and that no original entry was duly proved by the production of such original. The objections to *Patterson's* admissions are, that they infringe upon the Statute of Frauds, and set up orally against the appellant a species of admitted trust which ought to be declared in writing, unless a resulting trust can be held to arise in the absence of proof of any valuable consideration other than that which the respondent, *Robert Barnhart* asserts (*a*).

It is quite clear that a consideration expressed might be indirectly affected by independent proof and as a collateral fact of what the consideration really consisted, in the same way that the date expressed may be affected by proof of the time when the deed was in fact executed. As being an act done, there would be the less difficulty; but I

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cannot say that I can reconcile this altogether with the rule, that though the consideration may be enhanced or added to, it cannot be denied or contradicted unless something amounting to fraud in equity can be established.

In the absence of any proof that the consideration expressed, or any part thereof, was paid, or what the consideration really was, other than that alleged by the respondent; in the absence also of any proof that *Patterson* was actually possessed or in receipt of the rents and profits, with proof however that he had been solicited and did go security for *Robert Barnhart* to *Fisher & Co.*; and that after the execution of the assignment to him he admitted (while holding and beneficially interested therein) that he had received it in security as alleged—the foundation may be sufficiently laid to warrant the inference that though in form an absolute assignment,

(*a*) Downe v. Morris, 3 Hare, 404.

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it was in reality only for a specific purpose, and a mode adopted for rendering the contract for the land a security to *Patterson* to indemnify him in having become guarantee for *Robert Barnhart*, and perhaps also as bail for *John Barnhart*. The nature of the interest held by *Robert Barnhart*, as distinguished from an absolute estate in fee, may also assist in explaining the absolute terms in which such interest was assigned; but of course, consistently with this, he may have intended to place himself entirely at the mercy of *Patterson*, upon the understanding that if he duly paid *Fisher & Co.* and relieved *Patterson* from his obligation, *Patterson* was to re-assign the contract with the College Council; but that if *Patterson* had to pay the debt, such payment was to operate as satisfaction of the consideration for the assignment, which in that event was to remain absolute; and *Patterson* (who is said to have afterwards paid the debt) seems to have regarded it in this light, and in disposing of it to *Greenshields* to have treated it as his own absolute property accordingly. It may as well be looked upon as a conditional sale and purchase, as a redeemable security; and this perhaps is, under the circumstances before us, the correct light in which to view the transaction, more especially when it is remembered that no specific time for payment or redemption is otherwise suggested or shown; and this, notwithstanding the maxim that "once a mortgage always a mortgage."

Judgment.

However, being of opinion that the appellant, *Greenshields*, is entitled to prevail in the other branch of the case, it is unnecessary to express any decided opinion upon this point, and I therefore refrain from doing so. Were the case to depend upon it, I should have been desirous of still further time to consider it. But since, as between *Robert Barnhart* and *Patterson*, the latter admits the fact

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in his answer, and as no objection exists to *Robert Barnhart's* redeeming *Patterson* (if he is bound also to redeem *Greenshields*), unless the assignees of *Patterson* interpose obstacles on behalf of his creditors generally, which I do not understand them to do, I perceive no absolute necessity for my, at present, forming or expressing a positive opinion on the subject.

Assuming it to have been established by legal proof that the absolute assignment made by *Robert Barnhart* to *Patterson* was only by way of security, and redeemable; still, the appellant having obtained the legal estate, is entitled to the protection it affords, if the equitable rights of himself and *Robert Barnhart* are equal, and they are equal, unless there be something counterpoising the equity of *Barnhart* and entitling him to prevail over the legal estate.

Judgment.

The alleged counterpoise is, that the appellant took the assignment from *Patterson* with notice expressed or implied of *Robert Barnhart's* equitable rights; or under circumstances that ought to have put him upon inquiry, whereby, had due deligence been used, the rights of *Robert Barnhart* would have been discovered.

It is said great weight is due to a positive and distinct denial in the answer, in contrast with oral evidence; and the appellant seems to me distinctly to deny notice both before entering into the treaty and afterwards, before taking the assignment. The only evidence of express notice consists of alleged conversations between the appellant and *Bennett*, *Hammond* and *Charles Barnhart*; which conversations, as they are represented to have arisen out of inquiries casually made by the appellant of unauthorized persons, and not amounting to more than conjecture or vague rumors, are insufficient to

establish a direct and binding notice (*a*). Anything stated by those persons against the title of *Patterson* would be dispelled upon the production of the assignment which he held, and which would show, not only an absolute transfer of all *Robert Barnhart's* rights, but subsequent payments by *Patterson* of three instalments of the purchase money to the College—namely, the third, fourth and fifth instalments.

I perceive no room to infer presumed or implied notice; or negligence or wilful blindness.

In *Jones v. Smith*, Vice-Chancellor *Wigram* lays down two propositions on this head:—first, that there must be actual notice of facts binding to constructive notice; or secondly, designedly or fraudulently abstaining from inquiry, or gross negligence amounting to evidence of such fraud; but I do not see that the evidence sufficiently establishes either against the appellant. It is said he ought to have gone to *John Barnhart*, but there was nothing referring to him except what *Hammond* said in allusion to him, but without mentioning his name; and what *Charles Barnhart* said, who represented him as the lessee for years of *Robert Barnhart*. Had the appellant gone to *Freedy*, the tenant in possession, I see no reason to suppose he would have exhibited a written lease from *Robert Barnhart*, signed by *John Barnhart* as his attorney. No such lease is alleged to have existed. The most probable inference is, that the appellant would have been informed that the tenants entered under a verbal lease from *John Barnhart*, without any reference to *Robert Barnhart* as their landlord. Had the appellant gone to *John Barnhart*, there is no proof that he could have

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(*a*) Sugden's V. & Pur. pp. 473 & 1052-3-5 [10th ed.], and cases there cited; Lee on Abstracts, 426; Adams' Eject. 151-2; Powell on Mort. 562; Coote on Mort. 370-1 3; 2 Spence's Eq. Jur. 753; Wildgoose v. Weyland, cited in Sugden's Vendors, *supra*; and Cornwallis' Case, Toth. 254.

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exhibited a power of attorney from *Robert*, or anything in writing shewing that the latter was possessed through him or the tenants in possession, whatever *John Barnhart* might have stated verbally on the subject. Reference could not have been had to *Robert Barnhart* personally, for he was abroad out of the province, and apparently an insolvent, if not an absconding debtor.

Patterson seems to have asserted that he was the absolute owner, in support of the title ostensibly afforded by the assignment. Nothing in writing shewing the contrary, and to which the appellant was directly or indirectly referred, or which it is probable he could have discovered by any diligence, is suggested or shewn, unless it was the lease from *Robert* to *John Barnhart*, executed by *Charles Barnhart*, but of which there is no proof.

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I do not overlook the entries in *Patterson's* books, but there was nothing calculated to refer the appellant to those books or entries as sources of information. No notice was given to the College Council that the assignment to *Patterson* was not absolute. The taxes, it is said, were paid to the collector by *Patterson*; and of the assessor, or who was assessed for this lot, unless *Freedy*, we have no information.

No title or interest in *John Barnhart* is set up: it is only said he was the agent of *Robert*, and that if referred to he could have given information of *Robert Barnhart's* equitable claim to the premises. Had the appellant gone to him, and been told that by a verbal understanding between the parties the assignment from *Robert* to *Patterson* was only as a security, and redeemable, uncorroborated by anything by which the fact could be infallibly or satisfactorily tested or proved, I am not satisfied that the appellant would afterwards take at his peril, as thereby having

notice in the event of such equity being subsequently established by a series of collateral facts and circumstances, or by oral evidence. At any rate, I am not satisfied that he was bound to have applied to *John Barnhart*, or that not having done so he purchased, subject to whatever information *John Barnhart* could have given, as if he had been apprised thereof. The case of *Jones v. Smith*, to which I have before referred, seems to be against it.

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Clear and undoubtable notice, or gross negligence, or wilful forbearance from inquiry amounting to fraud, will do; but not mere suspicion of notice much less mere suspicion of fraudulently abstaining from inquiries whereby notice might have been obtained (*a*).

As respects the evidence of title afforded by possession, it was the less cogent because the legal estate was in the College Council, and the possession could only be rightly held under that body, or under a contract with such body. Such a contract *Patterson* held as absolute assignee; and this was the only evidence in writing, touching the title under the College, shewn to have existed.

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Possession in itself would not explain whether this assignment was absolute or redeemable, for a vendor or mortgagor might continue in possession, and *Patterson* might, in either event, have been equally entitled to dispossess him by ejectment; but I do not think that any actual possession by *Robert* is proved.

(*a*) Hine v. Dodd, 2 Atk. 275; Jolland v. Stainbridge, 3 Ves. 478; Butcher v. Butcher, 1 Vern. 363; Jackson v. Rowe, 2 S. & S. 472; Hanbury v. Litchfield, 2 M. & K. 633; White v. Wakefield, 7 Simons, 401; Steedman v. Poole, 6 Hare, 193; Attorney-General v. Backhouse, 17 Ves. 203; Worthington v. Morgan, 16 Simons, 547; Attorney-General v. Pargetter, 6 Bevan, 150.

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I think the actual possession was, from the beginning, in *John Barnhart*, or tenants entering under him. It is not proved to my conviction that *John Barnhart* was under any obligation to account to *Robert* for the rents and profits, rather than to *Patterson*; or that he was not bound to account therefor to the legal owner, whoever he was. The Statute of Limitations (*a*) was running against *Robert Barnhart* quite as much as against *Patterson*. The basis of the relief on this head is fraud in the eyes of equity, and I cannot point out what I deem satisfactory proof thereof against the appellant.

It appears to me therefore that, the equities being equal, the legal title must prevail.

Judgment.

McLEAN, J.—The plaintiff, *Barnhart*, filed his bill in the court below to redeem Lot No. 6, 5th Con. west of the Centre Road in the Township of Toronto, which he purchased from King's College on the 2nd of October, 1830, for the sum of 250*l.*, and for which he then received an agreement for the execution of a conveyance on payment of the amount of purchase money and interest. In March, 1832, the plaintiff paid the second instalment to the college upon the lot; and on the 4th of April, 1834, he assigned to *William H. Patterson*, his heirs, executors, administrators and assigns, by endorsement on the agreement with the college, as *well the within written deed* and *land therein mentioned*, as also *all his right of action on the within covenant*, and all his estate, right, title, interest, claim, property and demand whatsoever, to the land in that deed; also to the within written instrument or deed: and he did thereby authorize the said *Wm. H. Patterson* to enter into and upon the said land within described, and *have*, *hold*, *occupy*, possess and enjoy the same, and *take*

(*a*) 4 Wm. IV. ch. 1, sec. 17.

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the rents, issues and profits thereof; and he did thereby nominate, authorize and appoint the said *Wm. H. Patterson* to receive of and from the parties of the first part in the deed mentioned (the College) or their successors, a good and sufficient title in fee simple for ever of the said lands and premises, either in his own name or the name of such person as he should appoint, upon payment to the college of all sums which ought to be paid by the said *Robert G. Barnhart;* and he did further authorize the College to transfer and convey the land and premises to the said *Wm. H. Patterson,* his heirs and assigns, for ever, or to such person as he or they should appoint.

On the 24th January, 1835, *Patterson,* who received this assignment from *R. G. Barnhart,* paid the 3rd, 4th and 5th instalments due the college on the lot, amounting, with interest, to 94*l.* 10*s.*

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On the 11th December, 1839, *Patterson,* by an instrument under seal similar to that received from *R. G. Barnhart,* assigned as well the deed from the college and land therein mentioned, as also all his right of action on the covenants contained in the deed; and authorized, nominated and appointed his assignee, *J. B. Greenshields,* the appellant, to receive a good and sufficient title in fee simple, for ever of the lands and premises, in his own name, on payment of the amount due the college.

On the 14th December, 1839, the appellant paid to the college the balance due on the purchase money, and received from the chancellor, president and scholars of King's College at York, under their common seal, a deed in his own name for the lot in fee simple.

On the 9th March, 1841, the appellant executed a bond to *Wm. H. Patterson,* in which it is recited

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that *Wm. H. Patterson* was then indebted to the firm of *Gillespie, Moffatt, Jamieson & Co.* of Montreal, in a large sum; and that he was desirous of obtaining from them further advances in the way of his trade and business; and, as a security for the repayment of the *amount so due*, and all such future advances as might be made to him by the said firm, had conveyed and transferred, or *caused* to be *conveyed in fee* to *James B. Greenshields* for and on behalf of the said firm, the lots of land and premises thereinafter mentioned, specifying the east and west halves of lot No. 6, in the sixth concession west of *Hurontario Street* in the township of Toronto, and various other parcels of land. The condition of the bond is, that the appellant, his executors, administrators and assigns, or some of them, shall, *upon such payments* by *Wm. H. Patterson* of all such monies or sum or sums of money aforesaid, well and truly re-convey, at the proper costs and charges of the said *Wm. H. Patterson*, his executors, &c., all the said lands and premises to the said *Wm. H. Patterson*, his heirs or assigns in fee simple for ever.

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In the bill, the plaintiff alleges that, in 1833, being engaged in business as a merchant, and his affairs being deranged, he was obliged to discontinue his business; that in April, 1834, being indebted to *Fisher, Hunter & Co.* of Montreal in a sum of 296*l.* 0*s.* 3*d.*, he applied to *Wm. H. Patterson*, his brother-in-law, then a merchant at Streetsville, to assume that debt, and that *Patterson* consented to do so; that being desirous to *secure Patterson* against any loss in consequence of his assumption of that debt, he proposed to him to assign to him the contract entered into with King's College for the lot in question; and that he did, by a certain deed or assignment under his hand and seal, bearing date the 4th April, 1834, convey to the said *Wm. H. Patterson* all his interest in the said contract. He

alleges that such assignment was made solely with a view of securing *Patterson* from loss in assuming the debt of *Fisher, Hunter & Co.*; and that it was *understood and fully agreed* by and between him and *Wm. H. Patterson*, that the contract should be re-assigned as soon as he (the plaintiff) should repay the amount of the debt assumed (296*l.* 0*s.* 3*d.*) and interest, together with such amount as *Patterson* should in the iterim pay to King's College under the contract; or in case the defendant should obtain a conveyance of the legal estate in the lot from the college, then, upon repayment of the amount due, that it was understood that *Patterson* should reconvey the premises to plaintiff. The bill further alleges that *Patterson* never entered on the premises or took possession; and that the plaintiff, *by himself* and his tenants and agents, has been in possession of the land from the date of the assignment up to the time of the filing of this bill, and has during that period made great and extensive improvements on the property; that he (plaintiff) from time to time paid to *Patterson* sundry sums of money, and delivered him sundry large quantities of wheat and flour and large quantities of ashes and other merchandize, for the purpose of repaying *Patterson* all sums of money advanced by him on the *security* of the assignment.

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That *Patterson* assigned the said contract to *James B. Greenshields* to secure a *debt due* by him; and that the assignment was taken by *Greenshields* without any inquiry respecting the possession of the lot though it was notorious that plaintiff was in possession and the person entitled thereto.

The bill further charges that *J. B. Greenshields* has frequently been *at* the land, and has seen and must have known that *Patterson* was not in possession: and that before the assignment to him was

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executed, *Greenshields* had *some note or intimation* or *some reason to suspect or believe that the assignment* from plaintiff to *Patterson was an assignment upon condition*, and that *Patterson* was in fact only a trustee for the plaintiff.

By the evidence it appears that *John Barnhart*, the father of the plaintiff, was in possession of the lot, though he never lived on it, as far back as 1825 or 1826; and that since its purchase in the name of the plaintiff he has continued to be the actual occupant either by himself or persons to whom he leased, who always considered him as their landlord and paid their rents to him; that the plaintiff has not at any time been in occupation of the lot and not otherwise in possession than through his father, Mr. *John Barnhart*, as his agent. It is not shewn that *Patterson* ever took possession of the lot or in any way exercised any act of control or ownership over it from the time the contract was assigned to him in 1834; but it is shewn that after such assignment when it was suggested to him by Mr. *John Barnhart*, who alleges that he always acted in reference to the lot as agent of plaintiff, that the rent should be paid by the tenant directly to him, declined to receive it; and that on another occasion he applied to *Bennett* to procure permission for him to put a horse to pasture on the premises.

Judgment.

It is also shewn by the evidence of *John Barnhart* that various payments were made to *Patterson* and accepted by him on account of his advances for the plaintiff; and a copy of entries in a memorandum book of *Patterson* against the lot, and also of an entry in his ledger, are put in with a view of shewing that *Patterson* regarded the assignment to him as merely a security for the amount of his advances. Upon this evidence, the plaintiff contends that it is shewn that the assignment, though absolute and

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unconditional in its terms, was actually given only as a security, redeemable on payment of the amount of advances.

It is well established, and has been so decided recently in this court in the case of *Howland v. Stewart*, that parol evidence is inadmissable to shew that an absolute deed of real estate was in fact given only as a security for money; but it is also, I think, established, that if there are any acts of the parties, or any note in writing, though not connected with the deed, which shew that fact, parol evidence of such acts, or such note in writing, may be received. In the case of *Howland v. Stewart*, in this court, that principle is recognized; and in the case of *LeTarge v. DeTuyll*, the Court of Chancery acted on that principle, and decided that where an absolute conveyance is executed with a parol agreement for redemption, and the grantor continues in possession,—if the parties so deal with each other as to render such possession clearly referable to the parol agreement, as by demand and payment of the debt or interest—the parol agreement may be enforced in equity.

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In this case then are there such circumstances, independently of any mere verbal acknowledgements of the parties, as shew that the assignment from plaintiff to *Patterson* was only as a security? The lot is within half a mile of *Patterson's* place of business. It was occupied from 1834 till December, 1839, during which period *Patterson* held the assignment, by *John Barnhart*—whether as agent of plaintiff, or for himself, seems to me immaterial. He rented the premises in May, 1834, after the assignment to *Patterson*, to one *Freedy*, who remained seven years on the premises as tenant, paying 50*l.* a year for the first two years, and 75*l.* a year during the residue of his term, making a sum of 475*l.* received for rents by

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John Barnhart; during five years of which period *Patterson* was, according to the terms of the assignment, entitled to receive the rents and profits. This fact, I think, goes far to shew that *Patterson* did not regard himself as the absolute owner. The lands were improved extensively during the time, and were managed without any control whatever by *John Barnhart* and those to whom he leased, who knew nothing, apparently, of any claim of *Patterson* to the premises. Besides this fact, it is sworn by *John Barnhart* that he paid to *Patterson* all the instalments which fell due on the land, except 100*l.* 3*s.* 10*d.* Now, if the assignment was intended by the parties to be absolute, as it purports to be, there could be no reason for the payment of any moneys by *Barnhart* to *Patterson*; for, by the terms of the assignment, *Patterson* was to pay the instalments due to King's College.

Judgment.

These facts shew satisfactorily, to my mind, that the assignment to *Patterson* was a conditional one; and if *Patterson* were now the party interested, I should have no difficulty in coming to the conclusion that the plaintiff should be allowed to redeem. But *Greenshields* and his copartners are now the parties interested; a large debt is still due to them by *Patterson*, who, since his assignment to *Greenshields*, has become bankrupt; and unless they are entitled to hold the premises in question as part of their security, they will undoubtedly lose a considerable portion of their debt. Still, if *Greenshields* took the premises from *Patterson* with notice of plaintiff's right, they can only stand in the same position as *Patterson* and subject to the same equities. By the testimony of *Barnhart*, it appears that in a conversation which he had with *Greenshields* in September, 1839, before the assignment, he told *Greenshields*, who said he was about to get the premises from *Patterson*, that they did not belong to

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him; that plaintiff had purchased the lot from the college or the clergy; that *John Barnhart* had a lease of the place from *Robert*, to which he was a witness; and this witness states that there was a lease from plaintiff to *John Barnhart* made in 1835 for a term of eighteen or nineteen years or more; and that the most of the rent was to be spent in improvements.

By the testimony of *Hammond*, who had been for years a clerk of *Patterson*, it appears that he was asked by *Greenshields* whether the farm belonged to *Patterson* or *Barnhart*, and that the witness told him he thought it belonged to *Barnhart* (meaning *John Barnhart*); that he had rented it to one *Freedy*, and appeared to be in possession of the place. This conversation took place in September, 1839.

Josiah Bennett also swears to a conversation in September, 1839, with *Greenshields*, in which *Greenshields* said he was going to buy the premises from *Patterson*, and that he was then told that *Patterson* did not own the premises—that Mr. *Barnhart* owned them. This conversation is corroborated by *William Parsons*, who it appears was then a boy about fourteen years of age; and who, as he alleges, was standing near when the conversation took place.

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This is the substance of the evidence as to the notice to *Greenshields* that *Patterson* was not the owner; and it is contended that these several conversations should have put *Greenshields* on his guard, and induced him to make further and more particular inquiries, in which case he would easily have discovered the true state of the title. Now the question, as it appears to me, is not whether by further inquiry he could have made such a discovery, but whether, in fact, at the time he took the assignment he had notice of the defect or conditional nature of *Patterson's* title, or any reason to doubt its

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validity. Had he at that time, as stated in the bill, any note or intimation, "or some reason to suspect or believe that the assignment from *R. Barnhart* to *Patterson* was conditional, and that *Patterson* was in fact only a trustee?" It appears that the assignment was not taken without some inquiry, if all the testimony is to be credited. *Charles Barnhart* had informed *Greenshields* that *John Barnhart* was in possession under a lease from plaintiff. *Hammond* informed him that *Barnhart*, not mentioning whether *John* or plaintiff had leased the premises to *Freedy*, and that he appeared to be in possession. All this was not inconsistent with *Patterson's* title. The plaintiff might have leased to *John Barnhart* his father, and he again might be in possession under his lease and sub-let the premises to *Freedy;* but the deed to *Patterson* might nevertheless be perfectly good. There was nothing in the information derived from these parties, who were most likely to know something about the matter, to excite any suspicion in the mind of Mr. *Greenshields* of the absolute nature of the title of *Paterson*. By the assignment he could see that *Patterson* was entitled to demand the rents and profits from any lessee; but as he was only to take the assignment by way of mortgage, and was not to have the possession, it was a matter of indifference to him to whom the rents were paid or who was in possession. Then, as to the conversation with *Bennett*, giving to it every credit, though the testimony is strongly impeached by most respectable witnesses, there was not anything in it, as it appears to me, to require Mr. *Greenshields* to make any further inquiry, especially if he had previously heard that *John Barnhart* was in possession under a lease from plaintiff. He might well suppose that *Bennett*, seeing *Barnhart* in possession for many years, might speak of it as *Barnhart's* farm, in ignorance of the assignment made to *Patterson*. The statement of this witness, that *Greenshields* said it he could get the

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deed he did not care who the devil owned the lot, or something to that effect, seems wholly incredible. The object of taking the security was not merely to cover a debt due, which *Patterson's* other property would probably then have been sufficient to cover; but it was to secure advances subsequently to be made. Now it does not seem reasonable to suppose that *Greenshields* would receive anything like doubtful security for such advances, if he had any reason to suppose that *Patterson's* assignment was subject to any condition whatever. The strong presumption certainly is that it would have been rejected as a security, and that the amount of advances would have been lessened in proportion.

Under all the circumstances, after the fullest consideration which I have been able to give to the evidence adduced with a view to prove notice to *Greenshields* of a title or possession adverse to *Patterson's*, I am obliged to come to the conclusion that it is not sufficient to establish such notice, and that his claim as mortgagee stands unimpeached. It may be extremely hard, and I have no doubt it is so, that the plaintiff's property should go to pay *Patterson's* debts beyond the amount actually due to *Patterson*; but this arises from the very incautious manner of dealing between the plaintiff and *Patterson*. Had the deed to *Patterson* contained a defeasance on the face of it, the parties would not have been induced to advance their goods to *Patterson*, on the security of the premises, beyond what might appear due to *Patterson*; but having done so in good faith on seeing the assignment to be absolute in its terms, it would not be just that they should be deprived of a portion of their security.

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DRAPER, J., intimated that, on the point of the admissibility of parol evidence to shew that the absolute conveyance was intended to operate as a

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mortgage only, he concurred in the opinion pronounced by his lordship the Chief Justice; and if even his opinion on that part of the case had been different, that the evidence adduced in the present instance was not sufficient to affect *Greenshields* with notice.

ESTEN, V. C.—The bill in this cause was filed for the redemption of certain lands held by the plaintiff under a purchase-contract with King's College, and which while so held were conveyed by the plaintiff to the defendant *Patterson*, absolutely, but by way of security, and were afterwards mortgaged by *Patterson* to the other defendant, *Greenshields*, together with other lands, for securing moneys then due from *Patterson* to *Greenshields* and his copartners, and advances to be afterwards made by them to him. *Patterson* admits in his answer that the conveyance to himself was intended only as a security. *Greenshields* says that he does not know whether such was the case or not, but insists upon his title as a *bona fide* purchaser for valuable consideration without notice; he having, after the execution of the mortgage under which he claims, completed the purchase of the lands in question from King's College; and having, under a conveyance from that body, acquired the legal estate in fee in those lands. The decree of the court below proceeded on the principle that, whatever rule of evidence may be applicable to absolute conveyances by way of mortgage under other circumstances, parol evidence was certainly receivable for the purpose of shewing the real nature of the transaction where dealings had taken place by one party with the sanction of the other, upon the faith of the mortgage contract, of such a nature that it would be a fraud upon the party so dealing not to carry that contract into complete effect; as, for instance, where, under an absolute conveyance by way of security, the mortgagor, with the sanction of

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the mortgagee, remains in possession of the property and deals with it as his own without any idea or intention on either side that he shall be called to account for his acts or defaults in that respect. In such a case it would be a gross fraud to permit the mortgagee to treat the mortgagor as accountable for all that has received or done in the interval in respect of the property. The principle is the same as that on which a court of equity has always interfered in the case of a verbal contract for the sale of lands, under which the purchaser has been let into possession of the property and encourged to deal with it as his own; and the rule is stated by Lord *Redesdale* in the case of *Clinan v. Cooke* (*a*). At page 41 he says: "But I take another reason to prevail on the subject. I take it that nothing is considered as a part performance which does not put the party into a situation that is fraud upon him, unless the agreement is performed. For instance, if, upon a parol agreement, a man is admitted into possession, he is made a trespasser and is liable to answer as a trespasser if there be no agreement. This is put strongly in the case of *Foxcraft v. Lister*. There the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrong-doer and to account for the rents and profits: and why? Because he entered in pursuance of an agreement. Then, for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible; and if it was admissible for such purpose there is no reason why it should not be admissible throughout. That, I apprehend, is the ground on which courts of equity have proceeded in permitting part performance of an agreement to be a ground for avoiding the statute; and I take it, therefore, that nothing is to be considered as part performance which is not of

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(*a*) 1 Sch. & Lef. 22.

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that nature. Payment of money is not a part performance: for it may be repaid, and then the parties will be just as they were before—especially if repaid with interest. It does not put a man who has parted with his money into the situation of a man against whom an action may be brought; for, in the case of *Foxcraft v. Lister*, which first led the way, if the party could not have produced in evidence the parol agreement he might have been liable in damages to an immense extent."

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It is said that courts of law now feel the injustice to which Lord *Redesdale* adverts so strongly, that they themselves receive the parol evidence for the purpose of preventing it and of proving that possession was taken with the consent of the vendor, and that it was not intended that the purchaser should be accountable for the mesne profits. The license, which it is the object of admitting the evidence to prove, is of course to be inferred from the circumstances of the case; and therefore the whole transaction must be shewn. In the case of a mortgage, for instance, created by means of an absolute conveyance, nothing passes between the mortgagor and mortgagee relative to the possession. The mortgagor remains in possession under his original title with the tacit acquiescence of the mortgagee; and if the conclusion is to be arrived at that he was not to be held accountable for the rents and profits, it must be by receiving evidence that the conveyance was intended only as a security that the intended mortgagor remained in possession only as such, and of course was not intended to be subject to account. The leave and license is to be inferred from the circumstances of the case, and all those circumstances must necessarily be shewn. Supposing that courts of law do act upon this principle, what is the effect of it? Nothing more than this, that a court of law has to a certain extent adopted the rule of a court of

equity, and followed its example by admitting parol evidence. But the rule of equity is not thereby altered; it remains as it was. The court of law receives the evidence in order to prevent injustice—the court of equity for that purpose and to do complete justice. Courts of law have frequently adopted to a limited extent rules, which until then had prevailed only in courts of equity; but the rules of equity are wholly unaffected by such adoption. If it is true that courts of law now, in the case of a parol contract for the purchase of land under which possession has been taken, receive evidence for the purpose of preventing the purchaser from being liable to an action, it is nevertheless not one whit less the case now than it was formerly that such possession so taken under the parol contract is a part performance of it, which exempts the case from the operation of the Statute of Frauds; and specific performance of such contracts under such circumstances is decreed now as much as ever it was. The necessity for the interposition of equity is stronger in the case of a mortgage than of a purchase. If the intended mortgagee is to be prevented from recovering the mesne profits of the land, justice requires that he should have interest on the money. Can a court of law give it him? If it cannot, justice is but half done; if it can, then this singular effect follows—that the absolute owner of an estate is prevented from receiving the rents and profits of it, and is compelled to be content with interest upon money which is not due to him; while the person in possession is allowed to retain the rents of an estate which does not belong to him, and made to pay interest upon money which he does not owe. In other words, although the purchase has been concluded long before the land conveyed and the purchase-money paid, the completion of it is in fact procrastinated until the two cross actions have been commenced and terminated. The principle upon

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which the decision of the court below in this case was founded is, I think, undeniable; but I am far from thinking that it was necessary to support that decision. I am not prepared to say that there is any rule of law or evidence peculiarly applicable to mortgages as such; but it is nevertheless, I think, perfectly true, that it is scarcely possible to imagine a case of mortgage, effected through the medium of an absolute conveyance, in which, upon some well recognized principle of equity, parol evidence would not be properly receivable for the purpose of explaining the true intent of the parties and of carrying that intention into effect. If indeed the parties designedly omit a proviso for redemption for some particular purpose, the mortgagor trusting to the honor of the mortgagee to permit such redemption when it should be asked, the court can afford no assistance to a person who has intentionally represented the agreement as different from what it really was; but in every other case, if a proviso for redemption be not introduced into the deed it must be through ignorance or mistake; and in that case it would be of course for the court to reform the deed, which did not truly express the agreement of the parties, and, in the same suit, to treat and act upon the deed as already reformed, and give the consequental relief. Thus, in *England v. Codrington* (*a*), where the court was of opinion that the proviso for redemption had been excluded through fraud, a redemption was decreed immediately, and with costs, because the defendant had, contrary to the truth of the case, insisted upon the transaction as an absolute purchase. I consider the present a case of this description—not indeed of fraud but of ignorance and mistake—the deed having been drawn in such a manner that it did not express the agreement of the the parties sufficiently, and was inadequate to effectuate their real intention.

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(*a*) 1 Eden. 169.

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There is an important case of *Tull v. Owen*, reported in *Younge & Collyer's* Reports (*a*). The object of the bill was to obtain redemption of an estate conveyed absolutely, but, as was alleged, by way of mortgage forty-seven years before, some subsequent deeds having been executed by the grantors only and not by the defendant, which contained a recital that the prior deeds were intended only as security. The case was argued by Mr. *Treslove* for the plaintiffs and Mr. *Simpkinson* for the defendant, both equity counsel of great experience, and it is impossible to peruse their arguments without being convinced that they both assumed and acknowledged the admissibility of parol evidence for the purpose of shewing the real nature of the deed. Mr. *Treslove* did not argue for, nor Mr. *Simpkinson* against, its admissibility. It was assumed by both as unquestionable. Mr. *Simpkinson*, indeed, contended that the deed ought first to be reformed by decree, before a redemption could be obtained; but this is obviously immaterial, as the whole relief is administered in the one suit; and it only indicates perhaps the principle on which the evidence is admitted—namely, presumed mistake or ignorance. The learned Lord Chief Baron, Lord *Abinger*, did not deny this rule, but dismissed the bill upon the circumstances, saying that he was required to declare an absolute deed a mortgage, in the absence of any evidence and after confirmation by positve deeds. The doctrine of that case in regard to the effect of the recital in the subsequent deed, supposing the defendant to have claimed any benefit under that deed, seems to me inconsistent with what I had previously understood to be the equitable rule, although it may truly state the common law rule on the subject. See also *Ball v. Storie* (*b*) and

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(*a*) 4 Y. & C. C. C. 191. (*b*) 1 S. & S. 210.

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Ramsbottom v. Gosden (*a*) on the subject of reforming deeds by decree. I consider the case of *Tull v. Owen* as a strong authority for the admission of the parol evidence in the present case.

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Another principle may be mentioned on which parol evidence would be clearly receivable, and would of necessity have the effect of establishing the right of the mortgagor in case of a mortgage by an absolute conveyance. It may be always shewn by parol testimony in a court of equity whether the coosideration mentioned in a deed has been paid wholly or in part; whether it was the real consideration, and how and by whom the consideration has been paid; and if it appear from such testimony that the consideration really proceeded from a different person from the grantee, such grantee will be a trustee for that person. Now, in case of a mortgage by absolute conveyance, it can be shewn what the real consideration was, whereby it will appear that it was in fact an advance or debt, and that it was to be repaid, and that a right of action exists for its recovery. In this case a trust arises, by implication of law, which is excepted from the Statute of Frauds, and under which the mortgagor would be entitled to redeem. I am quite clear that in all cases of this description parol evidence of collateral facts inconsistent with the transaction being an absolute sale is admissible, and that evidence of an express agreement that the property should be redeemable is not excluded (which indeed would be absurd); but that probably in no case would mere evidence of a verbal agreement be sufficient to entitle the mortgagor to relief unless it were corroborated by collateral facts tending to the same point. The case of *Cotterell v. Purchase* is a clear authority for this position. The Lord Chancellor there says—"Indeed, if the plaintiff had

(*a*) 1 V. & B. 165.

remained any time in possession I should have been clear that it was a mortgage." This case is not to be got over. 1851. Greenshields v. Barnhart.

When, too, a conveyance has been given and accepted as a security, and the owner of the estate has parted with it on the faith of the agreement, by which he was to be at liberty to redeem it, and has been allowed by the other party to place himself in that situation, it is difficult to suppose that this party would be permitted to insist upon the deed as an absolute purchase. It is a fraud in a party who has received a conveyance as a security, and to whom it has been given as such on the faith that it would be so dealt with, to treat it afterwards as a sale of the entire interest. To say that in such a case the clearest evidence is required, is not to deny the rule but to regulate its application. Suppose that the property should be of far greater value than the sum advanced; that the grantor should pay all the expenses attending the transaction; that after the execution of the deed the grantor should demand, and the grantee should furnish, an account of rents received, although not in such a form as to satisfy the requirements of the Statute of Frauds; or that the grantee should request the approval or consent of the grantor in letting or otherwise managing or disposing of the property; and all or several of these circumstances to concur with clear and satisfactory evidence that the transaction was in fact one of loan and security;—it seems difficult to suppose that relief could in such a case be refused. Judgment.

It is remarkable that several text-writers of celebrity lay it down as a rule that in case of a mortgage effected through the medium of an absolute conveyance, parol evidence is always receivable for the purpose of shewing the property to be redeemable. These writers doubtless state the understand-

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ing of the profession in England upon the subject, which is a matter of great importance. It is probable that the law is well understood in Westminster Hall on many points respecting which no adjudged case can be found, for the very reason that it is well understood and acknowledged. The case reported at 3 *Salkeld* 241, pl. 2, seems to recognize and assume the admissibility of parol evidence for this purpose (*a*). The decree in the case before us, far from being a stretch of the law, as it was represented in argument to be, is in my judgment much within the limits of the law upon this subject.

As to the facts of the case, the only points in question in the view which the court below took of the case, were the nature of the conveyance from the plaintiff to *Patterson*, the continued possession of the plaintiff, and the notice on the part of *Greenshields*, when he received his mortgage, or afterwards, of the plaintiff's equitable title. It is to be remarked that it was necessary for the plaintiff to enter into evidence only as to *Greenshields*; for the defendant *Patterson* admitted all the facts of the case. According to the principle on which the court below decided the case, it became necessary, as respects *Greenshields*, to shew, that at the time of the execution of the mortgage under which he claimed *Patterson* had only a redeemable interest—in other words, that the conveyance was intended only as a security, and that the plaintiff had continued since its execution in possession of the property under his original title. For this purpose, of course, the answer of his co-defendant *Patterson* was not admissible evidence, although the contrary was strongly contended by the respondents at the hearing of the cause. The facts of the redeemable character of the conveyance, and the possession of the plaintiff, were not denied by the defendant, *Greenshields*. It was

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(*a*) See also Reeks v. Postlethwaite, Coop. 170.

competent therefore to the plaintiff to prove them by the evidence of one witness. He produced the testimony of one witness for this purpose—namely, his father, *John Barnhart*, who deposed in the clearest and most distinct manner to both points. An attempt was indeed made to shake the evidence of this witness. He was suspected of having, and perhaps had, a strong interest in the suit; and evidence had been adduced for the purpose of discrediting his testimony, which however had been met by other evidence adduced in its support. But under the circumstances of this case it was impossible, I think, to entertain the slightest doubt of the truth of *John Barnhart's* evidence upon these points. Both facts were admitted, as already observed, by the answer of the co-defendant, *Patterson*, who knew exactly what the truth was, and had the strongest interest to deny the facts in question. The continued possession of the plaintiff also, when once established, was strongly corroborative of the evidence of the redeemable character of the conveyance. The only point that remained to be proved was the notice to *Greenshields* of the equitable title of the plaintiff; and this part of the case was the only one about which, as it appears to me, any doubt could be entertained. It seems to me very clear that notice is no part of the *prima facie* case of the plaintiff, but that a purchase for valuable consideration without notice is a defence which a defendant must raise himself, if he desires to avail himself of it. Thus, it is apprehended that if a plaintiff should state merely an equitable title, and the defendant should state a purchase for valuable consideration under which he had acquired the legal estate, but subsequent in point of time, without more, the plaintiff would have simply to prove his prior equitable title, and the defendant could neither prove that he had no notice or call upon the plaintiff to prove that he had, because he had not put that fact in issue, and

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It would seem to follow that if the defendant should deny notice insufficiently, the plaintiff would be equally entitled to relief without proving notice. Thus, suppose the purchase-money to have been paid after the execution of the conveyance, and the defendant to simply deny notice at the time of the execution of the conveyance, he could neither prove that he had no notice at the time of the payment of the money, nor require proof of the contrary from the plaintiff: but had simply offered an insufficient defence which could not debar the plaintiff from relief. It is at the same time probably true that a plaintiff, by an insufficient charge of notice, may conclude himself, and may be deemed to have impliedly admitted what he had not negatived in express terms. To apply these principles to the present case, we shall find that the plaintiff has not concluded himself by any defective statement or charge contained in his bill relative to notice; but that when the defendant *Greenshields* comes to raise his defence to the plaintiff's claim of equitable relief, founded on his purchase for valuable consideration, without notice, he, in his first answer, denies notice of the plaintiff's title only at the time of the execution of the assignment. This point was very material; for it appears from *Greenshield's* own answer, that all the money that is now claimed to be due on his security was advanced after the execution of the assignment; and if upon that state of the pleadings he was to be deemed to have had notice when these further advances were made, it was unnecessary for the plaintiff to enter into evidence of notice at all. In his further answer he states

(*a*) Harris v. Ingledew, 3 P. W. 91; Aston v. Curzon and Weston v. Berkeley, id. 244 n. f.; Brace v. Duchess of Marlborough, 6th resolution, 2 P. W. 491; Hughes v. Garner, 2 Y. & C. 328.

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incidentally, as it seems, that he had no notice of the plaintiff's claim until the commencement of the suit, which may perhaps supply the defect in his former answer. The practice of the plaintiff's charging notice by the bill arose, I apprehend, from the desire to elicit from the defendant a confession of notice, or of facts from which notice might be inferred, in anticipation of a defence founded on the absence of notice. A defendant may, under such circumstances, deny the allegations, and sufficiently answer the interrogatories contained in the bill respecting notice—as perhaps has been done here—and yet fail in effectually raising a defence founded on the absence of it, from not considering that the object of the plaintiff is to elicit discovery; and he adapts his charges simply to that end. The two answers in this case may perhaps constitute a sufficient defence in respect of notice; but the state of the pleadings has, I think, a material bearing on the evidence by which notice is sought to be established. The denial of notice in the answer to the original bill is as follows: "And this defendant denies that he knew or believed, or had any reason to know or believe or suspect, before the execution of the said assignment from the said *Wm. H. Patterson* to this defendant, or before any treaty had been entered into for the said assignment that the said assignment from the said complainant to the said *Wm. H. Patterson* was an assignment upon condition, or that the said complainant was entitled to call for a re-assignment of the said contract, or a conveyance of the land therein contracted for, from the said *Wm. H. Patterson*, upon paying certain or any sums of money advanced by the said *Wm. H. Patterson* to the said complainant on the security of the said assignment; or that the said *Wm. H. Patterson* was only a trustee for the said complainant as to the said parcel of land in the said bill mentioned." Now, upon this denial of notice, two remarks may be

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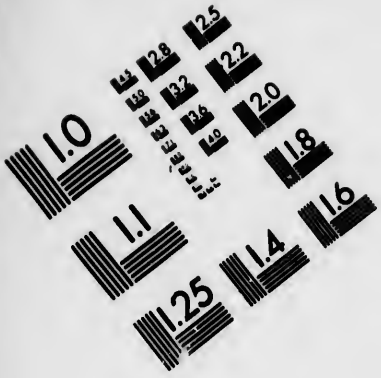
[redacted]



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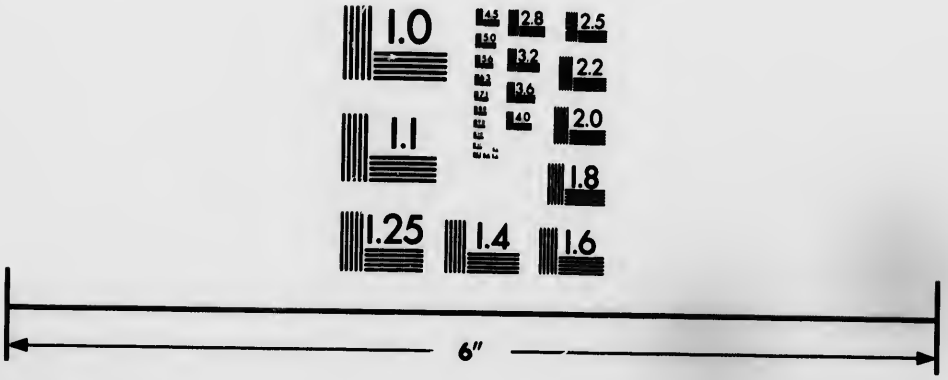

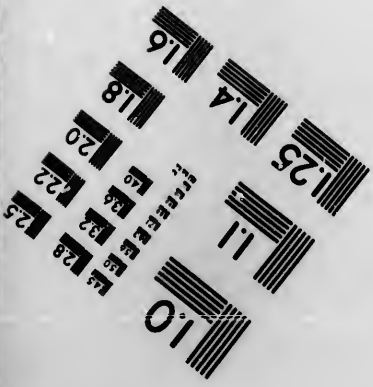

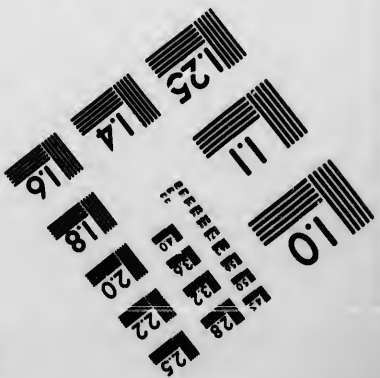

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made; one, that it negatives notice only at the time of the execution of the assignment, which in this case is immaterial, because the whole amount that is now claimed having become due after the execution of the assignment notice at the time of this amount having been advanced was the real and only point in dispute: the other, that it is very consistent with this defendant not having notice of the assignment being upon condition (which it was not), or that the plaintiff was entitled to call for a re-assignment or conveyance, or that the defendant, *Patterson*, was only a trustee for the plaintiff,—that he might have had reason to believe or suspect that the plaintiff claimed the property in some way. It is quite clear that this denial of notice contained in the answer of this defendant to the original bill is wholly immaterial, and may be altogether laid out of view, because it relates simply to notice at the time of the execution of the assignment, which is an irrelevant fact. The existence of notice at that time would, if it had been confessed by the answer, have been very material to the plaintiff, because notice at that time would have been notice afterwards; but the absence of notice at that time was wholly unimportant to the defendant, because it was perfectly consistent with notice at the time of advancing the money now due. All that we have to attend to therefore in this respect is the denial of notice in the answer to the amended bill, which is in the following words: "and that this defendant had no notice of the said complainant's claim until the said bill was filed." This statement is introduced incidentally, and not as part of a defence raised against the claim advanced by the bill. The evidence of notice in this case consists chiefly of a conversation stated to have occurred in the year 1839 between the defendant, *Greenshields*, and a person of the name of *Hammond*, the purport of which I propose to consider presently; but, supposing the conversation in question, if it really

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occurred, to constitute notice, it is manifest that the fact of such conversation is not at all denied by the answer; for possibly the defendant might not consider such conversation notice of the plaintiff's claim. The evidence of this conversation is wholly uncontradicted; and if it appears worthy of credit, must, it would seem, prevail to establish the fact which it imports; and if that fact amounts to notice, then the fact of notice is established. It is true that this conversation is not specifically mentioned in the bill, and I am not aware of any rule either of pleading or evidence which requires that such should have been the case in order to render it admissible in evidence; but no doubt a discretionary power exists in the court whenever a party is surprised by the production of unexpected testimony, which he has had no opportunity of contradicting, to direct inquiry to be made for the purpose of affording him that opportunity. This power is often very beneficially exercised in England, where a surprise of this nature may very well happen. There the examination of witnesses is private; and if a fact is proved by a witness which has not been mentioned in the pleadings, the opposite party has had no intimation of it until the depositions have been published, and has had no opportunity of disproving or explaining it. But the case is far otherwise here. In this very instance, the witness *Hammond* was examined openly in the Master's office. *Greenshields* was present by his counsel or solicitor, and cross-examined him; he could have adduced other evidence in contradiction of his testimony, and might have made a special application to the court for that purpose if it had been necessary. No inquiry was asked, nor was any surprise suggested; and under such circumstances, I cannot see any reason why the evidence should not be received and allowed such weight as properly belongs to it. What that is it is proper now to consider. The chief

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evidence, as I have already observed, in respect of notice, is that of the witness *Hammond*. This witness appears to be a person in a respectable station in society, being a storekeeper. He must have been about twenty-seven years of age when the conversation to which he deposes occurred between himself and *Greenshields*; and his testimony has not been impeached. I am entirely of opinion that at the distance of time at which he delivered his testimony from the circumstance to which it relates, the purport of a conversation and the year, if not the month, in which it occurred may be well recollected. The witness says that he recollects the conversation in question distinctly, and he repeats the purport of what he stated to *Greenshields* in a manner which precludes all doubt that he remembered it. *Greenshields* commences the conversation with a question which I think might well be remembered at that distance of time. "He asked me," says the witness, "whether *Patterson* owned it (the lot) or *Barnhart*." Now, whether *Patterson* had simply informed *Greenshields* that he owned the lot, or had informed him that he had purchased it from *Barnhart*, or had shewn him the assignment under which he claimed, it is quite clear that *Greenshields* must have seen or heard something which led him to suppose or suspect that *Barnhart* was the owner of the lot, or to doubt whether *Patterson* was the owner of it. Under these circumstances he did not apply to either *Patterson* or *Barnhart*, thinking probably that he would not receive a true answer from either of them; but he applied to the witness, who had been six years in the employ of *Patterson*, and who was then in business on his own account and dealing with *Greenshields* and his copartners; and who, we must suppose, was well qualified to give him the information he wanted. Nothing can be more distinct from a vague rumor than the communication to which this witness deposes. *Greenshields* doubted

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whether *Barnhart* or *Patterson* owned the lot; and he applied to the witness, as a well informed and impartial person, to resolve that doubt. The witness distinctly informs him that *Barnhart* was the owner of the lot, and in possession of it, as he considered. Now, if a person about to purchase or advance money upon an estate is credibly informed that another than the person with whom he is dealing is the owner and in possession of it, he may inquire of this person concerning his interest, or not, at his pleasure; but if it is the truth that he is the owner and in possession of the estate, the purchaser or mortgagee will be bound by his title. It does not appear which *Barnhart Greenshields* meant—it is certain that *Hammond* meant *John Barnhart*; but if any difficulty had arisen in consequence of the absence of *R. G. Barnhart*, who, it appears, was then out of the country, it would have been instantly removed in the course of that inquiry, which I think reasonable caution required *Greenshields* to make. *Greenshields* had manifestly seen or heard enough to make him doubt whether *Barnhart*—*John* or *Robert George*, it does not appear which—had not an interest in or did not own this property: he deemed it expedient, before he advanced any more goods to *Patterson*, to ascertain whether this was the case or not; and he applied to a person, in whom it is to be supposed that he had confidence, and who was qualified to give him the information he desired. This person tells him that *Barnhart* is the owner and in possession; and I think we must conclude that *Greenshields* considered him as meaning the same person that he did himself. If this was *John Barnhart*, or if he connected *John Barnhart* with the plaintiff (one or other of which things must necessarily have been the case, if he knew anything of *John Barnhart* in connection with the property), he would immediately apply to *John Barnhart* and learn the whole truth; if he knew only of *R. G.*

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Barnhart in connection with the property, and discovered in the course of his inquiry that *R. G. Barnhart* was not in Streetsville or in the country, he could not safely, after the information he had received, proceed in the transaction without inquiry of him; he should, if necessary, have had recourse to his former informant, who would have told him that he meant *John Barnhart* so that he would ultimately in either case have been led to *John Barnhart*, from whom he would have learned the nature of the plaintiff's claim; for I apprehend it must always be assumed, that if inquiry had been made of the agent he would have disclosed his principal's title. Ordinary prudence dictated further inquiry, under the circumstances in which *Greenshields* stood, after this conversation with *Hammond*. Whether he ultimately regarded *John Barnhart* as a principal or an agent, he was bound to inquire of him, and must be deemed to have notice of the plaintiff's equity on two principles; one, that the agent would have disclosed his principal's title; the other, that a person not making inquiry, which he was bound to make, and thereby putting it out of the power of the court to say how that inquiry would have terminated, is liable to have it assumed against him that it would have resulted in the disclosure of the truth. It is not necessary that the information received by a purchaser should be strictly accurate in all respects. If it is such that in the exercise of ordinary caution he should make further inquiry, and if that inquiry would inevitably lead to the discovery of the truth, he must be deemed to have had notice of it. Of this the case of *Taylor v. Baker* (*a*) is a strong example. Such, I think, was the case here. I very much question whether the answer negatives the fact of this conversation in such a manner as to render *Hammond's* evidence of it insufficient. I

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(*a*) 5 Price, 306.

think this evidence, apart from the denial of the answer, beyond cavil; and that we must believe the conversation in question to have happened, and the purport of it to be as this witness represents it; and I think that it constituted constructive notice to *Greenshields* of the plaintiff's equitable title. This evidence is, moreover, corroborated by that of *Charles Barnhart*, *Bennett* and *Phillips*, which we cannot entirely disbelieve. It cannot be doubted that *Greenshields* had conversations of some kind with these persons, and probably with others, in relation to this property; and what he learned on these occasions probably led him to make that inquiry of *Hammond* which produced the conversation to which I have referred. There is no reason to think that any concert existed between *Charles Barnhart* and *Bennett*, who were examined at places very distant from each other; and yet their evidence is very similar in purport and effect. I much question whether the denial in the original answer, even if not not confined to the execution of the deed, would have availed to invalidate *Hammond's* evidence of the conversation in question; but, supposing the case to be different, it is manifest that the matter negatived by this answer, in respect of this conversation, is simply the fact of its having occurred before the execution of the assignment, and nothing more. I think the evidence of the nature of assignment admissible in this case. I think incontestably establishes the fact of its being a security and not an absolute sale; and I much question whether the evidence of notice is not also sufficient, although a doubt may be entertained whether the conversation between *Hammond* and *Greenshields* occurred before or after the execution of the assignment. It cannot however, I think, be doubted that it happened in 1839; and it is certain that no part of the amount now claimed had then been advanced. I rise from a renewed and close consideration of this

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case with my original views respecting it strongly confirmed, excepting on the point of notice, respecting which perhaps further inquiry may be proper. I think a determination that what has occurred here did not amount to notice would weaken the doctrine itself, shake titles, and be productive of mischievous consequences. This case has the circumstance which was wanting in *Jones* v. *Smith*—namely, the mention of the particular property. As this is a point of great importance to the general administration of justice in this court, I propose to consider it more particularly.

I should premise that, if doubt is entertained as to the fact of the conversation with *Hammond*, or as to the date of it, an issue might be directed for the purpose of ascertaining those points. But, supposing it to have really occurred, what is the purport of it?

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Hammond distinctly informs *Greenshields* that *John Barnhart* is the owner of and in possession of the lot. Now it is the well-established law of this court, that if a person about to purchase or advance money upon an estate is informed that a third person is in possession of it, he is bound by any equitable title or interest which that person may have. He may know *aliunde* that that person has a lease of the property and is in possession under that lease—it makes no difference. He may know that the person from whom he is purchasing, or to whom he is about to advance money, has a conveyance of the property from the very person so alleged to be in possession, or from another person, made five years before; it makes not the slightest difference. These propositions are perfectly incontestable; they do not admit of question. Suppose a case were to come into the Court of Chancery to-morrow, in which a person about to purchase or to advance money upon certain property had been informed by a trustworthy individual, of whom he had made inquiry as to the title,

that another than the person with whom he is so in treaty was the owner and in possession of the estate; and suppose such person to be really in possession, and to have an equitable lien, claim or interest in the estate, the intended purchaser or mortgagee may know *aliunde* that this person has a lease of the property under which he is in possession; he may know that the individual with whom he is in treaty about the property has a deed of it from this very person, or from another person, connected or not connected with him. No one, I am sure, will contradict me when I say, that there is not a single counsel practising at the bar of that court who would consider such a case as arguable, and that the court itself would not consider it its duty to have any argument upon it. I ask, then, in what respect the present case differs from the one I have suggested?

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Greenshields, about to make advances upon an estate, and making inquiry as to the state of the title of a person to whom he applies for that purpose, is informed by him that *John Barnhart* is the owner and in possession of the estate; but *Greenshields* knows, we will suppose, from another quarter, that he has a lease of it from the former owner and is in possession under that lease, and that the person with whom he is in treaty about the estate has a deed five years old from such former owner. He nevertheless refrains from inquiry — he remains wilfully blind to the truth; and when the person so in possession and equitably entitled afterwards claims his equitable interest, he is told by the mortgagee that he had no notice of it; and we hold that he has a right to say so. How is such a decision to be reconciled to the English authorities? How is it to be reconciled to *Jones v. Smith*? Suppose *John Barnhart* were a tenant in actual possession, and to have contracted for the purchase of the fee, the case would be undeniable; it would be exactly the case

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of *Daniels v. Davison* (*a*). Can it make any difference that he had let the property and was in receipt of the rents and profits? Nobody will maintain such a proposition. Then, the only distinction is that he was in possession as the agent of the real owner. But is it possible that, if the equitable owner of an estate is in possession of it by his agent, who is the ostensible owner of it, and if a person about to purchase or receive a mortgage of such estate is credibly informed that such agent is the owner and in possession of it, and he completes his purchase or mortgage without inquiry of that person, that he will not be deemed to have notice of the equitable title of the principal? Is it not to be presumed that if he had made inquiry of the person in possession he would have disclosed his principal's title? At all events, must it not be so presumed against a person not making such inquiry? If, under such circumstances, the agent suppressed his principal's title, the principal would be bound, and the purchaser or mortgagee would be safe. Has the purchaser a right to say, when informed of the possession and supposed title of the person who is really the agent of the owner, that he will incur the risk and complete his purchase, and then avail himself of the fact that the title was not in the agent but in the principal? Surely not. The agent and the principal are, for this purpose, identified. Where the equitable owner is in possession by his agent, it is the same thing as if he was in possession himself. The purchaser or mortgagee knowing the possession of the agent, in fact knows the possession of the owner; because, if he had applied to the agent, he would have informed him that he was but an agent for another. How then, I again ask, is this case to be distinguished from the English authorities? If the facts are as I have represented them, I do not think

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(*a*) 16 Ves. 249, 17 id. 433.

it will be contended by any one that it can be so distinguished. The difference of opinion must be as to the facts, or as to the proper legal bearing of those facts; although, after the most careful consideration, I am unable to perceive any error in the conclusion at which I have arrived on those points, or in the reasoning by which I have arrived at that conclusion. In the case of *Jones v. Smith*, Vice-Chancellor *Wigram* uses these words—"It was said that if a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the party in such occupation may have in the land. I do not dispute this proposition; for possession is *prima facie* evidence of a seizin in fee. But this case is strictly within the principle upon which I am proceeding: the purchaser has actual notice of a fact by which the property is affected, and he is bound to ascertain the truth." Now, compare the case under our consideration with that suggested by Vice-Chancellor *Wigram*. The purchaser, *Greenshields*, has actual notice (that is, he is informed by a person of whom he makes inquiry for the purpose) of a fact by which the property is affected (that is, that the estate is in the occupation or possession—by receipt of the rents, which is the same thing—of another than the vendor);—and apply the rule which the Vice-Chancellor propounded as applicable to such a case—"he is bound to ascertain the truth." Instead of which the purchaser, in the present instance, abstains from making inquiry even of the person from whom he was purchasing. How this case is to be distinguished really and substantially from the one suggested by Vice-Chancellor *Wigram*, and to which he yields his unqalified assent, I must confess my inability to understand. It may be right to direct an issue in this case, as the defendant has in a manner denied notice, for the purpose of ascertaining whether this conversation really took

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place, and what was the date of it; but to hold, if it actually occurred before the moneys now due were advanced, that it did not amount to notice, is, in my humble judgment, to go counter to the English authorities. *Greenshields* has certainly answered carelessly, to say the least of it, as to notice. In his first answer he says that he had always been informed and believed that *Patterson* was in possession of the lot. The first thing that strikes one as to this is, that it must have been *Patterson* who gave him this information, for that no disinterested person would have told such a gratuitous untruth; but that *Patterson* denies having ever informed him to that effect. When, however, we turn to the further answer of *Greenshields*, we find him confessing that he never was informed by anybody, as he had alleged in his former answer, but always took the fact for granted. This mode of swearing in an answer of course weakens one's confidence in its statements; and I very much question whether my original view of the sufficiency of the evidence of notice in this case against the denial in the answer was not correct, but incline upon reflection to the opinion, as the safer course, that further investigation as to the fact of the conversation with *Hammond*, and the date of it, may be advantageous and would be proper. In conclusion, I would say, that if it should be thought that the evidence adduced by the plaintiff is admissible for the purpose for which he adduced it, but that it is insufficient to establish his title to relief, this seems to be a case in which it would be proper to direct further inquiry in order to ascertain the truth. In determining the course to be pursued under such circumstances, the court is greatly influenced by the justice and fairness of the case under consideration. Now the present case is one in which the owner of an estate having made a mortgage of it, the mortgagee, instead of holding it ready to be conveyed whensoever his principal,

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interests and costs should be paid, as he ought to have done, mortgaged it for several times its value, with other lands, to another person, whom he also, so far as he was concerned, deceived as to the nature of his estate. It might have been that the *Barnharts* stood by and knowingly suffered *Patterson* to deal with the property in this way without giving notice of their interest; and if such had been the case it would of itself, without more, have constituted a complete answer to the plaintiff's claim. But such a circumstance is not surmised in the answer, nor suggested in the argument, nor pointed at in the evidence; and apart from anything of this sort the case of the plaintiff is a perfectly fair and just one. Some allusion was indeed made to a supposed underhand dealing between the father and son in relation to this property, and to the probability that it was still in reality the father's; and this might be an important consideration in weighing the testimony of *John Barnhart*; but what other bearing has it upon the case? If *John Barnhart* made an assignment of his property to his son to defraud his creditors, they may have reason to complain, but certainly neither *Greenshields* nor *Patterson*. If *Patterson* afterwards took a mortgage of the property from the son with the consent of the father, and if the father is not now objecting to this mortgage, what have the defendants to do with any previous dealings between father and son? As between the parties to this record the father and son are identified, and there never was a more equitable case brought under the cognizance of any court. It is one in which the court would make every effort and use all means for the purpose of arriving at the truth. Now what has the plaintiff done here? He has brought his case to a hearing with such evidence as no doubt he thought sufficient for its establishment. He finds, however, when the court comes to adjudicate upon it, that it is deemed not to be legally made out; although (as

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I think) no one, looking at the pleadings and evidence in the cause, can fail to arrive at a moral certainty of the truth of it. Is such a case to be dismissed without further inquiry? Is the court to shut its eyes to the almost certain truth? I cannot help expressing the apprehension (always supposing parol evidence to be admissible in such a case) that if we decide against the plaintiff here without further inquiry, through the intervention of a jury or otherwise, we shall fail to do justice between these parties according to the principles and practice of a court of equity.

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SPRAGGE, V. C.—Upon the general question raised in this case as between the plaintiff in the court below and the defendant, *Patterson*, whether, where a conveyance is absolute in its form and terms, parol evidence is admissible to shew it to be a mortgage only, a possession being shewn inconsistent with the terms of the deed, I agree with my brother *Esten*. I think his judgment delivered upon the hearing of the cause in Chancery contains a sound exposition of the law. I would enter more at large into this question but that I shall have to consider at some length other points in which I have the misfortune to differ with him.

As between the plaintiff and *Patterson*, the answers of *Patterson* are sufficient to prove that the assignment to him of the premises in question by the plaintiff was by way of security only; but in order to affect *Greenshields* this must of course be proved *aliunde*. *John Barnhart* is the only oral evidence to prove this. It is however corroborated by other circumstances. The keeping of the account is one. It is not conclusive certainly, as the owner of prperty may with great propriety keep an account with it in order to ascertain whether it is a paying or losing concern; but it is, I believe, very

unusual, at least in this country, and is a circumstance tending, in connection with others, to shew that he considered himself an accounting party. *Hammond's* evidence as to *John Barnhart* calling on *Patterson* about his account, and asking about the lot and the instalments payable upon it, is further confirmatory of the same view. Whether, in judging of the weight due to *John Barnhart's* evidence, *Patterson's* answers can be looked at so as to affect *Greenshields*, a co-defendant, admits I think of great doubt (*a*). The court may certainly look at the answer not as evidence, yet as that which may regulate its discretion with respect to the further investigation of particular facts; but it appears to me that when it is looked at with a view of confirming or weakening credence in the evidence of a witness whose credit is impeached, that so looking at it is using it as evidence. If the mind is in doubt, and that doubt is removed—a weight and effect given to evidence which otherwise it would not be conceived entitled to—that, I think, can only be done by that which is itself evidence; and the giving it such weight and effect is treating it and using it as evidence.

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I think however that, without looking at *Patterson's* answer, it is sufficiently established that the assignment to *Patterson* was intended by the parties to be by way of security only.

There is another point in the case, which, so far as it affects *Greenshields*, rests upon the evidence of *John Barnhart* only (with the exception of that of *Bennett*, to which I will advert presently,) unless indeed *Patterson's* answer can be looked at—that is, the possession of the lot after the assignment to *Patterson*, the character in which *John Barnhart*

(*a*) Miller v. Gow. 1 Y. & C. C. C. 59.

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was in possession, whether as owner or not; and if not as owner, then, whether as agent or tenant to the plaintiff or to *Patterson*. *Hammond* indeed supposes him to have been in possession as owner, but in that he was clearly in error. *John Barnhart's* evidence is to the effect that he was in possession as agent for his son, the plaintiff; and *Patterson's* answer, even if it could be looked at, is so ambiguous upon this point as to throw but little light upon it; for, while speaking of *John Barnhart* as agent to his son, the plaintiff, he speaks also of himself (*Patterson*) *giving leave* to *John Barnhart* to occupy or let the land, and states that he (*Patterson*) put his own cattle to pasture thereon.

It is difficult to gather from *Patterson's* answer whether he considered *himself*, or the plaintiff, in possession; his giving such leave as he states to *John Barnhart* being not inconsistent with his own possession. He says further in his answer that he never personally occupied nor entered into possession of the land otherwise than as he had before mentioned—not leaving it to be inferred, as I read his answer, that he had never entered into possession at all.

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John Barnhart and *Bennett* both profess to give particular evidence as to the possession, but there is a great discrepancy between them. *Bennett* says that the plaintiff was in possession from 1830 to 1834, and from thence to April, 1837; and that from thence to July, 1845, (when the witness left the country) *John Barnhart* was in possession. *John Barnhart*, on the other hand, says that he was always in possession; that the plaintiff, when he purchased the lot from him in 1830, left him in possession by consent between them: and that he has since remained in possession as agent to the plaintiff. *Bennett's* evidence cannot be looked upon as sup-

porting that of *Barnhart* as to the matter of possession. The latter stands alone upon its own merits; and the question arises whether his credit as a witness has been so shaken by the evidence brought to impeach it that the court cannot safely find a fact as *proved* when supported by his evidence alone; and in this connection it is material to consider whether any bias or interest exists on the part of *John Barnhart* which would be likely to influence such a witness as he is described to be to swerve from the truth. He himself was equitable owner of the premises before 1830, under a contract of purchase with the college. The plaintiff became proprietor in 1830, having purchased the premises (so *John Barnhart* says) in that year. *John Barnhart* himself in that year, as appears by his evidence, was forty years of age: what age his son was does not appear, but in all probability a mere lad. Unless the father married three years before he was of age the son could not have been of age in 1830; yet the father says, "the plaintiff left me in possession of the premises by consent between us." The father has been in possession ever since; and, as it would appear, without account to any one; the son in the meantime, an insolvent debtor, swearing himself not worth 5*l.* and absent from the province the greater part of the time—as nearly as I can gather from the evidence about ten years. All this appears to me to wear the complexion of the premises being nominally the plaintiff's (at least until the assignment to *Patterson*) but really *John Barnhart's*. If so, or if he retained any interest in the property, or if he felt deeply interested in their being now redeemed, his evidence, I think, cannot be relied upon. I infer this from the evidence of the witnesses called to discredit him. He appears, judging from the evidence, to have borne a better character formerly than of late. The witnesses who impeach his character lay great stress upon his being unworthy of belief

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in matters where he was deeply interested. If this be so, it taints with suspicion not his evidence only but the character of his dealings, and leaves extremely questionable not only what he has *said* but also what he has *done* in relation to the transactions which are the subject of this suit. I think the allegation that the plaintiff was in possession of the premises at the time of the assignment to *Greenshields* is not sufficiently established in evidence as against *Greenshields*. This point would be very material if the court should be of opinion that the possession alleged in the plaintiff's bill would, if proved, *per se*, affect *Greenshields* with notice of the fact of *Patterson's* estate being defeasible.

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To come now to the question of notice, apart from mere possession. The bill charges in effect that *Greenshields* had notice that the assignment to *Patterson* was by way of security only and defeasible; the mode of notice, by conversation or otherwise, is not alleged. *Greenshields* by his answer denies notice. The evidence of notice is, that conversations took place between *Greenshields* and the witnesses, with the exception of *Phillips* who deposes to hearing only and not being a party to a conversation; and it is contended that what passed at these conversations amounted to notice to *Greenshields*. No opportunity has been given to *Greenshields* to contradict or explain these conversations by answer; they ought not therefore, I think, to be taken more strongly against him than they would have been if set forth in the bill and denied or explained.

Evidence has been given to discredit one of the witnesses as a person not to be believed upon oath—*Josiah Bennett*, formerly a blacksmith, and bailiff of the Court of Requests at Streetsville, who left the

country in 1845, and has since resided in the United States, where his evidence was taken upon commission. The evidence as to his character and credit is conflicting—that against them, however, I think greatly preponderates; and in regard to that called to sustain them I would observe, that men of very bad character, and who, to the knowledge of many, have actually sworn falsely, may with little difficulty find several men of character and respectability in their neighborhood who, not being themselves aware of any instances in which the individual has, to their knowledge, sworn falsely, are ready to depose that *they* would believe him upon oath. It is not because these latter have had no reason for disbelieving the oath of a person that the court is to believe it when his worthlessness is deposed to by a number of persons, several of whom speak not only as to character, but being cross-examined give particular instances of his having sworn that which to their knowledge was false. I think that the evidence of *Bennett* should be thrown out of the question. I confess, however, that it would not have had much weight with me, even if his credit had not been successfully impeached. Not to enter into an analysis of the evidence given by *Charles Barnhart*, it is clear that it must have been evident to *Greenshields* that *Charles Barnhart* was not aware of the assignment to *Patterson*. Whether or not he had then seen the assignment does not appear; but if he did not see it till afterwards, the seeing it must have convinced him that *Charles Barnhart* had founded his opinion upon the mere fact of the plaintiff having bought the place and his disbelief of *Patterson* having obtained a title for it; and he must have seen that *Charles Barnhart* had spoken in ignorance of a fact that really did exist. *William Phillips*, who describes himself as a laborer, speaks of a fragment of a conversation, of which he did not hear the commencement, which took place between

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Greenshields and *Bennett* between eight and nine years before—he then being about sixteen years old. He says he heard *Greenshields* asking *Bennett* whether the farm No. 6 did not belong to *Patterson*, and that *Bennett* said "No, it is *Barnhart's*."

The evidence given by *Hammond* is more circumstantial, and entitled I think to greater weight. He had been a clerk with *Patterson* from 1829, to May, 1836. This no doubt was known to *Greenshields*, who had visited Streetsville frequently, first as agent of, and afterwards as partner in, the firm of *Gillespie, Moffat & Co.*, with which firm *Patterson* dealt and with whom also the witness, *Hammond*, dealt after setting up in business for himself at Hornby. In September, 1839, shortly before the assignment to himself from *Patterson*, *Greenshields* had a conversation with the witness at Hornby; *Greenshields* asked him some questions about the lot, whether *Patterson* owned it or *Barnhart*: he told *Greenshields* that he considered that *Barnhart* owned it and was in possession; that he had rented it to one *Freedy*, and appeared to be in possession. *Hammond* says he knew nothing of the *plaintiff* having anything to do with the place, and that in speaking of *Barnhart* owning it he meant *John Barnhart*; he does not say whether he told *Greenshields* which of the *Barnharts* he meant, but having *John* in his mind; speaking of his possession, of his exercising acts of ownership and letting the place to *Freedy*, he probably spoke in such a way as to lead *Greenshields* to understand that he meant *John* and not *Robert*, who was known to be out of the country.

Judgment.

The plaintiff's bill points to *Greenshields* having notice of plaintiff's possession, and that the assignment to *Patterson* was by way of security, and that *Patterson* was a trustee for the plaintiff in respect of the land. *Greenshields'* answer denies this. He

does not deny having had notice of, or having been informed, or having had reason to suspect or believe that the plaintiff or any other *Barnhart* was owner of the premises in question. This is what *Hammond's* evidence points to; but the answer to the bill does not deny this, because the bill does not allege it. There is however one allegation of the bill which is denied by the answer, and in which the answer is at variance with *Hammond's* evidence—namely, that *Greenshields* was informed that *Barnhart* was in possession; unless, indeed, *Hammond* led *Greenshields* to believe that he meant *John Barnhart*.

If the allegations in the bill as to notice and possession can be supported by evidence of notice and possession of a different person than the one in respect of whom they are alleged, on the ground that as proved, though not strictly correct, it should have led *Greenshields* to inquiry, then *Greenshields* has been placed at this disadvantage,—that it has not been so stated in the bill as to call his attention to the fact with a view to his so framing his answer as to meet it; and thus an allegation which, if correctly stated, might have been explicitly denied and proof thereof by more than one witness rendered necessary, in consequence of its being inaccurately stated, is not met by the answer, and so the plaintiff may sustain his case by less proof than if he had stated his case correctly. In *Taylor v. Baker* the notice appears to have been correctly charged in the bill as being notice of a previous mortgage, the answer denied notice of a mortgage but admitted that the mortgagor had informed the defendant that the plaintiff had a judgment or warrant of attorney against him; and it appeared in evidence that the deeds were shewn to the defendant's solicitor before the second mortgage was given, so that he clearly had notice, and the evidence was no surprise upon him. If the information, so to call it, conveyed to *Greenshields*

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by *Hammond* is to be taken as referring to *John Barnhart* and not the plaintiff, and being so understood by *Greenshields*, I doubt very much whether it is admissible under this bill. The case of *Taylor v. Baker* does not seem to me to be an authority in its favor. If the evidence of *Hammond* could be read at all, it would not be just to *Greenshields* to read it without his being placed in at least as good a situation as if he had been afforded an opportunity of denying notice of title and possession, which it is supposed to prove; and this could not be except by reading it, and taking it is denied by *Greenshields* in his answer; but this would be an anomalous proceeding, and in my mind goes far to shew that *Hammond's* evidence, if taken as referring to a different title and possession than are referred to in the bill, cannot be read all. But, supposing it to have been understood by *Greenshields* as applying to the plaintiff, it was calculated, I should think, to lead him to suspect that the plaintiff, and not *Patterson* was owner of the premises; and in that case his course, as a discreet, cautious and prudent man of business, would have been to have made inquiries, in order to ascertain whether the person about to convey to him had or had not a title to convey.

Judgment

It becomes material then to consider what degree of caution a person is bound to use, or what amount of negligence is required in order to affect him as with a binding notice. The cases upon constructive notice are numerous; those upon *actual* notice, comparatively few. The disposition of the court appears, I think, to be not to extend the doctrine beyond its present limits.

In *Butcher v. Butcher* the evidence of notice would not certainly appear to be such, as far as appears by the report, as to call for particular attention, or to indicate very gross negligence if disregarded. There

appears to have been no direct proof of notice, "save that some neighbors in discourse did say they had heard the defendant, *Butcher*, had sold the estate to the plaintiff." It was held in that case that *Stapely* had notice, and the court was of opinion that it was a contrivance between the defendants to defeat the bargain. The report of the evidence is very meagre; but the court must have been fully satisfied, not only that *Stapely* was fully notified of the previous bargain, but that he was so notified by the defendant, *Butcher*, himself, otherwise there could not have been a contrivance between them to defeat the prior bargain.

Chief Baron *Eyre* says (*a*), "I find no case that goes the length of saying that a failure of the utmost circumspection shall have the same effect of postponing a mortgagee as if he were guilty of fraud or wilful neglect."

Judgment.

The language used by Vice-Chancellor *Wigram* in *Jones v. Smith* was so strong as to the degree of negligence necessary to be established in order to affect him with notice, that he thought it right in the subsequent case of *West v. Reid* (*b*) to define in guarded language his views upon that point. He says, "I have been told that, according to the language I make use of in that case, the grossest negligence could in no case justify the court in charging a party with constructive notice, unless the negligence proceeded from a fraudulent motive existing in the mind of the party at the time. Nothing certainly could have been farther from the intention than to say anything which should lead to the conclusion that there may not be a degree of negligence so gross (*crassa negligentia*) that a court

(*a*) 2 Anst. 444. Bacon Abt. Mortgage, E. 3.
(*b*) 2 Hare, 249.

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Greenfields v. Barnhart.

of justice would treat it as evidence of fraud, impute a fraudulent motive to it, and visit it with the consequences of fraud, although morally speaking the party charged may be perfectly innocent."

In the case of *Jones v. Smith*, on appeal, Lord *Cottenham* lays down the same principle in the following language; "I don't think, therefore, that the present case goes beyond this—that a prudent, cautious and wary person would have inquired further; the want of that prudence, caution and wariness is not sufficient, according to the decisions and the principles which have hitherto been acted on, to affect the party with notice. I do not consider this a case of gross negligence; and I am of opinion that the party having acted *bona fide*, and having only omitted that caution which a prudent, cautious and wary person might and probably would have adopted, is not to be fixed with notice of this instrument. I am satisfied that he acted *bona fide* in the transaction; and under these circumstances I think the Vice-Chancellor's decision was right, and that the appeal must be dismissed with costs."

Judgment.

The case of *Hine v. Dodd* (a), and the case of *Jolland v. Stainbridge*, shew how very strong is the evidence required to affect a party with notice. These cases are indeed under the registry acts; and in such cases there must appear to have been actual fraud to affect a party with notice. Still, making due allowance for the difference in principle applicable to the two classes of cases, the above authorities shew how closely the courts will scrutinize the evidence, and how slow they are to admit it so as to charge the party with notice.

The above classes of cases are cited as authorities not only in cases under the registry acts but in other

(a) 2 Atk. 275.

cases between prior and subsequent purchasers and mortgagees. Where indeed it clearly appears, by the admission of the party or otherwise, that he knew of the existence of a previous title or contract, he will be affected by such knowledge. But it is not every information from every quarter that is to put a party upon inquiry, nor even information from a proper quarter which would put a prudent, cautious man upon inquiry; but notice to him must be of such a nature that to neglect it would be evidence of negligence so gross that the courts cannot do otherwise than treat it as evidence of fraud. So at least I understand the language of Vice-Chancellor *Wigram* and Lord *Cottenham* in the case to which I have referred. To apply this to the case now before this court: *Greenshields* finds, whether before or after the conversation deposed to, the only existing evidence of title to be an indenture of agreement with King's College for the purchase of the lot in question, and that contract assigned absolutely to *Patterson* and in *Patterson's* possession: nothing on the face of the assignment to lead him to think it conditional, but on the contrary, a clause authorizing *Patterson* "to enter into and upon the premises, and to have, hold, occupy, possess and enjoy the same, and take the rents, issues and profits thereof." He finds that of the four instalments paid thereupon to the college the three last were paid by *Patterson*; that the assignor of the agreement is out of the province; and, so far as appears, *Patterson* absolute owner of the property. If he supposed *Hammond* to refer to *Robert Barnhart* as owner, he would see that he had been but had ceased to be so—if to refer to *John* as owner, he would see that he had not been so since 1830. Nothing that was said by any of the witnesses as to who owned the place would have led *Greenshields* to suspect the *true* state of the case, unless it be what *Hammond* said as to his considering *Barnhart* to be in possession, he must have meant and have

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been understood to mean the same person as in possession and as exercising acts of ownership, and as leasing—not a mere possession by agent—that *agent* exercising acts of ownership. This person in possession could not be *Robert Barnhart*, who had been for years out of the country. Then, supposing *John Barnhart* to be the person meant as in possession, *Greenshields* would find that the owner *had been Robert Barnhart*, and *then* was *Patterson*.

If he understood *John Barnhart* to be meant as the person in possession, and also onwner, he would probably infer that *Hammond* considered him owner *because* of his exercising acts of ownership; but finding him not owner, and that he had not been so since 1830, he would refer his possession, or what *Hammond* called possession, to acts as agent for the owner, which owner he found to be *Patterson*. *John Barnhart*, it appears, never lived upon the land; and there was nothing beyond *Hammond's* information to guide *Greenshields*, or to induce any belief in his mind as to who was in possession.

Judgment.

Upon this point of notice a material consideration is, from whom the information came which is relied upon in this cause as notice to *Greenshields*. The rule appears to be that actual notice must be given by a person *interested* in the property; that vague reports from persons not interested will not affect the purchaser's conscience. This is laid down expressly in the eleventh edition of *Sudgen* (*a*); and Mr. *Spencer*, in his treatise on equity (*b*), states the rule thus—"that to constitute a binding notice, where at least it depends on oral communication only, it must be given by a person interested in the property, and in the course of the treaty. Vague rumors from persons not interested in the property will not affect

(*a*) p. 1040. (*b*) p. 753.

the purchaser: and in a late edition of *Coote* on Mortgages (*a*) it is said—"In reference to the doctrine of express notice, equity does not require a party to take notice of vague rumors proceeding from strangers to the estate. And it is expected that the notice shall be made with some degree of precision as to the nature of the supposed right, and not consist of a mere general and undefined claim."

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For this last position *Jolland v. Stainbridge* is cited as authority. The author goes on to observe, "that whether the notice be express, or rest on rumor or on general claim, a purchaser or mortgagee can never be advised to disregard it or to accept the title without an inquiry into the nature of the demand."

My first impression in this case was, that taking the conversations between *Greenshields* and *Barnhart* and between *Greenshields* and *Hammond* to be correctly narrated by them in their evidence, it was such notice as to set him upon inquiry; that if he drew conclusions and inferences which, though not unreasonable or forced were still erroneous, he acted upon them at his peril; because, if he had made the inquiries which he might have made, he would have found them to be erroneous and have learned the true state of the case; and I still think that in abstaining from making inquiry he was guilty of negligence, but not negligence of so gross a kind as to amount to evidence of fraud in the meaning of Sir *James Wigram*, but rather an an absence of that prudence, caution and wariness, the absence of which, Lord *Cottenham* says, is not sufficient to affect a party with notice. The rule that information as to title or claim must come from a party interested, may sometimes operate with hardship; but parties

Judgment.

(*a*) 3rd ed. p. 372.

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generally by their negligence or loose manner of transacting business give occasion to the difficulties which afterwards arise. If in this case the assignment had carried upon its face its true character, instead of purporting to be absolute, when in fact it was only conditional, no one could have been misled: the origin of the difficulty lies there. One consideration, upon which Lord *Cottenham* (in *Lever v. Smith* on appeal) laid great stress, is not wanting here—the *bona fides* of the party who is sought to be affected with notice; and I think this case fails on the ground of notice, independently of the preliminary difficulties to which I have adverted.

Judgment.

There being three of the judges in favor of the admissibility of the parol evidence in this case to establish the fact of *Patterson* being mortgagee of the premises, the result is that the decree of the court below stands; the point upon which it is reversed being merely as to the fact of notice to *Greenshields*; and the order, subsequently drawn up, varied the relief consequent thereon; so that, in effect, the assignment from *Patterson* to *Greenshields* was directed to stand as a security for al sums due by the former to the latter, or to the firm of *Gillespie, Moffatt & Co.*

LEGGE v. WINSTANLEY.

Practice—Absent defendants' act.

December 2. Where a plaintiff desires to obtain the leave of the court to effect service on a defendant by serving the subpœna on a person resident in the province as agent of the defendant, it must be shewn that the person so to be served is such agent by some evidence other than the statements of the alleged agent.

Statement.

The bill in this case was filed for the foreclosure of a mortgage; and, previously to any proceedings being taken, a letter had been written by the solicitor of the plaintiff to the defendant calling upon him for a settlement of the claim. In answer to this communication a letter was written by a brother of the defendant, in which he stated to the effect that

the defendant had left the country, having first placed his business in the hands of the writer; and that he was busily engaged getting in money, and would settle the demand as soon as sufficient was collected: and now,

1851.

Legge v. Winstanley.

Mr. *Turner*, for the plaintiff, moved for an order under the statute 14 and 15 Vic. ch. 10, giving the plaintiff permission to serve the subpœna on the brother, as being the agent of the defendant, founding his motion upon an affidavit setting forth the above facts: but—

Argument.

Per Curiam—We think this motion cannot be granted in the absence of all evidence as to any statements made or acts done by the defendant himself sufficient to shew that the alleged agent has been duly authorized to act. Clearly, the alleged agent's own allegations cannot be received as proof of the fact of agency.

Judgment.

Motion refused.

WILMOT v. MAITLAND.

Warehouseman's receipts—Injunction.

Where a warehouseman had delivered warehouse or transfer receipts to a party for one thousand barrels of flour, and afterwards delivered out some portion thereof at the instance of the party who had left it in his custody, on the understanding that the quantity so delivered out should be made up by other flour to be brought to his warehouse, and it appeared that such a course of dealing was in accordance with the usage of the trade, the court refused an injunction to restrain the delivery of flour subsequently brought by the same party to the warehouse, although such latter flour had been assigned *bona fide* to the plaintiff, who had made advances thereon after it was stored, and although such flour had not been manufactured at the time of giving the warehouse receipts.

December 12.

The application in this case for an interim order, restraining the defendant from removing the goods

Statement.

1851.

Wilmot v. Maitland.

in question in the cause until the hearing of the motion for a special injunction for the same purpose, of which notice had been served pursuant to leave obtained from the court for that purpose, has been already reported (*a*). The plaintiff had applied the evening before for a special injunction under the circumstances stated in his affidavit in support of the motion, and which were, that it had been agreed between the plaintiff and the two firms of *Hughes, Kline & Co.* and *J. N. Kline & Co.*, that the plaintiff should have security for advances made and to be made to the two firms, on certain flour belonging to them, and then in the store-house of the defendant, *Maitland;* and a few days afterwards orders were delivered by the two firms to the plaintiff requiring *Maitland* to deliver the flour in question to him. The further advances were stated by the affidavit to have been made in pursuance of the agreement, but their amount, or the amount due altogether, was not stated; nor was any certain date assigned to the agreement, otherwise than that it was alleged to have been made in the month of October. *Maitland* was a mere agent. The affidavit stated that the flour in question was on the point of being shipped and removed by the defendants *Ross, Mitchell & Co.*, claiming by virtue of an assignment made to them and one *McMaster* by the two firms for the benefit of their creditors. *Ross, Mitchell & Co.* were stated to be creditors of the two firms to a large amount, but were alleged to have had notice of the plaintiff's claim upon the flour in question before the execution of the assignment. The evidence of notice, however, was not satisfactory, not going beyond an assertion to that effect of the principal member of the two firms. It was also stated in the affidavit that *Maitland* insisted that the flour in question was held by some

Statement.

(*a*) Ante Vol. II. p. 556.

1851.

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transfer receipts delivered some time previous to *Ross, Mitchell & Co.* by way of security; but the affidavit alleged that such was not the case, and that the flour in question had been manufactured long after the transfer receipts had been delivered. Under these circumstances, the court thought the case too doubtful to grant the injunction as prayed immediately, but gave the plaintiff leave to serve notice of motion for three o'clock the next day, and to file an additional affidavit on the following morning.

Argument.

At the time appointed, the motion came on to be argued by Mr. *J. Duggan* and Mr. *Morphy* for the plaintiff, and Mr. *Hector* and Mr. *McDonald* for the defendants, when the defendants produced various affidavits, stating to the effect that the defendants, *Ross, Mitchell & Co.*, having become liable for the two firms by reason of certain indorsations given for their benefit, certain transfer receipts were, in the February previous, delivered to them by the defendant, *Maitland*, at the request of the firms, for one thousand barrels then in his warehouse belonging to them; that it was the custom of the trade to remove flour covered by transfer receipts upon depositing other flour in its stead, care being taken that sufficient flour always remained to satisfy the transfer receipts; that seven hundred and fifty barrels of flour embraced by the transfer receipts held by *Ross, Mitchell & Co.* had, on the 10th of October last, been shipped on the account of the plaintiff by the defendant, *Maitland*, at the request of the firms, and upon the understanding that this quantity should be replaced by the first flour that they should deposit in his warehouse; that the flour in question was shortly afterwards conveyed to Toronto by the firms and deposited in the defendant, *Maitland's*, warehouse, and reserved by him to answer the transfer receipts held by *Ross, Mitchell & Co.* It thus appeared that the flour in question having been deposited in the

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defendant *Maitland's* warehouse in pursuance of the understanding before mentioned, and before the agreement between the plaintiff and the firms had been entered into, became bound by the agreement between the firms and *Maitland*, and by the transfer receipts of *Ross, Mitchell & Co.* The plaintiff rested his case on the doctrine of fiduciary relation giving the court authority to interfere between a principal and his agent by restraining the latter from making away with the property of the former, and ordering its specific restoration; and he relied on the cases of *Wood v. Rowcliff* (*a*) and *Fuller v. Richmond* (*b*). He argued that when the flour was originally deposited by *Kline & Co.* with *Maitland*, the latter became their agent; and the delivery of the orders above mentioned to the plaintiff having vested in him an equitable lien upon the flour in question, *Maitland* became his agent, and a fiduciary relation thereby arose between them which entitled him to the specific relief which he sought by his bill; and, although the general assignments to *Ross, Mitchell & Co.* and *McMaster* might have vested the legal property in them, and *Maitland* might have recognized the title of *Ross, Mitchell & Co.*, yet the fiduciary relation originally subsisting between *Maitland* and the plaintiff was not thereby disturbed; *Ross, Mitchell & Co.* having notice of the plaintiff's equity, and taking therefore subject to it, and *Maitland*, a mere agent, having no power by his act to alter the respective rights of the parties.

Argument.

Judgment.

Per Curiam—Without determining the questions raised by the plaintiff—which, however, we think of great importance and highly proper to be discussed, as warranting the interference of this court in the manner asked, if supported by the facts—we are of

(*a*) 3 Hare, 304. (*b*) Ante Vol. II. p. 24.

opinion that any equitable claim which the plaintiff may have had, and which, under other circumstances, might possibly have entitled him to the relief which he seeks, was over-reached by the title of the defendants, *Ross, Mitchell & Co.*, founded on their original agreement with *Kline & Co.* and the transfer receipts given in pursuance of it, and on the understanding between *Kline & Co.* and the defendant, *Maitland*, in furtherance of that agreement;—and, therefore, although the case made by the plaintiff would have clearly warranted the intervention of the court, still, the case so made having been distinctly displaced, the ground of the suit entirely fails, and the injunction must be refused, and with costs.

1851.

Wilmot v. Maitland.

Judgment.

MOFFAT v. THOMSON.

Parties—Foreclosure.

To a suit for the foreclosure of a mortgage, in which the wife of the mortgagor has joined to bar her dower, the wife is not a necessary party; and, if made a defendant, the bill as against her, will be dismissed with costs.

December 2.

On a former day, Mr. *L. W. Smith*, for the plaintiff, moved for the usual reference, under the 77th order of May, 1850, and for foreclosure. It appeared that the wife of the mortgagor had joined in the conveyance, made by way of security; and the plaintiff had made both *Thomson* and his wife defendants to this bill.

Mr. *Turner*, for the defendants, opposed any decree being made against the wife; and submitted that, as against her, the bill ought to be dismissed with costs.

The Court, after looking into authorities, directed

1851. Moffatt v. Thomson. the usual decree of foreclosure to be drawn up as against the defendant *William A. Thomson*, and dismissed the bill as against the defendant *Elizabeth Thomson*, with costs.

McLean v. Coons.

Injunction—Specific Performance.

This court will restrain a vendor from selling property previously contracted to be sold, if the vendee has not been negligent in carrying out his part of the agreement.

Statement. The bill in this case was filed by *Allan N. McLean* against *Nicholas J. Coons*, for the specific performance of a contract alleged to have been entered into between those parties on the 19th day of August, 1851, for the sale by the defendant to the plaintiff of certain leasehold property situate in the city of Toronto, for the price or sum of 750*l.*, to be paid by the plaintiff to the defendant on or before the 15th day of September then next; upon the payment whereof the defendant was to convey the premises to the plaintiff free from all incumbrances. The bill stated that the plaintiff paid to the defendant previously to the 12th of September, the sum of 21*l.* 5*s.* 7½*d.* as part of the purchase money, on which day, and on the 15th of September, the plaintiff had tendered to the defendant the balance of the purchase money. From the statements in the affidavits filed on the present application, it appeared that the defendant had endeavored to evade the carrying out of the agreement with a view, as it was alleged, of selling the property at an increased price to some other purchaser.

Argument. On this state of facts Mr. *Vankoughnet*, Q. C., now moved for an injunction, as prayed by the bill, restraining the defendant from selling or disposing

of the said premises, or in any way parting with, charging or encumbering the same. 1851.

McLean v. Coons.

The Court, upon consideration of the facts, ordered the injunction to issue in the terms of the prayer of the bill.

NOTE.—The injunction was issued and served before any conveyance was executed, whereupon the defendant consented to execute the conveyance to the plaintiff, and to pay the costs of the suit.

SOULES v. SOULES.

Alimony—costs in suits for.

Semble—That this court will, in a proper case, grant *interim* alimony *pendente lite*.

Where, in a suit for a separate maintenance, *interim* alimony had not been applied for, the court refused to carry the allowance for alimony back to a date beyond the time of making the decree.

In suits for alimony, the plaintiff, when she succeeds, is entitled, as a general rule, to her full costs of suit.

January 27 and March 12.

The facts of this case are sufficiently set forth in a former report (*a*). After the decree made on the original hearing the parties proceeded before the Master, who had made his report, allowing to the plaintiff the sum of 25*l.* a year for permanent alimony; and the cause now came on for further directions, and on the question of costs, which had been reserved by the original decree—when

Statement.

Mr. *Patrick*, for the plaintiff, asked that the sum allowed by the Master's report should be directed to be paid to the plaintiff from the time that the separation between the parties took place; urging, as a ground for that course, that the practice did not warrant the plaintiff in applying for the allowance of interim alimony. If not entitled to the allowance

Argument.

(*a*) Ante Vol. II. p. 299.

1852.

Soules v. Soules.

from the time of the separation, he submitted that clearly she was entitled to it from the time when the bill was filed.—*Bird v. Bird* (*a*).

Argument.

Mr. *Morphy*, for the defendant.—No good reason is shewn why interim alimony had not been applied for during the progress of the suit. If the court has jurisdiction to decree alimony, it could also have ordered the payment of interim alimony if the facts of the case would have warranted its being granted. A further objection exists to this being done, no enquiry having been had to warrant the court in now saying what would have been a proper amount for alimony during the litigation. He referred to *Legrand v. Whitehead* (*b*), *Rees v. Rees* (*c*). *Wilson v. Wilson* (*d*), and *Daniel's* Chancery Practice, 1506-7.

Mr. *Patrick*, in reply—In *Goodyere v. Lake* (*e*) interest was allowed on further directions, although the decree was silent on the point.

March 12.

The judgment of the court was now delivered by

Judgment.

SPRAGGE, V. C.—The decree in this cause referred it to the Master to report to the court what sum by way of alimony ought to be paid annually or otherwise to the plaintiff *Hannah Soules*, for her maintenance and support, by the defendant her husband, regard being had to the station in life of the parties and to the nature of the property of which the husband was possessed. Further directions and costs were reserved. The Master reports that 25*l.* per annum is a fit and proper sum to be allowed to the plaintiff by way of alimony. The report has not been objected to by either party, and therefore stands confirmed. The plaintiff now claims that the

(*a*) 1 Lees Eccl. R. 209
(*b*) 1 Russ. 310.
(*c*) 1 Phill. 387.
(*d*) 3 Hagg. 329 (n).
(*e*) Amb. 584.

alimony should be allowed to her from the period when she was forced, by the cruel treatment of her husband, to leave his house and live separate from him; or, if it cannot be allowed from the date of departure, then, that it should be allowed from the commencement of this suit.

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Soules v. Soules.

The alimony reported upon by the Master in this case as proper to be allowed as *permanent* alimony, as distinguished from *interim* alimony allowed by the ecclesiastical courts in England *pendente lite*. The present application, therefore, is for the court to order that *permanent* alimony should be allowed from the separation or from the commencement of the suit.

It has not been contended that the rules of the ecclesiastial courts in England as to granting alimony in suits in those courts for divorce, or for the restitution of conjugal rights and alimony, do not apply in suits for alimony in this court; but, on the contrary, counsel on both sides have referred to the decisions of those courts as authority upon the point in question here; and I see no reason to doubt that they must be held to be authority as far as they are applicable to proceedings in this court. The cases shew, I think, conclusively, that in England, *permanent* alimony is not granted till sentence or decree. In *Cooke v. Cooke* (*a*) the suit was brought originally in the Commissary Court of the Dean and Chapter of St. Pauls; no interim alimony was applied for; the wife had an income of her own of about 180*l.* per annum. Upon the sentence for divorce and for alimony, the court allotted to the wife 450*l.* per annum in addition, to be computed from the return of the citation. The sentence was appealed from to the Arches Court of

Judgment.

(*a*) 2 Phillimore, 40.

1852.

Soules v. Soules.

Canterbury, on two grounds: first, that the amount allowed for alimony was extravagant; and, second, because it was ordered to commence from the return of the citation, instead of from the date of the sentence. Upon the first ground of appeal the sentence was approved; upon the second, it was reversed. Sir *John Nichol* said, "In respect to the time from which the alimony is payable—namely, from the return of the citation—this, I apprehend, is contrary to the rule of the court and to the reason of the thing. I can see no ground to depart from the ordinary rule of these courts by carrying back the permanent alimony beyond the date of the sentence. It is clear, from several cases, that the true rule of the court is to decree permanent alimony from the date of the sentence." In the subsequent case of *Kempe v. Kempe*, Sir *John Nichol* again proceeded upon the same rule. In giving judgment, he said, "I allot 250*l.* per annum as permanent alimony, to commence from the date of sentence; for, though no alimony *pendente lite* was granted (because none was asked), the suit has not been long pending, and the present allotment is liberal. Besides the question now solely regards permanent alimony; and I should interfere with the usual course of practice if I decreed its commencement to date from an earlier period."

Judgment.

Mr. *Shelford*, in his treatise on the law of marriage and divorce (*a*), states the rule thus: "The rule of the court is to decree permanent alimony from the date of the sentence of divorce, though alimony *pendente lite* were neither asked for nor granted." And *Cooke v. Cooke* and *Kempe v. Kempe* are cited as authority. From the case of *Rees v. Rees* (*b*) it would appear that even *interim* alimony cannot be ordered to commence prior to the decree by which

(*a*) Page 594. (*b*) 3 Phill. 387.

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it is allowed. There would, moreover, be this inconsistency in ordering permanent alimony to be allowed before decree—that interim alimony is only allowed upon such a scale as to supply the reasonble necessities of the wife during the pendency of the suit, while she is establishing her rights; whereas permanent alimony is allowed upon a more liberal footing. If, therefore, the allowance for permanent alimony could be carried back to an early period of the suit, the plaintiff could, in many cases, thus obtain more than if interim alimony had been applied for according to the ordinary rule.

It is true that in this case a very moderate allowance is made to the wife—not more than sufficient for her reasonable necessities; but the rule must be general, though in some cases all the reasons for it may not apply.

Judgment.

Interim alimony was not applied for in this suit: why it was not applied for is not stated. It is not urged as a reason for carrying back the allowance for permanent alimony that interim alimony *could not* be granted by this court. The reasons upon which it is granted in England appear to apply here. It is not necessary, however, to express any decided opinion upon the point.

It may be observed, further, that it is not shown how the plaintiff has been supported since her separation from her husband—by whom or at whose expense; or whether wholly or in part, or not at all, at the expense of her husband. And, in regard to the application to carry back the allowance to the date of the separation between the parties (in addition to the objections already given to carrying it back at all), it is not shewn when that separation took place.

I may add that the decree evidently contemplated

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a prospective allowance only; and that what the plaintiff asks for would, in addition to other difficulties, be open to the objection that it would vary the decree.

By holding the plaintiff not entitled to carry back her allowance for alimony to a period before the decree, the husband is not exonerated from being chargeable with her support from the time of her separation to the time from which alimony is allowed by this court. I apprehend there can be no doubt that when a husband obliges his wife to leave his house by cruel treatment—such as is in evidence in this case—and has formed the ground for the decree for alimony which has been pronounced, he is liable for necessaries furnished to her; and this as well where there has been no decree or suit for alimony as where there has been such a decree, and the alimony has been allowed by the husband to run into arrear.

Judgment.

With regard to the costs in this case: the plaintiff applies to be allowed them, as between solicitor and client. The defendant admits that the plaintiff is entitled to costs, but only as between party and party. I do not find any express authority upon the point; but I think, upon principle, that the defendant must pay full costs. The rule is stated in *Beevor v. Beevor* (*a*) to be, that the wife has a right to have her costs at all times. The reason is, because there are no other means of obtaing justice, since the marriage gives all the property to the husband; and in Mr. *Jacob's* note to the second volume of *Roper's* Husband and Wife (*b*) it is said, "In suits in the ecclesiastical courts the general rule is, that the husband pays the costs on

(*a*) 3 Phill. 201. (*b*) Page 311.

whichever side the suit begins; and, as soon as the marriage is admitted or proved, the wife's proctor may call upon the husband for payment of his bill up to that time." The rule admits of an exception when the wife has sufficient property to maintain herself and carry on the suit.

In *Roger's* Ecclesiastical Law it is stated that the wife is entitled to her costs *de die in diem*. I infer from the above passages, and from the reason upon which the rule referred to is founded, that, in the ecclesiastical courts, the husband pays all the costs of the suit. Indeed, the marriage having given all the property to the husband, except in the case where the wife retains a separate income, she has no means wherewith to pay any portion of the costs.

The case of infants suing in this court by *prochein amy* is less strong than that of a wife suing her husband; but even in the case of infants, it would appear that the *prochein amy* is entitled in a proper case to full costs. In *Fearns v. Young* (*a*), which was a case of trustees, Lord *Eldon* refers to the case of infants, and remarks, "With regard to an infant this requires great consideration; for as the infant himself cannot incur charges and expenses, if they cannot be claimed under just allowances and the next friend is to be at the whole expense of the infant beyond his costs, persons will deliberate before they accept that office." And in the earlier case of *Osborne v. Deane* (*b*) before Sir William *Grant*, where application was made on behalf of the *prochein amy* of an infant that in some way he might have costs beyond the taxed costs, either by a direction to have them taxed as between solicitor and client, or by a reference to the Master to see

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(*a*) 16 Ves. 184.

(*b*) 7 Ves. 424.

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what extra costs he had been put to,—the Master of the Rolls said, "If the *prochein amy* is to a certainty to have all that exceeds the taxed costs, that leads him to be very careless; the inquiry could be only what was properly expended." In that case no order was made. Now, though the language of Sir *William Grant* is less in favor of allowing to a *prochein amy* anything beyond taxed costs than that of Lord *Eldon*, it rather implies his right to be allowed what should appear, upon inquiry, to have been properly expended. In the two last named cases, the costs were to have come out of a general fund. In the case of a relator in a charity information, he is entitled, upon obtaining a decree for the charity, to his costs as between solicitor and client—not indeed against the defendant, but for the excess beyond costs between party and party, out of the fund which has been benefitted by his suit. The principle upon which, in these cases, costs are allowed beyond the costs between party and party appears to be, that a person properly taking legal proceeding on behalf of another not competent to sue in his own name is to be recompensed what he may necessarily expend.

Judgment.

The simple question in this case is, whether the costs beyond those taxable between party and party are to come out of the pocket of the next friend of the plaintiff, or to be paid by the husband, whose gross misconduct has made the suit necessary. There is no fund out of which they can be ordered to be paid, and it is not reasonable that the wife should pay them out of that which is allotted to her for her maintenance. There is but one way for the *prochein amy* to get these costs—namely, against the defendant; and certainly he ought to get them from some quarter. It is not just, I think, to interpose unnecessary obstacles to a woman obtaining redress against her husband in such a case as has

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been disclosed by the evidence in this suit. If the next friend is to be at the whole expense beyond the ordinary costs, it will be difficult, and in some cases probably impossible, to find persons willing to undertake the duty.

The order will be for the allowance for alimony to commence from the date of the decree on the hearing of the cause, by analogy to the rule in the ecclesiastical courts. Costs to be allowed as between solicitor and client.

In this case, considerable time has been consumed and expense incurred in the reference to the Master to fix the amount to be allowed for alimony. This duty would have been readily performed by the court if submitted for its consideration at the hearing, with evidence upon which to found a judgment upon the point. It is obviously to the advantage of suitors, as avoiding both delay and expense, that such points should be disposed of by the court. In several instances the court has acceded to the suggestions of counsel, and in others it has been suggested by the court that certain matters which it *has* been the practice to refer to the Master's office, but which, it was conceived, might be conveniently disposed of by the court without such reference, should be so disposed of; and the court has felt it right to take upon itself that duty whenever it appeared that it could be done with advantage, and that the ends of justice would be promoted, and delay avoided and expense saved to the suitors of the court. The fixing the amount to be allowed for alimony is peculiarly such a case; and in the ecclesiastical courts in England it is done by the court itself.

Judgment

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HAMILTON v. STREET.

Practice.

February 24 and March 12.

Where a defendant had applied to open publication, and an order was made for that purpose on payment of costs, it was subsequently discovered that the plaintiff had proceeded to set the cause down for hearing without taking out the rules to produce and pass publication; and the defendant thereupon moved to strike the cause out of the paper of causes for hearing; the motion was refused with costs.

Statement.

It appeared from the affidavits filed on the present motion that this case had been pending for some years, and that frequent letters had passed between the solicitors, in which the defendant's solicitor was urged to proceed with the examination of his witnesses, and that the plaintiff at last proceeded to set the cause down for hearing; whereupon a motion was made to enlarge publication, which was granted on payment of costs. Before taking out the order on that motion the defendant's solicitor discovered that a mistake had been made by the plaintiff's solicitor in setting the cause down for hearing without having first taken out the rules to produce witnesses and pass publication; thereupon the defendant moved to strike the cause out of the paper for irregularity with costs, or to open publication for a further period of six weeks.

Argument.

Mr. *Brough* for the defendant.

Mr. *McDonald* contra.

The circumstances which gave rise to the motion, and the cases mainly relied on by counsel, are stated in the judgment.

Anderson v. Harrison (*a*) and *Walmsley v. Wolsey* (*b*), were also cited in argument.

(*a*) 8 Jurist, 603. (*b*) 9 Jurist, 641.

The judgment of the Court was now delivered by

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Judgment.

March 12.

SPRAGGE, V. C.*—On the 10th of February the defendant, by his counsel, Mr. *Brough*, applied, on notice, to enlarge publication; he asked for six weeks, which was opposed by counsel for the plaintiff; publication was opened for two weeks—a period within which it was considered the defendant would be able, with diligence and promptness, to examine the witnesses whom it was suggested he was desirous of examining. It appeared on that application that negotiations for a compromise had been going on between the parties for a considerable time past; and that from the 29th of October to the 24th of December the plaintiff was very pressing that the defendant should either accede to the terms proposed by the plaintiff, or complete his evidence, in order to the cause being at once brought to a hearing. Several letters appear to have been written with this object to the defendant's solicitor, and one dated 24th December last to the defendant himself. On the 6th of January the plaintiff served the defendant's solicitor with a subpœna to hear judgment, returnable on the 10th of February, on which day the defendant applied to open publication. On the 24th of the same month, the day to which publication stood enlarged on the defendant's application, he moved that this cause should be struck out of the list of causes set down to be heard, to set aside the subpœna to hear judgment, and the service thereof, for irregularity, and to vary the order of the 10th of February: or, that publication should be enlarged for six weeks.

This motion is supported by the affidavit of the defendant's solicitor; in which it is stated, among

* The Chancellor and Esten, V. C., had been concerned in the cause at the bar.

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other things, that no rules to produce witnesses, or to pass publication, had been taken out, and that publication had not passed by consent or otherwise; that he, the defendant's solicitor, had examined the proceedings in the cause, in consequence of the opposition to his former application, and not having any recollection of publication having passed, and that until the former motion was heard, he supposed all the proceedings in the cause were regular.

The present application has to encounter these difficulties; that he did not move against the subpœna to hear judgment between the time of its service and the time appointed for hearing the cause; that he made a motion in the cause after service of that subpœna, not questioning its regularity; and that his motion of the 10th February *assumed* that publication *had* passed, for he applied to open publication; the ground of the present application is, that publication had not passed.

Judgment.

The defendant insists that he is in time in making the present application, and that he has not waived the irregularity upon which he now moves, because he shews by his affidavit that he did not know of it until after his previous application. The salutary rule, that a party objecting for irregularity must do so promptly, and that he waives it if he take any subsequent step, is, most properly, a rule in equity as well as at common law. Indeed, in *Carrick v. Young* (*a*) where the irregularity was in the subpœna to hear judgment, the defendant had not himself made any motion since the service of the subpœna until he moved against it; but as he had appeared by counsel on the plaintiff's motion to accelerate the hearing, without objecting to the irregularity in the subpœna, he was held to have waived it. *Emery v. Brodrick* (*b*) and *Steele v. Warner* (*c*), cited for the

(*a*) Jac. 524. (*b*) Jac. 580. (*c*) 2 Ph. 780.

plaintiff, are also authorities on the subject of waiver, and the language of Lord *Brougham*, in *Taylor v. Clemson* (*a*) is emphatic upon the point. Speaking of the Court of Queen's Bench, Common Pleas and Exchequer, he says—"They made a general rule that when any one step is taken by a party after an irregularity known to him, that step should be a waiver of the irregularity; which, I must take leave to say, is rather to be held as a declaration of the common law rule as to irregularities in general than a new rule introduced, because it is the constant and invariable rule in all courts of equity as well as of law. In this case I understand the defendant's solicitor to rely upon the circumstance of his not knowing of the irregularity as preventing the application of the ordinary rule in relation to waiver. It appeared to me that a solicitor could not be heard to say that irregularities in proceedings conducted between himself and the opposite solicitor were *unknown* to him; in this instance that no rule to produce, and no rule to pass, had been served upon him —they are things that must necessarily be taken to be known to him, though the omission may have passed unobserved by him. Judgment.

The cases which I have seen, in which it has been said that a man cannot waive an irregularity if he do not know of it, are not cases at all analogous to this; and it is clear that a party is not excused merely by ignorance of the irregularity, or of the fact which constitutes the irregularity, but he must prove that he was ignorant of the proceeding in which the irregularity occurred.

The language of Mr. Justice *Patteson* in *Esdaile v. Davis* (*b*) is apposite to this point; he says—"There are cases where it is laid down that a man

(*a*) 11 Cl. & Fin. 610. (*b*) 6 Dowl. Prac. Cases, 465.

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cannot waive an irregularity if he do not know of it; but the rule is, that when he does know of it he must apply promptly. What is meant by the rule that he is bound to come promptly is, that he is bound to come promptly after he knows of the proceeding in which the supposed irregularity exists, and not after he knows of the irregularity itself. A man is bound to know of every proceeding taken against him, and if there be any error in it he ought to ascertain that error; he cannot be heard to say that he did not know of it."

The affidavit of the defendant's solicitor in this case cannot be taken as proving, nor indeed does he say, that he never did know that the rules to produce and pass were not served; and, on the contrary, he swears that until after his motion of the 10th of February he supposed all the proceedings were regu-

Judgment.

lar; the affidavit only shews that when the subpœna to hear judgment was served he did not know of the omission, or, as I take it that he had forgotten that which he must be taken to have known.

In this case, in addition to the waiver implied in taking a subsequent step, is the express waiver of irregularity, or rather admission that none of the nature now complained of existed, which is contained in the application of the 10th of February. This circumstance makes the case stronger against the present application than any of those to which I have referred; and I must say, that to allow a solicitor to exempt himself from the operation of the rule in relation to waiver, upon an affidavit of his ignorance as to proceedings between himself and another solicitor, would be at variance with the spirit of the rule, and be of very mischievous tendency.

In the letters to which I have referred the plaintiff assumed that he was in a position to set down his

cause to be heard. In the one of the 29th October he says—"We beg you will complete your evidence, that we may at once bring the two suits to a hearing:" and in one of the 24th December he says—"must now proceed to hear the cause, unless you reply at once to our last letter;" while in an intermediate one, that of the 19th November, the defendant is urged to make a move as a thing long past due from him.

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There was quite enough to shew the defendant that the plaintiff considered that publication had passed, even before the subpœna to hear judgment had issued; quite enough to put him on inquiry, if he questioned or doubted the fact. There is no reason to doubt that the plaintiff, as well as the defendant, believed that all the proceedings were regular, and that both acted upon the assumption that they were so. Upon that assumption the letters were written, and the subpœna to hear judgment taken out and served; and upon the same assumption the defendant applied to open publication.

Judgment.

I cannot doubt that the defendant is not in a position now to avail himself of the irregularity upon which he grounds his present application. I think it ought to be refused and with costs. As to that part of the application which seeks to vary the former order: I do not see that the former order is erroneous. Such time was granted as appeared to the Court sufficient with promptitude and diligence, to procure the attendance and examination of the witnesses required by the defendant. When time is granted after delays not fully accounted for, it is reasonable to expect from the party who asks the indulgence *more than ordinary* diligence. In this case the defendant asked for six weeks; two weeks appeared sufficient, and that time was granted—properly, as I still think—only upon payment of costs.

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It appears now upon affidavit, that the defendant was absent from home at the time of the former application; and further, that "he requires to be further advised by his counsel before he determines upon accepting or refusing the proposal for a settlement made by the plaintiff." The plaintiff, by his counsel, avows his readiness to consent to such time being given to the defendant as may be reasonable, in order to his making up his mind, whether or not he will compromise the suit upon the terms proposed by the plaintiff, or failing to compromise, for the examination of his witnesses. Between the time of his communication to his counsel and the present, a sufficient time has elapsed for the former purpose. For the latter purpose, two weeks from the present time ought to suffice; the cause to be heard one week thereafter. Let the order be drawn up accordingly.

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Cancellation of Deeds--Amendment at hearing.

Oct. 24, 1851, and Mar. 16, 1852.

In 1813 one *Street* agreed in writing with one *Ryckman* to furnish the latter with certain supplies, in consideration of which *Street* was to receive from *Ryckman* a conveyance of certain lands; and the agreement was deposited with one *Benson*. The supplies were only partly furnished; but in 1824 deeds were prepared by *Ryckman* of the lands to be conveyed, and were handed to one *Shook* to be delivered to *Street* on getting up the agreement. *Shook* delivered the deeds to *Street* on getting an order on *Benson* for the agreement; but, on his presenting the order, it was found that the agreement was not forthcoming. The agreement afterwards got into *Street's* possession, and no explanation was afforded of this. In 1825 the deeds were accidentally destroyed by fire. Several actions of ejectment appeared to have been afterwards brought, and with varying results; and in 1850 a bill was filed by *Street's* devisee of part of the property against the defendant, who claimed under *Hiles*, to whom *Ryckman* had sold and conveyed the property in 1832. The bill, which prayed for a conveyance and for the cancellation of the subsequent deeds, under which the defendant claimed, was, under the circumstances, dismissed with costs.

Amendment of bill—in what cases under the orders of May, 1850, it should be allowed at the hearing of a cause.

Statement.

The facts are fully stated in the judgment.

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Argument.

Mr. *R. Cooper*, for the plaintiff.—If the court should be of opinion that the title of the plaintiff, under the facts appearing in the pleadings and evidence, is good at law, and therefore does not require the jurisdiction of this court to be exercised in his favor, he is still clearly entitled to call upon this court to cancel the conveyances under which the defendant claims, as forming a cloud upon the plaintiff's title. On this point counsel referred to *Peake v. Highfield* (*a*), *Hayward v. Dimsdale* (*b*), *Byne v. Vivian* (*c*), *Jackman v. Mitchell* (*d*), *Pemberton v. Pemberton* (*e*); also note b, 2 *Swans.* 155. As to what constitutes a complete delivery of a deed, he cited *Shepherd's Touch.*, vol 1, p. 59; *Coke Litt*, 36 *a*. The defence mainly relied on by the other side is lapse of time, that, however, does not apply to this case.

Mr. *Mowat*, for the defendant.—A complete answer to the case made by the plaintiff is the great lapse of time that has occurred. Here, it appears that the deeds, which were executed in 1824, were destroyed in 1825; and, notwithstanding, no steps were taken by the plaintiff or his testator to obtain the relief now sought until 1850—thirteen years after the establishment of a court of equity in this province. In analogy to the Statute of Limitations, this affords the defendant a perfect defence to his suit. *Portlock v. Gardner* (*f*) shews that a defence under the statute would be applicable to this case.

This court will refuse to interfere on the ground solely of lapse of time, even though less than the statuable time has been allowed to run.—*Gregory v. Gregory* (*g*), *Pickering v. Stamford* (*h*), *Champion*

(*a*) 1 Russ. 559.
(*b*) 17 Ves. 111.
(*c*) 5 Ves. 604.
(*d*) 13 Ves. 581.
(*e*) 13 Ves. 298.
(*f*) 1 Hare, 597.
(*g*) Coop. 201.
(*h*) 2 Ves. Jur. 280.

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v. Rigby (*a*), *Roberts v. Tunstall* (*b*), *Beckford v. Wade* (*c*).

Argument.

We submit that all the plaintiff here is entitled to, if anything, is a decree to perpetuate tertimony. Again the evidence shows that the deeds were delivered as escrows, and that the condition on which alone they were to take effect was never fulfilled.—*Bowker v. Burdekin* (*d*).

March 16.

Judgment.

THE CHANCELLOR.—After much consideration, we have been unable to arrive at the same conclusion in this case. The best opinion I have been able to form, after an attentive examination of the pleadings and proofs, is, that the evidence not only fails to establish the case made by the bill, but is such as to disentitle the plaintiff to any equitable relief.

The bill states that *Samuel Ryckman*, through whom the defendant claims, being seized in fee simple of the premises in question in the cause, did, sometime in the course of the year 1824, execute a deed of bargain and sale, by which he conveyed the same to *Timothy Street*, the plaintiff's testator, in fee, "in pursuance of an agreement in that behalf;" that this deed, with others, was delivered by *Ryckman* "*to one Peter Shook, as the agent of Ryckman, with instructions to him to deliver the said deeds to the said Street, and to obtain from the said Street when he delivered over to him the said deeds, or from one Ezekiel Benson—in whose hands the same had been deposited for the benefit of the said Ryckman and Street—a certain agreement or writing between the said Ryckman and Street, dated the 12th of June* 1819: *That the said Shook afterwards, accordingly, delivered the said deeds to the said Street, who thereupon gave to him, the said Shook,*

(*a*) 1 R. & M. 539.
(*b*) 4 Hare, 257.
(*c*) 17 Ves. 96.
(*d*) 11 M. & W. 128, 147.

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permission and authority to obtain the said agreement from the said Benson, in whose possession the same then was, or was supposed to remain, for the benefit of the parties aforesaid: That all these deeds were accidentally destroyed by fire in 1825, when *Street* applied to *Ryckman* to execute duplicates: That *Ryckman* prepared such duplicates for execution, "but afterwards declined to execute them without receiving the said agreement, which it appeared as the fact the complainant believed was, that *Benson*, on being applied to, had been unable to find: That the said *Street* had been and had expressed himself always ready and willing to let the said *Ryckman* have the said agreement if it could be obtained, and had exerted himself to obtain the same, but that *Benson* had not been able to find it, and that it was supposed to have been lost: That *Ryckman* made the non-production of the agreement a pretext for not executing, and would not execute afresh to the said *Street* deeds of the said premises; but that he had never alleged or pretended that the said *Street* was not entitled, and on the contrary always admitted that he was entitled, to the said premises, but insisted on having the said agreement before again executing the said deeds, on the pretence that there was vested in him some causes of action arising thereon against *Street*, and that he could not enforce the same without the possession of the said agreement." That *Street* made his will in October, 1839, and devised the premises in question to the plaintiff: That subsequently to the destruction of the plaintiff's title deeds by fire, *Ryckman* assumed to convey the same premises to one *Hiles*, and *Hiles* to the defendant, both of whom, it is alleged, had notice of the plaintiff's title: "*That from the destruction of the deeds, the great lapse of time and the peculiar circumstances attending the transaction, and the conduct of the defendant himself, there are great difficulties and impediments in the way of the com-*

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plainant asserting his title at law ;" and the bill prays, amongst other things, that the defendant may be ordered to deliver up the conveyance from *Hiles* to himself, and also the conveyance from *Ryckman* to *Hiles*, and all other evidences of title claimed by him under or through *Ryckman*.

The answer states, that *Ryckman*, having undertaken to survey certain townships in this province, and to receive payment for that service in land, entered into the contract of June 1819, referred to in the bill, which was to this effect,—that *Street* should supply all the provisions necessary for the survey and pay one-half the other expenses attending it, and that after the survey and payment of the hands, and other expenses, in land or otherwise, the residue of the land should be equally divided between the parties: That *Street* failed to fulfil the contract: That the provision actually supplied was not more than an equivalent for the damage sustained by *Ryckman* by means of such default: That subsequent to the survey, several attempts were made to estimate the damage so sustained, which had proved unsuccessful, the parties differing as to the amount, though *Street* did not deny such default; That under these circumstances *Ryckman* was advised to execute deeds for such parcels of land as *Street* would have been entitled to had he fulfilled his contract, and "to deliver the same to him upon receiving the agreement of June, 1819, *of which Ryckman had no copy, and the terms of which he could not otherwise establish in evidence, and then to sue Street for damages for his breach of contract; and that accordingly Ryckman placed the said instruments in the hands of a third person—not for the said Street, but as an escrow until and expressly to be by such third person holden and kept until he should receive the said agreement; and that on receiving the same, but not before, he was to deliver them to the said Street:* That the

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person referred to gave up the said deeds to the said *Street* without obtaining the said agreement, and without the knowledge, permission or authority of *Ryckman*: That the said instrument *was then pretended* or supposed to be lost, and *Ryckman* being unable in consequence to prove the same was unable to bring any action, as he had intended to do; and the said *Street* thereupon retained his possession of the said instruments so prepared; That within the last few years a person named *Street*, one of the devisees under the will of the testator, admitted that he had in his possession the said agreement, though how he obtained the same the defendant was ignorant. And the defendant submits, that under all the circumstances, as well as from lapse of time, the plaintiff is not entitled to any relief.

Judgment.

Now, upon the question—obviously a fundamental one in the case—whether this deed was delivered absolutely or as an escrow merely, the evidence goes far, I think, to establish the statements in the answer. Upon this point it is material to consider the position in which the parties were placed at the period in question. The evidence leaves no doubt in my mind that *Street* had failed, in some important particulars, to fulfil the agreement of 1819. *Morlatt* and *Hiles* both prove that he had neglected to supply provisions according to the contract; and it is apparent upon the whole evidence, I think, that the amount of compensation, not the fact of breach, was throughout the matter in controversy. This much is at all event certain, that *Ryckman*, at all times, from the earliest to the latest period, complained loudly of *Street's* breach of contract. He seems to me to have been thoroughly convinced of the fact himself, and to have acted uniformly upon that conviction. In that state of things, there being no court of equity to which either party could apply for specific performance, *Ryckman*, being fully persuaded

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that *Street* had been guilty of a breach of contract, but considering the possession of the agreement to be necessary in order to the enforcement of his legal rights, determined upon the adoption of a course not only fair and reasonable in itself, but, as it seems to me, highly advantageous to *Street* under the circumstances;—he determined to fulfil literally everything for which he had himself stipulated, upon having the agreement of 1819, possession of which he thought important, delivered up to him. And the first question is, whether the deeds which *Ryckman* confessedly signed and sealed, in pursuance of this determination, were delivered absolutely or as escrows merely.

Judgment.

Upon that point *Peter Shook*—as fair and impartial a witness as I ever heard examined—gives the most important testimony. He says, "There was a contract between the late Mr. *T. Street* and Mr. *Samuel Ryckman* respecting some land held by *Ryckman*: there was a survey of lands, and *Ryckman* was to execute the survey and *Street* to find the provisions, in consideration of which *Ryckman* was to convey the land to *Street*. Deeds were executed by *Ryckman* to *Street*, and were placed in my hands *to be delivered by me to Street whenever Street should lift an article entered into between them, and which was in the hands of one Benson.*" And again, "*Nothing was to be done on the part of Street in order to have the deed except getting up the article.*" In the cross-examination he says, "Mr. *Ryckman* wanted the article in order to prosecute *Street* for non-performance." And in answer to a question from the court he says, "When *Ryckman* signed the deeds he handed them to me, together with an order for the article, and said to me, '*when you get that article then hand Mr. Street those deeds.*'"

Now, I must confess that, upon the evidence

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before us, my mind inclines strongly to the opinion that these deeds were delivered as escrows, and not absolutely. It is true that the word "escrow" does not seem to have been used on the occasion; but that was not, I apprehend, necessary. In *Bowker v. Burdikin* (a) Baron *Parke* states the law upon the subject in these words: "In this case, the execution of the deed was proved in the ordinary form, and I take it now to be settled, though the law was otherwise in ancient times, as appears by *Shepherd's Touchstone*, that in order to constitute the delivery of a writing as an escrow, it is not necessary it should be done by express words; *but you are to look at all the facts attending the execution—to all that took place at the time, and to the result of the transaction; and, therefore, though it is in form an absolute delivery, if it can be reasonably inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow.*"

Judgment.

Assuming that to be, as I believe it is, a correct statement of the law, there would be great difficulty, I think—looking at all that took place at the time of the execution here, and at the result of the transaction—in concluding that *Ryckman* intended an absolute delivery. He felt—whether rightly or wrongly seems to me unimportant—that *Strect* had broken his covenant. All attempts at an amicable adjustment of differences had failed, and nothing remained but an action at law, for which purpose he was desirous of getting possession of the agreement. The delivery of these deeds, therefore, to take effect upon the performance of that condition, is quite intelligible, and is in perfect accordance with the expressions used at the time of the execution; but that *Ryckman*, believing himself already in *Street's* power, meant to

(a) 11 M. & W. 147.

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vest in him a title to the lands before obtaining possession of the agreement—thus unaccountably complicating all his difficulties—that is a conclusion which I should have great difficulty in persuading myself to adopt.

But, whatever the true effect of the evidence may be, it is quite clear, I think, that we could not determine this question against the defendant without directing the issue he has asked; and a verdict in favor of the defendant should lead, as it seems to me, to the dismissal of the present bill; because, without determing against the right to specific performance of the agreement of June, 1819, such a bill would differ so widely from the present, in parties, allegation and proof, that leave to amend could not, with any propriety, be granted.

Judgment.

But, suppose the absolute delivery of these deeds established by the verdict, it would remain no less clear, notwithstanding, that *Ryckman* had made *Street's* right to the possession of them dependent upon his delivering up the agreement of 1819. There was nothing either illegal or inequitable in that condition. There existed, then, no means of compelling *Ryckman* to execute the deeds; and in doing, voluntarily, all that a court of equity would have compelled, had it existed, it was but just that he should have been furnished, in his turn, with the means of enforcing this contract against *Street*. Had equitable assistance been necessary to enable *Street* to obtain possession of the deeds, this court would certainly have compelled him to comply with the reasonable terms upon which his right to that possession had been made to depend; and the duty is no less plain I think, where, having obtained the deeds without performing the condition, he asks to be protected in the enjoyment of the title so acquired. Here, however, the evidence not only

shews that the agreement was not delivered up when *Street* received the deeds, but proves clearly that he retained it in his possession many years prior to the filing of the bill, in direct contravention of the terms upon which *Shook* had been authorized to transfer the deeds, and of the understanding upon which the transfer was actually made. *Shook* swears that *Street* subsequently told him—the precise date does not appear, but it must have been, I presume, prior to November, 1839—that he had the agreement in his possession; and it is now produced from his papers by his executors. But upon the manner in which and the time when he obtained the possession of the instrument, the evidence is altogether silent. The proposition, therefore, is, that this court is bound to exercise the peculiar equitable jurisdiction invoked by this bill in favor of one who has failed to perform the condition precedent upon which his right to receive or retain those title deeds had been made to depend;—who subsequently neglected to comply with those reasonable terms, when compliance was unquestionably to some extent in his power;—and who now comes here when performance, for any practical purpose, has become impossible.

Judgment.

But it is greatly to understate, if not mis-state, the evidence, to say merely that it leaves the manner in which *Street* obtained possession of this instrument unexplained. It discloses, to say the least, a most suspicious case. It is to be inferred, I think, that the agreement had passed out of *Benson's* hands at the time the deeds were delivered to *Street*. *Shook* swears that *Benson's* answer to his application was, that it could not be found. This is the statement of the plaintiff's own witness; and there is no reason, I think, to doubt its truth. It is not to be inferred from this evidence, either, that *Benson's* answer was collusive—that he improperly withheld the agreement—or that, having been in truth unable to find

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it, he did subsequently find and deliver it to *Street*, in fraud of the arrangement between the parties. The fair inference would seem to be, that it was, at the very time when the deeds were delivered, in *Street's* custody. That *Ryckman* considered its possession matter of great importance cannot be doubted. Upon that condition he consented originally to do what *Street* had no means that I can discover of compelling; and on every subsequent occasion of which we hear, he expressed his perfect readiness to execute fresh deeds upon its performance. *Marlatt's* testimony is clear upon this point. He says, "After the fire at *Street's* house, he came to me to induce me to go to *Ryckman* to try and get him to give new deeds. I declined to go, saying that I knew *Ryckman's* mind, and that he would not give fresh deeds *until the article was forthcoming.* He came to me at least twice. *On the second occasion I asked him if he had the article.* He said that he had not, and that he believed *Benson* had lost it on removing to Kingston. *I told him that Ryckman complained that he, Street, had got the deeds unlawfully without the article being delivered up. Street* said he could not help it; the article was lost, and he was willing to give a receipt against it." This evidence, again, comes from the plaintiff's witness. It proves clearly that *Street* was not only aware of the importance which *Ryckman* attached to the possession of this instrument, and of his perfect readiness to execute fresh deeds upon its surrender, but also, that unfair management in relation to the matter had been imputed to himself. Now, if these deeds were really obtained by *Street* contrary to good faith—not only without delivering up the agreement, but having taken means to secure its non-delivery—it would be quite clear, I apprehend, that he would have had no title to this equitable relief (*a*). But the agreement is in fact produced,

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(*a*) Brackenbury v. Brackenbury, 2 J. & W. 391.

upon the hearing of the cause, from amongst the papers of *Street*, after a lapse of twenty-five years, without any explanation, except that it must have been in his custody prior to November, 1839. 1852. Street v. Horeboom.

It is true, indeed, that the bill does not mention the condition upon which the deeds had been deposited, and, of course, does not allege its performance. But, in that respect, the bill states the plaintiff's case untruly; and such misstatement cannot, certainly, place him in any better position in point of proof. This is not an application to cancel a deed for some fraud or vice inherent in the contract itself. For aught that appears, this deed may be perfectly fair and binding as between the immediate parties. If fraudulent, it is so only with reference to the plaintiff's prior title. To decree its cancellation, therefore, is to affirm the validity of the plaintiff's title and the *bona fides* of his conduct; but the evidence before us negatives, instead of establishing, these facts. Judgment.

But, without giving undue weight to the suspicion of fraudulent practice so forcibly suggested by the evidence, the case alleged and proved may be briefly stated thus: The agreement out of which the suit has grown was executed in 1819. The deed which constitutes the plaintiff's title came into the possession of his testator in 1824. The execution of that deed would have been a complete fulfilment of that agreement on *Ryckman's* part; but as *Street* had not performed it on his side, the deed was placed in the hands of *Shook* to be delivered to *Street* upon his obtaining and giving up the original agreement. *Street* obtained possession of the deed without having performed that condition; and, under those circumstances, all *Ryckman's* efforts to obtain the agreement having proved unavailing—there being no court of equity to which he could apply, both

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parties resolved, as it would seem, to stand upon their legal rights. *Ryckman* contended that *Street*, having failed to perform the condition precedent, had not acquired any title; and he assumed to deal with the lands as his own in fee. *Street*, on the other hand, insisted that he had acquired a perfect legal title; and a long course of litigation ensued, with various success, commencing in 1832, and continued till 1840, or later. In that state of things—thirty years after the execution of the original agreement, and sixteen years after the trial of the first ejectment under the conveyance, we are now asked to cancel—after the death of both parties to the agreement, and when, owing to the great lapse of time, justice to the defendant has become almost impossible;—in that state of things this suit is instituted, and brought to a hearing upon evidence which distinctly proves, not only that *Street* never did perform the condition, upon the performance of which his right to receive the deed in question had been made to depend—never did deliver the original agreement to *Ryckman*, but that, on the contrary, it had remained for a long period in his possession, under circumstances which certainly called for, and as certainly have not received, satisfactory explanation.

Judgment.

In that state of the evidence a decree would be, I think, impossible. The only question upon which I have felt any difficulty has been, whether the plaintiff should be now left to the case he has alleged and proved, or should be allowed an opportunity of adducing further proof. Upon that point my opinion is in favor of the defendant. If that question be one upon which the discretion of the court should be guided in a great degree by its views of the fairness and moral propriety of the suit (*a*), then I am of

(*a*) Marin v. Whichelo, C. and P. 259; Simmons v. Simmons, 6 Hare, 352; Molony v. Kernan, 2 D. & W. 38.

opinion that this plaintiff has not made a case for that relief, and that the bill must be dismissed with costs.

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Street v. Hogeboom.

ESTEN, V. C.—The circumstances of this case are as follows: In 1819, one *Samuel Ryckman*, a deputy provincial surveyor, was employed by the government to survey certain townships, for which he was to be paid in land. He thereupon entered into an agreement with one *Timothy Street* to assist him in performing this survey, the terms of which were that *Street* should furnish the necessary provisions for *Ryckman's* party and should pay half the expenses of the survey, and in return should receive one moiety of the land which should be assigned to *Ryckman* by the government in payment for this service, to be conveyed by *Ryckman* to *Street* so soon as he should receive a patent or patents from government for the entire quantity. The survey was performed. *Street* furnished to some extent the provisions which he had engaged to supply; but, as was alleged by *Ryckman*, made default in supplying the whole quantity: he, however, after this fact became known, paid half the wages of the hands employed in the survey, and of the other expenses attending it; and a patent or patents for the whole quantity of land assigned to *Ryckman* in remuneration of this service duly issued. Upon this, *Ryckman* signed and sealed and delivered to one *Shook* certain deeds conveying or purporting to convey to *Street* in fee simple a moiety of the land which had been granted by the government to *Ryckman*—not an undivided moiety, but certain specified lots of land, amounting in the whole to 1994 acres, which must have been agreed upon between him and *Street* as *Street's* portion of the entire quantity granted to *Ryckman*. The agreement which was made between *Street* and *Ryckman* was in writing and under seal, and its execution was attested by two

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subscribing witnesses. To one of these—namely *Ezekiel Benson*—it was delivered, to be held by him for both parties; and when *Ryckman* delivered the deeds which have been mentioned to *Shook*, it was with instructions to hand or deliver them to *Street* when he should procure from *Benson* the article or agreement before mentioned, of which it seems *Ryckman* was desirous of obtaining possession in order to proceed at law against *Street* for the alleged breach of its provisions in not furnishing the stipulated supplies in manner agreed upon. The expression most frequently employed by the witnesses in speaking upon this point is "lift," the precise meaning of which perhaps it is not easy to define. It is clear that *Benson* would have delivered the article to neither without the consent of the other. *Shook* had an order from *Ryckman* for its delivery to him, and a similar order from *Street*, or a verbal intimation or direction from *Street* to *Benson* to a similar effect would no doubt have been a sufficient compliance with the condition upon which the deeds were given up to him. *Shook* afterwards delivered up the deeds to *Street*. It does not appear whether a written order upon *Benson* was given by *Street* to *Shook* upon this occasion for the delivery of the article, or what passed between *Street* and *Shook* upon the subject. It is plain, however, I think, that *Shook* had no idea disobeying or not following the instructions of *Ryckman* as to procuring the article, and that what did pass between *Street* and *Shook* on this occasion in respect of the article was, in *Shook's* apprehension, sufficient to enable him to procure the article from *Benson*, and a substantial compliance with the stipulation upon which *Ryckman* had entrusted the deeds to his custody. This was probably the case; but when application was made to *Benson* for the article it appears to have been mislaid, and *Shook* failed to procure it. The subject was repeatedly mentioned afterwards between *Street* and *Ryck-*

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man, and *Street* always professed his willingness to procure the article to be delivered to *Ryckman* if it were in his power to do so. 1852. Street v. Hogeboom.

The deeds of part of the property assigned to *Street* in the division were destroyed by fire in 1825. *Street* afterwards applied more than once to *Ryckman* to furnish him with fresh deeds in their place; and it appears that *Ryckman*, who was in the habit of preparing deeds for people, went so far as to prepare these fresh deeds, and was even paid for it by *Street*, but refused to execute them until the article was delivered up to him. The deeds of the rest of the lands appear to have been duly registered by *Street*, and his title to this portion of the lands has never been disputed. Upon the registration of these deeds one of the subscribing witnesses must have made affidavit of their execution. It is not, however, suggested that they were executed in any respect differently from those which were destroyed by fire. *Shook* says that *Street* afterwards told him that he had the article in his possession; but it does not appear when this conversation between *Street* and *Shook* occurred. The answer states that one of the devisees under *Street's* will admitted to the defendant that he had the article; but the defendant does not impute to *Street* the having obtained possession of the article in a fraudulent or improper manner. It is very odd that *Benson*, who appears to be living, has not been examined by either party. Judgment.

It appears, further, that previous to 1832, *Ryckman* took upon himself to alienate such of the lands assigned to *Street* in the division as were comprised in the burnt deeds, and which must have amounted in quantity to one-half of the lands so assigned, to one *Hiles*, who afterwards alienated part of them, amounting to about eight hundred acres, to the defendant. Upon this taking place, two or three

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actions of ejectment occurred between *Street* and *Hiles* respecting these lands, which appear to have terminated in different ways. *Hiles* says thas the first action, which took place in 1832, went against him, which implies, I suppose, that the other or others went for him. *Street* afterwards died, having made his will in October, 1839, and having devised the lands which form the subject-matter of this suit, and which were part of the lands comprised in the burnt deeds, to the plaintiff, who thereupon filed this bill, praying that the deeds executed by *Ryckman* to *Hiles*, and by *Hiles* to the defendant as before mentioned, might, so far as they affected the land claimed by him, be delivered up to be cancelled,—and for further relief.

Judgment.

The case stated by this bill is obviously founded on the supposition that the delivery of the burnt deeds by *Ryckman* to *Shook* was an absolute delivery on behalf of *Street*, so as to vest the estate, although they were not to be handed by *Shook* to *Street* until the article was procured. If this supposition is incorrect—if, as the answer insists, the deeds were delivered to *Shook* only as escrows, the estate never vested in *Street* at all, and the agreement *quoad hoc* remains unperformed. It is difficult, if not impossible, to determine how this was upon the evidence; the word "escrow" does not occur in the whole of it, and the witnesses speak of the execution of the deeds as if it was complete. This, however, is inconclusive; and it would, I suppose, if it became necessary to decide this question, be the duty of the court to direct an issue for the purpose of having it determined through the intervention of a jury. Should it appear that the deeds were never delivered so as to vest the estate which they were designed to convey, and that, consequently, the agreement remained *pro tanto* unperformed, it is possible that the parties interested under it may, under the

peculiar circumstances of this case be entitled to its specific performance, so far as it remains unperformed, even at this distant date; and, while I abstain from expressing any opinion on this ground, I by no means wish to be considered as intimating an opinion unfavorable to their title to relief in this shape; and it is also probable that such relief might be obtained under the new orders of this court, although probably not under the previous practice, by means of an amendment of the present bill, if any sufficient object should appear to exist warranting the adoption of this course, such as the prevention of a bar rising from the lapse of time, or any other reason of equal validity; but, in order to attain relief of this description in the present suit, it would be necessary to recast the record so completely (for if the agreement is to be specifically executed it must be in one suit), by bringing before the court all the parties interested in the unconveyed lands—the representatives of *Ryckman*, in order to receive any compensation that may be due for *Street's* failure to perform the agreement on his part, and the representatives, personal and real—that is, all persons interested in the real estate of *Street*—in order to make good such compensation that I suppose it would be right in this case to award the costs of the suit up to the hearing to the defendant, who by his answer had raised the objection in an early stage of the suit, and therefore the proper course to adopt in the absence of any such objects as I have mentioned in amending the bill would be to dismiss the present suit with costs, without prejudice to any other that the plaintiff might be advised to institute. If, however, the verdict of the jury should shew that these deeds were absolutely delivered by *Ryckman* to *Shook* on behalf of *Street*, and were only to be handed by him to *Street* on procuring the article, then it would appear that the estate is and always has been in *Street* and his devisees; that no estate whatever is vested in

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the defendant and *Hiles*; and that the deeds under which they claim are mere waste paper so far as respects any benefit to them, while they form a cloud upon the title of the real owners of the property; and it would be a most unsatisfactory determination of this litigation to allow matters to remain as they are—one party having a colorable but no real title to the property; the other having the real title, but that title rendered useless by the existence of the colorable title of the other. To such a claim the doctrine of laches does not seem with much force to apply. A party owning property may acquiesce for almost any length of time in the possession by another party of an instrument purporting or affecting to dispose of it; and yet, at the end of that time, may be entitled to seek its destruction through the interposition of this court. He does not seek to deprive the other party of anything real. The existJudgment. ence of the void instrument, without being of any benefit to the possessor, is an inconvenience to himself, to which he has for a certain time submitted, but is unwilling to submit any longer. The mere lapse of time should not, I think, oppose any bar to this mode of relief, if it should appear to be the proper one to be extended in this case.

It is objected, however, that this relief ought not to be given without providing compensation to *Ryckman's* estate for any default that may have been committed by *Street* in the performance of the agreement on his part, and that at this time it is difficult, if not impossible, to make adequate compensation to *Ryckman's* estate for such default. I may observe, that *Ryckman* has contributed to this difficulty, (if any) by his own neglect; for he had three years after the establishment of the court in which he might have compelled a discovery from *Street* of the contents or purport of the article. I agree that relief ought not to be given in this suit without providing the means

of enforcing any claim that the estate of *Ryckman* may have against the estate of *Street* in respect of the agreement, the proper mode of effecting which would be to order the article—which I understand has been produced from amongst the plaintiff's papers, and is probably in the possession of the *Stret* family—to be impounded, with liberty to both parties to apply; but I think it would be too much to assume that adequate compensation cannot be made to *Ryckman*'s estate, and for that reason to deny relief to the plaintiff in a case so circumstanced as the present. On the contrary, it seems to me that no difficulty would arise in this case in doing justice to all parties.

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It is considered however, I believe, by his lordship the Chancellor and by my brother *Sprague*, that the ptaintiff, *Street*, is not in a condition to seek the assistance of this court, because it does not appear but that *Timothy Street*, under whom he claims, obtained possession of the article unfairly, or improperly retained it; and that when it appeared that it could not be procured by *Ryckman* from *Benson*, *Timothy Street* ought to have restored the deeds to *Shook*; that *Timothy Street* cannot therefore be considered as having acted in such a manner as to merit the interposition of this court in his favor, and that the plaintiff, as claiming under him, stands in the same disadvantageous position. Great weight is due to this opinion, and it is with great distrust of my own judgment that I venture to differ from it. It appears to me, however, after the best consideration that I have been able to give to this case, that if *Street* did all that *Shook* required him to do for the purpose of procuring the article when he delivered up the deeds to him, with the *bona fide* intention that it should be delivered up (and this is consistent with the facts as they appear), it would be too much to expect him, when it appeared that the article was

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not forthcoming, to return the deeds to *Shook*. He might, I think, fairly say that, however unfortunate it might be for Mr. *Ryckman* that *Benson* had lost the article, he *Street* had not lost it; he had done what he could to procure it for *Ryckman*; and it would be hard that because the article was lost he should lose his deeds. The ground of the objection is the existence of *mala fides;* and I think it would be too much to impute *mala fides* under such circumstances. The objection with regard to the possession of the article wears a more suspicious and serious aspect. I fully agree that if it should appear that *Street* had obtained possession of this article before he had any reason to complain of *Ryckman*, and had suppressed it with the fraudulent intent of preventing *Ryckman*, from obtaining satisfaction from him for the alleged breach of his agreement, he would not be in a situation to seek the interposition of this court in his favor; and probably the plaintiff, as deriving title from him, might labor under a similar disability.

Judgment.

Had any possibility of agreement existed upon the other points of the case, I should not have objected to an inquiry for the purpose of having it ascertained how *Street* obtained possession of the article; although, as the defendant was aware that it was in the possession of the *Street* family, but had nevertheless refrained from investigating the matter, and had not examined *Benson*, and had not ventured to impute any fraud to *Street* in obtaining or retaining possession of the article, it would perhaps have been stretching a point in his favor to have directed such an enquiry. To refuse relief under such circumstances without enquiry is, I think, to presume fraud, and that in favor of a party who does not venture himself to impute it. This, I think, we ought not to do.

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When the entire quantity of lands was granted by the government to *Ryckman*, *Street* became tenant in common with *Ryckman* of those lands. He could have insituted a suit against *Ryckman*, and upon equitable terms have obtained a division of the lands; and the court would, if necessary, have directed an action or an issue of *quantum damnificatus*, in order to ascertain the amount of damage sustained by *Ryckman* in consequence of *Street's* failure to perform his agreement.

When the deeds were signed and deposited with *Shook*, *Sreet's* portion of the land was ascertained by the agrement of the parties and under the hand of *Ryckman*, and *Street* became to all intents and purposes the equitable owner of those specific lands. If the loss of the agreement happened without any fault of *Street*, *Ryckman* might fairly object to the delivery of the deeds by *Shook*, until some satisfaction had been accorded to him for the supposed breach of the agreement on *Street's* part: but surely it was doing *Street* a grievous wrong to alienate those lands: and if, after *Ryckman* had done him this wrong, and attempted to deprive him of his property, and had involved his title in every possible difficulty, *Street* accidentally obtained possession of the article, I do not think any blame was imputable to him for not producing it, and thereby arming his adversary with a weapon with which to injure him, after he had disabled himself by alienating the land from fulfilling his agreement; or that the retention of the article under such circumstances should debar the devisee of *Street* from any relief to which he would otherwise be entitled.

Judgment.

We cannot fail to see that *Ryckman* availed himself of the accidental destruction of the deeds to commit a legal fraud (I do not impute an actual fraud to him) upon *Street* by alienating lands to which he was equitably and in good conscience entitled.

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The course, which I think it is our duty to adopt in this case, is to direct an issue for the purpose of having it determined whether the deeds in question were delivered absolutely or as escrows; and if it should appear that they were delivered as escrows, then to dismiss this bill with costs, and without prejudice to any suit which the plaintiff may be advised to institute for the specific performance of the agreement so far as it remains unperformed; but, if it should appear that the deeds were delivered so as to vest the estate, then to impound the article, with liberty to all parties to apply; and to order the deeds to *Hiles* and *Hogeboom*, also to be impounded with like liberty, or to be delivered up to be cancelled, according to the nature of the deeds themselves, without costs.

Judgment.

SPRAGGE, V. C., concurred with his lordship The Chancellor.

Per Curiam.—Bill dismissed with costs.

DRUMMOND v. ANDERSON.

Practice--Passing and entering decrees.

March 12. In January, 1841, an original decree of foreclosure had been made; in pursuance thereof the Master made his report; and in May of the same year the cause was set down for hearing on further directions, but the decree then pronounced was not drawn up or any entry made thereof. A motion now made to allow the plaintiff to draw up and enter *nunc pro tunc* the decree on further directions, from minutes alleged to have been prepared by the registrar, was refused.

It is essentially requisite to the perfect completion of a decree that it should be passed and entered.

Statement.

On a former day, Mr. *Turner*, for the plaintiff moved for an order allowing the plaintiff to draw up and enter, *nunc pro tunc*, the decree pronounced in this cause at the hearing on further directions, upon the grounds set forth in the judgment. The matter having stood over, the judgment of the court was now delivered by

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THE CHANCELLOR.—The original decree in this suit was pronounced on the 28th day of January, 1841. The Master made his report in pursuance of that decree on the 28th day of April next ensuing; and the cause came on for further directions upon the Master's report on the 13th of the following May. The decree pronounced at the hearing on further directions not having been either drawn up or entered, the object of the present application is to have it drawn up and entered *nunc pro tunc*, and to obtain the order for foreclosure absolute.

The entry in the registrar's book proves satisfactorily that the cause was heard on further directions, and a decree pronounced. Besides that entry, we have before us the affidavit of Mr. *Turner*, the agent of the plaintiff's solicitor. He swears that certain minutes annexed to his affidavit are in the handwriting of the registrar; that believes the decree was drawn up, because the fee for that purpose has been charged against him in his pass book with the registrar; and that the omission to enter the decree is attributable to the neglect of the officer of the court; but no office or other copy of the decree has been produced, nor is it otherwise known to have been drawn up in fact. The plaintiff swears now that she attended at the office of *George Rideut*, Esq., on the 28th April, 1842, at the hour appointed, but that the mortgage debt was not then paid, and is still due.

Judgment.

I am of opinion that this application cannot be granted.

It is abundantly plain, I apprehend, that according to the settled practice, all decrees and orders of the court must be drawn up and entered in the registrar's book, and that any proceedings taken under a decree or order not so entered are irregular

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and voidable (*a*). Mr. *Harrison* states the practice of the court thus (*b*): "When the decree is passed by the registrar, an entry thereof in the entering books in the registrar's office is, in the next place, necessary to be made; and it is to be observed that *passing* and *entering* the decree *are essentially requisite to the perfect completion of it*, and necessarily antecedent to any subsequent or further proceedings being had thereon; for unless the original decree appears to be entered, or an office copy of the decree, passed and signed by the registrar, is entered in the room of it, no subsequent proceedings, according to the direction of the decree, can regularly be pursued, nor the decree itself carried into execution; and if any proceedings are had inadvertently, they are irregular and voidable, and the same, by a proper application to the court, will be set aside for irregularity."

Judgment.

It is true that when a decree, regularly passed, has either been acted on by both parties or suffered to lie dormant, in either event the court may, upon a proper case, direct it to be entered *nunc pro tunc*, even after a very considerable lapse of time. In *Lawrence v. Richmond* (*c*) such an order was made after the lapse of twenty-three years; but then the decree had been drawn up and office copies delivered out, and no proceedings had been taken under it. In *Downe v. Lewis* (*d*), on the other hand, the decree had been long acted on by the parties, and was recited not only on two several reports of the Master, but in an order of the court made on further directions. But this application differs materially from those to which I have just referred. There is no evidence here—at least no sufficient evidence—that the decree was ever drawn up (*e*); and there are no

(*a*) Tolson v. Jervis, 8 Beav. 366. (*b*) 1 Har. C. P. 621.
(*c*) J. & W. 241. (*d*) 11 Ves. 601.
(*e*) Withy v. Norton, 4 Y. & C. C. C. 266.

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proceedings on the part of the defendant from which waiver of that irregularity can be inferred. The whole minute in the Registrar's book is "Ordered foreclosure." But this entry neither gives time nor place for payment of the mortgage debt. There is nothing which shews that to have ever been done; and yet we are asked to direct an order to be now drawn up and entered *nunc pro tunc*, which is to have the effect of foreclosing the defendant because he failed to pay the mortgage debt ten years since at a time and place now for the first time designated. The plaintiff, who comes after great and unexplained delay, should have been able to point out some clear principle or settled practice to justify the indulgence asked. None were referred to; and, so far as I have been able to discover, no precedent for such an order exists. It would be, as I humbly conceive, contrary to principle, and without the sanction of authority.

Judgment.

TAYLOR v. SHOFF.

Opening publication.

Where publication had passed shortly before a motion to open was made by the plaintiff, and it appeared on the motion that the defendant had examined witnesses, but the plaintiff had not examined any; and the plaintiff and others swore that his evidence was material, and that the delay had arisen from the poverty of the plaintiff: publication was opened on payment of costs.

Nov. 25, 1851, & March 12, 1852.

This was a motion to open publication for six weeks, founded upon affidavits affirming the materiality, and setting forth the nature of the evidence the plaintiff wished to give. The plaintiff also swore that he had been for a year in indigent circumstances; that owing to the deprivation of his property as complained of in the bill he had been unable to raise money to have his witnesses examined: that this was the only reason why they had not been examined; and that he was now enabled to proceed with the examination, if the Court would allow him.

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Mr. *McDonald*, for the plaintiff, referred to *Campbell v. Scougal* (*a*), and to *Daniel's* Chancery Practice, 1136-8.

Mr. *Mowat*, for the defendant, *Shoff*, contended that poverty was no excuse for the plaintiff's delay. The plaintiff should not have commenced his suit till he was prepared to proceed with it according to the practice of the court. There is no authority to warrant an application of this kind, under the circumstances here disclosed being granted. The rule laid down by Mr. *Daniel*, as cited by the other side, is against the order being granted. *Patterson v. Scott* (*b*), ; *Waters v. Shade* (*c*) ; *Hovenden v. Lord Annesley* (*d*) ; *Whitelock v. Baker* (*e*) ; *Facer v. French* (*f*) ; Doe *Lindsay v. Edwards* (*g*) ; and *Archbold's* Practice (8th Ed.), 1122—all tend to shew that this motion should be refused.

Argument.

Mr. *R. Cooper*, for the defendant, *Morrill*, contended that the plaintiff's solicitor was bound either to furnish funds for carrying on the suit after commencing it, or to give distinct notice to his client that he would not do so ; no such notice appears.

March 12.

THE CHANCELLOR.—This suit is for the cancellation of a deed, impeached on the ground of fraud.

Judgment.

The answer wholly negatives the case made by the bill.

The replication was filed on the 13th of September. The plaintiff has not taken any evidence. The defendants examined their witnesses on the 3rd, 4th and 6th days of November ; and publication passed in the ordinary course shortly afterwards.

(*a*) 19 Ves. 552
(*b*) Ante vol. 1, p. 582.
(*c*) Ante vol. 2. p. 218.
(*d*) 2 S. & L. 639.
(*e*) 13 Ves. 512.
(*f*) 4 Dowl. 554.
(*g*) 2 Dowl. 471.

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Notice of this motion was served on the 25th of November. It is supported by several affidavits, in which the materiality of the evidence to be introduced is asserted; improper motives are negatived; and the plaintiff's failure is attributed to extreme distress, which, it is sworn, rendered the production of his witnesses in due time impossible.

No affidavits have been filed by the defendants. The motion was not resisted upon any special ground arising in the case; but it was contended that the application should be refused upon general principles, strictly applied in England, and repeatedly recognised, it was said, in this court.

On several recent occasions we have had to consider how far the principle upon which the English rule proceeds applies to cases arising in this court; and have more than once taken occasion to point out the consequences which seem to us to result, necessarily, from the different practice which prevails in this country (*a*). It is perfectly plain that the open *viva voce* method of examination adopted here has a twofold effect in limiting the operation of that rule. Our more effective mode of cross-examination tends to exclude impure testimony, because it supplies a test of truth unattainable under the English system; while the publicity of the examination supplies inducement and affords facility for the manufacture of evidence which that system excludes. Thus, on the one hand, the necessity for the strict application of the English rule against the admission of evidence after publication passed, is diminished; and, on the other hand, the reason, to a great extent at least, upon which that rule was based, fails. We continue to use the expression, "publication passed," but the thing implied in the

Judgment.

(*a*) Chisholm v. Sheldon, ante v. 1, p. 124; Patterson v. Scott, id. 582.

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expression has no existence. With us, publication passes as to each witness in the literal, though not in the technical sense, at the time of the examination, because that is open—takes place in the presence of the parties; but in England, until "publication passed," the testimony is unknown. There, consequently, passing publication materially alters the position of parties; and, having reference to the great imperfection in this mode of taking evidence, the strong expressions attributed to Lord *Eldon* in *Whitelock v. Baker* are quite intelligible. But here, the position of parties after publication passed is substantially the same. It is a mere form. Application of this sort, therefore, in this court, are analagous to motions to enlarge publication, rather than to those which seek to introduce evidence after publication passed. Undoubtedly, the orderly conduct of cases must be enforced; and all attempts contrary to good faith must be carefully repressed. It will be our duty, on both grounds, to watch such motions with jealous care. In this instance, however, the delay has been inconsiderable, and the case made out is such as, under all the circumstances of the case, entitles the plaintiff to the indulgence he asks, on payment of costs.

Judgment

ESTEN, V. C., concurred.

SPRAGGE, V. C.—I agree in the propriety of opening publication in this case, though I have had some hesitation in arriving at that conclusion. I do not, however, quite concur in the view of his lordship the Chancellor, that the objection against opening publication in cases where the party applying has seen the depositions of his opponent's witnesses, fails, as a reason against admitting further evidence here. It cannot certainly be here, as it is in England, an *insuperable* objection, because otherwise publications could never be opened, nor additional evidence

admitted; but I cannot but think it a strong reason for the cautious exercise of the discretion of the Court in letting in additional testimony. 1852. Taylor v. Shoff.

The open *viva voce* examination of witnesses is certainly a great safeguard—more especially when they are examined before the Court; still it is of dangerons tendency to allow a party to mend his case after seeing the weak points of that of his adversary; it is felt to be so at common law, where the courts are careful and guarded in granting new trials on the ground of discovery of evidence since a former trial, because open to that very serious objection.

In this case no evidence has been taken by the plaintiff; until that was done it was not necessary for the defendant to take his, at least I understand it to be so admitted. The plaintiff, however, had given notice of his intention to examine witnesses, and the defendant had reason to suppose that he would do so, as indeed he might have done as a matter of strict right up to the time of publication passing. I think the defendants were not wrong in examining their witnesses, only that they did what was not absolutely necessary. Under the circumstances set forth in the affidavits filed on behalf of the plaintiff, it is right, I think, not to preclude him from proving his case; but I think it should be upon payment of costs of this application. Judgment.

Mr. *Cooper's* position—that this application should be refused, on the gronnd that the solicitor was bound to procure the attendance of witnesses and have them examined at his own expense—appears to me to be erroneous. It would be most unreasonable that a solicitor should be bound to do so, and I do not see that the cases cited at all warrant the position.

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MUSSELMAN v. SNIDER.

Parties—Next of kin.

April 30, and June 11. Where the plaintiff, suing on behalf of himself and the other next of kin of an intestate, alleges in his bill, but does not prove, that the next of kin are too numerous to be made parties by name; that some are resident out of the jurisdiction and others unknown, the Court will either allow the cause to stand over to supply this proof, or will direct an enquiry by the Master as to the other next of kin.

Statement. In an administration suit, the bill was by one of the next of kin, who sued on behalf of himself and the others, and contained the usual allegations to support a bill in that form.

It appeared that the bill had originally been filed in the name of the plaintiff alone, and had purported to name all the next of kin (seven in number), four of whom were married women, and who with their husbands were made defendants thereto. The administrator and his wife, one of the next of kin, were the only defendants who answered the bill and admitted the allegations as to the next of kin; but the plaintiff afterwards amended his bill, struck out the names of all the others, and introduced the allegations above referred to.

The cause now coming on to be heard,

Mr. *Brough* appeared for the plaintiff, and asked for the usual decree for the administration of an intestate's estate.

Argument. Mr. *Mowat*, for the defendants, objected to the want of proof as to the number and absence from the country of the next of kin; that it appeared by the original bill and the answers that they were only eleven in number, including the married women and their husbands, and that under the circumstances the plaintiff should not be permitted either to amend his bill or supply the proof that was wanting, particu-

larly as the suit was under the old practice, and a new suit would be less expensive than the present one.

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The following cases were referred to:—*Harrison v. Stewardson* (*a*); *Leathart v. Thorne* (*b*): *Calvert* on Parties, 63, 236, and cases there cited; *Seton* on Decrees, 257 n. 270, 508.

Argument.

The judgment of the Court was now delivered by

THE CHANCELLOR.—This suit, for the administration of the estate of *John Musselman*, is instituted by *David Musselman*, on behalf of himself and all others the next of kin of the intestate. The bill alleges that the complainant is ignorant who the other next of kin are; that of some who reside beyond the jurisdiction of the court he is unable to discover the residence; and that they are, as a whole, too numerous to be made parties. There being no proof of these allegations, Mr. *Mowat* contends that the bill should be dismissed; but should the Court be of opinion that the bill ought not to be dismissed on that ground, he consents to such order as may most conveniently dispose of the matter in litigation.

Judgment.

It is not to be doubted that in a proper case a bill may be filed by some of the next of kin of an intestate, on behalf of themselves and all others of the same class. Lord *Redesdale* says, "For the application of personal estate amongst next of kin, or amongst persons claiming under a general description, *where it may be uncertain who are all the persons answering that description*, a bill has been admitted by one claimant on behalf of himself and the other persons equally entitled" (*c*). Indeed, the regularity

(*a*) 2 Hare, 530. (*b*) 15 Jurist, 162, 762. (*c*) Mitford, 169-70.

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of the pleading, in point of form, is not denied; but it is contended that, at the hearing, the plaintiff is bound to prove the facts which justify this exceptional mode of procedure. But, though the practice were admitted to be so, there is nothing here which could justify us in dismissing the plaintiff's bill. The only result of the objection would be an order directing the cause to stand over, with liberty to the plaintiff to supply the defect. That would be perhaps, the strictly regular course (*a*); at least, such was the course pursued by Vice Chancellor *Knight Bruce* in *Leathart v. Thorne* (*b*). But when it is remembered, on the other hand, that, in cases of this kind, the court is in the uniform habit of directing an enquiry before it pronounces any decree (*c*), and that the parties ascertained by the Master's report may appear in the Master's office and intervene in the subsequent proceedings in the cause, without being made parties by supplemental bill (*d*), it would seem convenient, in cases of this kind, to direct the ordinary inquiry in the first instance, without requiring the preliminary proof here insisted on, and such would seem to have been the course adopted by the Master of the Rolls in *Harvey v. Harvey* (*e*).

Judgment.

But for the reasons to which I have adverted, it is unnecessary, in the present case, to determine the strict regularity of such an order as has been suggested; and as the question is not likely to arise, if indeed it can arise, under the new practice, it will be sufficient without further observation, to direct the usual inquiry for the next of kin of the intestate.

(*a*) Baker v. Holland, 3 Hare, 68. (*b*) 15 Jur 162.
(*c*) 2 Danl. C. P 636; Hawkins v. Hawkins, 1 Hare 543; Baker v Harwood, 1 Hare, 327.
(*d*) Wait v. Temple, 1 S. & S. 320; Hutchinson v. Freeman, 4 M. & C. 491; Shuttleworth v. Howarth, 4 M. & C. 495.
(*e*) 4 Beav. 221.

PERRIN v. DAVIS. 1852.

Pro confesso—33rd order.

In application, to take bills *pro confesso* under the 33rd order of May 1850, the order to be pronounced is left a good deal to the discretion of the court. March 12th.

After an order to set down a cause to be taken *pro confesso* is made, a subpœna to hear judgment need not be served, and all subsequent proceedings may be *ex parte*, unless otherwise directed.

On a previous day, Mr. *McDonald*, for the plaintiff, moved, under the 33rd order of May, 1850, that the bill might be taken *pro confesso* against some of the defendants. Argument.

Mr. *Mowat*, for these defendants, referred to *Courage v. Wardell* (*a*), and asked that the order, if made, should be in the form there given.

The judgment of the court was now delivered by

THE CHANCELLOR.—The practice in taking bills *pro confesso* prior to the orders of 1845 seems to have been somewhat unsettled. In *Seagrave v. Edwards* (*b*) the Solicitor General stated the practice to be, that where there is but one defendant, the bill may be taken *pro confesso* upon motion; but if there are more defendants the cause must be set down. In that case the bill was taken *pro confesso* accordingly, upon motion; and so prevalent did this notion afterwards become, that in *Woolams v. Baker* (*c*), the registrar refused to set down the cause for the purpose of having a decree made, upon the ground that the plaintiff should have taken a decree when he obtained his order to have the bill taken *pro confesso*. Judgment.

Mr. *Smith* denies the existence of the practice stated by the Solicitor General in *Seagrave v. Edwards* (*d*). He says the cause must be set down

(*a*) 4 Hare, 481.
(*b*) 3 Ves. 372.
(*c*) 6 Sim. 316.
(*d*) 1 D. C. P. 175.

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Perrin v. Davis.

for a hearing in all case, unless the defendant be in actual custody, when the bill may be taken *pro confesso* against such defendant, upon motion, whether he be a sole defendant or one of several.

Mr. *Smith's* statement of the practice seems correct, and explains some observations of Lord *Lyndhurst*, in *Needham v. Needham* (*a*), otherwise obscure. But it is at all events plain, we think, that under the 35th general order of May, 1850, causes in this court must, under all circumstances, be set down for a hearing. Upon the motion for an order to take the bill *pro confesso*, the court may, if it see reason, fix a day for the hearing; but where that is not done the cause must be set down in the ordinary course. It will be unnecessary, however; to serve a subpœna to hear judgment upon those against whom an order to have the bill taken *pro confesso* has been made. Against such parties subsequent proceedings may be *ex parte*, unless otherwise directed. The order to be pronounced upon these motions is left a good deal to the discretion of the court. Where there are no circumstances in the case rendering delay, or other conditions proper, the order will be pronounced immediately. Where there are such special circumstances, or a case is made upon affidavit, the course suggested in *Courage v. Wardell* (*b*) would seem convenient. The order may be pronounced only to be drawn up, however, in case the defendants fail to put in their answer and pay the costs within the time limited.

Judgment.

(*a*) 1 Phil. 646. (*b*) 4 Haro, 481.

MOFFAT V. MARCH. 1852.

Foreclosure—Form of decree.

A summary reference for foreclosure had been made, and on proceeding in the Master's office it was discovered that there were several registered judgments against the defendant. The plaintiff thereupon moved to amend the decree by inserting a direction to the Master to enquire and report upon the priorities, &c., of the judgment creditors, which was accordingly ordered on payment of costs, and with a reservation of further directions. March 12th.

Under the circumstances set forth in the judgment, Mr. *A. Crooks*, for the plaintiff, on a former day, moved to vary the decree drawn up in this cause; and the motion having stood over for consideration, judgment was now delivered by

THE CHANCELLOR.—In this suit the bill stated a simple case between mortgagor and mortgagee, and prayed foreclosure, which was decreed upon motion. Further incumbrances were discovered after decree, and the plaintiff was desirous that they should be made parties in the Master's office under the 5th of the orders of January, 1851. The Master was of opinion that it would not be competent to him to make any report as to such incumbrances under the decree as framed, and therefore declined to accede to the plaintiff's request; and the object of this motion is to have the decree amended in that respect. Judgment.

There is no difficulty in point of form; the 8th order expressly sanctions the present motion in that respect; and, so far as the end can be accomplished, it seems to us expedient. One of the principal objects of the 5th order was to obviate the expense and delay which would have arisen from making all incumbrances, more especially judgment creditors, parties to the suit in the first instance. This object will be accomplished, we believe, when a sale is asked, by the form of decree adopted in *Beasley v. White*. But when foreclosure is prayed, the mode of attaining this end, with due attention to regularity of

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Moffatt v. March.

procedure, is not so apparent. We think, however, that considerable advantage may be gained, without the introduction perhaps of any serious anomaly, by adding to such decrees a clause authorising the acting Master to cause all incumbrances subsequently discovered to be made parties, with power to take the account and settle priorities; reserving, in that event, further directions and costs; and we direct this decree to be amended accordingly, on payment of costs.

Judgment.

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Mortgage—Redemption.

June 11.

In 1821 the plaintiff mortgaged three properties (in Belleville, Kingston and Camden respectively,) to secure a debt payable in the following year. It was not then paid. Payment was urgently demanded in 1827; the mortgagees being then in great pecuniary difficulties, and the debt still remaining due, the mortgagees sold and conveyed, with absolute covenants for title, the property in Belleville for what appeared to have been about its value at the time, and they gave credit for the amount on the mortgage. This property afterwards passed through several hands and was bought by the present owner in 1837, who subsequently made considerable improvements on it, and dealt with it as absolute owner. *Held*, that this property was not redeemable by the mortgagor on a bill filed in 1840, and that the effect of the sale and transfer by the mortgagees of portions of the mortgaged property was to transfer to the purchasers a part of the mortgaged debt, proportioned to the value of the property transferred, as compared with the whole property mortgaged.

After the judgment in this case (reported ante vol. 6, page 268) had been pronounced, the plaintiff having amended his bill, again set the cause down to be heard. On a former day the cause came on to be heard.

Mr. *Eccles* and Mr. *Turner*, for the plaintiff.

Argument.

Mr. *Vankoughnet*, Q. C., Mr. *Brough*, Mr. *Mowat*, and Mr. *Morphy* for the several defendants.

Baxter v. Brown (*a*), *Lockwood v. Ewer* (*b*), *Story's* Equity Jur. Ss. 1005-8, and *Spence's* Equity 637, 760 were referred to.

(*a*) 7 M. & G. 198. (*b*) 2 Atk. 303.

The judgment of the Court was now delivered by

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THE CHANCELLOR.—This cause has been again brought to a hearing, but it is in a state so materially imperfect that no decree can be at present pronounced.

The facts and documents having been recapitulated when the case was before us upon a former occasion (*a*), it becomes unnecessary to state them now in any detail.

The estates which the plaintiff seeks to redeem were conveyed by way of mortgage to *Maitland*, *Garden*, and *Auldjo*. The mortgage deed has not been produced, and it is to be assumed under the circumstances, I apprehend, that the mortgagees were entitled to the mortgage money in equal proportions. Upon the death of *Garden*, therefore, without more, his personal representative would have been a necessary party to this suit to redeem (*b*).

Judgment.

The bill alleges, however, and the answers admit, that in the year 1826, prior to the death of *Garden*, the estate of *Maitland*, *Garden* and *Auldjo* had been assigned to trustees, of whom the defendant *Lesslie* is the survivor, in trust for their creditors. This deed has not been produced, nor have any facts been alleged or proved which would render a decree against the trustee alone, in the absence of the *cestuis que trustent*, proper (*c*).

But, assuming, in the absence of objection, that the suit is properly constituted in this respect, it is alleged further that the trusts of the deed of 1826 have been determined, and that *Lesslie* is now possessed of the residue of the trust estate, including the mortgage premises, in trust for *Auldjo* alone. *Lesslie* in his answer, taken without oath or signature, admits this fact; but no such admission is to be found in

(*a*) Ante, vol. 1, p. 268. (*b*) Vickers v. Cowell, 1 Beav. 529.
(*c*) Coote on Mortgage, 3rd Ed. 501; 1 Dan. C.P. by Headlam, 254.

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the answer either of *Maitland* or *Auldjo*; indeed the allegation was introduced into the bill by amendment after those answers had been filed, and evidence upon this point is altogether wanting. This important fact then, being neither conceded nor proved, it follows, necessarily, either that the record is improperly constituted, or that the proofs are materially defective. If the trusts of the deed have been fully performed, as is asserted, then the trustee must be taken, I presume, upon this record, to be possessed of the residue of the trust estate for the benefit of all the assignors; and, in that event, *Maitland* and the representatives of *Garden* are necessary parties (*a*). The rights of three, equally interested, are not to be determined in a suit against one. But, on the contrary, if *Auldjo* be entitled to the entire residue of the trust estate, as the bill alleges, the personal representative of *Garden* is of course an unnecessary party, and the bill must be dismissed as against *Maitland*. That fact however, has neither been admitted nor proved; and, as it cannot be assumed on the mere assertion of the plaintiff, it follows necessarily that the evidence, in that event, is materially defective.

Judgment.

Under such circumstances it would be competent to the court, beyond doubt, to dismiss this bill (*b*); and in some aspects of the case, looking at the nature of the plaintiff's claim, and the great laches of which he has been undoubtedly guilty, the defendants have strong grounds to call for such an order. Viewed in other respects, however, to which I shall presently advert, we have come to the conclusion that the dismissal of this bill would defeat the ends of justice, and the case must therefore stand over with liberty to the plaintiff either to amend by adding parties, or to supply those defects in the evidence which have been pointed out, as he may be advised (*c*).

(*a*) Osbourn v. Fallows, 1 R. & M. 741.
(*b*) Marten v. Whichelo, C. & P. 257; Simmons v. Simmons, 6 Hare 352.
(*c*) Chisholm v. Sheldon, ante vol. 1., p. 108.

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Finding it impossible to pronounce a final decree in the present state of the record, we should abstain, under ordinary circumstances, from further observation. But, considering the extent to which this suit has been already protracted, and the injurious consequences thereby entailed upon the defendants, it may be proper, perhaps, that we should express our present views upon some of the questions in the case, in the hope that these parties may be induced to settle the matter in controversy without further litigation.

With respect to the Kingston estate, the plaintiff does not ask to redeem that. The prayer in relation to that estate is, that the plaintiff be declared entitled to receive its value, either from *William Maitland* and *George Auldjo*, or from the said *James Lesslie*, at the time of the appropriation thereof by the trustees, or of the sale to *Ritter*. Now it is perfectly obvious, I think, that the plaintiff is not entitled to any part of that relief. The trust deed is not produced, but the bill states that it was an assignment subject to the plaintiff's right of redemption. It is alleged that the trustees sold, and affected to convey the estate to *Ritter* absolutely; but there is no foundation for that allegation. The conveyance from the trustees to *Ritter* is not an absolute conveyance, but an assignment subject to redemption. The instrument is cautiously worded. It recites the original mortgage, the transfer to the trustees, *and is, in express terms, subject to the plaintiff's equity of redemption.* It will not be denied, I presume, that these mortgagees had a perfect right to assign their security. Where is the principle, then, to justify such a decree as is asked by this bill? Nothing was done by the mortgagees to defeat the plaintiff's right to redeem *Ritter*. This relief, unless barred by the plaintiff's default, might have been enforced against *Ritter*. But no such relief has been asked, and *Ritter* is not even a party to this suit. This portion of the case, therefore, wholly fails.

Judgment.

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Then this being in effect a suit for partial redemption, the bill ought perhaps, in strictness, to be dismissed (*a*). It would be competent to the court however, I apprehend, and under the circumstances of this case that would, we think, be proper, to permit the plaintiff to redeem the residue of the estate, on payment of a proportionate part of the mortgage debt.

With respect to the Belleville estate, however, we think that redemption ought to be refused under the statute. The mortgage was executed in the month of March, 1821. The last instalment of the mortgage debt became payable in the month of November, 1822. A letter put in evidence by the plaintiff himself shews that payment was urgently demanded in 1827, the mortgagees being then involved in great pecuniary difficulties. Nothing effectual was done by the mortgagees towards realizing the mortgage debt until 1829, when the estate was sold to *Samson* for 400*l*. The deed then executed professes to convey the fee simple, and contains absolute covenants, but recites the state of the title correctly. *Samson* sold to *Henderson* in 1833, and in 1837 the defendant, *Elmere*, purchased *Henderson's* interest at sheriff's sale, and has ever since continued in possession, having made considerable improvements, and dealt with the property as absolute owner.

Judgment.

As might have been anticipated, there is great discrepancy in the evidence as to the value of this estate. All agree that the present value is from 1300*l*. to 1500*l*., but several witnesses on the part of the plaintiff state that it was of equal value at the time of the sale by the mortgagees. How an estate so circumstanced, in the town of Belleville, can have been of the same value in 1826 as at the present day, I am quite unable to understand. One witness on the part of the plaintiff, however, Mr. *Coleman*, then, and I

(*a*) Palmer v. Earl Carlisle, 1 S. S. 425.

believe now, the owner of the adjoining property, swears that the value in 1826 was 500*l.*, while very many witnesses for the defence have estimated it at 300*l.*; and we find that it was in fact sold by *Samson* several years later, (in 1833), upon credit, for 500*l.* Upon the whole, the evidence on this point, in my opinion, preponderates greatly in favor of the defendants.

This property, then, having been sold by the mortgagee in 1829, after great indulgence to the mortgagor, and at a fair price, for which he received credit—having since passed into the hands of several successive purchasers, who were permitted to deal with it as their absolute property until the filing of this bill in 1840, the plaintiff could not, I think, be permitted to redeem the Belleville estate, consistently with the judgment of the Privy Council in the case of *Smyth v. Simpson.*

The position of the Camden property, however, remains to be considered. Where several estates have been mortgaged to secure the same debt, although one or more of such estates, under existing circumstances, may have become irredeemable under the statute, the mortgagor, notwithstanding, may, we think, be entitled to redeem the residue in the absence of any specialty calling for a contrary determination. In this case we see no reason why the plaintiff should not be permitted to redeem the Camden estate, if he so desire, upon payment of a ratable part of the mortgage debt, proportioned to the value of that estate. Judgment.

But, although the ultimate determination of this court should be, that the Kingston and Belleville estates are irredeemable, still that determination may be found, as it seems to us, to entitle the plaintiff to equitable relief, different indeed from that specifically prayed by the bill and discussed in the argument,

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but hardly less important to the plaintiff's interests. The bill states that the mortgagees have commenced proceedings at law for the recovery of the mortgage debt, and prays that the action so commenced may be restrained. An injunction is prayed, but, as it would seem, predicated upon the right to redeem. The plaintiff's right to an injunction as the consequence of a successful claim by the defendants to retain the mortgage estates, was not, we think, discussed. But, if we refuse to permit the mortgagor to redeem, it would seem to follow that we ought to enjoin the mortgagees from suing for the mortgage debt. The mortgagees, calling for payment of the mortgage debt, cannot refuse to restore the pledge; and, *e converso*, if they insist that they have acquired an absolute property in the pledge, they cannot be permitted to sue for the debt (*a*).

Judgment.

But, although that were otherwise, it is difficult to understand how the original mortgagees can have any right to sue now in respect of this mortgage debt, for their own benefit; at least, how they can have such right beyond a sum bearing to the entire mortgage debt the same proportion that the Camden estate bears to the entire mortgage estate. When the mortgagees conveyed the Kingston estate to *Ritter*, subject to the equity of redemption of the mortgagor, the assignment of that portion of the mortgage security—laying out of view for the moment the prior sale of the Belleville estate—had the effect, I apprehend, of transferring a portion of the mortgage debt proportioned to the value of the Kingston estate, and, in that proportion, entitled the assignee to the benefit of all attendant securities (*b*). To this extent, therefore, the beneficial interests in the covenant would be in *Ritter*, and not in the mortgagees.

(*a*) Lockhart v. Hardy, 9 Beav. 349.
(*b*) Dutchess of Bucclengh v. Hoare, 4 Mad. 477; Duffield v. Elwes, 1 Bligh. N. S. 438; Coote, 301.

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Without considering whether the purchaser of the Belleville estate acquired any greater interest, owing either to the form of his conveyance or the priority of his assignment—without entering into that question (*a*), the conveyance to *Samson* must have had the effect, I think, of giving him, and consequently those claiming under him, an interest in the mortgage debt and attendant securities, at least proportioned to the value of the Belleville estate.

Now it is apprehended that the Kingston and Belleville estate constitute twenty-nine-thirtieths of the whole mortgage security, and, if the view of the law which has been suggested be correct, it follows that to the same extent the mortgage debt and the beneficial interest in the covenant has been transferred to the holders of these estates, and the action of the plaintiff-at-law, confessedly instituted for his own benefit, ought therefore to be enjoined.

Judgment.

Upper Canada College v. Jackson.

Agency—Fraud—Setting aside contract for purchase of land.

One *H.*, a clerk in the office of the Bursar of King's College, (where all the business connected with the sale of the lands of Upper Canada College was transacted), procured a contract to be executed by the University for the sale of certain of such lands to *J.* The defendants alleged that *H.* had acted as *J.'s* agent in the matter, but the court was satisfied that *J.'s* name had been used by *H.* for his own benefit, and that the contract was in breach of *H.'s* duty as such clerk as aforesaid, and therefore ordered the contract to be rescinded with costs.

January 13, 14, and June 9th.

The leading facts of this case are fully set forth in the judgment.

Mr. *Cameron*, Q. C., and Dr. *Connor*, Q. C., for the plaintiffs.

Argument.

Mr. *Turner* and Mr. *Roaf* for the defendants.

(*a*) Hartly v. O'Flaherty, 1 Lloyd & Goold, tem. Plunket, 216, ; Hamelton v. Royse, 2 S. & L. 327 ; Barnes v. Racster, 1 Y. & C. C. C. 401 ; Bugden v. Bignold, 2 Y. & C. C. C. 377.

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For the plaintiffs, it was contended that, independently of any fraudulent contrivance shewn to have been practiced by the defendants, the position *Hawkins* occupied in the College was such as, on the grounds of public policy, to avoid any contract entered into by the College for his benefit, or through his agency for the benefit of *Jackson*, unless concurred in by the council after a full and fair disclosure of the facts.

Argument.

For the defendants, it was urged that, if any fraud did exist in the transaction, it was of a purely technical character, and that under these circumstances, it was the duty of the College to have taken measures promptly for the purpose of setting aside the contract which had been executed; and that the laches of the plaintiff's disentitled them to the relief sought.

In addition to the cases referred to in the judgment, counsel cited and commented on *Charter v. Terevelyan* (*a*); *Barker v Greenwood* (*b*); *Mulhollen v. Marum* (*c*); *Woodhouse v. Meredith* (*d*); *Saunderson v. Walker* (*e*); *Lowther v. Lowther* (*f*).

June 9.

The judgment of the Court was now delivered by

Judgment.

THE CHANCELLOR.—In the year 1843, all lands belonging to the "Principal, masters and scholars of Upper Canada College and Royal Grammar School," —the plaintiff's in this suit—were vested in the then University of King's College, to which corporation the management of the endowment had been confided. On the 17th of October in that year a contract was executed by the University of King's College for the sale of the premises in question in this cause—being a portion of the endowment of Upper Canada College—to the defendant *Jackson*, which contract it is the object of this suit to have rescined.

(*a*) 11 Clk & F. 714. (*b*) 2 Y. & C. 414. (*c*) 3 D. & W. 317.
(*d*) 1 Jac. & W. 204 (*e*) 13 Ves. 601. (*f*) Ib. 95.

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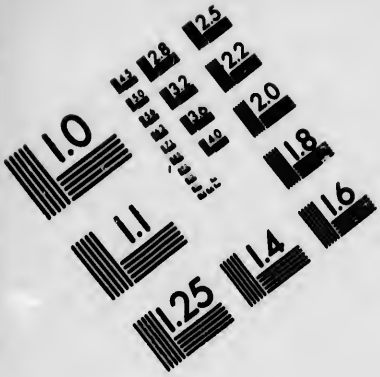
The bill states that at the period in question all business connected with the sale of their lands was transacted in the office of the Bursar of the University, subject to the control of the council: that the defendant *Henry Hawkins* was chief clerk in the Bursar's Office, "and as such, was in the habit of seeing persons coming to the said office to make enquiries and applications for the purchase of the said lands, and of holding communication with them, and was in fact the principal person who saw such applicants and replied to them:" "that the said *Hawkins*, so being such chief clerk as aforesaid, conceived the improper and fraudulent design of trafficking in the lands of his said employers for his own private benefit and advantage, and did, in pursuance of his said design, improperly and fraudulently procure several contracts to himself and others, who were covertly trustees for him, for the sale of various portions of the said lands: that *Hawkins*, from his position in the Bursar's office, had become acquainted with the premises now in question, and, with intent to carry out his said design, and to commit a fraud upon his said employers, and to procure the said lot at a gross undervalue for his own benefit, *did fraudulently, and contrary to his duty as a clerk in the said office*, procure the corporate seal of the said University to be affixed to the contract for the sale of the said lot to the defendant, *Andrew Jackson*, at the price of 32*s.* 6*d.* per acre;" and "*that the said Hawkins merely made use of Jackson's name to cover his said fraud, and that Jackson is merely a trustee for the said Hawkins, and has no interest in the contract.*"

Judgment.

I have adverted particularly to the statements of the bill, in this aspect, because, if I understood the argument correctly, it was contended that the plaintiffs had not, in the pleadings, objected to the contract on the ground of the defendant's agency, but had confined themselves to the specific case of posi-



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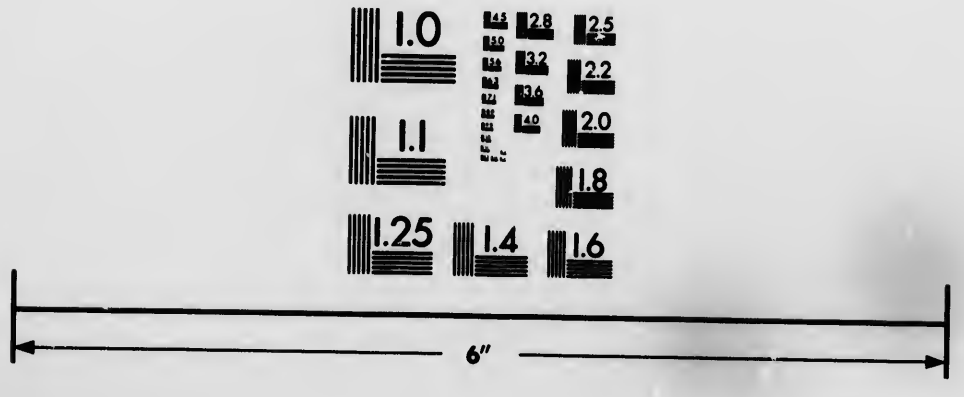

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tive fraud and concealment in relation to the *Grahams*. It is obvious, however, as it seems to me, from the passages which I have extracted, that there is no foundation for that argument.

The case is presented by the bill in other and somewhat different aspects. *Hawkins* is charged with positive fraud in having concealed from the University the condition and value of the property in question, as well as the offers of purchase made by the occupants of the land and others in their behalf. And it is further submitted that *Jackson*, though he should prove to have been a *bona fide* applicant, cannot claim the benefit of this contract, as the principle which precludes *Hawkins* from becoming himself a purchaser equally incapacitates him from being the agent of another for that purpose. The prayer is that the contract may be delivered up to be cancelled.

Judgment.

Upon the argument it was contended, for the defendants, that the proper conclusion of fact from all the evidence was, that *Jackson*, having a sum of money at his disposal, had applied to *Hawkins* to invest the amount in the purcase of lands belonging to the University of King's College, or subject to their control: that the contract in question in this clause had been entered into, through the agency of *Hawkins* indeed, but, at the request and for the benefit of *Jackson*, who remained exclusively entitled thereunder until the month of November, 1850, when he assigned his interest to the defendant, *Hawkins*, for the sum of 129*l*. It was argued that *Hawkins* was not the agent of the University in any sense which incapacitated him from purchasing himself, or from becoming the agent of another for that purpose; inasmuch as, although he had been the chief clerk in the bursar's office, and discharged the duties attributed to him in the bill, he never had authority to fix the price to be paid for lands sold, that question having been at all times reserved for the determination

either of the bursar himself or of the council of the University. And it was argued lastly, that the evidence had wholly failed to establish the positive fraud imputed to *Hawkins*.

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The only questions in this case which admit of argument arise upon the evidence; for it cannot be necessary, at this day, to cite authority for a proposition so well established and so consonant with reason as this, that an agent cannot himself become the purchaser of that which he has been entrusted to sell, without the express sanction of his employers (*a*). And it is equally well settled that the principle upon which that proposition rests is one of preventive, not remedial justice; which operates, therefore, however fair such sail may have been,—however free from every taint of moral wrong. Since *Fox v. Mackreth* (*b*), the law has been so laid down repeatedly by the most eminent judges. The language of *Sir Edward Sugden*, in a recent case (*c*), cited in argument, is peculiarly pertinent. "It is perfectly well settled," he observes, "that it is not necessary to prove undervalue. A principal selling to his agent is entitled to set aside the sale upon equitable principles, whatever may have been the price obtained for the property." And again: "*The moment it appears in a transaction between principal and agent that there has been any underhand dealing by the agent—that he has made use of another person's name as the purchaser's instead of his own—however fair the transaction may be in other respects, from that moment it has no validity in equity.*"

Judgment.

That this rule applies to such an agent as *Hawkins* is shewn to have been, does not, I think, admit of doubt. It may be true that the ultimate step in the transaction—the execution of the contract—did not

(*a*) Arthurton v. Dalley, ante vol. 2, p. 1. (*b*) 2 B. C. C. 400.
(*c*) Murphy v. O'Shea, 2 Jones & La. 422.

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rest with him; and he swears that he had not authority to fix, and, in point of fact, did not fix, the price to be paid; but he was placed in a situation of great confidence, in which, though not instructed to fix the price, the power to purchase for himself or for others was quite incompatible with his duty to his employers. There was nothing in the nature of his employment to absolve him from the duty imposed upon agents generally—the duty of obtaining for his employers the best possible price for the property entrusted to his care, and of making all the information within his reach available to that end. To satisfy ourselves that this sort of agency is liable to the abuses intended to be prevented by the rule, it is only necessary to glance at the evidence in the case now before us. It is sworn that Mr. *Hawkins*, knowing this land to be of peculiar value, and after various propositions for the purchase of it had been made to him as the agent of the University, suppressed those facts and became himself the purchaser in the name of a third party, at an undervalue. Now, without enquiring at present whether those allegations have been sufficiently proved, this much, at least must be admitted, that such a state of things was possible: and does not the admission prove that in the position which *Hawkins* actually occupied, the right to purchase contended for, would have been as incompatible with his duty to his employers as though he had been authorized to fix the price and seal the contract? But, if the principle be applicable and the necessity for its application apparent, it is our obvious duty to extend instead of restricting it—to apply it to every case fairly within its reach, instead of limiting it in the way contended for in the argument.

Judgment

The only difficulties then, in this case, arise upon the evidence. The question of fact principally discussed —namely, who was the real purchaser, *Jackson* or

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Hawkins,—is, for the plaintiffs, one of difficult solution. All knowledge with respect to such questions is confined, for the most part, within the breasts of the parties immediately concerned; and the testimony of those who combine for such a purpose must always be regarded with some suspicion. In this case the defendants, after they had answered the bill, were examined before us *viva voce*, under the practice recently adopted in this court, and their examinations, which have been put in evidence by the plaintiff, seem to me to have thrown much light upon several matters, which, from the nature of the case, must otherwise have been involved in considerable obscurity. For, while the defendants have had a full opportunity of stating all parts of the transaction, and of placing them in the point of view most favorable to their own interests, the *viva voce* examination has enabled the plaintiffs to drag into light many things, which, under the former practice, would have remained forever undisclosed.

Judgment.

Jackson represents, as I before stated, that having about 150*l.* at his disposal, he authorized *Hawkins* to invest the amount in the purchase of University property; that the contract in question was entered into for his benefit, in pursuance of that authority, and that his interest thereunder continued until he sold to *Hawkins* in Nov., 1850, for 129*l.*

This statement is corroborated by *Hawkins*.

Now, first, with respect to the authority to purchase, the evidence was vague and unsatisfactory. The authority was verbal merely—had reference to no specified land, but left everything, as to price, quality, and situation, in the discretion of *Hawkins*. In that commission *Jackson* certainly reposed a very large, though, perhaps, not an unprecedented degree of confidence in his agent; but under the circumstances, and having reference to the allegations

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in the bill, the enquiry was naturally suggested whether *Hawkins* had a general authority to purchase University lands, in the name of *Jackson*, but for his own benefit. Such a general authority, if admitted, would have tended obviously to strengthen very much the plaintiff's case. *Jackson*, however, at first denied the existence of any such general authority. He said, moreover, "*I never had knowledge of any other sale, or executed a contract for the purchase from the College of any other lot.*" But upon having two further contracts placed in his hands, he admitted that they bore his signature, and offered this explanation of his previous testimony—"I had forgotten them. I cannot say under what circumstances I signed them. I never purchased from the College either of the lots mentioned in those papers, or authorized their purchase. No advances were made in respect of those lots. They were never brought into account between *Hawkins* and myself. I never made enquiry respecting them. In reference to the two lots mentioned in deeds B. & C., the purchase was for *Hawkins*' benefit; at least I judge so." And being further pressed, he admits, "*I agreed to let Mr. Hawkins use my name in the purchase of land from the College for himself;*" and in answer to a question from the Court, he says, "*I agreed before I left England that Mr. Hawkins might use my name in the purchase of College lots.*"

Judgment.

Mr. *Hawkins*, when interrogated upon this subject, says, "*I had no general authority from Jackson to purchase lands from King's College, either for him, or in his name for my benefit,*" and to this statement he constantly adhered.

The evidence of these gentlemen is quite irreconcileable. But it is not to be doubted, I think, that this testimony, however conflicting, establishes conclusively the allegation, "that *Hawkins* had general permission to make use of *Jackson's* name in the

purchase of College lands for his own benefit." And, while the fact so established strengthens materially the plaintiff's case, the great and unexplained discrepancy in the evidence of these gentleman, upon this fundamental fact, is calculated to shake very much our confidence in their general testimony. It is an observable fact, too, that while the contract at present in question was executed on the 17th day of October, in the year 1843, those others, to which I have been adverting, bear date respectively on the 1st of October and the 28th of December in the same year. The defendants, therefore, undertake to prove that this intermediate transaction was a *bona fide* purchase for the benefit of *Jackson*, although those other contracts, the one which preceded, and the one which followed it, are admitted, or proved, to have been fraudulent and void as against the College, having been entered into, with *Jackson* nominally, but in reality for the benefit of *Hawkins*. Now, without denying its possibility, the extreme difficulty of the task undertaken by the defendants will not, I think, be questioned. If this sale can be sustained in favor of the agent against his principal, under such circumstances, it must be upon the clearest and most conclusive testimony. The reality of the sale to *Jackson* must be established beyond all doubt.

Judgment.

Looking at the evidence, then, with a view to that question, the first enquiry which naturally suggests itself is as to the payment of the purchase money. *Jackson* being interrogated upon this point says, "*on the contract of sale being executed, I paid Hawkins* 30*l.* *as the first instalment on the land;* it included some interest. I do not know how much was to be paid down under the contract to the College. I have forgotten. *Hawkins handed me a receipt from Dr. Boys for the money I paid Hawkins on the issuing of the contract; it is among my papers.* * * * I.

1852. made another payment on the land—I do not know how much I paid altogether. I kept no account. I think the second payment was a long time after. *I paid it to Hawkins at his own house and got a College receipt.*" Now, it may be safely asserted, I think, without straining the evidence against this witness, that if in point of fact nothing was ever paid by *Jackson* upon this contract—if all sums received by the College were paid by *Hawkins* himself from his own moneys, then the above statements must be wholly inconsistent with the truth. The enquiry would have been under any circumstances important; but, considering that *Jackson* had represented the application to *Hawkins* as having originated in the desire to invest a sum of 150*l.*, then at his disposal, the payment of the purchase money by *Hawkins*, under such circumstances, would have been, undoubtedly, very difficult of explanation. This no doubt was felt, and the evidence was intended to obviate the difficulty. It imports a payment by *Jackson*—and, having watched the witness closely, I must add that, in my opinion, he intended to convey that impression. But on being asked where he had procured the money, and whether *Hawkins* had not advanced it, he objected "that it is not a fair question whether he got the money from *Hawkins*," and being pressed and told that the question must be answered, he proceeds—"*part* of the moneys I paid was advanced by *Hawkins*. The *whole* of the 30*l.* was advanced by him, *and the whole of the subsequent payment also.*" *Jackson* then, in point of fact, paid no part of the purchase money due under this contract, and, conscious of that fact, designedly suppressed, if he did not wilfully misrepresent, the truth.

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Judgment.

The next portion of the evidence to which I desire particularly to advert, has reference to the possession of the contract of sale. It must be borne in mind,

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that the plaintiffs charge their agent, *Hawkins*, with having purchased this property for his own benefit, in the name of *Jackson*. Now, the retention of the contract of sale by *Hawkins* would have had an obvious tendency to establish the collusion charged by the bill; and when Mr. *Hawkins* is interrogated upon the subject he makes the following statement, for the purpose, I presume, of repelling any such inference. "*Mr. Jackson got the contract of sale when it was signed. He had it the whole time, except when a party came to me to buy. I got it shortly before November last, and have had it since.*"

Jackson having been asked a similar question gives this account of the matter—"I received the contract from *Hawkins* by appointment at his own house, on the day it bears date. *I left it with him. I let it remain with him for that winter.* I think that it was in 1844 I found that there would be trouble about it. I learned this from *Hawkins*. He said the persons in possession, *Grahams*, were violent characters, and would resist the College and everybody. I knew that there were charges against *Hawkins* himself. *I think it was in the winter* 1844 *that he gave me the contract. I think that it was at his suggestion that it was placed in my possession. He said that it was better that I should have it. He gave no reason.*" And further on he says, "I saw the *lease* at *Hawkins'* house. I never had it in my possession. *I may have had the contract of sale in my possession for a day. I always allowed him to have it. I never asked him to let me have it.*"

Judgment.

Here again the statements of these witnesses, upon a most material point, are totally at variance. What is the truth? *Jackson's* statement is circumstantial; and, judging from the passage itself, as well as from the other parts of the testimony of both defendants, I have no doubt of the truth of his account. Then, did *Hawkins* forget the facts? Looking at the diffi-

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culties in which he was involved shortly after the execution of this contract, arising out of this and other transactions of a similar kind, I am unable to draw that conclusion. If designedly false the defence can hardly prevail.

I omit many particulars in the transactions of these gentlemen which were very properly discussed at considerable length upon the argument, and which, had the other evidence been less distinct, would have called for special consideration. Throughout the whole of this transaction, *Hawkins* acts, to all appearance, as the absolute proprietor of this property. He directs the legal proceedings—he proposes compromises—he offers to sell,—nay, even to exchange the estate; and all this quite irrespective of his supposed principal.

Judgment.

But, passing by those parts of the evidence, I come to the sale of *Jackson's* interest to *Hawkins*, which is said to have taken place in the month of November, 1850. Now, considering the fraud imputed to *Hawkins* in relation to this matter—keeping in view all that had arisen prior to this sale, it would not have been too much, perhaps, to have required this last step in the transaction to have been established upon the most irrefragable testimony. Thus much, however, may be affirmed, I think, with certainty, that if, under the peculiar circumstances, this had been a *bona fide* sale, and not a merely collusive proceeding, these gentlemen would have been able to have furnished us with a clear, consistent statement of the material facts with which it was attended. Every difficulty would have then received an instant explanation, not conjectural merely, but suggested by an intimate knowledge of the facts, and possessing, therefore, those characters of singleness, certainty and clearness which prove at once the truth of the fact, and the truth of the explanation. But the statements of these gentlemen agree in little be-

sides this, that no money passed upon the occasion of this supposed sale. Certain pieces of paper, indeed, which they called promissory notes were produced, and these constituted the sole evidence of consideration. This alone, perhaps, would have been fatal to *Hawkins'* claim as a *bona fide* purchaser for value. But, without relying upon that defect in the evidence, the numerous difficulties and inconsistencies in the statements of these gentlemen are wholly unexplained. *Jackson* swears that he had never seen the property in question, and that he was quite unacquainted with its value. *Hawkins* affirms that he was himself equally ignorant. Why this sale, if fair and honest, should have taken place under such unusual circumstances, has not been explained. *Jackson* swears that the consideration which he received was 95*l.* over and above a sum of 129*l.* already expended, while *Hawkins* asserts that the 75*l.* were included in the 129*l.* *Jackson* swears that he received three promissory notes.—*Hawkins* swears that he gave but two. *Jackson* swears that a promissory note for 12*l.*, dated some months prior to the sale, was wholly unconnected with it.—*Hawkins* swears that it formed part of the 75*l.*

Judgment.

But it would be tedious to observe upon all the minute inconsistencies in the evidence. I shall confine myself, therefore, to this single point—the value placed upon *Jackson's* interest, and the manner in which it had been estimated. *Jackson* had been examined closely upon this subject in the course of his evidence in chief, but had failed to give any satisfactory explanation; and, for the purpose, I presume, of clearing up the difficulty, a question was put by his own counsel at the close of his re-examination, in answer to which he gave the final account of the matter—"*Our estimate of what Hawkins should pay me was not based on the value of the land, but upon sums which I had advanced, and the trouble*

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and expense I had been put to about the land in journeying to and from Toronto. *Hawkins*, on the other hand, swears "*the 75l. was over and above everything; it was not on account of expenses or anything else;*" and on being interrogated as to *Jackson's* advances, he says "*Jackson* has occasionally lent me money. *I am not aware that these were taken into account in account K. I think they amounted to 8l. or 10l.*"

These gentlemen agree, indeed, as might have been anticipated, that the sum to be paid was 75*l.*, but in all other respects their evidence is totally at variance. Now it must be admitted, I think, that had this been a *bona fide* sale of an actual interest, their evidence, under the peculiar circumstances of this case, would have been, in this respect at least, consistent. Truth and reality must have produced coincidence of statement. And, *e converso*, the irreconcileable variance in their evidence demonstrates to my mind conclusively that the sale was unreal, and the narration a fiction.

Judgment.

Upon the whole, judging with the tenderness due to property, but with the firmness which the Court is bound to exercise, it would be mere affectation in me to say that I entertain any doubt as to the proper conclusion to be drawn from this evidence. I entertain no doubt that this contract, like the others, was entered into for the benefit of *Hawkins* himself.

Such being the conclusion at which we have arrived upon this branch of the case, it becomes immaterial to consider the other question discussed in the argument. I may state here, however, that having considered the case attentively in its other aspects, I am of opinion that the positive fraud with which *Hawkins* is charged has been satisfactorily established.

It was argued, however, that the plaintiffs had so acquiesced in this sale to *Hawkins*, and had been

guilty of such unreasonable delay as to have disentitled themselves to equitable relief. But whatever force there may be in the observation as applied to other branches of the case, it ceases obviously to have any application in the view we have taken of the facts. 1852. J. C. College v. Jackson.

Up to the moment of filing the bill, the deed was demanded in the most formal manner by *Jackson's* solicitor, and on his behalf. In their answers and subsequent examinations, both defendants repeatedly asserted upon oath that this was a sale to *Jackson*. It is plainly repugnant to reason to assert that the plaintiffs acquiesced in this as a sale to *Hawkins*, in the face of his uniform denial of that fact. And how could we refuse to relieve against the fraud of an agent on the ground of delay, when the fact upon which relief is decreed, being peculiarly within the knowledge of the agent, has been only established by the proofs in the cause, against his positive and solemn denial. Judgment

The plaintiffs are entitled to the relief they ask, with costs against both defendants. It must be referred to the Master to take an account of the sums paid by *Hawkins*, and on repayment of any balance that may remain after deducting the plaintiffs' costs, the contract must be delivered up to be cancelled.

DICKSON v. MCPHERSON.

Principal and Surety.

Where a surety covenanted to pay certain advances made by the creditors of the principal to him on a certain day, or so soon as certain timber should be sold at Quebec, and before the time appointed arrived and whilst the timber was being conveyed to Quebec, an agent of the creditors obtained from the principal debtor a confession of judgment, and sued out execution thereon, under which the timber in question was sold: *Held*, That this was such a dealing between the parties as discharged the surety from any further liability under the bond. January 30. February 3d, 6th, 10th & 12th, and June 18th.

This was a bill filed by *Andrew Dickson*, sheriff of the county of Lanark, against Messrs. *McPherson*,

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Crane & Co. to restrain the sale of the plaintiff's property, seized under an execution issued at the suit of Messrs. *McPherson, Crane & Co.* It appeared that *Dickson* had become bound, with his brother *William Dickson*, to pay *McPherson, Crane & Co.* certain advances to be made by them to *William Dickson*, for the purpose of getting out timber on the river Cologne, in one of the back settlements above Bytown. The covenant to pay the money was that the amount would be paid on the first of September, 1847, or so soon as the timber was sold at Quebec. On the arrival of the raft of timber at Bytown, *William Dickson* being in charge, it appeared that a large sum of money, (about 700*l.*) was due to the hands for wages, and that being out of supplies, application was made to one *Clemow*, agent of *McPherson, Crane & Co.* for an advance of money and provisions, but which he refused to make, as, owing to the price of timber at Quebec, it was evident the raft would not pay the sum already advanced. After some discussion, however, it was agreed that *Clemow* should advance money to pay one-third of the men's wages; and give goods for another third; and that *Dickson* should give his notes for the balance. A cognovit having been executed by *William Dickson* in favor of *McPherson, Crane & Co.* execution was issued thereon, and the sheriff seized and sold the timber by auction, on which occasion *McPherson, Crane & Co.* became the purchasers, at a sum exceeding the price afterwards realized by them for the same timber at Quebec. Upon these transactions a large balance remained due to *McPherson, Crane & Co.* from *William Dickson*, for the recovery of which they brought an action at law against *Andrew Dickson*, who then claimed to be free from any responsibility; first, on the ground that *Clemow*, in consideration of the cognovit being given by *William Dickson*, agreed to discharge *Andrew Dickson* from all further liability; and

Statement.

secondly, if that were not so, the dealings and transactions between the parties were such as to relieve him from all liability as surety. The Court of Queen's Bench decided against the latter defence; and, as to the former, said, if the [agreement as alleged were really made, it did not, under the circumstances, form any defence, the covenant to pay being absolute in its terms, and *Dickson's* redress was by action for damages; the court suggesting at the same time that these matters formed a fit subject for enquiry in a Court of Equity where they could be more fully entered into.*

Statement.

The case now came on for hearing in this court.

Mr. *Wilson*, Q. C., and Mr. *Turner* for the plaintiff.

Mr. *Philpotts* and Mr. *Mowat* for the defendants.

For the plaintiff—*Boultbee v. Stubbs* (*a*), *Bonser v. Cox* (*b*), *Willis v. Willis* (*c*), *Rees v. Berrington* (*d*), *Samuell v. Howarth* (*e*), *Calvert v. The London Dock Company* (*f*), *Bonar v. McDonald* (*g*), were cited and relied on.

Argument.

For the defendants—*Bell v. Banks* (*h*), *Cross v. Sprigg* (*i*), *Leeds v. Cheetham* (*j*), *Holtzapffel v. Baker* (*k*), *Williams v. Owen* (*l*), *Eyre v. Everett* (*m*), *Tyson Cox* (*n*), *Hall v. Hutchons* (*o*), *Lewis v. Jones* (*p*), *Story's* Eq. Jur. Ss. 885-7 and 894, were cited and commented upon.

THE CHANCELLOR.—This bill is filed by *Andrew Dickson* to be relieved from legal liability upon a

June 18th.

* See *McPherson v Dickson*. 8. U. C. Q. B. R. 44, in which report the facts of the case are more fully set forth.

(*a*) 18 Ves. 20.
(*b*) 4 Beav. 379
(*c*) 14 Jurist, 404.
(*d*) 2 Ves. Junr. 540
(*e*) 3 Mer. 272.
(*f*) 2 Keen. 638.
(*g*) Jur. 1077.
(*h*) 3 M. & G. 258.
(*i*) 6 Hare 552
(*j*) 1 Sim. 146.
(*k*) 18 Ves. 115.
(*l*) 13 Sim. 597.
(*m*) 2 Russ. 381.
(*n*) Tur. & R. 395.
(*o*) 3 M. & K. 426.
(*p*) 4 B. & C. 506.

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contract entered into by him as surety for *William Dickson*, his brother. This relief is claimed, first, on the foot of an express, though parol, contarct for his discharge, entered into by the defendants, upon sufficient consideration; secondly, as the result of certain dealings between the defendants and *William Dickson*, the principal debtor, without the plaintiff's knowledge or consent.

This relief is resisted on three distinct grounds. First, it is asserted that the plaintiff was a principal in this contract, and not a surety. Secondly, the express contract for his discharge, relied upon by the plaintiff, is wholly denied. And lastly, it is contended, that the dealings between the defendants and the principal debtor were not of a character to entitle the plaintiff to the relief he asks.

Judgment.

The first ground of defence fails, I think, upon the evidence. The sealed contract between these parties represents *Andrew Dickson* as a mere surety, and the whole instrument is framed accordingly. *William Dickson* swears that *Andrew* had no beneficial interest in the contract, and his evidence, it that respect, is corroborated by *Forbes*, who, from his connection with *Andrew*, would have been, it may be presumed, informed upon such a subject. Then this very important fact does not seem; so far as I can gather, to have been suggested upon the trial at *Nisi Prius:* on the contrary, these defendants, by their agents, appear throughout to have treated *Andrew Dickson* as mere surety. *Clemow* swears, "*Andrew Dickson* was, I think, the person principally benefitted by the sale; if this arrangement had not been made the men must have been paid in full, *and Andrew Dickson would have been a loser so much, being surety;* as it was, the men were paid in part, and *William Dickson* gave his notes for the balance, which the men accepted." I have extracted this passage from Mr. *Clemow's* evidence in

this cause. Again, Mr. *Lyon*, the solicitor of the defendants, and the person through whose agency the confession of judgment executed by *William Dickson* was obtained, says, "The opinion I gave as to *Andrew Dickson* not being discharged, was *that he was a surety, that his principal giving a confession was no more than his making an admission of the debt, and that which was being done was for the benefit of the surety.*" Lastly, those important transactions at Bytown of which Mr. *Lyon* speaks, which resulted in the absolute purchase of all this timber by the defendants, were carried on and conducted to their conclusion by *William Dickson* alone, without the least reference to *Andrew*, whom they would now represent as the real principal.

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The force of this train of evidence, beginning with the sealed contract, deliberately executed, and ending in those transactions at Bytown, is not, I think, to be denied; and against it I find nothing positive adduced execept the declaration of *Clemow*, "that *Andrew Dickson* seemed the principal person in the transaction;" and the statement of Mr. *Lyon*, "that the original contract was prepared under the direction of *Andrew*, with whom alone he had communication." But this evidence, loose and unsatisfactory at best, loses all force when read in connection with the other parts of their testimony to which I have adverted. Judgment.

It is argued, however, that the testimony of *William Dickson* is inconsistent with itself, and carries with it internal evidence of its untruth. In proof of this, his admissions, "that a great proportion of the moneys paid upon this contract, if not the whole, had been received by *Andrew*," and "that the accounts between them had not been finally adjusted," are pointed out and relied upon as inconsistent with the allegation that *Andrew* is a mere surety. I agree that the evidence of the witness is

1852. not altogether satisfactory, and there was something in his manner calculated to make an unfavorable impression; but upon this point the case does not by any means rest upon his testimony; and I find nothing in the inconsistencies pointed out, or in the other parts of his testimony, sufficient to warrant the conclusion which the defendants draw from them. Placed as *William Dickson* was, it would have been impossible, or at least, highly inconvenient for him to have received the moneys in person; and under the circumstances, I know of nothing more natural than the appointment of *Andrew* for the purpose. It might have been argued, with as much force, that *Forbes* was a principal contractor, because he received the provisions; but, obviously, there would have been no foundation for any such conclusion.

Judgment. Then, the accounts between *Andrew and William* do not seem to me to have been unsettled in a sense to justify the argument which the defendants found upon that fact. That they had not been formally adjusted is sufficiently clear, but *William* swears that all the money received on his account was applied to his use, and every day's experience teaches us that persons less closely connected than these parties frequently rest satisfied with such a general impression, without requiring any formal settlement. But, allowing that the accounts remained unsettled in the sense contended for, that fact seems to me to furnish an argument against the inference deduced from it by the defendants. *William Dickson* has been subjected, confessedly, to severe loss and inconvenience, in consequence of the failure to fulfil the contract. His liability to the defendants is large, in addition to the promissory notes given to the raftsmen, upon several of which he would seem to have been at different times arrested. Now, had *Andrew Dickson* been the real principal in the transaction, it is hardly possible to conceive why *William*

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Dickson should not have insisted upon a settlement of the accounts, and indemnity from his principal.

But, although the evidence could be shewn to preponderate against the plaintiff as much as it seems to me to incline in his favor, we could not, I think, have drawn the conclusion contended for by the defendants under present circumstances, without endangering general principles upon which the security of all contracts depends. The agreement between these parties is stated in a solemn instrument under their hands and seals; and, to the statement there found, all their subsequent dealings in relation to the matter in question have been conformable. The proposition, then, advanced by these defendants, is, that the real contract between these parties was something wholly different from that deliberately stated and repeatedly recognized. Now, the respect due to written contracts regularly proved and long acted on requires, not only that such a case should be established upon the clearest proof, but that all the evidence material to its determination, and within reach, should be produced by those on whose behalf such a proposition is advanced. But it is abundantly evident that, under the peculiar circumstances of this case, the testimony of *Andrew Dickson* would have been extremely important. His evidence could not have been received on his own behalf, but the defendants might have examined him. They have chosen however to refrain, whilst they ask us to determine against the written contract, upon evidence the most loose and unsatisfactory. That is a course which we could not, in my judgment, safely adopt; and I am therefore of opinion that the first ground of defence has not been established.

Judgment

The second objection, so far as it depends upon the question of fact, is much more difficult of solution (*a*). *William Dickson* swears very positively to

(*a*) Blake v. Whyte, 2 Y. & C. 425.

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an express agreement for the discharge of his surety, in consideration of the execution of himself of the confession of judgment mentioned by Mr. *Lyon*. There is certainly nothing improbable in his statement; on the contrary—weighing the probable reasons on both sides—the preponderance will be found, perhaps, to be in favor of his evidence. Taking *Andrew Dickson* to have been a surety merely—and, for the reasons already assigned, that is, in my opinion, his true character—it would have been highly unreasonable in *William Dickson* to have taken so decisive a step, in the absence of his surety, and without having provided for his discharge. On the contrary, if he were the real principal, such a course would admit still less of explanation. Reasons were not wanting, either, to induce the creditors to concede that which it was so natural that the debtor should demand. It is plain, from the evidence of Mr. *Lyon*—indeed from the whole testimony—that they felt themselves to be in a position of some difficulty; and the sufficiency of the surety was, certainly, considered questionable. Then the evidence of this witness, probable in itself is corroborated in several particulars, more or less material, by *Forbes*, *Murphy* and *Hyde*.

Judgment.

On the other hand, *Clemow* swears with equal clearness, that no such agreement was come to; and his statement is greatly strengthened by the evidence of Mr. *Lyon*. Had it been necessary for us to determine this question, some further proceedings must probably have been directed in this conflict of evidence; but as the facts, either admitted or established, are sufficient, in our opinion, for the decision of the case, irrespective of this agreement, further consideration of that point becomes unnecessary.

Before proceeding to enquire into the transactions at Bytown, or to consider their effect upon the liability of the plaintiff, it will be convenient to examine

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the general nature, as well as some of the particular provisions of the contract upon which the question arises. The deed is made between *William Dickson* of the same place, of the first part, *Andrew Dickson* of the same place, of the second part, "*and surety for the said party of the first part*" and the defendants of the third part. It recites, "Whereas the said *William Dickson* hath been engaged in the lumbering trade, and is desirous of continuing the said business and operations therein, and for such purposes will require certain *advances* hereinafter mentioned to carry on the same, to secure the payment of which he hath agreed to transfer the timber therewith manufactured." In accordance with this recital, the party of the first part, *William Dickson*, bargains, sells and assigns to the parties of the third part all the timber manufactured or to be manufactured upon his limits, with a proviso for redemption upon repayment of all advances already made or to be made under the deed. Then follow covenants by the party of the first part and his surety for the repayment of advances and commission. Such is the general nature and frame of the deed.

Judgment.

With respect to the particular provisions material to be considered, it was plainly the intention of these parties, as it seems to me, that this timber should be conveyed to the Quebec market. *William Dickson* assigns it to the defendants, and authorizes them to take possession whenever they may desire; he covenants to convey it to the *port of Quebec* for the said parties of the third part, *and there* to deliver it to them, without any let, suit or denial. And this deed empowers the defendants to sell and dispose of it *in the Quebec market* to any person or persons willing to become the purchasers thereof, at such rates as can be obtained therefor. From these and other passages in this deed, I have no doubt that the agreement between these parties was, that the timber

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should be taken to Quebec, and there sold, so as, if possible, to realize the advances before the 1st of September.

It is argued, however, that the construction of this agreement must be the same here, and at law: and, as the Court of Queen's Bench has already determined that the covenant for the repayment of advances is independent of the covenant for the conveyance of the lumber to Quebec and the sale of it in that market, that decision, it is contended, is conclusive against the equity set up by this bill.

I quite concur in the judgment of the Court of Queen's Bench, that these covenants are independent; but that determination has no bearing upon the question at present under consideration. It would be obviously absurd to argue, that, because the covenants are independent, therefore, one or other of these must cease to constitute part of the contract. The covenant for the conveyance of the lumber to Quebec, and its sale there, is not the less a part of the agreement, because it is independent of the covenant for the repayment of advances. No such point was determined by the Court of Queen's Bench. On the contrary, the learned Chief Justice upon the first trial, and the court, in disposing of a subsequent motion, seem to have intimated a doubt of the plaintiff's right to recover, because they had not averred a sale at Quebec, and to have suggested an amendment of the pleadings in that respect (*a*). And Mr. Justice *Burns* in the course of his argument upon the motion for judgment *non obstante veredicto*, is very explicit upon this point. "I think it was in the contemplation of all parties," he says, "that the timber should be disposed of in the Quebec market; and it is but fair to the defendant to suppose *that such circumstances perhaps was the chief consideration*

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(*a*) 5 Q. B. 478, 481.

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with him in becoming security; for he might have been willing to become his security, knowing the timber was to be disposed of in a particular market, and to be disposed of by the plaintiffs themselves, when he would not under other circumstances have been security."

I am of opinion, further, that the defendants agreed to give credit to *William Dickson* for the advances to be made until the 1st of September, unless the lumber should have been sooner disposed of in the manner provided by the deed. This construction of this instrument, considered apart from the last proviso, is, I apprehend, free from all doubt. It recites, *William Dickson's* appplication for advances to enable him to carry on his business as lumberman, and the agreement of the defendants to supply money and provisions, in certain specified proportions, to be secured upon the lumber manufactured under the agreement. Then follows an assignment to the defendants of all the lumber to be manufactured on *William Dickson's* limits, upon a condition, however, which is thus expressed in the proviso, "Provided always, that if the said party of the first part do and shall, *on or before the first day of September now next ensuing, if the said timber be not before then sold and disposed of at Quebec;* but if the said timber be sooner sold, then, if the said party of the first part, do and shall, on the sale thereof, well and truly pay to the said parties of the third part &c., all and every such sum and sums of money which now are and shall or may become due and owing from him to them, for goods, provisions, produce and cash, which they now have, *and shall or may advance to him, during the fall, ensuing winter and spring and summer, under the covenants, provisions and agreements hereinafter contained or otherwise;* and also do and shall upon the sale of the said timber, pay to the said parties of the third part, a commission of five per centum on the amount for which said timber may sell, for their trouble and

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expenses respecting the said timber, and the sale thereof; and also do and shall in all things observe and perform the covenants hereinafter on their part to be observed and performed, then these presents shall become void."

Then, after stipulations which bind *William Dickson* to manufacture a certain quantity of lumber, and to convey the same to the *port of Quebec and there* safely deliver it to the defendants, and after a power to them "to sell and dispose thereof in the Quebec market," follows the covenant for repayment, which is in these words,—"the parties of the first and second parts covenant, promise and agree to, and with the said parties of the third part, that the said party of the first part shall and will, at the times and manner limited and appointed therefor, and in the within proviso mentioned, well and truly pay to the said parties of the third part all and every or any sum and sums of money which now are and shall become due and owing and payable from the said party of the first part to them, for cash, goods, provisions and produce advanced and to be advanced by them to him, under the covenant hereinafter contained."

Judgment

The covenant entered into by the defendants is as follows:—The parties of the third part covenant with the party of the first part, "that the said party of the first part, observing the several covenants on his part to be observed from time to time, they, the said parties of the third part, shall and will from time to time—in proportion as the said party of the first part progresses in the manufacture of the said timber, rafting and conveyance thereof to market—advance to, furnish and supply him with goods, provisions and produce to the amount of 600*l.*, and in cash to the amount of 600*l.*"

Had there been nothing further in the contract, it

would have been plain, I presume, beyond question, no less from the general nature of the agreement, than from its express stipulations, that the defendants had agreed to give *William Dickson* credit for the advances made, and to be made, until the first of September ensuing the date of the contract, unless the timber should have been sooner sold under its provisions. And it is equally plain that the plaintiff's contract, as surety, would have been for the repayment of advances made in accordance with that stipulation.

It is contended, however, that the last clause in this agreement has a material effect upon the construction of the previous covenants to which I have just adverted. It is in these words—"Provided always that if the said parties of the first and second parts shall and will, (if required so to do), at each or only time of requiring or receiving said advances, and any part or parts thereof, give and grant to the said parties of the third part their acceptances or promissory notes for such portion and portions as shall be from time to time required and advanced, and payable at such date or dates, time or times and places which the said parties of the third part may require; and also, that if and after they shall have sold and received the proceeds of said timber at Quebec, that they shall pay to the said party of the first part the balance which may be over, after deducting and paying the amount of advances, commission and other charges which the said timber may be subject to in the said port, and for men's wages and other expenses attending the said timber." The argument upon this clause is, that it clearly negatives the intention expressed in the other parts of the deed, that the advances to *William Dickson* should be upon credit—inasmuch as he thereby covenants to grant the defendants his promissory note for each advance, payable at such time as they may require.

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I dissent, on several grounds, from this conclusion. In the first place, I would observe, that the passage as it stands is obviously incomplete and insensible. It provides "that if" the parties of the first and second parts shall give their acceptances &c. But the consequence intended to follow from that state of things is not declared; and I know of no principle upon which the plaintiff can be held to have covenanted to do that which is merely surmised in the deed as a possible event.

But, assume that this clause is to be read as a covenant on the part of the plaintiff to grant his promissory notes in the way provided for, still it cannot be construed, I think, as controlling the previous covenants in the way contended for. The right to call for a negotiable security upon each advance from *William Dickson* and his surety, might be a matter of great importance to the defendants in enabling them to procure the necessary funds. But such a covenant is quite compatible with the stipulation that *Dickson* should not be bound to repay the advances until the first of September, or the sale of the timber, whichever should first happen; and that, in my opinion, is all that the parties can be held to have intended. The contrary construction, indeed, would be subversive of the entire agreement. *William Dickson* requires certain advances to enable him to manufacture and bring to market his timber. The defendants agree to make these advances, to be repaid upon the first of September then next, or upon the sale of the lumber. Now, if the last proviso is to be construed as authorizing the defendants to demand repayment of every advance at the very moment of its being made, that is a construction not only repugnant to the nature and spirit of the agreement, but clearly subversive of all its previous provisions.

Judgment.

But, placing upon this clause the construction most

favorable for the defendants, it is still a merely conditional agreement. The plaintiff and *William Dickson* covenant to grant their promissory notes, at the time of each advance, if required. Now for a considerable portion of these advances, amounting, if I understand *Clemow's* evidence correctly (*a*), to 996*l.*; promissory notes were neither required, nor given; to that extent, therefore, at the least, this debt was secured by the covenant only, and was not payable until the expiration of the stipulated credit.

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Passing, then, from the construction of this agreement to the dealings, upon which the plaintiff relies as entitling him to be discharged, I do not find that these transactions, so far as they are material to this question before us, are open to any, at least to any serious, doubt. It is admitted that on the 27th of July, before the timber had been conveyed to Quebec, and while it was still unsold *William Dickson* executed a confession of judgment in favour of the defendants for the whole sum then advanced, and that judgment was entered up, and execution issued on the same day. There is considerable contrariety in the evidence as to the *motives* by which these parties, *William Dickson* and the defendant's agent, were actuated in taking these steps; and, in the argument, much was said upon that point, as well as upon the *effect* of their transactions upon the plaintiff's interest. Neither of these points is material, in my opinion, to the question before us. Whatever may have been the motives by which these parties were actuated, and with whatever consequences their acts may have been attended, this confession of judgment was executed by *William Dickson*, and accepted by the defendants, without the concurrence of the plaintiff.

Judgment.

It is admitted further, that upon the sheriff's sale,

(*a*) See Clemow's evidence at law, put in by consent.

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which took place shortly afterwards, the defendants became the purchasers of the entire raft at 2151*l.* 19*s.* 9*d.* A question is made, indeed, whether this was a *bona fide* sale, or mere matter of arrangement to get rid of the raftsmen. I entertain no doubt, from the whole evidence, that it was the object of the defendants to acquire the absolute property, as well as to obtain exclusive possession of the raft, and I am satisfied that the course pursued was adopted for both purposes. Upon this point the testimony of Mr. *Lyon* would seem almost conclusive. He says "I was present at the sheriff's sale. *I bid at the request of Clemow a price which I thought was as much as it was worth at Bytown.* He bid a higher price, *and I thought he was foolish in bidding so high*, judging from what I believed to be the Quebec price, *and I told him so.*" This evidence is obviously inconsistent with the notion that this was a sham sale. Had it been a merely collusive proceeding, devised for the sole purpose of getting rid of the raftsmen, and not intended to transfer the property in the timber to the defendants, the remonstrance addressed by *Lyon* to *Clemow* would have been meaningless; because the amount bid would, upon that hypothesis, have been mere matter of form. But ignorance of the real nature of this transaction is not to be presumed, indeed was hardly possible, considering that these gentlemen were the confidential agents by whom this whole scheme had been devised, and through whom it was managed. Then, the subsequent conduct of both parties is inconsistent with any other hypothesis than that this was an actual sale. Upon its completion *William Dickson* prepares to return to the woods, and takes no further part, so far as I can discover, in the management of the property. On the other hand, the timber is delivered to the *defendants; they* convey it to Quebec, where it remains under their exclusive control for a period of two

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years, when it is said to have been sold under their instructions.

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It has not been established, I think, that the plaintiff either originally assented to, or subsequently sanctioned, these arrangements. The evidence of *Clemow* is the only direct testimony in favour of the contrary conclusion. "I saw *Andrew Dickson*," he says, "a few days before the arrival of the lumber at Bytown, and before the confession was given. *I suggested this course to him.* The account was heavy, and the timber was not likely to realize enough to satisfy it. I suggested the obtaining a confession from *William Dickson* as the best course that could be adopted for all parties. *The object was to get the men off the raft, to whom there were wages due.*"

Now, had this evidence been unshaken, it would have been quite insufficient, I think, to have proved *Andrew Dickson's* concurrence in that course, which, in the re-sale, these parties thought it right to adopt. *Clemow* suggested, as I understand his testimony, a manœuvre for the purpose of getting rid of the raftsmen. Such, indeed, would seem to be, necessarily, the true construction of his evidence, because the whole transaction is *now* represented by him as a proceeding of that sort, and such was the conclusion contended for in argument. Then, if *Clemow* proposed no more than that, the plaintiff, as a necessary consequence, cannot be held to have acquiesced in more. But, the proposition to get rid of the raftsmen by a manœuvre, a collusive sale, was something very different from the absolute purchase of the property at Bytown, upon a sheriff's sale, under a writ of execution issued for a debt not yet due.

Judgment.

But the evidence of *Clemow*, upon this point is, in my opinion, very much shaken. When examined at Nisi Prius, he spoke doubtingly of *Andrew Dickson's*

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acquiescence. His statement was "*he appeared to acquiesce.*" When examined here, although his attention is called to his former statement, he says that he is prepared to swear positively, after a lapse of several years, that he did acquiesce. Looking to the subject matter of the evidence, and keeping it in view that his statement at Nisi Prius was upon re-examination, after *William Dickson* had been called for the defence, the difference is, I think, material.

It is sworn that *Andrew Dickson* was desirous of remaining in concealment on Saturday the 10th and Sunday the 11th of July; and he certainly quitted Bytown at a very unreasonable hour on Monday morning, from fear of arrest. These facts are quite consistent with *Forbes's* account of the interview on Friday the 9th, but are wholly irreconcileable with the assertion that the subsequent proceedings had been previously arranged between *Andrew Dickson* and *Clemow*. Had such an arrangement been made, there would have been, I apprehend, no fear of arrest.

Judgment.

Again: on his cross-examination in this cause *Clemow* says that the interview with *Andrew Dickson* was "a week or ten days before the arrival of the raft;" and in another place, that it was on the Sunday, or the Sunday but one before his interview with *William Dickson*. It is to be inferred, I think, from all this evidence, that the conversation must have been prior to the interview sworn to by *Forbes* on the 9th of July. Now, if the testimony of *Forbes* is to be relied upon,—and I find nothing in the testimony itself, nor was I able to detect anything in the manner of the witness to throw discredit upon any part of it,—then, it is hardly possible to believe that *Andrew Dickson* had at that time assented to the proceedings which shortly afterwards took place; and unquestionably everything which then passed

implied his entire dissent. *Forbes* says, "*Dickson said he wished by all means that the timber should go to Quebec and be sold. Nothing was said about a confession of judgment.*"

Lastly: I am quite unable to reconcile Mr. *Lyon's* testimony with the assertion that *Andrew Dickson* had been consulted about, and had assented to, the course to be adopted. Mr. *Lyon* says, upon his cross-examination, "*The opinion I gave as to Andrew Dickson not being discharged was that he was a surety, that his principal giving a confession was no more than his making an admission of the debt, and that what was being done was for the benefit of the surety. Clemow asked me the question with a view, as I understood, of not doing any act which would have the effect of discharging Andrew Dickson.*" Now, had *Andrew Dickson* assented to the contemplated proceedings, it is hardly possible that *Clemow*, in consulting the confidential adviser of the defendants upon this point, could have forgotten so important a fact; and it is still less possible to conceive that Mr. *Lyon* would have omitted so obvious and important a consideration in forming his opinion. The fair inference, as it seems to me, is, that Mr. *Lyon's* opinion was asked and given upon the supposition that the contemplated steps were about to be taken without the knowledge or assent of the surety.

Judgment

In the course of the argument, however, considerable reliance was placed upon the fact that *Andrew Dickson* signed a promissory note in favour of the defendants upon the 4th of August, 1847, for the sum of 103*l.*; and it was contended that the fair inference from that fact was, that *Andrew Dickson* had acquiesced in the arrangement entered into between his principal and the defendants.

The evidence does not, in my opinion, warrant that conclusion.

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In the first place, the acquiescence of the surety is not to be inferred from this act, unless he is shown to have been acquainted with the dealings which he is supposed to have sanctioned; but there is no evidence to establish that fact, or from which, in my opinion, it can be judicially inferred.

Again: it is quite clear that these parties,—both *William* and *Andrew Dickson*,—were in the habit of putting their names to blank pieces of paper, to be filled up by the defendants. *Andrew Dickson*, in his letter of the 24th of April, 1847, in evidence, seems to have enclosed several such blanks; and *William Dickson* in his evidence speaks of that as the usual mode of transacting their business. What is there to show that this particular note was not so signed? The evidence is entirely silent upon the subject. The note is produced upon the hearing for the first time in this cause, for the purpose of the argument to which I have been adverting. Now it is endorsed by *Clemow*. He could have explained, I presume, the time when, and the circumstances under which it was executed; but the defendants refrained from asking him any questions upon the subject. That was a very material omission on the part of the defendants, under the circumstances. But, upon the other evidence in the cause, my mind inclines very much to the conclusion that *Andrew Dickson* did not execute that deed at the time it bears date. The agreement stipulates for the execution of promissory notes, if required, at the date of each advance; but it is clear, I think, that no advance was made after the sheriff's sale. That transaction would seem to have concluded all dealings of that kind. Looking to *Forbes's* testimony, such an event would seem highly improbable; and, indeed, *Clemow* himself admits "that he did not see *Andrew Dickson* for some time after the confession was given." It cannot be inferred, I think, that he

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saw him on or before the 4th of August;—quite the contrary. 1852.

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Upon the whole, the defendants, in my opinion, have failed to prove that *Andrew Dickson* assented, at any period, to the transactions which are admitted to have taken place at Bytown.

Turning then, to the law, as applicable to these facts: It is clear, I apprehend, that *Andrew Dickson* who executed this contract as the surety of *William Dickson* had a material interest in all its stipulations and provisions; and that any variation, by the defendants, in any of them, by which the surety might be prejudiced, if made without his consent, will be regarded by this court as an effectual discharge. If that be a correct statement of the law, it is not to be doubted, I think, that the variations in this contract were such as might have been prejudicial to the surety. The covenant is that the timber shall be conveyed to Quebec, and there sold by the defendants, to the best advantage, so as, if possible, to repay the amount to fall due on the first of September; by arrangement, between the principal debtor and the creditors, it is seized under execution at Bytown, many hundred miles from the proper market, and there sold at sheriff's sale. The covenant is to advance monies on credit sufficient, as was supposed, to admit of the timber being sold in the Quebec market for their repayment; by arrangement between these parties a confession of judgment is executed before the expiration of the stipulated credit, under which this very timber is sold at Bytown, and all the provisions in the agreement for the indemnification of the surety are effectually defeated. If the law be as I have stated it, these dealings were clearly such, in my opinion, as to discharge the surety.

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It is argued, however, that the law upon this sub-

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ject has been modified by recent decisions; it is said that there is no case in point to show that the transactions at Bytown ought to have the effect of discharging the surety in this case; and it is contended that, according to modern authority, the dealings between the defendants and *William Dickson* have not discharged the plaintiff; because, to produce that effect, they must have been such as not only might have prejudiced, but as had in fact prejudiced the surety—a state of things negatived, it is said, by the evidence in this case.

I agree that actual loss is not proved—is, perhaps, rather negatived than proved; and, if such proof be necessary, it follows that the plaintiff has failed to establish his case. I am of opinion, however, that such was not previously, and is not now, the doctrine of the court. That no such law was laid down in the earlier cases is abundantly evident. In *Rees v. Berrington* (*a*), a leading authority upon this subject, Lord *Rosslyn* says, "This produces no inconvenience to any one; for it only amounts to this, that there shall be no transaction with the principal debtor, without acquainting this person, who has a great interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity, not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound, and transact his affairs (*for they are as much his as your own*) without consulting him. You must let him judge whether he will give that indulgence, contrary to the nature of his engagement."

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The judgment of Chief Baron *Richards*, in *Bowmaker v. Moore* (*b*), is very clear and explicit upon this point. "The real and only question, he says, in

(*a*) 2 Ves. Jr. 540. (*b*) 7 Pri. 223.

this case is, whether the surety was, in point of fact, placed in a different situation, by what had taken place on the arrangement between the principal and obligee, *and whether by such charge of situation he might have been prejudiced*, and not whether he did sustain in fact any injury in consequence. *A creditor taking a surety is bound to notice the nature of his engagement, and to protect him. The surety is entitled to every advantage which the principal would have had under the circumstances.*" And a little further on he observes, "I am not at liberty in such a case to enquire whether any inconvenience did actually arise to the plaintiff in consequence of the agreement between *Moore* and *Sheriff*; *for if the plaintiff was discharged by anything which took place between them, he was discharged at the time when the agreement was entered into between them.*"

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Now I take that to be a perfectly correct statement of the law as it is understood at the present day.

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In *Calvert v. The London Dock Company* (*a*), the plaintiff became surety for the due performance of a contract between the defendants and one *Streather*. One stipulation in the agreement between *Streather* and *The London Dock Company* was, that the money to become due to *Streather* for the work performed under the contract should be paid by instalments, viz. three-fourths of the cost of the work certified to be done every two months, and the remaining one-fourth after the full completion of the contract. The company paid in fact a larger amount than they were bound to do under the contract, to enable the builder to fulfil his engagement; and it was contended there, as here, that the variation of the terms of the contract was beneficial to the principal debtor, and by consequence to the surety, and could not, therefore, have the effect of discharging him from his

(*a*) 2 Keen, 638.

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engagement. But the plaintiff had relief. Lord *Langdale* says, "The argument, however, that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties can be of no avail. In almost every case where the surety has been relieved, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended, that what was done was beneficial to the surety,—and the answer has always been, that the surety himself was the proper judge of that, *and that no arrangement different from that contained in the contract is to be forced upon him.*"

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I *Bonsar v. Cox* (*a*), *John Cox* had become surety for *Richard Cox*, or for *Cox* and *Davies*, for the repayment of certain sums to be advanced by Messrs. *Morrell, upon a draft at three months.* The notes executed by the surety were expressed to be for "value received by a draft at three months." The Messrs. *Morrell*, however, made the advance in cash, and it was determined that they had thereby discharged the surety. Lord *Langdale* says, "A man may have reason to believe that a person in pecuniary difficulties may effectually redeem his affairs if allowed time, and may be willing, on the assurance of the required time being allowed, to become surety for the payment of a particlar debt at the end of that time, and yet would not become surety until such terms were fully answered by the principal debtor. *These are circumstances which a person advancing money on the security and claiming the benefit of the suretyship, does not appear to me to have any right to alter.* It is not enough that he voluntarily forbears to demand payment during the time for which the surety had stipulated; the surety did not intend to rely on his forbearance; but rested on an agreement or condition that the principal

(*a*) 6 Beav. 111.

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debtor should have the time assured to him, and should thereby have an assured and not a precarious freedom for that time. His conduct for his own protection might be materially affected by the difference; and if that stipulated term be not given, and no agreement of the surety to waive it is shown, it appears to me that the situation of the surety is improperly altered and that he is released."

Lastly: in *Bonsar v. McDonald* (*a*), the plaintiff had become surety to a banking house for the due discharge of his duty by one of their clerks. In the instrument executed by the clerk there was a covenant entered into by them with the firm, "that he should have no other business of any kind, nor be concerned in any shape with any trade, manufacture, or mercantile copartnery, nor be security for any individual or copartnery in any way whatsoever." Some time after the execution of this agreement a new arrangement was made with the clerk, by which he became responsible for a portion of the loss upon discounts in consideration of an increase in his salary. The bank subsequently sustained a loss, not arising out of any discount transactions, but in consequence of credit improperly given to some of the customers; and it was argued that as the original agreement had been varied by the new arrangement, without the assent of the surety, he was thereby discharged; and the House of Lords so determined. In moving judgment in that case the written opinion of Lord *Cottenham* (who was absent from illness) was read to the house by Lord *Brougham*—and, I there find the rule stated in this way, "any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, *which may prejudice him*, or which may amount to a substitution of a new agreement for a former agreement,

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(*a*) 14 Jurist, 1077.

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and though the original agreement may notwithstanding be substantially performed, will discharge the surety."

These authorities, as it seems to me, not only prove conclusively that the rule upon this subject has not been varied, as was contended in argument, but are all more or less directly in point, to show that the surety in this case is entirely discharged.

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ESTEN, V. C.—This was a bill by a surety to restrain proceedings at law on the agreement under which he became surety, on the ground that he had been discharged from it by dealings which had occurred between the creditor and the principal debtor, without his knowledge, and also on the ground of an alleged express agreement for his discharge. The contract was contained in a deed of covenant dated the 29th September, 1846, between one *William Dickson* and the plaintiff as his surety of the one part, and the defendants of the other part, whereby *William Dickson* transfers to the defendants all the pine timber within his limits on the Colonge river, and the lumber to be manufactured from them, subject to redemption on payment of all moneys due and to become due from him to them as mentioned, on the 1st September, 1847, if the timber should not sooner be sold at Quebec; if sooner sold, immediately after such sale; and the parties of the first part covenanted with the defendants that *William Dickson* should manufacture sixty thousand pieces of timber and mark them with the letters D. M., and deliver them or some of them in the name of the whole to the defendants, and should raft them during the ensuing spring, and convey them to Quebec for, and there safely deliver them to, the defendants. And *William Dickson* thereby gave permission and license to the defendants at any time to take possession of the timber and to sell it in the Quebec market for any

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prices that could be obtained for it: and the parties of the first part likewise covenanted with the parties of the second part, that *William Dickson* should pay to the defendants the moneys before mentioned at the times previously appointed for that purpose, and would also pay to the defendants a commission of five per cent. upon the sale of the timber: and the defendants covenanted with *William Dickson* to advance to him, in proportion as he should progress in the work which he had agreed to perform, 600*l.* in provisions, and the same sum in cash; and then follows an incomplete proviso, seeming to import that the plaintiff and *William Dickson* should, if required, upon any advances being made, furnish their notes or acceptances to the defendants; and it was lastly agreed that the defendants should pay any balance of the timber that should remain after satisfying the purposes before mentioned to *William Dickson*. The stipulated advances were made by the defendants—the timber was manufactured by *William Dickson* in pursuance of the agreement, and conveyed by him to Bytown on its way to Quebec. At this time a large amount—namely, about 2700*l.*—was due to the defendants under the agreement, and about the sum of 700*l.* was due for wages to the men on the raft. While the raft was at Bytown the transaction occurred which has given rise to the present suit. Prices were low at Quebec, and it seems that by the law of Lower Canada the fact was, or was supposed to be, that if the raft should be conveyed within the precincts of that part of the province, a lien in favor of the men in respect of their wages would attach upon it in preference and priority over the claims of the defendants. Under these circumstances *Clemow*, the agent of the defendants at Bytown, became desirous of obtaining possession of the timber, freed from the lien of the men, and of having authority to defer the sale of it until prices should rise. For this purpose an agreement was

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made between *Clemow*, acting on behalf of the defendants, and *William Dickson*, to the effect that *William Dickson* should give a confession of judgment in favor of the defendants, upon which judgment should be immediately entered; that execution should be forthwith issued on the judgment; and that under it the timber should be sold by the sheriff and purchased by the defendants, and that *Clemow*, on behalf of the defendants, should advance one-third of the wages of the men in cash, and another third in goods, and that for the remaining third *William Dickson* should give the men his notes.

The bill alleges, and *William Dickson* states in his evidence given on behalf of the plaintiff, that it was also expressly agreed that the plaintiff should be discharged from his liability, and that the articles of the 29th of September, 1846, should be delivered up. The confession was given, the judgment entered, execution was issued, the timber was sold and purchased by *Clemow* on behalf of the defendants, and a settlement was made with the men in the manner agreed upon, by *Clemow* on behalf of the defendants paying the one-third of their wages in cash and another third in goods, and by *William Dickson* giving them his notes for the remaining third. The raft was thereupon conveyed by the defendants themselves to Quebec, and a formal (called a *pro forma*) sale took place of it there in the month of December—more for the purpose of ascertaining its value than for any other purpose. After this proceeding had been gone through, the defendants prepared a general account against the plaintiff and *William Dickson*, in which they charged them with all advances, or expenses, or payments, subsequent as well as prior to the transaction at Bytown, and gave them credit for the net proceeds of the *pro forma* sale. This account was transmitted to the plaintiff; and shortly afterwards the agent of the

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defendants had an interview with him and applied for a settlement, to which the plaintiff answered that he could not tell whether the account was correct or not, but must see his brother. *William Dickson* states in his evidence given on behalf of the plaintiff, that he left Bytown a day or two after the seizure and went to Pakenham and saw his brother, the plaintiff, sometime in the ensuing month of August, when the plaintiff had heard of the seizure, and they conversed about it. Previously to his departure from Bytown, *William Dickson* had demanded the agreement from *Clemow*, who however refused to deliver it up, stating that he held the plaintiff liable for what the timber should not be sufficient to pay. Promissory notes or acceptances had been furnished to *William Dickson* and the plaintiff respectively, for the greater part, if not the whole of the advances made by the defendants, which appear to have been negotiated, and were, I apprehend, all retired by the defendants. One of these notes, signed by the plaintiff, bore date the 4th of August, 1847. The plaintiff was at the date of these transactions sheriff of the Bathurst district. He had however mills at Pakenham, and a number of orders for supplies under the agreement are produced by the defendants, dated Pakenham Mills, and signed by a son of the plaintiff in his fathers name, with the exception of one which he signed in the name of one *Forbes*, who managed his father's milling business. The supplies, both of money and provisions, appear to have been conveyed to *William Dickson* through the medium of the plaintiff and his son, and *Forbes* acting on his behalf, and great part of the moneys appears to have been received by the plaintiff, who had rendered similar assistance to his brother, or had intervened in a similar manner in former contracts; but no regular accounts appear to have been kept between them, nor had they at any time come to any settlement of these matters.

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The defendants soon after the interview between their agent and the plaintiff, and in March, 1848, commenced an action of covenant against the plaintiff for the recovery of the balance appearing to remain due after giving credit for the net proceeds of the *pro forma* sale; but, as appears from the evidence of *Robertson* their agent, it was found necessary to give credit for the net proceeds of the sale at Bytown, the reason of which he does not further explain. The plaintiff insisted, by way of defence to the action, upon the express discharge asserted by *William Dickson*, and upon the dealings between *William Dickson* and the defendants, as working his exoneration through the operation of law, supposing the evidence insufficient to establish the fact of an express agreement for that purpose. The matter was pending a long time before the Court of Common Law, the defendants having obtained a verdict upon every issue excepting one, and their final determination was, that the defendants were entitled to maintain the verdict they had obtained, and to enter judgment *non obstante veridicto* upon the issue upon which the verdict had been against them. The ground of their determination, as appears from the report of the case (*a*), was that supposing the indenture to contain covenants on the part of the defendants for securing the sale, if possible, of the timber at Quebec before the 1st September, 1847, they were wholly independent of the covenants on the part of *William Dickson* and his surety on the other side, upon which the action was founded; and that the agreement between the defendants through the instrumentality of *Clemow* and *William Dickson*, at Bytown, which was confessedly a merely verbal one, was insufficient to vary the covenant of the party contained in an instrument under seal. The learned judges of the Court of Queen's Bench intimated at the same time, that if the plaintiff was

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(*a*) 8 U. C. Q. B. R. 29.

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entitled to any relief, he must seek it in a court of equity. The principles upon which the Court of Queen's Bench founded their judgment are, I apprehend, not to be disputed, and the question which we have to decide is, whether the plaintiff, being without remedy at law, is entitled to any relief in this court. The plaintiff sought relief here, as he attempted to resist the action at law, upon the double ground of the express agreement to discharge him from liability and of the dealings between the principal and creditor behind his back, as in law operating his discharge. I may observe here that, in my judgment, the express agreement has not been proved, and therefore that the plaintiff must rely wholly upon the other ground upon which his suit is based. The defendants resisted this suit upon three ground: 1st—That the plaintiff was a principal and not a surety in the transaction. 2nd—That he consented to or acquiesced in dealings between the creditor and the principal. 3rd—That those dealings were insufficient in law to work his discharge.

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I think that the plaintiff being a principal and not a surety in the transaction is nothing more than a probable conjecture, from the circumstances of the case, unsupported by any express evidence, and directly negatived by the evidence of *William Dickson*. The instrument describes him as a surety, and the defendants dealt with him in that capacity. The onus therefore of proving the contrary lay upon them. The plaintiff's consent to the transactions, upon which he relies for his exoneration, rests entirely upon the evidence of *Clemow*, which itself is not strong upon this point, is at the same time so much at variance with the other evidence in the case, and facts which must be considered as proved, as to be wholly insufficient to establish this material fact, which the defendants asserting were, of course,

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bound to prove in the most satisfactory manner. I am also of opinion that nothing that was done by the plaintiff, or said by him, after the transactions in question, amounted to an acquiescence, or confirmation, of them. The act mostly relied on for this purpose, of giving his note of hand for 103*l.* 1*s.* 9*d.*, dated 4th of August, 1847, is involved in uncertainty. It is quite uncertain when this note was given, or by whom,—or whether at the time the plaintiff was at all aware of the circumstances which had taken place; and, although the defendants had ample opportunity, through the evidence of *Clemow*, their own witness, and the cross-examination of *William Dickson*, of throwing light on these points, they have left them in the obscurity in which we find them; from which we must necessarily infer, either that all the information that could be given on the subject has been already obtained, or that the real facts of the case, if disclosed, would not improve the defendants' condition. The only question therefore which we have to consider, is, whether the transactions, which are proved to have taken place at Bytown between *Clemow*, as the agent of the defendants, and *William Dickson*, the principal debtor, are sufficient, in this court, to exonerate the surety from his liability under the original contract.

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The doctrines which prevail upon this subject, are said to have had their origin in courts of equity, and to have afterwards extended themselves wholly or partially to courts of law; and it is said now to be a legal maxim, that whatever will work the discharge of a surety in equity will have the same effect at law. This however, like most general maxims, must be received with some qualification. It is laid down by Lord *Cottenham*, in the case of *Eyre v. Hellier* (*a*), that whether a party to a contract is or not a principal in that contract, must, as between

(*a*) 9 Cl. & F. 1.

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himself and the opposite parties to the contract, be collected from the instrument itself, and that no extraneous evidence is admissible for this purpose; but that a party to a contract may be a principal as between himself and the opposite party, and a surety as between himself and his co-contractors, and that when this is the case, and the opposite party has notice of it at the date of the contract, dealings may take place between him and the principal creditor, which will exonerate the surety. No question of this sort arises here, for the plaintiff is described in the instrument itself as a surety, and there is no doubt that the defendants contracted with him in that capacity. It is undoubtedly true, as stated by the learned judges of the Court of Common Law in this case, that mattter of record or an instrument under seal, cannot be waived by any transaction of inferior force or degree, and therefore cannot be affected by a mere parol agreement; but with this qualification, it would seem to be in a great measure true, that whatever will work the discharge of a surety in equity, will now have the same effect at law: and decisions of courts of law upon these points are now looked upon as authorities of great weight in determining even questions of equitable jurisdiction. A court of equity does not regard the fact of a contract being or not being under seal, but only whether it is or not founded on valuable consideration. See the admirable and valuable judgment of the Lord Chief Baron, in *Blake v. White* (*a*). The contract between the principal debtor and the creditor, to have the effect of discharging the surety, must be a binding contract upon the the parties to it, and one that can be legally enforced. But there is no doubt that a verbal agreement between the creditor and the principal debtor, founded upon valuable consideration, and binding upon those parties, will, if it be of such a nature as the law

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(*a*) 3 Y. & C. 434.

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requires for this purpose, discharge the surety in equity, although his original liability may have been created by matter of record or an instrument under seal. To have this effect the transaction must alter the situation of the surety in such a way that he may by possibility be injured. He is discharged, however, if at all, by the effect of the agreement itself; and therefore the judgment must be formed as at the time of making the agreement, without any reference to the event. These are the terms in which the rule is laid down in *Bowmaker v. Moore* (*a*). No terms less comprehensive will describe the rule in its full extent, and so as to meet every case that may arise; and this rule, so stated by a very able judge, has not, so far as I have been able, after a diligent examination of a great number of cases, to judge, been in the slightest degree varied or qualified by any subsequent decision, and has been recognized and acted upon to the fullest extent in the late cases of *Bonser v. Cox* (*b*), by the Master of the Rolls, and *Bonar v. Macdonald* (*c*), by the House of Lords. In *Bonser v. Cox* the question was presented under two aspects, both of them important for this purpose. A bond, intended to be executed by a principal and surety had not been executed by the principal, but the surety had a counter bond of indemnity from the principal. The situation of the surety was undoubtedly different from that he intended it should be, but it is difficult to image how he could by possibility have been injured. If the principal had executed the bond and the surety had paid it, he could not have sued the principal on the bond, because the plea of payment would have been a bar to the action; and, even if he could have done so, he had a precisely co-extensive remedy on his own bond of indemnity. There is no doubt also, that he could have filed his bill against the principal and compelled him to pay the

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(*a*) 7 Pri. 223. (*b*) 4 Bea. 307. (*c*) 14 Jur. 1077.

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debt, but it is probably true that he had no remedy against the creditor to compel him to sue the principal; and in this respect, and in this respect only, does his situation appear to have been less favorable than he intended it should be. This point was considered too clear for argument. In the same case two bills had been given, by a principal and surety, to secure moneys to be advanced to the principal by means of acceptances at three months, so that, if the primary arrangement had been carried out, the creditor could not have sued the principal under three months, because the drafts must have been dishonoured by the principal and retired by the creditor before he could have done so. The principal however, without the knowledge of the surety, agreed to receive, and did receive the stipulated advances in cash, for which an action could immediately have been brought, there being no stipulation as to credit. This agreement appears to have been binding on upon the parties to it; the payment in cash in lieu of drafts was a valuable consideration, moving from the creditor, sufficient to support the stipulation which entitled him to an immediate remedy for the recovery of the amount advanced. The only way in which the situation of the surety was altered was that the principal was placed in a less favorable situation than the surety contracted that he should be placed in, — in other words, because the term of credit was shortened; and the only way in which the surety could have been injured was, that if the principal had been compelled to pay part of the debt before the expiration of the original term of credit, and had been unable to pay the remainder, or had had proceedings instituted against him for the recovery of the debt, but had not been able to pay any part of it, and the surety had paid the whole of the balance of the debt, as the case might be, the principal would have been less able to repay him what he should so have paid, in consequence of such part payment or such proceedings.

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The credit stipulated for by the original agreement was in fact given, but the surety was held to be discharged. Upon the case of *Bonar v. Macdonald*, before the House of Lords, I need not make any other than the general remark I have already made.

In the present instance the legal effect of the agreement seems to me to have been, that the property in the timber vested probably at law, but certainly in equity, in the defendants, by way of security; that the agreement contained in and to be implied from, the instrument was, that the timber should, unless prevented by inevitable accident, be conveyed to and sold at Quebec before the 1st of September, in order to relieve both principal and surety; but that if this object could not be accomplished, they should, at all events, be liable to the defendants on that day, or sooner, if an earlier sale should be effected. When the timber reached Bytown on its way to Quebec, the arrangement already mentioned was made between *Clemow*, acting for the defendants, and *William Dickson* without the knowledge of the surety. We must, I think, upon *Clemow's* evidence, hold that this arrangement was within his authority, but supposing it was not so, the defendants have undoubtedly adopted and acted upon it to an extent which made it their own. The particulars of this agreement I have already mentioned, as I understand them. It was undoubtedly an agreement founded upon valuable consideration, and binding upon the parties to it. The defendants, who had made all the advances which they had contracted to make, advanced two-thirds of the wages of the men, and thereby exonerated *William Dickson* from liability to them to that extent, which was a valuable consideration, moving from the defendants; and *William Dickson* gave the confession of judgment, whereby they were enabled to obtain possession of the timber, freed from the lien

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of the men, which was a valuable consideration moving from him. We must, I think, regard the sale at Bytown as real proceeding, vesting the property in the timber in the defendants, as their own absolutely, and discharging the debt due to them from *William Dickson* to the extent of the net proceeds of the sale. The defendants took a verdict and entered judgment for the balance of their debt after deducting the net proceeds of the sale at Bytown, which judgment they would have enforced but for the proceedings pending in this court; they cannot, therefore, now repudiate that transaction as being unreal and formal: besides which, if they were right in law as regarded the lien of the men, (and it is immaterial for this purpose whether they were right or wrong, for in judging of their intention we must judge according to what they thought was the fact, not according to what the fact really was,) nothing but a *bona fide* sale under the execution would have prevented that lien from attaching; for the men, I apprehend, would have been entitled to show that the judgment, execution and sale were mere formal proceedings, working no transfer of property or change in the rights of the parties, and so have enforced their lien in spite of those proceedings; the consequence of which is that the defendants must have intended to reserve to themselves the power to say to all the world that this was a *bona fide* sale; and if such were the case, they cannot now say that it was not so, whatever private arrangement might have existed between them and *William Dickson*, depending on honour, or whatever intention they might privately have entertained. The result is that the greater part of the debt was paid on the 27th July, instead of waiting for that purpose for the sale of the timber at Quebec, or the 1st of September, as the case might be; and for the balance—I believe a considerable sum—the surety, in case he should pay it, had to look to *William Dickson*

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alone for indemnity. His situation was, therefore, altered and the question is, whether he could by possibility be damnified by that alteration. In answering that question we must take our stand, in point of time, at the very instant of making the agreement, and banish from our minds everything that subsequently occurred, looking only to what might, within the range of possibility, have happened. Now the minute before the agreement was made, it is clear that *Andrew Dickson* was liable as surety for the whole amount of the debt, having however the raft and *William Dickson* to repay him whatever he should pay on account of it, and with the possibility that from some cause between that time and the 1st of September prices might rise in such a way that the raft might produce enough to pay the whole of the debt, or so much of it as to leave a smaller balance than now remains due. The minute after the agreement *Andrew Dickson* was indeed discharged from four-fifths of the debt, but for the remaining one-fifth he had to look only to *William Dickson*, who might never be able to repay it, for indemnity, without having any raft on its way to Quebec ready to be thrown into the market, so as to profit by any unforseen turn of affairs which might render it productive to the extent I have mentioned; besides which the debt, which by the terms of the original agreement was not to be paid until the sale of the timber at Quebec, or the 1st of September, as the case might be, was for the most part actually paid on the 27th of July, and if, as in *Bonser v. Cox*, the mere liability to pay within the term of credit, not enforced, can discharge the surety, *a fortiori* the actual payment within that period must have that effect.

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The consequence, therefore, of that transaction was, in my judgment, to discharge the surety from the balance remaining due from *William Dickson*.

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It was contended in argument—that there is evidence entitled to perfect credit, pointing the same way—that the proceedings at Bytown were not a deviation from the agreement, but a mere contrivance for carrying the agreement into execution more effectually and beneficially than could otherwise have been done. This proposition is, I think, inadmissible for the reasons I have mentioned; but supposing the case to be as it would represent, it cannot be doubted that it was part of the arrangement that the defendants, if they did not keep the timber at Bytown, might hold it, if they thought expedient so to do, over the 1st September, which agreement being for valuable consideration, in effect discharged the defendants in equity from their covenant to sell the timber if possible before the 1st September, so that if in the exercise of their discretion they had deferred the sale beyond that day, and any loss should, as did in fact, happen in consequence, they would not be answerable for that loss; whereas if the agreement had not been made, and the defendants had taken this course, and a loss had ensued, they would have been answerable for it, and it would have gone in reduction of their demand in respect of the balance against *Andrew Dickson*, supposing *William Dickson* unable to make good the loss sustained by his surety.

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Much stress was laid in the argument upon the fact of notes having been required to be, and having been in fact, given, payable at different dates, for the advances. I am quite clear that the plaintiff and *William Dickson* were never intended to be liable on these notes, and that they were given for the accommodation of the defendants, who were intended to provide for, and did in fact always retire them: but supposing the fact to be otherwise, it does not make the slightest difference in my view of the case. At the time the agreement at Bytown was made,

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Andrew Dickson was liable for a certain amount, whether wholly on his covenant, or partly on his covenant and partly on his promissory notes, is wholly immaterial. They were the same moneys due upon the notes and the covenant, and howsoever they were secured, he was liable to pay them only as a surety; and by the effect of that agreement, his situation was altered in such a manner that he could by possibility have been damnified, and therefore he was discharged. It is wholly immaterial to the question before us, whether the covenants contained were dependent or independent, although it is quite clear that they were independent. The Court of Queen's Bench had two questions to decide—one, whether the surety was discharged—the other, whether the covenants were independent. Their judgment was that the surety was not discharged, and that the covenants being independent, the defendants could maintain an action on his covenant without averring performance of their own.

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SPRAGGE, V. C.—I agree that the defendants have not established the fact that the plaintiff was a principal, and not a surety only, in the transaction in question: upon the agreement and the evidence, I think he must be viewed as a surety only. I think it cannot be doubted, looking at the whole of the agreement, that the contract between the parties was, that the timber should be sold at Quebec; and it is plain, from what passed at Bytown previously to the seizure and sale of the raft, that a sale at any other place than Quebec was considered by them a deviation from the agreement; whether an important deviation or not, or whether beneficial or otherwise to the *Dicksons*, still a deviation from the agreement; and I think a fair result of all the evidence is that no such deviation was assented to by *Andrew Dickson*.

It might, as a matter of first impression, appear reasonable that a surety should only be discharged

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by a departure from the agreement, where it was made to appear that the deviation operated to his prejudice, and then perhaps only to the extent to which it was shewn that it did so operate; but such a rule would throw upon the surety a burthen of proof that it would be unreasonable to require. The contract, the performance of which he has guaranteed, is a matter in which he is interested as well as the principal debtor, and if that contract be varied without his consent, it would not be just to him to require him to shew more than that the deviation, to which he was not a party, from a contract to which he was a party, *may* operate to his prejudice. The case of *Rees v. Berrington*, in which Lord *Loughborough* states the principle in the words quoted by his Lordship the Chancellor, is cited as a leading case at the present day. And the rule in the United States appears to be as stringent as that laid down by Lord *Loughborough*. In an American note to the case of *Nisbet v. Smith* (*a*), it is said: "The surety has a right to stand upon the very terms of his contract; and it matters not that the surety sustains no injury by a change in the contract:" and several American cases are cited as authority for this position. The language of Lord *Langdale*, in *Calvert v. The London Dock Company*, strikes me as peculiarly applicable to this case; he says, "The argument showing that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was beneficial to the surety, and the reason has always been that the surety himself was the proper judge of that, and that no arrangement different from that contained in his contract is to be forced upon him." The case of

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(*a*) 4 B. C. C. 582.

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Whitcher v. Hall, and other cases which have been referred to, support the same principle.

In the case of *Bonar v. McDonald*, reported in the 14 Juris, 1077, Lord *Cottenham* states the result of the English cases to be, "that any variation in the agreement to which the surety has subscribed which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement, and though the original agreement may, notwithstanding such variation, be substantially performed, will discharge the surety. In this, Lord *Brougham* fully concurred.

The case *Hollier v. Eyre*, does not militate against this principle, but the language of the court supports it. In none of the cases certainly has the surety been held bound to shew that the variation of the contract has actually operated to his prejudice. Taking the law at this day to be (as I think it is), that a surety shewing a variation of the contract which *may* operate to his prejudice, is not bound to show more, but is discharged from his suretyship, I agree with the other members of the court that the cognovit, seizure and sale at Bytown, did constitute a material deviation from the contract, that the timber was to be sold at Quebec. His Lordship the Chancellor, and my brother *Esten*, have pointed out how this change might operate to the prejudice of the surety. It might also prejudice him in this way: If he had reason to believe, as no doubt he had, that the timber would not realize the amount advanced, it became of the greatest importance to him that it should be sold to the utmost advantage, and it might be worth his while to become a purchaser himself, and to make some disposition of the timber that might save him, to some extent, from loss. This is indeed nothing more than the ordinary course of a prudent surety. By the course taken he was virtually disabled from

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thus saving himself. Can it then be said that a sale at a place other than that which he had stipulated for might not operate to his prejudice?

It is evident too that the surety considered a sale *at Quebec* a material point, for a sale at that place is repeatedly provided for in the agreement, and it appears from the evidence of *Forbes*, who I think is worthy of credit, that he (the surety) attached importance to the sale taking place there. In the case in the 14 Jurist, Lord *Cottenham* laid considerable stress upon a similar circumstance. The legal principle upon which this case turns, as well as the other points in the case, have been so fully considered in the judgment of his Lordship the Chancellor, that I have not felt it necessary to do more than to state shortly the grounds upon which I form my judgment. I concur in the opinion that the plaintiff was discharged.

Judgment.

COLEMAN v. WHITEHEAD.

Executor—Payment of Legacies.

Payment of a legacy in full is a *prima facie* admission of assets to pay all the legacies in full, because, if the assets are not sufficient for this purpose, all the legacies must abate in proportion, but it is open to explanation.

When an executor pays some legacies and makes provision for the others, he has not conclusively admitted assets, because the provision which he has made for the unpaid legacies may have proved insufficient, without any fault being attributable to him.

Where two legacies were payable at the expiration of a year after the testator's death, and another legacy would not be payable for twelve years, and did not bear interest in the meantime, and the executor paid the legacies immediately payable—sufficient property to all appearance remaining to meet the future legacy—and let the residuary legatee into the enjoyment of the residue, on his undertaking to pay the legacy when it became due, out of the assets; and subsequently, with the assent of the executor, a portion of the personal residue was appropriated to the satisfaction of a devise of land worth a certain sum, or its proceeds: *Held*, that the executor had not so admitted assets as to warrant a personal decree against him at once.

January 20, and May 11.

The bill in this cause was filed by *Sarah Ann Coleman* and others, the infant children of *George Coleman*, against *Marcus Paycette Whitehead* and

Statement.

1852. Coleman v. Whitehead. *Mary Strange*, for the purpose of obtaining payment of a legacy of of 300*l.*, bequeathed to them by their uncle, payable on the eldest child (*Sarah Ann*) attaining twenty-one. The other statements of the bill are sufficiently detailed in the judgment of the court.

Mr. *Gwynne*, Q. C., and Mr. *Hector* for the plaintiffs.

Mr. *Wilson*, Q. C., for the defendant *Whitehead*.

Mr. *Mowat*, for the defendant *Strange*.

Argument. *Holland v. Clark* (*a*), *Rogers v. Soutten* (*b*), *Barnard v. Pumfrett* (*c*), *Dinsdale v. Dudding* (*d*), *Tombs v. Roch* (*e*), *Bateman v. Hotchkin* (*f*) *Mirehouse v. Scaife* (*g*), *Attorney General v. Chapman* (*h*), *Purcell v. Blennerhassett* (*i*), were cited by the plaintiffs.

For the defendants—*Howe v.* Earl of *Dartmouth* (*j*), *Whittaker v. Whittaker* (*k*), *Mark v. Willington* (*l*), *Savage v. Lane* (*m*), *Broome v. Monck* (*n*), *Langford v. Gascoyne* (*o*), were referred to.

May 11th. Esten, V. C.—This is a suit by certain legatees against a surviving executor, and the executrix of a deceased executor to compel the payment of their legacies. By the will of *Robert Coleman*, dated 19th May, 1832, he gave certain specific chattels to his brothers *Thomas Coleman* and *George Coleman*, and his nephew *Robert L. Coleman*, respectively. He also gave a legacy of 50*l.* to the defendant, *Whitehead*, payable at the end of one year after his death, and another legacy of 25*l.* to his brother *George Coleman*. His farm, being Lot No. 12, in the 1st concession of Hope, he devised to his nephew *Robert L. Coleman;* and he "gave and bequeathed to *Charles Coleman* the sum of 400*l.*, to be paid to him

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(*a*) 2 Y. & C. C. C. 319. (*b*) 2 Keen, 598. (*c*) 5 M. & C. 63.
(*d*) 1 Y. & C. C. C. 265. (*e*) 2 Coll. 490. (*f*) 10 Beav. 426.
(*g*) 2 M. & C. 695. (*h*) 3 Beav. 256. (*i*) 3 J. & La. 42.
(*j*) 7 Ves. 150. (*k*) 4 Br. C. C. 31. (*l*) Bea. 128.
(*m*) 11 Jur. 1053. (*n*) 10 Ves. 597. (*o*) 11 Ves. 333.

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in twelve months after his decease, either in landed property at a valuation, or the proceeds of any sale thereof," at the option of his father, *Thomas Coleman*. He then gave and bequeathed "to *John Strange* his house and lot, situate in Water street, and numbered 30, in the town of Kingston, or in lieu thereof the sum of 150*l*." Lastly, all other property, either in houses, lands, bonds, mortgages, notes, or money, belonging to him after his decease, he thereby gave and bequeathed to his above named brother *Thomas Coleman*, for and on behalf of his remaining children, the above named *Robert L. Coleman* and *Charles Coleman* excepted; recommending his said brother *Thomas Coleman* not to dispose of any part of his property to be sold, until his son *Charles Coleman* comes to age: and he appointed the defendant *Whitehead* and *John Strange*—named in his will—his executors. The testator died on the 10th of May, 1835. His executors proved his will, and possessed themselves of his personal estate, and paid his funeral and testamentary expenses and debts, and satisfied the specific bequests, and paid all the pecuniary legacies left by his will, except the plaintiffs', which did not became payable until the 30th of December, 1849, when the eldest child (*Sarah Ann Coleman*) became of age, nor did it bear interest, the legatees not being children of the testator, and he not standing in *loco parentis* towards them. The testator in his lifetime had taken a mortgage from one *Bletcher* to secure 325*l*. and interest, which remained wholly unpaid at the time of his death. No foreclosure has taken place, but the persons claiming under the testator seem to have been in possession of the mortgage property ever since his death. Part of this property was assigned by *Thomas Coleman*, with the assent of *Whitehead*, in the year 1844, to *Charles Coleman*, towards satisfaction of the devise in his favor, and the remainder has been in *Whitehead's* possession since the testator's death. The testator in his life-

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time had sold some land consisting of part of lot No. 66 in the village of Port Hope, to one *McSpadden* for 175*l.*, for which he gave his promissory notes. *McSpadden* paid one instalment of 50*l.* in the testator's lifetime, and after his death the executors sued him for the remainder, or so much of it as was due, and obtained judgment and issued execution upon it, but nothing was levied. Subsequently, *Thomas Coleman* rescinded this contract, and transmitted *McSpadden's* notes, of which he appears to have been in possession, to *Whitehead*, who surrendered them to *McSpadden* and received from him the testator's bond for the conveyance of the land, which he held. From this time *Thomas Coleman* has been in possession of this property, and about the year 1837, he with the consent of *Whitehead*, and as *Whitehead* says of *Strange*, entered into possession of all the real estate of the testator not specifically devised, and has continued in such possession ever since.

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John Strange died in 1840, leaving *Whitehead* surviving him, and having made his will and appointed the defendant, *Mary Strange*, his executrix, who proved it and possessed his personal estate. The bill insists that both defendants are personally liable for the payment of the plaintiffs' legacies, on the ground of an alleged admission of assets of the testator *Robert Coleman* on the part of both *Whitehead* and *John Strange*, and of an admission of assets of *John Strange* on the part of the defendant *Mary Strange*, although on what this latter admission of assets is founded it is difficult to discover, the bill not alleging any express admission, and imputing no act from which any such admission can be inferred. The bill seems to rely solely on a supposed admission of assets on the part of the executors; for, although it alleges a delivery of part of the personal estate to *Charles Coleman* towards satisfaction of his devise, and of the residuary personal estate to *Thomas*

Coleman, which might, under other circumstances, amount to a devastavit; it also alleges that this was not done without the executors' retaining sufficient to satisfy the plaintiffs' legacy, which would exclude anything in the nature of a devastavit, unless the amount so retained were afterwards misapplied, which is not suggested. The acts relied upon by the bill as rendering the defendants personally liable for the payment of the plaintiffs' legacy, are, 1st, various express admissions of a sufficiency of assets made to third persons: 2nd, the delivery of the residuary personal estate to *Thomas Coleman*: 3rd, the application of part of the mortgaged premises towards satisfaction of the devise to *Charles Coleman*: and 4th, The payment and retention respectively of the pecuniary legacies in full, with the exception of the plaintiffs'. Several cases were cited upon this subject in the course of the argument. We have looked at all of them and at many others also. The rule to be extracted from them, we think, is, that a course of conduct deliberately and advisedly pursued implying an admission that the assets are sufficient for the payment of the legacies in full, will bind the executor so, that at the hearing of the cause the court will not direct an account of the assets for the purpose of ascertaining whether they are or are not sufficient. Such conduct however is always open to explanation, as that it was pursued under misapprehension or in ignorance, either of law, or fact. It is probable also, that should it appear that the executor had paid or retained legacies in full, with a knowledge that the assets were not sufficient for the satisfaction of all the legacies, and to all appearance, with a deliberate purpose of leaving some of them unprovided for, he would be considered equally bound, and the court would in like manner make an immediate decree for payment, unless, perhaps, he acted *bona fide* in total ignorance of his duty in this respect. In the

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present case the express admissions on which reliance is placed, may, we think, be at once dismissed. They were not only to all appearance casual conversations between the executor and third persons, but for aught that appears, may have been made at a time when, *Bartlett's* debt not having been established, and the mistake as to the amount of the Bank stock not having been corrected, Mr. *Whitehead* might have had every reason to believe that his statement was strictly correct, at the same time that it rested on a ground which a subsequent and unexpected alteration in the state of things entirely displaced.

With regard to the next fact, on which the plaintiffs rely, namely, the delivery of the residuary personal estate to *Thomas Coleman*—the residuary legatee and devisee in trust—it does not appear what, if any part of the personal estate, was delivered to *Thomas Coleman*. He appears to have had *McSpadden's* notes, and he may have had *Bletcher's* mortgage, but the executors appear to have retained a cash balance in their hands until after the institution of this suit, when it was deposited in court under an order obtained for that purpose. So far as regards *Thomas Coleman's* taking possession of the residuary real estate, the executors of course had nothing to do with it. The legal estate appears to have been vested in him, and they could not, and had no right to, prevent him from taking possession of any part of the lands. Even if the legacies were, as the plaintiffs' counsel in argument contended, charged upon the lands, this circumstance gave the executors no interest or power over them, but the residuary devisee was a trustee for that purpose.

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If the property sold to *McSpadden* be looked upon as personal estate, the legal estate appears to have vested in *Thomas Coleman;* and if he entered into

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possession of the residuary property before the establishment of this court, which for aught that appears he might have done, the executors were without remedy; and *Whitehead*, in forbearing to object to *Thomas Coleman's* taking possession of this part of the estate, may have only assented to what he could not prevent. But, giving the fullest effect to *Whitehead's* assent on this occasion, what does the transaction amount to more than this: namely, that an executor having paid all the funeral and testamentary expenses and debts, and paid and satisfied all the legacies except one, which would not become payable in less than twelve years, and did not bear interest in the meantime, allowed the residuary legatee to go into the enjoyment of the residue, stipulating that he should provide for the legacy when it would become payable? It was not surrendered to the residuary legatee absolutely as the residue, but subject to the legacy, the amount of which must therefore be considered as retained by the executor. This might have been ineffectually and inadequately done; the legacy may in the meantime have been exposed to danger; but if no alienation or waste of the property has occurred; if it is still there to answer this demand, we think it ought to be applied, in the first instance, before making the executor personally responsible. Then, with regard to the appropriation of part of the mortgaged premises towards satisfaction of the devise in favour of *Charles Coleman*, it must be observed that this gift is erroneously styled a legacy. It is, in fact, a devise of land or the produce of land, and the executors had no concern with it whatever. The application, however, of part of the personal estate towards its satisfaction might be a devastavit, or it might be construed into an admission of assets, since it was, in fact, a disposition of so much of the personal estate at the instance of the residuary legatee, which ought not to have been done until

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all the legacies were provided for. But we cannot regard it as an admission of assets which ought to bind the executors so as to render them personally liable. We must look at the circumstances under which it was done It probably took place under some misapprehension of the nature of the gift to *Charles Coleman* and the character of the property in question; and the arrangement and understanding between *Thomas Coleman* and the executor may have been, that a provision had been made for the payment of the plaintiffs' legacy out of the residue, of which *Bletcher's* mortgage formed a part, if it was not required for the payment of this legacy; and as *Charles Coleman* was willing to accept this property in part satisfaction of the gift in his favour, whereby land, which must have otherwise been devoted to that object, would be preserved as part of the residue, an exchange should be made between *Charles Coleman* and the residuary legatees and devisees of that which then formed part of the residue for that which *Charles Coleman* was entitled to take from it. If the children, for whom *Thomas Coleman* is a trustee, should not sanction this arrangement, this raises a question between them and him and the executor, with which, however, the plaintiffs have no concern; but if an executor, after having made provision for a particular legacy, dispose of a part of what he considers, under such circumstances, as the residue, at the instance of the residuary legatee, we think the adequacy of the provision which he has made for the particular legacy should be tried before he is made personally answerable. The last circumstance relied on by the plaintiffs as an admission of assets, is the payment and retention respectively of the other pecuniary legacies in full. But this act ought not, in my judgment, any more than the others which have been considered, to bind the executors conclusively. No doubt the payment of one legacy in full is *prima facie* evidence of an admission

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that the assets are sufficient for the satisfaction of all the legacies, because if they are not, they must abate in proportion; and I do not mean to advance the proposition that in no case could such a circumstance be alone sufficient to render the executor personally liable. But such a proceeding is open to explanation: and should it appear that at the time of such payment there was other property, to all appearance amply sufficient to answer the legacy that remained unpaid, and was indeed not yet payable, the executor is not conclusively bound to satisfy the demand out of his own property, but the part of the estate to which he looked for satisfaction of it must first be applied, and should it prove insufficient, it will then be a question whether the executor alone is to make good the deficiency, or whether the legatees must refund in proportion.

Judgment.

Upon the whole, we think that this cause should stand over without costs, in order that the bill may be amended by adding *Thomas Coleman* and his children, excepting *Robert Coleman* and *Charles Coleman*, as parties, without prejudice to the question as to the personal liability of the executors, or to any other question in the cause.

SPRAGGE, V. C.—I concur in the view taken of this case by my brother *Esten*. I was at first inclined to the opinion that the payment and retention respectively of pecuniary legacies, insisted upon by the plaintiffs as amounting to an admission of assets, were sufficient to charge the defendant *Whitehead*, if not the estate of his co-executor *Strange*, with an admission of assets to satisfy the legacy of the plaintiffs. But looking at all the circumstances—the time when the legacy claimed was made payable; a portion of the assets turning out less than was expected: a demand established against the estate to a considerable amount, evidently unexpected;

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the other circumstances to which my brother *Esten* has adverted, I incline to think, that to charge the executors personally with the plaintiffs' legacy would be going further than is warranted by the English cases, and further than would be just. The rule is a stringent one, and ought not to be applied, I think, in any case where the executors give a reasonable explanation of the acts upon which legatees may seek to charge them with an admission of assets.

I agree that the legacy to the plaintiffs does not bear interest until it was made payable, not only on the ground of the legatees not being children of the testator, and that he did not stand in *loco parentis* towards them; but also because the terms of the bequest appear clearly to indicate that only the principal sum of 300*l.* was intended to be paid. The words of the bequest are, "I give and bequeath to the children of my brother *George Coleman*, by *Isabella*, his wife, and now residing, &c., the sum of 300*l.* Halifax currency, share and share alike, on the day the eldest daughter, named *Sarah Ann*, becomes of age." From a portion of the correspondence I gather that the legacy was supposed to bear interest; my impression certainly is that it does not.

Judgment.

There appears to have been some misapprehension among the parties entitled under the testator's will, in relation to the land mortgaged by *Bletcher* to the testator, and to land sold by the testator to *McSpadden*—the money secured upon the one, and the purchase money of the other, formed part of the personal estate of the testator. The lands mortgaged, it appears, were given over to *Charles Coleman* in satisfaction of a bequest to him of 400*l.*, to be paid to him in landed property of the testator, or the proceeds of a sale of landed property. Applying the premises comprised in the *Bletcher* mortgage to satisfy this bequest was erroneous. It appears also

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that the residuary legatee has taken possession of the land sold by the testator to *McSpadden*. If as real estate, he was in error in so treating it. If as residuary personal estate, it was of course applicable in the first place to satisfy the pecuniary legacies of the testator.

The surviving executor, Mr. *Whitehead*, appears to have fallen into the same error as the parties; for he treats the balance of moneys in his hands, (since paid into court,) as the only fund applicable to the payment of the plaintiffs' legacy.

It will probably be found, I think, that no reference for an account will be necessary, as the two funds I have referred to, together with the money in court will be more than sufficient to pay the plaintiffs their legacy. The landed property, out of which the 400*l.* bequeathed to *Charles Coleman* was to be satisfied, has probably been taken to be part of the residuary estate, as well as the *McSpadden* property. If this be so, the residuary estate has that which should be applied *pro tanto* to the satisfaction of the plaintiffs' legacy. Perhaps the simplest mode would be to make up, out of the residuary estate, a sufficient sum with the money in hand, to satisfy the plaintiffs' legacy; that is to say, 300*l.* with interest from the date of *Sarah Ann Coleman* becoming of age. In this way no existing arrangement need be disturbed, and no injustice could be done to any one, and the expense of an account would thereby be saved. Judgment.

Unless some arrangement be made between the parties, the cause must again come on for hearing, after the addition of proper parties.

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GARVEN v. ALLAN.

January 9.

Where a memorandum had been made in partnership books, and signed by one of the partners, stating that such partner was indebted to his co-partner in a certain amount, and such co-partner subsequently sued for, and insisted upon being paid that sum, notwithstanding that it was evident from the entries in the books that the sum so claimed was not due; the court, upon a bill filed by the partner who had signed the memorandum, directed an account of the partnership dealings to be taken, with costs to be paid by the defendant, up to the hearing.

Statement. The bill in this case was filed by *Robert Graven* against *Charles Allan*, stating that a partnership had existed between the plaintiff and defendant, and set forth the articles of co-partnership, and under the circumstances set forth in the judgment prayed an account of the partnership dealings; an injunction to restrain proceedings at law; and the defendant from collecting debts due to the co-partnership business.

The defendant answered the bill and amended bill. Witnesses had been examined in the cause, and it now came on to be heard on the pleadings and evidence.*

Argument. Mr. *Hector*, for the plaintiff, cited *Esdaile* v. *Molyneux* (*a*) *Story's* Eq. Jur.; secs. 524, 5, 6, 7.

Mr. *Morphy*, for the defendant, cited *Knight v. Bampleild* (*b*), *Lucan v. O'Malley* (*c*), *Sumner v. Thorpe* (*d*). *Sewell v. Bridge* (*e*).

Judgment. The judgment of the court was delivered by

THE CHANCELLOR.—The object of this suit is to have the accounts taken of a partnership which had subsisted between the plaintiff and defendant for several years, and which was dissolved by mutual consent so far back as the month of October, 1841.

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* See also a report of the case *Allan v. Garven*, 4 U.C.Q.B.R. 242.

(*a*) 10 Jur. 852. (*b*) 1 Vern. 180. (*c*) 2 C. & L. 180.
(*d*) 2 Atk. 1 (*e*) 1 Ves. Senr. 297.

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Garven v. Allan.

The defendant swears, that, on the third of April, 1841, an account of the partnership transactions up to that day was stated; when a balance of 288*l.* 16*s.* 1½*d.* was found to be due from the plaintiff to the defendant, and an entry to that effect ma[illegible] in the partnership books and signed by the plaint[illegible]. The same benefit is claimed as if the stated account had been pleaded.

The plaintiff, by amendment, charges that no account of the partnership transactions had ever been stated. He alleges that he either had not signed the memorandum set up by the defendant, or had signed it in utter ignorance of its purport and effect.

The defendant, in his answer to the amended bill, reiterates his former statement as to the settlement of the third of April, 1841. He alleges that the memorandum of that date had been signed by the plaintiff with a full knowledge of its purport and effect; and in confirmation of that allegation he states that an action brought by him for the recovery of the balance of 288*l.* 16*s.* 1½*d.* had been tried since the date of his former answer, when a verdict had been found in his favor, although the plaintiff had adduced evidence to disprove the authenticity of the entry.

Judgment.

The only question to be determined at present, is, whether the accounts are to be taken from the commencement of the partnership, or on foot of the settlement of April, 1841.

The argument here turned almost entirely upon the genuineness of the entry relied upon by the defendant. On the one side five witnesses have sworn that the entry and signature are in the handwriting of the plaintiff. While, on the other hand, three witnesses have sworn to the contrary; and one of those three swears that both the entry and signature

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are in the hand-writing of *Allan*. Had the question depended upon this testimony, further inquiry would, perhaps, have been necessary. Upon questions of this kind, so much depends upon the habits of observation, and the capacity of the witnesses, that it is difficult, in a case of conflict, to form any satisfactory opinion upon written testimony. But the entry and accounts referred to, which we have examined, afford internal evidence—strangely enough overlooked both at law and here—sufficient, in our opinion, for the determination of the question.

In the first place, it has been assumed throughout that the entry in question, if genuine shews a settlement of the partnership accounts up to the third of April, 1841. Upon the motion for a new trial the Court of Queen's Bench would seem to have considered the entry as sufficient to preclude enquiry into the state of the accounts anterior to that date, but insufficient to maintain an action at law, because not a final settlement (*a*). Here, as I have said, the argument turned upon the authenticity of the entry. But, upon examining the accounts referred to, they by no means purport to be the accounts of the partnership up to the date of entry; but merely the account of the partners with the firm. Now, it is obvious that these accounts do not furnish data sufficient to form any conclusion as to the indebtedness of one partner to the other (*b*).

Judgment.

But assuming the authenticity of the entry in question, and assuming the parties to have intended by that entry what has been supposed, then it is obvious that they acted under such an entire misapprehension as must preclude the possibility of treating this as a stated account. The memorandum is based upon statements which shew, or profess to

(*a*) 4. U. C. Rep. 242.
(*b*) Richardson v. Bank of England, 4 M. & C. 165.

shew, the amounts drawn by each partner from the partnership fund. The whole amount received by the plaintiff, as shown upon the statements, exceeded the amount received by the defendant by 288*l.* 16*s.* 1½*d.* Now those statements, as I have said, afford no sufficient data for determining any debt to be due from the plaintiff to the defendant; but, had they involved the whole partnership accounts, the proper conclusion would have been that one-half the excess would have been due from the plaintiff to the defendant---not 288*l.* 16*s.* 1½*d.*, but 144*l.* 8*s.* 0¾*d.*

This obvious mistake is not only sufficient to destroy the effect of the memorandum as a stated account, but has also a tendancy to corroborate the plaintiff's evidence. The mistake is not such a one as the plaintiff would be likely to fall into, in a case circumstanced like the present; and there is, therefore, room for the inference that he did not sign the memorandum at all, or that it was at least signed under misapprehension of its effect. Still, in the absence of evidence of *mala fides* on the part of the defendant, the proper conclusion, perhaps, would have been that the memorandum had been signed under misapprehension. But there is, in our opinion, strong, is not conclusive, evidence of fraud. The defendant admits in his answer that he himself kept the books during the co-partnership. All the entries, I think, during that period, are in his hand-writing. Upon the dissolution the books were placed in the exclusive custody of the defendant; all subsequent entries were made by him, with the exception of a few by one *McQueen;* and he admits that shortly after the action at law had been commenced he refused to permit the plaintiff to refer to them. Now at page 639, book AA., where a portion of the account of the plaintiff with the firm is entered—and where the memorandum in question is to be found—several subsequent entries have been obliterated, some of

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them so carefully as to be quite illegible. The figures on the credit side I am not able to read. The last entry is, "Balance due the firm," but the amount opposite cannot be traced. On the debit side the figures and entries are all legible The last entry is, "To balance, being amount drawn by *R. G.* out of the firm, 527*l.* 0*s.* 4½*d.*," and at foot of the page there is a reference to "page (the number cannot be read) for general statement." At page four of the book—to which I perceive the entry to have had reference—the defendant's account is entered, and there also several entries have been obliterated. Some of these can be read, though with difficulty, some are quite illegible. The entry, so far as I have been able to decipher it, is in these words:

"MEMORANDUM.

Am't drawn by *R.G.*, page 63, £527 0 4½
" " by *C. Allan*, 367 4 10½

159 15 6 *overdrawn by R. G., the half of which* (£ *quite obliterated*) *he must pay to Allan, to equalize the receipts.*"

Judgment.

The words opposite the entry $159*l.* 15*s.* 6*d.* are indistinct, but can be read. Then the memorandum proceeds thus:

"The partners' rct's will then stand thus
R. Garven's present account.....£526 0 4½
Less to be paid by him to *C. Allan*..... 79 17 9

£447 2 7"

"C. *Allan's* present account.....£367 4 10½
Add amount to be paid by *R. Garven* (quite obliterated)

(Quite obliterated)"

This whole memorandum is very indistinct; but, so far as it has been transcribed, may be read, I think, with certainty. It must have been made between November, 1843, and March, 1844. Subse-

quent to November, 1843, because the last item of the account of which it is an abstract is entered under that date; prior to March, 1844, because the defendant, under that date, charges himself with a sum of 109*l.* 19*s.* 10*d.*, received from Messrs. *Ross & Co.*, which is not brought into the account upon which the memorandum is based. It was entered, therefore, after the dissolution, at a time when the books were in the exclusive custody of the defendant, and is utterly inconsistent with the claim now made by him. The balance is brought down, not from the third of April, 1841, but upon the accounts from the commencement. The excess of the plaintiff's receipts over the defendant's—irrespective of the 109*l.* 19*s.* 10*d.* received from Messrs. *Ross*—is but 159*l.* 15*s.* 6*d.* The amount due from the plaintiff, after these stated accounts, is correctly stated as 79*l.* 17*s.* 9*d.*,—half that amount, not the whole, as in the memorandum of April, 1841. And lastly: it does not purport to be a statement of the partnership accounts, but a mere abstract of the state of the "partners' receipts."

Judgment.

Now, by whatever hand that entry may have been made, it is obviously irreconcileable with the notion that the partnership accounts had been settled up to the first of April, 1841, and a balance of 288*l.* 16*s*, 1½*d.* then found to be due to the defendant. It was certainly sufficient, if seen, to call attention to the erroneous principle upon which the partners must have proceeded in April, 1841—assuming that to be a genuine entry. And it cannot have been overlooked, for it has been erased with more than ordinary care. But, in the face of these entries, an action was brought for the recovery of this supposed balance of 288*l.* 16*s.* 1½*d.*, and throughout his several answers in this suit the defendant has sworn that the sum in question was justly due to him upon the partnership transactions in April, 1841.

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Taking the most favorable view of the case for the defendant, he has been guilty of a very gross fraud. The decree must be for an account as proved. The defendant must pay the costs up to and exclusive of the hearing. Subsequent costs and further direction must be reserved.

Judgment

NOTE.—When the above judgment had been pronounced, it was suggested by the council for the defendant that it proceeded upon a misapprehension of the facts. He stated that the entries in the books of account, referred to by the court, had been made not by *McQueen* as was supposed, but by one *Williamson*, after the suit had been instituted. As the court proceeded upon grounds not taken in argument, it was directed that both the defendant and *Williamson* should be examined. Upon that examination it was shown that the entries had been made by *Williamson*, and not by *McQueen*; but it was also shewn that they had been made by *Williamson* with the knowledge of the defendant, and that they had been shown to him, or the effect of them explained at the latest, before he had sworn to his last answer, and before any evidence had been taken in the cause. This enquiry, in the opinion of the court, only evinced more fully the propriety of the judgment: and it is therefore printed in the original shape, and this note is added for the purpose of correcting the immaterial error in fact into which the court had been betrayed.

MCDONALD V. ELDER.

May 11th.

Practice—Specific Performance—Costs.

In decrees for specific performance of a contract for purchase, a time for payment of the purchase money should be limited, or, in default, the bill dismissed.

In such cases also the decree should direct a set-off between the unpaid purchase money and the costs.

Statement.

The facts of this case are fully reported ante volume 1, page 513. When the decree in the cause was prepared and passed, the solicitor for the plaintiff objected to the introduction of any specified time for payment of the purchase money; and, it not being insisted upon by the defendants, the clause limiting the time was omitted. The balance of the purchase money never having been paid, the defendant *Brown* petitioned for and obtained a re-hearing, and the cause now came on to be re-heard.

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McDonald v. Elder.

Mr. *Turner* for the plaintiff.

Mr. *A. McLean* for the defendant, *Elder*.

Mr. *Mowat*, for the defendant, *Brown*, referred to Lord *Lowther v.* Lady *Andover* (*a*). Argument.

Per Curiam.—In this case a decree has been passed and entered for specific performance of an agreement for the purchase of land, with costs. There are two defendants; the vendor, *Elder*, having, after the sale to the plaintiff, sold the land, the subject of the suit, to the defendant, *Brown*. Part of the purchase money remains unpaid, and the decree as drawn up does not appoint any time for the payment of it; nor does it direct any set-off between the unpaid purchase money and the costs. The cause has been re-heard, in order to obtain an alteration or amendment of the decree in this respect; and, upon the authority of Lord *Lowther v.* Lady *Andover*, referred to in argument, we think it proper to direct that the decree should be altered by directing the money to be paid on a particular day, otherwise that the bill shall be dismissed with costs; and also, by directing that the costs of the suit shall be set against the unpaid purchase money *pro tanto*, the defendants as between themselves not objecting to this arrangement. Judgment.

(*a*) 1 B. C. C. 132.

1851.

January 14, 15, 18 & 21.

1852.

February 6, March 26, and June 11.

COVERT v. THE BANK OF UPPER CANADA.

Mortgage—Practice—Costs.

The holder of 2000*l.* government debentures, the payment of which depended on certain contingencies, assigned them to the defendants, and delivered to them his bond to secure the interest, upon which the *Bank* passed the full amount to his credit. Subsequently the defendants obtained from the debtor security for the principal, as well as the interest, and for another debt which he owed them. The debtor, about the same time, assigned his interest in the debentures to *G. S. B.*; and the defendants afterwards accepted a release of part of the mortgaged property, in part payment of the amount secured by the mortgage. The mortgaged property was then sold by the defendants for much less than the amount of the debentures, which were afterwards paid in full by the government. It appeared, from the defendants' books and their communications with the government, that they did not consider themselves entitled to both sums.

Held, that the plaintiff, who was the assignee of *G. S. B's.* interest in the debentures, was entitled to the proceeds of the property sold.

Where a defendant would have been entitled to costs of suit up to the hearing but for an offer which the plaintiff made by letter, after the answer was filed, to accept a sum he named, and to which, in a particular view of the matter which he mentioned, he thought he would be entitled to, if he failed in establishing the larger claim he made by his bill, and by which offer it was proposed that each party should pay his own costs, but the court decided both against the larger claim and the view referred to, but granted a decree for an account on a different footing, which, it was alleged, would result in shewing the amount mentioned in the letter to be about the true amount:

Held, that these circumstances did not entitle the plaintiff to have the costs reserved until after the taking of the account.

Statement. The bill in this case was filed by *Henry Covert* against *The Bank of Upper Canada* and *William Proudfoot*, as president of that institution, setting forth the facts detailed in the judgment of the court. The defendants put in their answers to the bill, and evidence was taken in the cause, and it now came on to be heard.

Argument. Mr. *Cameron*, Q. C., Mr. *Gwynne*, Q. C., and Mr. *McDonald* for the plaintiff.

Mr. *Vankoughnet*, Q. C., and Mr. *Crickmore*, for the defendants.

For the plaintiff, *Finden v. Parker* (*a*), *Lockhart v.*

(*a*) 11 M. & W. 975.

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Hardy (*a*), *Dyson v. Morris* (*b*), *Thomas v. Courtnay* (*c*), *Powys v. Mansfield* (*d*), *Holden v. Hearn* (*e*), *Tenant v. Hamilton* (*f*), *Hunter v. Daniel* (*g*), *Harrington v. Long* (*h*), *Flight v. Leman* (*i*) *Graham v. Oliver* (*j*), *Hart v. Hart* (*k*) *Blake v. Marvel* (*l*), were cited and commented on.

For the defendants, *Wallis v.* Duke of *Portland* (*m*), *Prosser v. Edmunds* (*n*), *Stevens v. Bagwell* (*o*), *Woods v. Downes* (*p*) *Hartley v. Russell* (*q*), *Burke v. Green* (*r*), were, amongst other cases, referred to.

February 6.

The judgment of the court was now delivered by SPRAGGE, V. C.*

Judgment.

An act of the legislature of Upper Canada, passed in the year 1833, having authorized the issue of debentures to the extent of 2000*l.* for the improvement of certain inland waters of the Newcastle District, four debentures, each for the sum of 500*l.*, were issued by the government and placed in the hands of the late *James Grey Bethune*, the managing commissioner for the construction of the projected works.

Mr. *Bethune* applied to *The Bank of Upper Canada* to advance the amount of the debentures. The debentures were payable, not out of the general revenues of the province, but only from the rates and tolls authorised by the act to be levied on the projected works, and on that ground the *Bank* refused at first to cash the debentures; but afterwards they agreed to do so, upon Mr. *Bethune* giving his bond to the *Bank* guaranteeing the payment of the interest of the debentures half-yearly, as made payable by the debentures, in case such interest should not be paid

(*a*) 9 Beav. 379. (*b*) 1 Hare. 413. (*c*) 1 B. & Ald. 1.
(*d*) 6 Sim. 528. (*e*) 1 Beav. 445. (*f*) 7 Cl. & F. 122.
(*g*) 4 Hare, 450. (*h*) 2 M. & K. 590. (*i*) 4 Q. B. 888.
(*j*) 3 Beav. 124. (*k*) 1 Hare, 1. (*l*) 2 B. & Ben. 35.
(*m*) 3 Ves. 494. (*n*) 1 Y. & C. 481. (*o*) 15 Ves. 139.
(*p*) 18 Ves. 120. (*q*) 2 S. & S. 244. (*r*) 2 B. & B. 517.

* The Chancellor and Vice Chancellor *Esten* had been concerned in the cause while at the bar.

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by the Receiver General. The debentures all bore date the 3rd of June, 1833, and were payable respectively in three, five, seven and ten years.

Between the day of the date of the debentures and the twenty-seventh of the same month (the precise date does not appear), *Bethune* gave to the *Bank* the required bond, and on the last named day the *Bank* placed to *Bethune's* credit 2008*l.* 4*s.* 4*d.*, being the aggregate amount of the four debentures with interest from their date. *Bethune* was at this time agent at Cobourg for the *Bank of Upper Canada*, and was reputed to be a man of wealth. The whole of the 2000*l.* was not, it appears, expended on the projected works, but about 1300*l.* only.

In the month of December following, *Bethune* was found indebted to the *Bank* in very large amounts; in the sum of 5000*l.*, or thereabouts, for loans, advances, discounts and other transactions (independently of the debentures' transaction), and also in the sum of 3000*l.*, being the amount of a deficiency discovered upon investigation of his accounts with the *Bank*; it became doubtful also whether the whole 2000*l.* had been expended on the works: if not so expended, the value of the debentures would of course be affected injuriously. At this time also the solvency of Mr. *Bethune* became very questionable.

Judgment

Under these circumstances, the *Bank* called upon Mr. *Bethune* to give security on real estate for the two sums of 5000*l.* and 3000*l.*, and that he should also give collateral security on real estate for the principal as well as the interest of the debentures; and accordingly three several mortgages and bonds were given to secure these several amounts, all bearing date the twenty-first of January, 1834.

In the bond for the payment of the principal and interest made payable by the debentures, they (the

debentures) are recited, at what period payable, and from what source; the bond then recites that the *Bank* had advanced the sum of 2000*l.* on the debentures, and that it was uncertain whether the moneys arising from the tolls on the works would be sufficient to repay the same and interest, and it was conditioned that if the moneys that should come into the hands of the Receiver General, arising out of such rates, tolls and dues aforesaid, should be insufficient to repay the principal and interest of the said several debentures, then that *Bethune* should pay to the *Bank* the said sum of 2000*l.* and interest, at certain periods set out in the bond, and which correspond with the periods at which the interest on the debentures, and eventually the principal, were severally payable.

The bond for the payment of the 3000*l.* was given by the late Mr, *John Covert*, father of the plaintiff, and by one *Charles Clarke*; the other bonds by *Bethune* alone. The mortgages were given by *Bethune* and his wife, and by the trustees of her marriage settlement, and comprised lands in which, under her marriage settlement, she was interested. The 3000*l.* mortgage comprised certain town lots in Cobourg, in which the late Mr. *Covert* subsequently claimed an interest under some conveyance from *Bethune* alleged to have been made prior to the mortgage to the *Bank*. The 5000*l.* debt was further secured by other mortgages. The several bonds and mortgages above referred to, appear to have been brought up from Cobourg and tendered to the *Bank* by Mr. *Donald Bethune*, a brother of *James Grey Bethune*, acting on his behalf, and they were accepted by the *Bank* as in fulfilment of the arrangement between that institution and *James Grey Bethune*.

Judgment.

By an instrument dated the 28th of December, 1836, under the hand and seal of *James Grey Bethune*,

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he assigned to *George Strange Boulton* his right, title and interest of, in and to 2000*l.*, or such part thereof as was expended by him as one of the commissioners under the act before referred to, and he thereby authorised Mr. *Boulton* to give any receipt or acquittance that might be requisite in the premises. The consideration expressed in the assignment is five shillings. Mr. *Boulton* in his evidence says that a nominal consideration was inserted, as he did not know how much, if anything, would be realized from the debentures. He also says that *Bethune* was at that time indebted to him, as he believes, in upwards of 1600*l.*, but that no balance was struck between them. After the assignment, but how long afterwards does not appear, *Bethune* left the province and went to the United States, where he died.

Judgment.

Subsequently, and before the arrangement of 1841, *Boulton* claimed to be entitled to receive the moneys payable under the debentures. He stated his claim to the president and cashier in the year 1840 or '41, as nearly as I can ascertain from the evidence, and shortly afterwards he laid his claim before government. He claimed of the *Bank* that they should elect whether they would take the debentures or the mortgaged lands, and insisted that if they claimed upon the debentures, they should give him the land. To this claim the president and cashier (no more formal application to the *Bank* appears to have been made) refused to accede, insisting upon the rights of the *Bank* to the debentures, and also upon their rights under the mortgage.

In the year 1839, three bills were filed for the foreclosure of the several mortgages, securing payment of the respective sums of 2000*l.*, 3000*l.* and 5000*l.* During the pendency of these suits, *James Grey Bethune* died, and subsequently negotiations were commenced between Mr. *John Covert* and the *Bank*,

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for an arrangement of the claims of the *Bank* upon *Covert* himself and upon the estate of *James Grey Bethune*. The two were mixed up, and Mr. *Covert* acted as well for his daughter, the widow of Mr. *Bethune*, as on his own behalf. Mr. *Donald Bethune* and Mr. *Draper*, trustees under the marriage settlement of Mr. *Bethune*, and who had joined in the mortgages of lands in which she was interested, also took part in the negotiations. The arrangement of August, 1842, was the result.

The correspondence appears to have commenced in the early part of 1841. The substance of the proposition made by Mr. *Covert* was, that he should be released from the bond for 3000*l.*, which had been in part satisfied by his co-obligor, *Charles Clarke*, that the town lots in Cobourg should be released by the *Bank* and that, with the exception of those lots, the equity of redemption in the whole of the property mortgaged by *Bethune* and wife, *Donald Bethune* and *Draper*, should be released to the *Bank*. Pending this correspondence, inquiries appear to have been made by the *Bank* with a view of ascertaining whether the debentures would be paid by the government, and it would appear that the *Bank* delayed acting upon Mr. *Covert's* proposition while making these inquiries. In reference to this, as I suppose, Mr. *Covert*, in his letter of the third of May, 1842, says: "The government debentures in question, or the appropriation of those moneys should not, cannot interfere with my concerns and offers to the *Bank*; they are in no ways connected. By Mr. *Donald Bethune's* account, the *Upper Canada Bank* have a just right to the receipt of 1200*l.* of those moneys."

Judgment.

Mr. *Donald Bethune* and Mr. *Draper*, in letters written in the December previous, speak of the claim of the *Bank* in respect of the debentures as unaffected by the proposed arrangement. Mr. *Bethune* says:

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"they (the *Bank*) can urge upon government whatever claim to payment they may have, as well after such settlements as before it." And Mr. *Draper*, in reference to the proposed arrangement, says: "their claim (the claim of the *Bank*) founded on the debentures will in no respect be altered or weakened."

These letters are material in reference to the position of the plaintiff, that by the arrangement carried out by the deeds of August, 1842, it was agreed that what the *Bank* was to receive upon that arrangement was to be in full satisfaction of the 2000*l.* debt, so that thereby, as the plaintiff alleges, the Cobourg lots "and the said debentures might and would become released and exonerated from the said securities affecting the same respectively as aforesaid."

A part of the arrangement was that a debt of about 500*l.* due by *Donald* to *James Grey Bethune* should be paid or secured to the *Bank* (this was made part of the arrangement at the instance of the *Bank*). The correspondence was closed, so far as appears by a letter from Mr. *Henry Covert*, the plaintiff in this suit to the bank solicitor, as follows:

Judgment.

"COBOURG, 22nd July, 1842.

"DEAR SIR:—In reply to your favour of the 19th ultimo, I beg to say that I should suppose the best and speediest method of now bringing matters to a final settlement between the *Bank of Upper Canada* and ourselves will be to prepare for each other's inspection the necessary deeds and papers. To secure the payment to the *Bank of Upper Canada* of the sum of 500*l.* by my father, I would propose the joint bond of Mr. *Donald Bethune* and myself, with or without my father's being a party to the instrument, as the *Bank* should think fit. You will be good enough to inform me if this arrangement meets your approval.

"Yours, "H. COVERT."

The parties having agreed upon terms, the arrangement was carried out by the execution of indentures of lease and release, by Mrs. *Bethune's* trustees to

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the *Bank* releasing the equity of redemption in all the lands (with the exception of the Cobourg lots) which were comprised in the marriage settlement, and comprised also in the several mortgages which they had joined in making to the *Bank*. By the like indentures, executed by *Angus Bethune*, releasing to the *Bank* the equity of redemption in all lands comprised in the several mortgages of 1834, descended to him, as heir-at-law of *James Grey Bethune*; and by an instrument, executed under the hand and seal of *Martha*, widow of *James Grey Bethune*, whereby she released and relinquished to the *Bank* all her estate, right and interest in all the aforesaid lands (the Cobourg lots excepted), and her dower and right of dower therein. This instrument bears date the 18th of August, 1842. The two releases bear date the previous day. For securing to the *Bank* payment of the debt due by *Donald* to *James Grey Bethune*, a bond was executed by *Donald Bethune*, *Henry Covert* and *Lewis Moffat*, conditioned for payment to the *Bank* of the sum of 500*l*.

Judgment.

The two releases recite the several mortgages of 1834, for securing the respective sums of 5000*l*., 3000*l*. and 2000*l*., the agreement of the releasor to release the equity of redemption, and the agreement of the *Bank* to accept the same in part payment of the sums by those mortgages secured to the *Bank*. The *habendum* is expressed to be "to the end and intent that the said several sums above mentioned and interest might become merged and extinguished in the freehold reversion and inheritance of the said hereditaments, and that the said (releasors) their heirs, executors, administrators and assigns might be absolutely debarred and foreclosed" of their equity of redemption.

In the month of January following, the lands comprised in the 2000*l*. mortgage were sold by the

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Bank at public auction, and realized the sum of 598*l.* 10*s.*

By an instrument dated 11th January, 1847, and indorsed on the assignment from *Bethune* to *George Strange Boulton*, the latter for the consideration as therein expressed of five shillings, assigned to the plaintiff all his right, title, interest, claim and demand to the sums of money and claim and demand thereto of *James Grey Bethune*, as contained in the assignment from *Bethune* to *Boulton*. By an agreement bearing the same date, and made between the plaintiff and *George Strange Boulton*, it was agreed that so soon as the plaintiff should have settled and obtained, either in money or property, his claim upon the government for about 2000*l.*, as therein expressed arising from the expenditure made by *Bethune* in improving certain inland waters of the Newcastle District, and upon the payment of one-third of the expenses which the plaintiff might thereafter incur in the prosecution of his claim, he, the plaintiff, would pay to Mr. *Boulton* the sum of 700*l.*

Judgment.

In the month of October, 1847, the provincial government, in pursuance of an act of the legislature appropriating certain moneys for that purpose, paid to the *Bank of Upper Canada* 3440*l.*, being the full amount due on the debentures, with interest up to the 3rd of June, 1846, and thereupon received the debentures from the *Bank*.

The plaintiff's bill treats the debentures as continuing to be the property of *Bethune*, after the advance or payment to him by the *Bank* of the sum of 2000*l.* The plaintiff's position is, that *Bethune* pledged the debentures to the *Bank* as security for the advance, the debentures remaining his, subject to the payment of the sum advanced and that after the mortgage and bond given in 1834 the debentures were at most only a collateral security, the bond and

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mortgage being the primary security. He insists indeed that the bond and mortgage were a substituted security for the advance; and he further contends that the effect of the arrangement of 1842 and of the conveyances by which they were carried out was a release by the *Bank* of any interest they might have theretofore held in the debentures.

To examine, first, the capacity in which the *Bank* in the first instance became holders of the debentures; Mr. *Bethune*'s application to the *Bank* was that they should advance and lend to him, on behalf of the commissioners, on the debentures, for the purposes of the works, the sum of 2000*l*. Now, though the words "advance and lend" were made use of in Mr. *Bethune's* application, it is sufficiently clear that a lending of money, in the proper meaning of that term, was not contemplated, as it is an essential quality in a loan that the person to whom or on whose account money is to be advanced is to become liable for its repayment. It was not contemplated that the *Bank* should look to the commissioners in general or to *Bethune* in particular for payment of these debentures, or that they should incur any liability in respect of them (with the single exception of *Bethune's* guaranteeing payment of the interest), but it was evidently understood, as well by the party applying for the advance as by the party making it, that the latter (the *Bank*) were to look for payment of the debentures only to the provincial government, and only to a certain fund designated by the act. When therefore the *Bank* advanced the face of the debentures and interest and thereupon the debentures passed into the hands of the *Bank* and they became holders thereof, did they become *owners* of the debentures? did the debentures become the property of the *Bank*, theirs absolutely, to deal therewith as they might think proper? or did they remain the property of *Bethune*, pledged only to the *Bank* to secure the

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repayment of a loan? *Bethune* was not bound to redeem the debentures: is there anything to shew that he retained the right to do so? I think there is not. His guaranteeing the payment of the interest could not, I conceive, have that effect. The giving of such guarantee was merely a compliance with a condition exacted by the *Bank*, without which they refused to advance the money which *Bethune* had applied to them to advance. I look upon the transaction as being a purchase by the *Bank* of certain debentures, which they took at par, the due payment of the interest being secured by the person from whom the *Bank* purchased them, and I think that the *Bank* upon becoming the holders became also the absolute owners of the debentures. There is nothing to lead me to the conclusion that *Bethune* retained any right to the debentures whatever.

Judgment.

But it is urged that the transactions of 1834 altered the character in which the *Bank* held the debentures, if they did not cease of right to hold them at all. At this time the *Bank* were treating with a man largely indebted to them, and with scanty means, as they had discovered, for the payment of his debts, and it is evident that they secured themselves as far as they were able upon his property, and otherwise, for debts due to themselves, and at the same time, they obtained, security for payment of the sum they had advanced when they purchased the debentures. At first view, it would appear as if they treated that advance as an existing debt from *Bethune* to the *Bank*; but these circumstances intervened: a portion of the money advanced had not been expended for the purpose for which it was advanced, and the expenditure of which was looked upon as necessary to give value to the debentures: and Mr. *Bethune* had since become insolvent. If no money at all had been expended the debentures might be looked upon as absolutely valueless, and therefore valuable only to the extent to

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which money had been expended on the works for the construction of which they had been issued. To require payment, or security for payment, of the amount unexpended was then perfectly reasonable, and would have been so if there had been a sale, in the most express terms, of the debentures, and consequently no debt as between *Bethune* and the *Bank* in respect of the amount advanced; and if there had been no other transaction between the parties, and the *Bank* had induced *Bethune* to secure to them by bond and mortgage the due payment of the 2000*l.* they had advanced, with interest, according to the terms of the debentures, I do not see how the mere giving such security would affect the character in which the *Bank* had theretofore held the debentures. Its only effect, as it appears to me, would be this, that whereas the *Bank* had up to that time *Bethune's* guarantee by bond for the payment of the interest only, they had now his guarantee, by bond and mortgage, for the payment of the principal also,— in each case the rates and tolls being the primary fund for payment; and failing that, then the securities given by *Bethune*. I look upon such securities as additional and collateral to the debentures (which remained in the hands of the *Bank*), and not certainly as a substitution for them.

Judgment.

In this case it is true that the debentures' transaction was not the only one between the parties, and it may be that the relative position of the parties made it difficult for *Bethune* to refuse the terms required by the *Bank* for securing the amount of the debentures, while making arrangements for the settlement of his large indebtedness to that institution. This arrangement, however, is not impugned, but the plaintiff founds his claim upon the legal effect of the several transactions to which I have adverted.

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The bond, the condition of which I have in substance set out, refers to the debentures as to be retained by the *Bank*. It provides that *Bethune* should be liable only in the event of the moneys coming to the hands of the Receiver-General from rates and tolls being insufficient for the payment of the principal and interest of the debentures. It is clear thus far that the *Bank* was to receive the proceeds of the rates and tolls from the Receiver-General, and to retain the debentures for the purpose. The proviso in the mortgage is for the payment of the money according to the condition of the bond.

There is no doubt that a great deal turns upon whether, after the transactions of 1834, the *Bank* held the debentures of right as their own, the bond and mortgage being collateral security for their payment, or whether a debt was created by the bond and mortgage, in which, as it is contended, a prior debt—the sum advanced for the debentures—was merged, and so, that the property in the debentures reverted to *Bethune*, they either ceasing to be the property of the *Bank* at all, or standing only as a collateral security in their hands for the debt created by the bond and mortgage.

Judgment.

According to my view, there was no pre-existing debt due by *Bethune* in rsspect of the 2000*l*., and therefore none to merge. I have examined carefully the evidence, documentary and otherwise, connected with the arrangements of 1834, with a view of seeing if they supported the position of the plaintiff as to effect of those arrangements. I cannot see that the property in the debentures was in any way affected thereby. I do not find anything that could have the effect of revesting in *Bethune* any right to the debentures, either a qualified right or otherwise. I do not of course speak now of any right that might have accrued to him in the event of the debentures being

satisfied by himself or by the mortgaged lands. I mean only, that in my view of the matter the debentures were, up to the transactions of 1834, the property of the *Bank*, and so remained, unaffected by those transactions afterwards.

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After the transactions of 1834, I take the position of the *Bank* and of *Bethune*, in relation to the debentures, to have been this: The debentures were the primary fund out of which the amount for which they stood was payable. The *Bank*, as owners of the debentures, looked to them primarily. *Bethune* by his bond, given in January, 1834, became security for the payment of the debentures, and, by the 2000*l.* mortgage, collateral security was given for their payment. The debentures then stood in the place of principal debtor, the *Bank* in that of creditor, and *Bethune* in that of surety.

Did any interest then exist in *Bethune*, or could any interest accrue to *Bethune* in respect of the debentures, assuming them to be the absolute property of the *Bank?* If the whole of the moneys payable by the debentures had been realized out of the mortgaged lands, or had been paid to the *Bank* by *Bethune*, it cannot be questioned, I think, that he would have been entitled to the debentures. Or, if the *Bank* retained the debentures, and received payment of them from government, after receiving payment of them by the mortgaged lands, or from *Bethune* himself, it is equally clear that they could not retain the double payment against *Bethune;* so if the amount payable by the debentures had been partially satisfied in like manner and the *Bank* afterwards received the whole amount, the amount paid by the surety, or satisfied by his property, could not be retained against him by the *Bank;* or, more strictly perhaps, so much of the amount received afterwards would be his, because, in the eye of the law, received to his use.

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If this position be correct, then upon the execution of the bond and mortgage in 1834 there sprang up a contingent interest in *Bethune* to the debentures and to any moneys that might come into the hands of the *Bank* in payment of the debentures; that contingency being the payment by *Bethune*, or from his lands, comprised in the 2000*l.* mortgage of the amount, or any part of the amount, payable by the debentures. I am treating the matter so far as if there had been no transactions between *Bethune* and the *Bank* other those connected with the debentures, and apart from the consideration of the effect of the transactions of 1842; and I think that the ownership of the debentures being in the *Bank* absolutely is not inconsistent with the existence of a contingent interest in the same debentures in *Bethune*; and I think that such contingent interest in *Bethune* did exist.

Judgment.

The next question is, whether such interest was an assignable interest; and if so, whether *Bethune* did make a valid assignment of it to *Boulton*. The general of course is that interests, whether vested or contingent, are assignable. I do not think that the interest in question falls within any of the exceptions to the general rule. The assignment is in terms sufficiently comprehensive to embrace the moneys, or any portion of the moneys, in question, in whatever hands they might happen to be, and it appears to have been made for a valuable consideration.

I have considered the case as if the transactions between *Bethune* and the *Bank*, in relation to the debentures, were the only transactions between those parties, because the transactions of 1834 for securing the respective debts of 5000*l.* and 3000*l.* were separate and independent transactions, and did not in any way affect any right or interest *Bethune* might have in the lands comprised in the 2000*l.* mortgage or in the debenture moneys.

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To consider now the effect of the suit for the foreclosure of the 2000*l.* mortgage, or rather what would have been its effect if not abated as it was by the death of *Bethune*, and if prosecuted to the final order for foreclosure: the *Bank*, in my view of the matter, would still have had the right to receive the debenture moneys with only this effect, that the foreclosure would have been thereby opened. This is sufficiently established by the case of *Lockhart v. Hardy*, reported in 9 Beavan.

A considerable time before the arrangements were entered into in 1842, the *Bank* had notice of Mr. *Boulton's* claim, though they denied its validity. He claimed indeed more than he was entitled to—that is, either the debentures or the land; and he insisted that the *Bank* were bound to elect which they would take. I think certainly they were not bound to elect, and that Mr. *Boulton* mistook the legal effect of the bond and mortgage of 1834, and the assignment to himself. But still the *Bank*, having notice of the fact of the assignment, was bound, I apprehend, to the extent that he acquired rights under that assignment. The position of the parties then at the time of the arrangement in 1842 was this: the *Bank* were holders and absolute owners of the debentures, holding as collateral security *Bethune's* bond and the 2000*l.* mortgage.—*Bethune* was dead, and his rights as a *quasi* surety for the payment of the debentures were outstanding in a third person, Mr. *Boulton*: the parties entitled to the mortgaged lands and the *Bank* enter into the arrangement which has been detailed. How does that arrangement affect *Boulton's* rights? He was no party to it, and it was entered into with notice of his claim; it could not therefore affect him prejudicially. Then, on the other hand, was his position bettered by any think that took place at that arrangement? Great stress was laid by the learned counsel for the plaintiff

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upon the words of the *habendum*, to which I have referred, and it was contended that they amounted to a release not only of the liabilities incurred by the mortgage and bond, but of the debentures also. I think that the construction contended for is pushing the words beyond their necessary legal effect in the place where, and under the circumstances in which, they are used. There was no *debt* from *Bethune* to the *Bank*, but a guarantee that certain moneys should be paid, and that guarantee was to the extent of 2000*l.* and interest. It should be borne in mind that the arrangement was between the *Bank* on the one hand, and those interested in the estate of *Bethune* on the other, those interested in the real estate mortgaged and the personal estate liable for the 2000*l.* and interest—that liability, or sum of 2000*l.*, is the sum referred to (*inter alia*) in the habendum; and the words "to the end and intent that the several sums above mentioned and interest might become merged and extinguished in the freehold, reversion, &c.," must be read, I conceive, with reference to what the sums respectively were as between the parties to that agreement. The 2000*l.* was a sum *not due* by *Bethune's* estate to the *Bank*, but a sum *quasi* due by a third party, but for which nevertheless *Bethune's* estate and certain lands of his specifically were liable; and the intent, as I read the instruments, was that the sum as it affected *Bethune's* estate should become merged and extinguished as thereby provided; not that it was meant to pay or extinguish the debt of a third person. The whole of the instrument shews this; and it is from the whole of an instrument, the relative position of the parties, and the nature and object of an agreement, that the intent is to be gathered, not from an expression that may be contained in a passage taken by itself alone and isolated from the rest of the instrument.

Judgment

The judgment of the Court of King's Bench in England, in the case of *Thomas v. Courtnay* (*a*),

(*a*) 1 B. & Al. 1.

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appears to me strongly confirmatory of the view which I have taken as to the effect of the releases. In that case certain traders, Messrs. *Baker & Sons*, had entered into a composition with their creditors, and articles of agreement were signed by the creditors by which they agreed to accept, in full satisfaction of their debts, a composition of twelve shillings in the pound, to be secured by the promissory notes of *Baker & Sons* at six, twelve, fifteen and eighteen months; the concluding clause was as follows: "and they, the said creditors, shall and will accept the sums secured by such promissory notes in full of all the debts due to them from *Baker & Sons*, and release them from all actions and demands from the beginning of the world to the thirty-first day of December last past." The plaintiffs were creditors of *Baker & Sons* in the sum of 1,295*l.*; that sum was written opposite to their names when they signed the articles of composition; for that debt they received the promissory notes of *Baker & Sons*, at the rate of twelve shillings in the pound, and these notes were ultimately paid. The question arose out of the following transaction: In the preceding November the plaintiff had received from *Baker & Sons* a bill of exchange drawn by them for 200*l.* and accepted by a Colonel *Gower*; this bill had fallen due and was dishonoured prior to the thirty-first December, and at the date of the agreement remained in the hands of the plaintiffs. Afterwards, in February, 1815, the money due on the bill was paid by Colonel *Gower*.—The amount of the bill and interest was included in the 1295*l.*—The suit was brought against third persons on a guarantee to be answerable for goods to the amount of 150*l.*, supplied by the plaintiff to *Baker & Sons*, and it was contended that the moneys received in payment of the bill were moneys received to the use of *Baker & Sons*, and taking the words of the agreement in their literal sense "they, the said creditors shall and will accept the sums secured by such

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promissory notes in full of all the debts due to them from *Baker & Sons*," such would be the case; but the court unanimously held the contrary. They decided that the plaintiffs were entitled to retain any securities they might hold against third persons, and that the composition deed only disabled them from looking to *Baker & Sons* for more than the amount of the composition notes, and *Bayley*. J., said; "The fair meaning of such an agreement as this is, that *Baker & Sons* should not be forced to pay more than twelve shillings in the pound on the amount of their debts to the different persons who signed the agreement."

Judgment

As in that case it was *Baker & Sons* who were intended to be protected by the agreement and not third persons, so in this it was *Bethune's* estate that was intended to be protected, and that only; and the remedies of the *Bank* against third persons were not intended to be affected. In the case cited, the words used were comprehensive enough to have included Colonel *Gower's* bill, but, as was said by Mr. Justice *Bayley*, the *fair meaning* was that *Baker & Sons* should not be forced to pay more than the composition agreed upon. The plaintiff's remedies against third persons remained unaffected by language which in terms comprehended them. Suppose no assignment had ever been made by *Bethune* of his interest in the debentures at the time of the arrangement made in 1842: it would appear that those interested in *Bethune's* estate assented in express terms, in writing, by letter that any claim the *Bank* might have to the debentures should remain unaffected by that arrangement: in this I include Mrs. *Bethune*, as her father, who acted as her agent in the negotiations, was very express upon this point. Had those interested in *Bethune's* estate afterwards claimed any interest in those debentures against the *Bank*, I apprehend that those letters would be admis-

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sible as evidence, to shew the nature and object of the transaction. But it may be said, Mr. *Boulton* was no party to those letters and cannot be affected by them. To this I do not agree. If Mr. *Boulton* seeks to avail himself of an arrangement to which he was no party; to have the benefit of any written agreement entered into between others, he cannot exclude anything that, between the parties to that agreement, would be evidence to shew its object and intent. There cannot be one construction of the agreement as between the parties to it, and another construction as between one of the parties and a stranger who claims a benefit under it. The agreement should be looked at in view of his being a stranger, whose rights and interests were not in the contemplation of the parties who made the agreement, but their own respective rights and interests only; and so where *general* words are used, they must be referred to those rights and interests which were the subject matter of agreement.

Judgment.

In the case of *Thomas v. Courtnay*, the absence of any provision for assigning securities was remarked upon as evidencing an intention that they should be retained by creditors for their own benefit. In this case there is the absence of any assignment or delivery of the debentures; but, on the contrary, an open retainer and express claim on the part of the *Bank* to continue to hold them as their own, and this expressly acquiesced in by the other parties to the agreement.

I have not overlooked the language of the recitals in the instruments by which the arrangements of 1842 were carried out; I think it favours the construction which, in my judgment, is the true construction of the instrument. In the recited agreement of the *Bank* to accept the release of the equity of redemption in *part payment* of the sums secured by

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the several mortgages, it would be wresting the words "in part payment" from their ordinary signification to read them as meaning part payment, because previous payment had been made on account. In such case, the ordinary words would be in payment of the balance remaining due on the mortgage, or some equivalent expression. The words 'in part payment,' certainly import that something remains yet to be paid; and the words are not without their weight when reading and comparing the different parts of the instruments with a view to interpreting their object and intent. It is possible however that the words "in part payment" in the preamble may have been used in each release in reference to the lands comprised in that release, the lands comprised in each being in part payment of the aggregate amount. From the best consideration that I have been able to give to this point. I am of opinion that Mr. *Boulton's* claim derives no additional force from the *habendum* in the releases.

Judgment.

If the construction contended for by Mr. *Boulton* were correct, he would, I apprehend, have been entitled to the debentures; because the creditor, the *Bank*, having accepted from the surety a something, which they received not only as a consideration for exonerating the surety from his liability, but in satisfaction of the debt itself, the *Bank* would no longer be entitled to receive the debt; and the surety, having satisfied the debt, would be entitled to stand in the place of the principal creditor. Considering Mr. *Boulton* wrong upon this point, it is yet necessary to ascertain his position and rights. His having received from *Bethune* an assignment of a contingent interest of the nature described, could not place him in a position to affect the right of the *Bank* to avail itself of all its remedies—among them to foreclose the mortgage. If they had foreclosed the mortgage, they would still have had a right to receive the debenture

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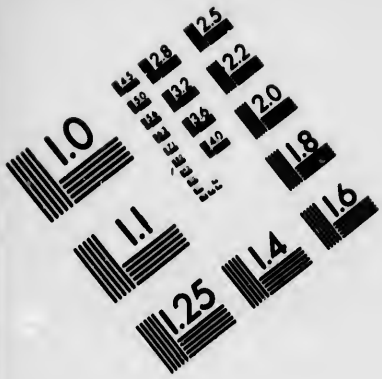
moneys, with the effect however of opening the foreclosure. If they had foreclosed, and then sold the mortgaged lands, they would probably have precluded themselves from receiving the moneys secured by the mortgage from any other source, because they would have placed it out of the power of the mortgagor to redeem, which otherwise he might have done upon any act being done by the mortgagees to open the foreclosure. But when the mortgagor by his own voluntary act releases his right to redeem, without providing against the mortgagee's availing himself of his other remedies, does he not leave it open to the mortgagee so to avail himself? He released his right to redeem for a certain consideration, the *Bank* abandoning certain rights on their part, but not abandoning their right to receive the debenture moneys, but it being clearly understood by the parties to the transaction that the *Bank* were to retain that right, whether Mr. *Boulton*, as assignee from *Bethune* of the contingent interest already adverted to, could have had an equity to compel the *Bank* to realize what had been thus assigned to them, it is not necessary to enquire, for the *Bank* did realize and convert into money the lands comprised in the 2000*l.* mortgage security. Those lands were sold at public auction in January, 1843, and realized the sum of 598*l.* 10*s.* The conduct and management of that sale have been impeached, I think, unsuccessfully; I think the *Bank* not chargeable with neglect or mismanagement in regard to it.

Judgment.

The question then is, whether the *Bank* is entitled to retain the proceeds of the sale, and also the money received on the debentures in full, or whether the moneys realized by the sale must be taken as so much paid by the surety on account of that, the payment of which he guaranteed. If there had been no assignment of *Bethune's* interest in the debenture moneys outstanding, it might have been urged that the arrangement of 1842 must be looked at as a



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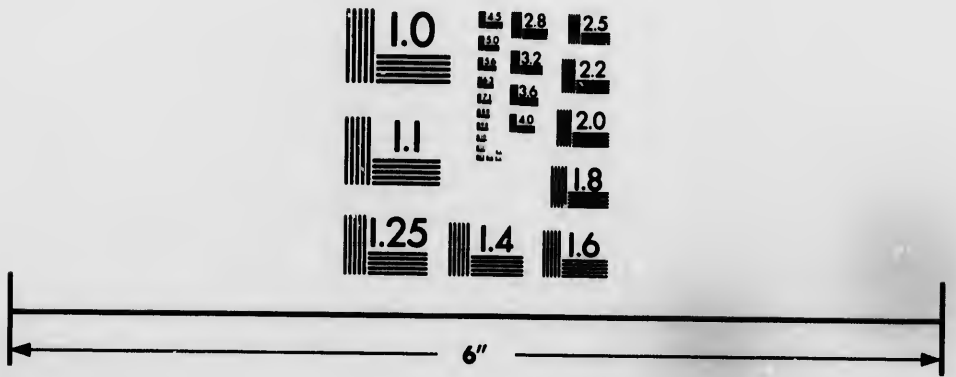

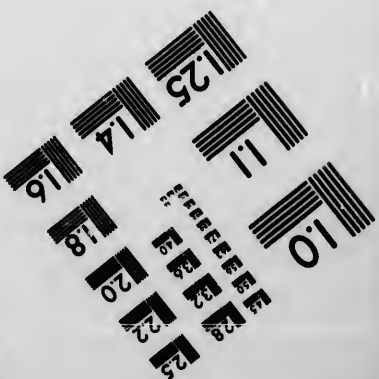

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whole, and that *Bethune's* estate being indebted to the *Bank* in 10,000*l.* and interest (less some payment that had been made on account), the lands comprised in the several mortgages, the 500*l* due by *Donald Bethune*, and the debenture moneys also, were no more, or perhaps even less than an equivalent for that debt; but the contingent interest which *Bethune* had formerly had in the debenture moneys did not then belong to his estate; the *Bank* had notice of its assignment to Mr. *Boulton*, and his rights under that assignment were, of course, not affected by a transaction to which he was no party. It follows, I think, that the moneys realized from the mortgaged lands must be taken as so much paid by the surety on account of the principal debt, the payment of which he had guaranteed.

Judgment.

The officers of the *Bank* seem indeed to have been conscious that they had no right to retain the whole amount of the debentures and also the moneys realized from securities, which were collateral securities for the payment of the debentures. This appears as well by their books as by their statements to government after receiving payment of the debentures. They were in error indeed in treating the government as entitled to the moneys realized from such collateral securities, but right in assuming that these moneys did not belong to the *Bank*.

Now, to consider *Boulton's* rights after the *Bank* had received payment of the debentures, or rather what they would have been if he had retained the contingent interest which he derived from *Bethune*.—*Bethune's* guarantee to the *Bank* was that the debentures and interest should be paid in full. If the legislature had authorised the payment only of the moneys expended on the works, say 1300*l.* and interest, *Boulton* would have been entitled to receive nothing, unless the moneys realized from the collateral securities, or paid by *Bethune*, the surety,

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exceeded the difference between the moneys paid by the government and the full principal and interest due on the debentures, and then only the amount of the excess. The sum received by the *Bank* was 3440*l.*—the amount of the debentures and twelve years' interest, being interest up to the third of June, 1846. The above was the amount appropriated by the legislature for redeeming these debentures. The debentures were not redeemed till October, 1847, and *Bethune* would have been bound under his guarantee to have made good the interest up to that date, and after the assignment to *Boulton his* interest was subject to the same charge. The *Bank* therefore, in accounting for what they have realized from the collateral securities (which of course will include the rents received by their agent,) will be entitled to deduct the unpaid interest on the debentures.

Taking the view that I do of the relative position of the parties, I need hardly say that I dissent in toto not only from the plaintiff's claim to be entitled to the whole amount of the debentures, but also from his alternative, or modified claim, to be entitled to all above 1300*l.* taken as the amount expended on the works and interest thereon. It is true that the *Bank*, at the time of the arrangement of 1842, expected that the government would pay only the amount expended, but that would give no right to those claiming through *Bethune* to receive the difference. It was *Bethune's* wrong that the whole 2000*l.* was not expended; that wrong made the claim of the *Bank* questionable to the extent of 700*l.*, the amount unexpended. *Bethune* guaranteed the full payment of the debentures. Upon what principle could *Bethune*, or those claiming under *Bethune*, be entitled to the amount which he wrongfully omitted to expend, and that against those who advanced the whole amount to him, upon the faith that he would expend it, and to whom he guaranteed the payment of the whole sum?

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Again: The terms of the assignment to *Boulton* negative his right to any excess. *Bethune* assigned to him his right, title and interest of, in and to 2000*l.*, *or such part thereof as was expended* by him as one of the commissioners. A person claiming adversely to Mr. *Boulton* might reasonably claim such excess, but such a claim by him or by one claiming under him, is wholly untenable.

Judgment.

A point is raised by the defendants as to whether the plaintiff can have any relief in this suit, if only entitled to relief in respect of moneys actually received by the *Bank* in payment of the debentures, inasmuch as as it is alleged the moneys were not paid till after the original bill was filed. The counsel who raised this point is not quite accurate as to the fact. The bill was filed on the 14th of October, 1847; at that time the *Bank* were in the course of receiving payment of the debentures. Two payments, amounting together to 2580*l.*, had already been made, and the balance was received on the 18th of the [illegible] month; and further, it appears from correspon[illegible] put in, that the Receiver General was officially authorised to pay the money on the 29th of the previous month, the *Bank* having executed the required bond of indemnity on the 20th of that month. I have no doubt, therefore, that the cause of action had arisen at the time of bill filed, even supposing that it did not arise till the money was received by—or, what would be equivalent to being received, was at the disposal of—the *Bank*. Upon this point the words of the answer would probably be sufficient; it states that the debentures were paid to the *Bank* in the month of October. This, I apprehend, would be taken to be before bill filed (the 14th of that month), if material to the defendants to shew that it was after that date. I may remark too that proceedings in this court had long previously been recommended by the government, for the purpose of ascertaining which of the rival claimants was entitled to the debenture

moneys. I do not express the opinion that the actual receipt of the money by the *Bank* was necessary before a suit could be instituted in this court.

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It is objected by the defendants that the Attorney General ought to have been made a party to this suit. I do not think that he is a necessary party. The legislature thought proper to appropriate a sum of money to redeem the debentures in full, not confining the appriation to the amount believed to have been actually expended on the works. The goverment have paid that amount in full and make no claim in respect of the difference. On the contrary, although a correspondence has taken place between the *Bank* and the government in relation to a deduction which it was supposed the government might be entitled to on another account, yet the claim now suggested was never alluded to by either party, and is only mentioned in the defendants' answer, where it is suggested that the government may have a claim in that respect. To make the Attorney-General a party for this purpose would be to require his presence, in order to litigate the question raised by the *Bank* who received the money, whether they were not wrong in receiving, and the government wrong in paying, for a specific purpose, a sum of money which the legislature had seen fit to appropriate for that purpose, and that merely upon a doubt raised whether the claim for the whole sum was made good, a matter upon which the legislature must have passed before making the appropriation; no right of the crown is involved, nor any public right or interest not already disposed of in the proper quarter.

Judgment.

The only remaining question is, whether the plaintiff is before the court in a position which should disentitle him to relief in a court of equity, although the person from whom he immediately derives title, Mr. *Boulton*, would, if plaintiff have been entitled

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relief; whether the assignment to himself is open to objection on the score of *champerty*, or as savoring of *champerty:* whether he is a mere volunteer; or whether his mode of acquiring title is impeachable on any other grounds. I have given some consideration to this branch of the case. I take the plaintiff as claiming only through *Boulton*. There is no evidence of any assignment from *Bethune* to the late Mr. *Covert*, and I take the plaintiff' position to be, that he at the time of getting an assignment from *Boulton*, having or believing that he had, and having reason to believe that he had a right or interest in the debentures derived from his father in virtue of an alleged assignment from *Bethune* to his father and being aware that *Boulton* also held an assignment from *Bethune*, took the assignment from *Boulton*, under which he now claims. In determining this point, it may be necessary for the plaintiff to shew that he was not a mere stranger when he took the assignment from *Boulton*, and that he believed and had reason to believe that he himself had an interest in the debentures. Of this there is no *legal* evidence. The objection was not made by the answer, but was raised for the first time at the hearing of the cause. I think the defendants were in time in raising it then, as the facts upon which, as I understand, they chiefly rely to sustain the objection were not disclosed till a late period of the taking of the evidence, and there is reason to believe that they were unknown to them before.

Judgment.

But, as the objection was not taken till the hearing, I think it reasonable that the plaintiff should have an opportunity of shewing that his conduct in the transaction is not open to the objection urged against it. At present I refrain from expressing any opinion upon the point. I have thought it well, however, to express my opinion upon the merits of the case, and to ascertain, as far as my judgment can

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ascertain, the position of the parties, and the rights really in question between them. With this view, I considered the question as between the *Bank* and Mr. *Boulton*, and am of opinion that he had certain rights in a portion of the debenture moneys, which rights he has transferred to the plaintiff. The *Bank* have not, in my view, a right to retain the whole amount received, nor, of course, would such right be conferred upon the *Bank* even if the transaction between *Boulton* and *Covert* be open to the objections urged against it, which it may or may not be, according to certain facts not yet disclosed.

Apart from these objections my opinion is that the plaintiff is entitled to an account of what has been realized by the *Bank* from the collateral securities for the payment of the debentures, less the amount of interest on the debentures from the third of June, 1846, to the date of their payment.

Judgment.

In this way the *Bank* will have been paid the full amount of the debentures, with interest, as I think was their right; the plaintiff, in the place of a *quasi* surety who had guaranteed the payment of the debentures, being reimbursed what had been realized by the *Bank* from collateral securities, a right which accrued to him upon the principal debt being afterwards received in full by the *Bank*, such full payment being to the extent previously realized, a receiving by the *Bank* twice over of the same amount.

The plaintiff's claim, however, was for a different thing, and rested upon a different footing. He has failed, in my judgment, in establishing his right to that which was substantially sought by his bill, and the defendants, I think, are entitled to their costs up to and inclusive of the hearing of the cause.

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After this judgment had been pronounced, a motion was made on behalf of the plaintiff to vary the minutes of the decree by inserting a reservation of the costs, under the circumstances set forth in the judgment on the motion.

March 26.

Argument.

Mr. *Gwynne*, Q. C., and Mr. *McDonald*, for the motion, cited *Perry v. Phelps* (*a*), to shew that the evidence sought to be given might now be received by the court. *Millington v, Fox* (*b*), shews that the court will always receive with favour a proposition to settle a suit, in order to put an end to litigation. *Marten v. Whichelo* (*c*), *Hood v. Pimm* (*d*), *Kelly v. Hooper* (*e*), *Christian v. Field* (*f*), *Colburn v. Simms* (*g*), *Sivell v. Abraham* (*h*), *Penny v. Watts* (*i*), were also cited.

Mr. *Vankoughnet*, Q. C., and Mr. *Crickmore*, contra.

June 10th.

Judgment.

SPRAGGE, V. C.—In this case, in which judgment was given on the sixth of February last, an application is made by the plaintiff, having for its object the reservation of the costs until after the inquiries which are referred to the master. By the decree some relief is given to the plaintiff, but the costs up to and inclusive of the hearing are adjudged to the defendants, on the ground that the plaintiff had failed in establishing his right to that which was substantially sought by his bill.

The present application is founded upon an offer contained in a letter addressed on the third of April, 1848, to the solicitor of the defendants, a copy of which was at the same time communicated by the plaintiff to the defendants, through their president and cashier. The letter is in the following terms:

(*a*) 1 Ves. Jur. 251. (*b*) 3 M. & C. 338. (*c*) Cr. & P. 257.
(*d*) 4 Sim. 101. (*e*) 1 Y. & C.C.C. 197. (*f*) 2 Hare. 177.
(*g*) 2 Hare. 560. (*h*) 8 Beav. 598. (*i*) 11 Beav. 298.

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"Before taking further proceedings in this suit, we beg to make you the following proposal: We offer to accept the 700*l.* and interest, paid to the *Bank* on the debentures in question in this suit, over and above the 1300*l.* claimed by the *Bank*, giving a bond of indemnity, if the *Bank* with it, and paying our own costs.

"This offer is made, of course, without prejudice, and in order to make sure of our costs at all events, whether eventually the court should hold us entitled to the whole amount of the debentures or only to the 700*l.*

"As we must take another step without delay, we shall feel obliged by your answer, and as we shall rely upon this offer upon the question of costs ultimately, we send a duplicate copy to the *Bank*."

The plaintiff's bill had been filed in the previous month of October, to which the defendants had put in their answer. The offer was not accepted. The plaintiff subsequently amended his bill, and required a further answer from the defendants, which they filed. This letter was not put in evidence in the cause, and is disclosed to the court for the first time upon this application. Various objections are made to its being allowed now to be put in evidence; but, as in my opinion it ought not, if it had been put in evidence upon the hearing, to have varied the judgment given as to costs, it is unnecessary to consider these objections.

Judgment.

The leading case upon this point of refusing to a successful party his costs of continuing a suit, the further prosecution of which was rendered unnecessary, by an offer made by the opposite party, is that of *Millington v. Fox.* This has been followed in subsequent cases, and the principle as succinctly stated by Sir *James Wigram* in *Colborne v. Simms*, is, that if a plaintiff immediately after the suit is commenced is offered and may obtain all he seeks, and still thinks proper to go on with his suit, the court may give him his decree, but will not give him the costs of the suit so unnecessarily prosecuted. It is

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clear from this case, and from the cases of *Kelley v. Hooper*, and *Sivell v. Abraham*, cited by the plaintiff, that the defendants submitting to the plaintiff's demand, must also submit to pay his costs up to the time of his making the offer.

This case differs from those cited in support of this application in several essential particulars. In the cases cited, the plaintiff spread his claim upon the record, and that claim was promptly submitted to by the defendant, who offered to give him, without further suit, all that he could obtain by its successful issue; to continue the prosecution of the suit after such submission and offer, certainly was (what the courts call it), unnecessary litigation; but here, instead of a defendant promptly submitting to a plaintiff's claim, is a plaintiff who files his bill, making a large demand upon defendants, and about six months afterwards, and after having got in their answer, offers to take a little over a third of his original claim and to pay his own costs, leaving it, of course, to the defendants to pay theirs; now supposing it had turned out that he was afterwards adjudged to be entitled to what he had so offered to take; there is no reason why he should not have paid the defendants their costs up to the time of making this offer. It does not appear that he made such offer when he filed his bill; but, putting the defendants to the expense of contesting a large demand, he afterwards offers to accept a comparatively small one, leaving the defendants to bear the expense of contesting that which he has consented to forego. I do not think that such a proposal is one which the defendants ought to be held bound to have accepted at the peril of forfeiting their right to their costs of further defending the suit and I think that to deprive them of costs, to which, but for this offer, they would be entitled, he must show that his offer was such a one as they ought to have accepted.

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But there is this further difficulty in the way of granting the plaintiff's application: even his modified claim was not adjudged in his favour by the court. In his letter he says: "This offer is made of course without prejudice and in order to make sure of our costs at all events, whether eventually the court shall hold us entitled to the whole amount of the debentures, or only to the 700*l.*" It would appear indeed from this passage that the plaintiff only looked to receive his costs in the event of either the whole amount of the debentures, or at least the 700*l.*, being adjudged to him. He succeeded as to neither; but the relief which he was decreed entitled to, has no connexion whatever with the 700*l.*, or the difference between that and the whole amount of the debentures, but rested upon an entirely different footing; the claim made by his bill and the modified claim offered to be accepted by the letter, were equally adjudged against him.

Judgment.

It is suggested that the amount to which the plaintiff is entitled under the decree pronounced will about tally with that which he offered to accept. I do not think that this will be found to be the case, unless indeed the defendants are found to be chargeable with a much larger amount, in respect of rents and profits received, and proceeds of sales of lands mortgaged, than the amount which they have credited, and this has not been suggested. The offer of the plaintiff was to accept 700*l.* and interest, and his position evidently was, that the *Bank* was entitled at most only to 1300*l.* of the principal of the debentures and interest thereupon, and that he was entitled to the difference—viz., 700*l.* and interest; the interest on each share would of course date from the same period—that is to say, the date of the debentures, 3rd June, 1833—as the *Bank* clearly could not be entitled to any interest when they were not entitled to the principal. At the date of the letter

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what the plaintiff claimed amounted to about 1323*l.* It was stated on this application by the plaintiff's counsel that he computed that what the plaintiff would be entitled to under the decree would amount to about 700*l.* or 800*l.* But if the two amounts did happen to be about the same, I do not think that it ought to relieve the plaintiff from the payment of costs, as he did not offer to accept a certain sum in satisfaction of his claim generally, but placed his claim upon a specific footing, and as the defendants were not called upon by that letter to consider whether, upon some different ground from that on which the plaintiff rested his claim, he might perhaps be entitled to some other relief, which might entitle him to a sum of about the same amount as that claimed by him. I say this in reference to the fact that the plaintiff's claim to be relieved from costs rests upon the offer contained in the letter in question, and upon that alone.

Judgment.

Upon the objections raised to the minutes being varied so as to admit this letter in evidence, I will only advert to the circumstances of its being retained by the plaintiff till after the hearing; and its admission being then made the subject of a special application, I am inclined to the opinion that it ought to be refused on that ground alone. In the cases referred to in support of its admission, the evidence sought to be supplied had been omitted through inadvertance of counsel or mistake. Nothing of that kind is pretended here, and I think that its admission would be wrong in principle and is not warranted by authority; but, as I have said before if the offer had been in evidence before the hearing I should not have considered it as affording sufficient ground upon which to refuse to the defendants their costs. The application must therefore be refused.

The decree as finally passed was as follows:

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Upon, &c. And the said defendants, by their counsel, waiving a reference as to the plaintiff's interest in instituting this suit, this court doth order and decree that it be referred to the master of this court to take an account of what was due to the said defendants, *The Bank of Upper Canada*, on the security of the debentures and the two thousand pounds mortgage in the pleadings mentioned, in the month of October, 1847, when they received the amount on account of the said debentures. Also, of all sums received by the said defendants, *The Bank of Upper Canada*, from the said plaintiff, or from any person or persons, on account of such debentures and mortgage security, and from any sales or rents of the lands in the said two thousand pounds mortgage mentioned. And this court doth order that the balance be paid by the party from whom, to the party to whom such balance shall be reported due, with interest from the time such balance shall appear to have accrued due.

Decree.

Usual directions.

ORDER—Plaintiff to pay costs to defendants.

RE GILLRIE.

Guardian—Custody of infant.

This court will, upon the petition of the guardian duly appointed by the Court of Probate or Surrogate, interfere summarily and order the person of the infant to be delivered into the custody of such guardian, when there is danger of the infant being removed out of the jurisdiction—although no suit is pending in court respecting the infant's estate.

September 6.

This was a petition by *Frances Gillrie* setting forth her intermarriage with *William Gillrie*, who died intestate in the month of November, 1851; that the petitioner had one child by her said husband named *James*, who was born in July, 1841, but that in consequence of the dissolute habits of her husband she had been unable to reside with him; and that he had cohabited with a woman named *Margaret Shaughnessy*, for a period of seven years previously to his decease.

Statement.

That the son of the petitioner had resided with his father up to the time of his decease, and that since the death of his father he had continued to reside with the said *Margaret Shaughnessy*, who it was stated had since intermarried with one *Wright*.

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The petition then stated the appointment of the petitioner as guardian by the Court of Probate, and that she had applied, both before and after her appointment, to *Margaret Shaughnessy* to have the child delivered up to her, but which was refused. And that the petitioner had been informed and believed that the child was about to be removed beyond the jurisdiction of the court by the said *Shaughnessy*, and prayed for an order for the delivery of the infant into the custody of the petitioner. The statements of the petition were verified by affidavit.

Statement.

Argument.

Mr. *Brough*, in presenting the petition and moving for the order, cited *Eyre v.* The Countess of *Shaftesbury* (*a*), and *Reynolds v.* Lady *Tenham* (*b*), to show that the court will thus summarily interpose for the purpose of preventing an infant being kept out of the custody of the guardian.

Judgment.

The Court, upon the authority of the cases cited, made the order asked for, and thereupon the following order was drawn up:

Order.

Whereas the above-named petitioner, *Frances Gillrie*, has this day presented her petition unto this court, setting forth that *Margaret Shaughnessy* (or *Wright*) has obtained and keeps possession of *James Gillrie*, infant son of the petitioner, and praying that the said *Margaret Shaughnessy* (or *Wright*) may be ordered to deliver up possession of the said *James Gillrie* to the petitioner, the duly appointed guardian of the said infant. Whereupon and upon reading the said petition, the affidavits of *Thomas Lewis* and the said *Frances Gillrie*, and hearing what was alleged by counsel in support thereof,—this court doth order, that the said *Margaret Shaughnessy* (or *Wright*) do forthwith, upon notice of this order, deliver up the person of the said *James Gillrie* into the custody and possession of the said *Frances Gillrie*, or of whom she shall appoint: and that the said *Margaret Shaughnessy* (or *Wright*), is to have leave to apply to this court to rescind, vary, or amend this order, as she may be advised.

(*a*) 2 P. W. 102. (*b*) 9 Mod. 41.

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Injunction—Practice—Appeal.

Feb. 16 & 19; April 23. June 4 & 30.

In 1844 the plaintiff obtained an injunction, restraining the defendant from suffering to continue any dam whereby the natural flow of the river, on which they both had mills, should be interfered with, to the injury of the plaintiff's rights. To this bill no answer was ever filed, but a motion to dissolve this injunction was made and refused: and, in the same year, the plaintiff recovered a verdict against the defendant at law, in respect of the same matters. An arrangement was then made between them that the dam should remain, and that each party should have the exclusive use of the water for a certain portion of every day, and this agreement was acted upon for nearly seven years. The defendant then began to make a limited use of the water all day: and contended that, from some improvements he had introduced into the machinery of his mill, this would not interfere with the plaintiff's rights. The plaintiff denied this, and moved to commit for contempt.

Held: That the delay was no answer to the motion; that the defendant having abandoned the agreement, the plaintiff had a right to fall back on his injunction; that on this application, the propriety of granting the injunction originally was not a proper subject of consideration; and the court being of opinion that the continuance of the defendant's dam was a breach of the injunction, ordered him to stand committed in two weeks, unless, in the meantime, he obeyed the injunction.

A defendant appealed from an order directing his committal for breach of an injunction, and moved this court to stay proceedings under the order, pending the appeal, which was refused.

Statement.

The circumstances which gave rise to this suit are fully detailed in a report of the case in the second volume of the Upper Canada Jurist, page 161. After the decision there reported had been made, an arrangement was entered into between plaintiff and defendant, which permitted the defendant to retain the dam in its then state, he undertaking to use the water at certain hours, and thus afford sufficient for the use of the plaintiff.

The agreement then entered into between the parties had been acted upon from that time until recently, when, in consequence of a deficiency in water for plaintiff's purposes, caused, it was alleged, by the defendant's user thereof, the plaintiff had made frequent applications to the defendant to afford him a sufficient supply of water, but which, it was alleged,

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the defendant would at times refuse to comply with. Under these circumstances a motion was made to the court to commit the defendant for breach of the injunction; but as the grounds of such application are fully set forth in the judgment, it is unnecessary to state them here at any length.

Argument.

Mr. *Vankoughnet*, Q. C., and Mr. *Crickmore*, for the motion, referred to *Partington v. Booth* (*a*), *Blanchard v. Bridges* (*b*), *Elmshurst v. Spenser* (*c*).

Mr. *Gwynne*, Q. C., contra, cited *Canham v. Fisk* (*d*), *Morris v. Morris* (*e*), *Robinson v.* Lord *Byron* (*f*), *Lane v. Newdigate* (*g*), *Wright v. Howard* (*h*), *Hanson v. Gardiner* (*i*), *Bealey v. Shaw* (*j*), *Mason v. Hill* (*k*), *Dawson v. Paver* (*l*), *Birmingham Canal Company v. Lloyd* (*m*), *Barret v. Blagrave* (*n*), *Motley v. Downman* (*o*), *Dewhirst v. Wrigley* (*p*), *Spottiswoode v. Clarke* (*q*), *Hall v. Swift* (*r*).

April 23.

The judgment of the court was now delivered by SPRAGGE, V. C. *

This application is for the commitment of the defendant for breach of an injunction obtained *ex parte*, on the sixteenth of January, 1845, on which day the bill in this cause was filed.

Judgment

The injunction restrains the defendant from doing, or continuing to do, any act, and from making or constructing, or from suffering to continue, any dam, race, or other matter or thing whatsoever, whereby the natural flow or course of the water in the river Humber may be prevented, diminished or affected in

(*a*) 3 Mer. 148. (*b*) 4 A. & E. 176. (*c*) 2 McN. & G. 45.
(*d*) 2 Cr. & Jer. 126. (*e*) 1 Hogan, 238. (*f*) 1 B. C. C. 588; S. C. 2 Cox 4.
(*g*) 10 Ves. 192. (*h*) 1 S. & S. 190. (*i*) 7 Ves. 305.
(*j*) 6 East 208 (*k*) 5 B. & Ad. 1. (*l*) 5 Hare, 415.
(*m*) 18 Ves. 516. (*n*) 6 Ves. 104. (*o*) 3 M. & C. 1.
(*p*) C. P. C. 319. (*q*) 2 Ph. 154. (*r*) 4 Bing. N. C. 381.

* The CHANCELLOR and V. C. ESTEN had been concerned in the cause.

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such a way as to prejudice, injure, or impair the water power necessary for the use of the woollen mills or manufactory of the plaintiff, and at any time theretofore enjoyed by the plaintiff, or those under whom he claims. On the 12th of August, in the same year, the defendant moved to dissolve the injunction upon affidavits. In this he failed, and the injunction was continued to the hearing. Upon that occasion a great many affidavits were filed upon both sides, and the respective rights and claims of the parties appear to have been as fully laid before the court as could be done upon affidavit evidence. The defendant put in no answer, nor has he ever put in any up to the present time. An action of trespass between the same parties, in relation to their respective rights to the water of the Humber, was commenced on the 25th of July, and tried at the autumn assizes of the County of York in the same year, when a verdict was rendered in favour of the plaintiff: upon this verdict judgment has been entered up recently.

Judgment.

In the following summer an arrangement was entered into between the parties, according to which each was to have the exclusive right of the water (in the dry season) for a certain portion of each day. This arrangement, varied somewhat in its terms from time to time, continued to be recognized as the arrangement between the parties until some time last year. In the dry season of that year (the exact date does not appear), the plaintiff, by his agent, *Frederick Whitney*, complained to the defendant that the agreement was not observed by the defendant. Defendant, upon that occasion, proposed a new arrangement, which, if accepted, would have given him the right to the exclusive use of the water for a larger portion of the day than he had a right to, under the then existing arrangement. To this proposal the defendant says he received no answer, but he continued, he says, to act under the former arrangement

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as if still in existence, until the 26th of September last, when he gave directions to his millers as to the use of the water, which he considered fair and was advised was within his right and would obviate all just cause of complaint—viz., never to use more than one water wheel at his mill either during the day or night when the water in the river was low. This of course, whether fair and reasonable or the contrary, was a repudiation by the defendant of the arrangement theretofore subsisting between the parties.

Before proceeding further, it is well to consider whether the affidavits filed by the plaintiff *in reply* can be read; the defendant objects that they are inadmissible, having been filed, as he says, without the leave of the court, and he contends that without such leave they cannot be filed. The most direct authority to which I have been referred in support of this position, or which I have seen, is contained in a note to *Clement v. Griffith* (*a*), where it is said that the Vice Chancellor declared that when an injunction was obtained on affidavit, and a motion was made to dissolve it on counter affidavits, his practice was to hear the matter immediately and not to give time to file affidavits in reply, unless upon hearing the matter he found it right to allow it. From this note it would appear to have been the Vice Chancellor's practice to allow no affidavits whatever to be filed in answer to the motion to dissolve, unless upon hearing the application he found it right to allow it, so that it was not till after the motion was in part heard that he decided whether the plaintiff should be admitted to answer the defendant's affidavits. Supposing this to establish a practice in the particular case to which it applies, it certainly establishes no general rule that a party making an application shall not file affidavits in reply without the leave of the court; the general rule I understand to be otherwise, and I find

Judgment.

(*a*) C. P. Cooper, 470.

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that in this case, on the motion to dissolve the injunction, the party who now urges this objection did himself file affidavits in reply. In the other cases cited the question was, under what circumstances affidavits could be used by a plaintiff *against an answer;* and therein distinguishing between matter of *title* and matter of waste, or other matter, to restrain which the injunction is applied for. These cases have no application here. The general rule is thus stated by Mr. *Daniel* (*a*): "If an affidavit which has been filed upon or in answer to a motion requires an answer, but it has been filed so recently that an affidavit in answer cannot be procured, the party affected by it should, if he be the party moving, save his notice of motion till a future day; or, if he be the respondent, he should ask that the motion should stand over, in order that he may file another affidavit." This indeed is precisely what has been done upon this application by each party, time having on the return day of the notice to commit defendant been asked for him and granted, in order to his filing affidavits in answer, and at the expiration of the enlarged time, the plaintiff having on his part asked for and obtained time to file affidavits in reply. On the latter occasion, as well as the former, the defendant's counsel was present, and the right of the plaintiff to file affidavits in reply was not then questioned, as it ought to have been if questioned at all. What took place upon that occasion deprives the defendant's objection of all force, for the plaintiff then obtained leave to file affidavits, and it surely must be a matter for the discretion of the court (if leave at all be necessary) whether to grant it before or after a motion is partly heard. I think the plaintiff entitled to read all the affidavits he has filed, though there may be portions of affidavits filed in reply which contain new matter, and which new matter muft be excluded from consideration.

Judgment.

(a) Daniel's Prac., Perkins' Ed., 1798.

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Another objection raised by the defendant is, that supposing the defendant to have committed a breach of the injunction, the plaintiff has forfeited his right to punish him for it by his long delay in bringing the cause to a hearing, which must be looked upon, it is contended, as an abandonment of his injunction; and further, that the arrangement between the parties (to which I have already adverted) amounts to an acquiescence on the part of the plaintiff in the continued existence of the defendant's dam.

Judgment.

The arrangement, as long as it was observed, made it unnecessary to bring the cause to a hearing; the defendant, in contempt for want of an answer, never filed one. His application to dissolve the injunction failed, and the injunction was, by order of the court, continued to the hearing. The trial at law resulted in favour of the plaintiff, and it was under these circumstances that the arrangement alluded to was made. I remarked when this objection was raised that the arrangement, in my view, looked more like an acquiescence on the part of the defendant than on the part of the plaintiff; like a submission on his part to adverse decisions by the courts both of equity and law, and I continue to view the arrangement in the same light. The plaintiff's rights having been ascertained to a certain extent, he forbore to exercise them strictly upon an undertaking being entered into by the party against whom he had successfully asserted them, which, as long as it was observed, gave him what he had established his right to substantially, or at least such as he was content to receive. This arrangement, which the defendant professed to adhere to until September last, he then repudiated, and now claims to treat that arrangement as an abandonment by the plaintiff of his rights. I cannot look upon that arrangement as anything more on the plaintiff's part than a tacit con-

sent that his rights should not be enforced as long as it remained in existence; while on the defendant's part it must, I think, be looked upon as a submission to a right which he had denied and resisted, and which had been established against him. The arrangement having been put an end to, the plaintiff stood, as I conceive, upon as good a footing as when it was entered into; whether the defendant did so, is another question. As to the plaintiff's delay in bringing the cause to a hearing, it may fairly be questioned whether [illegible] would have been right in doing so if the defendant by his conduct rendered it unnecessary. The arrangement was based upon the assumption that the plaintiff was entitled equally with the defendant to a share of the waters of the river. If this had been done before suit brought, a suit would have been unnecessary; being done after suit commenced, its further prosecution, while the arrangement was observed, was in like manner unnecessary, because the right, to establish which the suit was brought, was, for the time at least, conceded. But when that right was again denied, the necessity for prosecuting the suit revived; a necessity that did not revive until such denial; if so, there was no delay on the part of the plaintiff which is not sufficiently accounted for, and certainly, under the circumstances, no abandonment of right. I think that neither on the ground of delay, of abandonment, nor of acquiescence, can the defendant's objection prevail.

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Judgment.

Upon the main question—whether there has been a breach of the injunction—the affidavits are very conflicting. In questions of this nature they appear to be so generally, much more so than ought to be the case, even allowing for the different views that persons may take in relation to some of the matters in question. Many of the affidavits on both sides are directed to the fact whether or not the defendant did allow the water to flow to the plaintiff's factory as

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he had engaged to do by the arrangement. Upon carefully considering the affidavits, I am of opinion that the weight of evidence is against the defendant. But in my view of the matter that fact is less material than it appears to have been considered by the parties, because the question is not whether the defendant has committed a breach of that agreement, but whether he has committed a breach of the injunction.

Now, suppose there had been no such agreement or arrangement between the parties after the legal proceedings to which I have referred, the evil and inconvenience to the plaintiff, against which he was protected by the injunction, would begin to be practically experienced in the dry season of 1846. If the plaintiff had come then to the court, or at an earlier period, complaining of a breach of the injunction, the simple question would have been, whether the defendant, by his dam or otherwise, prevented, diminished or affected the natural course or flow of the river, in such a way as to prejudice, injure or impair the water power necessary for the use of the plaintiff's factory, and at any time theretofore enjoyed by the plaintiff, or those under whom he claims; and such, I apprehend, is the simple question now.

Judgment.

It is agreed on both sides that the plaintiff's dam in existence now is the same dam as existed when the injunction was granted. The defendant says however, that in consequence of alterations and improvements made in his machinery since the injunction was granted, his mills not only do not but *cannot* use so large a quantity of water as was required when the injunction was granted, and affidavits of scientific and practical men are produced to prove this. There is no doubt that scientific improvements are constantly being made in the construction of machinery driven by water, which give greater power for the quantity of water used, and it

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appears that both the plaintiff and defendant have availed themselves of modern improvements in this respect, and I am satisfied that it is not a just inference from an additional saw, or an additional run of stones being placed in a mill, or additional looms or other machinery in a factory, that therefore as a necessary consequence, an increased quantity of water is used; and I incline to think that in this case it is sufficiently proved by each party that by improvements in machinery, and the consequently more economical use of water, no more water is used by each than was necessarily used in the old, less effective machinery. But it is not necessary to decide this point, though it was very naturally brought into discussion between the parties.

Judgment.

The defendant objects that the injunction granted in this case does not define the respective rights of the parties with sufficient distinctness and accuracy to enable the court now to say whether a breach of it has been committed or not. It is true that it does not define what *quantum* of water, or what portion of the waters of the river had been theretofore enjoyed by the plaintiff, or by those under whom he claimed, but *id certum est quod certum reddi potest*, and the affidavits on both sides have been directed to shew what the facts are as to those points. The court certainly did hold, upon the evidence before it, that the defendant, by his dam or otherwise, had diminished the natural flow of the river to which the plaintiff was entitled, to the prejudice of the plaintiff; otherwise the court would not have granted the injunction or have refused to dissolve it, when the very matter in question was whether the defendant had abridged the plaintiff's rights or not; for it would have been idle to have done what the defendant contends was done in this case—viz. grant a mere cautionary injunction, without determining whether the defendant had infringed the plaintiff's rights or not, when

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the affidavits filed and the whole of the arguments of counsel, as reported in the U. C. Jurist, were directed to that point. What the plaintiff is entitled to under tht injunction is clearly this: the natural flow of the river necessary for the use of his factory as at any time theretofore enjoyed by him, or those under whom he claims. He may of right (independently of the injunction) be entitled to more than this—viz. to the natural flow of the river to his factory, whether necessary for its use or not, or whether ever heretofore used or enjoyed or not, and this may be half of the waters of the river, or more or less than half, according to the formation and flow of the river; but I confine myself now to the rights, in the enjoyment of which he is protected by this injunction.

Judgment

The court has already determined that the defendant's dam, which existed in 1845, prevented the natural flow of the water to which the plaintiff was entitled. Is the defendant's answer to this, that his machinery is now so altered that he does not and cannot use as much water as he used then, any answer to the fact that the same dam exists still? Obviously it is not. He may be able to use less than formerly, and even less than half, and still his dam may prevent the natural flow of water to which the plaintiff is entitled. Assuming, for the sake of argument, that he is entitled to have a dam which would pen back as much water as was penned back by the dam of the mill in 1838, when the lease of the factory was granted, or rather a dam which would pen back as much water now; still, in order to shew that the plaintiff was not damnified by the erection of his present dam, because of his alterations in the machinery, it would be necessary for him to shew that by those alterations the machinery was now so constructed that as large a quantity of water must necessarily flow to the factory as would flow to it if such a dam were in existence now. This is

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assuming the existence of an easement in favor of the defendant affecting the natural right of the owner or lessee of the factory to the ordinary and natural flow of the water, and I put it in this light as the one most favorable to the defendant. Upon the evidence before me, I am of opinion that he does not shew even this.

Again, if he had shewn that he had allowed as much water to flow to the factory as would have flowed to it had the mill dam of 1838 been in existence, still he would have infringed the injunction and abridged the plaintiff's rights, because the plaintiff had the right to object to the existence of any dam which made the flow of water to his factory permissive only, and placed the control of the water in the hands of the defendant, to be granted or withheld at his will, however liberally that will might be exercised.

Judgment.

A great peculiarity in this case is that the issue of the water used at the defendant's mills is below the plaintiff's factory, so that there is not a mere retardation of the water, but the water used by the defendant is in a sense consumed by him. It is possible that it may be indispensible to the use by the defendant of his rights in the stream that he should so pen back the water that it would not reach the plaintiff's factory in its natural flow, but would reach it nevertheless, occasionally retarded perhaps, or occasionally accelerated. The right to the use of the stream is common to both; neither must so use his own right as to destroy the right of the other, and neither can insist upon the other's so using his rights as to make it a barren useless right, on the plea that his own right to the natural flow of the water is somewhat affected by the other's mode of exercising his right, although it may be the only mode in which such right is capable of being exercised. This is well

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explained in the judgment of Mr. Justice *Story* in the case of *Tyler v. Wilkinson*, reported in 4 Mason's U. S. Reports, and cited in the case of *Wood v. Ward* (*a*). He says: "There may be, and there must be, of that which is common a reasonable use; the true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not; there may be a diminution in quantity, or a retardation or acceleration of the natural current indispensible for the general and valuable use of the water perfectly consistent with the common right; the diminution, retardation or acceleration not positively and sensibly injurious, by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness subversive of common sense, nor into an extravagant looseness which would destroy private rights." In this case, however, nothing has been shewn which would lead me to suppose that the waters of the river to which the defendant is entitled cannot be so penned back and so used by him as to leave water to flow to the factory in its natural course. I have no reason to believe that this would be impossible, or even very difficult. It is but too probable that unless this be done, or unless some satisfactory and permanent arrangement be made between the parties, the control which the defendants dam gives him of the entire waters of the river, will continue to be a source of discord, contention and litigation between the parties. I am clearly of opinion, upon the grounds which I have stated, that a breach of the injunction has been committed by the defendant. The defendant however contends that it is open to him upon this application to shew that the injunction ought not to have been granted, at least with reference to

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(*a*) 3 Exchequer, 748.

the measure of punishment with which the court should visit him for the breach of it. 1852.

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The case of *Partington v. Booth* is not an authority for such a course, except where, as in that case, the part of the injunction of which it was complained that a breach had been committed was issued under a misapprehension of the facts of the case. In this case it would be virtually to sit in appeal; for the judgment of the court was deliberately given, after an able argument by counsel on the motion to dissolve the injunction.

The words of the injunction recognizing the right of the plaintiff to the natural flow of the river to his factory as theretofore enjoyed by the plaintiff, or those under whom he claims, leads me to consider how the use of the river was enjoyed by the plaintiff, or those under whom he claims. The right is evidently recognized to the largest enjoyment of which any have had the benefit under whom the plaintiff claims. Suppose this not to include *Thomas Cooper*, the lessor, still has it any limit, unless the lease granted by him in 1838 limits it? The defendant suggests that it contains something of the kind. If so, he might easily have shewn this in the regular way, by requiring the plaintiff to bring it into court. So far as appears this lease does not restrict the lessees to any use of the water less than its natural flow. Judgment.

But suppose the lease to be of the close and factory, and of the waters appurtenant to the factory, still I do not see that such words are restrictive, for the waters appertaining to the factory are, taking the words in their ordinary meaning, the waters which naturally and in their ordinary course flow to the factory. If it had been meant, as the defendant contends, that the lease should grant for the use of the factory only such water as might remain after that

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required for the use of the mills, in fact the mere surplus water, the words to convey such meaning would certainly not have been "waters of the river appurtenant to the factory." I question whether these words, if they are in the lease, were not introduced for the protection of the lessees, to prevent its being claimed against them that they were entitled to the waters of the river, subject to an older claim on the part of the proprietors or lessees of the mills. It is claimed, again, that these words restrict the lessees of the factory to the use of as much water as was required for the factory then built: a perusal of the whole lease would be necessary to determine this. I am not prepared to say that the words necessarily import such a restriction; and besides, there is a great deal of evidence to shew that no more water is necessary to drive the machinery now in use in the factory, though increased in quantity since the date of the lease, than was necessary to drive that in use at the date of the lease.

Judgment.

A good deal of evidence has been given as to the understanding of lessees of the mills and of the factory and others, with respect to the waters to which the lessees of the factory were entitled. Much of this applies to a date anterior to the lease under which the plaintiff claims, and to the agreement for lease under which the defendant claims; and as to that period, as well as to the subsequent period, stress is laid upon the circumstance of the lessees of the factory applying to the lessees of the mills as for a favor for a supply of water. Too much weight should not be attached to this circumstance, inasmuch as the lessees of the factory could only obtain water by the consent of the lessees of the mills or by course of law, and parties desirous of avoiding litigation might be well satisfied to obtain by consent, and even as a favor, that which they could only enforce by legal proceedings; and this should not be held as

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an abandonment of right. Such applications were viewed in this light in the case of *Bealey v. Shaw*, reported in 6 East's Reports; and indeed a more express admission could not, I apprehend, have affected the plaintiff's rights, for the admission of a party as to matters not of facts but of law, in ignorance or misapprehension of his rights at law, cannot affect the rights of those claiming under him at law, nor even his own rights.

I may here notice the extravagant notion which the defendant appears to entertain of his rights in the waters of the river. His idea, as I gather from the affidavits, is that *Thomas Cooper*, under whom he claims, being proprietor of the land on both sides of the river, having built a mill on the eastern side and having thus a right to use as much of the waters of the river as he pleased for the purposes of that mill; having then subsequently built a factory on the western side of the river, he retained, as proprietor of the mill site, the same rights as before; that lessees of the factory took subject to such right; that such right being to take as much as he thought proper, his right continued and was not confined to taking as much as he had previously thought proper to take for the use of his mills, and had accordingly appropriated for that purpose; but that it extended to the taking of as much as he might at any future time choose to appropriate for the use of mills on his lands on the eastern side of the river. The defendant says indeed that he did not exercise his rights to this extent, but always acted within his rights. Still, if he believed such to be his rights, it is not surprising that he resisted the claims of others which necessarily and very materially restricted those rights. It is not very clear whether he claims that those from whom he derives title acquired any right as an easement by adverse possession and user for twenty

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years. Upon this point it is not necessary to go back earlier than the year 1822. The dam then in existence, and which had not been built twenty years, was in that year, as appears by the affidavit of *William Noble*, peaceably removed by the inhabitants of the neighborhood being considered, as he says, a public nuisance, the then proprietor thereof, *William Cooper*, being cognizant of and assenting to such removal. The next dam, called the upper dam, was built by *Thomas Cooper* in 1824; and the present dam, constructed by the defendant, was built, as appears by his own affidavit, in 1842. It is clear therefore that no easement has been acquired by length of possession and user. If any easement exists, it must be by unity of ownership of the two sides of the river in the same person; but it is quite clear that such unity of ownership could destroy an easement acquired by long possession, and of consequence would certainly not create one.

Judgment.

If *Thomas Cooper*, from whom both parties claim, had owned the land on both sides of the river for twenty years, had built mills on the one side and then sold the land on the other side, the purchaser would have taken it with a right to the flow of the water in its natural channel. *Shury* or *Sury v. Pigott*, reported in *Popham* 172, and 3 *Bulstrode* 339; and *Brown v. Best*, 1 *Wilson*, 174, cited and approved of by the court in *Wood v. Ward*, and the case of *Canham v. Fish*, are authorities to this point. *Thomas Cooper* did not sell, but in 1838 he granted the lease under which the plaintiff claims, and which bound him during the term as much as if he had sold in fee, as he could of course no more derogate from his own grant for a term of years than from his grant of his whole estate in fee. He had previously, in 1834, granted a lease of the mills to one *Falls* for ten years, but that is unimportant. The land appears

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to have reverted to *Cooper* by surrender of the lease or otherwise, before the agreement with the defendant, which was made in 1840. Whether the lease to *Falls* contained any provisions as to the use of the waters of the river, which affected the rights which the lessees of the factory would otherwise have been entitled to enjoy under their lease, it is not necessary to enquire: that lease fell in to the lessor; *against him* the lessees of the factory could claim their full rights under the lease, and his making a subsequent lease or agreement for a lease to another of the mills could not abridge or affect those rights. I have said *agreement* for a lease to the defendant, for that appears to be his position. I gather from his affidavit that no lease has been executed to him; but taking him to be lessee, his position is this; *Thomas Cooper*, owner of lands on both sides of the river, grants a lease in 1838, to those under whom the plaintiff claims, of land and a factory on the western side of the river, and in 1840 he grants a lease to the defendant of land and mills on the eastern side. Apart from the question whether the lease of the factory restricts the use of the waters of the river to less than would flow in their natural channel to the factory, which does not appear, I take the above to be the true position of the parties, and in that view any assumption by the defendant of right to the waters of the river beyond their natural flow, superior to the right of the plaintiff. is without any foundation.

Judgment.

I meant to have noticed before, that, even assuming the defendant's position to be correct that *Cooper*, as proprietor of both sides of the river, had a right to use as much of the water for his mill as he thought proper, and that such right amounted to an easement after he had granted the lease of 1838, still the consequence that the defendant deduces from it is unsound—viz, that he still retained the right to use as much as he should think proper thereafter; re-

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tained in fact an unlimited right to the waters of the river. The right he retained would not be unlimited; his easement, if any, would be to use to the extent he had appropriated, and to that extent only. This point came up in the case of *Bealey v. Shaw*, to which I have before referred. It was held at *Nisi Prius*, by Mr. Baron *Graham*, that such right was so limited, and this was agreed to by the court. Upon this point Mr. Justice *LeBlanc* said: "Now here the point insisted on by the defendant at the trial was that, as prior to the year 1786 those who occupied the defendant's premises were the only persons who had works on this stream and had taken from time to time as much water as they pleased, leaving the rest to flow in the natural channel, the plaintiff, who came in 1787 to an estate lower down the river, had only a right to take so much as the defendant did not choose to take at any future time. This position it was which my brother *Graham* denied to be law, and I think he properly denied it.

Judgment.

In regard to the trial at law which took place between the parties to this suit, the defendant says that the verdict against him was upon the ground that having built new mills, he had occasionally used the waters of the river as well to drive the new mill as the old saw and grist mills, and thereby had used more water than had been accustomed to be used at the old mills at the time of the execution of the lease under which the plaintiff claims; and the defendant says in his affidavit that the issues in fact were found against him upon the above grounds, and upon no other, as he is informed and believes. In the plaintiff's affidavit this is denied. The defendant's object is to shew that it has not been determined at law that his dam or his raceways are such as he had not a right to erect and maintain. Upon referring to the exemplification of the judgment, I find that the first count of the declaration avers the

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right of the plaintiff to have the waters of the river flow in their natural current to his factory and close, and he complains that the defendant wrongfully erected a certain dam, and other obstructions and erections, on and across the stream above the plaintiff's premises, and wrongfully continued the same, and thereby wrongfully impounded, penned back and stopped the waters of the stream from flowing to the plaintiff's factory, close and premises. The second count complains of the cutting of race-ways above the defendant's mills and enlarging race-ways below them, instead of complaining of the erection of dams; in other respects it is similar to the first count. This is the whole declaration. The defendant pleaded not guilty to the whole declaration. To the first count he also pleaded that *Cooper* was proprietor of both sides of the river; that he built a dam of certain dimensions, which are set forth; that only so much of the stream which he did not find occasion to use flowed to the factory; that the defendant having become lessee of the mills, erected a dam which was not of a sufficient height to pen back the water to a higher level than it was accustomed to be penned back by the old dam; that the water gates and apertures for the admission of water to the new mills were not capable of passing a greater quantity of water than those used by *Cooper*; and the plea concludes with averring that, by reason of the said dam, erections, obstructions and water-courses, he did divert and lead away a certain quantity of the water of the stream for the purpose and to the extent set forth in the plea, and not to a greater extent, or to deprive the occupiers of the factory of more water than *Cooper* was accustomed to do before and until the lease of the factory was made. Upon this the plaintiff took issue. He says that the defendant did prevent the water of the stream from flowing to the factory in as large quantities as the same had been accustomed to do before and until the lease of the

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factory was made, and this issue was found for the plaintiff.

To the second count the defendant pleaded a similar plea, upon which the plaintiff took issue in the same terms as to the plea to the first count, and that issue was also found for the plaintiff. It is not necessary to notice the other pleas, none of them, either in fact or law, were found for the defendant. The issue on the general plea of not guilty was found for the plaintiff.

Looking at the declaration and the pleas to which I have adverted, I should say that the same matter was in question in that suit as is in question here; and the above issues being found for the plaintiff, that the same matter was determined there is in question in this suit. And, after the verdict in that suit, the defendant certainly acted as if it were so, for otherwise all that he had to do was to stop the use of the old grist and saw mills. He says in his affidavit that he did immediately stop the use of the former and only used the latter, under the arrangement before referred to, until 1848, when he ceased to use it altogether, and that he has used neither of the old mills since. Yet the arrangement was continued for about three years longer. Now it is strange that he should, after removing the only ground of complaint found against him, as he says, at law, continue an arrangement so manifestly detrimental to his interests, and which he had entered upon to all appearance in consequence of the verdict at law. If right as to what was determined at law, his obvious course was to put in an answer to this suit, either at the time or after he had removed the cause of action. His acting as he has done appears strangely inconsistent with his belief as set forth in his affidavit as to what was determined at law.

Judgment.

The counsel for the defendant insists that there ought

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to have been a a second trial at law before the plaintiff can practically insist upon the fruits of his injunction. This is founded upon what was said by the Lord Chancellor in *Robinson v.* Lord *Byron*, as reported in 2 *Cox's* Reports; the Lord Chancellor said that, "from his recollection of the cases, he did not conceive that a right was ever considered in this court as determined *with a view to a perpetual injunction* by any one trial at law, unless upon an issue sent out of this court for the purpose." I think it will nowhere be found that a party can commit a breach of an injunction in any case and then say that he cannot be punished for it until the right in question between the parties has been twice established by the plaintiff at law, even in those cases where the court of equity acts only as auxiliary to a court of law. In this case the unreasonableness of the objection is apparent. When should the plaintiff have brought his second action? While the arrangement was in force between them there was no cause of action, and after it ceased to be in force the plaintiff surely was not obliged to await the result of another suit before he could punish the defendant for breach of the injunction. If a plaintiff may obtain an injunction, as it is certain he may in a proper case, before he has established his right at law, *a fortiori* may he punish for a breach of it without again establishing his right.

Judgment.

The defendant insists very strenuously that the rights of the parties cannot be sufficiently determined upon affidavit evidence, and there is force in what he says. But, such being his opinion, his course ought to have been very different from what it has been. It has been in his power for the last two years to have had the whole matter heare upon *viva voce* testimony simply by putting in his answer, and even before the last two years he might have asked for an issue. Instead of taking any such course, he has acted at first as if in submission to the injunction

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and to the verdict on the trial at law; he then stood upon what he conceived to be his rights, and now raises these objections. To allow them, would not only be allowing a party to take advantage of his own wrong, but to set at naught the process of this court.

In disposing of this application I have been drawn (by the terms in which the injunction is framed) somewhat into the general merits of the cause. I have however abstained from entering into the question of right between the parties as fully as I should have thought it proper to do if this had been the hearing of the cause.

The order must go for the commitment of the defendant for breach of the injunction and with costs, but I trust it will not be necessary to act upon it, and I think it would be right that it should not be delivered out of the office for a short period—say for two weeks—or delivered out only upon the undertaking of the plaintiff's solicitor that it shall not be enforced if the injunction be obeyed by the defendant within that time. I suggested at the hearing of this motion, that the parties would do well, I thought, to employ some competent engineer, or more than one if necessary, who should ascertain as nearly as possible what proportion of the waters of the river would, in their natural channel, flow on the two sides of the river respectively, and who should devise the construction of a dam, or dams, by which each party should independently of the other, get the proportion of water to which he is entitled. I have no reason to believe that this is impracticable, but the contrary. It appears that the supply of water in the river is now less in quantity and less regular than it used to be. As long as, of two proprietors on opposite banks of the river, one has the entire control of the water, and his issue of water is

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below the other's works, misunderstandings and disputes are almost sure to prevail, and probably would do so under the circumstances even where parties meant to deal fairly with each other.

I should strongly recommend to the parties, for the sake of peace and the avoidance of litigation, to call in the aid of competent scientific men, with a view to some such permanent adjustment of their relative rights as I have suggested.

June 4th.

From this judgment the defendant appealed, and on the 11th of May filed the usual appeal bond, and gave notice of motion to stay proceedings under the order to commit during the pendency of the appeal. The motion now came on to be argued.

Argument.

Mr. *Gwynne*, Q. C., for the motion, contended that this was a case, in which, under the 40th section of the 12th Victoria, chapter 64, proceedings would be directed to be stayed pending an appeal.

Mr. *Crickmore*, contra, cited *The Shrewsbury and Birmingham Railway Company v. The London and North Western Railway Company* (*a*), *Walburn v. Ingolby* (*b*), *Bainbrigge v. Baddeley* (*c*), and *Daniel's* Chancery Practice, p. 1611.

June 30th.

Judgment was now delivered by

Judgment.

SPRAGGE, V. C.—An order was pronounced on the 23rd of April last for the commitment of the defendant for a breach of the injunction in that order referred to. The defendant has since presented a petition of appeal. The opinion of counsel is dated the

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(*a*) 14 Jurist, 285. (*b*) 1 M. & K. 51. (*c*) 10 Beav. 35.

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17th of May; the notice for the hearing of the appeal is for the 9th of December next; and the defendant now applies to stay proceedings under the order for his commitment "until the Court of Appeal shall have made their order in this cause."

By the 40th section of the act 12 Vic. ch. 63, by which the present Court of Appeal is constituted, it is enacted that appeals shall lie to the said court from all judgments of the Courts of Queen's Bench and Common Pleas, and from all judgments, orders and decrees of the Court of Chancery; and, after providing that no such appeal shall be allowed until the party shall have given proper security, to the extent of 100*l.*, to the satisfaction of the court from whose order, decree, or judgment he is about to appeal, that he will effectually prosecute his appeal and pay such costs and damages as shall be awarded in case the judgment or decree appealed from shall be affirmed; it is further provided that, upon the perfecting such security, execution shall be stayed in the original cause, except in certain cases therein enumerated. The cases excepted do not apply to such a case as is the subject of appeal in this cause.

Judgment

The twenty-eighth of the general orders of the Court of Appeal prescribes the form of the security to be given on appeals from this court, directs that the same shall stand allowed unless the respondent shall, within fourteen days after service of the notice of the filing of the security, move the court to disallow the same; and provides that a special application shall be necessary to stay proceedings under any of the exceptions in the fortieth section of the act.

Neither the act, nor the general orders of the Court of Appeal, provide for an application to the court to stay proceedings pending appeal except in the cases excepted by the fortieth section, and in these cases

provision is made for security to meet the exigency of each of those excepted cases, additional to the ordinary security given upon every appeal.

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In this case then, proceedings under the order for commitment are stayed by the general words of the fortieth section, or they are not stayed at all. This application therefore, which is avowedly made under the statute, appears to me to be unnecessary, and is improper under the circumstances, and ought to be refused; and if the application had been made to the discretion of the court, independently of the statute, I should still think it an application that ought to be refused.

The application was however not met with the objection to which I have alluded, but was resisted on the ground that the fortieth section does not apply to such proceedings as are here sought to be stayed, but that the word "execution" applies to common law process only. But it is plain that it is not confined to a stay of execution upon common law process; the excepted cases clearly apply to orders and decrees of this court. Whether proceedings for the commitment of a defendant for breach of an injunction are stayed by the operation of the fortieth section, is another question. Judgment.

The fortieth clause enacts that an appeal shall lie to the Court of Error and Appeal from all judgments, orders and decrees of the Court of Chancery; and then provides that upon the perfecting of the security required upon such appeal, execution shall be stayed in the original cause (except in certain cases provided for.)

Before the late statute, the appeal did not stay proceedings upon the order, and the court, in the exercise of its discretion, very rarely interposed to

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stay them, and in no instance I believe on an appeal from an injunction order, or from such an order as is appealed from here. The order of the court was assumed to be right until overruled upon appeal.

Now, under the statute, by the perfecting of the security for the appeal, execution is *ipso facto* stayed. The old rule is thereby changed, and the question is to what extent. The words of the statute are, "execution shall be stayed in the original cause." To take the case of an order for an injunction, or for dissolving or for continuing an injunction, and an appeal from such order, does the perfecting of security for appeal stay the operation of such order? The statute does not provide that it shall. Suppose an order for an injunction restraining a defendant from pulling down a house, or cutting down trees, or committing other irreparable mischief, and a writ of injunction issued upon such order: Is such writ of injunction an execution in the original cause within the meaning of the statute? From the injunction itself, and such order as is now appealed from, there is but one step; if the writ of injunction is not itself stayed by the appeal, the defendant is bound to yield obedience to it; and if bound to yield obedience, he cannot justify himself for disobeying it by the terms of the statute or otherwise. If bound to obey, an order enforcing obedience cannot be wrong; so if a defendant against whom an injunction has issued remain bound, notwithstanding his appeal from the injunction, still to obey it (and there is nothing to shew that he is not so bound), then the order and process of the court to compel obedience follow as of course, as it appears to me; otherwise this absurd consequence will follow, that a party is bound to obey until he disobeys, and then the very act of disobedience and an appeal from its ordinary consequences relieves him from the necessity of obedience.

Judgment.

An appeal from an injunction leaves him bound to obey the injunction; he disobeys, and an appeal from an order to compel obedience leaves him at liberty to disobey. Such, I think, is the result of the defendant's position. This is wholly different from the position of a party appealing, where, upon perfecting his appeal, he is no longer, pending the appeal, bound to obey.

If the question raised by the defendant here could admit of reasonable doubt at all, it would be upon this point; that he had committed no breach of the injunction; that it is not necessary for him to contend that he is at liberty to disobey the injunction, for that in truth he has not disobeyed it, and that he appeals from an order which adjudges him to be punished for an act which he has not committed. Upon an application to commit for breach of injunction the question whether or not the defendant has obeyed it, is the proper question to be tried; at the same time, if proceedings upon that order are stayed by appeal, they are stayed by the simple operation of the act, even though no doubt could exist as to a breach of the injunction having been committed, and even though no question upon the point had been raised by the defendant, and the defendant would then be enabled to defeat the orders of the court, and, in fine, to render nugatory its jurisdiction in cases of injunction. All that a defendant would have to do would be to disregard the injunction; to continue to do the acts, perhaps of irreparable damage, perhaps even of incalculable injury to the plaintiff, which the injunction restrained him from doing, and then, when an order for his commitment should be made, appeal from it. The court would be thus rendered powerless, in the very cases where it is of the greatest importance that its action should be prompt and effectual; in the words of Lord *Eldon*, the arm of the court would thus be paralysed.

Judgment.

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It is evident too how frequently appeals might be resorted to in such cases when they enabled a defendant, in spite of the court, to commit acts, the commission of which the court had deemed it right to restrain. The greatest and most deliberate wrong might be the consequence.

The question then recurs, how far the old rule upon this subject is changed by the statute. It does not say that proceedings upon, or that the execution of the judgment, order or decree appealed from shall be stayed, but that execution shall be stayed in the original cause: and the question is whether the words used necessarily mean anything more than the process by which the respective courts appealed from enforce their judgments, decrees, and decretal orders. The words "execution in the original cause," used in their ordinary sense, seem to point to such process. I do not think that they necessarily apply to the orders, or proceedings upon orders, by which this court punishes disobedience of its orders; and the proceedings which are sought to be stayed here are peculiarly of this nature, as distinguished from process to enforce obedience to the decree, or decretal order, which, adjudging upon the case presented for adjudication, decrees and orders what acts shall be done by the one party in favor of the other party, in satisfaction of the equitable rights which that other has established against him, so as to put him in possession of that which he is decreed entitled to.

Judgment

Bacon defines execution to be "the obtaining actual possession of a thing recovered by judgment of law," and *Coke* calls it "*fructus finis et effectus legis.*" Both are speaking of common law executions; but taking that definition to apply to what is analogous to it in courts of equity, it could only be the process by which the court enables the successful party to obtain actual possession of the thing recovered by its judgment and decree.

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Gamble v. Howland.

Assuming that in this sense the words "execution in the orignal cause" may, without impropriety, be applied to the process by which a party obtains the fruit of what the law adjudges to him; it by no means follows that it is properly applied to the proceedings by which the court punishes disobedience of its orders simply as such; on the contrary, to apply the word "execution" to such proceedings, I cannot but think, would be a very great misapplication of the term. Such proceedings are not "execution in the original cause" in the common law sense, nor, to the best of my judgment, in the sense intended by the statute.

I should have regretted extremely if the words of the statute had called for an interpretation which would have enabled defendants to set at naught the powers of the court in injunction matters: and which would have virtually repealed that useful and important branch of its jurisdiction, by rendering the court powerless to enforce obedience to what it enjoins, and I should say that words the most express and unequivocal would be required to call for such an interpretation.

Judgment.

I think that the words used do not at all necessarily apply to such proceedings as are sought to be stayed by this application; and further, that so to apply them would be to wrest them from their ordinary and proper meaning.

I have expressed my opinion upon the construction of the latter part of the fortieth section of the statute, because the point was discussed upon this application, and because the plaintiff may desire to act upon the order which he has obtained. This order is refused however, upon the ground that an application to the court is only proper in the several excepted cases enumerated in the fortieth section of the act.

1852.

Macara v. Gwynne.

MACARA v. GWYNNE.

Practice—Reference to Master.

The plaintiff has, *prima facie*, a right to have the reference directed to the master resident in the county wherein the bill is filed.

The bill in this cause had been filed in the office of the deputy registrar in Hamilton, and prayed a reference to the master to take an account of partnership dealings alleged to have taken place between the plaintiff and defendant, as attornies and solicitors.

A motion was made to refer the matters to the master at Hamilton, but this was resisted on the alleged ground of inconvenience in obtaining the attendance of witnesses and also ready access to the books and papers in the offices of the master and registrar at Toronto. The court, under these circumstances, directed the cause to stand over, in order that each party might file affidavits shewing the facts, as well as the convenience or inconvenience likely to arise from the reference being directed to the officer here or at Hamilton. Affidavits were accordingly filed, but these were of a contradictory nature, and

Statement.

Mr. *Mowat*, for plaintiff, now renewed the motion for an immediate reference, under the seventy-seventh order of May, 1850, to the master at Hamilton.

Argument.

Mr. *Vankoughnet*, Q. C., contra, opposed the reference being to Hamilton, but would consent to the order being made if the accounts were directed to be taken before the master of the court at Toronto.

Per Curiam.—In motions of this nature, the party moving is *prima facie* always entitled to have the reference directed to the master resident in the county in which the bill has been filed; this *prima facie* right however may be rebutted, by shewing sufficient grounds for the court interposing and directing the reference to the master at Toronto, or

Judgment.

any place other than where the proceedings have been instituted. Now, in the present case, although the cause stood over for the purpose of allowing affidavits to be filed shewing that any material advantage was to be derived by directing the accounts to be taken here instead of at Hamilton, the defendant has failed to satisfy us that such would be the case. 1852. Macara v. Gwynne.

The grounds of convenience suggested by the defendant as justifying the order of removal have all been met by Mr. *Macara* in his last affidavit, which is uncontradicted.

Judgment.

This being a contest for convenience in taking the accounts, each party naturally desires them to be taken where he is carrying on his profession; this convenience the defendant might have secured to himself by having become plaintiff and instituted proceedings in Toronto. The plaintiff having been more assiduous in the matter, must not, we think, be deprived of any convenience or benefit to arise therefrom, unless it be clearly shewn that it is proper so to do. The defendant having failed to establish this point, we see no reason to induce the Court to deviate from the practice generally pursued in these cases.

CAMERON v. MCRAE.

SPARKS v. REDHEAD.

Mortgage—Foreclosure.

Upon default in payment by a mortgagor of any instalment of, or of interest upon, mortgage money, the mortgagee has a right to call in the whole amount secured by the mortgage. September 7.

In the first named cause the bill was filed to foreclose two mortgages; the time limited for payment of the principal sum in one had elapsed; upon the other an instalment of interest alone was due. In the second case the bill was filed for the foreclosure of a mortgage upon which some payments of

Statement.

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interest were due; the time limited for payment of any portion of the principal not having arrived.

On a former day Mr. *Brough*, for the plaintiff, in the first; and Mr. *Strong*, for the plaintiff in the second, moved for an immediate reference under the seventy-seventh order of May, 1850, and asked that the decree might direct payment of the whole amount *secured* by the mortgage. *Roddy v. Williams* (*a*), and *Stanhope v. Manners* (*b*), were referred to.

Some doubt having been suggested as to the propriety of making the decrees asked for, the motions were directed to stand over for consideration, and now

THE CHANCELLOR.—This is a foreclosure suit. The mortgage money is made payable by instalments. At the time of filing the bill the period fixed for the last payment had not arrived, but one or more of the previous instalments had become due. The defendant does not appear upon the motion, and the sole question is as to the form of the decree. Is the plaintiff entitled, in consequence of the defendant's default, to call in the whole principal money, or should the decree be for foreclosure upon the defendant's failure to pay that portion of the principal already due, according to the terms of the mortgage deed?

Judgment

I am of opinion that where, as in this case, the defendant does not appear, the plaintiff, in that case at least, is entitled to call in his whole debt; and that there is no principle which would justify us in directing such a decree as has been suggested.

Where the mortgagee has not disabled himself from calling in his principal, in that case any default on the part of the mortgagor, in payment either of

(*a*) 3 Jones & La. 1. (*b*) 2 Eden. 197.

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interest or principal, is a breach of the condition, which makes the estate of the mortgagee absolute at law, and entitles him as a necessary consequence to file a bill for the foreclosure of the mortgagor's equity of redemption. In Mr. *Powell's* work on mortgages (*a*), it is said "that where a mortgage was made on the 19th of January, 1759, with a proviso that if the mortgagor paid 250*l.* on the 19th of July, 1759, and 10,250*l.* on the 19th of January, 1760, the mortgage should be void, and the 250*l.* was not paid on the 19th of July, 1759, it was held that the condition was forfeited and the estate of the mortgagor became absolute, *and of a consequence that he might call in his money*, or proceed to foreclose the redemption immediately." And Mr. *Coote* in his book on mortgages (*b*), says "a default in payment of a half-year's interest on the appointed day, will be a sufficient breach of condition to enable the mortgagee to foreclose."

Judgment.

The older cases referred to do not bear out the rule laid down by the text writers; and in *Taylor v. Waters* (*c*), the point is not noticed in the printed report; still such an explicit statement by text writers of considerable reputation is of great weight, as it must be considered to convey the general understanding of the profession upon the subject.

But *Burrowes v. Molloy* (*d*), seems to me to be a decision precisely in point. In that case the mortgagee had covenanted not to call in the principal during his life time, but had filed his bill of foreclosure for default in payment of a half-year's gale of interest. In determining the propriety of that course the Lord Chancellor had to consider—first, the rule applicable to ordinary cases; secondly, the effect of the covenant not to call in the principal during the

(*a*) 2 Powell, 965, n. E.
(*b*) Page 497, 3rd edition.
(*c*) 1 M. & C. 266.
(*d*) 2 J. & Lat. 521.

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Cameron v. McRae. Sparks v. Redhead.

lifetime of the mortgagee. With respect to the first, his statement of the law is very explicit, and in strict accordance with the rule laid down by Mr *Coote*. "Supposing that the principal had been made payable on a given day," he says, "no matter whether it was one year or twenty years after the date of the mortgage, with interest thereon half-yearly in the meantime, and that, before the day of payment of the principal money default had been made in the payment of the interest thereon, the mortgagee would, at any time after that event, have a right to file his bill for a foreclosure, because his right became absolute at law by the non-payment of the interest; the estate having been conveyed subject to a condition which had not been fulfilled."

It is said however that this case only settles the right to file a bill of foreclosure upon default, but determines nothing as to the form of the decree. But this is not so. It is obvious that throughout the whole judgment Sir *Edward Sugden* treats the right to call in the whole principal money, and the right to file a bill of foreclosure, as one and the same thing. He says "I do not see how any default in payment of the interest during the lifetime of the mortgagor can enable the mortgagee to commit a breach of his covenant. I think, therefore, that under these instruments the plaintiff was not at liberty to file a bill of foreclosure, *as far as relates to the principal money, and therefore cannot do so in respect of the interest which accrued before the principal became payable.*"

Judgment.

But the question now before us was the very point then in judgment. Had there been any precedent or principle to justify such a decree as is suggested here —that is, a decree *nisi* to become absolute upon failure of the mortgagor to pay interest or a part of the principal—then the plaintiff in that case would have been entitled to relief. For, although the mortgagee had

precluded himself from calling in the principal, the interest had been reserved half-yearly, and the decree suggested here would have been exactly suited to the circumstances in which the plaintiff was placed. But, because he had precluded himself from calling in the principal during his lifetime by express covenant, the Chancellor concluded that he had thereby precluded himself from filing a bill of foreclosure for any interim default; thus deciding, as I understand the case, the very point now before us.

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It is said that decrees such as that which has been suggested have been frequently pronounced in the Court of Chancery in the State of New York. I am inclined to think that those cases depend upon special statutory provisions. The revised statutes of the State of New York, collected in 1836, contains a chapter regulating the law upon the subject (*a*), which would seem to have been enacted at a much earlier date; and yet the cases before Mr. Chancellor *Kent* would seem to proceed upon general principles (*b*). But, however that may be, the case to which I have adverted is an authoritative declaration of the law of England, which we do not feel ourselves at liberty to disregard. If the law upon the subject requires alteration, that is matter proper for consideration of the legislature; we are to administer the law, not to alter it.

Judgment.

ESTEN, V. C., concurred.

SPRAGGE, V. C.—The question which has arisen in these causes has never been argued in this court.

I do not purpose pronouncing any elaborate judgment upon it, but having, when the question has once or twice arisen, expressed an opinion that upon default by a mortgagor in payment of an instalment

(*a*) Vol. 2, page 118.

(*b*) Lansing v. Capron, 1 J. C. C. 615; Campbell v. Macomb, 4 J. C. C. 533.

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of, or of interest upon, mortgage money, the whole mortgage debt does not become immediately payable, I will merely state briefly my reasons for such opinion.

1st.—I do not see that such a consequence necessarily follows from the default. It is true there is a forfeiture which can only be relieved against in a Court of Equity, but I do not see that the immediate payment of a sum not otherwise payable for five, or ten, or twenty years, is a necessary or proper condition to relief against such forfeiture. It appears to me to be holding this language: A forfeiture is incurred by default in payment, even for a day; *therefore*, if you have relief in equity, it *can* only be by paying now what is made payable by the mortgage in the course of years. I do not say that courts of equity could not impose such terms to granting relief, but that they do not do so *of necessity*—as a result necessarily flowing from the default and forfeiture against which they grant relief.

Judgment

The equity of redemption is styled emphatically the creature of a court of equity, which moulds it and applies it, as under all circumstances appears to be just. This being the case, the legal forfeiture can entail no consequences except what are just; and cannot, therefore, entail as a necessary consequence the immediate payment of the whole mortgage debt. It *might* be a just consequence (a point I will consider presently), but it is not a necessary consequence of the legal forfeiture.

2ndly.—It is, as it appears to me, at variance with the principle upon which courts of equity act in relieving against such forfeitures. Mr. *Spence*, in his treatise on equity jurisprudence, states the principle to be, that the party had sustained no injury, or only to a trifling amount, or *at most such an injury as might be compensated by interest*. Natural justice,

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he says, was evidently the ground of interference. That the injury occasioned by default in payment of money can be compensated, is a principle acted upon in numerous instances in courts of equity. This being so, I do not see how it requires to be *further* compensated by accelerating the payment of the principal money. It appears to me to be even inequitable where the default can be compensated by interest, to superadd as a condition of relief a burthensome, often an impossible, act, to be performed by him whom the court professes to relieve. He is entitled to relief. It is his equitable right, though only upon terms just to the person who has suffered by the default, but having ascertained what is required in order to be just to him, has he any equity to require anything further; to require something wholly unconnected with the default; to say, my interest is overdue for a money, and *this* gives me a right in equity to ask that my principal (not payable for ten years) be now paid presently? The two things appear to me to be wholly independent; to require one as a condition to the other does seem to me very unreasonable.

Judgment.

3rdly.—To impose such a condition is to require of a party, entitled in equity to relief from a forfeiture, the performance of an act not in accordance with the contract agreed to by the parties, but at variance with it. Where there is a forfeiture by default in performance of an agreement, equity looks at the contract in order to give to the parties, as far as may be, their rights under the contract; and this, I apprehend, to both parties, to the defaulter as well as to the other, only taking care that he make compensation to the party who has sustained damage by his default, but not making a new contract for the parties, nor abrogating the old one, but keeping the parties to the agreement which they themselves had made.

4thly.—The common law remedy upon the same instrument is less stringent than the terms thus

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imposed as a condition to relief in this court. If the mortgagee pursue his remedy at law, whether upon the covenant, or, what is more analogous to this case, upon the mortgage bond, the default does not entitle him to immediate payment of the whole sum, but only to payment as it falls due by the contract. Can the same default entitle him in this court to payment presently, or, as a consequence, to forfeiture of the estate. Equity, too, looking upon the mortgage as a pledge for a debt, that debt not recoverable at common law, even after default, earlier than it is made payable by the instrument, is yet upon the same default made payable in equity at an earlier day—i. e., in six months—on pain of the the forfeiture of the pledge. I confess this appears to me to be a great anomaly.

There are, I think, other reasons besides, why this condition should not be imposed.

Judgment.

In the case of an agreement for the sale of real estate, the purchase money payable by instalments, and default made in payment of one instalment, and bill filed by the vendor for specific performance, or failing that, recision of the contract. It has not, that I am aware of, been decided how the vendor would be entitled to payment of his purchase money; but, coming for a performance of his contract, I apprehend he could not ask for payment otherwise than according to his contract; yet in such a case there would have been the like forfeiture as in the case of a mortgage, with the mortgage moneys payable in the same way. In what essential point do they differ? In the one case the vendor asks for a recision of the contract unless the purchase money be paid; in the other the mortgageee asks for a foreclosure unless the mortgage money be paid. Upon what principle can the *consequences* of the forfeiture which in each case has occurred, be so widely different.

In the great majority of cases of the sale of land in

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this country the purchase money, or a portion of it, is secured by mortgage upon the land purchased, and is usually made payable by instalments spread over several years; there is no understanding or belief that the money can be called in, in any event or upon any contingency, at an earlier period than it is made payable by the mortgage. To hold it payable presently upon any default, would not only be a thing different from what was contemplated by the parties, but would operate with peculiar hardship upon purchasers, who would by such a rule almost certainly lose their purchase, together with the improvements which in very many instances are made upon them. To this class of mortgagors the adoption of such a rule would be nothing less than ruinous. In a country like England it would be comparatively innocuous, while in Canada it might produce immense mischief. It is unsuitable to the circumstances of the country; its operation would be inequitable; and unless it be (which I think it is not) a *necessary inevitable* consequence of the default, it ought not, I should have thought, to be adopted. Of course, if such a rule prevail, the least default, even for a day, will make the whole mortgage money payable, and I fear that in many instances improper advantage may be taken of it.

Judgment.

If the point which has arisen in these cases were an open question, I should certainly have thought, for the reasons which I have briefly given, that the mortgagor was relievable upon payment of what had accrued due, and was not compellable, in order to relieve himself from the consequences of the legal forfeiture, to pay presently the whole mortgage money; but the case of *Burrowes v. Molloy*, appears to have decided otherwise. Sir *Edward Sugden* in that case appears to have considered that the right to file a bill to foreclose and the right to call in the whole mortgage money were synonymous, and in that view it would follow that inasmuch as any

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default gives a right to file a bill to foreclose, any default gives a right to call in the whole mortgage money—that is, in the absence of any express stipulation to the contrary. Why the right to file a bill to foreclose should be synonymous with a right to call in mortgage money not yet payable by the mortgage is not explained; but as it is so decided, it is an authority upon the point which is binding upon this court, and in deference to that authority, I concur in the judgment which has been delivered, though I must add, that but for that authority my opinion would have been different.

Judgment.

Decree.

ORDER, that it be referred to the Master of this Court to take an account of what is secured to the plaintiff for principal and interest on the mortgage in the bill of the said plaintiff mentioned, and to tax to the plaintiff his costs of this suit; and upon the said defendant paying to the said plaintiff what shall be reported and so secured to him for principal and interest as aforesaid, together with the said costs when taxed within six months after the Master shall have made his report, at such time and place as the Master shall appoint, order, that the said plaintiff do reconvey the mortgaged premises in the plaintiff's bill mentioned, free, &c., and deliver up all deeds, &c.: but in default, order that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises.

Usual directions.

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March 12.

SMITH V. CROOKS.

Partnership--Practice.

In a partnership suit the usual decree had been made, and the master made a general report, finding that a certain balance was due from the defendant to the plaintiff, but that all the partnership assets had not been realized. After this report had been signed, the defendant applied for leave to carry into the master's office and prove a charge and discharge. It appeared that the defendant had been guilty of gross negligence in omitting to bring these papers into the master's office, and no explanation was now attempted of his neglect to do so; but the court was of opinion that the report was erroneous in finding a sum to be due from the one party to the other before the assets were realized and the liabilities paid; and, as the report which had been made could not be acted upon, the defendant's application was granted on terms.

The bill in this cause was filed on the 12th day of October, 1850, by *Larratt W. Smith* against *Robert P. Crooks*, setting forth that plaintiff and defendant had, for some years previously, been carrying on business as attornies and solicitors in partnership, which had been dissolved by mutual agreement in January, 1849, but that notwithstanding repeated applications by plaintiff to defendant for the purpose, he (the defendant) had refused to come to any adjustment or settlement of the accounts of the said partnership business. The bill prayed an account; the appointment of a receiver, and that an injunction might issue, restraining the defendant from collecting or receiving the assets of the co-partnership. Statement.

To this bill no answer was put in, and on the 22nd of November, (1850), the plaintiff moved for and obtained the usual order for immediate reference, under the 77th order, to take the partnership accounts. By the master's certificate it appeared that the plaintiff carried this decree into the master's office. After issuing the usual warrants, the plaintiff, on the 21st of March, 1851, moved for and obtained an order for a sergeant-at-arms against the defendant for not bringing in the accounts, &c., but which the certificate stated were afterwards brought in by the defendant on the 25th of the same month. On the 4th of

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April the master issued warrants for the defendant to bring in his charge and discharge, and on the 30th of May a warrant for defendant (peremptorily) to bring in his charge and discharge on or before the 7th of June was issued. The 30th of June was appointed to settle the master's report, on which day such settlement was postponed, by consent, until the 8th of July, when it was settled, and on the 10th was signed. The master by his report found due to the plaintiff from the defendant a sum of about 500*l.*

Afterwards the defendant served a notice of motion for the 19th of September, to refer the report back to the master, and for leave to the defendant to bring in his charge and discharge. The motion now came on, and

Mr. *Turner*, for the motion, cited *Daniel's* Chancery Practice, 1422, as authorising the motion being granted.

Argument.

Mr. *Mowat*, contra, objected, after the great and unexplained delays that had occurred, to the report being referred back except upon the terms of the defendant being ordered to pay the money into court; if that condition were acceded to, he would consent to the order.

The judgment of the court upon this motion was delivered by

Esten, V. C.—This was an application by the defendant to be allowed to introduce a charge and discharge, after the confirmation of the report and of very great delay on his part. The suit was for an account and adjustment of the affairs of a co-partnership, and the ordinary decree had been pronounced at the hearing of the cause. The master had merely taken the account between the parties, and found how much each had drawn from the funds of the co-partnership; and, it appearing that the defendant

had drawn about 1000*l.* more than the plaintiff, he had reported that the sum of 500*l.* was due from the defendant to the plaintiff and ought to be paid accordingly. This was the sum of the report; but the co-partnership affairs remained otherwise unadusted; the assets had not been collected, the debts had not been paid, nor the surplus ascertained. The account seems to have been taken and the report framed with much care and accuracy, and the report appeared to be erroneous only in directing the 500*l.* to be paid by the defendant to the plaintiff. So far as it went it was both necessary and useful, but it was not final in its nature, and the court cannot avoid perceiving that much remains to be done; that a final adjustment of the partnership affairs is still required, and that the report needs correction in the particular which has been already noticed as erroneous. Under these circumstances we think it right to grant this application on the terms of the defendant paying the costs of it and of the proposed investigation and procuring the master's report upon the state of the account between the parties, which must still be reserved as a separate report, within a reasonable time. The plaintiff however claimed that if this indulgence should be extended to the defendant, he should be required to pay into court the amount erroneously reported to be due and payable by him to the plaintiff. We think this claim unreasonable. If the plaintiff should apply for an order to this effect, he would fail. The 500*l.* mentioned in the master's report constitutes no debt from the defendant to the plaintiff, and the whole of it may in fact at this moment belong to the defendant himself. The claim preferred by the plaintiff is in fact this: that because the defendant has asked and obtained an indulgence, to which, under the circumstances, he is entitled, the plaintiff ought to have something, which he could not under any circumstances obtain. It is clear that the application of the

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defendant bears no resemblance to an attempt on the part of a plaintiff in equity, to restrain the prosecution of a *prima facie* legal title of the defendant. The plaintiff has no present title which he can enforce as to the 500*l*.

Statement.

The foregoing judgment having proceeded upon a point not taken by counsel in the argument, leave was given to the plaintiff to apply, upon affidavits setting forth the circumstances, that the order to be drawn up referring back the master's report should direct, as a condition, that the amount found due by the master should be first paid into court. Affidavits were accordingly filed, the statements of which are set forth in the judgment.

Argument.

Mr. *Mowat* again appeared for the plaintiff, and cited *Fairthorne v. Weston* (*a*), *England v. Curling* (*b*), *Foster v. Donald* (*c*), *Exp. Yonge* (*d*), *Toulmin v. Copeland* (*e*).

Mr. *Turner* contra.

The judgment of the court was now delivered by

Judgment.

THE CHANCELLOR.—Under the decree in this suit, which was the usual one directing the partnership accounts, the master having taken the account as between the partners merely, made a report which finds the defendant to have received from the partnership assets 1006*l*. 17*s*. 4*d*. more than the plaintiff, and, as a consequence of that finding, declares the former to be indebted to the latter in the sum of 503*l*. 8*s*. 8*d*., being one-half of such excess.

In that state of things a motion was made that the report might be referred back to the master, with

(*a*) 3 Hare 387. (*b*) 8 Beav. 169. (*c*) 1 J. & W. 252.
(*d*) 3 V. & B. 31. (*e*) 3 Y. & C. 25.

liberty to the defendant to bring in his charge and discharge, upon an affidavit which, without giving any satisfactory explanation of the laches attributed to the defendant, affirmed that further investigation would vary the result arrived at by the master to the extent of 1000*l.* in his favor.

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We acceded to that application principally upon the ground that the accounts directed by the decree had not been taken; and, as the enquiry before the master was necessarily regarded, upon the papers before us, as still open, we thought that substantial justice would be done, without material injury to the plaintiff, by allowing the defendant a further opportunity to bring in his discharge upon payment of costs.

In disposing of that motion we refused to order the defendant to pay into court the sum found to be due from him by the report; because there were not before us sufficient data upon which the existence of any debt from the defendant to the plaintiff could have been predicated. The master had not taken the partnership accounts, but had merely ascertained one of its items. The partnership estate had not been realized. The result of the whole might be to show the defendant entitled to retain the sum he was said to have received. He had sworn that such, to the best of his information and belief, would be the result; and, under such circumstances, it appeared to us that an order of the kind suggested would have been alike contrary to principle and authority. Judgment.

This matter having been thus disposed of upon grounds not taken in argument, the learned counsel for the plaintiff contended that the amount reported to be due in this case had been received by the defendant in breach of good faith, contrary to the articles of partnership, and should, upon that ground, be ordered into court, irrespective altogether of the re-

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suit upon the whole account; and, under all the circumstances having reference to the course said to have been pursued by the defendant in the master's office, to the great laches of which he had unquestionably been guilty, and to the turn which the argument had taken here, we granted him permission to file further affidavits upon that point, the only one now remaining to be disposed of.

Judgment.

Since the discussion upon the further affidavits I have again looked at the case of *Richardson v. Bank of England* (*a*), but have not been able to discover any grounds upon which to limit its application in the way contended for in argument. The law laid down by Lord *Cottenham* there is not new. He proceeded upon general well settled principles, applicable, it seems to me, in this as in other cases of partnership (*b*); and it does not appear to me that *Toulmin v. Copeland* (*c*), or *Domeville v. Solly* (*d*), can be regarded as conflicting authorities. In each of those cases the whole partnership estate had been already realized, and was in the hands of the party against whom the application was made; there was no room therefore for the application of the principle upon which Lord *Cottenham* acted; and the court professed to proceed upon admissions, as fairly deducible from the defendant's answer, in ascertaining the amount to be paid in upon the motion. But in this case the estate has not been realized, the partnership account has not been taken. There is nothing therefore to negative the defendant's right to retain the whole sum now in his hands; and he swears that, to the best of his belief, such would be the result. Under those circumstances, I see no reason to doubt the propriety of the order already pronounced upon the general ground.

(*a*) 4 M. & C. 176.

(*b*) Crawshaw v. Collins, 2 Russ. 325, p. 347; Foster v. Donald, 1 Jac. & W. 252.

(*c*) 3 Y. & C. 643.

(*d*) 2 Russ. 372.

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But it is said that the articles of co-partnership in this case provide for the semi-annual statement of accounts, and division of the profits; and stipulate for the repayment by each partner of whatever amount may have been received by him beyond his just proportion. It is contended that this provision was neither abandoned nor waived; although no statement had ever been prepared, and no demand of repayment consequently made; because the plaintiff is shewn, it is said, to have constantly remonstrated with the defendant on his breach of covenant. And it is concluded that the plaintiff is now entitled to have the moneys in question paid into court, as having been received by the defendant contrary to good faith, upon the principle laid down by Lord *Eldon*, in *Foster v. Donald*.

I cannot accede to this argument. Assuming, for the moment, that the defendant's oath is not conclusive against this application, I am quite clear that there are no circumstances here which would warrant us in ordering this money into court upon the principle of the case referred to. Without relying upon the character of this provision, obviously, from its nature, inapplicable, to a great extent at least, unless enforced according to its stipulations, I am quite satisfied, from all the evidence before us, and more particularly from the plaintiff's own affidavit, that these parties had abandoned all intention of enforcing the strict observance of this covenant. It is to be remarked, for the argument proceeded, I think upon the opposite notion, that the clause in question does not restrict the right of either partner to receive the assets of the firm, but provides for the repayment of the excess upon each semi-annual statement. These moneys therefore cannot be said to have been received by the defendant under circumstances in which he ought not to have received them. They were not *received* contrary to good faith; the ar-

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gument therefore necessarily is that the excess should have been repaid at the stipulated periods, and is now retained contrary to good faith. The right of the plaintiff was not to prohibit the receipt of partnership moneys by the defendant, but to require the repayment at stated periods of whatever had been received beyond his fair proportion of the profits. Now, if the plaintiff, knowing the defendant to have been in the constant habit of receiving more than his proportion of the net profits, not only refrained from demanding re-payment of the excess, but failed throughout the whole term of the partnership to make out a single statement by which the amount to be paid under the covenant would have been evinced, is not the conclusion inevitable that the clause in question had been abandoned? It is undoubtedly law that any provision in the articles of partnership may be either varied or altogether abandoned by the conduct of the parties. But what course of conduct can be more distinct than the total disuse of the provision during the entire period of the contract, and under circumstances, it would seem, which would have always called for its application? In *ex parte Yonge*, Lord *Eldon* determined that money drawn out by a partner ceases to be part of the partnership stock, so that upon bankruptcy the joint creditors cannot recall it, unless there has been fraudulent abstraction, so that the partner, to use Lord *Eldon's* expression, "may be represented as having stolen property out of the joint fund." And in determining whether that sort of fraud existed in the case before him, he said, "if his partners could have known that he had applied it to his own purposes, from their immediate or subsequent knowledge, upon subsequent dealings, their consent would be implied." Now there can be no doubt in this case, of the plaintiff's knowledge that the defendant had all along received more than his fair proportion of the net profits. That is abundantly evident from the letter of the 28th of March, 1848. But, although that

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long letter, obviously written upon a careful review of the past, and with anxious consideration for the future, is filled with angry remonstrance and just expostulation, I nowhere find in it a demand that Mr. *Crooks* should repay the amount already overdrawn, or anything approaching to such demand; it neither contains nor refers to any statement upon which such a demand should have been based, on the contrary, the writer's object throughout is, obviously, to secure greater moderation for the future. He entreats the defendant to aid him in placing the office in a better condition, and hopes that all may yet go well; but, failing that, he points to a dissolution as the only remedy. He neither demands that the amount already over-drawn should be repaid, nor insists upon the strict enforcement of this covenant as a means of protection.

But there is a passage in the close of the plaintiff's affidavit, which, if not an express waiver, goes so far to prove a tacit abandonment of the provision, and is so much in accordance with the inference to be drawn from the letter just referred to, as to have left no doubt upon my mind. Mr. *Smith* says, "That the half-yearly statements contemplated by the articles were never made up: that the deponent spoke to *Crooks* several times about this being done, and the said *Crooks* always discouraged the same." It would be very difficult, I think, to argue upon this passage that these parties did not intend to abandon the clause in question. The propriety of a strict observance is discussed; Mr. *Crooks* discourages that course, and the clause remains, in fact, a dead letter. It would be quite impossible I think, under such circumstances, to treat Mr. *Crooks* as having received these moneys fraudulently without due authority. Judgment.

One of the clauses in the deed of dissolution was relied on as evincing an intention to enforce the covenant in the articles of copartnership. I do not

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agree in the construction contended for; on the contrary, the fair inference is, I think, that no such intention existed. An agreement such as that we are now asked to infer, would have been of great importance to Mr. *Smith*, in the view he had taken of his own case. The articles of co-partnership contained a very explicit covenant directly applicable, which would have been introduced into the deed of dissolution, as it seems to me, had Mr. *Smith* felt himself entitled to insist on such a provision, and had the parties so intended. The absence of any express provision goes far to negative the intention. The same inference is deducible, I think, from the subsequent dealings of the parties, making it plain upon the whole case that the application must be refused, but, under the circumstances, without costs.

DAVIDSON v. THIRKELL.

Partnership—Practice—Appeal from Master.

Under the order of this court abolishing exceptions to the master's report, the appellant occupies the same position as under the old practice he would have done before the master on bringing in objections; and, with that single restriction, the whole case is open to him on the appeal.

The proper method of taking partnership accounts in a very special case discussed and illustrated.

Allowances made to an in-coming partner in respect of misrepresentations made to him by his co-partners, as to the liabilities of the business when he joined it.

In such a case the master was held to have jurisdiction to charge the guilty parties with either interest or trade profits, on the advances which such misrepresentations rendered it necessary for the in-coming partner to make.

Interest allowed to and against each partner on advances by and to him during the partnership.

One partner (*A*) was held to have been properly allowed by the master for buildings which such partner had erected for the purposes of the business, without the sanction of, or reference to his co-partner, during a period that the existence of any partnership between them was not recognized by either; the one (*A*) affirming it had been put an end to by a sheriff's sale, which the other (*B*) denied, affirming on his part that an award was valid which, amongst other things, put an end to it, and which award the first (*A*) impeached, the court having afterwards held that the partnership continued notwithstanding both sheriff's sale and award, and having directed the accounts to be taken accordingly.

It is contrary to the ordinary course to charge partners with what but for their wilful default they would have received.

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This was an appeal and cross-appeal from the master's report:

Argument.

Mr. *Turner*, for the appeal, cited, amongst other cases, *Rowe v. Wood* (*a*), *Wright v. Pilling* (*b*), *Sullivan v. Jacob* (*c*), *Penn v. Lockwood* (*d*), *Seton* on Decrees, p. 38, and cases there cited.

Mr. *Mowat*, contra, and for the cross-appeal, cited amongst other cases, *Stocken v. Dawson* (*e*).

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THE CHANCELLOR.—This difficult and complicated case has been at length reduced—speaking comparitively—within a narrow compass. The decree pronounced by the *Vice-Chancellor* so far back as the year 1848 having been reversed, certain enquiries were directed by the Court of Appeal, and the case now comes before us on appeal by both sides from the master's report upon that reference.

The defendant's objections are fifteen in number; those of the plaintiff eight: it will be unnecessary, however, to consider the latter in detail, because they will be found involved, to a great extent, in the defendant's case; and for the rest, their correctness has been admitted.

Before proceeding to the grounds of appeal presented by the defendant, it will be proper to dispose of a question of practice arising upon the orders of May, 1850, which, more or less, affects the whole case. According to the practice which formerly prevailed, reports of this kind were brought under discussion by means of exceptions to the master's finding. In regulating the mode of procedure in relation to such matters, it was thought expedient that such questions only should be brought under the

(*a*) 2 J. & W. 553. (*b*) Finch's Prec. 494. (*c*) 1 Moll. 472.
(*d*) Ante vol. 1, p. 547. (*e*) 2 Ph. 141.

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consideration of the court as had been discussed before the master, and in respect to which an opportunity had been afforded him of correcting any supposed error in his judgment; and, to effectuate this object, the party excepting was bound to carry in before the master's objections to his report; and exceptions not founded upon such previous objections were, on that ground alone, disallowed. These regulations were not mere matter of form. They were designed and had an obvious tendency to guard against abuses by no means unlikely to arise. But, in this, as in other respects, the practice of the court, framed to obviate every possible abuse, was found to have become too cumbrous in its application to ordinary cases—the remedy had become a greater evil than the abuse intended to be remedied—and the recent orders, introduced under the sanction of the legislature, were intended to simplify the ordinary course of procedure, leaving extraordinary cases to be met as they might arise. By the eighty-third order of May, 1850, objections and exceptions to reports are abolished, and in their room is substituted an appeal by way of motion. Under that order the appellant occupies, of necessity, we think, the same position he would have done on bringing in his objections to the master's report under the old practice; and is therefore at liberty to shew the report wrong upon any ground specified in his notice of motion. Of course parties may conduct themselves, in the master's office, as in any other stage of the cause, so as to preclude objection to proceedings, no matter how erroneous. To such cases this decision will not apply. But, apart from such specialties, the whole case is, we think, open upon the appeal. No doubt those abuses which the old practice was intended to correct may arise under the new order of procedure. Objections may be improperly reserved. But such conduct would be regarded with great disfavour. The party having recourse to

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it would forfeit all title to recover costs, and would, under circumstances, be directed to pay them. The court must deal with such cases as they arise.

The master finds, by his report, that the actual liabilities of the firm of *Thirkell & Masson*, at the time of the formation of the new partnership, exceeded the amount represented to *George Strachan* by the sum of 3215*l.*, and he finds that the estate of *George Strachan* is entitled to be allowed in respect thereof one-third of the amount advanced and paid beyond what was contemplated, being the sum of 1071*l.* The defendant's first exception questions the plaintiff's right to any allowance on the ground of misrepresentation. Upon the argument it was contended, as it seemed to us, with great force, that the evidence negatived any such misrepresentation; whilst, on the other hand, it was argued that the degree precluded the defendant from raising that question. The circumstances of the case are very peculiar, rendering it a matter of great difficulty to do justice between the parties. The construction of the decree has caused us a good deal of embarrassment; but, upon an attentive consideration, it appears to us to afford a conclusive answer to this objection. The bill prays relief in several alternatives. It first seeks to have the contract of partnership declared void, as having been brought about by the fraud and misrepresentation of *Thirkell & Masson*. Failing that, and another alternative, which it is unnecessary now to notice, it prays to have the partnership dissolved "and that an account may be taken of all the debts and liabilities of the said *Joseph Thirkell* and *Thomas Masson* on the 24th day of June, 1843, and that they may be *decreed to pay and hold complainant harmless and indemnified from and against such of the said debts and liabilities as were not included in the statement exhibited by the said Joseph Thirkell and Thomas Masson to the complainant*, and that the said *Joseph Thirkell* and *Thomas Masson* might

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be decreed to make good, for the benefit of the complainant, *the representations so made to the complainant as aforesaid with regard to the value of their assets and the state of their business.*" The statement alluded to in the prayer of the bill is the exhibit in the cause marked D, which purports to be an abstract of the assets and liabilities of the firm of *Thirkell* and *Masson*. The gross errors in that statement, found by the report, and not now denied, were attributed on the one hand to the fraudulent designs of *Thirkell* and *Masson*; whilst, on the other side, the document was alleged to have been prepared in its present shape at the desire and for the purposes of the plaintiff. The decree of the *Vice-Chancellor* declared "that *George Strachan* had been induced to enter into the partnership in the pleadings mentioned by the fraudulent misrepresentations and concealments of the said defendant, *Joseph Thirkell*; and that by reason thereof the said partnership was void, and that the instruments of the 24th of June, 1843, whereby the said partnership was intended to be constituted, were fraudulent and void against *George Strachan* and his representatives." Now, although that decree, so far as it declared the partnership to be void, was reversed; yet the declaration that *George Strachan* had been induced to enter into it by the misrepresentations and concealments of *Thirkell* has been affirmed; and the master is directed to take an account of the state of the concern, as to its liabilities and assets, when the said *George Strachan* became a partner therein, and of the allowances which the estate of the said *George Strachan* is entitled to for advances or payments made by the said *George Strachan*, or the said *George Davidson*, his administrator, or by the said concern, *beyond what was contemplated on the formation of the partnership.*" That *Thirkell* was guilty of fraudulent misrepresentation, therefore, has been expressly declared; and, looking at the pleadings and evidence, we are of opinion

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that the decree must be taken to have affirmed the allegations in the bill in relation to exhibit D. No other misrepresentation had been either alleged or proved; and therefore the court, having declared that there had been misrepresentation, and directed accounts consequent upon that, must be taken to have affirmed that exhibit D was the basis upon which *Strachan* agreed to enter into the proposed partnership.

The second exception asserts that the allowance made to the estate of *Strachan*—1071*l.* is excessive. We have had great difficulty in disposing of this exception, not from any doubt as to the principle upon which the enquiries should have been conducted, which appears to us sufficiently obvious, but in consequence of the proceedings both in the master's office and here. The decree in this cause imposed upon the master in this and other respects a task of considerable difficulty, not a little enhanced by the manner in which the case was presented to him. It was contended, on the part of *Thirkell*, that as the assets of *Thirkell* and *Masson* exceeded very much the representation in paper D, the amount of such excess, in reason and justice, as well as upon a proper construction of the decree, ought to be deducted from the allowance made to the estate of *Strachan* on the ground of undisclosed liabilities. We accede to that argument. Exhibit D has been imported, as it were, into the contract of these parties. All payments from the estate of *Strachan* on account of liabilities not disclosed by that document are to be refunded. But if exhibit D be imported into that contract for the purpose of shewing the contemplated liabilities, so must it also for the purpose of shewing the contemplated assets. As the defendants are to be charged with the omitted liabilities, they must also be credited with omitted assets, which, having been omitted, were equally withdrawn from the contemplation of the parties. If *Strachan* purchased a share in this partnership, exempted from the

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ordinary duty of a vendee, to ascertain for himself the nature and value of that which he was about to purchase, then he purchased, in effect, a specific amount of property, charged with a specific amount of debts; and if entitled to an allowance for debts undisclosed, he must, by parity of reasoning, give credit for so much of the assets as had been overlooked. In reason and justice, therefore, it seems to us that the excess of assets must be deducted from the excess of liabilities.

The same consequence appears to follow no less clearly from the language of the decree. The master is directed to make an allowance, not on account of *liabilities*, but on account of "*payments or advances*, beyond what was contemplated on the formation of the partnership." Now, so far as funds were supplied by unrepresented assets, to meet unrepresented liabilities, "Neither *Strachan* nor the concern was called upon to make any payment which had not been contemplated on the formation of the partnership." To that extent the decree seems to treat the accounts as balanced, and only directs an allowance as to the excess; for to that extent only had *payments* been made beyond what was contemplated.

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Assuming that the allowance made to the estate of *Strachan* should have been calculated upon the principal to which I have adverted—and my learned brother, before whom the matter came in the master's office, acquiesces in the justice of this view, and informs us that he had no intention of determining anything contrary—it was contended that the amount stated in the report falls short of the real value of the assets of *Thirkell* and *Masson* on the 24th of June, 1843, by 1133*l.*, or thereabouts. This sum is composed of a debt said to be due to the firm from the defendant *Masson*, not taken into account, amounting to 450*l.*, and of several parts of the fixed capital, omitted, as was alleged, in the Master's estimate.

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Those were the only grounds of exception to the allowance of 1071*l.* With respect to the supposed debt from *Masson*, we are of opinion, for reasons which will be stated in disposing of the 10th exception, that no such debt in fact existed; and, as to the other items alleged to have been omitted, the exception proceeds upon a misapprehension of the true facts. My learned brother informs us, and indeed this was eventually admitted by the counsel for the defendant, that the particulars supposed to have been omitted, have in fact been brought into the account. But, irrespective of the explanation furnished by my brother *Spragge*, the exception, as it seem to us, must have failed, because the value of the fixed capital, as ascertained by the report, exceeds the amount at which it had been estimated both by the parties themselves, upon the formation of the partnership, and afterwards by the arbitrators upon the subsequent reference. We should have felt no difficulty therefore in overruling this exception, upon the ground taken in argument. But in examining the papers and evidence, it appears to us that the principle upon which the calculation should have been based had been overlooked. In estimating the allowance to be made to the estate of *Strachan*, the value of the assets not specified in exhibit D should have been ascertained, upon the principle before stated, and that amount should have been deducted from the excess of liabilities. But upon the investigation in the masters office, all parties proceeded upon a statement prepared by the arbitrators, designated in the proofs as exhibit V. Now, however accurate that statement may have been for the purpose contemplated by the arbitrators, it obviously failed to afford correct data for the calculation which the master was required to make. The arbitrators desired to ascertain the *actual* value of *all* the assets of *Thirkell* and *Masson*, without distinction; and consequently, we find all of them—those specified in

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exhibit D as well as those which had been omitted—enumerated in that paper, and the amounts stated, not according to the *apparent*, but according to what was then thought to be the actual value. This is what has been done, in effect, by the report. The parties proceeded as if the question in the master's office had been the one before the arbitrators—namely, the actual value of all the assets of both classes. But the enquiry in the master's office was for an entirely different purpose. The object there was to discover the value of a particular class of assets—those which had been omitted—not to ascertain the actual value of the whole. The *real* value of those specified in exhibit D was immaterial; nothing, either in the contract of the parties, or the decree of the court, obliged the defendants, to guarantee those debts. But the calculation as made has had that effect. The report negatives the existence of omitted assets to be set-off against the excess of liabilities, not because there were not in fact such assets, but because the actual value of the whole had not proved greater than the apparent value of those enumerated. In that point of view, the report appeared to us incorrect, and the evidence, in relation to the matter, unsatisfactory; but, as the question had not been raised upon the argument, and as the case, in that and other respects, was involved in a good deal of obscurity, further argument was directed. Upon the re-argument, the learned counsel for the defendant expressly waived the account I have mentioned, to which—unless estopped by his proceedings in the master's office, or debarred by laches—his client, in our opinion, would have been entitled. Mr. *Turner* consented that the report should be treated as if the *actual* value of all the assets had been the subject of enquiry. Further consideration becomes therefore unnecessary; but, with a view to the general practice, it may be proper to remark that, irrespective of express waiver, we incline to think the objection

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would not have been now open to discussion. Had the defendant omitted, merely, to raise the question in the master's office, that would not have precluded him, upon the grounds, and subject to the restrictions before explained, from contesting the point here. But, looking to the course of proceedings in the master's office, we incline to think that this objection was no longer open to him. In another respect, however, embraced within this objection, we continue to think that the report must be varied. The master finds the estate of *Strachan* entitled to the sum of 1061*l*. That amount was based upon the assumption that there would not be any excess of assets over the amount represented. But at the date of the report there were no means of ascertaining that fact; the assets had not been realized. The values assigned by the arbitrators in exhibit V were conjectural merely, and are said to differ widely from the actual results as since ascertained. All that could have been done properly then, and all that can be done now, is to settle the principle upon which the allowance is to be calculated; the actual amount must be ascertained after the estate shall have been realized.

Judgment.

In disposing of this ground of appeal we have in effect determined the fifth, sixth and seventh exceptions taken by the plaintiff. By these exceptions the plaintiff on his side asserts that the allowance made by the master is insufficient. To a certain extent these exceptions must prevail, though upon a principle opposed to that relied on in argument. The master should not have found any precise amount, because he was not in possession of data for its ascertainment. But with that exception, the report must stand. Complete justice is, under the circumstances, unattainable. The principle of calculation adopted by the master is as near an approximation perhaps, as any we could now suggest; there is, therefore, no sufficient ground for disturbing his finding upon the point under consideration.

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It will be also convenient, before proceeding to the defendant's next exception, to dispose of the question arising upon the first and third grounds of appeal assigned by the plaintiff. The master having ascertained the excess of liabilities determined that *Thirkell* and *Masson* should be charged, and the estate of *Strachan* credited, with the third part of that amount. Now that determination has been carried into effect in this way: In the first place, the sum which should have been brought into the partnership by *Strachan* has been set-off against this allowance; and the balance has been credited to the estate of *Strachan* in account with the partnership. The course thus adopted has the effect obviously, of charging the allowance, not against *Thirkell* and *Maeson*, as was the intention, but against the partnership. That is plainly incorrect, and the plaintiff is therefore entitled to succeed on these exceptions The amount, when ascertained, must be charged against *Thirkell* and *Masson*, one-half against each.

Judgment.

The defendant's next objection affirms that the master should have reported the assets of the co-partnership on the 18th of June, 1850, at a sum greater by 200*l.* than that stated. This points to a mere error in addition; its correction was not disputed; further observation is therefore unnecessary.

The report finds the estate of *George Strachan* entitled to the sum of 308*l.* 9*s.* for interest. This amount consists of two items: 165*l.* being the interest on the allowance made for undisclosed liabilities; and 143*l.* 9*s.* for interest on advances made to the co-partnership from time to time by *George Strachan* and his administrators. The fourth and fifth exceptions question the legality of that finding; and upon the argument it was contended that the master, in allowing interest, had plainly exceeded his jurisdiction, that being a question exclusively for the court. With respect to the 165*l.* there would not appear to

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be a shadow of ground for the objection. The assets of the co-partnership having been absorbed to the extent of 3000*l.* and upwards, by liabilities which had been fraudulently concealed, it would have been obviously unjust had the master merely repaid to the estate of *Strachan* his proportionate share of this amount, after the lapse of so many years. Justice plainly required not only the return of the capital but compensation for its withdrawal, and the decree directs a just allowance to be made. Had the master calculated trade profits on the amount, it could not have been said that he had exceeded his jurisdiction. That would have been literally sanctioned by the decree. In allowing simple interest he adopted the view of the case most favourable to the appellant. The defendant then, singularly enough, objects in effect that the master has made to the plaintiff the minimum allowance, for he has calculated simple interest instead of trade profits upon a sum which, had the defendant's representations been true, would have been engaged during the partnership in a profitable trade. As to the 143*l.* 9*s.* allowed for interest upon advances, we think that the general order referred to in the argument gives the master jurisdiction in matters of interest; and that it has been properly exercised in this particular case. But, irrespective of that order, the finding is, we think, expressly sanctioned, in this respect also, by the decree. The master is directed to make an allowance for all payments and advances beyond those contemplated upon the formation of the partnership. Now, if the master were right in allowing to the estate of *Strachan* the principal sum mentioned, being one-third of the excess of liabilities, with interest, then the allowance of interest upon advances necessitated by the withdrawal of the remaining two-thirds, which should have been furnished by *Thirkell* and *Masson* but were not, was no less within the decree. The advances which became necessary in that respect were equally

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advances which had not been contemplated upon the formation of the partnership. These exceptions therefore must be overruled. The report is correct in principle; although, as explained above, the amounts must be ascertained hereafter.

The defendant's sixth exception raises the question how far the master was justified in allowing to the estate of *Strachan* a sum of 715*l.* which had been expended in buildings and other improvements connected with the foundry. The argument does not turn so much upon the prudence or *bona fides* of the expenditure—both of which are established, we think, by the evidence—as upon the right of the plaintiff to incur such an expense without the sanction of the defendant, and at a time when he was excluded from the management.

Judgment.

In determining this point, it will be necessary to advert briefly to one or two facts of the case. Shortly after the formation of this partnership, in June, 1843, difficulties and embarassments of a serious character supervened, which resulted in the sale of the foundry by the sheriff in the January of the following year, to satisfy a debt due from the old firm to Messrs. *Scott & Shaw*. *Strachan* treated the partnership as dissolved upon, and by reason of this sale, and thenceforward carried on the business, nominally on behalf of *Bruce*, the purchaser at sheriff's sale, but in reality, as it would seem, for his own benefit. But as *Thirkell* continued to remonstrate against the course pursued by *Strachan*, and to interpose as partner, by the release of debts and otherwise, although excluded from the management, all parties agreed, in the month of August following, to refer their differences to arbitration. The arbitrators in the month of February, 1845, awarded the partnership property and assets to *Strachan*, and directed that a sum of about 1100*l.* should be paid by him to *Thirkell*

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at certain periods specified in the award. *Thirkell* was perfectly satisfied with that decision, and from that period let to *Strachan* the undisturbed possession of the property, and uncontrolled management of the affairs of the co-partnership. *Strachan*, however, did not acquiesce in the awards, but, on the contrary, after various proceedings, which we need not enumerate, filed the bill in the present cause, praying either that the original contract of partnership should be declared void as bottomed in fraud; or a declartion that it had been dissolved by the sheriff's sale; or that the award should be set aside, the partnership dissolved, and an account directed, with certain allowances to the plaintiff, in consequence of the misrepresentations by which he had been induced to enter into the contract. *Thirkell's* answer, having insisted upon the award as final, concludes in these words: "And this defendant is advised and submits *that, if the award were not in existence, the only relief that the said complainant could claim would be an account on the footing of the said co-partnership, which this defendant would be perfectly ready to give or enter into,* were the same not barred by the said award, upon which the defendant insists as a final settlement of all matters, claims and demands whatsoever between or amongst the said complainant, the said *Thomas Masson* and the defendant, save such as arise out of the award." The Court of Appeal refused the relief asked in the two alternatives first mentioned, but granted the third. They set aside the award; dissolved the co-partnership; and credited an account on the foot of it, with certain special allowances to the plaintiff.

Judgment.

Now the above statement of the facts, pleadings and decree shews conclusively, in our opinion, that this exception cannot be maintained. After the award—and it was then that these buildings were erected—the business was exclusively managed by

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Strachan and his representative. If continued at all it must have been so carried on; for, from that time *Thirkell* disclaimed all interest in the concern. But the decree declares that the partnership had not been determined, that the business so carried on was partnership business, and directs an account on the foot of it. It follows necessarily, that all just allowances must be made to *Strachan* and his representative, who had managed this business; and, indeed, the defendant submits to this by his answer. Is *Thirkell* to receive the profits of this business without being subject to pay the expense of management? It is idle to say that he was not consulted, for at the period in question he repudiated the character of partner. Now the evidence establishes that the amount in question was fairly expended; this exception, therefore, must be disallowed.

Judgment.

The seventh ground of appeal is, "because the master by his said report has allowed the said *George Strachan* and the said plaintiffs, or one of them, to take from the funds of the said co-partnership a large sum of money, the same having been applied in or towards the expenses of this suit." This exception was submitted to upon the argument. The learned counsel for the plaintiff admitted that the master, although intending to expunge from the costs' account all amounts referrible to the present suit, had inadvertently included in it sums of that character, amounting in the whole to 640*l.* 9*s.* 1*d.* This amount must therefore be charged against *Strachan's* estate, and the report must be corrected accordingly.

The eighth reason of appeal is in these words: "Because the master hath not, in and by his said report, charged the estate of the said *George Strachan* with such a sum of money as, under the articles of partnership, he was chargeable and ought to have been charged with." Upon the formation of this

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co-partnership the amount of capital to be advanced by *Strachan* had not been determined; could not, it would seem, have been satisfactorily determined, because the position of the old firm had not been ascertained. It was therefore agreed between the parties that *Strachan* "should and would, in consideration of his being taken into partnership, advance and pay for the support and increase of the said establishment such a capital sum of money, not exceeding the sum of 1000*l.* of lawful money, nor less than 400*l.*, as might be considered fair and reasonable, and as might be agreed upon between them, when the balance sheet of the affairs of *Thirkell* and *Masson* should be made out." It was further agreed that in case of difference the matter should be submitted to arbitration. This question having been neither settled by the parties nor submitted to arbitration, owing to the unfortunate difficulties which supervened, became of course matter for the determination of the master, who fixed the amount at 750*l.*; and the question now raised by the defendant on this exception is, whether the sum should not have been fixed at 1000*l.* The plaintiff, on the other hand, insists by his second objection to the report that the amount should be reduced to 400*l.* No witnesses have been examined upon this point. We have before us therefore nothing beyond the naked facts of the case; and the best opinion we have been able to form upon the facts, without the assistance which would have been derived from the opinion and judgment of those conversant with such matters, is, that the plaintiff's exception must prevail. It was argued on the part of the defendant, that the allowance made to the estate of *Strachan* having placed it in the same position as if the representations of the defendant were true, the capital to be awarded should have been fixed at the largest amount contemplated by the parties, upon the faith of these representations —namely, 1000*l.* This argument is obviously based

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upon a misconception of the effect of the report. Statement D represented the assets of *Thirkell* and *Masson* at about 7000*l.*, and the liabilities at about 3000*l.* and thus shewed a realized capital of 4000*l.* Now, although an allowance has been made to the plaintiff which would have the effect of repaying one-third—that is, the proportionate share of the concealed liabilities—and of replacing to that extent what had been represented as realized capital, still the payment of that sum *now*, after the partnership has been dissolved, will be very far from placing the plaintiff in the same position as if that capital had been in existence at the commencement of the partnership, as was represented. Again, to repay the plaintiff now his proportionate share of what was represented as realized capital when the partnership was formed, is not to compensate him for the non-existence of the remaining two-thirds, which, if really existant, would have been employed throughout in the business, and would probably have obviated all the difficulties in which the plaintiff was subsequently involved. It is plainly erroneous, therefore, to assume that the plaintiff has been placed in the same position as if the representations of the defendant had been true. The liabilities are represented as about 3000*l.*; they were in fact about 6000*l.*, and for a large proportion of that amount judgments had been recovered and executions placed in the hands of the sheriff. To have relieved the concern from these embarassments would have required, as it seems to us, very large advances on the part of *Strachan*; and we feel satisfied that he never would have consented to pay even the small sum of 400*l.*, had the true state of the business been disclosed to him. This conclusion appears to us to be also in accordance with the intention of the parties to be gathered from the articles of co-partnership. *Thirkell* and *Masson* prepare paper D as a true representation of the state of the business; that is, they represent their realized

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capital as 4000*l.* Now, upon that basis, the parties seem to have considered that 1000*l.* would be a proportionate capital to be advanced by *Strachan*; but as that statement was known not to be perfectly accurate, the parties would seem to have provided for the reduction of the sum to be advanced, according to the actual result upon the preparation of an accurate balance sheet. If this be a true construction of the contract, then the sum to be advanced by *Strachan* should bear the same proportion to 1000*l.* (the actual capital) that 1000*l.* does to 4000*l.*; that is, should be less than 400*l.* Upon this exception therefore we think the plaintiff entitled to succeed.

It will be apparent from what has been already said, that the plaintiff is also entitled to succeed, to some extent, upon his third exception. The sum to be charged *Strachan* must not be set-off against the amount to be paid by *Thirkell* and *Masson*, which would be in effect to credit those partners and not the partnership. The amount with which we think *Strachan's* estate justly chargeable was in fact paid by him, although improperly entered in the books. It should have been treated as his proportion of the capital, and not as a loan. Judgment.

The ninth reason of appeal is: because the master has not charged against the estate of *Strachan* a sum of 936*l.* due from one *Bethune*, and eventually lost by his bankruptcy. This objection appears to proceed upon the hypothesis that the account between the estate of *Strachan* and the co-partnership ought to have been taken upon some principle different from that which ordinarily prevails in relation to partnership accounts. It will have been perceived from what has been said in disposing of the sixth exception, that we do not accede to that position. The ordinary rule must prevail. But it is contrary to the ordinary course to charge partners with what

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but for their wrongful default would have been received. Irrespective of that principle however, the evidence, in our opinion, does not prove wilful default in relation to the debt. This exception must therefore be disallowed.

The tenth reason of appeal is in these words: "Because the master has charged to the co-partnership in favour of the said *Thomas Masson* a debt of 162*l.* when a debt was due from him and stood in the books of the old firm to the amount of 450*l.* and which 450*l.* ought to be charged against him in and by the said report and carried to the credit of the new co-partnership." It would appear that very little, if any, capital had been brought in by the partners in the old firm; nor has any contract as to the amount of capital to be brought in been established. The business would seem to have been commenced and carried on almost, if not altogether, upon credit. Between the formation of the original partnership and the admission of *Strachan*, sums had been drawn out both by *Thirkell* and *Masson* as occasion required, and the sums so drawn out by *Masson* amounted at the period in question to 450*l.*; but no account had been, nor was one then, stated between the partners, or either of them, and the firm. The question then, or rather one of the questions, raised by this exception is, whether the master should have charged this sum of 450*l.* as a debt due from *Masson* to the new co-partnership. It is quite plain, we think, that such a course would have been erroneous. It is perfectly obvious from the facts stated that at the time of *Strachan's* admission there was no debt due from *Masson* to the old firm (*a*). Whether *Masson* was debtor to the firm at that time, or the firm debtor to him (using the terms debtor and creditor in their popular sense) could only have been ascertained by taking the partnership accounts; and

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(*a*) Richardson v. Bank of England, 4 M. & C. 165.

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such an account, it would seem, would have shown *Masson* a creditor and not a debtor. Otherwise there would have been then no realized capital beyond the sums drawn out by the partners; for the realized capital consisted altogether of the profits of the trade; but, on the contrary, the allegation is that the profits were large and the realized capital considerable.

The same conclusion is to be deducted, as well from a consideration of the nature of the contract between these parties as from the language of the articles of co-partnership; but, as the principle above stated is sufficient for the determiation of the question, it is unnecessary to consider further the points to which we have just adverted.

We are of opinion, however, that the report is erroneous in another particular, not suggested in argument, but comprehended within the reason of appeal now under consideration. The master has debited "trade charges account," annually, with two sums of 160*l.*, and those amounts have been credited to *Strachan* and *Masson* as a compensation for their care and trouble in the management of the partnership business. It is from this annual credit that the balance in favor of *Masson* has been derived. Now, upon the general law of partnership, no such allowance could have been made to these partners (*a*); but in this case the existence of such a right is negatived by an express provision in the articles. *Strachan* and *Masson* are required to give their personal attention to the management of the business, while *Thirkell*, being exempt from that duty, covenants to charge his share with the salary of a clerk in lieu thereof. These provisions are obviously inconsistent with the claim of *Strachan* and *Masson* to compensation for management. It is argued, however, that the mode of taking the account, though wrong in principle,

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(*a*) Stockton v. Dawson, 6 Beav. 371.

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has not been productive of any erroneous result, inasmuch as the master, instead of debiting *Thirkell* with 160*l.* per annum, under his covenant, has debited three sums of that amount against the partnership; thus producing practically the same result. But, in one respect at least, this mode of proceeding has been productive of error. *Strachan* has been credited with interest upon his advances to the partnership. But to the extent of this allowance, these advances were from partnership funds; so that whilst *Thirkell* has been charged interest for all partnership moneys in his hands, *Strachan* has been credited with interest upon advances made from the same source. This error alone would be sufficient to render the correction of the report in this respect necessary. But it appears to me further, and in this respect I desire to be understood as expressing my individual opinion only, that this mode of taking the account would be obviously unjust to *Thirkell* if this concern should eventually prove insolvent, a result frequently suggested in argument by the learned counsel for the plaintiff.

Judgment.

The only question argued upon the eleventh objection was, whether the sum of 159*l.* and interest, being the balance due upon the promissory note of *Matthew Hunter*, inorsed by *Thirkell* and *Masson* to Messrs. *Forsyth, McGill & Co.*, had been properly charged against *Joseph Thirkell*. The facts in relation to this matter are involved in much obscurity; but, upon the whole, we are of opinion that the evidence is insufficient to justify the charge. The note of *Matthew Hunter* was endorsed by *Thirkell* and *Masson*, either for the accommodation of *William Thirkell*, it would seem, or in the course of accommodation transactions between *Thirkell* and *Masson* and Messrs. *Forsyth, McGill & Co.*, for such would seem to have been the nature of the only business transactions between these firms. If endorsed for the

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accommodation of Mr. *Thirkell*, then the fair effect of the evidence is, we think, that it was so endorsed with the consent of *Masson;* for the business of the firm seems to have been carried on throughout by means of accommodation paper, which *ex vi termini* involves mutuality. If *William Thirkell* was in the habit of lending his name to the partnership, it was but reasonable that the partnership name should be lent to him in return; and such would seem to have been the course of dealing between the parties. If this practice was adopted with the sanction of *Masson* (and such is, in our opinion, the fair result of the evidence), then there was not, in this view of the case, sufficient to warrant the charge of the amount against *Thirkell*. On the contrary, if *Hunter's* note were endorsed for the purpose of taking up paper discounted by Messrs. *Forsyth, McGill & Co.* for the benefit of *Thirkell* and *Masson*, and we are by no means clear that this is not the proper conclusion, there would be no pretence for charging the amount to *Thirkell's* individual account. Now these are the only explanations of this endorsement which have been suggested. The bill asserts that it was for the accommodation of *William Thirkell;* the the answer, on the other hand, affirms that it was in discharge of a debt of *Thirkell* and *Masson* to Messrs. *Forsyth, McGill & Co.* In either event it appears to us that the amount should not have been charged, under the evidence, against *Thirkell;* and that it must therefore be struck out of his account and added to the general liabilities of the firm.

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The twelfth exception is altogether groundless. It is true that the master has not credited the partners with their respective shares of profit from year to year, as suggested in the reason of appeal; but no such profit had been ascertained. No account had been stated from the commencement to the dissolution of the co-partnership. But the master, having adjusted the

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accounts of the partners, and provided for the payment of the debts of the concern, has divided the surplus (including of course the whole profits) according to the articles; and, in our opinion, this was the only course open to him under the circumstances.

This report is objected to in the next place upon the ground that certain books of account purchased upon the sheriff's sale should not have been charged against the partnership. Had these books been unnecessary, and in the result useless, this objection would have been well founded. There would have been manifest injustice in charging the firm with an expenditure incurred unnecessarily and with a view adverse to its interest. But the books would have become necessary in a short time; and they were in fact used in keeping the partnership accounts of which the defendant is deriving the benefit. Under these circumstances, this sum was, we think, properly

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charged.

We also think that the premiums of insurance, referred to in the fourteenth reason of appeal, were properly charged by the master. It is true that the policies of insurance were not affected in the partnership name; but the decree has determined that this business was throughout partnership business, and an account has been directed upon that footing, under which each partner will receive his share of all profits made. All moneys received upon the policies in question would have formed its items in the account. The partnership would have been entitled to the moneys recovered by the policies, and has been properly charged therefore with the premiums.

The fifteenth exception must also be disallowed. The master has taken the account of *Thirkell* and *Masson*, so far as he was directed by the decree—namely, to the extent of ascertaining the assets and

liabilities of that firm on the 24th of June, 1843. Beyond that point the account was not directed by the decree, and would have been foreign to the purpose of the present suit.

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Eston, V. C.—The only points upon which I desire to offer any observation are, that I have not considered the effect of the general order of court mentioned by his Lordship warranting the allowance of interest, but think the allowance reasonable and just, independently of that order; and that I think the proper and correct mode of making the necessary allowance to the estate of *Strachan* is to charge the whole amount of extraneous liabilities, except so far as they may be reduced by surplus assets, against *Thirkell* and *Masson* in favor of the firm; and also, that although I think the allowance of the annual sums for services, in the erroneous form in which it has been made, has not varied the result of the account, still it seems to me that the error in form ought at all events to be corrected, as it cannot possibly be said with certainty that it is a mere error in form and has produced no practical mischief.

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Practice—Partnership—Fraud.

March 16.

In a suit to wind up the affairs of a partnership, on the ground of alleged misconduct on the part of one of the partners and the confidential clerk and manager of the partnership business, the court, having reference to the facilities for investigating matters of account before the master, gave the clerk leave to carry in and prove any claim he had against the firm for his services, although it was clearly established that he had been guilty of gross misconduct and might have been left to pursue his remedy at law for his demand, if any; and directed sufficient of the partnership funds to be reserved to satisfy the claim, in the event of his succeeding in establishing it.

Where partnership business was carried on in buildings erected by the funds of the firm upon lands for part of which the patent from the crown had issued in the name of one of the partners parol evidence was received to shew whether the land was separate or joint property.

This was also an appeal and cross-appeal from the master's report, made in a suit for the winding up of

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partnership business, carried on at Peterboro', the hearing of which had occupied the court for several days. The facts and circumstances which gave rise to the suit are fully detailed in the judgment.

Mr. *Turner* for the defendants, who appealed.

Mr. *Read*, contra, and for the cross-appeal.

The judgment of the court was now delivered by

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Esten, V. C.—The suit in this case was instituted by three persons of the names of *Newton*, *Appleyard* and *Wilson*, against their former co-partner *Doran*, and one *Towns* who had been the manager of the co-partnership business, for an account and final arrangement of the co-partnership affairs.

It appeared, from the pleadings and evidence in the cause, that a co-partnership had existed at the town of Cobourg for some time amongst *Newton*, *Appleyard*, *Doran* and one *Hooper*, in the business of manufacturers of cloth, and that then *Hooper* had retired from the business, and the other co-partners had removed from Cobourg to Peterborough and had there established a new co-partnership in the same line of business amongst *Newton*, *Appleyard*, *Doran* and one *William Wilson*, who had afterwards died, having bequeathed his share in the partnership business to his wife, *Sarah Wilson* (one of the plaintiffs), for life, with remainder to *William Wilson* (another of the plaintiffs), absolutely, both of whom had been recognized by the other members of the firm as partners. Upon the formation of this second partnership, several lots of land had been purchased by the partners as partnership property, and the necessary buildings had been erected, and proper works completed on them for carrying on the projected business. Shortly after the commencement of the partnership,

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differences had arisen amongst the partners, which had been referred to arbitration, and an award had been made which directed the partners to pay various sums into the concern respectively, in order to complete their proper contribution of capital; and also ordered that a certain deed of co-partnership should be executed by the partners, and a manager appointed for carrying on the business. These provisions were in the event all carried into effect. The sums ordered to be paid by the parners were paid accordingly, and the deed of co-partnership was executed by the partners. The defendant *Towns* was taken into the employ of the co-partnership soon after the arbitration, which occurred in April, 1845, as fuller, dyer and scourer, and continued to act in that capacity until the month of January, 1846, during which time the plaintiff *Newton* attended to the accounts and performed the business of carder for the firm. In January, 1849, quarrels took place amongst some of the partners and *Towns*, and in the end *Newton* was excluded from the business by *Doran* and *Towns*, with the sanction of the other members of the firm, and after a little time removed to Cobourg, where he obtained employment, and continued to reside until shortly before the commencement of the present suit. The articles of co-partnership, executed by the partners in pursuance of the provision to that effect contained in the award of the arbitrators, directed that while any of the partners should be employed in the business they should receive wages in the same manner as any other workman. They also authorized the manager to conduct the entire business of the firm, under the control of a majority of the co-partners. After the departure of *Newton*, *Towns* was appointed manager under the provision in that behalf contained in the articles of co-partnership, and he continued from that time to manage and conduct the whole business of the firm until the commencement of this suit.

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During this time he likewise performed the business of fuller, dyer, scourer, and carder to the firm, and attended to the co-partnership books and accounts. For these various labors, however, he received no remuneration but his wages for the work which he actually performed, as fuller, dyer, scourer, and carder, the rates of which were settled by the agreement under which he was appointed manager. He received no express or particular remuneration for his labor or assistance as manager, cashier, and book-keeper of the firm. All the moneys however, or revenue, as it was called, of the firm passed through his hands. *Appleyard* continued after the departure of *Newton* to work at the factory until some time in the year 1849, when he discontinued that employment. Mrs. *Wilson*, soon after the death of her husband, removed to a distance, having parted with her life-interest in her share of the business to her son, who was entitled in remainder to the same share, and their interest was thenceforward looked after by another son, *John S. Wilson*, who however did not reside at Peterborough but at some distance, and only occasionally visited the town, upon which occasions however he generally availed himself of the opportunity of observing what was passing at the establishment of the firm. *Appleyard* was an illiterate man, not being able to read or write, and he appears to have been of somewhat intemperate habits. The receipts of the firm were partly in money, partly in produce, which was divided amongst the partners and hands, and charged against them in account at a certain price. During the greater part of the interval between the departure of *Newton* and the commencement of this suit, *Towns* had boarded with *Doran*.

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From the beginning of 1846 until some time before the month of November, 1850, the business was carried on under the management of *Towns*, to the

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apparent satisfaction of *Wilson*, *Appleyard* and *Doran*. Owing however, to the circumstances which have been detailed it was almost entirely under the control of *Towns* and *Doran*, the latter of whom was an intelligent person and constantly in the factory. From June, 1848, to the spring of 1849, and more or less since, however, he was ill, and his sight also became very much affected, so that latterly the business was conducted by *Towns* almost without any control whatever. After the departure of *Appleyard* dissatisfaction arose on the part of the plaintiffs at the proceedings of *Towns* and *Doran*, and some time before the commencement of the suit they dismissed *Towns* from his employment. He continued however, with the sanction of *Doran*, to follow his previous occupations at the factory, and the business proceeded in precisely the same way as before. However *Towns*, after his dismissal, commenced an action against all the partners, for the recovery of his wages for the whole time that he had been employed at the factory, claiming that no part, or only a very small part, of them had been paid, upon which occasion *Doran* had the books examined by two men, being incapacitated from performing the task himself by the failure of his eyesight, and having satisfied himself, through their assistance, that *Towns* had earned the amount of wages which he claimed, he furnished him with an acknowledgment to that effect under his hand, in order that he might use it at the trial; at the same time he desired *Towns'* attorney to employ an attorney for him to defend the action, which he did, as he alleged, because he was aware that a set-off existed against the demand of *Towns* to the amount of about 76*l.*, which he desired should be insisted on at the trial of the action for the benefit of the firm. Under these circumstances the present suit was instituted by *Newton*, *Appleyard* and *Wilson* against *Doran* and *Towns*. An applicatton was in the first place made for a special injunction to stay proceedings in

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the action brought by *Towns*, which was refused, but the common injunction was afterwards obtained for want of appearance or answer, and it has not yet been dissolved. Before the defendants had answered the bill, it was arranged between the parties that the cause should be summarily referred to the master to take the necessary accounts under the seventy-seventh order of the court, reserving further directions and the question of costs. This order was accordingly pronounced, and the master proceeded under it to take the necessary accounts, and on the 11th of July, 1851, made his report upon the matters referred to him. From this report the present appeal is brought.

The first point which it is necessary to notice in the report is, that the master found that in the month of January, 1846, *Doran* and *Towns*, with the acquiescence of *Sarah Wilson* and *Appleyard*, had expelled *Newton* from the factory, and thereby thrown him for a time out of employment. The articles of co-partnership had provided that if the partners should be employed in the factory they should receive the same wages as any other workman, and it appeared to be the intention of the partners that they should, if no reason existed to the contrary, be so employed. *Newton* was charged by *Doran* and *Towns* with dishonesty, whether justly or not does not appear, in receiving moneys of the firm without accounting for them, and in applying the moneys of the firm to the discharge of his individual liabilities; he was however an expert workman, and the master considering that he had been excluded from the factory without sufficient cause and without that notice to which an ordinary workman would be entitled, and had been thereby deprived of employment for fifty-three working days, allowed him, as a compensation for this loss, the sum of 10*l.* 12*s.*, which he charged in his favor against the co-partnership, and in favor of the co-partnership against *Doran*,

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Appleyard and *Sarah Wilson*, in equal shares. This determination is the first point of the appeal, but we think the master's judgment in this respect reasonable, and see no reason for disturbing it.

The next point in the appeal relates to the conduct of *Doran* and *Towns* in the management of the business. The master was of opinion that they had been guilty of mismanagement; that the co-partnership accounts were not properly kept according to the provisions of the articles, and that the books were not open to the inspection of the partners as they ought to have been; that *Towns* and *Doran* had expended the means of the firm wastefully in making unnecessary additions to the machinery and alterations in the buildings of the firm; that they had not exerted due dilligence in the collection of the debts of the firm, and that by these means the firm had sustained a loss which he estimated at the sum of 283*l.* 4*s.* and charged in favor of the co-partnership against *Doran* and *Towns*. Upon this point we are of opinion that there is not sufficient evidence to sustain the master's determination; and without expressing any opinion as to his power of awarding damages or compensation under such circumstances, we allow this ground of appeal, and reverse this part of the report for defectiveness of proof.

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The third objection to the report had reference to *Appleyard's* account. It appeared that an account had been made out against *Appleyard*, to the amount of 88*l.* and upwards, for produce and cash paid and supplied to him during the year, beginning in April, 1845, and ending at the same time in the following year, and that credit had been given to him for his wages earned during the same period, amounting to about the sum of 39*l.*, which being deducted from the above sum of 88*l.* and upwards, left about the sum of 48*l.* to his debit; other items of charge also

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appeared to have existed against him, extending to some time in the year 1848, and an account was stated, as was supposed, at that time, comprising the several particulars before mentioned, and shewing a balance due from him to the firm of 98*l.* and upwards. It is to be observed that this account, which was signed by *Appleyard* with his mark, he being unable to read or write, and which, as was alleged, had been read over to and acknowledged by him, although it comprised some items extending to some time in 1848, did not give him credit for any wages to which he may have been entitled from April, 1846. *Towns* however, in his evidence before the master, deposed that *Appleyard* had been employed pretty steadily at the factory from that time until some time in 1849, when he departed altogether from the factory. It was the duty of *Towns*, as manager and book-keeper of the firm, to have kept a regular account of *Appleyard's* earnings and the firm was bound by his default in this respect. *Towns'* evidence was wholly uncontradicted, and *Appleyard* preferred a claim for wages after April, 1846, but stated that owing to his inability to read or write he had kept no account of his earnings during that time, and had depended entirely upon *Towns* to do so. Under these circumstances and in this state of the evidence, the master allowed wages to *Appleyard* from April, 1846, to the time of his final departure from the factory at the same rate as he had been credited in the account signed by him as above mentioned, for the year commencing in April, 1845, and ending in April, 1846. As this did not appear to be a high rate of wages the master, in reference to the principle upon which he proceeded perhaps rather fell short of than exceeded the due allowance to which *Appleyard* would on that principle have been entitled. We think the principle upon which the master proceeded was, under the circumstances, a highly reasonable one; and if we had to decide this point with no other

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evidence before us than the master, when he decided it, had before him, we should without hesitation confirm his decision. After however this matter had been brought under our consideration by means of this appeal, upon examining the different papers which had been produced in the master's office in relation to this enquiry with rather more care than appears to have been used by either of the parties to the investigation before the master, we discovered an account in relation to *Applegard* not perfect, extending from a period anterior to that at which the other account which has been mentioned ended, to about the time of his final departure from the factory, and embracing both his earnings during that time, and cash and provisions and other things supplied and paid to him during the same period, but not so far as it had come to light, including items of a different kind mentioned in the other account. Why this account was not produced in the master's office, it was not easy to conjecture. It is right to mention that it was pointed out to the court by the solicitors for both parties in the course of the consideration of the appeal. Its non-production however by *Doran* and *Towns*, to the latter of whom at all events its existence must have been known, in the master's office has had its effect in conjunction with other circumstances in exciting those doubts and misgivings which have certainly on the part of the court attended this investigation. The account thus brought to light seemed to supersede the master's presumptive conclusion, however reasonable under the circumstances, and upon the matter being mentioned by the court to the respective solicitors they agreed to abide by the result of the account which had been discovered, and which shewed a balance of about 10*l.* in favor of *Appleyard*, whereas that stated by the master had shewn a balance in his favor of about 40*l.* *Doran* and *Towns* had, as we understand, claimed against *Appleyard* in the master's office the

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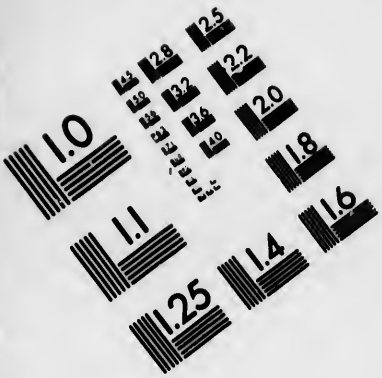

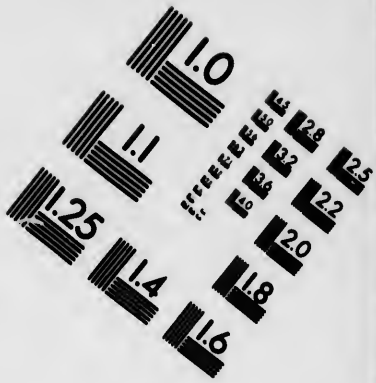

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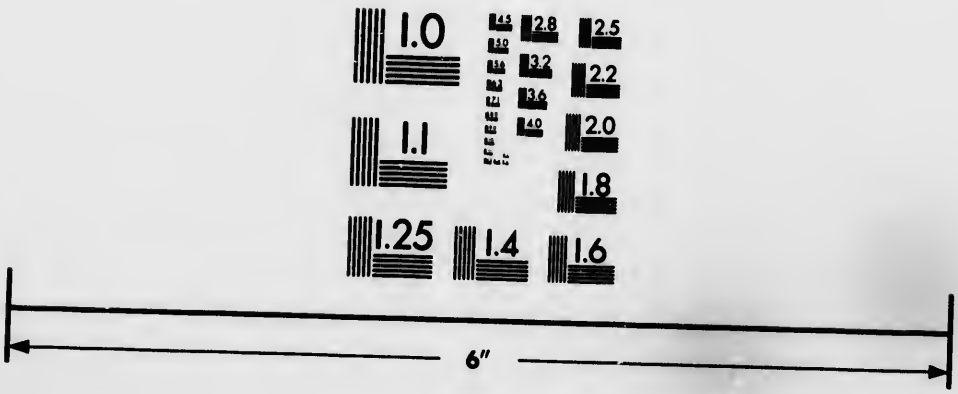

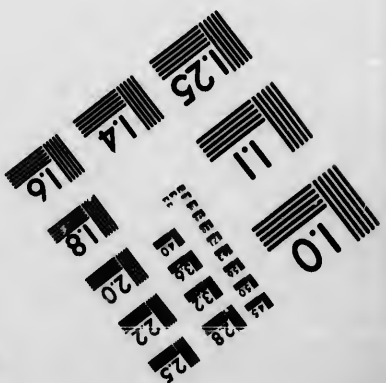

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balance of the signed account. This arrangement between the parties disposed of the third and fourth objections to the report.

The fifth objection referred to the charges allowed in favor of *Doran* to the amount of 256*l.* 7*s.* 7*d.*, and charges against him amounting to 250*l.* 12*s.*, which latter sum being deducted from the former there remained a balance due to *Doran* of 5*l.* 15*s.* 7*d.*, as appeared by the report. A part of the charge against *Doran* consisted of the sum of 141*l.* 12*s.*, being half of the sum of 283*l.* 4*s.* which had been allowed by the master against *Doran* and *Towns* on account of the supposed mismanagement of the co-partnership business. This charge has already been disallowed in disposing of the second objection to the report. This should have reduced the charge against *Doran* and increased the balance due to him by the sum of 141*l.* 11*s.*, but in disposing of this part of the case and applying to it the principles which regulate the treatment of accounting parties who have not duly fulfilled their obligation to render full and perfect accounts, we have found it necessary to increase the charges against *Doran*. We have found the accounts lodged in the master's office in relation to *Doran's* receipts incorrect. This discovery was made through the personal *viva voce* examination of the parties. *Doran* should have seen that these accounts were correct. He was obliged to confess in the course of his examination that he had not been sufficiently charged. We have found *Doran* and *Towns*, after *Newton's* exclusion, having had the almost exclusive management of this business for nearly five years, claiming against *Appleyard* the amount of an account signed about the middle of this period, without producing his subsequent account, which, to say the least of it, was essential to the right understanding of the position in which he stood towards the firm, obliged, in consequence of the disowning of this

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account, to abandon virtually their whole claim against *Appleyard;* and, on the other hand, themselves introducing their own accounts, in which they have failed to charge themselves with sums with which they were fairly chargeable. Under these circumstances, we have thought it our duty to apply a rigid rule to the investigation of the account as regards these parties. *Towns'* account is afterwards disposed of; but against *Doran* we have proceeded on the principle of selecting the supplies of one year —namely, from June, 1847, to June, 1848—not by any means the year in which the largest amount, according to his own evidence, was received as the standard, and have charged him at a somewhat increased rate with produce and cloth during the whole period of *Towns'* and his joint management of the business. To this amount we have added the items of cash charged in the cash-book, and the result is that *Doran* is charged with the sum of 259*l.* 1*s.* 2*d.* and credited with the sum of 256*l.* 7*s.* 7*d.* as allowed by the master; the effect of which is that a balance is due from him to the firm of 3*l.* 3*s.* 7*d.* instead of a balance being due to him from the firm. The produce has been charged against him at the rate of 30*l.* a year, and cloth at the rate of 6*l.* a year. This disposes of the fifth objection.

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The next objection has reference to the claim of *Towns* and the state of his account with the firm. The master allowed him wages during the whole time that he had been in the employ of the firm, and had charged him with half of the supposed deficiency or compensation, amounting to 141*l.* 12*s.*, the sum of 84*l.* 14*s.* 4$\frac{3}{4}$*d.* balance of cash unaccounted for, and the sum of 11*l.* 4$\frac{1}{2}$*d.*, being, as was alleged, the whole amount of goods with which *Towns* had been supplied from the co-partnership during the whole period that he was in their employ. The charge for deficiency or compensation has, as I have mentioned,

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been already disallowed. With regard to the rest of the account, we have thought it our duty to adopt a still more rigid course than we have pursued towards *Doran*. *Towns* was chosen manager of the firm in January, 1846, immediately after the exclusion of *Newton*. He received no express remuneration for performing the duties of manager and book-keeper, but he derived a considerable benefit nevertheless from that appointment, inasmuch as he secured thereby an abundance of profitable employment, and indeed he appears to have reaped a greater amount of benefit from the business than any one of the partners themselves. He was, at all events, entrusted by the co-partnership with these duties; he undertook their performance and was bound to perform them to the best of his ability; in this responsible situation, having the almost entire management of the business, he received all the moneys and produce paid and delivered to the firm; he however

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kept no proper or complete account of his own receipts, and the amount of cash charged against him was in fact a deficiency of cash counted for. We have seen that in the master's office he attempted to impose upon the court a stated account of *Appleyard* shewing a considerable balance in favor of the firm, but embracing only about half of the time that *Appleyard* had dealings with the firm, while another account in the handwriting of *Towns*, extending to the time of *Appleyard's* departure and shewing a small balance in his favor was withheld. *Towns'* own account and *Doran's*, as introduced by him into the master's office, omitted as we already observed, several charges against them respectively. *Towns'* evidence before the court, given in the course of the appeal, abounded in self-contradictions, and exhibited a desire occasionally to account plausibly for difficulties and inconsistencies rather than the simple consideration whether what he was saying was the strict truth; the books of the firm too

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exhibited alterations of dates which were disowned by *Towns* and about which he professed utter ignorance, although *Doran* afterwards proved that they were in his handwriting, and for which we must suppose that he did choose to account. It should be observed, on the other hand, that *Towns* does not appear to have been a skilled accountant, and that he may probably have been much hurried occasionally in entering the necessary matters in the books, and that his general management of the business does not appear to be liable to any just complaint. Under these circumstances, it became matter of serious consideration whether it was not our duty to disallow *Towns'* claim altogether. It is to be observed that he insisted that although he had been in the employ of the firm during more than five years in the most confidential capacity, and had received all the moneys and produce delivered and paid to the firm, he had never in fact retained any part of his own wages, but had merely from time to time used such moneys as he required for his occasional expenses. This account was corroborated by the evidence of *Doran*. It appeared that he had received board at *Doran's* nearly the whole time that he had been in the employ of the firm, but that no settlement of account had ever taken place between them, nor could either of them tell what was due from one to the other for board, although both agreed that the amount must be considerable. It does not appear to have been understood with any certainty between them what amount of produce furnished to *Doran* was to be charged to him and what to *Towns* in the accounts of the co-partnership. It is no doubt true that where an accounting party, by neglecting to keep a full and regular account of his receipts, renders it impossible for his employer to know with certainty with what amount to charge him, he is liable not only to be charged with the greatest possible amount with which he can be chargeable, but

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also to have any claim to which he might be otherwise entitled disallowed, since it is impossible to say that it has not been satisfied. After the best consideration that we have been able to give to this part of the case we have thought it best to pursue the course adopted in *White v.* Lady *Lincoln*, where Lord *Eldon* did not positively disallow the claim of the solicitor but refused to allow it in that suit, and gave him, or rather his executors, liberty to attempt to enforce it should they be so advised in a separate suit to be instituted for that purpose. We shall follow this example in effect. The regular course in the adjustment of the affairs of this partnership would be to pay all the debts due from it, and after realizing all its effects, to make a fair division amongst the partners. Under the peculiar circumstances of this case we must in some degree deviate from this course. We shall make *Towns'* claim for the present an exception to the general settlement. The concern will be otherwise finally wound up and closed, with the exception after mentioned, but *Towns* must make his claim *de novo*, and substantiate it in regular course before the court as he may be able, or left to pursue such remedy as he may be advised, either at law or in equity, for enforcing his claim against the individual members of the partnership; and if he has been delayed in the assertion of his alleged rights, he has himself alone to blame. When, after his dismissal from the confidential situation which he held by the act of a majority of the co-partners (since which time it is proper again to remark he has, in defiance of that dismissal, been retained in that situation by the intervention of, as we must consider him, his confederate *Doran*), he commenced an action against the members of the firm for the whole amount of his wages, having previously obtained from *Doran* an acknowledgment under his hand that that amount was due to him, with the view no doubt of using it in evidence as an

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admission binding upon the other partners, it was undoubtedly the right of those partners, sued by their confidential agent, who had been in the management of their business and in receipt of their moneys during more than five years, without having rendered any account, in a matter of complicated account, to transfer the case to this court in a suit for the dissolution of the co-partnership and an adjustment of the partnership affairs. An injunction granted for default of appearance or answer, was at the hearing properly continued during the investigation that was to follow by consent of parties in acknowledgment of that right. As I have already observed, the regular course in such cases is to finally wind up and close the concern by the payment of all debts and demands existing against it, and *Towns'* debt, if any, would, under ordinary circumstances, have been paid in due course in common with the others. But the court is not obliged to pursue this course, and may, under special circumstances, depart from it. The creditors have no lien on the property joint or separate of the co-partners; their right to satisfaction is incidental to that of the partners themselves to a final adjustment of the affairs, which cannot be completely effected without payment of the joint debts. *Towns* might be properly called to account for his dealings in the co-partnership business as the confidential agent and cashier of the firm, without having his demand, if any, satisfied. His own remedy for the recovery of his demand, if any he has, remains unimpaired. We do not leave him to that remedy, because we think that justice may be more effectually done in this court. We should perhaps have left him to file his bill in this court for the recovery of his alleged demands, but, having reference to the facilities for investigating matters of account and the brevity and rapidity of the pleadings and practice under the new orders, we have preferred the course before mentioned. We shall reserve enough to satisfy

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Towns' claim should he succeed in establishing it. This disposes of the sixth objection to the master's report.

The seventh objection was based on the conclusion of the master that lot No. 20, part of the land on which the business was carried on, was partnership property, whereas it was claimed by *Doran* as his separate estate. The patent had been issued in the name of *Doran*, but the patents of the other lots admitted to belong to the firm had been likewise issued in the names of other members of the firm respectively, who however preferred no claim to them on their separate account. It was not disputed that parol evidence was admissable to shew whether this lot was separate or joint property. We have considered the evidence to which our attention was directed on the point, and are of opinion that the master's conclusion from it was correct, that lot twenty was partnership property and we confirm that determination.

Judgment.

This disposes of all the objections to the report raised by the defendants. A cross-appeal has been presented by the plaintiffs. Our impression is that our judgment, as pronounced on the points raised by the defendants, involves the disposal of the plaintiff's objections likewise. Should this not be the case a separate judgment will be pronounced on those points in the plaintiff's appeal which the foregoing judgment has not touched or entirely disposed of.

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Mortgage—Parol Evidence.

June 29th and Sept. 7th.

Under the circumstances set forth in this cause, as reported *ante* volume 1, page 227, decree made to let plaintiff in to redeem. Whether a deed absolute on the face of it, nothing more being shewn, parol evidence will be admitted to shew the conveyance was intended to operate as a security only (*Quære*) (*a*).

After the judgment had been pronounced in this cause, as reported *ante* volume 1, page 227, the plaintiff amended his bill by adding *Antoinette Taylor* as a party defendant. As against her the bill had been taken *pro confesso*, and the cause was now brought on for hearing upon the pleadings and the evidence as taken in the original cause. Statement.

Mr. *R. Cooper* for the plaintiff. Argument.

Mr. *Crickmore*, for the defendants, *DeTuyll* and *Rattenbury*.

THE CHANCELLOR.—Upon the former hearing Mr. Vice-Chancellor *Jameson* and myself were of opinion that, upon the evidence then before us, the plaintiff was entitled to relief; but, from a defect of parties the cause was ordered to stand over, with liberty to the plaintiff to amend. Sept. 7th. Judgment.

As against the new party there is now an order to take the bill *pro confesso*. The evidence, therefore, remains unchanged; and, as I see no room to doubt the correctness of the conclusion at which we before arrived, I am of opinion that the plaintiff is entitled to a decree to redeem.

The deed in this case was absolute; and the principal question was whether parol evidence could be received to shew the real nature of the transaction. We then thought that the same rule of evidence must be applied to mortgage as to other contracts; and only admitted the evidence under the special circumstances of the case. That question has since under-

(*a*) See also Holmes v. Matthews, *post* 379.

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gone a good deal of discussion; and I find that several of my learned brothers in the Court of Appeal have expressed similar opinions in *Howland v. Stewart* (*a*), and *Greenshields v. Barnhart* (*b*), but there is not, I believe, any direct decision upon the point.

As to the admissibility of the parol evidence in this case, I entertain no doubt. I adhere to the conclusion, but after much reflection upon this subject, I doubt the premises from which it was drawn. I am not now prepared to affirm some of the principles upon which my judgment proceeded; and, as the point is of frequent occurrence and great importance, I wish to take this opportunity of adverting to the principles and authorities which were then, and, as it seems to me, have been since overlooked in the discussion upon this subject.

Judgment

The right to redeem after forfeiture, except in cases of accident or other specialty, was for a long period pertinaciously resisted by the courts of common law. That was natural, for equity in decreeing redemption after forfeiture, does in fact overturn the plain import and legal effect of the deed. Sir *Matthew Hale*, who was not only the greatest common law judge, but also the greatest equity judge of his time, says, in *Roscarrick v. Barton* (*c*): "By the growth of equity upon equity the heart of the common law is eaten out, and legal settlements are destroyed. In 14th Richard II., the parliament would not admit of redemption; but now there is another settled course; as far as the line is given man will go, and if an hundred years are given, man will go so far, and we know not whither we shall go."

The jurisdiction of courts of equity in relation to mortgages is not a branch of the general jurisdiction as to forfeitures. It would have been then confined, I presume, to cases of accident and other specialty.

(*a*) Ante Vol. 2, p. 61. (*b*) Ante p. 1. (*c*) 1 Ca. Cha. 217.

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For some time, indeed, the jurisdiction was so limited, and the law would seem to have been in that state in the time of Lord *Ellesmere* (*a*); but in the reign of Charles I. the right to redeem, without reference to any such special circumstance, was firmly established (*b*).

The jurisdiction is based, first upon the specific nature of this sort of contract; secondly, upon the relative position of the parties. Natural justice required that what had been transferred but as a pledge, should be restored upon payment. Public policy required that the necessity of the borrower should be protected against the oppression of the lender.

The right to redeem, nowithstanding the form of the deed, and notwitstanding the rule of the common law, having been established, the necessity of disregarding every shift of the creditor to defeat that right was obvious. The same principle of natural justice, the same motives of public policy which entitled the mortgagor to relief against the letter of the mortgage deed, entitled him equally, in reason, to relief against every device, or contract, by which the creditor might seek to frustrate the exercise of that right. A jurisdiction based upon the essential nature of the contract and the unequal condition of those contracting, would have been impotent indeed, could it have been defeated by the form which the contract might be made to assume, or by the express agreement of the parties. Judgment.

Many of the doctrines of our law upon this subject, and amongst them, I presume, this one, have been derived from the Roman civil law, in which code the rule upon this point is expressed with great

(*a*) Harg. L. Tr. 431.
(*b*) Emmanuel College v. Evans, 1 Cha. Rep. 11.

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force and clearness: *Quoniam inter alias captiones præcipue commissoriæ pignorum legis crescit asperitas, placet infirmari eam, et in posterum omnem ejus memoriam aboleri. Si quis igitur tali contractu laborat, hac sanctione respiret, quæ cum præteritis præsentia quoque repellit, et futura prohibet. Creditores enim re amissa jubemus recuperare quod dederunt.* Some commentators suppose this law of Constantine to have been declaratory merely; but that opinion does not seem to rest upon any sufficient foundation. *Pothier* in his note to the 13th book of the Pandects says: "*Sunt qui existimant hanc commissorium legem fuisse etiam retitam jure Pandectarum: et postea, cum invaluisset, rureus hic a Constantino prohiberi. Quæ sententia merito displicet. Jac. Gothofredo, utpote nullo certo fundamento nixa.*"

Judgment.

The infirmity and vigor with which this doctrine has been enforced in our courts of equity might be shown in a long series of decisions applicable to a great variety of circumstances. The cases warrant this proposition, that, by our law a mortgage cannot be made irredeemable. This doctrine was clearly stated by Lord *Eldon*, in *Seton v. Slade* (*a*): "To say time is regarded in this court, as at law, is quite impossible. The case mentioned of a mortgage is very strong, an express contract under hand and seal. At law the mortgagee is under no obligation to reconvey at that particular day; and yet this court says that though the money is not paid at the time stipulated, if paid with interest at the time a reconveyance is demanded, there shall be a reconveyance, upon this ground, that the contract is in this court considered a mere loan of money, secured by a pledge of the estate. *But that is a doctrine upon which the court acts against what is the prima facie import of the terms of the agreement itself:* which

(*a*) 7 Ves. 273.

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does not import at law that *once a mortgage always a mortgage*, but equity says that; and the doctrine of this court as to redemption does give countenance to that strong declaration of Lord *Thurlow* that the agreement of the parties will not alter it; "*for I take it to be so in the case of a mortgage, that you shall not by special terms alter what this court says are the special terms of that contract.*" And in *Vernon v. Bethel* (a), Lord *Northington* says "*I take it to be an established rule that a mortgage can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute; and there is great reason and justice in that rule, for necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them.*"

In almost every other case the maxim, *modus et conventio vincunt legem*, is permitted to prevail; but in this peculiar sort of contract a mortgagor is not permitted by any contract into which he may enter, at the time of the loan, no matter how well considered, no matter how free from any taint of actual fraud, to deprive himself of his right to redeem. All contracts and all decrees, having that object are treated as fraudulent and void against the mortgagor, and ineffectual to bar the equity of redemption. Judgment.

Now, does the law, which thus disregards every shift to which the mortgagee may resort to defeat the equity of redemption, permit him to attain that object by so obvious a device as the exclusion from the deed of the proviso to redeem? If the mortgagor be so completely *in vinculis* as not to be permitted by any contract, at the time of the loan, to relinquish his right to redeem, can he be considered a free man in omitting altogether the clause of redemption? If the restriction of the proviso be fraudulent, must not the

(a) 1 Eden, 110.

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omission of it be equally so? Would not the exclusion of parol testimony in such a case be subversive of the principles upon which this jurisdiction is founded? And if the omission of the proviso for redemption be in itself a fraud, is not parol evidence admissible upon general and well settled principles?

This view of the law seems sanctioned by authority of considerable weight. In *Cotterel v. Purchase* (*a*), the deed was in form absolute. It would seem to have been framed in that way, so far as I can gather from the report, without any stipulation on the part of the mortgagee, and without objection by the mortgagor. In the course of his judgment the Lord Chancellor says: "Otherwise the length of time would not have signified; *for they who take a conveyance of an estate as a mortgage without any defeazance are guilty of a fraud; and no length of time will bar a fraud.*" And again, "In the northern parts it is the custom in drawing mortgages to make an absolute deed with a defeazance separate from it, but I think it is a wrong way, and to me it will always appear with a face of fraud, for the defeazance may be lost and then an absolute conveyance is set up. I would discourage the practice as much as possible." Lord *Talbot* unfortunately presided in the Court of Chancery for but a short period, but with great parts, he brought to the bench a more extensive experience, perhaps, than any other man who ever occupied the wool-sack; and the case to which I have just adverted has been cited, by almost every judge who has since had occasion to refer to the subject, with approbation.

Judgment.

In *Baker v. Wind* (*b*), where the proviso for redemption had been omitted at the instance of the mortgagor, Lord *Hadwicke* says: "The not inserting the clause was an imposition upon the mortgagee."

(*a*) Cas. tem. Tal. 61. (*b*) 1 Ves. Senr. 161.

In *England v. Codrington* (*a*), where the mortgagee insisted that the mortgagor must trust to his honor, and refused to advance his money if a proviso for redemption were inserted; Lord *Northington* says; "I am of opinion, upon the proofs in the cause and particularly from the answers of Sir *W. Codrington*, that the agreement bearing date the 18th of July, 1751, was not for the sale of the premises therein mentioned, but was only an agreement to convey the estates to Sir *W. Codrington* and his heirs, redeemable at a certain time and particular [illegible]nt, upon payment of the money with interest, *which ought to have been inserted in the agreement, and appears to me to have been fraudulently omitted by the drawer of it.*"

Upon a principle analogous, but of much more extensive operation, which applies, however, with peculiar force to mortgage transactions, it may be found, perhaps, that a mortgagee who procures, or suffers, the security to be executed in an absolute form, upon a representation that he will hold it as a security merely, cannot be permitted afterwards to use it for any other purpose. Judgment.

In *Walker v. Walker* (*b*), Lord *Hardwicke*, giving effect to this principle, in favor of a defendant, in a case of trust, not mortgage, says: "I am not at all clear whether, if the defendant had brought his cross-bill to have this agreement established, the court would not have done it, upon considering this in the light of those cases where one part of the agreement being performed by one side, it is but common justice it be carried into execution on the other."

In *Young v. Peachy* (*c*), acting on the same principle in *favor of the plaintiff*, that great judge says: "It manifestly appears, the conveyance from *Fox* and his wife was obtained in order to answer

(*a*) 1 Eden. 173. (*b*) 2 Atk. 100. (*c*) 2 Atk. 256.

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one particular purpose, but that the father has attempted to make use of it for a very different one; *and there have been a great many cases, even since the Statute of Frauds, where a person has obtained an absolute conveyance from another, in order to answer one particular purpose, but has afterwards made use of it for another, that this court has relieved under the head of fraud, for a practice of this sort is a deceit and fraud which this court ought to relieve against, the doing it is dolus malus.*" And again: "In the present case the recovery, as has been said, was suffered for one purpose, and is attempted to be made use of for another and though it has been objected the allowing the evidence of this sort is against the Statute of Frauds and Perjuries, yet, if that objection should be allowed, the statute would tend to promote frauds rather than prevent them."

Judgment

The same doctrine is propounded by Lord *Cottenham* in *Hammersley v. The Baron DeBiel* (*a*), and by the Vice-Chancellor of England in *Podmore v. Gunning* (*b*), and has been enforced in many other cases.

I shall refer to but one other case, which, though not the decision of an English judge, must be allowed to have great weight as the opinion of one distinguished alike for great ability and profound learning. In *Strong v. Stewart* (*c*), where the defendant by his answer denied the fact of loan, and insisted upon the transaction as an absolute sale, Mr. Chancellor *Kent* says: "On the strength of the authorities, and on the proof of the loan, *and of the fraud on the part of the defendant in attempting to convert a mortgage into an absolute sale*, I shall decree an existing right in the plaintiffs to redeem. The cases of *Cotterell v. Purchase, Maxwell v. Montacute, Washburn v. Mirrill*, and the acknowledged doctrines in

(*a*) 12 C. & F. 62. (*b*) 7 Ves. 644. (*c*) 10 John's C. C. 168.

2nd Atkin. 99, 258; 3 Atkin. 389, are sufficient to shew that parol evidence is admissable in such cases, to prove that a mortgage and not an absolute sale was intended, and that the party had fraudulently perverted the loan into a sale."

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It is said that this argument, if tenable, would establish a rule of evidence, in relation to mortgage contracts, here, different from that which prevails in courts of law. But that follows necessarily from the fact that mortgage contracts are regarded by this jurisdiction in a light wholly distinct from that in which they are viewed by courts of law. They are no longer the same contract. Common law regards the letter by which alone it is governed. Equity, looking to the spirit, interprets the contract in a way wholly different, and prescribes rules for the conduct of the contracting parties of which the common law takes no notice. The one jurisdiction treats as a fraud that which the other does not suffer to be impeached; and, as a necessary consequence, the ground upon which the parol testimony is admitted by the one court, is wanting altogether in the other. Neither can it be said that this argument subverts either the rule of evidence or the Statute of Frauds, because the parol testimony is admitted on the ground of fraud, which, as to both, is an acknowledged exception.

Judgment.

But, whatever may be the ultimate decision upon the general question, I am satisfied that a defendant who admits in his answer that the transaction was a loan, and not a sale, cannot by setting up the Statute of Frauds defeat the plaintiff's right to relief.

It is not necessary to decide in this case any of the points to which I have been adverting; and when so much doubt has prevailed in the minds of men of great ability and experience, I naturally feel great hesitation in expressing such opinion as I have been

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able to form, but I have thought it right not to dispose of the case finally without pointing out the particulars on which I have reason to doubt the soundness of the principle upon which my former judgment proceeded.

SPRAGGE, V. C.*—I was not a member of the court when this cause was originally brought on for hearing, and upon which occasion the judgment was delivered which has been referred to by his Lordship The Chancellor. It is not necessary in this case to decide whether parol evidence is in all cases admissable to shew that a deed of conveyance, absolute in its terms, was intended to operate as a mortgage, because there appears upon the evidence to have been such a dealing between the parties, upon the faith of the contract sought to be established, as properly to admit evidence as to what the real contract between the parties was, and I am of opinion that the plaintiff is entitled to relief, because he has shewn such dealing as admitted evidence of the real contract. I put it upon this ground, because I desire not to be understood as assenting to the proposition of his Lordship the Chancellor, that upon the question "mortgage or no mortgage" parol evidence is always admissible.

Judgment.

In some other cases it may probably be necessary to decide that question; at present I incline against the admissibility of the evidence.

*ESTEN, V. C., gave no judgment, having been concerned in this cause while at the bar.

HOLMES v. MATTHEWS.

1852.

April 3 and Sept. 7.

Mortgage—Parol Evidence.

Upon the question whether a deed, absolute in its terms, was really intended as a security merely, an unsigned memorandum of the transaction made at the time, for the use of the parties, by the attorney's clerk who drew the deed for them, was held sufficient to let in parol evidence.

Parol evidence does not become admissible in this class of cases, because of a note in writing sufficient to take the case out of the Statute of Frauds, but because of the existence of some fact which evinces the real intention of the parties to have been different from that expressed in the deed.

Where an absolute deed appeared from parol evidence (which under the circumstances was admissible) to have been intended as a security only, and the defendant, the devisee and executrix of the grantee, swore that she believed the equity of redemption, if any, was put an end to by a subsequent parol agreement between the parties, casual conversations by the mortgagor with third persons, from which such an agreement was attempted to be inferred, were held in sufficient proof of it, though, it was said that the mortgagor had claimed no interest in the property from the time of the alleged agreement until after the death of the mortgagee—a period of about ten years.

Statement.

The bill in this case was filed by *John Holmes*, of London, the assignee of *Alfred T. Jones*, a bankrupt, and set forth that *Jones* had, on the 2nd of September, 1840, conveyed the lands therein mentioned (being certain town lots in London), to *Edward Matthews*, since deceased, to secure 100*l.*, although in fact part only of that amount was due; that the sum of 100*l.* was the sum then stated to have been advanced, but that *Matthews* had retained 15*l.* as an alleged bonus, 44*l.* being paid to *Jones* and 41*l.* paid by *Matthews* to government for arrears due on the lots, and on the 20th of January, 1843, *Matthews*, as assignee of *Jones*, applied for and obtained letters patent from the crown for said lots, and became the owner thereof, subject to the equity of redemption of *Jones* on payment of 85*l.* and interest from 2nd September, 1840; that subsequently to that date, and before the bankruptcy of *Jones*, *Matthews* became possessed of the legal estate in certain premises in the said town of London, being the west part of lot seventeen, north side of Dundas street, on which there was erected at the time a build-

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ing, consisting of a shop and dwelling house, the property of *Jones*, of which *Matthews* was aware at the time of becoming so possessed thereof, as *Jones* then was, and for "*a time*" after *Matthews* became possessed of the premises remained, in possession of the said house and shop as of his own property; and *Matthews*, about the same time, made various improvements on the property at the request of, and being employed by, *Jones*, to whom the expenses thereof were charged; and *Matthews* "fully admitted the said *Alfred T. Jones* to be the owner of the said house and shop, although he, the said *Edward Matthews*, had become possessed of the land on which it stood," but that afterwards *Matthews*, as owner of the land, ejected *Jones* from the premises; that *Matthews* and those claiming under him have ever since been in possession thereof and have received the rents and profits thereof. The bill then stated the decease of *Matthews*, having first made his will, whereby the defendant *Catherine Matthews* was appointed his devisee and executrix; prayed an account; an allowance for the said house and shop; and redemption, on payment of balance to be found due.

Statement.

The defendant by her answer, admitted the execution of the assignment to her testator, who thereupon entered into possession of the premises, that he and defendant had since paid taxes thereon, and that no claim was ever made by *Jones* or his assignee, until after the death of testator; alleged that if the transaction originally had been a loan and security therefor, the equity of redemption therein was (*the defendant had no doubt*) subsequently disposed of to *Matthews*; that the purchase of lot seventeen, as defendant believed, embraced the house thereon as well as the land, which was purchased from the brother of *Jones* at a sum equal to the full value of house and land, and that *Jones*, although aware of the negotiations in relation to such sale, never forbade it. The answer set up the Statute of Frauds,

the Statute of Limitations, and lapse of time independently thereof, as a bar to relief. 1852.

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Evidence was taken in the cause on behalf of both parties, the purport of which appears in the judgment.

The cause now came on to be argued upon the pleadings and evidence.

Mr. *R. Cooper*, for the plaintiff, cited amongst other cases, *England v. Codrington* (*a*), *Pitcairne v. Ogbourne* (*b*). Argument.

Mr. *Mowat* and Mr. *Strong*, for the defendant, objected that no circumstances existed in this case sufficient to admit the parol evidence of the right to redeem. No evidence of possession by *Jones*, after the execution of the assignment to *Matthews*; nothing is shewn inconsistent with that instrument; and it is not alleged that plaintiff is entitled to relief on ground of fraud, accident, or mistake; referring to *Greenshields v. Barnhart* (*c*), and cases therein cited. The case made by the bill does not warrant the admission of parol evidence; however, if the transaction were a mortgage, the right to redeem was waived. In *Simpson v. Smyth*, before the Privy Council, it was expressly held that the conduct of parties in England even, may put an end to the equity of redemption within the period of twenty years. *Vernon v. Bethell* (*d*), *Price v. Dyer* (*e*), and *Taylor* on evidence, section 822, were also referred to, for the defendant.

Sept. 7.

The judgment of the court was now delivered by

THE CHANCELLOR.—The object of this bill is twofold; first, redemption of four parcels of land, being lots eleven and twelve on the north side of King street, and the south side of Dundas street, in the town of London. Secondly, compensation for moneys Judgment.

(*a*) 2 Eden 169. (*b*) 2 Ves. senr., 375. (*c*) Ante p. 1.
(*d*) 1 Eden 110. (*e*) 17 Ves. 356.

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expended on another parcel of land, also in the town of London, being lot seventeen on the north side of Dundas street.

The actors in both transactions were *Alfred T. Jones* and *Edward Matthews;* the plaintiff is the assignee in bankruptcy of the former, the defendant the devisee and executrix of the latter.

The first transaction took place on the 2nd of September, 1840. At that period *Alfred T. Jones* had only an equitable title to the premises in question, under a contract for purchase; this contract at the period in question was assigned, unconditionally, to *Edward Matthews*, to whom the legal estate has been since conveyed in pursuance of it. There is not any defeazance.

The plaintiff asserts that the transaction was in reality a mortgage; and he objects that the contract is void for usury.

Judgment.

The defendant says she is ignorant of the facts; she believes that the transaction of September, 1840 was a mortgage, but if so, has no doubt that the equity of redemption was subsequently disposed of to *Matthews*, her testator; she denies usury, and sets up the Statute of Frauds.

It is not contended that the conveyance of the legal estate to *Matthews* affects the case. If *Jones*, having the equitable fee simple, made a conditional conveyance of it to *Matthews*, to secure a debt, it is quite obvious that the mortgagee cannot defeat the right of the mortgagor by clothing himself with the legal estate. The equity of redemption attaches to the legal title (*a*).

(*a*) Keech v. Sandford, Select Ca. Cha. 61; Holt v. Holt, 1 Cha. Ca. 190; Rakestraw v. Brewer, 2 P. W. 511. But see Greenshields v. Barnhart, ante. 33.

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For the purpose of proving the assignment to have been a mortgage, the plaintiff called Mr. *Wilson*, the solicitor of the defendant in the present suit, who acted for both parties in the transaction of 1840. He says: "I am aware that in 1840 Mr. *Mattews* agreed to lend to *Alfred T. Jones*, the last witness, 200*l.* upon the part of lot seventeen of which he speaks, called then the Ferguson lot, and to *Alfred B. Jones* in the bill named 100*l.* upon lots eleven and twelve south upon Dundas street, and upon lots eleven and twelve north upon King street, in the town of London, for one year to each, at six per cent. per annum. There was no bonus. I am sure there could not have been, for this reason, I hold and now look upon a memorandum (marked exhibit B) in the hand-writing of Mr. *Beecher*, then my clerk, which shews the transaction, and, although not dated, by reference to my day-book I have no doubt it was made on the 3rd of September, 1840. The advance was made up in this way; *A. T. Jones* owed Mr. *Matthews* on a cognovit, then in my hands, for a previously existing debt of 125*l.*; Mr. *Matthews* had an account exclusive of the cognovit of 21*l.* 17*s.* 6*d.*; there was supposed to be due to the government upon the lots eleven and twelve, King street and Dundas street, 42*l.* 18s., and a cheque was then given for the balance, 110*l.* 4*s.* 6*d.* (now produced and marked exhibit C). At this time no patent had issued for these lots. I got one assignment from *A. T. Jones* in favor of Mr. *Matthews* for the four lots, on which assignment I believe the patent was obtained. The assignment was absolute in its terms, but it fact was security for the said loan of 100*l.* with interest at six per cent. to be repaid in one year."

Judgment.

There are several other witnesses to the same point; but it will not be denied, I think, that this testimony alone, if admissible, establishes conclusively the plaintiff's case. Nothing can be conceived more clear and unequivocal than Mr. *Wilson's* statement.

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This evidence, however, is objected to on two grounds: First—On the ground of professional confidence. Secondly—As being contrary to the general rule of evidence and the express provisions of the Statute of Frauds.

I am of opinion that there is no foundation for the first objection, for two reasons: First—he was the attorney of both parties. Secondly—Because the matter as to which he was examined was not confidential (*a*).

The second objection, had there been nothing further in the case, would have raised the general question as to the admissibility of parol testimony in mortgage cases, against the effect of the deed; and, had that question arisen, I should have felt it impossible, I believe, upon the principles stated in *LeTarge v. DeTuyll* (*b*), to dismiss the plaintiff's bill in the face of such evidence. But there are circumstances to be found here which relieve us from the necessity of deciding the general question. Mr. *Wilson*, upon his examination, in order, I presume, to repel the charge of usury, produced a paper, marked as exhibit B, in these words:

Judgment.

Memorandum of account between Mr. Matthews and Jones.

Cr.

Amount to be advanced by Mr. *Matthews* on the Ferguson place	£200	0	0
On lots 11 and 12 north and south on King and Dundas streets	100	0	0
	£300	0	0

Dr.

To due Mr. *Matthews* on cognovit given up	£125	0	0
To " " on account	21	17	6
Due on lots 11 and 12 above, which Mr. *M.* is to pay government	42	18	0
Cash cheque to balance	110	4	6
	£300	0	0

(*a*) Fraser v. McDonald, ante. vol. 2, p. 442. (*b*) Ante. 369.

This paper comes from the defendant, and is endorsed—in whose hand-writing does not appear:

"Memorandum from *A. T.* and *A. B. Jones.*"
"£300 0 0"
"Loaned for one year."

The paper itself is in the hand-writing of Mr. *Beecher*, then a clerk in Mr. *Wilson's* office, who appears to have managed the whole transaction, on behalf of both parties, in Mr. *Wilson's* stead. He has been called by the defendant, and having been examined as to this document, gave the following account of it: "The memorandum (exhibit B) I have no doubt shewed the transaction between the parties, *and was made out by me for that purpose on that day*, from my recollection of my practice on these occasions, *I have no doubt I made one for each party.*"

Here, then, is written evidence which shews conclusively that the contract between these parties was not that stated by the deed, and which is therefore sufficient, within *Cripps v. Jee* (*a*), and the other cases of that class, to admit the parol testimony. It is proved, indeed, that this paper is not in the hand-writing of *Matthews*, except perhaps the indorsement, and has not been signed, but it was written by the agent of *Matthews*, under his immediate instructions; it subsequently remained in his possession, and is produced in evidence by his devisee, the present defendant. Now parol evidence does not become admissible in this class of cases, because of a note in writing sufficient to take the case out of the statute, but because of the existence of some fact which evinces the real intention of the parties to have been different from that expressed by the deed, and which thus raises, as it has been expressed, an equity *dehors* the deed. Accounts kept do not constitute a memorandum within the statute, and yet they are sufficient for this purpose; and in *Flanklyn v. Fern* (*b*), a memorandum signed by the Mortgagor himself,

Judgment.

(*a*) 4 B. C. C. 472. (*b*) Barnard, 30.

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but in the presence of the mortgagee, was sufficient to admit the parol testimony. Here is such a fact. This document, prepared by the agent of both parties, contemporaneously with the deed, and for the purposes of it—which was in fact the basis of their contract—proves conclusively that the transaction was not what the deed purports it to be. That introduces the parol testimony, which establishes beyond doubt that the real contract was a mortgage and not a sale.

I have not considered the effect of the statement in the defendant's answer. If she is to be regarded as admitting the transaction to have been a mortgage, as perhaps she should (*a*), that alone would be sufficient, I apprehend, to admit the parol evidence, although she claimed the benefit of the Statute of Frauds. But as the other ground is sufficient, it is unnecessary to determine this point.

Judgment.

Besides this principal question, two other points are made. The plaintiff asserts that the contract is usurious. The defendant, that the equity of redemption had been released. The evidence establishes neither.

The first point depends upon the testimony of *Alfred T. Jones*. His evidence is objected to on the ground of interest. The plaintiff relies upon the 12 Vic. c. 70, as obviating that objection. I incline to think that the evidence would have been admissible under the provision of that act (*b*). But the point does not arise. The evidence was taken in March, 1851; subsequent, therefore, to the act 14 & 15 Vict. c. 66; and under the latter act there can be no doubt, I apprehend, as to the admissibility of the testimony. But, though admissible, it must be received with caution; and, upon grounds to which I shall advert more fully hereafter, I do not think his testimony entitled to credit.

(*a*) Potter v. Potter, 1 Ves. senr. 274.
(*b*) Udal v. Walton, 14 M. & W. 254; Hill v. Kitching, 2. C. & K. 278.

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The argument upon the second point proceeds upon two grounds. First—Upon the fact that the equity of redemption is not included in the bankrupt's schedule. Secondly—Upon certain admissions which he is said to have made. The first branch of the argument would have had great weight had the bankrupt been plaintiff, but cannot prevail against his creditors. Moreover the facts of the case, as shown by Mr. *Beecher's* testimony, sufficiently explain the omission. Upon the second point of the argument there is no evidence, parol or written, of any contract for the release of the equity of redemption. Even this depends upon the inference to be drawn from admissions supposed to have been made by the bankrupt. That is always the most unsatisfactory species of evidence. But in this case, the admissions, besides that they have not been put in issue, are extremely loose and indeterminate. What security would there be for men's titles if permitted to be shaken by evidence of loose casual conversations, occurring at so great a distance of time, with persons wholly unconnected with the title in point of interest?

Judgment.

The relief prayed, with respect to lot seventeen, by the bill, is that "the master may be directed to enquire and state the value of the house erected thereon, and to give credit to the plaintiff on the said account for such value." This part of the case, so far as direct testimony is concerned, depends entirely upon the testimony of *Alfred Jones*. In September, 1840, the legal estate was vested in *Aby Jones*, who then mortgaged to *Matthews* in fee, to secure 200*l*. In the subsequent year the mortgagor released the equity of redemption in consideration of 150*l*.; so that, upon the face of the deeds, *Matthews* would appear to be the owner in fee. But *Alfred Jones* swears that he had an interest in the house. The nature of his interest has not been anywhere explained; but, with respect to the contract upon

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which the bill is founded, this is his evidence: "At the time that Mr. *Matthews* bought from *Aby Jones* he well knew that I had an interest in the house, and we then entered into an agreement virtually that he was to let me have the premises purchased from my brother at the same price he paid my brother, *or to pay me for my interest in the house*, and that in the meantime I was to remain in possession; *the sum to be allowed me for the house was not named.*" The house appears to have been burned down before the filing of the bill in this suit, and the relief prayed is based altogether on the latter alternative of the agreement; probably because the destruction of the house rendered the former alternative undesirable. Upon whatever ground that relief is not prayed.

Judgment

Now, considering the material interest *Jones* has in the result of this suit, his testimony, as I have said, must be examined with care, and if discredited in any material respect, it must be altogether rejected. But, upon some fundamental facts of the case, his statements, if not designedly untrue, are yet so wholly incorrect, as to weaken very much the credit to be given to the other parts of his testimony, if not wholly to neutralize it. First, as to the question of usury: That was a most prominent part of the plaintiff's case. *Jones* being interrogated with respect to it on his first examination, says: "Mr. *Matthews* declined to advance except at fifteen per cent., *and a deduction was made accordingly.*" Then, as the whole sum advanced is accounted for by exhibit B, with the exception one item of 21*l.* 17*s* 6*d.*, he fixes upon that entry as the one in which the bonus of 15*l.* had been included. He says: "I look upon written paper marked B, I was not present when it mas made up, I never saw it until about six months prior to Mr. *Matthews'* death. I did not, to the best of my knowledge, owe Mr. *Matthews* the sum of 21*l.* 17*s.* 6*d.* therein mentioned, nor any sum except the

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125*l.* included in the cognovit above mentioned." But, two or three witnesses having proved that the sum of 21*l.* 17*s.* 6*d.* was due from *Jones* to *Matthews* for work done, *Jones* is recalled, when he makes this statement as to the bonus: "I think that it was in 1840 Mr. *Matthews* got a gold watch from me, for which he said he would allow me 20*l.* It was about the same time of his taking security for the lots, for which I never received value; he said he would account for it in the money transaction about the lots. *It was kept by Mr. Matthews as a bonus.*" Now had that been the first and only statement made by *Jones* it must have been regarded, I think, as most suspicious testimony. There is an incoherency and uncertainty in the manner of this statement hardly to be reconciled with its truth. Had such a transaction really occurred, it is of a nature to impress itself upon the witness's recollection, much more than the sum deducted from the amount. His recollection would have been clear, and his statement explicit.

Judgment.

But when it is remembered that the whole statement came out, for the first time, on the witness's second examination; that it not only was omitted upon his first statement, but is wholly irreconcileable with the account then given; it becomes difficult to view it in any other light than as a wilful fabrication, which should destroy altogether the credit of the witness's testimony.

Again, as to the possession of the property, *Alfred Jones* says, on his first examination: "Mr. *Matthews* had been in possession of the lots on Dundas and King streets ever since the assignment, or shortly after, and had paid the taxes." Subsequently the fact of possession seems to have been thought material and an attempt is made, in a very singular way, to shake the testimony of a witness who had stated the fact as to possession in the same manner as *Jones*

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himself. For this purpose *Jones* is again produced and says: "*Griffith* then said that the part of his affidavit where he stated that *Matthews* was in possession was wrong; *that I was in possession then for some time after the time stated by him in his former affidavit.*" Now this evidence is either designed to prove the incorrectness of the witness's own statement on his former examination, or it is an improper attempt to impeach the testimony of a witness as to a point with respect to which *Jones* must have known his testimony to have been correct. In either view, it is well calculated to destroy all faith in his testimony.

But apart from the general discredit thus attached to his evidence, his statement, as to the point under our more immediate consideration, is unsatisfactory; and it is contradicted. He admits that the sum to be paid him by *Matthews* was not settled. That was certainly a strange and very unusual contract on the part of Mr. *Matthews*. He is said to have purchased this property, in fact, without knowing the price to be paid.

Judgment.

But it is fair, I think, to assume that, had such a contract been made, *Aby Jones* must have been aware of it. He was called by the plaintiff, and on his cross-examination gave this account of the matter: "I sold house and all for this (350*l.*), subject to my brother's claim. *I do not recollect telling Mr. Matthews what my brother's claim was. Mr. Matthews did not buy the house meaning to pay my brother* 275*l.*, that is the sum which, as I have stated, my brother put in in building the house. It was built about two years before. Mr. *Matthews* told me *he intended* to let my brother have the property he bought of me for the same sum he gave me for it. There was no understanding that I know of between my brother and Mr. *Matthews* than that he (my brother) was to

have the land back at the same price I got for it. Mr. *Matthews* understood that my brother was a partner in building the house, and that 350*l.* was not the full value of the house and land. *I will not say that Mr. Matthews was to pay my brother any amount further than as I have stated, that is, that he was to give my brother the land for* 350*l. I do not know that my brother pretended to claim anything more at that time.*"

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It may well be doubted, I think, upon the whole statement, whether any definite contract at all had been entered into between these parties; but the contract set up by the bill, improbable in itself, is distinctly negatived by *Aby Jones*, who must be taken to have known it, I think, had any such really existed; and that, in my opinion, is the proper conclusion upon the whole evidence.

Judgment.

HUTCHINSON v. BOULTON.

Lessor and Lessee.

Where a lease contains a covenant on the part of the lessor for a renewal of the term, or in default, payment of improvements, the option rests with the lessor either to renew or pay for the improvements; and the lessee cannot compel a specific performance of the contract to renew.

Sept. 7.

This was a bill filed by *Sarah Hutchinson* and her children, one of whom was an infant under the age of twenty-one years, against *Sarah Ann Boulton*, the devisee; and the executors of *D'Arcy Boulton*, Esquire, praying the specific performance of a contract to renew a lease of certain property in the city of Toronto, made by Mr *Boulton*, to the testator *Jacob Hutchinson*. The lease contained a covenant to the effect that at the expiration of the term (twenty-one years) thereby granted the lessor, his heirs, &c., would grant a renewal thereof at certain rents to be fixed by arbitration, or in default, would pay the lessee, or his representatives, the value of the improvements; the amount thereof to be also settled by arbitration.

Statement.

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The devisee having, at the expiration of the lease, commenced proceedings at law to eject the plaintiffs from the possession, the present suit was commenced, praying an injunction, receiver, and specific performance of the covenant to renew. A motion, on a previous day, was made for a receiver to be appointed of the rents and profits, and

Argument.

Mr. *McDonald* for the motion, submitted that upon the proper construction of this covenant the plaintiffs, as the devisees of *Jacob Hutchinson*, had a right to insist upon a specific performance of the contract to renew.

The defendant, by her answer, raises two objections to the relief sought by this bill. 1st—That the option is with the lessor, but (2ndly) if not, and that the lessee must be deemed to have the option either to be paid or insist on a renewal, then, that the right to insist upon a renewal of the term had been waived by the plaintiffs having proceeded, to a certain extent, in ascertaining and arranging for the payment of the amount of the value of the buildings, &c., on the premises. Now, in this case, one of the plaintiffs is an infant; therefore, no action taken by the adult plaintiffs can be deemed to bind the interests of the infants, citing *Dann v. Spurrier* (*a*), and *Webb v. Dixon* (*b*).

Mr. *Crickmore*, contra.

The judgment of the court was now delivered by

Judgment.

THE CHANCELLOR.—The success of this motion for a receiver depends upon the construction of the covenant to renew contained in the lease, for if the plaintiff be not entitled to have that covenant specifically performed, he cannot, of course, be entitled to a receiver. The covenant is in these words: "And

(*a*) 3 Bos. & Pul. 399. (*b*) 9 East. 15.

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the said *D'Arcy Boulton*, the younger, doth hereby for himself, &c., covenant, promise and agree to and with the said *Jacob Hutchinson*, &c., that he, the said *D'Arcy Boulton* the younger, &c., shall and will, upon the expiration of this present lease, grant a new lease to the said *Jacob Hutchinson*, &c., for a term of twenty-one years, at a rent not exceeding 21*l.* yearly, *if the same shall be lawfully demanded*, or, *upon neglect or refusal so to do, after such demand*, within one month thereafter, pay for the buildings erected on the said premises such fair price or valuation as may be agreed upon between the said parties." The instrument goes on to provide a mode of ascertaining the price in case of difference.

We have read over the lease, but do not find in it anything which affects the construction of the covenant.

The learned counsel for the plaintiffs contended that the option whether they would have a new lease or the price of the buildings, was with the lessee, upon the principle laid down in *Dann v. Spurrier*, and *Webb v. Dixon*.

Judgment.

We assent unreservedly to the rule laid down in those cases—namely, that where the intention is doubtful, the words must be taken most strongly against the grantor; and, unquestionably, this rule prevails in the construction of covenants, as well as of the other parts of the instrument.

But in this case the construction does not appear to us to be doubtful. In the first place it is quite clear that these parties did not intend to confer upon the lessee the general option contended for. He is not authorised to demand, in the first instance, either a new lease, or the price of the buildings, at his option. The right to demand the price of the buildings only arises in case the landlord refuse to execute a new lease upon demand. Up to that period, there-

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fore, the option is clearly with the landlord. He reserves to himself power to defeat any claim for compensation by executing a new lease. But upon the *refusal* of the landlord to execute the lease, a right to compensation is given to the tenant. Now the term refusal clearly implies, we think, a right to refuse. Plainly the alternative is not a penalty consequent upon a wrongful refusal by the lessor, but a right which springs from the exercise on his part of an allowed option.

Judgment.

Per Cur.—Motion refused with costs.

Paul v. Blackwood.

Specific Performance—Laches.

The defendant had for some time used part of the plaintiffs, land, as a mill-pond, and differences existed between them in relation thereto, to put an end to which they entered into a written agreement that the plaintiff should sell to the defendant as much of the land as was, or had been, overflowed by the water of the mill-pond, for a price which was proved to be much beyond the intrinsic value of the piece of land so sold. To carry into effect this contract, the plaintiff had the ground surveyed, but the survey was erroneous, and the deed which the plaintiff thereupon tendered, comprised in consequence, less than the defendant was entitled to have. The defendant refused this deed, procured a new survey to be made, and tendered a new deed for execution by the plaintiff; and this deed the plaintiff refused to execute. When the first instalment of the purchase money became due the defendant tendered it, but did not pay it, in consequence of the non-execution of the conveyance. The defendant continued to use the land for a mill-pond, and gave no intimation of his intention to abandon the contract, and twelve months afterwards the plaintiff filed a bill for a specific performance of the contract, which was decreed without costs. (Blake, C., diss.)

Statement.

The bill in this cause was filed by *Eltham Paul*, against *James Blackwood*, and stated to the effect that, previously to and until the 30th of August, 1849, divers differences had existed between the parties; that plaintiff being seized in fee in possession of the premises in the deed therein mentioned firstly referred to, and defendant being seized of certain mill property therein also referred to, it was, upon that day, by deed, agreed between them to settle all

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such differences, and that plaintiff should sell to defendant, for 200*l.*, all "that certain piece of land next to a certain embankment for plank road, in the said deed mentioned, and in manner in the same deed mentioned flowed or overflowed by the waters of the mill-pond of the said defendant and should convey the same to the said defendant and his heirs, by a good and sufficient deed of conveyance, without covenants," and that defendant should pay plaintiff the sum of 200*l.*, and should execute to plaintiff a mortgage on the defendant's mill property for 300*l.*, conditioned to save harmless and keep plaintiff indemnified from all damages he might actually sustain, to be duly ascertained by a verdict of a jury in any action thereafter to be brought by plaintiff, his heirs, &c., against defendant, his heirs, &c., for any damages by the plaintiff, his heirs, &c., sustained by reason or on account of the destruction or injuring of the plaintiff's property, by the waters of the mill-pond of the defendant; such mortgage to be held by plaintiff, his heirs, &c., as a collateral security for the payment and satisfaction of all such damages, so ascertained as aforesaid, for such destruction or injury of property, and not otherwise or for any other purpose whatever. Or, if agreed upon between the parties, damages might be ascertained by arbitration, which should be binding. And that the defendant should so soon as he could (say forthwith) clean out the tail race of the plaintiff's mill of gravel, &c., therein or on any part of the plaintiff's premises by reason of the breakings away of the embankment or culvert on the twenty-ninth of August then last: such mortgage to be submitted to the judgment of *John Wilson* and *H. C. Beecher*, Esquires. Statement.

The bill was amended on the coming in of the answer, and thereby further alleged that the defendant was aware, before entering into the said agreement, of the nature and particulars of the plaintiff's title to the piece of land so agreed to be sold and of

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every objection that could be made thereto, if any could be so made, and the defendant was satisfied to take such title as plaintiff had thereto, and defendant thereupon executed the said agreement and went into possession of the said piece of land, and has remained in such possession ever since, using the same as his own; and the defendant did also, in part performance of the agreement, clear out the tail race of plaintiff's mill, and had otherwise acted on the said agreement: that the land intended by the parties was that comprised in the description set out in the bill, being the land which was overflowed by the waters of the mill-pond of the defendant on the twenty-ninth of August, 1849: that plaintiff was willing to specifically perform the agreement by conveying to defendant the land so intended as aforesaid, or so much more as for any reason defendant should appear entitled unto.

Statement.

The bill also stated that applications had been made by plaintiff to defendant specifically to perform the agreement on his part, which defendant refused to do. Also, that plaintiff had tendered a conveyance of the land agreed to be sold, but defendant refused to accept it.

The defendant by his answer stated that, previously to thirtieth August, 1849, (the date of the agreement) the piece of land in the said agreement mentioned was overflowed with water; that, being desirous to protect himself from claims or actions for damages in consequence of such overflowing, he, on the said 30th August, entered into the agreement in the bill mentioned for the purchase of the said piece of land; that the piece of land is in itself, or to the plaintiff, or any one except defendant, worth not more than 3*l.* or thereabouts, at the utmost, but in order to purchase immunity from such actions or claims aforesaid, defendant agreed to pay to plaintiff

200*l.* for a good and sufficient conveyance thereof; that the said price was in reality agreed to be so paid, not in consideration of the intrinsic value of the land itself, but of the indemnification the title to it would afford against future claims or actions for such overflowing; that the plaintiff well knew and understood, at the time of making such agreement, that such was the real consideration for the defendant entering into the same; that on or about the first of February, 1850, the plaintiff caused a deed, purporting to be a deed of conveyance of the said piece of land, to be tendered to the defendant, but the deed so tendered was not, as the defendant had been advised and believed, a good and sufficient conveyance of the land therein purported to be conveyed, and besides did not cover all the piece of land in the agreement mentioned; that in consequence thereof the defendant refused to accept the same as a performance on the part of the plaintiff of the agreement; that defendant, being desirous of obtaining a sufficient conveyance of the said piece of land, on or about the ninth day of the said month of February procured the promissory notes for 200*l.* in the agreement mentioned, to be tendered, and a deed of conveyance to be presented to the plaintiff for execution, but he then positively refused to execute the same or receive the said notes; that on the day on which the first of the said promissory notes became due, defendant was ready with the money and applied to the agents of the plaintiff, who had kept possession of the deed, and offered to pay the amount of the note upon receiving such good and sufficient deed, but the same was not then executed; that plaintiff continued to refuse to execuse such deed: and the defendant submitted that plaintiff had made default in performance of the agreement in an essential part thereof; that the deed tendered by plaintiff to defendant was defective in respect of the title thereby conveyed, and also in this that it did not cover all the land agreed

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to be conveyed; that the said agreement is in itself not fair in its terms, and that therefore plaintiff is not entitled to a specific performance thereof.

No answer was put in to the amended bill, and the plaintiff having replied to the answer, and put the cause at issue, evidence was taken, and the cause now coming on to be heard.

Mr. *Mowat* and Mr. *Strong* appeared for the plaintiff, and cited, amongst other cases (*O'Keefe v. Taylor* (*a*), *Winch v. Winchester* (*b*), *Jones v. Bishop* (*c*), *Daniels v. Davidson* (*d*), *Stewart v. Stewart* (*e*), *Smith v. Capron* (*f*), *Molloy v. Sterne* (*g*), *Freme v. Wright* (*h*), *Dyer v. Hargrave* (*i*), *Ogilvie v. Foljambe* (*j*), *Campbell v. Fleming* (*k*), *Gunnis v. Erhart* (*l*), *Bradshaw v. Bennet* (*m*).

Argument

Dr. *Connor*, Q. C., and Mr. *McDonald*, for the defendant, cited, amongst other cases, *Hall v. Warren* (*n*), *Wedgwood v. Adams* (*o*), *Gee v. Pearce* (*p*), *Watson v. Reid* (*q*), *Kinberly v. Jennings* (*r*), The Duke of *Bedford v. The British Museum* (*s*), *Frame v. Dawson* (*t*), *Stapleton v. Scott* (*u*), *Halsey v. Grant* (*v*), *Price v. Griffith* (*w*), *Salmon v. Cutts* (*x*), *Emmet v. Dewhirst* (*y*), *Foster v. Hoggart* (*z*), *Hook v. McQueen* (*aa*): 1 *Saunder's* Reports, 320 *a* and notes, and 320 *b*; *Story's* Equity Jurisdiction, Sec. 760; *Sugden's* Vendors and Purchasers (11th edition), 155, 160, 253, 454, 490.

The arguments of counsel are fully set forth in the opinions pronounced by their Lordships.

(*a*) Ante vol. 2, p. 95. (*b*) 1 V. & B. 375. (*c*) 6 Eng. Rep. 188.
(*d*) 16 Ves. 249. (*e*) 6 Cl. & F. 911. (*f*) 7 Hare, 185.
(*g*) 1 Dr. & Wal. 585. (*h*) 3 Mad. 264. (*i*) 10 Ves. 505.
(*j*) 3 Mer. 53. (*k*) 1 Ad. & E. 40. (*l*) 1 H. Bl. 288.
(*m*) 5 Car. & P. 48. (*n*) 9 Ves. 605. (*o*) 6 Beav. 600.
(*p*) 2 DeG. & S. 346. (*q*) 1 Rus. & My. 236. (*r*) 6 Sim. 340.
(*s*) 2 M. & K. 552. (*t*) 14 Ves. 386. (*u*) 13 Ves. 425.
(*v*) 13 Ves. 73. (*w*) 15 Jurist, 1093. (*x*) Ib. 615.
(*y*) Ib. 1115. (*z*) 14 Jurist, 757. (*aa*) Ante vol. 2 page 490.

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THE CHANCELLOR.—This bill is for the specific performance of a contract for the sale of about an acre of land, being a portion of lot forty-six, south on Talbot road, in the township of Yarmouth.

Sept. 7.

It is material to consider the position of this property, and something of its history previous to the contract in question. Both the plaintiff and defendant are mill owners in the neighborhood of these premises. Their properties adjoin each other; that of the plaintiff lies altogether within forty-six; that of the defendant comprises portions of forty-six and forty-seven. The side-line between these lots runs nearly due north. The planked road from London to Port Stanley, constructed in 1843, crosses both lots, in a course nearly south 45° east, and intersects the side line a little to the south of the premises in question, at an angle about 45°, thus separating a small trangular portion of forty-six, which lies to the north of the road. Of this triangle a small portion, at the vertex, also triangular, having a base of one chain forty-four links, belongs to the defendant. The property which is the subject of the contract is bounded on the south by the base of this small triangle, and lies between the planked road and the side line. All that part of the defendant's property which lies to the north of the road, with the exception of the small portion just described, is comprised within the limits of forty-seven. To the south of the road it consists of portions of both lots, and extends several chains northward of the base of the smaller triangle, along the premises in question, from which the London and Port Stanley road alone separates it.

Judgment.

Both mills lie to to the south of the Port Stanley road, and are situate a few chains from each other, within the limits of forty-six. The plaintiff's mill is turned by water drawn from Kettle Creek: the defendant's partly by steam, partly by a rivulet, which, crossing

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the plank road, falls into Kettle Creek. The defendant's mill-dam lies immediately to the south of the road, close to the bridge which crosses this rivulet. The mill-pond lies to the north. It is situated for the most part on lot forty-seven; but the embankment for the plank road, which is here of considerable elevation, constitutes the western bank of the pond, and the water not only covers the small triangular portion belonging to the defendant, but floods the plaintiff's land, the subject of the contract, to the extent of about one acre. The water is conducted from the pond to the defendant's mills by means of three flumes, two of which lead to a flour mill, one to a cloth factory. That which leads to the factory is placed about two feet lower than those which lead to the mill.

When the plank road was being constructed a culvert was formed underneath it in this locality, which, to the northward, opens upon that portion of the plaintiff's land comprised in the contract; to the southward, upon the property of the defendant.

Judgment.

The property of the defendant, of which I have been speaking, had formerly belonged to one *Gould*, who in the year 1845, or about that time, erected the dam at present used by the defendant, which had the effect of overflowing the plaintiff's property, in the way, though not to the same extent as afterwards; and as the water would have escaped from the pond through the culvert I have described, he caused that aperture to be altogether filled up.

The defendant purchased *Gould's* property in the spring of the year 1847, when he leased the woollen factory to the plaintiff at the rent of 100*l.* per annum. He, shortly afterwards, without any objection on the part of the plaintiff, raised the dam erected by *Gould* to its present height, having it in contemplation to

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construct a planing mill, and, as the control of the water was necessary for that purpose, the plaintiff, in the autumn of the same year agreed to surrender his lease, upon being relieved from rent, and upon the undertaking of the defendant not to make any use of the factory until the period at which the lease would have expired.

The dam, at that time, had been raised to its full height, and has not been since altered.

Some time during the year 1848 the water of the pond carried away part of the embankment of the plank road, and overturned the plaintiff's mill. For that injury the plaintiff brought an action and recovered damages. The defendant, however, repaired the breach in the embankment and the position of things remained unaltered until the month of August, 1849, when the water burst through the culvert. Upon this occasion the earth having been but partially carried away, the defendant hastened to replace it. After his men had been so employed two or three days, the plaintiff attempted to prevent them from proceeding further with the work, but the attempt proved unsuccessful; and Mr. *Hodge*, apprehending, as he says, a breach of the peace, induced the parties to enter into the contract which is the subject of the present suit.

Judgment.

That instrument bears date and was executed on the thirtieth of August, 1849. By it the plaintiff agreed, in consideration of 200*l.* currency, to be paid as thereinafter mentioned, to sell *and convey* unto the 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 defendant, his heirs and assigns, by a good and sufficient deed of conveyance, without*

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covenants." And, in consideration of the above, the defendant agrees to pay unto the plaintiff, as the purchase money of the above small piece of land, 200*l.*, in manner following—that is to say, 100*l.*, part thereof, within six months from the date of thereof, and the residue, being 100*l.*, within nine months from the date.

The value of this property is variously stated at from one pound to seven pounds ten shillings. Mr. *Hodge*, a very intelligent witness, called by the plaintiff, states the latter sum to be the intrinsic value per acre. The other witnesses vary; but that is the highest estimate.

It is admitted that the legal estate never was conveyed to the plaintiff; he entered under a bond for a deed from *Gates*, *Jones*, and *Bancroft*, to himself and his brother *Anson Paul;* but no conveyance was ever executed; and it is not shewn that *Anson Paul* ever released or assigned his interest under the bond to his brother.

Judgment.

Blackwood's mills and factory were totally destroyed by fire on the 21st of October, 1851.

The facts, so far as they have been stated, are not, I think, in dispute; and before I proceed to consider the subsequent transactions, I wish to advert here to one point made upon the argument. It was contended on behalf of the plaintiff, that the defendant had waived his right to investigate the title, and had agreed to accept whatever title the plaintiff himself could give. The plaintiff agrees "*to convey* the land to the defendant by *a good and sufficient deed of conveyance*, without covenants." Under that contract the plaintiff, in my opinion, was bound to prepare and execute the deed (*a*). Every vendee has

(*a*) Curragh v. Rapelje, ante vol. 2, p. 543; Candler v. Fuller, Willes, 65.

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a right to a good title, irrespective of contract, of which he will not be deprived except upon clear proof of his own agreement (*a*). Here the plaintiff stipulates, indeed, that he will not enter into any covenant; but that would obviously render the investigation of the title more imperative. But, in my view of the case, it is unnecessary to determine whether the plaintiff did in fact agree to accept such title as could be made under the bond, without insisting upon a conveyance from the parties having the legal estate; because, whatever ground there may be for that argument, there is no room, I think, to contend that he waived his right to a conveyance from the parties having the eqitable title—agreed to accept a conveyance from a party entitled only to a moiety. The evidence, so far from establishing any such waiver, shews distinctly, I think, that from the first he insisted upon *Anson Paul* joining in the conveyance. Mr. *Warren* says, "*Blackwood* asked *Paul*, in my presence, what title he had to the land, I think he said he had a bond from *Gates & Co.*, he said that either he would give a quit-claim deed or a deed without covenants, I am not sure which, *but that of Mr. Anson Paul, his brother, was required to join in the deed he was sure he would have no objection. I do not think that Blackwood would have required Anson Paul to join, if he had not been informed by Eltham Paul that the bond from Gates & Co. was to both.*" And again, "from the conversation which took place at the time of making the agreement, I considered that *Anson Paul's* name should be in the deed." Mr. *Hamilton* being interrogated to the same point says, "I think the written agreement marked A contains all that was agreed to, except as to *Anson Paul*, but I think it was said as to him by *Eltham Paul*, that he thought there would be no difficulty in getting him to do what was required in.

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(*a*) O'Keefe v. Taylor, ante vol. 2, p. 305.

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the matter." It is quite clear, therefore, that the bond from *Gates & Co.* was a bond to both the *Pauls*. The plaintiff admitted that, and he here proves it. The evidence does not prove any waiver of the defendant's right to a conveyance from both, but distinctly negatives it.

Then, as to the subsequent transactions, the agreement of the parties, as is distinctly shewn, was that the necessary deeds should be prepared in the office of Messrs. *Warren & Hamilton*.

On the 26th of September next after the date of the agreement the plaintiff employed Mr. *Hanvey*, a deputy provincial surveyor, to survey the land and prepare a desription to be inserted in the deed, which he did accordingly. Much turns upon the facts connected with this survey.

Judgment.

In the first place it is not asserted that the defendant had any notice of the proceeding, or that he was present when the survey was being performed.

In the next place it is quite plain that the survey was grossly erroneous. This is plain from Mr. *Hanvey's* own statement. For, being required by Mr. *Blackwood* to make some further measurements, he proceeded to the point in the month of February following, when on search he was unable to discover any traces of the monument he had placed. He then chained from other known points to the position in which he had placed the stone monument, and having chopped through the ice discovered it, as he says, four or five inches *below the water*. Allowing for the thickness of the ice, there would probably be sixteen or seventeen inches below the water-level at the time of the first frost. Now, as the agreement entitles the defendant to all the land that is *or was* covered with water, this monument could only be

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correct upon the hypothesis that the water at the period in question had been sixteen or seventeen inches higher than it had been before, a fact not contended for.

But this is placed beyond question, I think, by the testimony of other witnesses. From the evidence of *Rose*, for many years the defendant's miller, the water in the flume at the flour mill must have been, in ordinary seasons, more than four feet deep. *Comfort*, on the other hand thinks that it was but three feet. On the whole I incline to think *Rose* right, and that *Comfort* must have been speaking of the depth in the factory flume. But as there is that discrepancy, take it at the lowest, three feet. Now *Comfort* gives this account of the examination made by Mr. *Hanvey* in February: "I look upon the map, marked exhibit B. I have seen the stone marked thereon; it was shewn to me by *Hanvey* in the winter before last; *I think it was then more than a foot under water; I measured it with a foot rule; it was not quite long enough to reach it; I had to put my hand in the water;* Mr. *Haney* and Mr. *Rodgers* stood by while I measured it. *At that time the depth of the water in the flume was very low, I should think about a foot. With a full head of water on the mill that stone would be more than three feet under water.* * * * *The top of the stone and the bottom of the mill flume were then about on a line.*" Again on his cross-examination he says: "At the time I measured the depth of the stone I did not measure the depth of the water in the flume, but did so at the bulkhead, and found it a little over a foot. The bulkhead and the bottom of the flume are on the same level, the flume resting on the sleepers of the bulkhead. . *If the water was always so low as the stone was when I measured the depth of it, there would not be an inch of water in the flume.*"

Judgment.

Mr. *Rodgers* was present on the same occasion.

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He describes the steps taken to find the stone and the subsequent measurement. He says: "the only measurement of the depth of the stone I made by putting my arm down to it, and from that I suspect it was from a foot and upwards under water. And again, "I did not measure the water in the flume at this time, but I observed there was very little, not enough to work the mill as it should be worked. The water at the waste-gate on the floor was more than a foot deep inside next the pond; there was none running on it. *The stone might be a few inches higher than the floor of the waste-gate on the inside, according to the level of the water and of the ice at the time, and judging from Hanvey's mark.*"

Judgment.

Now, considering that the monument remained at the time this evidence was given, and that the fact was therefore capable of being tested by actual measurement; and considering that the plaintiff has not attempted to contradict this testimony, it must be taken as an established fact that *Hanvey's* monument, instead of being at least three feet higher than the floor of the flume, stood on the same level.

The survey, then, was clearly erroneous; and the proper conclusion from all the evidence, in my opinion, is, that the plaintiff was aware of that fact. He was well acquainted with the locality. There had been previous litigation and previous surveys. Mr. *Hanvey* is employed without the knowledge of the defendant. The plaintiff's son was his assistant. Mr. *Haney*, instead of communicating to the defendant, consulted Mr. *Hodge*, a friend of the plaintiff; and with respect to this monument, upon which the whole survey depends, he says: "*I went and placed at the request of Mr. Paul, a stone monument at the line where the water mark of the pond and the grass met, which line was very distinct.*" Now, during the summer of 1849, the water in the pond was very low, so

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much so that the plaintiff could not have driven his mill. *Comfort*, who rented the factory during that period, gives the following account of it: "In point of height the factory flume is the lower one; it is nearly two feet lower than the other, a little under two feet. I worked Mr. *Blackwood's* factory in 1849, previously to the culvert giving way. I hired the water for three months; during that time Mr. *Blackwood* did not use the water for the mill; I think so, and am pretty sure he did not use it during that time. *I had not enough for the factory*, and it could not have gone into the mill flume. *During the the summer of* 1849, *the water was at a very low level; I drew it down as low as I could get it, until there was only a little running through the flume of the factory. The grass had grown down to the surface of the water during the summer of* 1849."

Judgment.

Can the plaintiff have been ignorant of this point? His mill is hardly ten chains from the monument, and not three from the embankment. He resides close by, with constant opportunity of observation; and yet he directs the stone to be placed at a level, which even casual observers, as *Rodgers* and *Comfort*, perceived would be wholly useless to the defendant.

But this is hardly matter of inference. *Hanvey*, the plaintiff's surveyor, must certainly have been aware of the error in February. What *Comfort* and *Rodgers* said can hardly have escaped his observation. But his attention was distinctly called to the point. *Rodgers* says: "I observed to Mr. *Hanvey* that I thought it foolish of Mr. *Blackwood* to buy the place with so little water to work the mill. I then made a mark by boring with a centre-bit in the same place as Mr. *Haney* had marked. The mark was from four to six inches I think above the floor of the water-gate, which was the reason I made the remark to *Hanvey*." If *Hanvey* was aware of the fact, the

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plaintiff can hardly have been left in ignorance. But *Comfort's* evidence leaves no room for question. He says: "Mr. *Paul* said to me once, when talking to him about the trouble with Mr. *Blackwood*, that he thought the stone was under water. Mr. *Paul* lived close by and had the means of observing the stone."

The just conclusion, from all the evidence, is, in my opinion, that the plaintiff was aware of the error in *Hanvey's* survey; and yet *his* description is the one furnished to Messrs. *Warren & Hamilton*, to be inserted in the deed, and seems to have been insisted on throughout by the plaintiff.

Messrs. *Warren & Hamilton* did not, as it would seem, prepare the conveyance until the month of November following, when at the pressing instance of the plaintiff's son, it was prepared and delivered to him. The granting parties in this deed were the plaintiff and his brother, *Anson Paul;* the description was that furnished by the plaintiff; there were no covenants. The plaintiff procured the deed so prepared to be copied, omitting *Anson Paul's* name as a grantor; and having executed this copy, he caused it to be tendered to the plaintiff, without having informed either him or Messrs. *Warren & Hamilton* of the alteration which had been made.

Judgment.

This deed the defendant refused to accept, because, as it would seem, it had not been prepared by Messrs. *Warren & Hamilton*, pursuant to agreement. But he subsequently procured a new deed to be drawn by those gentlemen, differing from the first in the description only, which on the 19th of February was tendered to the plaintiff for execution, together with two promissory notes, signed by the defendant, in accordance with the agreement. *Hamilton* gives this account of what passed on that occasion: "I look upon the deed and notes, marked exhibits 1, 2,

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and 3. I tendered the deed marked 1 to the plaintiff, and also the notes marked 2 and 3. I requested him to execute the deed, and told him the notes were ready. He said he could not execute it. I opened the deed but did not read it." And, on cross-examination, he says: "When *Paul* said he could not sign the deed, his words I think were '*I can't do it; I have done all I could.*' I think he also said 'I have already signed a deed for *Blackwood.*'"

The description inserted in this last deed was furnished to Messrs. *Warren & Hamilton* by the defendant. It is in these words: "All that certain small piece of land next to the embankment for plank road which is or was flowed or overflowed by the water of the mill-pond of the said *James Blackwood*, as specified in the agreement made and entered into between the said *Eltham Paul* and *James Blackwood* on tue 30th of August last, (thus far the deed follows the agreement) which shall be held, and which was by the said agreement understood to be held, as being composed of whatever quantity of land the water of the said mill-pond may cover when the level of the water in the said mill-pond shall be four feet deep at the gate of the bulkhead which is at the south-east corner of the said mill-pond, which level of water may be better known and described by its being stated to be twenty-nine feet in height from the wheel pit in the flour mill."

Judgment.

I am not prepared to say that there is anything substantially incorrect in that description. On the contrary, upon the evidence before us, it must be taken, I think, to be correct. *Rose* swears that he measured from the bottom of the bent which forms the flume frame, to the top of the plank of the flume and found it to be four feet seven inches. He swears that in ordinary seasons the water is four feet deep at the flume, and that the height from the floor of the

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wheel-house to the top of the water, at that level, is twenty-nine feet nine inches. Now, at the time this evidence was given the flume was still there; the floor of the wheel-house remained in the same position. The plaintiff therefore had it in his power to demonstrate the incorrectness of *Rose's* testimony by accurate measurement. When, having it in his power to place the matter beyond doubt, he has not thought proper to adduce any testimony, there is, in my opinion, the strongest possible confirmation of the accuracy of *Rose's* testimony.

The accuracy of this description is of less direct importance, however, if the plaintiff was bound to prepare the deed; and I have before said that such, in my opinion, is the effect of the agreement. Indirectly, however, it is an important fact. It furnished the plaintiff with accurate information of what the defendant required. He knew, or had the means of knowing, and therefore must be taken to have known, what, in the opinion of the defendant would be a proper description of the land, and that, in his estimation, *Anson Paul* was a necessary party to the conveyance. It is evident also, from *Warren's* testimony, that he had been previously informed upon both points; but the deed leaves no room for question.

Judgment.

The intervtew of the 19th of February appears to have been the last communication between the parties. On the 1st of March following the defendant tendered the amount of his first note, and demanded his deed from Messrs. *Warren & Hamilton*, and that not having been executed he appears to have withdrawn the notes. The next step taken by the plaintiff of which we hear, was the filing the bill in this suit on the last day of the month of February, 1851, eighteen month after the date of the contract, and more than twelve months after the last communication had in relation to it.

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Now, in determining the propriety of giving relief in the present case, we must consider the foundation of the jurisdiction which this court exercises in decreeing the specific performance of contracts, and the object of that jurisdiction. The right to specific performance, like the right to damages, grows out of contract. But the foundation of the equitable jurisdiction is the inadequacy of the ordinary remedy. Equity considers the conscience of each party bound to the literal performance of his engagement; and the jurisdiction of equity is exercised in enforcing that duty, for the purpose of doing complete justice between the parties, where the remedy afforded by the ordinary tribunals is inadequate.

From this fundamental principle upon which the jurisdiction rests, several important consequences are plainly deducible. First—Where the contract is hard or unconscionable, the jurisdiction is sparingly exercised; because the equitable remedy, from its nature, is incapable of modification according to the circumstances of the case. In decreeing specific performance equity secures to the plaintiff the utmost benefit derivable from the agreement. Whereas in the ordinary mode of procedure juries have power to apportion the damages according to the justice of the case. In cases of that kind, therefore, as more complete justice may be done by the ordinary tribunals, the foundation of the jurisdiction fails. Again, no contracts can be the proper objects of this jurisdiction except such as are perfectly fair and honest in all their parts. There must not have been the slightest misrepresentation in the inception, nor the least want of good faith in the subsequent progress. Lastly—He who asserts a right to enforce a specific performance against another, as being that to which he is in conscience bound, most obviously be free from all impropriety of conduct on his own part. A plaintiff who has disabled himself from performing his agreement; who

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has himself contravened it; who has refused the same strict peformance to which he contends the conscience of the other party is bound; who has trifled with his engagement, instead of shewing himself prompt, ready and willing to peform his own part; such a plaintiff cannot, in reason, have any right to a decree for specific performance.

These consequences are not only deducible in reason, but have been stated by writers of deserved reputation, and by judges of the greatest eminence, as the settled practice of the court.

Sir *Edward Sugden*, in his work on Vendors and Purchasers (*a*), says: "And where these circumstances do not appear (where there has been no fraud), but the estate is a grossly inadequate consideration for the purchase money, equity will not relieve either party. And, after citing *Day v. Newman* (*b*), before Lord *Alvanley*, where many of the previous cases are collected, he proceeds thus: "Indeed, few contracts can be enforced in equity where the price is unreasonable, because contracts are not often strictly observed by either party; *and if an unreasonable contract be not performed by the vendor, according to the letter in every respect, equity will not compel a performance in specie.*" The language of the older cases is very strong. In *Underwood v. Hitchcox* (*c*), Lord *Hardwicke* says: "And, undoubtedly, every agreement of which there should be a specific performance, ought to be in writing, certain and fair in all its parts, and for adequate consideration." In *Barnardiston v. Lingood* (*d*), the same learned judge observes: "In the case of a hard bargain, where it is not absolutely executed but executory only, the constant rule of the court is not to carry it into execution."

Judgment.

In *Baxter v. Lister* (*e*), Lord *Hardwicke* says:

(*a*) 1 Sug. 310, 11 Ed. (*b*) 2 Cox. 77. (*c*) 1 Ves. 279.
(*d*) 2 Atk. 134. (*e*) 3 Atk. 385.

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"Nothing is more established in this court, than that every agreement of this kind ought to be certain, fair and just in all its parts. If any of these ingredients are wanting in the case, the court will not decree a specific performance." And in *Cadman v. Horner* (*a*), Sir *William Grant*, having stated that the charge of misrepresentation had been to a great extent disproved, proceeds: "Yet as upon the evidence the plaintiff has been guilty of a decree of misrepresentation operating to a certain, though a small, extent, that misrepresentation disqualifies him from calling for the aid of a court of equity, where he must come, as it is said, with clean hands. *He must, to entitle him to relief, be liable to no imputation.*"

In *Harnet v. Yielding*, upon which Lord *Redesdale* says he had bestowed a good deal of consideration, particularly with reference to the jurisdiction exercised by courts of equity in decreeing specific performance of agreements, it is said: "These cases shew what were the ground on which courts of equity first interfered; *but they have constantly held that the party who comes into equity for a specific performance must come with perfect propriety of conduct, otherwise they will leave him to his remedy at law.*" Judgment.

In *Knatchbull v. Grueber* (*c*), Lord *Eldon* says: "Now if the case rested here, the question would be simply this, whether the vendors can insist that the purchaser shall specifically execute the contract, when, if he were specifically to execute the contract, it is rendered impossible for him to have the full benefit intended him by the contract, and that through the act of the vendors themselves." The plaintiff himself contravened the contract, and upon that ground the bill was dismissed.

(*a*) 18 Ves. 11. (*b*) 2 S. & L. 553. (*c*) 3 Mer. 143.

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The author of the Treatise on Equity (*a*) says: "Where a man has trifled or shown backwardness in performing his part of the contract, equity will not decree a specific performance in his favor, especially if circumstances are altered. So if a man buys land, or certain shares of a ship, and secures the money (viz, by giving bond) if the seller will not make an assurance when reasonably demanded, he shall lose the bargain, for the party ought not to be perpetually bound without having a performance." *LeGate v. Hockwood* (*b*), there cited, is a very strong authority for that position. The plaintiff had purchased five-sixteenth parts of a ship and given his bond to secure the purchase money. He had taken possession of the vessel and sent her a long voyage; but, as the plaintiff refused to execute a bill of sale, he filed a bill to have the contract rescinded and his bond delivered up. Before bill filed the defendant had tendered a bill of sale, duly executed, which the plaintiff refused to accept. Lord *Nottingham* says: "When you had security you ought, on demand, to have made assurance; *if a man buy lands and secure the money, if he who sells will not make assurance, when reasonably demanded, he shall lose the bargain; therefore decree the bond to be delivered up and the five parts re-assigned to the defendant.*" In *Hayes v. Caryll* (*c*), the Lord *Keeper* says: "Where one person hath trifled, or shown a backwardness in performing his part of the agreement, equity will not decree a specific performance in his favor." In *Milward v.* Earl of *Thanet* (*d*), Lord *Alvanley* says, "It is now perfectly known that a party cannot call upon a court of equity for a specific performance, unless he has shown himself ready, desirous, prompt and eager." Lastly, in *Walker v. Jeffrey* (*e*), Sir *James Wigram* says: "The general rule in equity I take to be, that a party who asks the court to enforce an

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(*a*) 1 Fon. 392. (*b*) 2 Cha. Ca. 5. (*c*) 5 Vin. Ab. 538.
(*d*) 5 Ves. 720. (*e*) 1 Hare. 352.

agreement in his favor must aver and prove that he has performed, or been ready and willing to perform, the agreement on his part."

Now, to apply those principles to the present case: There is a good deal of force, I think, in the argument that it comes within the rule stated by Sir *Edward Sugden*, to which I have before referred. The utmost value of the land, according, to the plaintiff's witness, was 7*l.* 10*s.*, yet, being necessary to the defendant, the plaintiff insisted upon 200*l.*—thirty times its value. If 200*l.* be not a gross disproportion, I know of no principle upon which 2000*l.* would. Without determining how far, under modern decisions (*a*), the court would be justified in refusing specific performance upon inadequacy alone, yet where, as in the present case, there are other grounds, great disproportion between the price and the value of the estate must be a very material ingredient, if, to borrow the language of Lord *Redesdale*, "the court be bound to see that in decreeing a specific performance it really does that complete justice which it aims at, and which is the ground of its jurisdiction" (*b*).

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This plaintiff does not come with perfect propriety of conduct; on the contrary, he was guilty, in my opinion, of a manifest breach of good faith: first, with relation to the survey; secondly, in relation to the description inserted in the deed; and, lastly, in the alteration of the deed. He attempted to force upon the defendant terms quite contrary to his agreement; and, upon this evidence he must be taken, I think, to have done so knowingly.

The plaintiff is not shown to have been always ready, desirous, prompt and eager to perform his part of the contract; but, on the contrary, he positively,

(*a*) White v. Damon, 7 Ves. 35; Coles v. Trecothick, 9 Ves. 246; Borrell v. Dann, 2 Hare, 450.

(*b*) Harnett v. Yielding, 1 S. & L. 555.

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and as I think most unreasonably, refused to do so; although he now asks this court to compel the defendant to perform his part of the agreement *in specie*; and that after great and unexplained delay, when, from the altered state of circumstances, the property has become altogether useless to him (*a*).

It was argued, however, that the defendant having, continued in possession of the property in question, had precluded himself from taking advantage of any of these grounds of defence.

Had the fact been so, it would have been, perhaps, unimportant, having reference to the course of conduct pursued by the plaintiff, and to his refusal to execute a conveyance.

But under the peculiar circumstances of this case I am of opinion that there is no foundation for this argument. The defendant's dam was built, and the culvert closed, so far back as the year 1845. The plaintiff either assented to those acts originally, or subsequently acquiesced in them. His lease of the factory from the defendant, after the dam had been raised to its present height, and his subsequent contract for the surrender of that lease, furnish strong evidence of that. The defendant, therefore, when he replaced to earth in August, 1849, only restored things to the position in which they had been placed many years before by a former proprietor. The defendant might have repudiated the contract, in my opinion, upon any sufficient ground, without having re-opened the culvert, and without having discharged the water from his mill-pond; and the neglect of that step does not now debar him from availing himself of the plaintiff's improper conduct, and of his refusal to execute a conveyance, as a defence to this suit for specific performance.

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(*a*) Hook v. McQueen, ante vol. 2, p. 490; Gee v. Pearce, 2 DeG. & Smale, 325; Parkin v. Thorold, 2 Sim. N.S. 1; Legate v. Hockwood, 2 Cha. Ca. 5.

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Here the plaintiff was distinctly informed of the defendant's objection both to the title and the quantity of land proposed to be conveyed. But, instead of notifying the defendant of his intention to proceed, he declares distinctly that he "can do no more." He allows more than twelve months to elapse without making any attempts to obviate the defendant's objection. That course of conduct amounted, in my opinion, to an acquiescence in these objections, and, therefote disentitle the plaintiff to specific performance (*a*).

Having the misfortune to differ from my learned brothers in this case, I have thought it proper to advert particularly to the authorities, and to state clearly the principles upon which my judgment proceeds; and, in accordance with these authorities, and upon upon these principles, I am of opinion that the plaintiff's bill should be dismissed.

Judgment.

ESTEN, V. C.—This was a bill for the specific performance of an agreement for the purchase of a piece of land overflowed with water as a mill-pond. The plaintiff and his brother *Anson Paul*, would appear to have purchased it more than twenty years ago from a mercantile firm in Montreal, who had given them a bond for it, but no conveyance had been made of the legal estate. The plaintiff, however, had been in possession of it by himself and his tenants ever sinee the time of the purchase, without any claim apparently on the part of *Anson Paul*, but whether he had relinquished his interest, if he had any, to his brother, does not appear. The ground in question adjoined land formerly belonging to one *Gould*, and purchased from him by the defendant in the spring of the year 1847, at which time it had a cloth factory on it. A piece of ground contiguous or

(*a*) 1 Sug. Ven. & Pur. 300, 11 Ed.; Guest v. Humfrey, 5 Ves. 818; Walker v. Jeffries, 1 Hare, 348.

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near to that in question had been used by *Gould* as a mill-pond; water being diverted into it from Kettle Creek. In 1845 or 1846 a plank road was constructed along one side of the piece of ground in question, and an embankment raised for that purpose, and this affording *Gould* an opportunity of enlarging his mill-pond, he had lowered his dam and let the water from his pond into the piece of ground belonging to the plaintiff and in question in this cause, and thereby added to his mill-pond. This was done during a temporary absence of the plaintiff from home. The property was in this state when the defendant purchased from *Gould*, as already mentioned. Shortly afterwards the defendant appears from the evidence to have let his factory to the plaintiff from May, 1847, to May, 1848, at a rent of 100*l*. This factory was worked by the water from the mill-pond above described. The defendant built a new dam, apparently on his own land, in 1847, for the purpose of raising the water, and applied to the plaintiff, then in possession of the factory, to stop the work there for a day or two, in order to enable him to raise the water, which the plaintiff did. About the same time an agreement was made between the plaintiff and defendant that the plaintiff should surrender his lease of the factory as from the first of January, 1848, from which time he was to be relieved from the rent; that he should from that time remove all the cloth he had there, and that the defendant should not work the factory until the 1st of May, when the lease, had it continued, would have expired. This agreement appears to have been carried into effect. The defendant built a flouring mill in the course of 1848, and put it in operation about the 1st of December in that year. It also was worked by means of the water from the mill-pond already mentioned, and continued in operation until October, 1851, when it was destroyed by fire. In 1848 the water in the mill-pond burst through the embankment

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already mentioned, flooded the land of the plaintiff, strewed the wreeks of the embankment which it carried away over it, and destroyed the plaintiff's mill. For this injury the plaintiff brought an action and recovered damages, which, he alleged, were a very insufficient compensation for the injury he had sustained. Differences arose between the plaintiff and defendant concerning the defendant's use of the piece of land in question in this cause by covering it with water as part of his mill-pond, in the manner I have described. These differences had continued some time on the 30th August, 1849, but when they commenced does not appear. A day or two before the 30th of August, 1849, a culvert, which had been constructed in the embankment for the purpose of letting the water off, but had been always kept closed by *Gould* and the defendant in order to confine the water within their pond, gave way, or rather the barriers which had been placed in it for the purpose of confining the water yielded to the pressure of the water, and the greater part of the water escaped, so that the pond became almost dry. The defendant immediately began to restore the barriers which had been displaced. It would seem that until this time he had continued to use the piece of ground in question in this cause as part of his mill-pond. The plaintiff, it is obvious, could not have removed the water from it without making a breach in some part of the barrier which enclosed the mill-pond, a proceeding which would probably have led to a breach of the peace. He did not take this course, nor did he bring an action. When, however, the water broke away in the manner I have described through the culvert, he seemed to think it a favourable opportunity of resuming possession or use of his land, included in the defendant's mill-pond, and taking advantage of the temporary absence of the defendant's workmen, he employed several men to remove the earth, which the defendant's men had

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began to accumulate at or about the culvert for the purpose of confining the water. While the plaintiff's men were thus employed the defendant's men returned and something like a contention took place between the two parties. A third person, known to both parties, however, interfered and proposed an amicable settlement of the dispute, and thereupon the agreement was made which forms the ground work of this suit.

As soon as this agreement was signed, the plaintiff withdrew his opposition to the defendant's proceeding; the culvert was restored to its previous condition; the water again raised, and the defendant removed the earth and rubbish from the plaintiff's tail-race. The plaintiff shewed sufficient promptitude in carrying the agreement into execution on his part. He had the ground surveyed for the purpose of ascertaining the quantity and description of the land to be conveyed, applied repeatedly to Messrs. *Warren & Hamilton*—who by agreement of the parties were to prepare them—for the deed and mortgage to be executed in pursuance of the agreement, having previously communicated to them the result of the survey, so as to enable them to insert a description of the property in those instruments, and having at length procured the deed and mortgage; the plaintiff and his wife executed the deed, and the mortgage was submitted to Mr. *Wilson* for his approval, who objected to it in some respects and returned it to Messrs. *Warren & Hamilton* with his remarks upon it.

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At this point it is convenient to notice some circumstances which have been very material in the consideration of this case, and might have been very material in the decision of it. The natural and proper course to have been pursued in carrying this agreement into execution would have been for both parties to have examined the ground together, and

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to have determined and settled in consultation with each other the quantity to be conveyed. It has been mentioned that the pond was nearly dry when the agreement was made. The agreement provided that the plaintiff should convey to the defendant the ground "which is or was overflowed," the words "or was" having been interlined at the instance of the defendant. The expression is equivocal, it being uncertain to what period the words "or was" referred; but no doubt can be entertained that the intention was upon that occasion, when all disputes were to be settled and the defendant was paying a good price for the purpose of securing the unmolested enjoyment of his property, that the defendant should have all the ground that had at any time previous been overflowed. *Hanvey's* and *E. R. Paul's* evidence likewise places this point beyond dispute, for they say that they placed the monument which they erected slightly above the high water mark, and that there was nothing to shew that the water had ever been higher, and they did not know that it ever had been higher. While the pond was still nearly empty, *Hanvey*, a surveyor, at the request of the plaintiff and with the assistance of his son, surveyed the ground in question, and assuming the line where the grass terminated on the sides of the bed of the pond to be the high water mark, planted a stone a few inches above it, so as to include the lower edge of the grass, and commencing from this point conducted his survey, so as to include the ground beneath this line. The fact appears to have been that the water in the pond was always lower in the summer time, and was unusually low in the summer of 1849, and that as the water subsided the grass on the sides of the bed of the pond crept after it, and kept constantly close to the water's edge. The survey which I have mentioned was made on the 26th of September, 1849, at which time the water had sunk to its lowest point, and the grass had probably grown somewhat below

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the ordinary line, owing to the pond having been for some weeks nearly empty. *Hanvey*, nevertheless, chose the grass line as the higher water mark and planted his monument accordingly. Young *Paul* assisted him upon this occasion, and it is not clear that the plaintiff himself was not present. It must I think, have been perfectly obvious to either of them that this mark was erroneous and the stone improperly placed. I cannot doubt that the plaintiff, whether he was present or not at this survey, knew where the stone was placed, and why it was placed there, and that it was much too low. Nevertheless he communicates to Messrs. *Warren & Hamilton* a description of the land to be conveyed, based upon this survey, and I am driven to the conclusion that he knew when he made this communication and tendered the deed to the defendant that he was offering to the defendant less land than he was entitled to claim under the agreement. This fact, in my judgment, would, if the matter had stopped here, have been sufficient to preclude the plaintiff from relief.

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A court of equity will never countenance anything like *mala fides*, and will invariably refuse its aid to him who, to use the ordinary and almost technical phrase, does not enter it with clean hands. He who seeks to take advantage of some ambiguity of expression, and thereby to impose upon the opposite party less than the agreement entitles him to, will in vain invoke the assistance of this court. This state of the case however did not continue.

It is quite clear that when the defendant declined to accept the deed tendered to him by the plaintiff, he was led in his turn to direct his attention to the having a deed prepared for the purpose of being tendered to the plaintiff, and with that view to make an investigation in order to ascertain the height of

the water in the pond. More than one measurement appears to have been made at the mill for this purpose. The defendant employed the same surveyor who had performed the survey of the pond for the plaintiff and planted the monument which has been mentioned, to take a level between the top of this monument and the floor of his waste-gate, which was on a level with the bottom of his flume, and he also employed two other persons, who have been examined as witnesses in the cause and given important testimony, to accompany and assist him in this work. The deed prepared by the plaintiff had a memorandum annexed to it, shewing where the stone was placed, and the defendant must, I think, be deemed to have been well aware at the time that he had the deed prepared for the purpose of being tendered, and which he afterwards caused to be tendered, to the plaintiff for execution, that the plaintiff had attempted to foist upon him a smaller quantity of land than he was entitled to claim under the agreement. Does he avail himself of this power? Does he give notice to the plaintiff that he considered the agreement at an end, and that he was at liberty to withdraw or exclude the water from the land comprised in it, or that he was ready to make an arrangement with him for using the water as it was, or for withdrawing the water from his land and confining it within his own bounds; or does he even (which however, in my judgment, this court would not permit) give notice to the plaintiff that he should thenceforth revert to his former position and hold the ground in question as a wrong-doer; which proceeding would at least have had this merit, that it would have put the plaintiff upon his guard, and made him aware that he was set at defiance, and that he must enforce his rights if he did not wish to submit to their infraction. The defendant does none of these things. His very next step is an acting under the agreement. It is to tender the deed, which he had caused to be

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prepared, to the plaintiff for execution. This the plaintiff declines, stating that he had already executed the necessary deed. Does the defendant then put an end to the agreement? Far from it. He shortly afterwards makes a tender of the first instalment of the purchase money, and he continued from the date of the agreement until the time of filing the bill, and indeed long afterwards, and until his mill was destroyed by fire, to enjoy the use of this piece of ground in precisely the same manner that he had ever done, and without any notice whatever of any intention to hold it in any different manner or character. Under these circumstances we must, I think, necessarily infer that he kept the agreement alive for his own advantage and in order to have the benefit of it, and therefore waived his right to put an end to it, and reinstated the plaintiff in the rights which he previously possessed and in a position to claim the performance of the agreement. It is true that nearly a year elapsed after this occurred before the suit was commenced, but if the defendant has been enjoying all this time under the agreement, he cannot object any laches to the plaintiff.

Judgment

As a difference of opinion exists in the court upon the subject, it is necessary to examine the position which the defendant has occupied from time to time with some minuteness.

At the time that the agreement was made upon which this suit was based, the defendant was a trespasser on the soil of the plaintiff and a wrongdoer. We cannot fail to regard him in this light, because it is that in which he has represents himself. He says in his answer that previously to the 30th of August, 1847, the date of the agreement, the land in question was overflowed with water: that he was desirous to protect himself from claims or actions for damages in consequence of such overflowing,

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and for that purpose, on the 30th of August, entered into the agreement in the bill mentioned for the purchase of such land: that such land, so agreed to be purchased by the defendant, is in itself, or to the plaintiff, or to any one else than the defendant, worth not more than 3*l.* or thereabouts at the utmost, but in order to purchase immunity from actions on account of such overflowing, the defendant agreed to pay the plaintiff 200*l.* for a good and sufficient conveyance of such land to the defendant: that the price agreed to be paid by the defendant for the land was in reality agreed to be paid in consideration not of the intrinsic value of the land itself, but of the indemnity the title to the land would afford the defendant against future claims or actions for damages on account of such overflowing. These passages in the answer are material in reference to certain facts, not stated in the answer, but mentioned incidentally in the evidence, from which it might be inferred that the plaintiff had consented to the defendant's use and possession of the piece of land in question in this cause, or had stood by and permitted the defendant to lay out a considerable sum in erecting a mill and making other improvements in the expectation of using the land in question in the way in which it had previously been used, so as to give the defendant a title in equity to the land itself or to the enjoyment of it in the manner referred to. In either case he would have had an effectual safeguard against any action or actions that might be brought against him for such use or enjoyment of the land in question. No case of this sort is presented by the answer, and therefore the plaintiff was quite unprepared to meet it. The facts therefore to which I have alluded stand quite unexplained and unqualified, and they may or may not have been sufficient to create or sustain such a title as I have mentioned, and the defendant, who must be deemed to have been perfectly aware of the real circumstances of the

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case, and to have understood his true position, not having raised or insisted on, or even hinted at, such a case in his answer, not only waived and debarred himself from insisting upon any such right, if he had it, but afforded the most satisfactory evidence that the true facts of the case did not warrant any such claim. I consider, therefore, that these facts must be laid entirely out of view, and that on the 30th of August, when the agreement was entered into, the defendant, in the use which he had made of the land in question, was a mere trespasser and wrong-doer. By that agreement the defendant became in equity the owner in fee-simple of the piece of land in question, subject to the obligation of the plaintiff to shew a good title to it, save so far as the title may have been accepted by the defendant. It was undoubtedly the intention of that agreement that the defendant should continue in the enjoyment of the property. If the defendant was in possession of the land, previously to the agreement, his possession which was before wrongful, thenceforth became rightful; if he was not in possession before the agreement, it was undoubtedly the intention that he should be in possession from that time; and in either event, it is plain that from the date of the agreement the defendant was in possession of the land in dispute under it. Now this possession continued unchanged until the commencement of this suit and afterwards. Was there ever a time when the defendant ceased to have possession under the agreement? If so it must have been by operation of law, for he did no act himself to alter the nature of his possession. He gave no notice to the plaintiff at any time that he had ceased to hold possession under the agreement, so as to make the plaintiff aware of his real situation, and to put him upon asserting his rights, if he had any. If the defendant ceased to hold the possession under the agreement, he became immediately a wrong-doer. But would the law, by its own tacit operation, con-

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vert him into a trespasser? Could he, had he been so disposed, have given notice to the plaintiff that the agreement was at an end; that he consequently had ceased to hold under it, but that he should, nevertheless, continue in possession as a wrong-doer? I think not. I think if the defendant had desired to repudiate the agreement he would have been bound to restore the possession to the plaintiff, and that any attempted repudiation of the contract, unaccompanied by a relinquishment of the possession, would have been ineffectual. But the defendant does not even make an attempt of this kind. When the plaintiff tendered his conveyance, the defendant refused to accept it. When the defendant tendered a conveyance in his turn, the plaintiff declines to execute it, and when he afterwards makes a tender of the amount of the first note, he does not pay it, because the deed which he had tendered had not been executed. But he continues in the possession and enjoyment of the property, without any change, and without any notice or intimation to the plaintiff whatever, until the filing of the bill and long afterwards. It is true he repudiates the agreement in his answer filed on the 23rd of April, 1851. No earlier date can be assigned to this repudiation, as it is impossible to fix on any previous period for that purpose. But even this was, in my judgment, ineffectual, because not accompanied by an offer to relinquish the possession, or the proposal of any arrangement whereby the plaintiff would have been substantially reinstated in the possession of his property, and therefore the defendant continued in the full enjoyment of the property comprised in the agreement under it, until his mill was destroyed by fire, and then, having no further occasion for it, I suppose he had no objection to its resumption by the plaintiff. It is sufficient however for this purpose that the defendant must be considered as enjoying the property, the subject matter of the agreement under it, until the filing

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of the bill. This being the case, he cannot object any laches on the part of the plaintiff in asserting his rights under an agreement, under which he was himself all the while enjoying.

The other objections urged by the defendant's counsel to the performance of this agreement do not appear to me to be material. With regard to the alleged unreasonableness of the price, and the supposed hardship of granting a perpetual mortgage on his property, I think that the defendant perfectly understood, and was certainly the best judge of his own interest, and I have no doubt that, at the time, the agreement was deemed to be and was a highly beneficial and reasonable one; and with regard to the subsequent change of circumstances, owing to the destruction of the defendant's mill by fire, which it may be remarked happened several months after the commencement of the suit, I do not think that this fact should vary the rights of the parties. The defendant no where informs us that he does not intend, as the plaintiff did, to rebuild his mill, and one very material remark is applicable as well to this as to some other matters referred to in the evidence, but not mentioned in the pleadings, that nothing can be more unsafe than to proceed on matters which the party has not suggested fairly and openly on the record so as to invite explanation, and with respect to which perhaps we know only half the case. A dispute had arisen between the plaintiff and defendant as to the proper parties to the conveyance; the defendant insisting that a brother of the plaintiff's should join in it, and the plaintiff contesting the right to require his concurrence. I think the dispute may have occurred without any *mala fides* on the part of the plaintiff. It was also contended by the plaintiff that the defendant had waived the right to investigate the title. This allegation is not, I think, supported by the evidence, further than that the defendant has

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waived all objection on the ground of the absence of a conveyance from the persons from whom the plaintiff immediately derived his title. In other respects I think the defendant may call for the production of a good title, and the conveyance must be executed by all necessary parties whose concurrence has not been waived, as I have mentioned. The defendant has no right to call for the concurrence in the conveyance of the immediate vendors of the plaintiff or their representatives.

I think there should be a decree for a specific performance, if a good title can be shewn except as before mentioned, but without costs, owing to what I must consider the unfair conduct of the plaintiff in offering too little land to the defendant, which indeed as a bar to relief has been waived, but not so as to entitle plaintiff to costs.

Judgment.

SPRAGGE, V. C.—This case has received the deliberate and repeated consideration of the court. My brother *Esten* and myself have the misfortune to differ from his Lordship the Chancellor: the views which we entertain, after the most careful consideration, are so fully and clearly expressed in the judgment which my learned brother has delivered that I believe I cannot profitably add much to what he has said. I agree with him as to the relief to which the plaintiff is entitled, and that it should be without costs. I think it should be without costs, because it appears from the evidence that the plaintiff must have known that the conveyance which he was willing to execute did not comprise all the land to which the defendant was entitled.

With regard to the very large price, as it is alleged, which was to be paid for the land in question, it does not appear that there was any misrepresentation, and although this piece of land may have been of itself of comparatively small value, it is not improbable

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that the defendant's property may, by its acquisition, have been proportionately increased in value, inasmuch as he thereby obtained what was necessary to its enjoyment as a mill-seat, which, without it, he did not possess. I do not understand that the circumstance of a party holding at a high price, even at an unreasonably high price, land indispensable to another—and because it is indispensable to another—forms any objection to his obtaining specific performance. It may be an extortionate act, but it is not, I conceive, a hard and unreasonable bargain in the sense in which the term has been used by courts of equity as excluding parties from relief.

Judgment.

I cannot but think too, that great weight is due to the circumstance of the defendant never repudiating the agreement, but continuing in possession of the land and enjoying the full benefit of it to the full extent claimed by him, until after the filing of this bill. Under all the circumstances, I think he is not in a position to resist specific performance.

Declare that agreement in plaintiff's bill mentioned ought to to be specifically performed and carried into execution, if a good title can be shewn to the premises firstly in the said agreement mentioned save so far as such title hath been waived, as hereinafter mentioned: Order and decree the same accordingly.

Declare that the defendant has waived all objection to the title upon the ground of the absence of a conveyance from *Horatio Gates*, *Charles Bancroft* and *Nathaniel Jones*, the persons from whom the plaintiff immediately derived his title.

Decree.

Refer it to the master to enquire whether a good title can be made by the plaintiff to the premises firstly in said agreement mentioned, except so far as the same has been waived as aforesaid.

In case the master shall find that a good title can be made, except as aforesaid; refer it to master to take an account of what is due to plaintiff on account of the purchase money of the said premises in said agreement mentioned, and to compute interest thereon up to the period of one month after making his report.

Order that defendant do pay to plaintiff, or to whom he shall appoint what the master shall find to be due to him as aforesaid, within one month after service upon defendant of decree and report at such time, &c.

Order that defendant do execute a mortgage on the mill property of defendant in the said agreement mentioned to the effect thereby provided; such mortgage to be settled by the master, in case, &c.

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Order that defendant do duly execute such mortgage within one month after service upon him or his solicitor of decree, and master's report and certificate (if any) approving and settling such mortgage.

Order that such mortgage be left at master's office where the same is to be executed, and upon defendant respectively executing such mortgage and paying to the plaintiff, or to whom, &c., what the master shall certify to be due as aforesaid, within the respective times in that behalf mentioned:

Order that plaintiff do convey, in manner in agreement mentioned, to the said defendant, or to whom, &c., the premises firstly hereinbefore referred to and in said agreement firstly mentioned; such conveyance to be settled, &c.

Decree.

Order that all proper parties, except those whose concurrence has been waived as aforesaid, do join in such conveyance as master shall direct.

But in case the said master shall find that a good title cannot be made except as aforesaid, order that plaintiff's bill do stand dismissed with costs.

SEVERN v. SEVERN.

Alimony.

April 30 and Nov. 23.

In a suit by a wife for alimony, on the ground of cruelty, her own conduct was proved to have been in some respects blameable, but several instances were established of gross cruelty towards her on the part of her husband, far beyond what the provocation could justify; the last proved instance of such cruelty occurred a few months before the husband left the country. Until this time they had lived together. During the husband's absence, the wife, by arrangement with him, occupied a cottage of his, and received a weekly allowance for the support of herself and their children. On his return, which took place some months afterwards, he refused to live with her, and did not again live with her, leaving her, however, in possession of the cottage, and continuing to pay her the same weekly sum as she received during his absence; and it was proved that after his return he had said that he would not live with her: that he was afraid they would never agree, and that he might do something which would subject him to punishment—something which might bring a rope round his neck. *Held*, under these circumstances, that the wife was entitled to a decree for alimony.

Although in England the mere fact of desertion by the husband will not entitle the wife to a decree for alimony; still, as in this country the court cannot decree restitution of conjugal rights, desertion would be sufficient to warrant a decree for alimony. (*Semble*).

Desertion, although insufficient in itself to warrant a decree in England, does, when coupled with other acts of cruelty, form a material ingredient in determining a wife's right to relief.

This cause coming on to be heard on the pleadings and evidence,

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Severn v. Severn.

Mr. *Turner* and Mr. *Patrick* appeared for the plaintiff.

Mr. *Mowat* for the defendant.

The judgment of the court was now delivered by

Nov. 23. Judgment.

THE CHANCELLOR.—This suit is instituted by *Aureta Severn* against her husband; and its object is a decree for alimony on account of his cruelty.

Mr. *Mowat*, on behalf of the defendant, objects that this court has no jurisdiction. He argues that in England, permanent alimony is never assigned, except as incidental to a decree for a divorce: that in this case there is neither a decree for a divorce, nor any power to make such a decree, and, consequently, no jurisdiction in relation to alimony.

The state of the law upon this subject, second to none in extent and importance, must be admitted to be highly unsatisfactory. This branch of the law is administered in England by the ecclesiastical courts; and had the legislature either introduced the whole system of law, as administered by those courts, in relation to this subject, or taken upon itself the duty of promulgating such other system of law as might have been thought suitable to the condition of this country, our duty would have been comparatively simple. But neither course was adopted. The act constituting the court declares "That the said Court of Chancery shall have the like power, authority, and jurisdiction, in all cases of claim for alimony, that is exercised and possessed by any ecclesiastical or other court in England." Now, according to the law of England, the unauthorised separation of husband and wife is regarded as, in some sort, illegal—a derelection of those mutual offices which the parties are not at liberty to desert (*a*). Separate maintenance, therefore, is never decreed, except as

(*a*) Sullivan v. Sullivan, 2 Add. 303.

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incidental to divorce and a consequence of it; and the jurisdiction of the ecclesiastical courts as to alimony has become so intimately connected with their jurisdiction in relation to divorce on the one hand, and to the restitution of conjugal rights on the other, and the doctrines which govern them as to all are so closely interwoven with each other, that the separate application of those respecting alimony must, obviously, be matter of great difficulty. But we must not decline the task because of its difficulty. The legislature did certainly intend to confer upon this court some jurisdiction in relation to this matter. The necessity of lodging that power somewhere was indeed apparent. The matrimonial law forms a very important branch of the law of England, which the legislature had no intention, I presume, of excluding, when they introduced the municipal law of England into this province. It became necessary, therefore, to constitute some tribunal for its administration. The policy of investing any court of justice with power to decree a divorce *a vinculo matrimonii* may be matter of serious question; but it is assuredly necessary that interests of such vital importance should be governed by some law; and, until some other system shall have been introduced, the law of England must be considered, I presume, to be in force. But, if that law be in force, its administration must, of necessity, belong to some court. So manifest is that necessity indeed, that the argument for an inherent jurisdiction in this court, without any express provision of the legislature, to prevent a failure of justice, would have been very strong. In many States of the American union the jurisdiction of equity, in relation to this branch of the law, has been defined by legislative enactments; but in some this jurisdiction has been assumed, without the sanction of the legislature, from the necessity of the case (*a*);

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(*a*) 2 Kent Com. page 96, ch. 29; Revised Statutes State N. York, vol. 2, p. 76; 4 Desaus. Cha. Rep. 35; 4 Hen. & Munf, 511.

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and in England the same consequence attended the abolition of the ecclesiastical courts during the rebellion (*a*). But the statute of this province in relation to this matter, is very obscure. It devolves upon this court, in terms at least, the duty of administering a small, and that a dependent portion of the law of England upon this subject, without making any provision for the hiatus thereby occasioned. If the statute is to be construed as excluding the other portions of the English law upon this subject, then the system under which we live must obviously prove extremely defective. But, however defective, it is plainly our duty to give effect to it, so far as we are able; and therefore, had the question been open, we could not, I think, have negatived the plaintiff's right to file the present bill. But we took occasion to say, in *Soules v. Soules* (*b*), that we did not consider the question as now open. The jurisdiction of this court, as to alimony, was brought under the consideration of Vice-Chancellor *Jameson* at an early period, when he determined that he had no jurisdiction, under the act of parliament, either as to divorce or the restitution of conjugal rights; but he, nevertheless, assumed and exercised the power to decree alimony. To a construction so long acquiesced in, we feel ourselves bound to adhere, until it shall have been corrected by a higher tribunal.

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Besides this preliminary point, Mr. *Mowat* argued that the plaintiff's case had failed on three grounds. He contended, in the first place, that no acts amounting to cruelty, in the legal acceptation of the term, had been established against the defendant. Secondly, assuming such acts to have been established, he relied upon the habits of extreme intemperance into which the plaintiff had fallen, and the gross and improper language in which she was accustomed, at

(*a*) Legard v. Johnston, 3 Ves. 359; Head v. Head, 3 Atk. 550; 1 Mad. C.P. 495. (*b*) 2 Ante, 300.

such times, to indulge, as constituting, in the eye of the law, a sufficient excuse for the defendant's conduct. Lastly, he argued, that there had been a complete reconciliation, and condonation of prior acts of cruelty, previous to the defendant's departure for California.

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That the defendant was guilty of such acts as unexplained, would have entitled the plaintiff to a decree for divorce, and therefore to alimony, cannot, I think, be doubted. "Everything, it is said, is in legal construction *sævitia*, which tends to bodily harm, or to to the injury of the health, and in that manner renders cohabitation unsafe: wherever there is a tendency only to bodily mischief, it is a peril from which the wife ought to be protected, because it is unsafe for her to continue in the discharge of her conjugal duties."

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Now, apart from that general harshness and unkindness of conduct which the evidence, I think establishes, and without the light which that general course of conduct sheds on the other parts of the case, there are some particular instances of misconduct so great and so well established as to bring this case, in my opinion, clearly within the definition I have stated. Take as an example the occasion on which the plaintiff made her escape to *Morley's*. *John Morley*, the first witness examined upon this point, says: "She came to my house in the winter, two or three years ago. She was bleeding very bad. My house is near Mr. *Severn's*, about 250 feet from it. This occurred at night. The injury appeared to be in or about the abdomen." *Ann Morley*, in speaking of the same occurrence, says: "When I reached my house I found Mrs. *Severn* in the kitchen, lying with her head down on a bench. There was no miscarriage after I reached my house. Mrs. *Severn* was very bad and fainted two or three times in my arms;

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I attended her all night." Mrs. *Cherry* says: "About six weeks after this I went to Mrs. *Morley's* where I found Mrs. *Severn* lying apparently very dangerously ill. I did all I could to revive her. She fainted out of one faint into another. She was in bed when I got there." Dr. *Morrison* says: "I attended Mrs. *Severn*, on one occasion at Mr. *Morley's*. I found her much bruised, especially in one place in the region of the hip, between that and the abdomen. A medical man had seen her before I arrived. I did not examine the bruise. I did not think the bruise of so serious a nature as to make a particular examination necessary. It was not a very severe contusion. There had been an abortion, which I have little doubt was the consequence of injuries which she had received." Upon the latter point, respecting the miscarriage, there is some discrepancy in the evidence; I am not quite satisfied yet, however, of the incorrectness of Dr. *Morrison's* testimony. But, however that may be, it is quite clear that Mrs. *Severn* sustained a very severe injury upon this occasion. I shall have to advert again to the circumstances connected with this transaction for another purpose; but I may observe at present that there is no room for doubt as to the author of this injury, and that, unexplained, it is quite sufficient in my opinion to sustain the bill.

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Again, *Morley* says: "I saw Mr. *Severn* in the summer, about a year afterwards, get out of his carriage and go back and strike Mrs. *Severn*, knock her down, and kick her when the was down." *Philip Burns*, another witness to the same transaction, says: "I was in the shop. I saw Mr. *Severn* going away in a buggy. I saw Mrs. *Severn*, and I saw Mr. *Severn* get out of the buggy and knock her down, and kick her after she was down."

I have related these two instances, because they depend upon the testimony of credible witnesses,

unconnected, apparently, with either of the parties; and taking them to be clearly proved, as I think they are, it would be, in my opinion, a libel upon the law to doubt their sufficiency, if unexplained, to sustain the plaintiff's case.

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But we must not confine the plaintiff to witnesses in that position. Happily transactions of this sort are for the most part screened from public gaze. Under such, the ordinary circumstances, both parties are obliged to have recourse to evidence always more or less open to suspicion; and it must be admitted that Mrs. *Shepherdson*, to whose testimony I am about to advert, stands in a position which exposes her peculiarly to that sort of imputation. She is a near relative of the plaintiff, mixed up, to some extent, with several of these unhappy quarrels; and who might be presumed, therefore, to speak more or less under feelings of resentment. Nevertheless I see no room to doubt the truth of Mrs. *Shepherdson's* testimony. Her manner in the witness-box was calculated to disarm suspicion; and her testimony is, moreover, corroborated to a very considerable extent. This witness gives us an account of the first quarrel of which we have any information. She says: "I never saw Mr. *Severn* strike his wife until about two months before I left. I was in the kitchen, when I was called hastily up stairs, as something was amiss. I ran up-stairs to the sitting-room and there found both Mr. and Mrs. *Severn*. He left the room without saying a word. I found her sitting on the sofa, with injuries on her neck. It was nipped as with the fingers and nails."

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Two other witnesses, Mrs. *Morley* and Mrs. *Cherry*, speak of this occurrence in nearly the same words. The latter says: "I was fetched in after I understood there had been a quarrel. I saw marks on Mrs. *Severn's* neck, and she said to me that the

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master strangled her. The marks were such as would be made by the nails of a person. The skin was taken off. Mr. *Severn* came in after I had been there a short time; he said nothing to us, nor we to him; we stood as it were speechless. Mrs. *Severn* sent for me. Mrs. *Morley* was there when I got in. Mrs. *Severn* told me that when she had got up from the floor she told some one to go for me and Mrs. *Morley*. She was sitting on the sofa when I got in. She was black in the face. We fomented her neck."

Mrs. *Shepherdson* continues: "About two or three weeks after Mrs. *Severn* had been abused, as I have described, I heard Mr. *Severn* say to her '*If you give me a word I have a receipt for thee neck now.*' Soon afterwards I went up stairs and saw her upon her knees, he kicking her, he then got a broom and struck her with the handle of it. She was bleeding about the nose. I said, Mr. *Severn*, you will kill her; *he said I mean to kill her.*" And, a little further on, she says: "About two or three weeks afterwards I was again called up stairs by one of the girls, who satd that Mr. *Severn* was killing the mistress. I went up stairs and saw Mr. *Severn* either in the same room or an adjoining one. I saw Mrs. *Severn* with her cap off, the ear-rings pulled from her ears, and a bunch of hair upon the floor, it left a bare place on her head."

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I do not find it necessary to enter into the evidence upon this branch of the subject in any greater detail. Unhappily, the quarrels which arose between these parties were too notorious, and the violence with which they were accompanied, too well attested to allow of much question being made upon that point. Nor do I apprehend that such was the ground of defence really relied on. Indeed the witnesses most adverse to the plaintiff, I mean *George Severn* and *Caroline Fletcher*, furnish as flagrant examples of

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the defendant's misconduct as are to be found in any other part of the evidence. The witness, *Fletcher*, says: "I saw Mr. *Severn* abuse Mrs. *Severn* once. I cannot tell when it occurred. I was in the passage scrubbing. I heard the children crying, I went into a room and saw Mr. *Severn* knock Mrs. *Severn* under a desk, and beat her near a beer-barrel in a closet." The evidence of *George Severn*, a lad under eighteen, furnishes a sad example of the lamentable consequences which necessarily result from such a course of conduct, not only to the parties themselves but to their offspring. He says: "I never did spit in my mother's face. I never struck her, that I recollect. When she threw the hand-iron at my father *he knocked her down and gave her a kick or two, that was all he did.*" This youth looks on while a man of powerful frame knocks down and kicks a helpless female, and he speaks with an indifference approaching to levity of that example of brutual violence towards one who whatever provocation she may have given, was yet but a woman, and one whose near relationship ought to have awakened very different feelings.

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I have adverted to this evidence, therefore, not to prove that there were acts of cruelty sufficient to sustain the bill, but for the purpose of shewing that those acts were not mere isolated examples of misconduct, originating in extreme provocation, but that they form rather a part of this defendant's general course of conduct, quite irreconcileable with the duty which he owed to the plaintiff.

It was argued, however,—and this was, I believe, the main ground of defence—that the violence ascribed to the defendent was attributable to the gross misconduct of the plaintiff; and that, having been herself the cause of her misfortunes, she had forfeited her right to come to this court for relief, and must seek for redress in the reformation of her own manners.

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The marriage between these parties took place in the month of June, 1843. It is agreed on all hands that up to the close of the year 1845 they continued in the enjoyment of uninterrupted domestic happiness. But in the autumn of that year things began to change; altercation first, and then violence, cast their deep shadows upon the prospect, and increased so rapidly in number and intensity that in the beginning of the year 1850 all is involved in darkness and gloom. This melancholy change of scene is ascribed, as might be expected, to very different causes. By the plaintiff it is attributed to alienated affection, and a natural moroseness of nature which exhibited itself in acts of brutal violence upon the slightest provocation, and oftentimes without any provocation at all; by the defendant, to growing habit of intemperance in the plaintiff, which had increased in the end of 1849 to a state of almost constant drunkenness. He alleges that her habits had become so debased, and her language, when under the influence of drink, so gross and offensive, as to exceed the utmost limits of human patience; and to that cause alone he attributes the miserable discords, and the still more miserable scenes of violence which have disgraced this unhappy family.

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The witness principally relied on to establish this defence is *George Severn;* and, certainly, it would be difficult to imagine a more repulsive picture than that which has been furnished by this youth as the portrait of his own mother. He says, at the close of his evidence: "She commenced to drink about the latter part of 1845. There had been no particular quarrels before, that I remember. * * * * She drank much worse after the fall of 1848. She then became at times so drunk that she could not attend to her ordinary business, but would go to bed or talk nonsense. From that time till he went to California *she would be drunk for a week together.* This

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was usually when he was away. He was away a good deal from October to January. *It was frequently the case that she was drunk for a week together. She would go to the city and come back drunk.* She used to go out a good deal among the neighbors. She was a good deal over at Mrs. *Morley's* spinning long yarns, and sometimes Mrs. *Morley* would come over to my father's. She was there a good deal, not so much with Mrs. *Cherry*. *When she went to town she generally came back drunk.* I recollect *Nicholls* living at my father's; *she was in the habit of drinking at that time.* I remember my father choking her at one time. It was in 1845. It was about the cash-box. She was jawing a good deal, and it ended in him choking her. I do not think she got black in the face. She was in liquor at the time. She had become unfit from drinking to take care of the cash-box. *She was often drunk when she went out among the neighbors.*"

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I have extracted the above passage from the testimony of this witness, rather for the purpose of testing the credibility of his evidence than as conveying an accurate idea of the account which he gives of the general habits of the plaintiff. With respect to his general evidence, I may observe that, if true, it would go far, I will not say to justify—for there may be such an excess of violence, such an utter recklessness of passion, as no provocation of this sort could justify—but it would certainly go far to palliate the cruelty ascribed to the defendant. It becomes very material, therefore, to consider how far reliance can be placed upon his evidence.

Now of the witnesses examined for the plaintiff, nine have been interrogated as to her alleged intemperance; all of whom had ample opportunity for forming a correct judgment, and all, with the exception of one, quite unconnected with either party to

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the suit. Mrs. *Morley* says: "My house is near Mr. *Severn's*, about 250 feet from it. * * * Mrs. *Severn* used to come to my house often. I never saw her drunk. I never suspected she had been drinking." *Anne Morley* says: "I have seen Mrs. *Severn* once or twice in such a state that I knew she had taken a little beer too much, but I never saw her take spirits, and I never saw her prevented from going about her work." *Philip Burns* says: "I never saw her appear the worse for liquor." *Robert Nicholls* says: "I never saw any bad behaviour in Mrs. *Severn* during all the time I lived with them. She was a good mistress and kept the house well. I never saw her affected with liquor. Never saw any liquor in the house while I was there. Never heard her accused of it." *Anne Cherry* says: "I was a near neighbour to Mrs. *Severn* for five years, and I never saw her the worse for liquor." *Thomas Demerey* says: "I have known them both a number of years. I have been frequently at their house. I was there sometimes two or three times a week up to the time of Mr. *Severn* going to California. I never saw Mrs. *Severn* affected with liquor so as to stagger about, but I have seen her as I thought a little under the influence of it, but not so as to disable her from attending to her ordinary business, but she has talked faster than usual, and I suspected that it was in consequence of liquor." *George Speck* says: "I never saw Mrs. *Severn* under the influence of liquor or misconduct herself in any way." *Sarah Powell* says: "I know Mr. and Mrs. *Severn*. I have known Mrs. *Severn* eight years, I think. I never saw her the worse for drink or misconduct herself in any way." Lastly, *Elizabeth Severn*, a daughter of the defendant, says in her examination in chief: "While I was in the house Mrs. *Severn* occasionally took a glass of beer. I never saw her the worse for liquor." And, in answer to a question from the court, she says: "I was a great deal with Mrs. *Severn* while

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in the house after I had got through my work. I persist in saying that during all the time I was in the house I never saw her the worse for liquor."

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Stopping here for an instant, it is not to be denied, I think, that the balance of testimony would be greatly in favour of the plaintiff, even though *George Severn* had been a witness indifferent between the parties, and though his evidence had assumed more the air of truth than it at present wears. The witnesses produced by the plaintiff, with a single exception, are quite unconnected with the parties to this litigation. *Robert Nicholls*, indeed, resided at one time in the family as maltster, but no fact is pointed out calculated to raise a bias in his mind either against the defendant, or in favour of the plaintiff; and, judging from the evidence itself, and the manner in which it was delivered, I cannot say that I entertain any doubt of its truth. It must be admitted that *Elizabeth Severn's* position was one which put her veracity to a severe test, and which, therefore, exposed her testimony, justly, to observation. She is a daughter of the defendant; had herself fallen into grievous error; and speaks with affecting pathos of that parental unkindness to which she attributes her fall. Giving her testimony under the influence of such deep feelings, she might have been naturally betrayed into some exaggeration of the defendant's faults; but there is in her evidence a total absence of exaggeration. It is characterized throughout by simplicity and truthfulness; and my learned brothers, before whom she was examined, were satisfied that her testimony was delivered under a solemn sense of the circumstances under which she spoke. All the other witnesses may be said to be disinterested. I do not mean to say that there is an entire absence of bias; for in contests, of this kind especially, more or less of bias must be expected to exist in the mind of almost every wittness; but, so far as human

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infirmity will permit, they are unprejudiced. Now, all these witnesses, with ample means of forming a correct judgment, negative directly the state of things sworn to by *George Severn*. And I am therefore of opinion that the evidence of this witness, though he had occupied neutral ground, must have been set aside. But, when it is borne in mind that he is the son of the defendant, not yet eighteen years of age, and, at the time of his examination, in his father's employment; and when his active participation in these quarrels, and his undisguised enmity to his mother, are recollected, the most charitable conclusion at which we can arrive is that he had altogether lost sight of the true character of the parties, and of the real facts and circumstances involved in the case.

But, had any doubt remained upon this subject, it would have been removed by the testimony adduced on the part of the defendant. *John Browne* appears to have lived on terms of great intimacy with him, and, certainly, cannot be said to have had any prejudice in favour of the plaintiff. In answer to a question put by the court, this witness says: "I have never seen her that she could not attend to her business or do her work. I have never seen her stagger but the once. I have been frequently at Mr. *Severn's* two or three times a week in winter time from 1848 to 1850. I have never seen anything that would lead me to think she had been drunk a week together." *Philip Newman* says: "I have never seen Mrs. *Severn* unable to attend to her business from drink. I have never seen her the worse for liquor to my knowledge." *Thomas McLennan* says: "I never saw her affected with liquor so as not to attend to her ordinary business, and it may have been agitation or excitement."

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With respect to *Caroline Fletcher*, whether we consider the manner in which she gave her evidence,

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the matter of it, or the direct contradiction which it received from *Catharine McFarlane*, I am brought to the conclusion that no reliance can be placed upon her testimony.

Upon the whole, after a most careful consideration of all the evidence in the case, we have come to the conclusion that the defence is not sustained (*a*). The allegation is not that the plaintiff's temper was by nature so morose and violent that cohabitation with her became impossible, consistently with any tolerable degree of comfort. Indeed, the fact that these parties did live together for two or three years in the enjoyment of considerable domestic happiness would have completely negatived that case. But the allegation is that the plaintiff was the originator of all the quarrels, and this system of provocation, for which it would have been difficult otherwise to account, is attributed to her habitual intemperance. But this, in our opinion, is disproved. I may instance the occasion on which the plaintiff fled to *Morley's*. An attempt was made to trace that quarrel to an act of outrageous violence on the part of the plaintiff, growing out of intemperance. But Mrs. *Morley* swears that she had been in the plaintiff's company that very evening, within a few minutes before the dispute arose, that Mrs. *Severn* was perfectly sober, and had just ordered tea as she left the house. Then *Demerey* swears that he urged the plaintiff frequently, and it must be intended, I think, at the instance of the defendant, to refrain from instituting law proceedings. And after she had left *Morley's* and gone to her sister's the witness *Demerey* accompanies the defendant to *Shepherdson's* for the purpose of trying to induce Mrs. *Shepherdson* to persuade her sister to return and live with her husband. This Mrs. *Shepherdson* refused to do; and in explaining the reason

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(*a*) Warring v. Warring, 2 Phil. 133; Holden v. Holden, 1 Hag. Con. 459; Best v. Best, 1 Add. 423.

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of that refusal, *Demery* says: "The difficulty on Mrs. *Severn's* part evidently was that she was afraid to go back and be injured and ill-used again by her husband." Now all this is irreconcileable with the case set up the defendant. Indeed, irrespective of the direct testimony, it would have been difficult to understand why this woman should have so constantly courted quarrels, from which she seems to have been always so great a sufferer. Her extreme intemperance is the only explanation offered by the defendant; but as I before observed, the evidence has disproved that, which is, indeed, the very foundation of the defence.

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But besides the acts of cruelty of which I have been speaking, there are other considerations which have a material bearing upon this case. The defendant returned to this country some time during the month of November, in the 4850. During his absence, and since his return, the plaintiff's conduct would seem to have been irreproachable. *Catharine McFarlane*, who lived with her for about twelve months, says: "I have never seen Mrs. *Severn* drink anything stronger than tea or water;" and no witness has been examined by the defendant upon this subject, with the exception of *Sadaby*, who only speaks of an occurrence within a few days after the defendant's departure. Yet, on his return he positively refused to cohabit with the plaintiff. *Demerey* says: "Since he returned from California he has repeatedly said to me that he would not live with her. He said that she wished to live with him, but that he could not. He said that he was afraid that they could never agree. He said he was afraid he might do something which might subject him to punishment—that he might do that which might bring a rope round his neck." And before he departed he had said to *Donald McFarlane* "that he feared he might do something which might cost him his life." Now

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I am free to admit that, according to the law of England, desertion,—even what may be termed malicious desertion—is not in itself a sufficient ground to obtain a divorce (*a*), because the policy of the law is to compel cohabitation. The ecclesiastical courts regard all unauthorized separation as illegal. A decree for divorce cannot be obtained at the option of the parties, but only upon proof of sufficient ground; and, therefore, desertion alone cannot be the foundation of such a decree, because that would be to sanction and consummate what the court regards as illegal. But the ecclesiastical courts have it in their power to decree restitution of conjugal rights; and when the consequences of such a decree are dangerous to the wife, they retain the power of interfering for her protection. But, in this country there is no court which can decree restitution of conjugal rights; and, therefore, unless it can be shewn that a husband has power to expel his wife, and leave her dependant for her support upon the chance of obtaining credit; unless it can be shewn that every husband in this country has the power to place his wife in that position, it would seem to follow that desertion alone would be sufficient, in this court, to warrant a decree for alimony. At all events, whenever that question may arise it will deserve serious consideration. But it is clear, upon the English cases, and i.. reason, that desertion, although insufficient in itself to warrant a decree, may yet, when coupled with other acts of cruelty, form a very material ingredient in determining the plaintiff's right to relief (*b*). It is so, I think, in this case; important in itself as a substantive act, but still more so from the light which it reflects upon the other parts of the defendant's conduct.

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Condonation is, I think, quite out of the question.

(a) Sullivan v. Sullivan, 1 Ad. 302. (*b*) Evans v. Evans, 1 Hag. 120.

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Upon the whole, I cannot say that I entertain any doubt as to the justice of the present case. That the plaintiff was altogether free from the debasing habit imputed to her, canaot, certainly be affirmed. That her language was at times gross and offensive, and her whole conduct unbecoming, is I fear, too plain to admit of doubt. It must be admitted that such conduct would excuse considerable severity in the husband; but it affords no sufficient justification for the reckless and unmanly cruelty in which he so frequently indulged. The engagement between husband and wife is an engagement most solemn in its kind, and most extensive in its consequences. Those who enter into that engagement do so for better, or for worse. The wellbeing of society requires that it should be so. Conscious as we all are of manifold infirmities, we must neither expect nor require perfection in others; and, where the result fails to realize all our anticipations, it is our manifest duty to bear and forbear. The true happiness of those more immediately concerned, and the wellbeing of our whole social system, rest upon this foundation of mutual forbearance. It were lamentable, indeed, for the parties themselves, for their offspring, for the order of civil society, were every pique of pride or gloom of humor made the occasion for rushing upon separation, or violence which must lead to separation, or something worse. I will not relinquish the hope that the parties now before the court may be yet brought to a better understanding of their real interests, and that a way may be thus opened for them out of these scenes of misery and discord back to domestic happiness and peace. But, as matters stand at present, the plaintiff must be maintained from the defendant's estate.

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Holcumb v. Leach.

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Practice—Foreclosure.

Where the day appointed by the master's report for payment of the mortgage money found due by the report fell upon a Sunday, the court refused to make a final order of foreclosure.

In drawing up the report in this case, the time appointed for payment of the amount found due upon the mortgage was, through mistake, made to fall upon a Sunday. A motion by Statement.

Mr. *Vankoughnet*, Q. C., for plaintiff, was now made for the final order of foreclosure, upon affidavits shewing that the plaintiff's agent had attended at the place mentioned in the report on the Saturday and Monday, preceding and following the day named, and that the money was still due and unpaid. Argument.

The Court refused to make the order; and directed a new day for payment of the amount found due by the report to be appointed, and that a copy of the order should be served on the defendant or his solicitor. Judgment.

Tylee v. Burtchardt.

Practice—Traversing Note.

A plaintiff having proceeded in the cause filing a traversing note, as directed by the thirty-second order of May, 1850, afterwards moved, *exparte*, to remove the traversing note from the files of the court and to allow the plaintiff to proceed upon a notice of motion to take the bill *pro confesso*, which had in the meantime been served: the motion was refused.

On a former day a motion had been made for an order to set the bill, filed in this cause, down for the purpose of being taken *pro confesso* against the defendant. The certificate of the state of the cause shewed that a traversing note had been filed by the plaintiff; and the court intimated that the obvious course to be pursued by the plaintiff before any other proceeding whatever could be taken, was to have the traversing note taken off the files. And now Statement.

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Tylee v. Burtchardt.

Mr. *Brough*, for the plaintiff, moved for leave to withdraw the traversing note which had been filed and to proceed upon the notice which had been already served of the plaintiff's intention to proceed to take the bill *pro confesso*, and submitted that as no copy of the traversing note had been served on the defendant, it had no effect, and the court could now make the order asked. The thirty-second order provides that "a traversing note having been filed, a copy thereof shall be served on the defendant, against whom the same shall be filed, *and thereupon such note shall have the same effect* as if such defendant had filed an answer traversing the whole bill on the day on which such note shall be filed." He referred to *Simmons v. Wood* (*a*), and *Daniel's* Chy. Practice, p. 471. But,

Argument.

Per Curiam.—The effect of granting this application would be to give to the plaintiff the benefit of his own default in having omitted to serve the copy of the traversing note, as provided for by the thirty-second order. Now it does not require any great consideration to discern how much better satisfied a defendant may rest with a traversing note on the files, the effect of which is to compel the plaintiff to establish his case as effectually if the allegations in his bill had all been specifically denied, than he would be were the proceeding such as involved an admission of the case made by the bill. The case cited, we think, fully warrants us in refusing this motion, and requiring notice to be given to the defendant.

Judgment.

(*a*) 5 Beav. 390.

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June 4.

SMITH v. SMITH.

Dower—Power of Sale.

A person equitably entitled to lands (in this case a person who had not paid up his purchase money or obtained a conveyance) created a mortgage thereon containing a power of sale in default of payment; the power of sale was not exercised until after the death of the mortgagor; afterwards the widow of the mortgagor filed a bill against the purchaser for dower in the mortgaged premises. A demurrer thereto, for want of equity, was allowed: dower attaching only to such equitable estates as the husband dies seized of; the sale when made having relation to the time of creating the power, and thereby overreaching the title to dower, which had in the meantime attached.

Statement.

The bill in this cause was filed by *Caroline Smith*, widow of the late *David John Smith*, against *Henry Smith*, setting forth that the plaintiff's late husband had been equitably seized of certain valuable lands in the neighborhood of the city of Kingston, which he had purchased and paid part of the purchase money for, and on which he had expended a large sum in erecting a family residence and out-offices; that being so equitably seized, the said *David John Smith* had executed a mortgage thereon, containing a power of sale in default of payment of the amount secured, to certain parties, who had, under the agreement entered into, got in the legal estate, and immediately after, in pursuance and in exercise of the power of sale conferred upon them by the mortgage, had sold and conveyed the mortgage premises to the defendant in fee. The bill prayed that dower might be assigned to the plaintiff in the premises.

To this bill the defendant put in a demurrer for want of equity.

Mr. *Mowat* for the demurrer.

Argument.

Mr. *Brough* contra.

ESTEN, V. C., delivered a verbal judgment to the following effect:

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This is a bill for dower, to which a general demurrer has been put in for want of equity. The facts appear to be that the plaintiff's husband had purchased the land in question from the University of Queen's College, and had paid one instalment of the purchase-money, and built a dwelling-house on the property, in which he resided; that shortly before he died he made a mortgage in fee of the property to two persons of the names of *Mowat* and *Nicholls*, for securing a considerable sum of money. This mortgage contained a power of sale, and a provision that the mortgagees should be at liberty to complete the purchase from Queen's College and obtain a conveyance of the legal estate. After the death of the plaintiff's husband the power of sale was exercised, and the property sold by the mortgagees to the defendant, after the mortgagees had, in pursuance of the provision contained in the mortgage deed for that purpose, completed the purchase from Queen's College.

Judgment

The bill is filed to enforce dower out of an equitable estate, under the provisions of the provincial statute 4 Wm. IV. ch. 1. Dower attaches under the operation of this act upon the equitable estate of the husband at the time of his death and not before, inasmuch as the act provides that the right which it confers shall be confined to estates of which the husband dies seized. It attaches of course upon the estate, as it *eo instanti* that the husband dies, and subject to everything that then affects it. The estate of the wife is derived from that of the husband, is in fact part of it, and the remainder of it descends to the heir or devolves to the devisee. Being part of the estate of the husband, the wife's estate must prtaake of the nature, and be subject to all the infirmities of the estate out of which it is derived. It cannot be denied that an absolute alienation would defeat the wife's dower, because in that case the husband would not die seized. If this

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is so, a partial alienation must have the same effect so far as it goes. In this case therefore the wife's dower was subject to the mortgage which had been made by the husband, and to the power of sale contained in it.

Nothing can be more clear than that, if the husband had survived, his estate would have been defeated by this sale, or that the estate which has descended to the heir has in fact been defeated by it. Upon what principle can the wife's estate be exempted from a liability which affected the whole estate in the hands of the husband, and the residue of it in the hands of the heir? At law the dower attaches in the lifetime of the husband, upon the marriage or the acquisition of the property, as the case may be, and if the mortgage with power of sale be made afterwards, the dower over-rides it; in equity, the dower not attaching until the death of the husband, the mortgage has necessarily been made when the dower attaches, and therefore the mortgage over-rides the dower. It cannot be contended that the sale is subject to any incumbrances attaching upon the estate in the interval between the execution and exercise of the power of sale. The authority is to sell the estate mortgaged, which is the estate as it was at the time the mortgage was made, freed therefore from all subsequent incumbrances. The mortgagee stipulated for this when he advanced his money, and it would be most unjust to impair his security without his consent.

Judgment.

The case has been compared to that of a limitation, so usual on purchases of land in England, to such uses as the purchaser shall appoint, and in default of appointment to himself in fee. This operates as a limitation to the use of the purchaser and his heirs until an appointment shall have been made, and then to the use of the appointee; and the purchaser takes a determinable fee upon which dower attaches

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and partakes of its determinable quality, and, therefore, when an appointment is made it defeats the estate and the dower also. The analogy is considerable, though not perfect.

When a mortgage is made with a power of sale, the mortgagor authorises the mortgagee to sell the estate, and therefore when the power is exercised the estate is transferred, but as from the day on which the power was created; and therefore the equity of redemption and the dower which has attached upon it are superseded or defeated.

The demurrer must be allowed.

Judgment.

SPRAGGE, V. C.—It is proper to bear in mind that dower of an *equitable* estate of the husband, which is the creature of the statute, is only of the estate of *which he died seized*, differing therein from dower out of a legal estate. If at the death of the husband his estate was defeasible, so also must the wife's dower be; otherwise this consequence would follow, that the wife was dowable of an estate greater than that which her husband had at the time of his death; and, the estate in dower being only a continuance of the husband's estate, such a consequence would be repugnant to reason.

If the husband had himself aliened the land; or if the mortgagees had before his death exercised their power of sale, the husband would not have died seized of any estate; and it is admitted, and cannot indeed be doubted, that in either of such cases there would be no dower; but as neither of these acts was done up to the death of the husband, he died seized of some estate, and that was an equitable state of inheritance, subject to be defeated by the exercise of the power of sale; nothing was done to prevent the exercise of that power; the power was exercised, and the defeasible estate was thereby defeated and ex-

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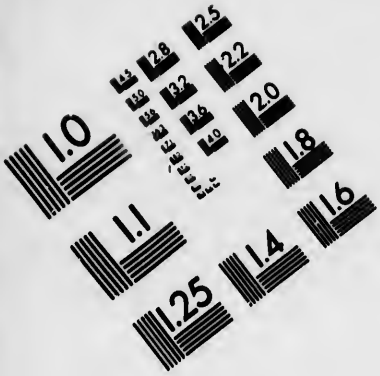
tinguished. It is difficult to conceive how the right to dower could continue to exist. The estate out of which dower is claimed was defeasible after, as well as before, the husband's death, by the exercise of the power of sale. Where is the sound reason why it should defeat the title to dower if exercised before his death, and yet leave the right to dower unaffected if exercised after his death?

It is true that if the estate left by the husband had become indefeasible—for instance, by payment of the mortgage-money—the widow would have been dowable for her life; and therefore it may be said that she would have been dowable but for the exercise of a power which might or might not be exercised; and if so, that her right to dower attached and cannot be defeated by the after exercise of the power; but supposing it to have attached on the death of her husband, and that it would have continued but for the exercise of the power, the husband's estate was defeasible by its exercise, so was that of his heir or devisee, and it appears to me to follow that so was that of the widow. Judgment.

I believe it has not been expressly decided that the right to dower may be defeated by the act of a third person after the death of the husband; but *that* has been decided from which I conceive such a result must necessarily follow (*a*). If a lease for years be granted, with liberty to the lessee to purchase the land demised at his option, for a certain sum, within a certain time, and the lessor die without the lessee having declared whether or not he would exercise his option by electing to purchase, and he afterwards elect to purchase, from that moment it has been determined that the nature of the property is changed; up to that time the heir has the right to enter, and is entitled to the rents and profits, but after that time the property becomes personality. Thus the estate of

(*a*) See 7 Ves. 436; Townley v. Bedwell, 14 Ves. 591.



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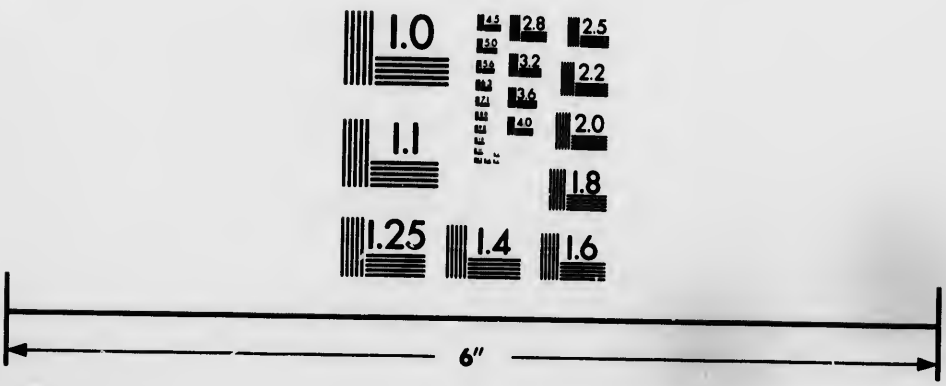

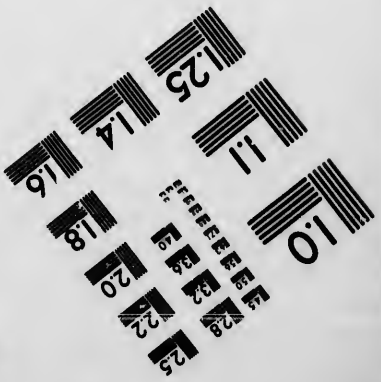

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the heir is defeated by the election of a third person to exercise a right which he was at liberty to exercise or to forbear to exercise, as he thought proper.

In Mr. *Roper's* treatise on the law relating to husband and wife, this principle is treated as applying to the right to dower; at page 235 (*a*) it is said: "The right to dower may also depend on the election of a third person. If previously to the title of dower attaching the husband has by contract given to the tenant, or another, an option of purchasing the estate, the exercise of that option, either before or after the husband's death, will convert the estate into personalty, and defeat the widow's right to endowment."

In the cases cited, as in this case, there resided in a third person a right to exercise a power which, if exercised, defeated the estate of the heir, and, as it would seem, of the widow also; while, if the right were not exercised, the estate would continue.

Judgment

I can come to no other conclusion, than that the husband having died seized of an equitable estate, defeasible by the exercise of the power of sale, the wife's right to dower was necessarily defeasible in like manner by the exercise of that power; and that power having been exercised, that she cannot now claim dower against the purchaser.

(*a*) 2nd Edition.

SHERWOOD v. THE BANK OF BRITISH NORTH AMERICA. 1852.

Construction of deeds—Principal and surety.

May 4 and 7, June 22, September 7, and November 5.

The effect in equity of the instruments which came in question in the *Bank of British North America v. Jones* (8 Upper Canada Queen's Bench Reports, p. 86) considered; and *Held* by *The Chancellor*, to be the same as that case decided the true construction thereof at law to be.

Per Esten, V. C.—The effect in equity is a mere transfer of the rights of the Bank as mortgagees, and

Per Sprague, V. C.—The effect in equity is *prima facie* an absolute sale of the notes and steamboat, not subject to redemption; and the plaintiffs to do away with this effect, must impeach the deed; which was not done by the bill in this case.

The bill in this case was filed by the Honorable *Henry Sherwood* and *James Browne*, as endorsers of *Donald Bethune*, praying relief, on the ground that they had been discharged by reason of certain dealings between the *Bank* and *Heron* and *Dick* in respect of the security given by *Bethune* to the *Bank*. The bill set forth at length the instruments that had been executed between *Bethune* and the *Bank*, as well as between the *Bank* and *Heron* and *Dick*; but as these are fully shewn in the report of the case at common law, it is unnecessary to make any further statement of them here. Statement.

The bill alleged that the *Bank* had offered *Bethune's* endorsers to sell them his shares in the vessel for 3,200*l.*, or thereabouts, but as the endorsers resided at a great distance from each other the concurrence of them all could not be obtained without considerable delay; and that the *Bank* had, without notice to plaintiffs or any of the other endorsers, withdrawn their proposition and had effected an arrangement with the defendants *Heron* and *Dick*, to assign to them *Bethune's* shares in the vessel for 3,208*l.* 4*s.* 11*d.*, [subject to redemption on payment by *Bethune*, or his assignees, of the sums due on the mortgages];* the consideration money for such assignment to be paid by instalments, as set forth in the bill. That at, or immediately after, the execution of the several indentures, the defendants, *Heron* and *Dick*, entered

* The deed did not contain any clause to this effect.

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into the possession or the receipt of the profits and earnings of the shares which had so belonged to *Bethune*, and still were in possession thereof, and had thereby received large and considerable sums of money, and sufficient to pay all or a great portion of the debt due to the *Bank*.

The bill then charged applications to have been made to the defendants to have the debt of the *Bank* paid by sale of the vessel and out of the earnings of it, but which they refused to do, pretending that the transaction between the *Bank* and *Heron* and *Dick* *amounted to an actual sale and purchase* of the shares theretofore owned by *Bethune;* whereas the plaintiffs charged that the said transaction was *fraudulent and void* as against them and the other endorsers of *Bethune*, and that the same created *no sale or purchase* of the said shares, but that *Heron* and *Dick*, by force and virtue of the same indentures of the 20th July, 1849, became only trustees for the *Bank*, the plaintiffs, and the other endorsers of *Bethune*, "and that the said indentures only operated as an additional security to the said *Bank* for the amount of the said debt to the said *Bank*.

Statement.

The bill prayed a decree that the *Bank* should refund the amount paid by plaintiffs on the judgments obtained against them; or, if it should appear that the moneys paid by the plaintiffs had been carried to the credit of *Heron* and *Dick*, then that they should be ordered to refund the same to the plaintiffs; or a reference to the master to take an account of the earnings of the vessel and the amount paid therefrom, and if that should be insufficient, then that the shares (of *Bethune*) should be sold and the proceeds thereof applied to payment of the deficiency.

The defendants (the *Bank*), by their answer admitted the execution of the several indentures set forth in the bill; the instituting of proceedings against the plaintiffs, and the payment by them of the amount of the judgments recovered.

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Heron and *Dick*, by their answers, set forth that the price payable for the steamboat, with the exception of a very small sum, had been paid by them, *Bethune* having failed to pay his proportion of the purchase-money: that it had been agreed between them and *Bethune* that they should hold his interest in the vessel and in the profits thereof until repaid the sum advanced for *Bethune*, and that by an agreement under their hands and seals, dated the 29th September, 1847, it was expressly agreed that, in case of payment for the vessel in manner therein mentioned, *Heron* and *Dick* should stand in the place of the parties from whom the purchase was made (the assignees of *Hugh Richardson*, the original owner of the boat): that the assignees then held a mortgage on the vessel to secure the price thereof; and *Heron* and *Dick* had had possession ever since, and had received all the profits of the vessel ever since, without hindrance or interruption from any one. The answer further alleged that the *Bank* had, by their solicitor, notice of the interest and claim of *Heron* and *Dick* upon the vessel before the registration of the mortgage from *Bethune* to the *Bank*, and even before the execution thereof: that afterwards *Bethune* executed a mortgage to defendants upon said vessel —being the mortgage in the said bill in that behalf mentioned—that the plaintiffs were aware of the transaction between the *Bank* and *Heron* and *Dick* immediately after the same took place, and were aware, before it was completed, of the negotiations in respect thereof: that the plaintiffs paid the judgments recovered against them after the execution of the conveyances set forth in the bill, and that the said vessel was advertised for sale for some time before the execution of such conveyances, and that the agreement with the *Bank* was that *Heron* and *Dick* should purchase the shares held by the *Bank* for 2000*l.*, being more than could be got for them from any other person or persons, and as that sum would

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pay but part of the debt secured on the vessel to the *Bank*, it was further agreed that *Heron* and *Dick* should buy the balance of the debt due to the *Bank* at and for the amount of such balance, and that the price of the said vessel and debt so bought by *Heron* and *Dick* was as set forth in the bill, and should be paid as in the said bill appearing.

The cause having been put at issue, evidence had been taken therein, the effect of which appears in the judgment of the court.

The cause now came on to be heard on the pleadings and evidence.

Mr. *Sherwood*, Q.C., Mr. *Phillpotts*, and Mr. *Turner*, for the plaintiffs.

Argument.

Mr. *Wilson*, Q. C., for the *Bank*.

Mr. *Mowat*, for *Heron* and *Dick*.

Mr. *Morphy*, for the assignees of *Bethune*.

Mr. *Crickmore*, for the defendant, *Cayley*.

Hamilton v. Wright (*a*), *Boultbee v. Stubbs* (*b*), *exparte Rushforth* (*c*), *Law v. East India Company* (*d*), *Hodgson v. Shaw* (*e*), *Wright v. Morley* (*f*), *Bowker v. Bull* (*g*), *The Bank of British North America v. Jones* (*h*), *Armitage v. Baldwin* (*i*), *Wade v. Coope* (*k*), *Stirling v. Forrester* (*l*), *Aldrich v. Cooper* (*m*), *Brace v.* The Duchess of *Marlborough* (*n*), *Lowthian v. Hassel* (*o*), *Morrett v. Paske* (*p*), *Belchier v.*

(*a*) 9 Cl. & Fi. 111. (*b*) 18 Ves. 20. (*c*) 10 Ves. 409.
(*d*) 4 Ves. 824. (*e*) 3 My. & K. 183. (*f*) 11 Ves. 12.
(*g*) 20 L.J.N.S. Ch. 47. (*h*) 8 U.C.Q.B.R. 86. (*i*) 6 Beav. 278.
(*k*) 2 Sim. 155. (*l*) 3 Bligh, 575. (*m*) 8 Ves. 382.
(*n*) 2 P. W. 491. (*o*) 3 B.C.C. 162. (*p*) 2 Atk. 52.

Butler (*a*), *Adams v. Claxton* (*b*), *Shepherd v. Titley* (*c*), *Coles v. Jones* (*d*), *Vanderzee v. Willis* (*e*), were cited for the plaintiffs.

For the defendants, the *Bank*, *Heron* and *Dick*—*Wade v. Coope* (*f*), *Bainbridge v. Wade* (*g*), *Haigh v. Brooks* (*h*), *Grant v. Maddox* (*i*), *Ford v. Beech* (*j*), *Lanton v. Horton* (*k*), *Arnold v. The Mayor of Poole* (*l*), *Marriott v. Hampton* (*m*), *McIntyre v. Miller* (*n*), were, amongst other cases, referred to.

THE CHANCELLOR.—On the 28th of July, 1848, *Donald Bethune* was indebted to the *Bank of British North America* in a sum of about 3000*l.* on various bills of exchange and promissory notes, which had been discounted by that institution.

These bills and notes were all endorsed, for the accommodation of *Bethune*, some by the plaintiffs in this suit, others by one or more of several persons, who have been made parties defendant.

Judgment.

At the period in question *Bethune*, and the defendants *Heron* and *Dick*, were the registered owners of the steam vessel *Chief Justice Robinson*, in the following proportions: *Bethune* owned $\frac{42}{64}$ parts; *Heron* $\frac{14}{64}$ parts; and *Dick* $\frac{8}{64}$ parts.

By a deed executed on the 28th day of July, 1848, and duly registered, *Bethune*, for the purpose of securing the debt so due to the *Bank of British North America*, conveyed his $\frac{42}{64}$ parts of this steam-vessel to *Paton*, as trustee for the *Bank*. This deed contains a power of sale, which authorises *Paton* to dispose of *Bethune's* interest, upon default, without notice to *Bethune*, and without his concurrence.

(*a*) 2 Eden. 523. (*b*) 6. Ves. 226 (*c*) 2 Atk. 348.
(*d*) 2 Vern. 692. (*e*) 3 B. C. C. 21. (*f*) Supra.
(*g*) 20 L.J.N.S.Q.B, 7. & 1 Eng. Rep. 326. (*h*) 10 Ad. & E. 309.
(*i*) 15 M. & W. 737. (*j*) 12 Jur. 310. (*k*) 5 Beav. 9.
(*l*) 4 M. & G. 860. (*m*) 2 Smith's L.C. 237. (*n*) 13 M. & W. 725.

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On the 20th day of July, 1849, an agreement was concluded between *Paton* on behalf of the *Bank of British North America*, and Messrs. *Heron* and *Dick*, touching this debt and security, which was embodied in two deeds, executed contemporaneously on that day, and which constitute, as I understand the matter, one transaction.

The proper construction of those deeds forms the principal question in this cause.

The plaintiffs contended that the transaction was an absolute sale of *Bethune's* interest in the steamvessel, under the power contained in the deed of 1848, for the full amount of his debt; which, consequently, had the effect of discharging *Bethune* and his endorsers from further liability.

Judgment.

The defendants, *Heron* and *Dick*, on the other hand, insisted, on the argument, that the transaction, upon the proper construction of these deeds, consisted of an assignment of *Bethune's* debt, and of the mortgage as a collateral security. But, if held to be an absolute sale of *Bethune's* interest in the steamboat, under the power, then they contended that it was a sale, not at 3,208*l.* 8s. 11*d.*, but at 2000*l.*, leaving a sum of 1,200*l.* still due upon the negotiable securities.

This precise question came under the consideration of the Court of Queen's Bench in an action brought in the name of the *Bank of British North America*, after the execution of the deeds of July, 1849, against the personal representatives of the late Mr. Justice *Jones* who had been an indorser upon one of the promissory notes in question. In that action the defendants pleaded that the note had been paid by means of the transaction in question; and upon the trial a verdict was taken for the plaintiffs, with leave, however, to the defendants to move that

a verdict should be entered in their favor, if the court in banc. should be of opinion that their pleas of payment were sustained in proof by the deeds of 1849. On a motion made in pursuance of that leave, the Judges of the court of Queen's Bench were unanimously and clearly of opinion that, upon the true constuction of the deeds now under our consideration the contract of July was a sale of *Bethune's* interest in the steam-vessel for the sum of 3,208*l.* 8*s.* 11*d.* (the full amount of *Bethune's* debt), which had the effect of discharging *Bethune* and his indorsers from further liaqility. His Lordship the Chief Justice says: "The legal effect is, we think, to entitle the parties to the notes to consider them paid by the transaction, and that the plaintiffs are estopped from saying otherwise when they have by deed under their seal conveyed the steamboat to Messrs. *Heron* and *Dick* for the sum of 3,200*l.* stated in the deed to have been paid to them, which 3,200*l.* it is also acknowledged by them, through their agent, was the full amount of all *Bethune's* notes, and intended to cover them." Mr. Justice *Draper* is very explicit: "It appears to me perfectly clear," he says, "that Mr. *Bethune's* shares in the steamboat were sold by Mr. *Paton* under the power, and not assigned as a security merely to Messrs. *Heron* and *Dick*. It appears to me further that the consideration which the plaintiffs stipulated for and obtained for this sale under the power was the sum of 3,208*l.* 8*s.* 11*d.*, explained in another indenture as the paying or securing to the said *Bank* the whole amount of the claim upon and against the said *Donald Bethune* or any one in respect or on account of the said *Donald Bethune*."

Judgment.

This judgment is not, I suppose, conclusive in the present litigation. It would not be so, I presume, in the same court in an action against a different endorser; although it would be, perhaps, admissible

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in evidence (*a*). But, though not conclusive, still, as a judicial determination by the ablest judges upon the very point now in question, it is certainly entitled to the greatest weight. Indeed the adjustment of the relative rights of these parties, in the event of a different construction being placed upon the agreement in this court, would be obviously matter of great difficulty. Should the court determine the contract of July to have been an assignment subject to redemption, or a sale for 2000*l.*, then, in either event, what is the debt? and who are to contribute to the payment of it. Is the estate of Mr. Justice *Jones* chargable with any portion of that debt? Are his representatives bound to contribute, having the judgment of a court of competent jurisdiction in their favor; and that not upon any ground of equity sufficient to avoid the effect of the judgment, but because this court has placed upon the contract of the parties a construction different from that adopted in the court of law where the matter was originally litigated?

[Judgment.

I have suggested these considerations lest they should seem to have been overlooked, but it is not my purpose to pursue them father, because, in consequence of a difference of opinion which unfortunately exists between the different members of the court, I have thought it right to consider these deeds as though the question of construction had been unaffected by judicial decision; and after an attentive perusal of them, I quite concur in the judgment of the Court of Queen's Bench.

Had the instrument by which *Bethune's* interest in the steamboat was assigned been the only deed executed between these parties, my opinion upon that instrument, taken alone, would have been, I think, in favor of the defendants. That deed having

(*a*) Pritchard v. Hitchcock, 7 M. & G. 156.

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recited the mortgage from *Bethune* to the *Bank*, the power of sale therein, *Bethune's* default, and the abortive attempt to sell under the power, when the vessel was bid in by *Berczy*, on behalf of the *Bank*, proceeds in these words: "And whereas the parties of the third part have agreed with the party of the first part to pay off the whole of the claim which the *Bank of British North America* at Toronto has against *Donald Bethune*, and which was intended to be further secured to the said *Bank* by the said indenture of mortgage, upon receiving from the party of the first part a transfer, assignment and conveyance to them of all his, the party of the first part, parts, share, interest, property, estate and demand, of, in, to, and out of the said parts or shares in the said vessel, and the appurtenances to the same belonging.

"And, upon the said *Bank* executing to the parties of the third part a transfer and assignment of all the claims and demands they hold upon or against the said *Donald Bethune*, or any one else, for or with him as aforesaid; whether such claims or demands be upon notes, bills of exchange, judgments or otherwise."

Judgment.

Then it is witnessed that "In consideration of the promises, and in consideration of the sum of 3,208*l.* 8*s.* 11*d.*, paid by the parties of the third part to the party of the first part, he, the party of the first part, doth hereby grant, bargain, sell, assign, transfer and convey to the parties of the third part," that is to say, to *Heron* $\frac{28}{64}$ and to *Dick* $\frac{14}{64}$ to have and to hold to them, their executors, administrators, assigns, "to and for his and their own proper use and benefit, so far as he, the party of the first part, has power to convey the same." There is then a clause restrictive of the liability of the party of the first part, and a covenant for further assurance.

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Now, had this deed stood alone, I incline to think that, properly construed, it would have amounted to no more than a transfer of the debt, and an assignment of the mortgage as collateral security. For, although the deed is absolute in form, yet the parties, in the recital to which I have particularly adverted, have clearly expressed their intention to be to assign both the debt and the security; and as that clearly expressed intention would have been defeated by holding the contract to have been a sale of the boat, under the power, for the full amount of the debt, it would have been proper, perhaps, to have treated it as an assignment, subject to redemption. For it is a maxim of universal application, founded in reason and justice, and sanctioned by the highest authority, "*benigne faciendæ sunt interpretationes chartarum ut res magis valeat quam pereat.*" And *Sheppard*, in his Touchstone of Common Assurances, says (*a*): "A deed that is intended and made to one purpose may enure to another; for if it will not take effect the way it is intended, it may take effect another way." And in *Roe v. Traumarr* (*b*), Chief Justice *Willes*, citing *Sheppard*, says: "Deeds which are intended and made to operate one way, may operate another way, if the intention of the parties cannot take place unless they operate a different way from what they were intended."

Judgment.

The intention of the parties, then, to be gathered from this deed, taken singly, would have been, I think, an intention to assign the debt and the mortgage as collateral security, and not an intention to assign a debt already realized by sale of the pledge; an object plainly contrary to the rule of law, and unattainable. And, upon the principle to which I have adverted, and in accordance with the authorities I have cited, and many others to the same purpose, the deed would have been so construed, I apprehend, as to give effect to that intention.

(*a*) Page 82. (*b*) Willes, 684.

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But we are not left to gather the intention of these parties from this instrument alone. There is another deed, or rather what may be considered as two other deeds, though blended in one, which seem to me to place the question beyond controversy. The first of these deeds, which provides for the collection of the debt by the *Bank* on behalf of Messrs. *Heron* and *Dick*, has this recital: "And whereas the said *Donald Bethune* has made default in the payment of the said notes and bills; and whereas the said party of the first part, by a certain indenture bearing even date herewith, and made, &c., *hath sold, assigned, and disposed of, to the said Andrew Heron and Thomas Dick, the said* 17/64 *shares for the consideration therein mentioned* and referred to: that is to say, among other things, paying or securing to the said *Bank* the whole amount of their claim upon and against the said *Donald Bethune*, or any one in respect or on account of the said *Donald Bethune*."

Judgment.

The second part of this deed, which is designed to secure the due payment of the consideration, recites, "That in order to secure the party of the first part in the regular payment of the said 3,208*l.* 8*s.* 11*d.* with interest as aforesaid, in manner aforesaid, *the parties of the second part being now full and absolute owners of the whole of the of the said steamship*."

Now it will not be denied, I think, that these recitals, especially the last, indicate very clearly an intention to sell absolutely under the power, and not to assign a security. The whole turn of expression seems to me to be adapted to that state of facts; and certainly on no other hypothesis could Messrs. *Heron* and *Dick* have become "*the full and absolute owners of the whole of the said steamship*," as they are stated to be.

Still, had there been nothing farther, it might have

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been our duty to have placed even upon these expressions, however distinct, a meaning consistent with the intention indicated in the recital to the first deed. For it is undoubtedly true, as Baron *Parke* has expressed the rule in *Ford v. Beech* (*a*), "that a contract ought to receive that construction which its language will admit, and which will best effectuate the intention af the parties to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of the intent. *Verba intentioni et non contra debent inservire.*"

Judgment.

But the question in this case does not turn upon the particular form of expression used throughout the deed, for its substantive provisions are only reconcileable with the hypothesis that these parties intended a sale under the power. For instance, the mortgagees covenant that until default the mortgagors "shall hold, use and enjoy the said vessel for their own use and benefit, and take the profits and earnings to be had or procured by the means of the said vessel during such non-default to their own use." But the time allowed by the *Bank* for the payment of the purchase money was three years. Now, had this been an assignment, and not a sale, such a covenant would have been idle and improper. Upon payment of the debt by *Bethune*, or his sureties, they would have an immediate right to call for the pledge, and it would have been the duty of the *Bank* to have so dealt with the security as to be in a position to restore it on payment of the debt.

Again: Messrs. *Heron* and *Dick* agree by this deed that upon default *for a period of three months* in the payment of any instalment, it shall be lawful for the *Bank* to "expose to sale and sell by public auction

(*a*) 11 Q. B. 866; and see Owen v. Homan, 3 McN. & G. 378.

or private bargain the said *steam-vessel*, with all her appurtenances, *after one month's advertisement of such intended sale* in any one or more newspapers published in the Home District, *upon a reasonable credit* or for cash, as the party of the first part shall deem expedient, and to make a full and perfect conveyance or transfer to perfect and complete such sale." And the *Bank* covenant to hand over the surplus arising from any sale, after payment of the debt and expenses, to Messrs. *Heron* and *Dick*. Now, in determining whether the first deed, which, it must be remembered, is in form absolute, should be construed to be a sale under the power, or a defeasible assignment, the parties must be held, I think, to have intended that which alone would render the subsequent provisions of this contract available. That indeed is the very rule so much insisted on by the defendants. The intention is to be gathered from the whole deed. But to construe the first deed to be an assignment and not an absolute sale, would be to render nugatory the most material provisions in the second. Upon that hypothesis Messrs. *Heron* and *Dick* would have had no right or power to have authorised a sale by the *Bank* upon default; and the surplus moneys, after payment of debt and expenses, would have belonged not to Messrs. *Heron* and *Dick*, bu to *Bethune*t or his sureties.

Judgment.

It is to be remarked too that the $\frac{32}{64}$ shares, of which Messrs. *Heron* and *Hick* were the undoubted absolute owners, are dealt with throughout the last deed in precisely the same way as the $\frac{42}{64}$ shares which they had acquired under the conveyance from the *Bank*: a circumstance, as it seems to me, very significant of the intention of the parties.

Upon the whole, seeing that these parties have executed a deed absolute in its form; seeing that

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they have recited, under, their seal, on the one hand, that the boat had been sold by the *Bank*, and, on the other hand, that the full and absolute ownership had been acquired by Messrs. *Heron* and *Dick*; and seeing subsequent material provisions in this contract consistent with those recitals, but wholly irreconcileable with the construction contended for; I cannot say that I entertain any doubt as to the correctness of the conclusion drawn by the Court of Queen's Bench. To construe these deeds in the way contended for by the defendants would be, not to carry out the intention of the parties, but to defeat it; would be, in effect, to *make* their agreement, not to *construe* it (*a*).

Such being my opinion as to the proper construction of the deeds, it becomes the less material to consider the manner in which the case has been presented upon the record. But I may observe here that Messrs. *Heron* and *Dick* appear to me to insist, by their answer, that the contract of the 20th of July was a sale under the power, and not an assignment. They say, "that the said vessel was advertised *for sale* for some time before the said 20th of July, and that the agreement between the defendants and the said *Bank was that the defendants should purchase the said vessel for* 2000*l.*, *being more than could be got for her from any other person or persons.*" And Mr. *Cassel's* evidence throughout is to the same effect.

Judgment.

It was argued, however, that as this mortgage security had been acquired by the *Bank* without the knowledge of the plaintiffs, and long after the date of their contracts, they had no claim to participate in its benefits, and *Wade v. Coope* was cited as in point. That position, in my opinion, cannot be sustained either in reason or upon authority.

(*a*) Moseley v. Motteux, 10 M. & W. 533; Farr v. Sheriffe, 4 Hare. 512.

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In the civil law the contract of a surety is regarded as in some measure conditional. It is looked upon not as an independent contract, but as subsidiary to that of the principal debtor. *Fidejussio est verborum obligatio qua quis alienam obligationem in fidem suam suscipit, ita ut debitor principalis maneat obligatus.* And the rights of the surety, as they are defined by the civil law, and acknowledged I believe in most countries whose jurisprudence is derived from that source, seem the legitimate consequences of this fundamental view of the essential nature of the contract. By means of the privilege termed "*beneficium ordinis,*" the surety was entitled to compel the creditor to proceed first against the principal debtor. The "*beneficium divisionis*" enabled him to compel contribution from his co-sureties. And the "*beneficium cedendarum actionum*" substituted the surety in the place of the creditor, and entitled him, as if he were a purchaser, to a conveyance of all the rights and securities of the creditor, either against the principal debtor or the co-sureties. As a necessary, or at least a natural, consequence of this latter doctrine, the creditor was regarded as in some degree a trustee for the surety. All securities obtained by him were regarded as obtained for his own benefit, indeed, in the first instance; but, secondarily, for the benefit of the surety. It became his duty, therefore, to acquire such securities legally, and to deal with them fairly and impartially; and if by any voluntary act the creditor disabled himself from making this cession, to that extent the surety was enabled, *per exceptionem cendenarum actionum*, to defeat his claim.

Judgment.

Now, although the provisions of our municipal law are, in some respects, wholly different, and in others much less favourable to the surety than were those of the Roman civil law, still very much of the doctrine to which I have last adverted has been infused

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into our equity jurisprudence. It was said by Sir *Samuel Romilly* in the course of his reply in *Craythorne v. Swinburne* (*a*), "that a surety will be entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities, entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor." And this language of Sir *Samuel Roumilly* was cited with approbation by Lord *Brougham* in *Hodgson v. Shaw* (*b*), who adds: "It is hardly possible to put the right of substitution too high;" and similar language is is to be found in almost all the cases. In *Dowbiggin v. Bourne* (*c*), the Chief Baron says: "I apprehend it to be a settled and general rule of courts of equity, that when a surety pays the debt of the principal debtor he has a clear right, by the course of proceedings in equity, to the benefit of all instruments and securities given by the principal debtor for payment of the debt." In *Mayhew v. Cricket* (*d*), Lord *Eldon* says: "The mere circumstance that the plaintiff did not know that the defendants held a warrant of attorney would be of no consequence *because sureties are entitled to the benefit of every security which the creditors had against the principal debtor, and whether the surety knows the existence of these securities is immaterial.*" And in *Stirling v. Forrester*, in the House of Lords Lord *Redesdale* says: "If several persons are indebted and one makes the payment, *the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors.*"

Judgment.

(*a*) 14 Ves. 161. (*b*) 3 M. & K. 191. (*c*) Youn. Rep. 115. (*d*) 2 Swan. 191.

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It is true that in the case referred to in argument (*a*), language is attributed to the *Vice-Chancellor* which would seem to import an opinion that a surety is only entitled to the benefit of such securities as were obtained *at the time* he entered into his engagement. That was certainly the position advanced by Sir *Edward Sugden* in argument. The report of that case is not very intelligible. It is quite clear, however, that the point for which it was cited was not then decided; for the *Vice-Chancellor* proceeded upon the principle that the mortgage had been given for a distinct debt; a ground in itself sufficient for the determination of the case. But had this case been more distinct, we must, I think, have considered it inconsistent with principle and contrary to the clear current of authority. This right of substitution flows from the relative position of the surety and the creditor. It is based upon the plainest principles of natural justice, and depends in no degree upon contract, express or implied. What difference can it make, then, whether the securitp be obtained by the creditor before the period of the surety's contract, or at the same time, or subsequently? The same principle of natural justice equally requires that in each the creditor should either resort himself to the appropriated fund, or that he should place the surety in a position to resort to it. But, as the argument is repugnant to reason, so it would seem opposed to direct authority. In *Parsons v. Briddock* (*b*), approved by Sir *William Grant*, in *Wright v. Morley* (*c*), and not disapproved upon this point in *Hodgson v. Shaw*, the judgment had been obtained long after the contract; and in *Dowbiggin v. Bourne*, the same circumstance existed but did not constitute the ground of the judgment. In *Hodgson v. Shaw*, and *Mayhew v. Cricket*, the securities were obtained before the contract. I am quite clear therefore that the sureties are entitled to the benefit of the security.

Judgment.

(*a*) Coope v. Wade, 2 Sim. 155. (*b*) 2 Vern. 608. (*c*) 11 Ves. 12.

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It was argued next that this, if a sale at all, was a sale, not at 3,208*l.* 8*s.* 11*d.*, but at 2000*l.*, leaving a sum of 1,200*l.* still due upon the negotiable securities. But the deed of assignment between *Paton* and Messrs. *Heron* and *Dick* states that "in consideration of the premises and in consideration of 3,208*l.* 8*s.* 11*d.*," admitted to have been paid, the boat is assigned. That is, as I understand the instrument, in consideration of 3,208*l.* 8*s.* 11*d.* and something beside; and the fact is recited in the same way in the second deed. Now the plaintiffs are not to be treated as strangers to this transaction. As I have shewn, the moment this mortgage security was taken, it was, in the eye of the law, taken, not only for the benefit of the *Bank of British North America*, but also for the protection of the sureties; and that institution was bound, in their subsequent dealings, so to regard it. Here, then, *Paton*, standing in that fiduciary relation to the plaintiffs, proceeds to the sale of the pledge, in which they had so deep an interest, and in the deed of assignment states the consideration to be 3,208*l.* 8*s.* 11*d.* Now, not to put the admission so high as an estoppel; not to assert that the defendants are, in a technical sense, estopped to deny its truth, it is not to be denied, I think, that it constitutes most material evidence in favour of the plaintiffs, amply sufficient, if not countervailed, to sustain the case. Indeed, it is a well established principle, both in courts of law and courts of equity, that those who make representations on the faith of which others either act or abstain from acting, cannot be afterwards heard, as between themselves and those to whom such representations have been made, to deny their truth (*a*). And there would have been great difficulty, I think, under the circumstances of this case, and in this mode of proceeding, in receiving such evidence. But that question does not arise, for we have not any evidence here to contradict the the admissions in these deeds.

Judgment.

(*a*) West v. Jones, 1 Sim. N. S. 205.

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It is true that Messrs. *Heron* and *Dick*, in their answer, stated the transaction to have been a purchase of the boat at 2000*l.*, and of the residue of the debt, that is 1,208*l.* 8*s.* 11*d.* for its equivalent. But that statement is unsupported by evidence and I am unable to reconcile it with the provisions contained in the second deed. By that instrument *Paton*, on behalf of the *Bank of British North America*, agrees to collect *all* the the bills and notes on behalf of Messrs. *Heron* and *Dick*, stipulating for the right to retain the first and last instalment of the sum to be paid by Messrs. *Heron* and *Dick*, and covenants to pay over the balance to them. Now the first and last instalments would amount to 1,300*l.*, 100*l.* more than the whole amount due above the 2000*l.*, and yet the covenant is to pay the surplus to Messrs. *Heron* and *Dick*. An arrangement not to be reconciled, I think, with the answer.

Judgment.

As a mere question of construction then, I am of opinion that the transaction of July, 1849, was a sale under the power, and not an assignment. And, upon all the evidence before us, the proper conclusion is, I think, that it was a sale at 3,208*l.* 8*s.* 11*d.*, the full amount of *Bethune's* debt. If the *Bank of British North America*, or Messrs. *Heron* and *Dick*, are advised that they can make a case for setting aside these deeds on the ground of mistake, I am not indisposed, under all the circumstances, to permit a bill to be filed for that purpose. But, considering that the judgment of the Court of Queen's Bench was acquiesced in without appeal; considering that no steps have been hitherto taken in this court to set aside these deeds on the ground of mistake, and that no case of that sort is made upon the pleadings, such relief, in my opinion, could not properly be granted, except upon a bill filed for that specific object (*a*).

(*a*) Farr v. Sheriffe, 4 Hare, 512.

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And I must not be understood to encourage that course, because the evidence before us is, in my judgment, altogether insufficient for such a purpose.

It was argued, however, that the plaintiffs, having paid the amount of these judgments voluntarily, had disabled themselves from instituting any proceedings to enforce repayment.

It has been truly said by an accurate writer: "That well considered transactions between parties who had a sufficient opportunity of enquiring before they acted, or solemn decisions of courts of justice are not to be wontonly opened and re-discussed," for "*interest reipublicæ ut sit finis litium.*" But it is obvious, I think, on many grounds, that the principle relied upon has no application to the present case.

Judgment.

The plaintiffs here do not desire to open a litigation already closed; they do not seek to introduce now a defence, where sufficient opportunity having been afforded for the purpose had been omitted. But they say the judgment having been duly recovered, subsequent events render the enforcement of it inequitable. Now, the law, so far from denying such a right, has provided a peculiar mode of enforcing it.

Again, it is quite clear that the principle in question does not apply to payments made in ignorance of the facts, where there has been no culpable neglect. In *Chatfield v. Paxton* (*a*), Mr. Justice *Ashurst* says: "Where a payment has been made not with full knowledge of the facts, but only under a blind suspicion of the case, and is found to have been paid unjustly, the party paying may recover it back." And *Milner v. Duncan* (*b*), is to the same effect. Now, here the plaintiffs must be allowed, I

(*a*) 2 East 471. (*b*) 6 B. & C. 671.

think, to have paid in ignorance of the facts, for to this moment it is matter of dispute whether the transaction of July was a mere assignment, or a sale at 2000*l.*, or a sale at 3,208*l.* 8*s.* 11*d.* But upon this depended the question whether the plaintiffs were or were not bound to pay those judgments.

Lastly, the policy of the law ceases to apply where the parties to the transaction were not, at the time of the payment, upon an equal footing. In *Brisbane v. Dacres* (*a*), Chief Justice *Gibbs* says: "That he was counsel in *Chatfield v. Paxton*, and that he then and still acceded to the doctrine that money paid with knowledge both of law and fact, but under fear of an arrest, would be recoverable." In *Morgan v. Palmer* (*b*), Lord *Tenterden* said: "It has been well argued that the payment having been voluntary, it cannot be recovered back in an action for money had and received. *I agree that such a consequence would have followed had the parties been on equal terms.* But if one has the power of saying to the other 'that which you require shall not be done except upon the conditions which I choose to impose,' *no person can contend that they stand upon anything like an equal footing.*" And in the Duke *DeCadaval v. Collins* (*c*), Mr. Justice *Coleridge* cites and relies upon this passage from *Selwyn's Nisi Prius*; "If an undue advantage be taken of a person's situation, and money be obtained from him by compulsion, such money may be recovered in an action for money had and received." Now it is quite clear, I think, that the parties here were not on anything like an equal footing. The *Bank of British North America* enforcing payment under their judgment, it would be repugnant to reason to hold a payment made under such circumstances voluntary; and the plaintiffs having been involved in the difficulties with which

Judgment.

(*a*) 5 Taunt. 156. (*b*) 2 B. & C. 735. (*c*) 4 A. & E. 867.

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they were surrounded by the act of these parties, and ignorant of the real nature of the transaction of July, had a proper case to come to this court for relief.

Lastly: It was contended that, in point of form, the plaintiffs were not entitled to recover upon this record as at present framed. It is certainly difficult to understand the principle upon which the bill was framed; but, upon the whole, I am of opinion that upon this point also the plaintiffs are entitled to recover. In the first place, the parties have not been misled. The question upon which the plaintiffs, in my judgment, are entitled to recover was the one principally discussed upon the argument. Then the relief to which I think them entitled is specifically prayed; and while the plaintiffs assert that the transaction of July was an assignment, the defendants, in their answer, insist that it was a sale. Inasmuch, therefore, as the parties have not been misled; and, inasmuch as the plaintiffs have specifically asked the relief to which I think them entitled upon the construction of deeds common to both, there is not, in my opinion, sufficient ground for this formal objection (*a*).

Judgment.

I am of opinion that there should be a decree for the plaintiffs, with costs; that if the moneys paid by the plaintiffs have been paid over to Messrs. *Heron* and *Dick*, then the decree should direct its repayment (*b*); the defendants, the co-sureties, must be paid their costs by the plaintiffs, and this amount must be repaid by the other defendants; all the notes must be delivered up to be cancelled.

Esten, V. C.—The bill in this case states that the plaintiffs, *Brown* and *Sherwood*, and the defendant *Cayley*, and the late Mr. Justice *Jones*, and Mr.

(*a*) Leman v. Whitley, 4 Russ; Walker v. Jeffrey, 1 Hare, 341; Powney v. Blomberg, 14 Sim. 179.
(*b*) Rice v. Gordon, 11 Beav. 265.

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Smith, were respectively endorsers on several notes of hand of the defendant *Bethune*, for his accommodation, and that he procured them to be discounted by the defendant, the *Bank of British North America*, and received the proceeds of such discounts; that on their becoming due, they were not retired by *Bethune*, and due notice of their dishonour having been given to the several endorsers, they were at the time of the execution of the mortgage afterwards mentioned liable respectively to the *Bank* on these notes, which then amounted, with interest, to the sum of 3,208*l.* 8*s.* 11*d.* *Brown* was an endorser on one note to the amount of 250*l.*, and *Sherwood* on two notes of 200*l.* each. *Jones* and *Smith* are dead and their personal representatives are parties to the suit. The bill then proceeds to state that the steamvessel *Chief Justice Robinson* had been registered in the name of *Hugh Richardson*, as the sole owner of her: that he became bankrupt on the 12th August, 1846; that *Brown*, *Harris* and *McDonell*, were appointed his assignees, in whom all his estate vested; and who, in March, 1847, by bill of sale, transferred the steamboat *Chief Justice Robinson* to the defendants, *Bethune*, *Heron* and *Dick*, in consideration of 7,500*l.*; that such bill of sale was duly certified on the back of the certificate of registry, and by a schedule attached to it divided the interest in the steamboat amongst *Bethune*, *Heron* and *Dick*, in the proportions of $\frac{42}{64}$ to *Bethuhe*, $\frac{28}{64}$ to *Heron*, and $\frac{14}{64}$ to *Dick*.

Judgment.

The bill then proceeds to state that *Bethune* being indebted to the *Bank of British North America* in the sum of 3,200*l.*, or thereabouts, on bills and notes of hand, some of which were due and some not, and owning $\frac{42}{64}$ of the steamboat, worth 4000*l.*, applied to the *Bank* for time on these and future liabilities on furnishing security on his shares of the steamboat, to which the *Bank* acceded, and thereupon a mortgage

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was made by *Bethune* to *Paton*, the agent and trustee of the *Bank*, of his $\frac{42}{64}$ of the steamer, for securing all moneys then due and to become due from him to the *Bank*, with power of sale in case of default in payment of such moneys.

The bill then proceeds to state the bankruptcy of *Bethune*, and that the defendants, *Patterson*, *McMurrich* and *McDonell*, had been chosen assignees of his estate, and that the *Bank*, on the 1st December, 1848, commenced actions against the plaintiffs, upon the promissory notes endorsed by them respectively, obtained judgment against the plaintiff, *Brown*, in July, and *Sherwood* in August, 1849; that the *Bank* had also brought other actions on others of the promissory notes before mentioned; that *Jonas Jones* was dead, having made his will and thereby appointed the defendant, *M. E. Jones*, executrix, who proved his will; that *D. J. Smith* was also dead, and having made his will, which had not been proved; and that letters of administration for the purposes of the suit had been granted to the defendant, *Phillpotts*.

Judgment.

The bill then states that the *Bank* had offered the $\frac{42}{64}$, mortgaged to them by *Bethune* as before mentioned for sale, but that the defendants, *Heron* and *Dick*, had attended the sale, and pretending untruly that they had an interest prior to the mortgage of the *Bank*, had forbidden the sale, and bidders being thereby deterred, one *Berezy* had bought in the $\frac{42}{64}$ on behalf of the *Bank*; that *Heron* and *Dick* had no interest in the $\frac{42}{64}$ prior to the mortgage of the *Bank*, but they were in fact second mortgagees of those shares for securing the balance due to them from *Bethune*.

The bill then states that it had been agreed between the *Bank* and *Heron* and *Dick* that the *Bank*, or rather *Paton*, should assign the $\frac{42}{64}$ to *Heron* and *Dick*, at or for the price or sum of 3,208*l.* 8*s.* 11*d.*,

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subject to redemption on payment by *Bethune* or his assigns of the two mortgages, which sum of 3,208*l.* 8*s.* 11*d.* was to be paid by certain instalments at certain times afterwards mentioned; and that in pursuance of that agreement, by an indenture dated 20th July, 1849, between *Paton* of the first part, *Berczy* of the second part, and *Heron* and *Dick* of the third part, after reciting the mortgage to the *Bank* of the 28th July, 1848, and that *Bethune* had made default in payment of the moneys thereby secured, and that in consequence it became lawful for *Paton* to proceed to a sale of the $\frac{42}{64}$ shares, subject to the trusts declared by the mortgage deed, and that he had accordingly offered them for sale on the 6th of June preceding under the indenture of mortgage, and by virtue of the powers vested in him for that purpose, but no one appearing or offering to purchase the $\frac{42}{64}$ shares, *Berczy*, on behalf of the *Bank*, had become the nominal purchaser of them at 1000*l.*, that no actual sale was thereby made and no assignment had been made to *Berczy*, and that *Heron* and *Dick* had agreed with *Paton* to pay off the whole claim which the *Bank* had against *Bethune*, and secured by the mortgage before mentioned, upon receiving from *Paton* a transfer, conveyance and assignment to them of all his interest, &c., in the $\frac{42}{64}$ shares, and upon the *Bank* executing to *Heron* and *Dick* a transfer and assignment of all their claims and demands against *Bethune* and others for or with him, and that *Berczy* had become a party to the indenture, in order to dispose of any right or interest he might have; it was witnessed that in consideration of 3,208*l.* 8*s.* 11*d.*, paid by *Heron* and *Dick* to *Paton*, he (*Paton*) transferred all his interest in the forty-two shares to *Heron* and *Dick*, that is, twenty-eight shares to *Heron* and fourteen shares to *Dick*, to hold to them respectively for their own use and benefit and so far as *Paton* had power to convey, and *Berczy* then transferred his interest and right in the same manner,

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and it was provided that neither *Paton* nor *Berczy* should be considered as in any manner covenanting for the title to the property, it being their intention simply to dispose of such right or interest as they respectively had, but they covenanted to execute any further acts necessary or proper for more effectually vesting such right or interest as they had respectively.

The bill then states that, at the same time with this deed was executed another instrument of the same date, and forming obviously with it one transaction, which after various recitals to the same effect as were contained in the accompanying deed, and after reciting this deed, and that the claim of the *Bank* against *Bethune* on that day amounted to 3,208*l.* 8s. 11*d.*, and that it had been agreed that that sum should be paid by *Heron* and *Dick* at the times and in the manner after mentioned; and that it had also been agreed that, besides the conveyance of the forty-two shares of the vessel, *Paton* should assign, transfer, convey, or collect for *Heron* and *Dick* as he should choose, all the notes, bills and cheeques upon which *Bethune* was liable to the *Bank*, and all judgments obtained by the *Bank* against all persons liable with or for *Bethune* to the *Bank*: it was witnessed that *Paton* should hold and collect, for *Heron* and *Dick*, all the notes, bills, cheques, suits or actions pending or recovered against *Bethune*, or all or any persons liable for or with him, upon such notes, bills, or cheeques, and the proceeds of all such collections *Paton* should pay, apply or retain in manner following—that is to say, in the first place, enough and until the note thereafter mentioned to be given by *Heron* and *Dick* to the *Bank*, and which would fall due on the 20th January then next, should be fully paid and satisfied, together with interest; and secondly, to pay, apply and retain the residue of all such collections until the note thereafter mentioned to be given by *Heron* and *Dick* to the *Bank*, and which would

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fall due on the 20th July, 1852, should be fully paid and satisfied, together with interest, though at the time or times of such application such notes, or either of them, might not be due or payable, and the surplus of such collections, if any, to pay over to *Heron* and *Dick*, and it was provided that all costs, charges, expenses and disbursements then incurred in and about the same notes, bills, cheeques, &c., should be paid and borne by *Heron* and *Dick;* and the costs, charges and expenses of all future proceedings should also be paid and borne by *Heron* and *Dick;* and all the other costs, charges, and expenses of the *Bank* or *Paton*, in relation to the transactions with *Bethune* and the persons liable for or with him; and *Paton* covenanted with *Heron* and *Dick* that he and the *Bank* should hold and collect the notes, bills, &c., for the benefit of *Heron* and *Dick*, and apply the proceeds in manner before provided, but at their expense and that the *Bank* would allow its name to be used by *Heron* and *Dick* whenever it should be necessary; and *Heron* and *Dick* covenanted with *Paton* to pay to the *Bank* the sum of 3,208*l.* 8*s.* 11*d.*, with interest from date, by the instalments and at the times after mentioned, and for which instalments they had given their promissory notes, payable at the same times, with interest—the first of which promissory notes, which was for 704*l.* 8*s.* 6*d.*, would fall due on the 20th January, 1850, and the last, which was for 600*l.*, would fall due on the 20th July, 1852; and it was provided that nothing in the deed contained should prevent *Paton*, or the *Bank*, from applying the proceeds of the notes, &c., to the satisfaction of such notes, so firstly and lastly falling due, although they might not have become payable in course of time; and for further securing the payment of the before mentioned sum of 3,208*l.* 8*s.* 11*d.*, and interest, to *Paton*, at the times and in manner before appointed for that purpose, *Heron* and *Dick*, being then the full and absolute owners of the

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whole of the steamboat, assigned the vessel and everything appertaining to her to *Paton*, subject to redemption on payment of 3,208*l.* 8*s.* 11*d*; with interest, at the times before appointed; and it was provided that until default should be made by *Heron* and *Dick* in such payment, they should remain in quiet possession of the vessel; and the deed contained a power for *Paton*, in case the notes and interest, or any part of them respectively, should be in arrear three months, to offer the vessel for sale, and make all necessary assignments for perfecting such sale, and so as to bar *Heron* and *Dick*; and the proceeds of the sale were, after defraying all expenses, to be applied to the satisfaction of the entire claim of the *Bank*, whether it should have become due or not, and the surplus was to be paid to *Heron* and *Dick*. And the indenture provided that the receipts of *Paton* for any moneys payable by virtue of the deed should discharge the persons holding such receipts from all responsibility for the application of the moneys thereby acknowledged to be received; and it also contained covenants for title, which appear to have been used without much regard to their meaning and effect, as I believe is very frequent in such cases, for some of them are very carefully guarded so as to make *Heron* and *Dick* liable only for their own acts, while others, if literally construed, would, by their generality, nullify this qualification.

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The bill proceeds to state that the plaintiffs had paid to the *Bank* the amount of the respective judgments which it had obtained against them respectively, and that *Heron* and *Dick* from the time of the execution of the deeds of the 20th July, 1849, had been in possession of the forty-two shares of the steam-vessel. The bill then states that it was pretended by *Heron* and *Dick* that these deeds operated as an absolute sale of the forty-two shares, whereas it insists that they were fraudulent and void, as against the other

parties, and did not amount to a sale of the forty-two shares; that *Heron* and *Dick* were merely trustees, and that these deeds operate only as additional securities to the *Bank*.

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The prayer of the bill is, that the *Bank*, or *Heron* and *Dick*, may refund to the plaintiffs the amount of their respective judgments, which must be on the ground that the transaction between the *Bank* and *Heron* and *Dick* operated as an absolute sale of the boat, and had extinguished all the debts; but the bill proceeds to ask in the alternative that an account may be taken of what is due to the *Bank* on the mortgage of the forty-two shares of the vessel and of the earnings of the vessel, and that a proportionate part of such earnings may be applied towards the satisfaction of the amount due, and any deficiency raised by sale of the forty-two shares of the vessel, and the plaintiffs' demand, might be paid out of such proceeds, and the surplus paid to the assignees of *Bethune*, or to *Heron* and *Dick*, with divers consequential directions resulting from the same view of the case. This branch of the prayer treats the transaction between the *Bank* and *Heron* and *Dick* as a mere assignment, either wholly in trust for the *Bank*, or with some beneficial interests in *Heron* and *Dick*, subject to the satisfaction of the *Bank's* demand.

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The answer of *Heron* and *Dick* to this bill states, first: That *Heron* and *Dick* paid the whole purchase-money of the boat, with the exception of a small part, to the assignees of *Richardson*; then, that it was agreed between themselves and *Bethune*, at the time of the purchase, that they should hold his interest in the boat for and until satisfaction of his proportion of the purchase money; and that by an instrument between them, dated 29th September, 1847, it was expressly agreed that in case they, *Heron* and *Dick*, should pay the whole purchase-money of the vessel,

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they should stand in the place of the assignees, and that the assignees then held a mortgage of the boat to secure such purchase-money. The object of this statement seems to be that these defendants should be at liberty to claim the earnings of the vessel or of *Bethune's* share of them, towards satisfaction of his proportion of the purchase-money, or should be entitled to the benefit of the mortgage previously held by *Richardson's* assignees; but the answer does not state whether these defendants insist upon these transactions as conferring on them any priority, and it omits to mention that the mortgage to *Richardson's* assignees was in fact released as part of the very transaction in which the deed of the 29th September, 1847, was executed. It proceeds, however, to state that they had been in possession of the vessel, and had received her earnings ever since, without molestation; that the *Bank* had notice of these defendants' interest before the registration or execution of its mortgage, and that the plaintiffs, and other endorsers on the notes of *Bethune*, did not so endorse on the faith of the mortgage. We are not informed what claim, if any, these defendants formed upon these facts.

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The answer then states that *Bethune* had afterwards executed to these defendants a mortgage on his share of the vessel, being the same mortgage as is mentioned in the bill, which describes it as a second mortgage, altogether secondary and subordinate to the security of the *Bank*, which view of the matter the answer does not impugn. It then says that the plaintiffs had notice of the transaction between the *Bank* and the defendants immediately after it occurred, and of the negotiations while they were in progress; that the plaintiffs paid the amount of these respective judgments after the execution of the deeds of the 28th July, 1849, and it concludes by stating that the vessel (meaning, I suppose, the forty-

two shares) was advertised for sale for some time before the 20th July, 1849; and that the agreement between the defendants and the *Bank* was, that the defendants should purchase the vessel (meaning of course the forty-two shares) for 2000*l.*, being more than could be obtained from any other person; and, as that sum would pay only part of the debt due to the *Bank*, that they should also purchase the balance of such debt at the amount of such balance, and that the price of the shares in the vessel and of the debt should be paid as the bill mentioned. The answer does not state that the instruments afterwards executed were in pursuance or an embodiment of this agreement. Upon this point, I may observe at once that, in my judgment, the previous agreement of the parties cannot be regarded for the purpose of influencing or governing the construction of the instruments afterwards executed. These must be construed according to the fair and reasonable meaning of their contents respectively, and such construction cannot be varied by evidence of any previous verbal agreement between the parties. I have looked at the cases cited by Mr. *Wilson* on this subject, but they only shew that where an instrument refers ambiguously to a fact, evidence of that fact may be received, in order to apply the language of the instrument to its subject-matter, which is wholly distinct from admitting evidence of the previous verbal negotiations and agreement of the parties, for the purpose of determining the construction of the written instruments deliberately executed for the purpose of expressing their final conclusion and agreement. The answer does not suggest that the instruments in question were executed in pursuance of this agreement; that they had been acted upon in this sense by both the parties to them; and that, if they do not truly embody such an agreement, they ought to be rectified, and should be enforced in accordance with it. We must intend that the defendants wish to abide by the in-

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struments as they are, and they must be construed according to their fair purport, without reference to matters *dehors*. Had the answer suggested any case of mistake, it must have been the subject of litigation between the *Bank* and *Heron* and *Dick* on one side, and the other parties interested in the question on the other; and, in my opinion, had the defendants established the case so suggested by evidence, it would have made no difference in the ultimate disposition of the matter.

The answers of the other defendants are unimportant, and simply admit the material facts stated in the bill. Upon the pleadings, therefore, it was uncertain what the respective claims of the parties were; but when they appeared in court by their counsel, it was intimated that the *Bank* and *Heron* and *Dick* desired to insist upon the instruments of July, 1849, as a sale of the forty-two shares of the boat, under the power of sale contained in the mortgage deed for 2000*l.*; and of the debts, or the balance of them, for 1200*l.*: that the plaintiffs desired to insist upon those instruments as a sale of the forty-two shares of the vessel for 3208*l.* 8*s.* 11*d.* under the power; or, if that view could not be sustained, then as an assignment of the security—claiming the benefit, however, of the defendants' view, if it should be sustained; and that *Bethune's* assignees desired to insist upon the transaction as an assignment, or, if a sale, then at 4000*l.*, the value of the forty-two shares, as shewn by the evidence; objecting altogether to the sale at 2000*l.*, and insisting upon the transaction as a mere transfer of the mortgage, with the consequential accounts.

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The evidence seems wholly unimportant; and the only question that we have to decide arises upon the construction of the instruments of the 20th July, 1849, and the consequences of such a construction.

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The question has been before the Court of Queen's Bench, not in this case, but in an action brought by, or in the name of the *Bank* against the executor and executrix of the late Mr. *Jones;* and that court decided in that case that the instruments in question operated as an absolute sale of the boat, or the forty-two shares, at 3208*l.* 8*s.* 11*d.*, and that the debt for which the action was brought had consequently become extinguished. The first question which naturally presents itself is, what effect should this determination have in this court?—I mean as binding it; for of course it is needless for me to observe that it must necessarily have the greatest weight as an expression of opinion. A power of sale in a mortgage deed is an equitable power. It is intended to enable the mortgagee to divest the equitable interest remaining in the mortgagor, and to transfer it, with his own legal interest, to the purchaser, so as to vest in him the absolute and entire interest and estate in the subject of the power. In the eye of the law the mortgagee is already the absolute owner on breach of the condition. Courts of law have sometimes occasion to decide questions of equity, as courts of equity are obliged sometimes to decide questions of law, incidentally in the exercise of their ordinary jurisdiction; but it seems to me that, whatever weight may be attributable to such decisions as expressions of opinion, they cannot bind the court which has the proper jurisdiction over the subject matter. I think, therefore, that it is open to us to entertain this question notwithstanding the judgment of the Court of Queen's Bench, without reference to the fact that that judgment was pronounced in another case; and that if the same question had arisen in that court in the present instance, it would have been open to the parties to contest the view taken in that case, and the court might possibly have arrived at a different conclusion upon the point in question.

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In considering what is the true construction of the deeds of the 20th July, we must regard them as one instrument. In this view, some things must immediately strike us as matters about which no doubt can be entertained, and all must agree. The first deed, as it may be called, although they must be considered as executed at the same time, after reciting the mortgage deed and the power of sale contained in it, proceeds to detail the different circumstances which preceded the nominal sale to *Berczy*, evidently with no other view than to introduce him as an actor in the contemplated transaction. It states that default had been made in payment of the moneys secured by the mortgage, whereby it became lawful for *Paton* to offer the forty-two shares of the vessel for sale; that a sale had accordingly been duly advertised, and had taken place at the time appointed; that no bidders appearing, *Berczy* had become the nominal purchaser of the property for the behoof of the *Bank*, for 1000*l.*; that no actual sale had been made, or assignment executed to *Berczy;* but that he had consented to join in the deed in order to pass any interest he might have. These recitals shew that the parties were well enough acquainted with the manner in which a deed under a power of sale is usually and properly framed, and furnish a striking contrast to the manner in which the immediate transaction then contemplated and in course of execution is described. The natural way to proceed, had the parties intended to exercise the power of sale, would have been to state, that the sale to *Berczy* being merely nominal, the power of sale continued unimpaired and exerciseable in the same manner as before; and that the mortgage debt continuing unpaid, the *Bank*, or *Paton*, as its trustee, had, by virtue of the power, contracted with *Heron* and *Dick* for the sale of the forty-two shares to them at such a price, and then to have proceeded to make an assignment, not of *Paton's* right, title and interest in the

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forty-two shares, but of the forty-two shares themselves absolutely, which would have involved *Bethune's* or his assignees' interest as well as that of the *Bank* and *Paton;* and *Paton* could have guarded and qualified such an assignment so as to obviate all personal liability by disclaiming any warranty of title as effectually as he afterwards did in the deed as it actually stood. There is nothing however of this sort in the deed; it expresses no intention of exercising the power of sale, or of making a sale at all; the power of sale is not again referred to; but the language which is employed is exactly such as would have been used had a transfer of the security been intended. When a sale is made under a power of sale, the party exercising the power contracts by virtue of it for the sale of the property at a certain price, which is paid to him, and he applies it in reduction or satisfaction of his debt, the purchaser merely obtaining his receipt; but, in this case, the deed states that *Heron* and *Dick* were to pay off the debt due to the *Bank*, upon having an assignment of *Paton's* interest in the forty-two shares, and an assignment of all the securities; and *Paton* then proceeds, not to transfer the entire and absolute interest in the forty-two shares, but simply his own interest; which transfer would not *per se* amount to an execution of the power of sale at all; would not divest the interest in *Bethune's* assignees or vest the absolute interest in the purchaser, but would simply convey *Paton's* interest, which was that of a mortgagee and liable to redemption. It is certainly true that had the parties professed and evinced an intention to act under the power of sale, and had stated that, in pursuance and in exercise of the power, *Paton* transferred his interest, the evidence of intention to act under and to exercise the power of sale might have been so strong as to prevail over the form of words used, and to amount to an execution of the power and a transfer of the entire interest, notwithstanding the express mention only of *Paton's* interest;

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but nothing of this sort occurs; and *Paton*, throughout the deed, very carefully and jealously limits the operation of the deed in terms to a transfer of his own interest, leaving that of *Bethune's* assignees entirely unaffected. This circumstance, if it does not conclusively negative any intention to exercise the power of sale shews the danger of relying upon any particular expressions used in the deed, without a proper apprehension of their meaning as evidence of intention; for the words to which I have alluded, construed according to their true and proper import, are absolutely incompatible with a sale under the power, and negative it as effectually as if it had been expressly disclaimed. Then this deed having expressed an intention of transferring all the securities and the mortgage-debt of the *Bank* to *Heron* and *Dick*, this object is affected in an indirect manner through the medium of the accompanying deed, whereby it is agreed that *Paton* shall collect the debts and enforce the securities, for the benefit of *Heron* and *Dick*, and apply the proceeds to the satisfaction of the first and last instalment of the new debt, which became due upon this transaction from *Heron* and *Dick* to the *Bank*, and pay the surplus, if any, to *Heron* and *Dick*. The whole is therefore applied to the use of *Heron* and *Dick*, and also stands as a security for part of the new debt contracted by *Heron* and *Dick* to the *Bank* in this transaction. *Heron* and *Dick* instead of paying the sum of 3,208*l.* 8*s.* 11*d.* to the *Bank* in cash, furnish their promissory notes for that amount, and these deeds operate as an assignment of the mortgage-debt of *Bethune*, and all the securities existing against him and his endorsers to *Heron* and *Dick* for their absolute use, and a re-assignment of them to the *Bank* in trust, to secure part (1300*l.*) of the new debt then contracted by *Heron* and *Dick* to the *Bank*, and as to the residue, in trust for *Heron* and *Dick*. These deeds then contained an assignment of the whole original mortgage-debt of *Bethune* and of all the securities existing with respect to it

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by the *Bank* to *Heron* and *Dick*, and whatever opinion may have been entertained of the value of that debt and of those securities, it was unquestionably the intention that the whole should be transferred, and had *Heron* and *Dick*, been fortunate enough to collect the whole that was due upon them, they could not have been interfered with or deprived of a single particle of it. *Bethune* and his endorsers were not intended to be benefitted by this arrangement, and the *Bank* departed with all its interest, *Heron* and *Dick* purchased the debt and securities for better for worse, and whatever they could realize upon them, they would be entitled to collect and retain. Now, it must be perfectly obvious to every one, that a sale, under the power of sale contained in this mortgage-deed, and an assignment of the debt secured by that mortgage, are as wholly incompatible and irreconcileable as it is possible for any two things to be. Every fraction of the purchase-money, payable by virtue of the sale, goes to extinguish the debt, which is transferred. If the purchase-money reaches to the whole amount of the debt, the debt is thereby *eo instanti* altogether extinguished; if it extends only to part of the amount of the debt, the debt is thereby extinguished *pro tanto*. In either case a sale of the property and an assignment of the whole debt is perfectly incompatible. One part of the deed destroys the other as effectually as if, after containing an assignment of the debt, it had proceeded to unsay everything it had said. The incompatibility is so obvious that it seems to me impossible that the two things could be intended, and as a transfer of the securities was undeniably in contemplation, because they are expressly transferred in terms which admit of no doubt; but the sale of the property is, to say the least of it, problematical, not being expressly done, and only inferred from circumstances by no means necessarily leading to that conclusion, I should say, with the utmost respect for the opposite opinion,

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and the greatest distrust of my own judgment, under the circumstances, that, judicially speaking, and without reference to what the parties have told us their intention was, which we cannot regard, and which only serves to embarrass the discussion, however, the parties may have afterwards, in the same instruments, proceeded to deal with the property as absolute owners, and whatever expressions they may have employed as descriptive of their interest, which is a way in which mortgagees frequently act; the true construction of these instruments is, that they did not operate as an execution of the power of sale either for the sum of 3,208*l.* 8*s.* 11*d.* or any less sum.

In the subsequent part of the cotemporaneous deed, *Heron* and *Dick* proceed to deal with the vessel very much as if the whole of it was their absolute property. It is to be observed that $\frac{33}{64}$ parts were so, that is to say, rather more than one-third of the vessel. I should not myself be disposed to attach much weight to particular expressions, such as those which occur in this part of the deed, whereby *Heron* and *Dick* speak of themselves as "being now the absolute owners of the whole vessel," because mortgagees frequently use expressions of this sort, and they are often employed without any intention corresponding with their precise and full meaning. Nor should I consider the form of the covenants for title material, because I believe these forms are commonly employed without any accurate apprehension of their meaning and effect, and such I think was the case here; nor should I think the absolute way in which the whole vessel is disposed of of much importance, because nothing is more common than for persons having partial interests to act in this way, especially in the creation of securities. The general power of sale also given by this part of the deed, would I think, be equally unsafe as a clue to the intention of the parties. The fact is, that by the effect of these instruments, regarded as working only

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a transfer of the interest that the *Bank* had, and placing *Heron* and *Dick* in the situation of the *Bank*, these individuals acquired a redeemable interest in the forty-two shares with a power of sale, which was then exercisable, because default had already been made by *Bethune* in payment of the amount secured. They were previously the absolute owners of the $\frac{42}{64}$ parts, and they made no distinction in their disposition of the vessel by way of security to the *Bank* between their own twenty-two parts and the forty-two parts transferred to them by the *Bank*. Upon this fact the whole argument in favor of these instruments constituting a sale under the power is founded. It assumes the form of a syllogism. *Heron* and *Dick* dispose of the forty-two shares as the absolute owners, they could only become the absolute owners by virtue of a sale under the power; *ergo*, these instruments operate as an exercise of the power. Apply the same mode of reasoning to the other view of the case in this way. The *Bank* have undeniably transferred their whole mortgage-debt to *Heron* and *Dick*; such a proceeding is utterly irreconcileable with an exercise of the power of sale; *ergo*, there was no intention to exercise the power. I think, if we compare one syllogism with the other, we shall find in the latter the conclusion resulting much more necessarily from the premises than in the former. The reasoning in favor of the sale cannot be placed on any higher ground. It by no means follows, I think, from the fact of *Heron* and *Dick* having dealt with the entire vessel as the absolute owners, that they had, or considered that they had, previously exercised the power of sale. It is not at all an improbable circumstance that they might have dealt with the forty-two shares in the same large and unconstrained manner in which they dealt with the twenty-two shares, thorugh inadvertence and not sufficiently considering the full and precise legal effect of all the provisions contained in the deed. It has required

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a more minute consideration of the contents of these instruments than I suspect they received at the hands of the parties to them, to discover their full effect.

It was not necessary that *Heron* and *Dick* should be the absolute owners of the forty-two shares in order to enable them to confer on the *Bank* a power of sale over them. They could carve such a power out of the power which was contained in the mortgage-deed, and was transferred to them by these instruments, construed as working merely an assignment of the security, and there was only one contingency, so far as I have been able to discover, in which such a power would not have been as effectual as the one which they have in terms given, namely, the improbable case, after the *Bank* had collected 1200*l.* on the secureties, and retained that amount towards satisfaction of the first and last instalments of the new debt, of *Bethune* or his assignees, or his endorsers paying the whole residue of the mortgage-debt, the *Bank* after satisfying the balance of the last instalment of the new debt, paying the remainder to *Heron* and *Dick*, and these parties then making default in paying the balance of the new debt to the *Bank*, in which case the *Bank* would not be able to exercise to its full extent the power of sale proposed to be given them by *Heron* and *Dick*, because the forty-two shares would, in that event, be re-transferable to *Bethune*, or his assignees, or the endorsers. If, however, the parties gave all the necessary considerations to, and perfectly understood, the case, this was not an improbable intention, and was a very safe proceeding on both sides; on the one hand, *Heron* and *Dick* could incur no risk by the absolute manner in which they acted, because, as regards the *Bank*, they could only be liable to the extent of their debt, for which they were otherwise liable on their notes and covenant; if *Bethune*, or his assignees, or endorsers, did not redeem the forty-two shares, and

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the *Bank* exercised the power of sale, the purchaser would acquire the absolute interest in the forty-two as well as the twenty-two shares; and if *Bethune*, or his assignees or endorsers, should redeem the forty-two shares before the power of sale should be exercised, although the *Bank* might possibly be obliged to pay to *Heron* and *Dick* any balance of the amount paid for this purpose over and above the amount of the first and last instalments of the new debt, and any other portion of it that may have become due, yet this could, of course, cause no injury or danger to *Heron* and *Dick*, and notwithstanding that, thenceforth the power of sale would be limited to the twenty-two shares; this, I apprehend, was a risk, improbable as it was, which the *Bank* were perfectly prepared to incur as the price of having the notes and judgments against *Bethune* and his endorsers as part security for the new debt, and which they could have on no other terms. It is probable, however, that the parties did not give the minute and close consideration to the matter which it required to enable them to understand fully the legal effect of all that they said and did. They probably planned this arrangement as one which suited their purpose and not doubting that they had power to carry it into effect, they have in fact attempted things which are incompatible with each other, so that the whole transaction which they have designed and attempted to execute cannot stand.

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The most perplexing provision in these instruments is, that *Heron* and *Dick* shall, until default in payment of the new debt, or some part of it, remain in the quiet possession. It is true that they were then in possession as second mortgagees, and it might have been meant that they should continue in possession in the same character. If they were to remain in possession under the mortgage of the *Bank*, the consequence would be that all the earnings of the

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forty-two shares would go towards the reduction of the mortgage-debt, which in fact was held by the *Bank* in security for part of the new debt. If such were the case, I think the effect was not perceived, and therefore furnishes no proof of intention. These deeds are a bundle of inconsistencies; it is impossible to give full effect to every part of them; and our plain duty is to adopt such a construction of them as will give the greatest possible effect to the whole, or the greatest possible portion of them.

With great submission, it appears to me that the construction which treats these instrument as a sale of the forty-two shares for 3,208*l.* 8s. 11*d.*, defeats fully one-half of the intention, because it nullifies altogether the transfer and re-transfer of the debt and collateral securities, upon which I apprehend the parties placed great dependance. That when a transaction involves things which are incompatible with each other, it is the duty of the court to put such a construction upon it as will best effectuate the general intention of the parties, *ut res magis valeat quam pereat* will not be disputed: It is a position for which I need cite no authority. The case mentioned by Mr. *Wilson* (*a*) is however a very strong instance of it. Now it is, I think, perfectly obvious that the transfer of the securities was regarded both by *Heron* and *Dick* and by the *Bank* as a very essential part of this transaction, and any construction which will reduce this part of their agreement to a nullity will almost wholly defeat their intention; on the other hand, the only inconvenience arising from the construction which treats this transaction as an assignment of the mortgage and a re-assignment by way of security for the new debt, is, that in a most improbable contingency, and then without any practical inconvenience, the new power of sale will not operate to its full extent as expressed. The clause

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(*a*) Bainbridge v. Wade.

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providing for enjoyment until default, should, I think, be confined as to the forty-two shares; to enjoyment in the character in which *Heron* and *Dick* were then in possession—namely, that of second mortgagees. In this way, I think, the greatest possible effect is given to the whole instruments and the general intention of the parties best effectuated. I should have been of the same opinion had the parties professed to act under the power of sale, which they have not done. Suppose the deeds to have stated expressly that *Paton* had contracted with *Heron* and *Dick* for a sale of the forty-two shares, under the power, at 3,208*l.* 8*s.* 11*d.*, and that *Paton* had proceeded to transfer these shares to *Heron* and *Dick*, in pursuance and by virtue of the power, and in consideration of that sum, and the *Bank* had afterwards made an assignment of the mortgage debt and all the other securities relating to it, it would have been impossible to have given effect to every part of this transaction, and the court would have been compelled to put such a construction upon it as would best have effectuated the general intention of the parties. It would, with this view, have considered one part of the deeds as qualifying the other and as the part which purported to be a sale of the forty-two shares could not operate as such, because qualified by the assignment of the debt, which was incompatible with it, the whole transaction would have operated as an assignment, because of course it would operate as far as possible between the parties to it, so long as neither sought to upset it; and the clause relating to quiet enjoyment until default would have received a similar qualification to that already mentioned.

Judgment.

Suppose, on the other hand, the deeds had purported to be a sale, under the power, of the forty-two shares, for 2000*l.* and a transfer of the debt and the other securities to the extent of 1,200*l.*, the result, I

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think, would have been the same. Such a transaction would not, in my judgment, be allowed to stand. A power of sale in a mortgage-deed is a trust, and its exercise is regarded with a jealous eye by the court, and must be rigidly judged. Any sale under such a power must be a fair, open and unambiguous proceeding: it ought to be complete in itself; the moneys produced by it should be applied in satisfaction or reduction of the debt in the first instance, and if not sufficient for its satisfaction, the remainder of the debt, when its amount has been ascertained, may be transferred as a distinct transaction. It is the duty of the mortgagee to get as much as he can for the property, but this practice, if it were allowed, would militate strongly against the fulfilment of this obligation. The defendants wish us to view the transaction in the light in which I have hypothetically represented it; but, as I have already hinted in another part of my judgment, it would not better their case to do so; they would still be assignees of the mortgage, and not purchasers of the forty-two shares of the vessel. The interest of *Bethune*, his assignees and endorsers, could be divested only by an effectual sale under the power; if the intended sale be ineffectual, as such, their interest is not divested; and if the transaction be still operative between the immediate parties to it, it works and can work only an assignment of the security. Nor is it necessary, in such case, that the mortgagor should impeach it; he cannot in fact do so. He has no right to set aside a transaction between third parties, who are desirous that it should operate as far as by law it can. He could only insist that it was ineffectual to defeat his equitable interest and pray to redeem, and his sureties are in the same situation. In the present instance indeed it suits the purpose of the sureties to treat this transaction as a sale at 3,208*l.* 8*s.* 11*d.*, because thereby the whole debt is extinguished. The defendants *Heron* and *Dick*, however, object to this

Judgment.

construction, and I think it untenable. The sureties may perhaps be willing to adopt the construction proposed by the last-named defendants, and to treat them as purchasers at 2000*l.*, but to this the assignees of *Bethune* object. On the other hand, it would be unjust to *Heron* and *Dick* to consider them as purchasers at 4000*l.*, whereby they would become bound not only to relinquish the collateral securities and the debt, but to pay the assignees of *Bethune* 800*l.* The result is, that the transaction which the parties cannot concur in ratifying in any one of the shapes I have mentioned, must be regarded as an assignment of the security; and the sureties having no power to set it aside, so long as the immediate parties to it are willing to abide by it, can pray only relief suited to that state of the case. This they have in fact done by this bill, in which I think they have treated the transaction as a sale or as an assignment in the alternative.

Judgment.

What the nature of this relief is forms the next point for me to consider. I may premise that I have no doubt that, although the mortgage was executed after the creation of the securities on which the sureties are liable, they are entitled to the benefit of it on payment of the debt. This is so consonant to reason that it would require a much clearer authority than the case of *Wade v. Coope* to convince me of the contrary. The question is, what effect has the payment of the amount of the judgment upon the relative rights of the plaintiffs, and of the *Bank*, and *Heron* and *Dick*, with respect to the mortgage? This mortgage was no doubt obtained by the *Bank* for its own security; but it is equally clear that when one of the debts, which it was made to secure, was paid, the mortgagees became to a certain extent trustees for the sureties who paid it. If they did not become trustees to the extent of making the sureties co-mortgagees, so as to entitle them to an immediate share

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of the earnings—which I think they did not—they must have become so to the extent of entitling the sureties to the benefit of the earnings, so soon as the residue of the debt should be paid; and so as to interpose the sureties between such residue and any second mortgage, which the creditor or any third person might have, as intermediate incumbrancers. The sureties then, who have paid the portion of the debt for which they were liable, seem to be in the position of second mortgagees, the property being in possession of the first mortgagee, but he electing to hold as third mortgagee. If the first and third mortgagee were different persons, the intermediate incumbrancer would have a right under such circumstances to a receiver, without prejudice to the rights of the first mortgagee; can the result be different because the first and third incumbrances are united in the same individual? Clearly not. The consequence is that the sureties have a right to say to the creditor, "hold if you please as first mortgagee, so that your incumbrance may be discharged, and the property may devolve to me; but if you elect to hold as third mortgagee, I will have a receiver." This language on the part of the sureties would, of course, bring all parties to the arrangement of satisfying the incumbrances in their order. It would seem that although the *Bank* would have a right to insist that the residue of the debt should be paid before the sureties could have any benefit; yet as between the sureties themselves, the debts must be considered as discharged *pari passu*. In the present instance that principle has no practical application, under the circumstances. It would not seem that the sureties could demand a sale, the creditor having a right to hold his security until he is paid the whole of his demands; but they might, it would appear, redeem, for the purpose of obtaining the benefit of their security.

Judgment.

In regard to the application of past earnings, I

think that *Heron* and *Dick* must be decreed to have been in possession as second mortgagees, until the filing of the bill. Such was the case, of course, until the transaction of 1849. Had the *Bank* and the sureties permitted *Bethune* to remain in possession, he would have received the earnings, without any liability to account for them. The same rule must apply to a puisne incumbrancer claiming under him. The *Bank* and the sureties not interfering, the puisne incumbrancers received the earnings, without any liability to account to them for them, but as between themselves and *Bethune* in reduction of the second mortgage. The first mortgagee could have taken possession, had he thought fit; the sureties could have paid the debt and stood in his place; or they could have compelled him to sue for their benefit; or they could have compelled the principal debtor to pay the debt, or so long as the pledge remained in his possession, or in the possession of any puisne incumbrancer, could have compelled the application of the annual proceeds of it to the satisfaction of the debt (*a*). But none of these things having been done, the mortgagor, or the puisne incumbrancer, would receive the earnings without any liability to account for them to the prior incumbrancer or the sureties. Did the assignment of the first mortgage to the second mortgagee make any difference? I think not. All that the sureties could expect or claim would be that they should not be injured by such a proceeding, not that they should receive any positive benefit from it. They stood in precisely the same position after as before the assignment, and had exactly the same rights. The second mortgagee, so long as they did not interfere, could elect in what character he would receive the earnings. That they have elected is beyond doubt, because they obviously intended to act according to the agreement between themselves and the *Bank*, and it would have been

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(*a*) Wright v. Morley.

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contrary to that agreement that they should immediately, upon the assignment, have assumed the possession under the first mortgage. I think, therefore, that up to the filing of the bill the earnings must be considered as applied to the second mortgage, but from that time to the residue of the first mortgage. When this shall have been satisfied, the plaintiffs will be entitled to have the earnings applied to the satisfaction of their respective claims. This relief should, I think, be given without costs. Neither party has been quite right in this litigation, and each, I think, should pay his own costs. *Hodges v. Shaw, ex-parte Rushforth, Bowker v. Bull, Parsons v. Briddock, Armitage v. Baldwin,* are cases very apposite to the question as to the nature of the relief to which the plaintiffs are entitled.

Judgment.

SPRAGGE, V. C.—In this cause two leading questions are presented for consideration; one, whether the instruments of the 20th July, 1849, operated by way of *absolute* sale and transfer, or merely by way of assignment, subject to redemption by *Bethune* or by those standing in the relation of sureties for *Bethune;* and the other, what was thereby transferred or assigned to *Heron* and *Dick* in consideration for their assuming to pay *Bethune's* debt to the *Bank;* whether *Bethune's* forty-two shares in the steambout, or those shares *and* the bill, notes, cheques and judgments held by the *Bank* against *Bethune* and his endorsers; or, in other words, whether the 3208*l.*, the amount of *Bethune's* debt to the *Bank,* which amount with interest *Heron* and *Dick* agreed to pay to the *Bank* at certain times agreed upon between them, was the agreed purchase money for *Bethune's* shares in the boat, or the agreed purchase money for those shares and the bills, notes, cheques and judgments held by the *Bank.*

In construing the instruments they must be looked at together; they relate to the same subject matter,

and are in fact one transaction; each in terms refers to the other; and they must, I conceive, be construed precisely as if the provisions of both were contained in one instrument.

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As to the first point: I think that the transfer is absolute; that Mr. *Paton* did not simply, as mortgagee, assign to *Heron* and *Dick* the mortgage property, subject to redemption in their hands as it had theretofore been in his, but that he made the transfer in exercise of the power of sale; and that, if the power was duly and properly exercised, there was an absolute transfer of the forty-two shares in the boat.

A great portion of the language of the instruments would be appropriate either to an assignment subject to redemption, or to an absolute sale and transfer under the power; but there is much that appears to me inconsistent with an assignment subject to redemption. By the terms of the instruments, the payment of the *Bank* debt by *Heron* and *Dick* was spread over three years; and it was provided, that they should have quiet enjoyment of the vessel until they (*Heron* and *Dick*) made default: this was correct if a sale, but wrong if a simple assignment; because, in the latter case, *Bethune* or his sureties might redeem at any time, and then *Heron* and *Dick's* right to enjoy would cease whether they had made default to the *Bank* or not. It is also provided, that, until default, *Heron* and *Dick* should take the earnings and profits of the vessel *to their own use*, a thing they would be entitled to if purchasers of the vessel, but not if merely assignees of the mortgage. Again, the terms of the *habendum* appear to me to indicate an intention by the parties that the transfer should be absolute: the mortgagee had power either to assign subject to redemption or to sell; and he "granted, bargained, sold, assigned, transferred and conveyed" to *Heron* and *Dick*, to hold to them for

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their own use and benefit, *so far as he* (*Paton*) *had power to convey the same :* and the same is also done in the like terms by Mr. *Berczy*, who was the nominal purchaser upon the occasion of *Bethune's* shares in the boat having been previously offered for sale under the power. In the instrument transferring the vessel the power of sale is recited, and the nominal purchase by *Berczy* on behalf of the *Bank*, then the agreement by *Heron* and *Dick* to pay off the debt to the *Bank* upon receiving a transfer, assignment and conveyance of *Bethune's* shares in the vessel, and a transfer and assignment of the claim of the *Bank* against *Bethune* or any one else for or with him upon bills of exchange, judgments or otherwise; and then the transfer is made in the terms which I have stated. The instruments read to me certainly as reciting an abortive sale to *Berczy*, and as intending to make and as making an effectual sale to *Heron* and *Dick*.

Judgment.

Again: In that part of the instrument secondly set out in the pleadings where the vessel, not the forty-two shares only, but the whole vessel, is mortgaged by *Heron* and *Dick* to *Paton*, the forty-two shares having by the other instruments been transferred to *Heron* and *Dick*, they preface their mortgage by the words, "they, the said *Andrew Heron* and *Thomas Dick*, being now full and absolute owners of the whole of the said steamship or vessel called the *Chief Justice Robinson*." The words used are very unequivocal, and in my mind derive additional force from the circumstance of *Heron* and *Dick* having previously been owners of the remaining shares in the vessel; for the words used imply, not that by the assignment they became absolute owners in some sense, but that they thereby became so *in the same sense* in which they had theretofore been absolute owners of the residue of the vessel; no distinction is made between the nature and quality of the ownership of the several portions.

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The power of sale in this last instrument also contains a provision consistent with the transaction being a sale of the vessel, but inconsistent with its being an assignment redeemable: it provides for the payment of any surplus to *Heron* and *Dick*; the property so contemplated to be sold in the event of *Heron* and *Dick* making default to the *Bank* was theirs if there was an absolute sale, but if only an assignment subject to redemption, by *Bethune* and his endorsers, the thing sold, or forty-two out of sixty-four shares, belonged to *Bethune*, and it would be a sale of the thing pledged; and after satisfying that for which it was pledged, the surplus would belong not to *Heron* and *Dick* but to *Bethune*, at least in the proportion of the number of shares which he held in the boat. This provision is another instance showing the mind and intention of the parties that there should be a sale of the vessel. The terms of the power of sale which I have just referred to lead to the same conclusion; for if the transaction in question was not an exercise of the power of sale, but an ordinary assignment by a mortgagee to an assignee, the mortgaged property could only be sold under the power contained in the original mortgage deed, the vessel remaining the property of *Bethune* the mortgagor: but here is an agreement, to which the mortgagor is no party, providing the mode and terms of sale, and these too differing from those contained in the original mortgage; so that the mortgagor's property would be sold, not under the power of sale contained in his mortgage, but under another power to which he was no party. Indeed, looking at these instruments, I do not know that they contain anything to shew that the parties thereto contemplated a mere assignment of the mortgage security subject to redemption by *Bethune* and his endorsers.

Judgment.

Upon the second leading question in this cause my opinion is, that both *Bethune's* shares in the boat

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and the securities held by the *Bank* against himself and his endorsers were transferred to *Heron* and *Dick*, for the consideration of the 3208*l.* which they engaged to pay to the *Bank;* that the *Bank* sold both to them for 3208*l.*; and that they agreed to pay that sum, not for *Bethune's* shares in the boat, but for those shares *and* the securities held against *Bethune* and his endorsers. I cannot help thinking that the instruments themselves are tolerably explicit upon this point: they recite that it had been agreed that *Heron* and *Dick* should pay off the claim of the *Bank* against *Bethune* upon receiving a transfer, assignment and conveyance to them of the shares in the vessel mortgaged by *Bethune* to *Paton*, and upon the *Bank* executing to them a transfer and assignment of all the claims and demands held by the *Bank* against *Bethune* or any one else for or with him, upon notes, bills of exchange, judgments or otherwise; and the agreement so recited is then carried out by the instruments, the assignment of the shares in the vessel being effectuated by one instrument, and the assignment of the *Bank* claims against *Bethune* and his endorsers by the other; and, as I read the instruments, the 3208*l.* was no more the purchase money of the boat only than of the securities held by the *Bank* only, but of the one as much as the other, though in what proportion for each respectively, or whether the gross sum was apportioned by the parties, or intended to be apportioned, does not appear upon the face of the instruments.

Judgment.

Unless this construction be correct, this anomaly, it appears to me, must follow—that the boat is sold at 3208*l.* (though the instruments nowhere say so), and the securities held by the *Bank* are transferred to *Heron* and *Dick* as a mere gratuity: and it is provided, that they shall be collected for the benefit of *Heron* and *Dick*, without *Heron* and *Dick* paying any consideration for them.

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Merely as between the *Bank* and *Heron* and *Dick*, apart from the rights of third persons, there was, I apprehend, nothing to prevent the sale of the boat and the securities together at a gross sum, and at any sum that might be agreed upon between them. At the same time, I incline to think that it is open to the parties to shew by parol evidence, what portion of the gross sum was the consideration for the purchase of the boat, and what portion for the purchase of the securities.

Conceiving, then, as I do, that there was an absolute sale, and not a mere assignment subject to redemption, from the *Bank* to *Heron* and *Dick*, and that such sale was of the notes and other like securities held by the *Bank* for the sum of 3208*l.*, upon each of which points I have the misfortune to differ from another member of the court, the question arises, whether the plaintiffs are entitled to any relief in respect of these transactions, and whether they can obtain it upon the case made by their pleadings and evidence.

Judgment.

The case made by the plaintiffs' bill is, not that there was a sale of *Bethune's* shares in the boat and of the notes and other like securities held by the *Bank*, for 3,208*l.*, and that such a sale of the boat, with the other securities, under the circumstances in which it took place, was not a due and proper exercise of the power of sale, and cannot in equity be sustained as a sale; but the case made is, that the *Bank* agreed with *Heron* and *Dick* to assign to them *Bethune's* shares in the vessel, subject to redemption, and that by the instrument of the 20th July, 1849, they did so assign them. I do not mean to say that the sale of the vessel and other securities together for 3,208*l.*, which, in my opinion, took place, was an undue or improper exercise of the power of sale contained in *Bethune's* mortgage to *Paton*, because that is a point not argued

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and not raised by the pleadings; but in my view of the case, if the plaintiffs are entitled to relief, it must be upon some such ground. In the latter part of the bill a sale is alluded to, but not in such a way as to raise the question to which I have referred; it is alleged that the defendants pretend that the transaction alluded to amounted to an actual sale and purchase of *Bethune's* share in the boat; and it is charged that such transaction was fraudulent and void as against all parties other than the *Bank*, *Paton*, *Heron* and *Dick*, and that the same created no sale or purchase of *Bethune's* forty-two shares in the boat; whether the plaintiffs meant in their bill to deny the correctness of what they say is pretended by the defendants, is left in doubt; whether they meant to charge that the transaction is fraudulent and void, whatever be its operation, or only as a sale, is also left in doubt; and as to the allegation that "the same created no sale or purchase of the said forty-two shares," it may mean that the proper construction of the instruments is that they were a mere assignment subject to redemption, as previously alleged, or that there was an improper exercise of the power of sale, and so that the same created no sale or purchase of the forty-two shares; but such improper exercise of the power of sale is not alleged in the bill. The plaintiffs do indeed complain that the *Bank* having offered to them, and other endorsers of *Bethune's* paper, to sell them *Bethune's* shares for 3,208*l.*, which offer the plaintiffs, *Sherwood* and *Brown*, were prepared to accept, did, pending negotiations with other endorsers, and without notice to *Sherwood* and *Brown* or the other endorsers, withdraw their offer and enter into the agreement which has been before referred to with *Heron* and *Dick*; but this certainly is not put as impeaching the transaction between the *Bank*, *Paton*, *Heron* and *Dick*, as an improper exercise of the power of sale. The bill, therefore, makes no case impeaching the transaction as an

Judgment.

improper exercise of the power of sale, and therefore no relief can be given upon that ground. If the bill had been framed with a double aspect, the question might have been properly raised, but upon this bill no such case was presented for the defendants to answer.

I think that the plaintiffs may properly be allowed to amend their bill, if they should be advised so to do, in order to raise the question to which I have adverted.

[For the purpose of having a decree drawn up, which could be appealed from, if desired, the *Vice-Chancellors* concurred in the judgment pronounced by his Lordship the *Chancellor*.

November 5.

In preparing the minutes of decree a question arose as to whether the decree should be a general direction for the costs to be paid by the *Bank*, *Heron* and *Dick*, or whether *Heron* and *Dick* should not be ordered to pay them, and the point was now spoken to by

Statement.

Mr. *Wilson*, Q. C., for the *Bank*, and

Mr. *Mowat*, for *Heron* and *Dick*.

Argument.

On behalf of the *Bank*, it was submitted that *Heron* and *Dick* should, under the circumstances, be directed to pay the costs: neither fraud nor concealment having been practiced by the *Bank* or its officers, no ground existed for charging the *Bank* with these costs. If so charged, it would result in the *Bank* being obliged to sue *Heron* and *Dick* upon the covenant of indemnity contained in the agreement between the parties. Besides, the *Bank* had no

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interest in this litigation further than to support the claim of *Heron* and *Dick*—*Potter v. Sanders* (*a*), *Trollope v. Routledge* (*b*).

Argument.

On the part of *Heron* and *Dick* it was contended that the covenant referred to did not apply to costs incurred in suits brought against the parties thereto; but only in respect of costs incurred in suits brought for the purpose of collecting the notes transferred to *Heron* and *Dick* by the *Bank*, and had been introduced into the conveyance in consequence of the provisions that they should be sued for in the name of the *Bank*. The general rule is that costs follow the event; still there are frequent exceptions: one of those exceptions, usually mentioned in the books of practice, is where the point to be settled is doubtful; and submitted that, under these circumstances, the decree should be without costs, but, if otherwise, then the direction to pay costs must be general, referring to *McDonald v. Elder* (*c*), where this principal had been acted upon.

Judgment.

The court refused to make any special direction as to which of the defendants should pay the costs.

Decree.

Declare that the transactions between the *Bank* and the defendants, *Andrew Heron* and *Thomas Dick*, constituted and were an absolute sale of the interest of *Donald Bethune*, and of the said *David Patterson*, *John McMurrich* and *Duncan McDonell*, as his assignees in the steamer *Chief Justice Robinson*, for the amount due by the said *Donald Bethune* to the said *Bank* at the time, being the 20th July, 1849; and, that, under and by virtue of the conveyance executed to the said *Andrew Heron* and *Thomas Dick* in pursuance of such transactions, all the right and interest of the said *Donald Bethune* in the said steamer *Chief Justice Robinson*, became and was vested in the said defendants *Andrew Heron* and *Thomas Dick* absolutely.

Also, that the endorsers upon notes of the said *Donald Bethune*, for the securing of which the interest of the said *Donald Bethune* had been assigned to the said *Bank*, were thereby discharged in respect of their liability for any part of the said debt

(*a*) 6 Hare 1. (*b*) 1 DeG. & S. 662. (*c*) *Ante* vol. 1, p. 231.

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And also, that the said *Henry Sherwood* and *James Browne*, being two of such endorsers, the said plaintiffs were entitled to be reimbursed all and every sum and sums of money paid by the said *Henry Sherwood* and *James Browne*, or either of them, to the said *Bank*, as such endorsers, after the said conveyance to the said defendants *Andrew Heron* and *Thomas Dick*, except for and in respect of the costs incurred up to the date of such conveyance—*Order* and decree the same accordingly.

And it being admitted by counsel for all parties that the moneys so paid by the said *Henry Sherwood*, over and above such last mentioned costs, amount to 453*l.* 16*s.* 6*d.*, and that the interest on the same form the respective times of payment up to 9th December, 1852, amounts to 63*l.* 9*s.* 5*d.*, making together 517*l.* 5*s.* 11*d.*—*Order*, that the said last mentioned sum, with interest in the said principal sum of 453*l.* 16*s.* 6*d.*, from the said 9th December up to the day of payment be paid by the said *Bank*, to &c., within, &c.

And it being also admitted by counsel for all parties that the moneys so paid as aforesaid by the said *James Browne*, over and above the costs so excepted as aforesaid, amount to 256*l.* 9*s.* 10*d.*, and that the interest on the same, from the respective times of payment up to 9th December, 1852, amounts to 64*l.* 5*s.* 7*d.*, making together 320*l.* 15*s.* 5*d.*—*Order* that sum, with interest on the said principal sum of 256*l.* 9*s.* 10*d.*, from the said 9th December up to the day of payment, be also paid by the said *Bank*, to &c., within, &c. *Order* that defendants *Andrew Heron* and *Thomas Dick*, do repay to the said defendants, the *Bank of British North America*, the sums so to be paid by the said *Bank*, within six months after the same are paid. *Order* that the said plaintiffs do pay to the said defendants other than the said *Andrew Heron*, *Thomas Dick*, *Thomas Paton* and the *Bank of British North America*, their costs of this suit, and add the same to their own costs, which the said defendants, the *Bank of British North America*, *Andrew Heron* and *Thomas Dick*, are hereby ordered to pay to the said plaintiffs.

Refer it to the master to tax, &c.

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Specific performance—Parol agreement.

March 7. September 7.

Where a person already in possession of property entered into a contract with the agent of the proprietor for the purchase of the property, and it was the intention of both parties that the purchaser should go on making improvements, and did so, with the knowledge of the agent, without objection on his part, the improvements are such an acting on the contract as will take the case out of the Statute of Frauds.

Where the agent of a person resident out of this province, sold, by parol, half a lot of land of the principal, and afterwards wrote and sent to him a letter in which the agent detailed the terms of the contract, but mentioned the whole instead of the half of the lot, and the mistake was clearly proved; Whether this would be a sufficient note in writing to satisfy the provisions of the statute—*Quære.*

The bill in this cause stated to the effect, that the defendant was the owner of a large quantity of wild

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lands in this province, upon portions of which parties had settled and made some improvements: that the defendant had appointed Messrs. *Crooks* and *Smith*, of Toronto, his agents for the management and sale of those lands, and, in the discharge of their duty as such agents, had visited the lands and announced to the settlers thereon the determination of the defendant to give to parties in possession a preference in purchasing, they giving as much for the land as could be obtained from others; that the plaintiff had purchased the possessory right of a party thus in possession, and afterwards applied to the agents to become the purchaser thereof, when it was agreed that he should be allowed to purchase the property he was so in possession of, being 100 acres in the township of King, at the price of one pound fifteen shillings per acre. A letter was thereupon written by the agents to the defendant informing him of the sale, and the price obtained, but, by mistake, the letter stated that the whole lot had been sold, instead of the half only.

Statement.

On the arrival of the defendant in this country, he was applied to, on behalf of the plaintiff, to execute a conveyance of the land so bargained for, but the defendant repudiated the contract and refused to execute a conveyance; thereupon the present bill was filed.

The agents of the defendant had both been examined in this suit, and their testimony fully corroborated the statements of the bill. Other evidence in the cause shewed that the improvements made by the plaintiff were of a valuable description, and some of them such as no one would be likely to have made unless with a view to becoming the owner of the property.

Two witnesses, *Thomas W. Tyson* and *James Lawrence*, had been examined in the cause, as to the

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nature of the improvements made by the plaintiff. From their evidence it appeared that the party whose right the plaintiff had purchased had cleared about fifteen acres; the plaintiff about sixty-five acres, during his occupancy: and the evidence tended to shew that it was subsequently to the agreement to purchase that his improvements were made. These witnesses stated: "The plaintiff is a very particular farmer—I allude to the careful manner in which he ploughs, lays out his farms, &c., and from his general method of farming—I considered the plaintiff thought he was the owner of the lot, from the particular manner in which he made his clearings, dug ditches, removed stones and stumps, and did other things on the lot. Squatters would not have taken such care in making improvements; they generally only fence with a brush fence—make a fence of trees and bushes; they generally only clear the best land, and in patches here and there. The plaintiff cleared with much more care and regularity than any one who was in possession before him. * * * No house is on the lot." Statement.

Mr. *Turner* and Mr. *Morphy*, for the plaintiff, referred to *Willis v. Stradling* (*a*), *Mundy v. Joliffe* (*b*), *White* and *Tudor's* Leading Cases, vol. 1, page 513, and cases there cited, and *Story* on Agency, 61. Argument.

Mr. *Vankoughnet*, Q. C., for the defendant. The acts of part performance relied on by the plaintiff are nothing more than every squatter does, when he takes possession of a lot of wild land, as he can only obtain a livelihood from it by improving the property to some extent; and submitted that the court could not say that the improvements shewn in this case were such as to shew that a contract such as is sought to be enforced must have existed between the parties. A

(*a*) 3 Ves. 378. (*b*) 9 Sim. 413.

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memorandum of contract must be entered into to evidence the agreement—*Johnson v. Dodgson* (*a*). He referred, amongst other cases, to *Lister v. Foxcraft* (*b*), and *Frame v. Dawson* (*c*).

THE CHANCELLOR.—This bill prays the specific performance of a *verbal* contract for the purchase of the east of lot number twenty-nine in the tenth concession of the township of King.

It is admitted that Messrs. *Crooks* and *Smith* were the duly authorized agents of the defendant; and it is distinctly proved that, on his behalf, they contracted to sell the premises in question to the plaintiff for 175*l*.

It was suggested, however, by the learned counsel for the defendant, although the argument was not pressed, that this contract is unauthorized by the power, and therefore void. It was said that the defendant's agents were only authorized to act "under his instructions;" and that, as no instructions had been given for this sale it was therefore void.

Judgment.

I do not agree in that construction of the instrument. But the question of construction becomes unimportant in the present case, because the defendant was informed of this sale by his agents, and not only did not repudiate but expressly sanctioned it. He instructs his professional advisers in Scotland to clear up the objection to his title suggested by the plaintiff; and in a note to their letter upon that point he himself adds: "As to the other parts of your letter you must, as heretofore, exercise your own discretion." It is quite plain, therefore, upon the principle, "*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*," that there is no color for this objection.

(*a*) 2 M. & W. 653. (*b*) Gilb. Eq. R. 411. (*c*) 14 Ves. 336.

To take this case out of the statute the plaintiff relies: First—Upon the letter of the 26th September and the answer thereto, as constituting a sufficient memorandum. Secondly—Upon part performance.

As to the first ground, the defendant objects to the sufficiency of the memorandum; but the view which I take of the case makes it unnecessary that I should express any opinion upon that point.

With respect to the acts of part performance, the defendant insists that they are insufficient to take the case out of the statute. As to the possession, he contends that it was not delivered in pursuance of the contract, but had been acquired by the plaintiff previous thereto, wrongfully; and he argues that the continuance of such wrongful possession, with the assent of the defendant, is not an act of part performance. He argues further that the other acts of part performance relied upon by the plaintiff are likewise insufficient, upon the principle that nothing can be regarded as an act of part performance which does not of itself, irrespective of extraneous evidence, indicate, and that unequivocally, the very agreement of which it is said to have been an act of part performance; and that the improvements which the plaintiff is admitted to have made want altogether this character, as they are plainly referrible to the unauthorised occupation previously acquired by him, to which some of the improvements are confessedly to be attributed. Judgment.

This point arises so frequently, and is of so much practical importance in this country—the argument adduced to us, moreover, receives so much countenance from the language to be found in some of the cases, that I am anxious to state clearly the reasons and authorities upon which, in my opinion, it cannot be sustained. But, before entering upon that enquiry,

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I may state here that I lay out of the case altogether the plaintiff's purchase from *Walker*. That transaction may have been entered into, I have no doubt was entered into, with a view to the subsequent purchase; but, confesssedly, it was not the result of that contract, but preceded it, and obviously, therefore, cannot be regarded as an act of part performance. I agree also that possession was not delivered in pursuance of this contract, but had been obtained by the plaintiff previous to and irrespective of it. Upon the rest of the case, however, I am of opinion, that the continuation of the plaintiff's possession and the melioration of the estate by him, under the circumstances stated in the evidence, were acts of part performance sufficient to take the case out of the statute.

Judgment.

Lister v. Foxcraft (*a*), decided by the House of Lords in 1701, is the leading authority upon this subject. There the plaintiff had agreed with one *Isaac Foxcraft* to pull down part of a messuage belonging to him and to erect in its room fourteen other messuages, in consideration whereof he was to receive a lease for ninety-nine years. There was no memorandum of this agreement within the statute; but the plaintiff having entered into possession and erected the messuages in pursuance of the agreement, filed his bill against *Foxcraft* for specific performance. This bill the Lord Keeper *Wright* dismissed; but in the House of Lords the decree was reversed and specific performance decreed.

The report of this case is unsatifactory in one respect, that it does not furnish us with the reasons upon which the House of Lords reversed the decree of the Lord Keeper. The principle of these cases, indeed, would seem to have been imperfectly understood for many years after this decision in the House of Lords; for in *Savage v. Foster* (*b*), decided in 1723,

(*a*) 1 Colles, P. C. 108. (*b*) 9 Mod. 37.

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Lord *Macclesfield* says: "contracts *executed in part*, are not always within the statute, though executory contracts are;" and in *Whitbread v. Brockhurst* (*a*), decided in 1784, Lord *Thurlow* says: "There certainly are cases which have considered an agreement which has been partly executed as never having been within the original view of the statute; and this has been a ground to induce the Court of King's Bench, as I am told, to determine the case to be entirely out of the statute."

But it has been long settled. I apprehend, that the ground, or, at least, one ground, upon which equity proceeds in such cases—a ground in itself sufficient for their determination—is fraud; a species of fraud cognizable in equity only. Courts of equity do not proceed, however, with reference to these cases upon any exceptional ground. Cases of part performance are but particular examples of the application of a general well settled principle which prevails extensively as well in courts of law as in courts of equity. *Savage v. Forster*, before cited, illustrates that proposition. There Mrs. *Forster* being entitled to an estate, as tenant in tail, was aware that a settlement was about to be made, on the marriage of the plaintiff, affecting it, but refrained from giving her notice of her title; and on a bill filed by those claiming under the settlement, for the purpose of having it established against the tenant in tail, Lord *Macclesfield* said: "Where there is a parol agreement made for a lease, and the lessee, by virtue of such agreement, enters and builds, this court will establish is on the foot of fraud in the lessor, notwithstanding the Statute of Frauds." * * * "Now when anything in order to a purchase is publicly transacted, and a third person know thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser notice of such right, he shall never afterwards

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(*a*) 1 B. C. C. 417.

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be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser."

In *West v. Jones* (*a*), recently decided by Lord *Cranworth*, that learned judge describes the general principle to which I have been adverting in these words: "Where a party has, by words, or by conduct, made a representation to another leading him to believe in the existence of a particular fact, or state of facts, and that other person has acted on the faith of such representation, there the party who made that representation shall not afterwards be heard to say that the facts were not as he represented them to be." The language of Lord *Cottenham*, in moving the judgment of the House of Lords in *Hammersley v.* The Baron *DeBiel* (*b*), is to the same effect: "A representation made by one party," he says "for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of the court, for the purpose of realizing such representation." And, in delivering judgment in *Nicholson v. Hooper*, which proceeded on this principle, that great judge said: "A party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title, against a title created by such other person, although he derive no benefit from the transaction."

Judgment.

It is quite obvious, I think, that cases of part performance fall within this general principle. The fourth section of the Statute of Frauds, so far as it affects contracts or sales of land, prescribes a rule of evidence for the protection of parties, which it is quite competent to them to waive. Now, if representations actual, or implied from conduct, be sufficient to estop

(*a*) 1 Sim. N. S. 205. (*b*) 12 C. & F. 62.

a party from asserting his undoubted title, in opposition to such representations, why should they not be sufficient to estop him from setting up the rule of evidence prescribed by the Statute of Frauds? In *Carter v. Bœhm* (a), a case somewhat analogous in principle, Lord *Mansfield* said: "What has been often said of the Statute of Frauds, may with more propriety be said of every rule of law drawn from principles of natural equity to prevent fraud—*that it should never be so turned, or construed, or used to protect or be a means of fraud.*" And if one who has encouraged, or suffered another to deal with property as his own, on the faith of a parol agreement, and to expend money in the melioration of it, were permitted afterwards to set up the Statute of Frauds as a defence to a bill for specific performance, would not that be, manifestly, to construe, turn and use the statute for the protection of fraud? The argument is, I think, *a multo fortiori*."

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Judgment.

This is not, however, the conclusion of reason merely, but seems equally clear upon authority. In a case already cited, Lord *Thurlow* says: "*I acknowledge I always thought that the court considered it as fraudulent in the party to make the contract and to lead on the other party to lay out his money in the melioration of the estate, and then to withdraw from the performance of the contract. Whether the money has been well or ill laid out is indifferent, the fraud is the same*" (b). In *Seagood v. Meale* (c), indeed, Lord *Macclesfield* seems to have proceeded on both grounds. He says: "So where a man, on promise of a lease to be made to him, lays out money on improvements, he shall oblige the lessor afterwards to execute the lease, *because it was executed on the part of the lessee; besides that, the leseor shall not take advantage of his own fraud to run away with the improvements*

(a) 3 Bur. 1919.

(b) Whitbread v. Brockhurst, Ub. Sup.
(c) Pre. Cha. 561.

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made by another; though in the subsequent case of *Savage v. Forster*, he treats such cases as altogether excepted out of the statute. In *Eyre v. Popham* (*a*), Lord *Bathurst*, speaking of a parol contract for the sale of land, says: "The only case I know that takes a contract out of the statute is fraud, and the jurisdiction of this court is principally intended to prevent fraud and deceit. *Where a party has given ground to another to think he had a title secure, the court will secure it to him.* The ground, therefore, in making or refusing decrees is fraud." In *Blore v. Sutton* (*b*), Sir *William Grant* says: "It is considered as a fraud in a party *permitting an expenditure on the faith of his parol agreement*, to attempt to take advantage of its not being in writing." In *Morphett v. Jones* (*a*), Sir *Thomas Plumer* says: "A party who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed." Lastly, in *Mundy v. Joliffe*—a case, as it seems to me precisely in point—Lord *Cottenham* says: "Courts of equity exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been part performance for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagement he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the contract."

Judgment.

Then, if this be the true principle, it cannot be confined to acts done, speaking strictly, in performance of the agreement. The expression so frequently met with, "that cases are taken out of the statute by *part performance*," is inaccurate and calculated to mislead. In strictness, it would seem

(*a*) Loft. 808 & 9. (*b*) 3 Mer. 246.

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to import that the acts done must be acts for the doing of which the agreement provides, and which, when done, are therefore, strictly speaking, acts of part performance. Such, indeed, frequently is the case. It was so in *Lister v. Foxcraft*, and also in *Frame v. Dawson*, the strongest case, perhaps, in favour of the defendant's position. But the principle is plainly applicable where no such circumstance exists. It applies, with equal force, to acts done *on the faith* of the agreement, as to those done in pursuance of it. For instance, upon a contract for the sale of land simply, building alone would not be, in any literal sense, an act of part performance, and yet it unquestionably would be, I presume, in a technical sense, such an act of part performance as would take the case out of the statute.

Then, if the principle apply to acts not contemplated by the agreement—to acts connected with it in no other sense than as having been done on the faith of it,—it must be obvious that such acts cannot indicate the agreement under which they were performed, because, upon the hypothesis, wholly unconnected with it, except as they are, by the evidence, shewn to have been done on the faith of it. This was clearly stated by Lord *Eldon* in *Cooth v. Jackson* (a): "It may happen," he says, "that they (acts of part performance) may be of such a nature as to be themselves pregnant evidence of some agreement containing terms incapable of being misunderstood, but in ninety-nine cases out of the hundred that cannot be expected upon the mere acts of part performance." The rule to be collected from the cases therefore, is, not that the acts of part performance must be in themselves indicative of the agreement under which they were performed, and, in the abstract, unequivocally referrible thereto. Such a rule, in my

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(a) 6 Ves. 38.

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opinion, would be repugnant to reason; for that cannot be said of any act in the abstract. The cases, I apprehend, mean only this, that, upon the whole evidence, the court must be perfectly satisfied that the acts are referrible to the contract of which they are said to be acts of part performance. Where that is equivocal—where they are capable of being referred, upon a fair construction of the evidence, to a different title—they are insufficient to take the case out of the statute. But where they are clearly and unequivocally referrible to the contract sued upon, the principle applies. Such I consider to have been the rule as it was understood by Lord *Eldon*. In *Dann v. Spurrier* (*a*), his Lordship says: "I fully subscribe to the doctrine of the cases that have been cited; that this court will not permit a man knowingly, *though but passively*, to encourage another to lay out money under an erroneous opinion of title; *and the the circumstance 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, but upon an expectation, that the lessor would not throw an objection in the way of his enjoyment. *Still it must be put upon the party to prove that case by strong and cogent evidence; leaving no reasonable doubt, that he acted upon that sort of encouragement.*"

Judgment.

I was anxious, for reasons before stated, to point out clearly the principle applicable, in my view of the law, to this class of cases; but it is unnecessary in this case to unsettle anything already determined, or even to extend the principle of decided cases, for if *Mundy v. Joliffe* be law, the plaintiff is, in my opinion, clearly entitled to our judgment. It is true that possession was not delivered to the plaintiff in pursuance of the contract. Had that been so the point would have been, I presume, incapable of

(*a*) 7 Ves. 236.

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argument. But he was suffered to continue in occupation, and with the knowledge and assent of the defendant's agents, expended, in clearing, fencing, and draining the land, more than the original purchase money. Now that is a case much stronger in favour of the plaintiff, in my opinion, than *Mundy v. Jcliffe*. There, as here, the plaintiff had been in possession prior to the contract, but with this material difference, that he was in under an existing lease. The part performance consisted in draining some portions of the land, and in laying down in meadow an arable field, acts plainly capable of being referred to an existing legal title. Lord *Cottenham*, however, reversing the decree of the Vice-Chancellor of England, concluded upon the whole evidence, that those acts were done in part performance of the new contract, and relieved the plaintiff on the ground of fraud (*a*). Here the acts of part performance are, in their nature, less equivocal; in extent, much more considerable; and there is no other legal title to which they can be referred. The defendant, indeed, contends that they are capable of being referred, and should be referred, to the prior wrongful possession of the plaintiff; but *Gregory v. Mighell* (*b*), where the same circumstances existed, furnishes so decisive an answer to that argument, that I shall do no more than cite the language of Sir *William Grant*: "I do not conceive that the defendant is now at liberty to say that it was a provision that had no reference to the agreement, as he permitted the plaintiff to remain in possession, and to make expenditure upon the land for eight years, before he brought an ejectment. He must have known that the expenditure was made on the faith of the agreement, and I cannot now permit him to turn round, and say, the plaintiff has been in possession merely as a trespasser, as he must be if his possession is not to be referred to the agreement."

Judgment.

(*a*) Dale v. Hamilton, 5 Hare, 381; and see Sutherland v. Briggs, 1 Hare, 26.

(*b*) 18 Ves. 328.

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Upon the whole case, I am clearly of opinion that the plaintiff is entitled to a decree for specific performance, with costs.

Judgment.

Esten, V. C.—In this case it is clearly proved that Messrs. *Crooks* and *Smith*, or either of them, as agents or agent of the defendant, in September, 1847, sold, by verbal contract, the east half of lot number twenty-nine, in the tenth concession of King, part of the lands of the defendant to the plaintiff, at the price of 1*l.* 15*s.* per acre; and, on the 26th of that month, that *Smith* wrote a letter to the defendant stating the terms of the agreement, save that the whole lot was mentioned, by mistake, in it instead of the east half, and signed it, and that this letter was read by Mr. *Crooks* before it was sent: that Mr. *Smith*, under the authority of the defendant, had made known among the settlers that any person making improvements and giving as much as any other person, should have the preference in purchasing: that the plaintiff was the occupant of the land in question and in possession of the improvements upon it when he purchased; that the plaintiff made considerable improvements after and in reliance upon the contract and in expectation that it would be carried into effect: that the plaintiff has exhibited every disposition and the utmost promptitude in carrying the arrangement into effect, and that the defendant has repudiated it.

My opinion is that the contract has been partly performed so as to except the case from the operation of the Statute of Frauds; and I am inclined to think, although it is unnecessary to express, and I do not express, any opinion on the point, that the letter of the 26th of September, 1847, is a sufficient memorandum in writing, signed by the agent of the party, to be charged within the statute, the mistake in it having been clearly proved; that Messrs. *Crooks* and

Smith, or Mr. *Smith*, acted within the limits of their or his, authority, in all that is necessary to sustain the plaintiff's case; and that the plaintiff is entitled to a decree for specific performance, with costs. 1852. Howcutt v. Rees.

SPRAGGE, V. C., concurred.

HOWCUTT v. REES.

Specific Performance

One K., in 1835, purchased from the defendant part of lot number one, being a portion of a block of land owned by the latter; and two years afterwards agreed for the purchase of fifty feet additional land, and then erected his fences, enclosing on the north twenty-seven feet, on the west six feet, and on the south a quantity of land, which could not now be defined, additional to the original purchase. Of the land so enclosed K., and those claiming under him, remained in undisputed possession for about ten years, with the knowlege of the defendant, who acted as agent for some years in respect of this property and was constantly in the habit of visiting it whilst the fences were in the course of erection. The plaintiff having purchased this property from K. afterwards purchased from defendant the remainder of a lot, situate on the south thereof, whereupon he removed the southern fence that had been erected by K., in order to put all the land into one parcel. On a plan of the property made by the defendant, a lane had been laid out or the south of the original purchase seventeen feet wide, and on the west another lane, six feet whereof were comprised within the limits of lot number one. K's fences enclosed the six feet on the west, and were supposed to have embraced the seventeen feet lane on the south, which, together with the twenty-seven feet to the north, made in all fifty feet. The vendor subseqnently sought to recover possession of the strips of land to the north and west, whereupon the plaintiff filed a bill to restrain the action at law and for a conveyance of the land. No place could be assigned to the fifty feet, unless the twenty-seven feet and six feet, formed part of it; and, it having been established that the purchase money for the fifty feet had been paid, the court made the decree as prayed, with costs.

June 25th and October 1st.

* The bill in this case was filed by *John Howcutt* against *William Rees*, setting forth, that the defendant had, in or about the year 1835, become possessed of a certain block of land in the city of Toronto, on Brock street, which he intended laying out in building lots, and having represented this fact to one *Thomas Kinnear*, since deceased, and that a

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* The defendant having appealed from the decree pronounced in this cause, the facts are stated at greater length than it would otherwise have been considered necessary.

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new government house was about to be erected in close proximity to the property of the defendant, *Kinnear* was induced to purchase a portion of said land, designated as part of lot number one, fronting on Brock street, seventy-two links on Brock street, by ninety-five links in depth; that *Rees* represented he had laid out a lane to the south of the portion so purchased by *Kinnear*, and another in the rear thereof; and that *Kinnear*, in 1837, built a cottage on the land so purchased by him; that during the progress of the building it became known that there was no intention to build a government house near the property; whereupon *Kinnear* represented to *Rees* that he had been misled by such representation, and had been induced to purchase at an exorbitant price, when *Rees* admitted the truth of the statement, and abandoning all idea of laying out the property with streets and lanes, offered to sell to *Kinnear* the lane reserved on the south, seventeen feet wide, and running to the rear of the said lot number one, and also so much of the said land as was situate on the said lot number one, adjacent (on the west) to the portion thereof purchased by *Kinnear* (being six feet in width) and fronting on the lane on the south side of the land conveyed to *Kinnear*, and also a strip twenty-seven feet wide of the said lot number one, situate on the north side and immediately adjoining *Kinnear's* land, fronting on Brock street, and running back to right angles therewith to the rear of the lot number one, "*making in all a frontage of fifty feet*," for 100*l.*, and that "*Kinnear* having been at considerable expense about the erection of the said cottage on the said piece of land conveyed to him as aforesaid, and finding that the ground so conveyed to him about the said cottage was too narrow and circumscribed, particularly as the plan on which the said block was originally subdivided had been abandoned as aforesaid, found it necessary to purchase the said several strips of land

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composing fifty feet frontage as aforesaid, at the price demanded for the same by *Rees*:" that in July, 1837, *Kinnear* paid 100*l.* to *Rees* as the price thereof, at which time *Rees* was not a position to make a conveyance of the fifty feet so agreed to be sold, by reason of a mortgage existing on the property, but *Rees* offered to make any such conveyance as he was able, and thereupon put *Kinnear* into the actual possession thereof, and promised, as soon as he was in a position to do so, to make a conveyance of the property to *Kinnear* and in the meantime to execute a bond for a deed, which bond *Rees* accordingly executed.

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The bill then stated that *Kinnear* thereupon continued the erection of the cottage and the improvement of the ground about it, and enclosed the whole of the land under both agreements, *including the said fifty feet frontage*, within one outside fence, composed of cedar posts and pine boards, which on the south, west and north sides divided the cottage grounds, *including the said fifty feet frontage*, from land of *Rees*, but then under mortgage: that *Rees* agreed to contribute one-half the expense of putting up the fence on those sides, and accordingly *Kinnear* paid the whole amount, and charged one-half to *Rees*, in an account furnished to *Rees*, and by him acknowledged to be correct: and that *Rees* personally attended and superintended the planting of the posts of the division fences and saw the lines of the same marked out on the ground, the posts planted and the fences put upon division lines so marked out; that *Kinnear* from thenceforth, until his death in 1844, continued, by his tenants and agents, in uninterrupted possession of the grounds, &c., so fenced in, as owner thereof, with the full knowledge, privity and consent of *Rees*: that in 1838 *Rees* acted as agent for *Kinnear* during his absence from, as also after his return to, this province, in respect of

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the said cottage and grounds, *including the said fifty feet*, and rented the same to various tenants and received the rents from them: and that from July, 1837, *Rees* was aware that *Kinnear* was in possession as owner, and never pretended to have any claim whatever in the land, but uniformly treated *Kinnear* as the owner thereof, under the said conveyance and agreement: that in 1845 plaintiff owned and occupied the said cottage and grounds, including the said fifty feet, during which year he purchased from *Rees* two lots on the same block, designated numbers two and twelve, twelve being to the south of the cottage grounds, and immediately adjacent to the lane of seventeen feet intended to have been laid out, and lot number two being situate in the rear, or on the west side of the said cottage grounds, and immediately adjacent to and alongside of the lane or street on the west, as before stated: that on the occasion of the treaty for the purchase of the said lots two and twelve, and as a further inducement for plaintiff to purchase them, *Rees*, both personally and through his agent, told plaintiff that all the land within the fences of *Kinnear* had been sold to him by *Rees*: that in 1844 *Kinnear* had been assassinated and that his papers had become greatly disarranged and confused, and part thereof lost, and amongst the papers so lost was the bond from *Rees*.

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The bill traced the title to the premises from *Kinnear's* heirs to plaintiff, and alleged that *Rees* had redeemed the property, but instead of conveying the fifty feet to plaintiff as he ought to have done, absolutely refused so to do, and commenced an action of ejectment to turn plaintiff out of possession: and that, owing to a mistake in entering into the usual consent rule, judgment had been obtained by default, on which judgment several writs of *habere facias possessionem* had been issued but none executed, until 1850, when the sheriff, by direction of *Rees*,

was sent to execute a writ of possession, on which occasion *Rees* brought posts and lumber, and had employed men, and threatened to pull down a portion of plaintiff's stable standing on the lane of six feet, and to destroy a peach tree and vinery also growing on part of the said fifty feet, but the sheriff seeing the destruction of property that would inevitably result from executing the writ, refrained from so doing on that occasion: that plaintiff being apprehensive that the sheriff might be compelled to execute the writ, filed the bill in this cause praying for specific performance of the alleged contract, and for an injunction to stay the execution of the writ in the action of ejectment.

Statement.

The defendant answered the bill at considerable length, the material points in it, however, were that he denied ever having executed the bond mentioned in the bill, or having either in writing or verbally bargained for the sale of that portion of the property forming the said strips of twenty-seven feet and six feet: or that *Kinnear* had paid him any sum of money as or for the purchase money thereof, but that *Kinnear* had taken possession of a portion of lot number twelve, abutting the property conveyed to him by defendant, on the south, the exact extent of which was never determined between the parties, and that *Kinnear* had arranged with defendant for the price thereof, but that defendant had no recollection of the amount, the manner or time of the payment thereof: and that the piece of land to the south of the lot conveyed to *Kinnear* was the only portion ever agreed to be sold by defendant to *Kinnear*. The answer also denied all knowledge of the fact that *Kinnear* had taken possession of the land forming the lanes. The defendant also claimed the benefit of the Statute of Frauds.

After the cause had been put at issue the plaintiff called upon the defendant to undergo a *viva voce*

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examination in court. On that occasion several notes in the handwriting of the defendant addressed to *Kinnear*, and also a private account book kept by Mr. *Kinnear*, were produced, and from these it was evident that the defendant had agreed to sell *Kinnear* fifty feet of land, in addition to that originally purchased from the defendant, for 100*l.*, and that the amount had been paid, partly in cash, partly by a contra account, and the sum of 66*l.* by an order on the sheriff of the county of York. No mention, however was made in any of them as to *where* the fifty feet was situate.

Several witnesses were examined who had been working about the premises in putting up the fences, they all proved distinctly that defendant was in the constant habit of visiting the property while the fences were in the course of erection: and the fences as they now were, and always had been, on the north and west sides of the lot on which *Kinnear's* cottage stood, enclosed the strip of twenty-seven feet on the north and six feet on the west side thereof. It was also shewn there there had been a fence erected on the south, but the exact position could not now be ascertained, the plaintiff having, after his purchase of the remaining portion of lot number twelve, removed the southerly fence so as to throw all the land into one parcel.

Statement.

On the cause coming on to be heard

Mr. *Cameron*, Q. C., and Mr. *McDonald*, appeared for the plaintiff.

Argument.

The defendant did not appear.

Chisman v. Count (*a*), *Davis v. Snider* (*b*), and *Batten* on Specific Performance, 80, 2, 4 & 92, were cited.

(*a*) 2 M. & G. 307. (*b*) Ante Vol. 1, p. 134.

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Howcutt v. Rees.

ESTEN, V. C.*—I think the evidence shews that after the first sale was completed, and in 1837, *Kinnear* purchased from defendant an additional piece of ground, which was paid for; that this additional piece of ground consisted of fifty feet, and that the purchase money was 100*l.*; that about the same time *Kinnear* erected fences which enclosed his new as well as his original purchase; that the northern and western fences have remained in the same places ever since; that consequently *Kinnear* was in the undisputed possession of the northern and western strips for ten years; that during all this time defendant was well acquainted with the property; that four years afterwards, if not more, he had to do with this very property; that he was constantly present while the cottage and fences were building; that the presumption is that *Kinnear* erected his fence on the proper line, which is materially strengthened by the acquiescence of the defendant, and that the defendant was satisfied either by reference to the lanes and the post mentioned in the deed of December, 1835, or by measurement, that the fences were being erected on the right places; that we are bound, therefore, as a jury, to conclude that the northern and western strips were part of the fifty feet sold in 1837 to *Kinnear* by defendant, and without enquiring where the southern fence stood, which seems uncertain, to assume that it did not include more than was required to complete the fifty feet. Judgment.

The notion of the defendant confining the fifty feet to the south of the original purchase seems unfounded, and to have been occasioned by forgetfulness; and the conjecture of the plaintiff that the south fence was thirty-five feet south of the land is entitled to no attention.

There is a sufficient parol contract and part per-

* The CHANCELLOR was concerned in the cause while at the bar.

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formance shewn; and the failure to prove the bond is wholly immaterial. The circumstances which occurred between the parties at law also seem immaterial; nor does any difficulty arise to the plaintiff founded upon the statute relating to pretenced titles.

The decree should be with costs of the suit in equity.

SPRAGGE, V. C.—I concur in what has fallen from my brother *Esten*.

It were certainly to be desired that evidence could have been adduced to show more clearly the position of the fifty feet of land purchased by the late Mr. *Kinnear* of Doctor *Rees*, subsequently to the first purchase. That fifty feet additional were purchased and paid for is sufficiently proved, and if it had been shewn, as it has been asserted, that seventeen feet to the south of the first purcha had been taken possession of and inclosed by *Kinnear* at the time that he inclosed the strips of twenty-seven and six feet respectively, I should think the position of the fifty feet made out. It does not appear that there was ever any southerly fence but the one put up by *Kinnear* at the time that he inclosed the block which comprises the twenty-seven feet and six feet strips, and that, from the evidence of *Hughes* and of Mr. *Brown*, the surveyor, seems not to have inclosed any portion of lot twelve, nor indeed any portion south of the first purchase, though if that first purchase was understood by the parties to comprise just seventy-two feet, without regard to its reaching the centre of the block, an additional strip of about eight and a half feet may have been intended to have been embraced within it.

Judgment.

Now the defendant is accounting for the fifty feet, so far as he does attempt to account for it, only does

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so by taking it as comprising at least thirtyfive feet of the frontage of lot twelve; yet in one of his letters to *Lewis*, the auctioneer, who was appointed to sell lot twelve by auction, he says that the lands purchased by *Kinnear* were comprised within his fence, which fence, it is evident from the tenor of his letter, he thought did comprise several feet of lot twelve. If it had in fact comprised about eight and a half feet of that lot, it would have contained seventy-two feet, the number of feet described along Brock street in the first purchase, seventeen feet to the south of it, twenty-seven feet to the north of it, and six feet to the west; but the evidence does not shew that it comprised any portion of it. There is no reason for believing that it was ever intended to comprise thirty-five feet of it. The twenty-seven feet and six feet were fenced in under the defendant's own eye, and if they were not part of the fifty feet purchase, they were most unwarrantable encroachments upon Doctor *Rees'* lands. I have very little doubt that they were part of the fifty feet purchase, though where the residue of it is, is not very plainly made out. The defendant cannot be correct in placing the fifty feet purchase all to the south of the first purchase, because he himself has said that that second purchase was comprised in *Kinnear's* fence, which fence did not comprise any such land. The inference is, I think, that the strips of land in question form part of the second purchase.

Judgment.

FITZGERALD v. PHILLIPS.

Practice.

Where a notice of motion had been given for Good Friday, the court refused to entertain the motion at the next sitting.

This was a motion by Mr. *Philpotts* for a summary reference under the 77th order. It appeared that the notice had been, through inadvertence, served

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Fitzgerald v. Phillips.

Judgment The Court however, refused to make the order asked, and directed a new notice of motion to be served.

NICHOLL V. ELLIOTT.

Practice—Production of documents.

September 7 and November 23. Whatever discovery a defendant would have been bound to give by answer with respect to documents in his possession must now be furnished by the affidavit in answer to a motion to compel production under the 31st order of May, 1850, and the ground upon which he relies to excuse production must be stated with the same particularity. Where therefore a party filed a bill claiming title as heir-at-law of an intestate, and called upon the defendant to produce deeds, &c., and in answer to a motion to compel production, the defendant put in an affidavit stating that the deeds in his possession did not prove the plaintiff's title, without furnishing any description so as to enable the court to judge of the effect proper to be given to this general allegation, such affidavit was held not to be sufficient, and production of the documents ordered.

The bill in this cause was filed by *Thomas Nicholl* against *Thomas Elliott*, setting forth to the effect, that *George Nicholl* had died intestate, possessed of real estate in several counties of Upper Canada, but where in particular the plaintiff could not state; and that the defendant had possessed himself of the deeds and other evidences of title to, and had entered into the receipt of the rents and profits of, those lands, to which the plaintiff claimed to be entitled as heir at law of the intestate. The bill prayed an account of rents received; a delivery up of title deeds; an injunction to restrain defendant dealing with the property, and for further relief.

Statement.

To this bill the defendant put in an answer admitting the death of *George Nicholl*, and setting forth that several persons had applied to defendant for an

account of the assets of the intestate claiming to be entitled thereto as his heir at law, and that proceedings at law had been instituted by one of them to turn defendant out of possession of the property, and that for these reasons, and the intestate having repeatedly told defendant and others that he had no relations, defendant did not believe the plaintiff to be the heir at law. The answer offered to account to complainant, or any other person, so soon as it was established that the party claiming was the heir at law, and claimed the same benefit as if he had pleaded to the bill.

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Upon the answer coming in, the plaintiff moved for and obtained the usual order for production of documents, under the 31st order of May, 1850, and the documents not having been brought in as directed, a motion was made for an order for a sergeant-at-arms.

To resist this motion an affidavit was made by the defendant, in which he admitted having possession of the deeds relating to the several properties owned by *George Nicholl* at his death, after which the affidavit proceeded: "And this deponent further saith, that he hath not now, nor ever had in his custody, possession or power, any deed, book, document, memorandum, letter, or paper writing, of any kind or description whatever, relating to the said complainant, or to his title to the real or personal estate left by the said *George Nicholl*, or which will in any manner, directly or indirectly, prove or tend to prove, the said complainant to be, as by his said bill is pretended, the heir at law of the said *George Nicholl*. And this deponent saith that he is ready and willing to abide by such order as this honourable court shall make herein, but he submits he is not bound to produce the deeds and muniments of title in his possession, until such time as the said complainant shall have proved himself, to the satisfaction

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of this honorable court, to be the heir at law of the said *George Nicholl;* and that he, this deponent, is entitled to the same benefit as if he had, under the former practice of the court, pleaded to the said plaintiff's bill."

Mr. *R. Cooper*, for the plaintiff, referred to *Flight v. Robinson* (*a*), *Fitch v. Weber* (*b*), *Smith v.* Duke of *Beaufort* (*c*), *Edwards v. Jones* (*d*), and the remarks upon the subject of production of documents under the new practice in the Jurist of January 4th, 1851, and submitted that the affidavit filed by the defendant was not sufficient to protect the documents from production.

Argument.

Mr. *Turner*, contra, cited, amongst other cases, *Adams v. Fisher* (*e*), *Atkyns v. Wright* (*f*), and *Wigram* on Discovery, 91.

THE CHANCELLOR.—The bill in this case is filed by *Thomas Nicholl*, as heir at law of *George Nicholl*, deceased, and prays to have all documents and title-deeds appertaining to the real estate of the intestate delivered up to him, and an account of the rents and profits received by the defendant.

Judgment.

The defendant, in his answer and affidavit, admits the possession of certain documents and title-deeds connected with the real estate of the intestate; but he at the same time denies that the plaintiff is heir at law of *George Nicholl*, and, upon that ground, he submits that the court ought not to compel him, upon this motion, to produce the documents in question.

In support of this contention, Mr. *Turner* argues that, as his client, under the old practice, might have protected himself, by plea, from giving the required

(*a*) 8 Beav. 22. (*b*) 6 Hare 51. (*c*) 1 Hare 507.
(*d*) Ph. 501. (*e*) 3 My. & C. 526. (*f*) 14 Ves. 211.

discovery; and as the 25th order of May, 1850, has abolished pleas, the court must, of necessity, initiate some new practice for the protection of defendants, else discovery will be compelled now, which, under the former practice, could not have been enforced.

This argument, if well founded, is certainly entitled to the greatest weight. The order in question, it is said, has deprived this defendant of the means of resisting discovery improperly called for; that is, has left him without the means of making his defence. Now, if such be, in truth, the effect of this order, the *reductio ad absurdum* is sufficiently obvious In a court of justice, no party can be left without the means of making his defence, if, in truth, he have one.

But it is abundantly evident that this argument cannot be maintained. It is based upon the assumption, that a defendant cannot, by answer, protect himself from discovery; or, at the least, that, by answering, he concedes the plaintiff's right to *relief* for the purpose of determining the extent of his right to *discovery*. That proposition is sanctioned, it must be admitted, by very high authority. Vice-Chancellor *Wigram* asserts—and he supports the assertion with great power and clearness of reason (*a*)—"that every objection to discovery which is founded upon a denial of the plaintiff's right of suit, or of his right to proceed with it in its existing state, should regularly be taken by demurrer or plea, according to the circumstances of the case; and where the objection is not so taken, and the defendant answers the bill, he will in general be held to have waived the objection, and will be obliged to answer the bill throughout." It is sufficiently obvious—excluding, for the present, a consideration to which I shall hereafter advert—that this proposition, if tenable to its full

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(*a*) Wigram on Discovery, p. 28.

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extent goes far to establish the defendant's argument. But it is equally plain—if *Adams v. Fisher* is to be regarded as stating correctly the rule upon the subject—that the proposition of Vice-Chancellor *Wigram* cannot be maintained to its full extent.

In *Adams v. Fisher*, the plaintiff, being the administrator, with the will annexed, of one *Collingridge*, filed his bill against the defendant, whom, as he alleged, he had retained as his attorney to collect the estate of his testator, and prayed an account on the foot of that employment. The bill contained the usual interrogatory as to books and papers. The defendant admitted, in his answer, that he had collected the estate of *Collingridge*, and that divers documents and papers relative to his estate and affairs were in his possession, a full list of which was set out in the schedule to his answer: but he alleged that he had been retained by one *Penchard*, with whom he had accounted: he denied the employment by the plaintiff, and the liability to account to him; and submitted that, under the circumstances, he was not bound to produce the papers and documents in question. The Lord Chancellor decided that, as the privity between the plaintiff and defendant was denied by the answer, the plaintiff could not call for a production of the documents. The conclusion of his lordship's judgment is in these words:—"Here the defendant has denied the plaintiff's interest; he has on the record stated that which, as it stands, in my opinion, excludes the plaintiff from instituting this suit against him. As long as that stands, I think the plaintiff is not entitled to see the documents."

Judgment.

This decision is plainly subversive of the defendant's argument; but it is said that *Adams v. Fisher* (1838) is a single case, which ought not to prevail against the strictly logical reasoning of Vice-Chancellor *Wigram*, and the strong current of authority to which it is opposed.

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Viewed in the clear light of strict reason, it may be difficult to sustain the judgment of the Lord Chancellor, in *Adams v. Fisher*, to its full extent: and, traced to its legitimate consequence, it may lead to conclusions practically inconvenient; but, so far from being a single case, the principle upon which *Adams v. Fisher* proceeded has been since repeatedly recognized, and by such a variety of judges, that it must be regarded now as having settled the law upon the subject.

In *Dubless v. Flint* (*a*) (1839), the plaintiff made title as heir at law, and heir according to the Custom of Gavelkind, of one *Mary Bradden*, to a fund in the hands of *Flint*, as trustee of her will. The defendant admitted the possession of the trust fund, but said that he *did not know* and could not state as to his belief or otherwise, whether *Mary Bradden* left the plaintiff her sole heir at law, or her heir according the Custom of Gavelkind, or whom she left her heir at law or customary heir. The Vice-Chancellor refused to order the trust fund into court, and upon appeal, Lord *Cottenham* sustained that decision.

Judgment.

In *Bannatyne v. Leader* (*b*) (1839), the plaintiffs were assignees of *John Maberly*, a bankrupt. Prior to his bankruptcy, he had been in partnership with one *Richards*, and had sold his interest in the partnership business, and the property belonging thereto, to the defendant *Leader*. The bill, which prayed that the assignment to *Leader* should be set aside, and that the partnership accounts should be taken, charged, in the usual way, that the defendant had in his custody divers books of account, books, ledgers, &c., relating to the matters contained in the bill. The defendant, by answer, denied all the allegations and charges in the bill upon which the plaintiff founded his title to the relief prayed. He admitted

(*a*) 4 M. & C. 502.

(*b*) 10 Sim. 230.

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the possession of various documents, a list of which he set forth in the schedule to his answer, but stated that the truth of the matters in the bill would not, *as he believed*, thereby appear. Upon the motion for the production of these documents, Mr. *Knight Bruce* argued that if the title of the plaintiff is denied by answer, that denial gives the defendant the same benefit, *with respect to all subordinate matters*, as he would have had if he had pleaded to the bill; and cited *Adams v. Fisher*. The Vice-Chancellor was of opinion that, had the denial in the answer been full, the documents would have been protected; but the allegation being equivocal, production was ordered.

Edwards v. Jones, (1843), came before the same judge. There the plaintiff, as personal representative of *Howell Powell*, claimed to be entitled to a moiety of the personal estate of *John Owen*, to whose estate the defendant, *Ellen Jones*, had obtained letters of administration. The defendants, *Pierce Jones* and *Ellen* his wife, admitted in their answer that *John Owen* left *Ellen Jones* his next of kin him surviving, and that he did not leave any other next of kin, "*unless his nephew Howell Powell was living at the time of his decease;* but whether *John Owen* did leave the said *Howell Powell* him surviving, *these defendants do not know, and cannot set forth as to their belief, or otherwise.*" They admitted the possession of the documents in the schedule to their answer, and they admitted that these documents related to the matters in the bill, *except the question of Howell Powell's death.* In refusing to order the production of these papers, the Vice-Chancellor said, "It is perfectly plain, in such a case as this, where a party sues as representing one of the next of kin of an intestate, *and his title is not admitted by the defendant*, that he is not entitled to a production of the documents, which the defendant merely admits to be in his possession, *and to relate to the affairs of the intestate.*"

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This judgment was reversed by Lord *Lyndhurst* upon appeal; not, however, upon any doubt as to the soundness of the principle upon which the Vice-Chancellor professed to proceed, or as to the authority of *Adams v. Fisher*, but entirely upon the insufficiency of the denial in the answer.

In *McHardy v. Hitchcock* (*a*) (1848), it appeared that a freehold had been vested in *Richard James Hitchcock* in trust for sale, and the ultimate trust of the produce was for the next of kin of *Jane McEiver*, living at the death of *Elizabeth Anne Clindinen*. The plaintiff filed her bill as the representative of *Hitchcock*, claiming the trust fund as the sole next of kin of *Jane McEiver* at the death of *Elizabeth Anne Clindinen*. The defendant, by answer, said that he did not believe that at the time of the death of *Elizabeth Anne Clindinen* the plaintiff was the sole next of kin of *Jane McEiver*; but who were or was at that time the other next of kin of *Jane McEiver* the defendant was unable, as to his belief or otherwise, to set forth. He admitted possession of the trust deed, the letters of administration, and accounts. The plaintiff moved for the production of these documents. Mr. *Beavan*, on behalf of the defendant, resisted the application. He argued that the plaintiff, claiming as sole next of kin, unless she could shew from the answer an admission that she filled that character, was a stranger, and had no right to interfere with the trust funds or documents: and Lord *Langdale*, upon that ground, refused the motion.

Judgment.

Harris v. Harris (*b*) (1844), and *The Attorney-General v. Thompson* (*c*) (1849), were decided by Sir *James Wigram* himself; but in neither of them does he question the authority of *Adams v. Fisher*. It appears to me, therefore, that the authority of that case is not now to be shaken.

(*a*) 11 Beav. 73. (*b*) 4 Hare, 179. (*c*) 8 Hare, 106.

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But, irrespective of that decision, it would seem clear upon principle, and well settled by authority, that, under the circumstances of the present case, this plaintiff has no right to the inspection of these title deeds previous to the hearing. Sir *James Wigram's* second proposition is expressed thus: "It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact, which, being well pleaded in the bill, *are material to the plaintiff's case about to come on for trial*, and which the defendant by his form of pleading does not admit." Now this proposition restricts the plaintiff's right, in terms, to the discovery of such facts "as are material to the case about to come on for trial;" but when a suit is instituted for the recovery of an estate, or of the title deeds connected with it, and where, as in this case, such documents are collateral to the plaintiff's case, the discovery of their contents wants altogether this character of materialty. For the purpose of the case about to come on for trial, such documents are wholly irrelevant. The plaintiff has no interest in them, in the proper sense of that term, because they have no tendency to prove the case, or any part of the case, necessary to enable him to obtain a decree. *Burton v. Neville* (*a*), and Lady *Shaftesbury v. Arrowsmith* (*b*), are leading authorities upon this subject. In the latter case Sir *John Webb*, by his will, gave all his estates to *Arrowsmith* and *Butler* in trust; Lady *Shaftesbury* disputed the will, and filed her bill against the trustees, praying to have the title deeds delivered to her. The defendants, in the schedule to their answer, gave an abstract of several settlements in their possession; and, upon the motion that they should be produced for her inspection, Lord *Rosslyn* says: "It would be a very delicate point to order a general inspection into all deeds and settlements on behalf of a person claiming in the mere character of

Judgment.

(*a*) 2 Cox, 242. (*b*) 4 Ves. 67.

heir at law. I do not find any spark of equity upon which that application could be made to this court and supported. The title of the heir is a plain one, and it is a legal title. All the family deeds together would not make the title better or worse. If he cannot set aside the will, he has nothing to do with the deeds." *Bolton v.* The Corporation of *Liverpool* (*a*), affirms the same doctrine; and although Mr. *Wigram* impeaches *Adams v. Fisher*, he refers to Lady *Shaftesbury v. Arrowsmith* as a standard authority.

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It is quite obvious, therefore, that the alteration which has been made in the practice has not subjected this defendant to any disadvantage; he might have protected these documents quite as effectually under the present, as under the former, practice; for the thirty-first order of May, 1850, expressly enables parties to assign by affidavit any reason for the non production of documents which might have been before assigned by answer. Under the present system the order-of-course for the production of documents supplies the place of the ordinary interrogatory formerly introduced into the bill; and the affidavit in reply comes instead of the answer to that interrogatory. Whatever discovery, therefore, a defendant would have been bound to give by answer, with respect to documents in his possession, ought now to be furnished by the affidavit in reply; and the ground upon which he relies to excuse production should be stated with the same particularity. Where the affidavit fails to furnish the discovery to which the plaintiff may be entitled, it will be competent for him, of course, to cause the defendant to be examined *viva voce*; and where that necessity arises without a sufficient excuse, the cost of such proceeding should be borne by the defendant. When the ground assigned is insufficient, production should be ordered.

Judgment.

(*a*) 1 M. & K. 99.

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Applying those rules to the present case, this affidavit is insufficient, in my opinion, upon two grounds. In the first place, it fails to furnish the plaintiff with any description of the documents admitted to be in the defendant's possession, to which discovery I think him entitled. The bill in this case asks to have the title deeds connected with the real estate of *George Nicholl*, which are said to be in the defendant's possession, delivered up to the plaintiff. To entitle him to that relief at the hearing he would be bound to prove, not only that he is the heir at law of the intestate, but also that the title deeds which he prays to have delivered up are in the possession of the defendant. Now, I take it to be clear that, whatever a plaintiff will be bound to prove at the hearing, he is *prima facie* entitled to a discovery of from the defendant; and to whatever extent, in this respect, discovery might have been enforced in the answer, to the same extent, in my opinion, it should be furnished by the affidavit. But it is clear, I think, that, under the circumstances of this case, this defendant might have been compelled by the former practice to describe in his answer the documents which he admits to be in his possession. I know of no principle upon which this limited discovery could be denied to the plantiff. To refuse discovery because the plaintiff's title is denied, and must therefore be proved, would be to refuse discovery where alone it is required—would be to exclude the very emergency for which the policy of the law, in giving discovery, intended to provide. The reasoning in *Adams v. Fisher*, and the other cases of that class to which I have adverted, has no application, consequently, where the required discovery relates to the fundamental point of the case, and not to some merely subordinate question; where it is the very foundation of the decree, and not a consequence of it. The real question, therefore, is as to the materiality and relevancy of the discovery which the plaintiff seeks;

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if material and relevant to the case about to be tried, the plaintiff's *prima facie* right cannot, I apprehend, be denied. Now it certainly is material that a plaintiff who institutes a suit for the recovery of certain documents should have an answer to the enquiry, whether the defendant is in possession of any, and which, of them; and if the plaintiff's right to a decree for the delivery of specific documents involves the proof not only of the plaintiff's right to the documents, but also of the defendant's possession of them, then that discovery must be admitted, I think, to be relevant to the case about to be tried. In reason, therefore, the plaintiff's right to a description of the documents which he seeks to recover, appears to me to be well founded; and such would seem to be the understanding of the profession to be gathered not only from the uniform practice in such cases, but also from the express statements of the ablest text writers upon the subject. Vice-Chancellor *Wigram*, for instance, appears to me to assume this point throughout his admirable treatise upon this subject. At page 102, pl. 165. he says: "It cannot be successfully objected to these observations that, if followed out, they might, in a given case, oblige a defendant to produce his title deeds at the instance of a party who had no interest in them. If such deeds would assist the plaintiff *in making out his title*, he would be entitled to a production of them before the hearing, according to all the authorities. And if the object of the suit were to obtain possession of the deeds, and the deeds were collateral to the plaintiff's case, *a description of them in the answer would be sufficient for the purpose of the decree, without the production of them before the hearing.*" Again at page 211, pl. 295, he says: "According to the definition of the word *interest*—if the object of this suit or action be the recovery of an *estate*—the plaintiff in a bill in aid of proceedings to recover that estate will (*prima facie*) be entitled, *before* the hearing of the cause, to the production

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of every document the *contents* of which will be evidence at the hearing of his right to the estate. But the same reason will not necessarily extend to entitle the plaintiff *before* the hearing of the cause, to a production of the title deeds appertaining to the estate in question. *He may, indeed, and* (if his bill be properly framed) *he will be entitled to have those title deeds described in the answer, and also to a discovery whether they are in the defendant's possession; because, without proof of such matters, (and whatever the plaintiff must prove the defendant must prima facie answer) a perfect decree could not be made in the plaintiff's favour.* The same observations will apply to a case *in which the object of the suit is to recover the possession of documents. The plaintiff is entitled to know what the documents are, and who holds them.* But there is no reason why the plaintff should, in cases of the description here noticed, inspect the documents before the hearing of the cause." And see to the same purpose pl. 182, 285, 291, 294, 298, 308, 318, and *Hare* on discovery, page 231. In *Latimer v. Neate* (a), Lord *Cottenham* says: "Now if the defendant was entitled to that protection against discovery which he now seeks to enforce at the bar, the order of the Court of Exchequer was clearly wrong in allowing these exceptions, *because a defendant may be bound to state in his answer and describe the documents; he may be compelled to admit he has such documents in his possession,* but not compelled to state the contents, if he is entitled to protect himself by any rule which prevents a plaintiff asking for the production of the documents."

Judgment.

In this particular case then the defendant, under the former practice, might have been compelled to describe the documents in question in his answer; and as the affidavit before us fails to furnish any such description, I am of opinion that it is, in that respect, insufficient.

(a) 11 Bligh. 154.

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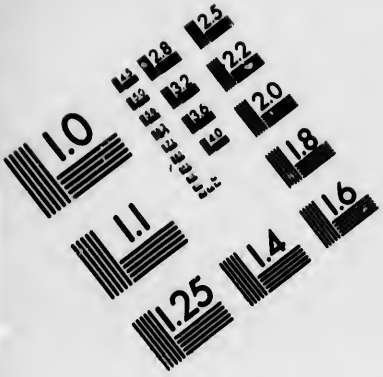
But in other respects also this affidavit would seem to be insufficient. The defendant swears that "he has not any document whatever in relation to the said complainant or to his title to the real or personal estate left by the said *George Nicholl*, or which will in any manner, directly or indirectly, prove or tend to prove the said complainant to be, as by his said bill is pretended, the heir at law of the said *George Nicholl*." Now the question as to the sufficiency of the averments in an affidavit to protect documents required to be produced, must, to some considerable extent, depend upon the circumstances of each case. It is true that a credible and sufficient denial of relevancy by the defendant must be conclusive upon the question of production. If a defendant were not permitted to protect himself in that way, he would be without the means of defence; and, upon a bill fictitious in its statements, he might be compelled to produce his title deeds to a plaintiff, who, according to the facts of the case, would have no right to the inspection. But the proposition which has been conceded admits that the court must exercise its judgment upon the credibility and sufficiency of the defendant's averments. A mere general allegation, such as that contained in the present affidavit, that the required documents do not prove the plaintiff's title, will be of no avail to protect the defendant from their production, where, from the character of the documents, or from other circumstances, the court discovers a probability that they may be material in proof of the plaintiff's case; and production has been ordered upon that principle, notwithstanding the general denial of relevancy contained in the answer (*a*).

Judgment.

Now, in this case, had the papers received from Detroit been the only documents in the defendant's

(*a*) Smith v. Duke of Beaufort, Harris v. Harris, Attorney General v. Thompson.



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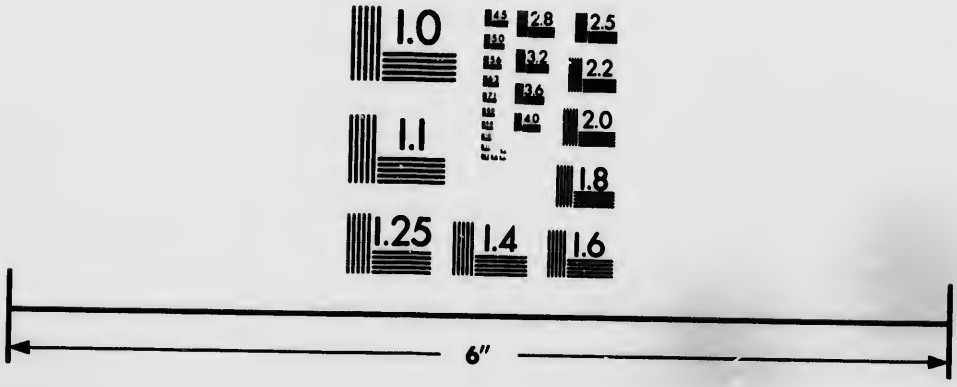

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possession, and had they consisted exclusively of title deeds, then, (apart from the plaintiff's right to have the documents described here) it is probable that the general averment contained in this affidavit would have been sufficient; because there would have been no probability, *prima facie*, that such documents would have assisted the plaintiff in proving himself to be heir at law of the intestate. But the title deeds were not the only papers received from Detroit. The defendant admits the possession of "some deeds *and documents*;" and does not deny the possession of documents other than those transmitted from Detroit. We are wholly without information as to the nature and character of these other documents. With respect to these, the defendant takes upon himself to say that they do not prove the plaintiff's case, without furnishing any description so as to enable the court to judge of the effect that should be given to that general allegation. That is a course which the defendant was not entitled to adopt; and I am therefore of opinion that the affidavit is, in that respect also, insufficient (*a*).

Judgment

ESTEN, V. C.—It would seem that a defendant is bound to discover, by answer or examination on oath, every fact necessary to a decree; but documents will not be exhibited to a stranger, nor money secured at his instance, although a reasonable probability of title is sufficient to entitle the plaintiff to production of the one, or payment into court of the other; and probably a less strong presumption of title will avail to secure the fund than to entitle him to production; and this exception seems to prevail, whether the documents are required to prove facts necessary to entitle to a decree, or facts conducive to ulterior or consequential relief. It would seem that a defendant not bound to produce documents is not obliged to set

(*a*) Attorney General v. The Corporation of London, 2 McN. & G. 266.

forth a schedule or description of them which would expose his title to danger. The answer is conclusive on a question of this nature, so far as it seems worthy of credit; but, being so, it must negative every fact which would entitle to the production, and every intendment is against it. The admission of relevancy, *prima facie*, entitles to production, which the defendant must avert by withdrawing the documents from the rule. This is done (besides shewing that the production might subject him to a penalty, &c.) by alleging credibly that the documents relate exclusively to the defendant's title or case, and would not support the plaintiff's title or case, directly or indirectly; by direct support, or by repelling the defence, or by defeating, weakening or damaging the defendant's case, where thereby the plaintiff's case would be established, strengthened or benefited, &c.

The answer must, by its language worthy of belief, exclude this possibility. It would seem that the affidavit should be judged by the same rules and have the same effect as the answer. It should shew whether there are any documents—whether they are relevant; must give a sufficient description of them, and then withdraw them from the rule. Judgment.

I think, owing to the insufficiency of the affidavit, in not shewing whether the defendant has any other papers than those he mentions, and whether they do or do not relate to the matters in question, the production should be ordered, with liberty to protect any particular document by affidavit.

Whatever may be the precise state of the practice in England, I think that under the new practice established here, a party should have the benefit of the negative plea used in England for the purpose of obviating improper discovery. This office must be

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performed by the affidavit, which must, however, state whether there are relevant documents; must give a proper description of them, and then assign the ground for withholding their production, with the same strictness as was formerly required in an answer.

SPRAGGE, V. C.—I concur generally in what has fallen from his lordship the Chancellor, but in one point I am not prepared to agree with him. I do not think the plaintiff entitled, at this stage of the cause, to a *schedule* of the deeds and papers in the possession of the defendant. A schedule is itself a discovery, to a certain extent; and a schedule of title-deeds which a defendant in possession as heir at law has in his possession may be a discovery of defects in title prejudicial to his interests; because swearing by the schedule as containing a list of *all* his title-deeds, might shew links wanting in the chain of title which would shew his title to be defective.

Judgment.

What a defendant is bound to shew against a plaintiff claiming as heir is, that he has no documents in his possession tending to shew that the plaintiff is heir. He may be enabled to state this positively after examining the documents in his possession, and he may be enabled to satisfy the mind of the court without a schedule that he has no documents in his possession which would tend to shew title in the plaintiff: for example, that he had in his possession deeds to the person whose heir the plaintiff claims to be, and earlier title-deeds of the property comprised therein; also agreements for conveyance of land to the alleged ancestor, and mortgages to him; and that he had no other documents whatever; and that none of the documents which he had tended to shew title in the plaintiff. I think that such an affidavit would satisfy the rule as to positiveness in what a defendant is required to

state in relation to documents in his possession, and the rule as to satisfying the mind of the court whether or not the documents might tend to shew the plaintiff's title.

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The plaintiff is entitled to the title-deeds *if* he be heir, but he is not likely to require them to *prove* himself heir, at least in this court; therefore, in withholding from the plaintiff the deeds, and a schedule of the deeds in the defendant's possession, there is but slight danger of his being damnified; while, on the other hand, the setting out of a schedule might not improbably be of serious detriment to a defendant by exposing defects in his title (*a*).

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LAWLOR v. MURCHISON.

Production of documents.

As a general rule, a plaintiff in equity is entitled to a discovery not only of that which constitutes his own title, but also of whatever is material to repel the case set up by the defendant; and as a part of that discovery, to the production of such documents as are material for the same purpose. Where, therefore, a bill was filed by a person claiming under a devisee, and in opposition to a motion to compel the production of deeds the defendant swore that the alleged testator had not made any valid will—it being sworn that he was not of sound mind when the supposed will was executed—the court ordered the deeds to be produced.

The bill in this cause was filed by *Mary Lawlor* claiming under the devisee of *William Bowkett*, who died in the month of August, 1832, against *John Murchison*.

Statement.

The defendant had answered the bill whereby he states that *William Bowkett* was not of sound and disposing mind at the time of making his said will.

An order had been obtained by the plaintiff for production of deeds, &c., which not having been complied with, a motion was now made to compel

(*a*) Tanner v. Ryse. 3 P. W. 293; Bolton v. Corporation of Liverpool, 3 Sim. at p. 489; Lord Shaftesbury v. Arrowsmith, 4 Ves. pp. 70, 71.

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their production. In answer to such motion the defendant put in an affidavit reiterating the statements made in his answer, and insisted, upon the benefit of such defence, as a good and sufficient reason for declining or refusing to comply with the order for production of deeds, &c.

Mr. *Mowat* for the motion.

Mr. *Turner*, contra.

Argument.

The cases cited in the preceding case were relied on here; also Dowager Duchess of *Newcastle v.* Lord *Pelham* (*a*), and *Hare* on Discovery, 190.

In opposition to the motion, it was contended that the answer was the same as if the rules had permitted defendant to plead *non devisavit;* had that been pleaded, counsel contended that it would have formed a complete bar to the plaintiff's recovery, unless he took issue on the plea or set it down to be argued,

Judgment

THE CHANCELLOR.—This suit is instituted for the purpose of recovering the easterly thirty-nine feet of lot twenty-two on the north side of King street in this city, and also the title deeds appertaining to that estate. There is a good deal of intricacy in the case as it is stated in the original bill; but, for the purpose of the present motion, it may be sufficient to say that the plaintiff claims through the devisee of one *William Bowkett*. The defendant is admitted to be in possession of this estate; and the bill alleges that he claims as heir at law of his son *John Joseph Murchison*, who is said to have acquired the legal estate under an indenture of bargain and sale, dated the 23rd February, 1845, and made between *Duncan Murchison* of the one part, and the said *John Joseph Murchison* of the other part. The bill asserts that this *Duncan Murchison* was a trustee for the plaintiff, or those under whom she claims; that *John Joseph*

(*a*) 3 B. P. C. 460.

Murchison took with full notice of that trust, and that, consequently, the defendant is now a trustee of the legal estate for the plaintiff. It prays that the defendant may be decreed to deliver up possession of the estate and title deeds, and to account for the rents and profits.

The defendant, by his answer, insists that he is absolutely entitled under the deed of the 23rd of February, 1845; and denies that *William Bowkett* ever made any valid will.

In order to protect himself from the production of the documents in his possession, the defendant files an affidavit in these words: "And this deponent, in defence to the said bill hath in his answer stated on his information and belief that the said *William Bowkett* was not, at the time of making and publishing his last will and testament in writing, of sound mind, memory and understanding, and therefore this deponent denies it to be true that at the time in the said bill stated, or at any other time, the said *William Bowkett* did duly make and publish his last will and testament in writing, sufficient to pass real estate, and did thereby devise as in the said bill mentioned; and the deponent by his said answer craves the same benefit as if by the rules of this honorable court he had been entitled to plead, and had pleaded, to the said bill. And this deponent submits and insists upon the benefit of the said defence as a good and sufficient reason for declining to comply with the order made in this cause."

Judgment.

Upon the discussion of the motion to compel the production of these documents, the argument was relied on which had been urged in *Nicholl v. Elliott*; I mean, the argument based upon the recent alteration in the practice of the court, and the supposed effect of that alteration in depriving a defendant of the means of making his defence. For reasons stated at

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length in that case, we did not think that argument entitled to any weight. It is quite clear that this defendant might have protected himself from producing any documents improperly called for by an affidavit properly framed for that purpose.

But it is no less plain that this affidavit is wholly insufficient for that purpose. In the first place, upon the grounds stated in *Nicholl* v. *Elliott*, the documents which the plaintiff seeks to recover in this suit, and which are admitted to be in the defendant's possession, should have been described in the affidavit; but upon this subject it is altogether silent.

In the next place, it is clear, as a general rule, that a plaintiff in equity is entitled to a discovery not only of that which constitutes his own title, but also of whatever is material to repel the case set up by the defendant; and, as a part of that discovery, to the production of such documents as are material for the same purpose. It has never been decided, I believe, that title deeds are distinguishable, in this respect, from other documents; and, upon principle, it seems to me that they cannot be distinguished (*a*). But, in the present case, the defendant, admitting the possession of documents relative to the matters stated in the bill, says simply, I do not admit your case, and therefore, I decline to produce the documents which you require; says, in effect, this, because your title is denied, or, at least, is not admitted (that is, because your case is one peculiarly requiring discovery), therefore I will not make discovery. That is obviously absurd. To admit the sufficiency of such an affidavit would be to subvert the whole law upon this subject.

Judgment.

ESTEN, V. C.—I think the benefit of the negative plea should be retained in our system, so that a defendant denying the title on which the right to discovery

(*a*) Wigram on Discovery, pl. 324; Attorney-General v. Thompson, 8 Hare. 186.

hinges should be protected from production of papers, or *viva voce* discovery, the right to which is consequential to the establishment of such title. In this case I am of opinion that the production should be ordered, owing to the insufficiency of the affidavit, with liberty by affidavit to protect any particular documents.

SPRAGGE, V. C., concurred.

WILSON v. THOMPSON.

Practice—Production of documents.

Where a defendant neglects to put in an answer, and the plaintiff files a traversing note under the 32nd order, the plaintiff is entitled to an order for production of documents, pursuant to the terms of the 31st order.

Statement. The defendant having neglected to put in an answer, the plaintiff proceeded under the 32nd order, and filed a traversing note, and now

Argument. Mr. *Patrick*, for plaintiff, moved for an order for production of deeds, books, and papers, pursuant to the 31st order of May, 1850. By that order, on the coming in of the answer, either party may obtain, as of course, this order. Here, it is true, no answer has been put in; but the 32nd order directs that the fact of filing a traversing note, and serving notice thereof, "shall have the same effect as if such defendant had filed an answer traversing the whole bill, on the day on which such note shall be filed;" and submitted, that the effect of the two orders taken together was to entitle the plaintiff to the present motion being granted.

Judgment. THE COURT.—We think the object of the orders will be best effectuated by directing the order to go for the production of the deeds, &c., as asked.

The order for production, was, under similar circumstances, subsequently granted in the case of *Russell v. Morgan*.

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GILLESPIE v. GROVER.

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Correction of Deeds—Statute of Frauds—Pleading.

Where a debtor made a conveyance to a trustee, for the benefit of his creditors, of all his lands, and a schedule annexed to the deed purported to contain the whole thereof; it was afterwards discovered that, either designedly or by mistake, some of the debtor's lands had been omitted from the list. *Held*, that a bill would lie to correct the schedule, on the ground of fraud or mistake.

Whether a letter written by a third person, and signed by him, addressed to the intended wife, and delivered to her by the intended husband, with a knowledge on his part of its contents, evidencing an agreement for a settlement by him, would be a sufficient writing within the Statute of Frauds signed by the agent of the party to be charged.—*Quære.*

The title to land conveyed upon trust being in dispute between the person creating the trust, being a defendant to the suit, and one of the other defendants, and the plaintiffs being entitled to have have this land sold if it really belonged to the author of the trust; the question between him and his co-defendant must be decided in the suit.

Where a defendant is not concerned in the whole of the suit, and the part in which he is interested can be properly separated from the rest, he can object to the frame of the bill; but this principle does not apply where the parts of the suit, being in their nature properly the subject of one suit are not interwoven, but one follows the other, and the part in which the objecting defendant is interested must first be disposed of and be dismissed from the suit before the other part can be entered upon.

Semble—Wife entitled to a provision out of her equitable inheritance the husband not maintaining her, and his assignees seeking the aid of the court to make his interest available.

Statement.

The bill in this cause was filed by *Robert Gillespie*, *George Moffatt*, and their co-partners, together with several others, creditors of the co-partners, stated in the pleadings, against *Peregrine Maitland Grover* and *James Foley* (the co-partners), *Almira Foley*, wife of the said *James Foley*, *George Denholm*, (trustee), and others, creditors of the co-partnership, praying for the correction of alleged errors in a deed of trust executed by *Peregrine Maitland Grover* and *James Foley*; and also for a conveyance to the trustee of certain lands held by the defendant *Almira Foley*.

The circumstances which gave rise to the suit are fully stated in the judgment of the court.

The cause coming on to be heard,

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

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Mr. *Vankoughnet*, Q. C., Mr. *Read*, and Mr. *Turner*, for the defendants.

For the plaintiffs, *Pritchard v. Draper* (*a*), *Richardson v. Smallwood* (*b*) *Stileman v. Ashdown*, (*c*), *Christ's* Hospital v. *Budy in*(*d*), *Ryland v. Smith* (*e*), *Gale v. Williamson* (*f*), *Taylor v. Jones* (*g*), *Walsh v. Trevannion* (*h*), *Vaughan v. Buck* (*i*), *Whittington v. Jennings* (*j*), *Blair v. Bromley* (*k*), *Norcutt v. Dodd* (*l*), *Roper* on Husband and Wife, 312-3, were referred to. Argument.

For the defendants *Parker v. Morrell* (*m*), and the same case before Mr. Justice *Cresswell* (*n*), *Stephens v. Olive* (*o*), *Michie v. Charles* (*p*), *Fisher v. Taylor* (*q*), *Simons v. Simons* (*r*), *Buckle v. Mitchell* (*s*), *Oswell v. Probert* (*t*), *Johnson v. Johnson* (*u*), *Slanning v. Style* (*v*), Lady *Elibank v. Montolieu* (*w*), *Bennet v. Davis* (*x*), *Greenwood v. Churchill* (*y*), were amongst other cases relied on.

Esten, V. C. *—The bill in this cause states as follows: that in the month of February, 1847, the defendants, *P. M. Grover* and *James Foley*, were carrying on business in partnership as merchants in Peterboro, Norwood and Keene, and were indebted to the plaintiffs and to the defendants, *William Foley*, *Charles Smith* and *George A. Grover* (the only persons besides the plaintiffs who became parties to the assignment after mentioned), and others, in the sum of 5000*l.* and upwards; and that being so indebted, they agreed to make over all their property Judgment.

(*a*) 1 Russ. & M. 191. (*b*) Jacob. 552. (*c*) 2 Atk. 477.
(*d*) 2 Vern. 683. (*e*) 1 M. & C. 53. (*f*) 8 M. & W. 405.
(*g*) 2 Atk. 600. (*h*) 16 Sim. 178. (*i*) 13 Sim. 404.
(*j*) 6 Sim. 493. (*k*) 5 Hare. 542. (*l*) 1 Cr. & Ph. 100.
(*m*) 2 Ph. 453. (*n*) 2 Car. & Kir. 599. (*o*) 2 B. C. C. 90.
(*p*) Ante vol. 1, p 125. (*q*) 2 Hare 218. (*r*) 6 Hare. 352.
(*s*) 8 Ves. 100. (*t*) 2 Ves. 680. (*u*) 1 J. & W. 472.
(*v*) 3 P. W. 337. (*w*) 1 White & Ludor, L. C. 319.
(*x*) 2 P. W. 316. (*y*) 1 My. & K. 546.

* The Chancellor was concerned in this cause while at the bar.

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real and personal to the defendant *Denholm*, for the benefit of their creditors: and that, in pursuance of such agreement, by an indenture of assignment dated the 26th of February, 1847, *P. M. Grover* and *James Foley* conveyed and assigned "in effect or professed intent," to use the language of the bill, all their real and personal property, and all debts, &c., to the defendant *Denholm* absolutely, upon trust, to collect, sell, and convert into money such trust estate, and out of the moneys produced thereby, after paying all the expenses of the trust, to pay, ratably and in proportion, the debts of the creditors named in the schedule to the indenture, and creditors whose names might be omitted, who should signify their assent to that assignment in manner provided by it, and pay any surplus of such moneys to *P. M. Grover* and *James Foley*. To this indenture were appended certain schedules which were intended to contain, and were declared by *P. M. Grover* and *James Foley* to contain and to be intended to contain, and were believed by the plaintiffs to contain a true description, so far as *P. M. Grover* and *James Foley* knew or had the means of knowing, of all their property at the time of the execution of the indenture. The indenture further provided that the creditors who should become parties to it should be barred from the residue of their respective debts, and that if *P. M. Grover* and *James Foley* should have been guilty of any fraud, or should have concealed any property, or made away with, in order to deprive the creditors of it, or should have been guilty of any misrepresentation, the indenture should cease to be binding on the creditors, and they should be at liberty to proceed against the parties so conducting themselves in the same manner as if the indenture had not been executed. It also contained a covenant on the part of *P. M. Grover* and *James Foley* to do all further acts, &c., for carrying into effect the purposes of the indenture and of the parties to it. At the time of the

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execution of this indenture such of the personal property of the debtors as was liable to execution was under seizure at the suit of some of their creditors; and it was intended, and so provided by the indenture, that they should retain this advantage and rank upon the estate for the residue of their debts. This indenture was executed by *P. M. Grover* and *James Foley*, by the plaintiffs, by the defendants who have been already named in that behalf, and by the trustee *Denholm*, who thereupon proceeded to carry the trusts of it into execution. The last mentioned property, stated to have been under execution at the time of making the assignment, was clearly not intended to be comprised in it, but, with this exception, the bill states, and the assignment itself indicates, and the answers of the defendants *P. M. Grover* and *James Foley* admit, that the agreement of the parties was that the whole property of *P. M. Grover* and *James Foley*, real and personal, joint and separate, should be included in this assignment and devoted to the purposes which it was intended to accomplish; and no doubt, if any property intended and agreed to be included in this instrument has in fact been omitted from it, either through mistake or fraud, the parties claiming the benefit of this arrangement have a right in this court to require the deed to be amended and the agreement performed in this respect; and, although I agree with the learned counsel for some of the defendants, that the principle of *falsa demonstratio non nocet* applies to this case; that the indenture first conveying all the property of the debtors generally, and proceeding to specify in the schedules the particulars of which that property was supposed to consist, did in fact pass all the property of *P. M. Grover* and *James Foley*, whether it was specifically mentioned in the schedules or not; yet this argument does not, in my opinion, meet or satisfy the claim of the plaintiffs to equitable relief in this court, for undoubtedly the intention and agreement of the

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parties was to particularize in the schedules all the property upon which the deed was meant to operate. The omission of any part of it cast a doubt upon the title of the trustee and raised an obstacle to the execution of the trust as to the part so omitted, and it was the duty *P. M. Grover* and *James Foley* to supply this defect, which, if they unjustly refused, the parties claiming the benefit of the arrangement had a right to compel them to perform, and to pay the costs of the proceedings necessary for attaining that end. I may also here observe that, although the deed provides that in case of any fraudulent conduct on the part of the debtors, the creditors were not to be bound by the assignment, but were to be at liberty to resort to their previous remedies for enforcing their claims, I consider that they are nevertheless entitled to abide by the indenture, if they see fit, and to have it put in that shape in which it was intended by all parties to be.

Judgment.

The case presented by the bill is, that various lands, belonging at the time of the execution of the assignment to the defendant *James Foley*, and which ought to have been specifically included in it, were omitted from it by mistake, or excluded from it through fraud; and it insists that the parties claiming the benefit of this transaction are entitled to have this mistake rectified, or the agreement in this respect performed, and the intention of the parties completely carried into effect.

The bill treats the lands, which it represents as having been omitted or withheld from the deed, as not passing by it at all. This seems to be a wrong conclusion, as I have already observed; but the bill seeks, in effect, to bring the lands in question clearly and indisputably within the operation of the instrument; and, as I have already observed, I think, if the facts of the case warrant the claim, the plaintiffs are

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entitled, in point of law, to have these lands specifically mentioned in the assignment.

The question then is, whether the facts of the case, as they appear by the evidence, warrant this claim on the part of the plaintiffs. The property which this claim affects may be advantageously divided into several heads, and considered separately according to the different circumstances in which it is involved. It may be classed thus: 1st—Lots twelve and thirteen, in the town of Peterborough. 2nd—Lot eighteen in Peterborough, and a lot in Percy. 3rd—Certain lands called "*Foley's* Point." 4th—A lot supposed in the bill to be situate in the township of Belmont, and represented to be held by the defendant *Robertson* upon a fraudulent trust for *James Foley*. And 5th—Various properties, including some of those already specified, but considered under other circumstances.

Judgment.

First, with respect to lots twelve and thirteen: I think the claim as to this property entirely fails. The bill represents that those lots were conveyed to Mrs. *Foley*, the wife of *James Foley*, who is a defendant, in fee in the year 1843 or 1844, after marriage; that thirteen was purchased from the government, and granted by patent to Mrs. *Foley* and her heirs, and that twelve was conveyed to her and her heirs by *P. M. Grover*, having been purchased either from the government or *P. M. Grover*; that the purchase moneys of both lots were paid either out of partnership moneys or the moneys of *James Foley*, and that both lots were conveyed to Mrs. *Foley* in manner beforementioned, in order to place them beyond the reach of the creditors of *Grover* and *Foley*, whose debts then existed, or were thereafter to be incurred. Now, supposing this statement to be strictly true, what is the effect of the circumstances which it imports, upon the claim advanced in this suit? The creditors could, under these circumstances, no doubt

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sue *Foley*, and issue process and seize and those lands, and apply them in payment of their debts; but if, instead of adopting this course, they choose to claim under *Foley*, how can they claim what he cannot give? how can they purchase what he cannot sell? This settlement, though void against creditors, is binding upon the settler himself, and he cannot do any act in derogation of it. The creditors could take this property against *Foley*, but could not take it from or through him. But, then it is contended that the facts which have been mentioned shew this settlement to have been voluntary, and that this assignment is a purchase for a valuable consideration, and will consequently prevail over the prior voluntary settlement by force of the statute of the 27th Elizabeth, and that, in this way, the plaintiffs may claim the lands in question for the purposes of the trust. It may certainly be contended, with much reason, that where a husband applies his own moneys in the purchase of lands, which he causes to be conveyed to his wife, this is a voluntary settlement by the husband himself, and that it will be defeated by a subsequent sale of the lands comprised in it by the husband for valuable consideration. The facts, as they regard those lots, and as they appear from the whole evidence, seem to be that Mrs. *Foley* purchased these lots from the government, partly in person and partly through the medium of her brother, *P. M. Grover*, as her agent, with moneys received by her with the consent of her husband after her marriage, on account of a debt due to her before her marriage, and on account of rent of lands belonging to her before her marriage. These moneys were no doubt *prima facie* the moneys of *James Foley*, and if he, or she as his agent, by his direction, had applied them to the purchase of these lands, and he had caused them to be conveyed to her, this transaction would probably have been decreed to have been a voluntary settlement by him, and the lands affected by it might

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have been considered subject to this sale for valuable consideration, to as to defeat this voluntary settlement. But in this instance the fact appears to have been that *James Foley* permitted his wife habitually to receive the debts due to her and the rents of her lands, and did not actively interfere in the purchases in question; and, under such circumstances, it might be contended that such moneys so received by the wife were in fact thereby given to her by her husband for her separate use, and any purchases made by her of lands, with such moneys, and the conveyance of such lands to her, would not be regarded in the light of a settlement made by him at all. Such a gift could not be impeached in his lifetime under the statute of 13th Elizabeth, and it would not be within the statute of 27th Elizabeth. The moneys therefore which were applied by Mrs. *Foley* to the purchase of lots twelve and thirteen, might be deemed to be moneys given to her by her husband for her separate use; and the purchase and conveyance of those lands would, in equity, be her act, and not a settlement by him upon her. I certainly regard that assignment as a purchase by the creditors of the property comprised in it. They relinquish their debts, which form a valuable consideration, and it is probable that if a husband were to pay the purchase money of lands out of his own means by himself, or his wife as his agent, and were to cause them to be conveyed to his wife in fee, and were afterwards to include those lands in a general assignment of all his property to trustees for the payment of his debts, in consideration of a release of those debts, it would be deemed to be a case within the statute 27th Elizabeth, and that the assignment would be considered to prevail over the voluntary settlement. It might be a question indeed whether such a result would follow where the lands were not specifically mentioned, and the husband agreed to convey, and did in fact convey, all *his* land, or all *his* property, in general terms. It might

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be contended that these were not *his* lands, or *his* property, except to a limited extent—namely, the interest which he had and could alienate in his wife's lands; and although, if these lands had been specifically mentioned, so as to evince conclusively an intention to dispose of them, they would clearly pass to the trustees, it would be too much to put upon an agreement merely to convey all *his* property a construction which would make it embrace lands not *his* except in a sense, but which he had previously settled on his family. My opinion is, that it is not necessary that lands should be specifically mentioned in an agreement to convey or in the conveyance itself, in order to bring the case within the statute 27th Elizabeth; but that every case must in this respect depend on its own peculiar circumstances; and that the circumstances of the case may be such that, although the only expressions used in the agreement or conveyance are "*his* property" or "*his* lands," they may nevertheless be properly interpreted to embrace lands which are not *his* absolutely but only *sub modo*.

Judgment.

In the present case, if we look at the circumstances and the situation of the parties, we shall find that the debtors were in difficulties, and compelled to make an arrangement for the payment of their debts. The creditors could have sued for the recovery of their demands, and the more diligent among them could, by means of process of execution, have taken and applied to the satisfaction of their claims, not only property indisputably their debtors', but also property which was theirs in a sense—that is, which had been theirs, and which they had endeavored to place beyond the reach of their creditors for the purpose of impeding and hindering them in the recovery of their debts. The creditors might also have caused a commission of bankruptcy to be issued against the debtors, in which case property

so circumstanced would clearly have passed to the assignees for the benefit of the general body of creditors. In accepting this assignment in lieu of their legal remedies, the creditors relinquish some of the advantages which they possessed, probably with a view to an equal distribution of the property of the debtors, without the unpleasantness and expense of a bankruptcy. They consented to accept whatever their debtors could give, and were willing to relinquish what they could take, but they could not give. It would be unreasonable to hold that they gave up more than this. Their agreement, indeed, is general that all the property of the debtors shall be applied to the purposes of this trust. This property might consist of a variety of particulars, circumstanced in a variety of ways, unknown to the creditors or their agents; and in applying the general terms of the agreement to any particular part of the property in order to ascertain whether it is included in the schedule, we must ask ourselves the question whether, if the circumstances affecting this part of the estate had been known to all parties at the time, the intention would have been to include it; and if so, and the general terms of the agreement be sufficient to comprehend it, to hold it to be included.

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Now it is quite impossible to suppose that if any particular property had been confessedly disposed of without consideration, and for the purpose of defrauding those very creditors, either party would have wished or intended that it should be excluded from the agreement. *Foley* might have disputed the facts, but he must have admitted that if, in point of law, the property were liable for the satisfaction of the defendants, as having been fraudulently departed with in order to secure it from his creditors; and if, having been disposed of without consideration, it remained subject to his power of alienation for value, it ought to be included in the assignment

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and subjected to the trusts of it. The construction therefore, which I put upon this agreement is, that it includes all property—in other words, that all property is the property of the debtors within the meaning of it, which remained subject to their power of disposition for value, and which had been previously disposed of or departed with by them for the purpose of disappointing their creditors in the recovery of their debts. These two circumstances however must in my judgment concur. The property must have been disposed of without consideration and in fraud of creditors, and in this case it is, in my judgment, the debtors' property within the meaning of this agreement. Now, one of these circumstances, if not both, certainly fails with regard to Lots 12 and 13 in Peterborough. I do not think they were purchased for, or conveyed to Mrs. *Foley* in fraud of creditors; and therefore, admitting the transaction of the purchase and conveyance to have been a voluntary settlement—which, for the reasons I have mentioned, seems to me doubtful—I do not think that, under the circumstances which I have detailed, they are fairly embraced by this assignment. Independently of these circumstances, however, I think they ought to be excluded from the trust. I do not think they were ever intended to be included and that it would be contrary to good faith to include them in it. *Rubridge* says in his evidence—I am not sure of quoting his exact words—"The property of Mrs. *Foley* in Peterborough was not intended to be included in the assignment. It was never mentioned, and I never dreamed of including it." Now, I am confident that Mr. *Rubridge* when he used these expressions referred to lots 12 and 13. The only other property in Petesborough was lot 18; and that he did not consider this as Mrs. *Foley's* property is evident from another passage in his evidence, where he says, "I know of other lands belonging to *Foley* not comprised in schedule B.—viz., 18 in Peterborough,

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Foley's Point, &c.;" besides which Mr. and Mrs. *Foley* had for some time resided on twelve and thirteen, and it was, I apprehend, well known that they claimed those lots. In a letter addressed by *Rubridge*, after the execution of the assignment, to *James Foley*, he uses these expressions: "Mrs. *Foley's* property is sufficiently protected: it is not at her husband's disposal, or under his control." He was probably referring, when he made use of these expressions, to lots twelve and thirteen alone. This letter he wrote, he says, as the solicitor of Messrs. *Gillespie, Moffatt & Co.*, and it must of course bind them and their co-plaintiffs, who have chosen to concur with them in this suit. For these reasons, I think the claim of the plaintiffs fails as to lots twelve and thirteen in Peterborough, and that they cannot be brought within the operations of this trust. The same observation applies to the other party, which belonged to Mrs. *Foley* at the time of her marriage. *George M. Grover* says that it was understood between *Greenshields, Moffatt, P. M. Grover* and *James Foley* that Mrs. *Foley's* property was not to be included in the assignment, and that *Gillespie, Moffat & Co.* knew before the assignment that Mrs. *Foley* claimed the property long previously; and *P. M. Grover* says that Mrs. *Foley's* property was not intended to be included in the assignment, particularly lots twelve and thirteen; and that *Greenshields, Moffatt* and *Rubridge* acted for the creditors generally. There is no doubt that Messrs. *Greenshields, Moffatt* and *Rubridge* procured this assignment for the benefit of the creditors: there is no trace of any other creditor being present at the negotiations which led to it, and *Rubridge* acted for all parties. The other creditors claiming the benefit of this arrangement so made for them by these gentlemen, are bound by any understanding which existed between them and the debtors, and on the faith of which it must be intended that the latter executed the deed. The claim of

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the plaintiffs fails therefore in my judgment as to the lands to which Mrs. *Foley* was entitled before her marriage as well as to lots twelve and thirteen in Peterborough. It was contended, indeed, in the course of the argument that the expression "Mrs. *Foley's* property" in the evidence related only to her interest in the lands which she and her husband had in her right. But I am persuaded that this was not the meaning of the witnesses, and that they intended to say that these lands were to be entirely excluded from the trust, and that to introduce them into the assignment for the purpose even of binding merely the husband's interest in them would be contrary to the intention of the parties.

I have been the more particular in discussing the several points which presented themselves for consideration in this part of the subject, because for the most part they had a material bearing on the question next presenting itself for consideration—namely, the claim to have the lot eighteen in Peterborough and the lot in Percy included in this assignment. The pleadings and evidence, as they relate to this part of the case, appear to present it to the notice of the court in this form: The bill states that divers lands, the property of the debtors, or one of them, had been omitted or excluded from the operation of the assignment, and it prayed that they might be introduced into it. The lands in question—namely, lot eighteen and the lot in Percy—were not specifically mentioned in the bill as having been so omitted or excluded, but the answer both of *Foley* and *Grover* mentioned these lots: that of *Grover* stating that *Foley* had omitted them from the schedule of lands appended to the assignment, without his (*Grover*) being able to account for it in any way; that of *Foley* stating that having become the owner of these lots some time previous, he had, in the year 1846, conveyed them to *William Foley* in trust for his wife and her heirs.

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The answers of *Foley* and wife respectively allege that it was agreed upon their marriage that all her property real and personal, should be held by her for her separate use. This agreement, which appears to have been a parol one, as no writing has been produced or proved, supposing it to be of any validity, would not, of course, embrace these lots, which did not, either of them, belong to her at the date of her marriage. Mr. *Ruttan*, however, who was probably called to prove this alleged agreement, proves a very different one, not alleged in the answers at all. He says that it was agreed, upon the marriage of *Foley* and wife, that *he* should settle all *his* property upon her. He says further, that exhibits N. and O., which are two deeds made by his direction to her before their marriage, were executed pursuant to this agreement. It does not appear that any memorandum in writing existed of this agreement, but a letter is produced and proved, written by Mr. *Ruttan* to Miss *Grover*, and delivered to by her *Foley*, which evidences this agreement; and if, as was probably the case, *Foley* was aware of the contents of this letter when it was delivered by him, it would probably be deemed to be a sufficient writing evidencing the agreement, within the Statute of Frauds, signed by the agent of the party to be charged. It carries the agreement however no further than Mr. *Ruttan's* evidence had done—namely, that *Foley* should settle all his property upon his intended wife. Such an agreement appears to be void for uncertainty, and at all events it did not comprise after-acquired property, for which purpose a very plain manifestation of intent would be requisite. The lots in question did not belong to *Foley* at the time of the marriage, which occurred in 1839. The lot in Percy was acquired, as appears from the answers, in 1842 or 1843; and although it is not expressly mentioned when lot eighteen was purchased, the way in which it is mentioned seems to indicate that it was acquired

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at no long previous date to 1846, and I think if it had belonged to *Foley* at the time of the marriage he would have conveyed it upon that occasion in the same manner as he then conveyed the lands comprised in exhibits N. and O., which probably were a complete performance of this agreement on his part. At the time therefore of the conveyance of these lots to *William Foley*, in trust for Mrs. *Foley* and her heirs, they were the absolute property of *James Foley*, not bound in equity by any previous agreement, and liable to all his debts. These lots were conveyed by *James Foley* to *William Foley* and his heirs, in trust for Mrs. *Foley* and her heirs in 1846, seven years after this marriage, without any apparent reason.

It will be very material to consider the situation of the firm at this time, and it can be gathered with tolerable certainty from the parol and documentary evidence which we have under our consideration.

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The letters which have been produced are very material for this purpose. The first is a letter from *Foley*, dated 13th December, 1844, shewing that the firm had need of money—from 1200*l.* to 1800*l.*—but whether for a particular purpose or to enable them to carry on their business generally, is uncertain. The next letter is from *P. M. Grover*, and is dated at Prescott, 22nd August, 1845. It shews that they were in difficulties at that time, and indeed were apprehensive of being ruined. There is another letter of *P. M. Grover*, dated 3rd, September, 1845, of a similar purport and tendency; and a letter is produced from *Foley*, dated 17th September, 1845, which shews that previously to the sale of a raft which they had been employed in conducting to Quebec, they were much embarrassed. The sale of this raft appears to have afforded them temporary relief; but the tenor of the different letters seems to indicate that had anything occurred to cause disappointment in this respect, and it evidently was for

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some time a subject of great anxiety, their ruin would have followed. I gather also from the contents of the letters that the raft itself had not been paid for. It is impossible not to see that at this time the firm stood in a very precarious situation, and that a recurrence of the same or a similar difficulty, which might have happened at any time, might have caused their entire failure. Under these circumstances, and in the early part of 1846, *James Foley* executes the voluntary settlement in question; and about a year afterwards the firm are obliged to make an arrangement with their creditors. There is other evidence which bears upon this point. *Rubridge* says that the circumstances of the firm were bad in 1845 and 1846: that an attempt was made in 1846 to make them bankrupts, which he had resisted successfully; and that *James Foley* had admitted to him that they were in difficulties in 1845 and 1846, caused, as he said, by the over-speculation of *P. M. Grover*. *Conger* also says, in his evidence, that *James Foley* spoke to him respecting the property called *Foley's* Point and he adds that this was in the end of 1846, and, at all events, about the time that *Grover* and *Foley* got into difficulty. There is a case of *Townsend v. Westacott* (*a*), which was cited in the argument, and which appears to be very material to the present purpose. In that case a person largely, indebted made a voluntary settlement, and shortly afterwards took the benefit of the Insolvent Debtors' Act. Under these circumstances the court—without entering into a minute inquiry whether, at the time of the execution of the settlement the settler was insolvent, or, what was more to the purpose, whether its execution left him in that condition—considered that the circumstances of the case were sufficient to warrant the conclusion that he intended by the act complained of to hinder and delay his creditors in the assertion of their claims, and therefore declared the settlement

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(*a*) 2 Beav. 340.

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void. This authority seems to establish a plain and reasonable rule for cases of this description. It is true that if a man is insolvent at the time of the execution of a voluntary settlement, or even if the execution of the settlement itself, by divesting him of a portion of his property, leaves him in that condition, the legal presumption of fraud may be so strong that it cannot be controverted; but the question is whether it way not arise under circumstances short of what I have mentioned. It is obvious that the circumstances I have referred to afford no certain criterion. A man may be insolvent, or a particular act may render him so without in either case his being aware of it. On the other hand, a man may be solvent at the time of performing a particular act, and he may remain so after having performed it, and yet he may think otherwise, and may intend all the while to defraud his creditors. Men do not always enter into a nice calculation of their means and liabilities before they make a voluntary settlement. If the idea present to his mind is, that he owes a great deal of money; that he does not know how he stands: that the creditors may take everything; that he had better make some provision for his family, while he had the control of his property—such a case would be within the 13th Elizabeth, although it might happen that he was actually solvent at the time, and remained solvent after the execution of the deed. The immediate cause of the act is the fact of his indebtedness, and the object of it is to place the property disposed of beyond the reach of that indebtedness. The rule established by the case 2nd Beavan, seems to be, that if a man largely indebted make a voluntary settlement and afterwards take the benefit of the Insolvent Debtors' Act, the settlement will be void against creditors, although it do not appear that he was actually insolvent at the time, or that the execution of the settlement rendered him so. Now, apply that rule to the present case, and we shall find

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that a person largely indebted, and perhaps intending to become still further indebted, having been threatened with ruin only a few months previous—a danger which might occur at any time—standing in a very precarious situation, makes a voluntary settlement in favor of his wife without any apparent reason—with nothing, so far as appears, to call for it at that particular time, and seven years after his marriage; which same individual, having defeated an attempt to make him a bankrupt, is compelled, within a year from the execution of the settlement, to make an arrangement with his creditors, in fact fails. I have no difficulty in holding that this case falls within the rule laid down in the case in *Beavan*, and that this settlement must be deemed fraudulent and void as against the creditors of *James Foley*. This property then—namely, lot eighteen in Peterborough and the lot in Percy—are, I think, fairly comprised in the agreement. It is property which the defendant *Foley* could have given to his creditors, and which, under the circumstances, he ought to have given to them; and which, therefore, both parties may be fairly considered as having agreed should be given to them. I think, however, that neither the general nor specific description in the assignment is sufficient to comprise it: that it therefore does not completely realize the intention of the parties; and that, as the bill prays, it must be rectified with that view.

Judgment.

The next point in the case which demands our consideration, is the question relating to the property called "*Foley's* Point." The circumstances relating to this property are very peculiar. It appears certainly to have belonged to the uncle of *James Foley*, a person residing in England, on the 3rd of July, 1844, when they were purchased by the defendant *James Foley*, at sheriff's sale. *Rubridge* says, in his evidence: "I have no doubt that *Foley's* Point

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belonged *bona fide* to the uncle when sold for taxes," and indeed the case stated by the bill supposes, and the answer of *James Foley* admits, such to have been the fact. The statute, under which this sale took place, provides that the owner of the lands sold for taxes shall be at liberty to redeem them within twelve months from the date of sale, but that if he shall neglect to do so, they shall become the absolute property of the purchaser, who shall thereupon become entitled to a deed of conveyance of them from the sheriff. In the present instance the lands in question having been purchased on the 3rd of July, 1844, were not redeemed within twelve months from that time. If *James Foley* had purchased them as agent or trustee for his uncle, and the uncle had afterwards ratified the proceeding, *James Foley* would not have been permitted to retain or dispose of them for his own benefit. But this was evidently not the case; *James Foley* disclaims having purchased the lands as trustee for his uncle, in his answer. He there says that he never was a trustee for his uncle; and in a previous part of the answer he says, that these lands originally belonged to his uncle, who had purchased them in 1818 with his own moneys; and that they were purchased on the 3rd July, 1844, by *G. A. Grover* at his, *James Foley's*, instance, in order to enable his uncle to redeem them. He then says that he *relinquished* these lands to his uncle before the execution of the assignment. If then we were to believe the statement in *James Foley's* answer relative to these lands, it would appear that on their being advertised for sale for taxes he had not paid the taxes and stopped the sale, which he would have done if he had been willing to incur the risk of not being repaid, but allowed the sale to proceed, and purchased the land through his agent, intending, as he says, to enable his uncle to redeem them at any time. Supposing his statement then to be true, it is manifest that he did not wish to incur the risk of not being

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repaid, but purchased the lands through his agent in order to make himself safe, intending, if his uncle should be willing to redeem them, to permit him to do so at any time, otherwise to keep them himself. The uncle, however, was under no obligation to redeem the lands, and he might never do so. It is plain, therefore, that after the expiration of the twelve months from the date of sale, they became the absolute property of *James Foley*, although, if we are to believe his account, he intended to allow redemption by his uncle, whenever he might choose to seek it. He was not, however, legally bound to permit it, and might refuse it when sought, if he should think fit. According to *James Foley's* own representation therefore of the matter, these lands were his absolute property at the time of instituting the negotiations for this assignment in January, 1847. If he had then stated all the circumstances relating to these lands to the creditors or their agents, and had stipulated that if his uncle should desire to redeem them he should be at liberty to do so, otherwise they might have them, the matter would have been different. But he does not pursue this course. On the contrary, fearing probably that if he made such a proposal to the creditors they would not accede to it, he allows the negotiations to proceed and to be brought to a close; enters into an agreement to make over all his property, and executes an assignment for the purpose of carrying that agreement into effect, and at the same time, in an underhand way, omitting or excluding these lands from the assignment, in order that the creditors might not have them, he relinquishes them to his uncle, receiving from the agent the sum he had three years before paid for the taxes, or rather the purchase of the property, amounting to 6*l.* 5*s.* 5½*d.*, and surrenders the certificates evidencing the purchase, which are thereupon destroyed. Now, supposing that *James Foley* had always entertained a *bona fide* intention of allowing

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his uncle to redeem this property at any time, and had made such relinquishment and surrender as I have mentioned, and had received the amount of the taxes in pursuance of such intention, I nevertheless think that transaction would have been a fraud upon the assignment, and that as between his creditors and the defendant *James Foley*, they would have been entitled to these lands. Nor would it have made any difference if, as *James Foley* states in his answer, but does not prove, Messrs. *Gillespie, Moffat & Co.* had known his claim to these lands, and had, through the medium of Messrs. *Greenshields, Denholm & Rubridge*, previously to the execution of the assignment, pressed him to include them in their mortgage, and he had refused their request, and had informed them that they belonged to his uncle. Nor would it have made any difference if, as is stated in the answer of *P. M. Grover*, and as is probably true, *James Foley*, either before, or at the time of, the assignment, upon its being pointed out that the schedule of lands did not include *Foley's* Point, stated that he had disposed of that property, or had held it as a trustee for his uncle and had relinquished it to him, it appearing by the answer of *P. M. Grover* that the assignment was executed under a suspicion on the part of the creditors that all *Foley's* lands were not included in the schedule; but on the understanding that whatever should appear to belong to him should be subject to the trusts of the deed, and retaining the right of insisting that any property that might appear to belong to him should be included in the assignment. The case, however, is much stronger than I have supposed. I am clear that *James Foley* never intended, if he could prevent it, to allow his uncle to redeem this property; but, on the contrary, always intended, if he could, to retain it for his own benefit. When I say if he could, I mean that probably shame may have deterred him from claiming a deed from the sheriff, and he may have wished to

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allow matters to remain as they were until a favorable opportunity should present itself of making his title complete. I infer that he intended to retain this property for his own use, if he could, from the facts of the case, which lead irresistibly to that conclusion. In the first place, if his intention had been to allow his uncle to redeem the land at any time, he would not have suffered nearly three years to elapse without communicating the object with which he had made the purchase either to his uncle or his agent. In the next place, we find that it was the wife of the uncle's agent, who was his neice, that informed the uncle of the purchase by *James Foley*, which information was given within the year, and that the uncle, after the expiration of the year, in answer to that letter, requested the agent, *Thomas Dennehy*, to "try and get back the land." We find further, from the evidence of the agent, that he shewed this letter to *Foley*, who did not, however, immediately say, as he would have done had he really entertained the intention for which he claims credit, that his intention always had been, and all he wished was to make over the land to his uncle, upon receiving the amount he had paid; but, in the language of the witness, he "put him off," and acted in such a way that the witness said to him, "it was a shame his keeping the land;" that the witness thought it a swindle, and that he, *James Foley*, never would give them up. Further, if the intention of *James Foley* had been such as he represents it, he would have stated the facts truly and plainly at the sale; he would have represented that he was desirous of purchasing the property, in order that his uncle might redeem it after the expiration of the year, if he should think fit; and, no doubt, such a representation would have been equally successful and effectual in obviating competition with the one which he actually made; but, in this case, it would have been difficult, and this he had sense enough to see, for him to

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retain the property afterwards against his uncle. He therefore, makes a representation at the sale which we must suppose upon this record to be untrue. The representation was, that he had the land from his uncle; that it was his own; that he desired to make his title more perfect, and, with that view, had suffered the taxes to fall into arrear, in order that the property might be sold by the sheriff so that he might purchase it. This representation, which upon this record must be taken to be untrue, and in that case fraudulent, shews that he did not make the purchase for his uncle's benefit but for his own. The supposed relinquishment of *James Foley* to his uncle of these lands took place in this way: In the month of January, after the commencement of the negotiations which resulted in the assignment, and, on the 27th of that month, *James Foley* handed to *Dennehy* a proposal for relinquishment of the lands, to which, no doubt, *Dennehy*, on the behalf of the uncle, acceded. This took place before the execution of the assignment, but, as I think, in contemplation of it. After the execution of the assignment the relinquishment is actually made and the money paid. Under these circumstances, I think this transaction was a fraud upon the assignment; that the agreement for the relinquishment, which may be deemed to have preceded the assignment, conferred no title in equity, being tainted with fraud on the part of *James Foley*; that the subsequent completion of an unfair title could make it no better; that the property passed under the assignment to the creditors or their trustee; and that the uncle, although having the legal estate, cannot insist that he is a purchaser for valuable consideration without notice, the consideration which he paid, although sufficient as between him and *James Foley* to sustain the transaction under the peculiar circumstances of the case, being altogether too trivial to make the uncle a purchaser as against the creditors, who are entitled

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to treat the property in the same manner as any other property of their debtor.

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There is, however, a difficulty attaching to the claim of the creditors to this property which will prevent the court from decreeing any relief with respect to it in the present state of the record. This difficulty is not suggested by the defendant *James Foley*, who would not indeed be heard or permitted to raise it, but appears from the plaintiff's own evidence in part, and partly from that of the defendants. It is proved plainly by *Conger* and *Dennehy*, and also by a witness named *Harvey*—and I can judge of the facts of the case only by the evidence before me—that *James Foley* procured this property by a fraud on his uncle. It appears clearly in the present state of the evidence, that just before the sale for taxes he represented to the sheriff that the lands were *his*; that he had them from his uncle, and that in order to perfect his title to them he had allowed the taxes to fall into arrear; and that he wished this fact to be stated at the sale in order to prevent competition; that this statement was accordingly made at the sale both by the sheriff and *G. A. Grover*, *James Foley's* agent, whereby competition was prevented, and *James Foley* obtained the property for the amount due upon it for taxes, being 6*l.* 5*s.* 5½*d.* This representation must be taken upon this record to have been untrue. *James Foley* in his answer makes no such statement. If he had, it would have made a case for the plaintiffs, and entitled them to this property. The statement he does make is inconsistent with it—namely, that he had purchased the land being his uncle's in order to enable him to redeem it, even after the expiration of the year allowed for that purpose, if he should so desire. *Dennehy's* evidence also is entirely inconsistent with the supposition that his uncle had given this property to his nephew. It is very improbable that if this had

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been the case, he would have instructed his agent to endeavour "to get back the property:" and when *Dennehy* remarked to *James Foley* that it was "a shame his keeping the land," the ready answer would have been, "Why, my uncle has given it to me." *Foley's* title, therefore, to this property, judging from the present state of the record, is infirm, its inception being tainted with fraud; and the court cannot, in justice either to a purchaser under its decree, or to the uncle, decree a sale of this property without having the uncle substantially before it, and without the question between him and his nephew being decided. The plaintiffs, however, are entitled to have this property sold if it really is *Foley's*, and can insist therefore upon the question between the uncle and nephew being decided in this suit. I may add that the relative position of the uncle and nephew seems to be, that *James Foley* has a *prima facie* title, based upon the sheriff's sale and the expiration of the time allowed for redemption, which title has passed to the trustee and creditors claiming by virtue of this assignment; and that the uncle must impeach and overthrow this title if he desire to do so.

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With regard to the case of the defendant *Robertson*, I think the bill is clearly not multifarious. It states that a lot of land in the township of Belmont, which belonged to *James Foley*, was conveyed by him to, and remained vested in *Robertson* for the purpose of *pro tanto* defeating the assignment. Now, if this were the case, the lot in question is bound by the trust, and the plaintiffs have a right to bring it within the provisions of the deed. The bill is filed for the attainment of this object in regard to this and other lands omitted or excluded from the deed through mistake or fraud, and if the lands so circumstanced should happen to be vested in twenty different persons, they could not complain of being joined in one suit instituted to redress the wrong or correct

the mistake. The bill also prays an execution of the trusts, but with this the defendant *Robertson* has nothing to do. He will either be dismissed or decreed to convey, and in either case the suit, so far as he is concerned, will then be terminated, and he will not be in the slightest degree implicated in the execution of the trust, which will be wholly subsequent. If, indeed, the trusts were disputed, it might be reasonable that the plaintiffs should have the deed rectified in one suit, and the trusts carried into execution in another. But when the trust is not disputed, I think it quite proper that the plaintiffs should in one and the same suit call for a rectification of the trust in the first instance, and, after it has been brought to its proper state, for its execution. Besides, we cannot help seeing that the substantial object of the suit is to rectify the deed, and that the bill asks for an execution of the trust, which is not resisted by any one, and for which no suit is necessary, only because the estate happened to be in court, and it was thought better than the trusts, when rectified, should also be carried into execution, under its direction. *Robertson* in his answer denies that any lot in Belmont was conveyed to him by *James Foley*, and disclaims all interest in any such lot. *Harvey*, however, in his evidence deposes, that *Robertson* in 1841 shewed a deed from *James Foley* conveying to him a lot of land which he believes was in Belmont, but might have been in Asphodel; and that *Robertson* admitted that it was not his and that he had paid nothing for it. Now *Robertson's* answer meets the case only of a lot in Belmont, to which his answer is wholly confined, and not of a lot in any other township, and if it should appear that a lot in Asphodel had been conveyed by *James Foley* to *Robertson* without consideration about the time of the assignment, which *Robertson* admitted not to be his property, I think such a case sufficient in point of law to warrant further investigation for the

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purpose of ascertaining whether the facts of which some evidence has been adduced, really were as represented, and whether any objection can be urged against this *prima facie* equity; the transaction would be within the general case presented by the bill of lands admitted or excluded from the trust by mistake or fraud; and all difficulty from surprise would be obviated by the direction of inquiry, supposing that the objection of surprise could be made in a case where the particular case stated by the bill applied exactly to a lot in the defendant's possession situated in another township, as must be perfectly obvious to the defendant himself. I think, therefore, that an inquiry should be directed as to any lot conveyed by *James Foley* to the defendant *Robertson* in Belmont, Asphodel, or elsewhere, and when, and for what consideration, and under what circumstances generally; and that the costs as to this part of the case should be reserved.

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There are several minor points which require to be noticed, in order to dispose entirely of the suit. One *Birdsall* executed an indemnity to *Conger*, of which he appears to be a trustee for the persons claiming under this assignment, and of which, I think, the benefit may be obtained in this suit. Lot eighteen in Peterborough seems to have been sold after the execution of the assignment to *Bowes & Hall*. The execution was issued against the property of *James Foley*, whose interest in this land, if legal, had already passed under the general words of the assignment to the trustee, notwithstanding its omission from the particular description which followed in the schedule. In this respect the case is very like that of *Welby v. Welby* (*a*), and I think the principle of *falsa demonstratio non nocet* thoroughly applies to it. We first have an intention plainly manifested to make over all the property of the debtors and each of them; a gener-

(*a*) 2 Ves. & Bea.

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al description is inserted in the deed, which effectuates that intention; and if the deed had stopped there, no doubt would have existed but that the intention of the parties had been completely fulfilled. A particular description, however, is added for the purpose of making the matter more plain, which is false, but cannot defeat the plain intent, with which it militates, and which without it had been completely effectuated. In *Welby v. Welby* the testator evinced a clear intent to dispose of his estates in a particular county to a certain individual; he gave these estates to that individual by his will under the general description of all his estates in such a county, adding, however, the words "which estates I bought" of such a person. This was not true as to all the estates, but this particular description, added by way of demonstration, was not not permitted to defeat the plain intention, which had been previously manifested and fulfilled. It is true that in the present case the object of the plaintiffs is to subject the entire estate in lot eighteen to the trusts of this deed, and the court thinks them entitled to this relief. If the estate of the husband and wife is legal, they are trustees of the remainder of it for the creditors under the assignment; if however the legal estate remained in *P. M. Grover*, he became a trustee of it in like manner for the same persons. In no case can *Bowes & Hall* claim any interest in this land except under registration, or prior registration of their conveyance; in which case they would appear to have the legal, and if they had no notice, the beneficial estate in the property. It seems from *Ruttan's* evidence that he sold the lot in Percy to *A. H. Meyers* for a third person, and lot No. 23, broken front concession A. in the township of Haldimand, after the execution of the assignment. The lot in Percy is in *pari materia* with lot eighteen in Peterborough, and the remarks which have been made respecting the latter lot might be repeated in regard to the former one. Lot twenty-

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three may have been acquired subsequently to the execution of the assignment; in which case the creditors would have no claim to it. If it belonged to *Foley & Grover*, or either of them, at the time of the execution of the assignment, it passed by the general words of that instrument; and *Burnham*, the purchaser at sheriff's sale, has no interest. In either event therefore he is not a necessary party to this suit. I think that the plaintiffs are entitled to have the omitted lands specifically introduced into the assignment, although they have passed under its general words. Their omissions, when others are particularly mentioned, casts a cloud upon the title of the trustee, and raises a difficulty in the way of the execution of the trusts, and it certainly was the intention of the trustees that all the lands should be specifically mentioned. The equity of redemption of the lands mortgaged to the plaintiffs, Messrs. *Gillespie, Moffatt & Co.*, and said to have been joint property, it is suggested, have been omitted from the schedule. It is not suggested that these lands were not intended to be included in the deed, and if the equity of redemption in them belonged at the time of the execution of the deed to *Foley* and *Grover* jointly, or either of them separately, it passed, I think, to the trustee under the general description in the deed, but ought to have been specifically mentioned in the schedule, and the deed should be amended in that respect. It is said that the trustee did not, in pursuance of the provision for that purpose in the deed, notify its execution to all the creditors, so as to enable them to become parties to it, if they should desire it. This fact is denied, but even if it is true, can furnish no ground of objection to the claims advanced in this suit. Mr. *Denholm* was as much the trustee of Messrs. *Grover & Foley* as of the creditors. The latter had no interest in seeing that the trustee did his duty in this respect—the former had; and it was their fault if due notice has not been given to all the

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creditors. It may be however a great hardship to any of the creditors, who have not received notice, and have been thereby prevented from becoming parties to the trust, and I think that an opportunity should be afforded them of doing so. It was contended by the learned counsel for the defendant Mrs. *Foley* that, supposing her husband's interest in her lands should be decreed to be subject to the trusts of the deed, she would be entitled to a provision out of such property before relief would be given to the plaintiffs with respect to it. The opinion which I have formed, that the *corpus* of the wife's lands must be entirely excluded from the deed, makes it unnecessary to decide this point; but I am strongly inclined to think that, as a general rule, the court would not deliver to the husband or his assignee that which the law gives to the husband for the maintenance of both husband and wife, the husband not performing that obligation, without securing a provision for the wife. The husband's interest in his wife's lands must be regarded virtually as a life-interest, although he may be able to dispose of the inheritance, subject to the right of herself or her heir at law to defeat the disposition: and the husband maintaining, his wife would appear to be entitled to the enjoyment of this interest by himself or his assignee, without making any provision for the wife out of it. It does not seem to me to make any difference in the application of the principle whether the husband's interest, which has been transferred by him, exists with respect to an equitable life-estate of the wife in lands, or to her equitable inheritance. I do not say however that the principle would have been applicable to the present case, if the lands in question had not been intended to be excluded altogether from the deed—the interest of the husband being legal, and having in fact passed under the general word, and the plaintiffs seeking to have this property specifically mentioned, only in order to

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remove a difficulty in the way of carrying the trusts into execution.

In the view which I have taken of this case it is also unnecessary to determine whether the husband can, without his wife's concurrence, alienate his own interest in his wife's real property. The doubt arises upon the construction of the last statute which has been passed in this province on this subject, and the Court of Queen's Bench have, I understand, decided that he cannot effect such an alienation. It is quite certain that at the common law the feoffment or fine of the husband alone of the wife's lands effected a discontinuance of her estate—that is, turned it into a right of action, and a new and wrongful estate was vested in the feoffee or conusee. This estate thus created was undoubtedly an estate in fee, and it could not be disturbed during the coverture, or, if the husband would have been tenant by the courtesy, during his lifetime, because during this time he would have been entitled to his wife's estate, and he could not derogate from his own act. After his death, however, the wife, or, if she were dead, her heir, was put to a real action for the purpose of recovering the estate. Her writ was called a "*cui in vita*," and the heir's a "*sur cui in vita*." This was altered by the 32nd Henry VIII., ch. 28, sec. 6, which provided that no feoffment, fine, or other act of the husband would thenceforth make any discontinuance of the wife's lands, or be hurtful or prejudicial to her or her heirs, but that she and they should thereafter enter on such lands, &c. The consequence is that the wife and her heirs are not now driven to their real action to restore the estate, but may make an entry. It is certain however that the feoffment or fine of the husband passes (unless any late statute may have made an alteration) an estate in fee in his wife's lands. Thus Mr. *Preston* says, in the first volume of his work upon Abstracts, page

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332; "In the meantime however the estate of the wife will be in the alienee of the husband; for the statute of 32 Hen. VIII. c. 28, sec. 6, did not restrain the extent of the power of alienation by the husband, it merely changed the remedy from an action to an entry. Hence the wife may be barred by the husband's fine and non-claim" (*a*).

A feoffment and fine had a violent and often tortious operation at the common law. A bargain and sale, and lease and release were what were called innocent conveyances, and passed no more than the bargainor and releasor could lawfully pass, Mr. *Preston*, however, is of opinion that the husband having the inheritance of his wife's lands (for marriage is a gift of the whole estate) may lawfully transfer it, subject to be defeated by the entry of the wife or her heirs after his death. This doctrine is in strict accordance with that relating to tenants in tail, whose bargain and sale, or lease and release, conveys a base fee to the bargainee or releasee, but the issue may, after his death, enter and defeat it (*b*). However this may be, it is certain that the alienation by the husband alone of his wife's lands transferred the estate during the coverture, or during his life, as the case might be. This was the state of the law up to the passing of the provincial statute.

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Now this was an enabling statute: it was intended to facilitate the alienation of the lands of married women, and certainly, I should suppose, not to curtail any power of alienation that already existed. I should have supposed the meaning of the statute to have been, that any other mode of alienation than the one there prescribed should be null and void, so as to pass the wife's estate, which was the only thing then in the contemplation of the legislature. They were not considering any estate that the

(a) 1 Inst. 32 Ca. (b) See Machell v. Clarke, 1 Ld. Raymond, 778.

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husband might have in his wife's lands, or his power of alienation over such estate. It seems repugnant to the genius of our law and to reason itself, that a man having an estate should not have power to alienate it. Now the husband certainly has an estate in his wife's lands. The case at law is not fully reported. Whether the precise point arose, or all the authorities were cited, perhaps does not satisfactorily appear. It is of course entitled to great weight; and, if it had been a judgment of the Court of Appeal, would have been binding on us. Under the circumitances I think, had we entertained a different opinion upon the effect of this agreement, it would have been our duty to have decreed these lands of the wife to have been inserted in the schedule, in order that the plaintiffs might have made what they could of them at law.—See *Polybank v. Hawkins* (*a*), and 1 *Saunder's* Reports, 250, 253, and the notes. Although it appears from these cases that during the coverture the husband and wife are both seized in fee of her lands in her right, yet it is certain that the husband alone has a power of alienation over them to a certain extent, just as the husband may dispose of the wife's chattels real during the coverture, but if he should not they will survive to the wife (*b*).

Judgment.

I think an inquiry may properly be directed as to what lands *Grover* and *Foley* had at the time of the assignment.

The plaintiffs *Gillespie, Moffat & Co.* claim to rank upon the trust estate to the extent to which they were injured by an alleged fraudulent removal on the part of *James Foley* of goods under seizure at their instance. This claim will properly be investigated in the master's office.

(*a*) Dougl. 329. (*b*) See Pres. Abr. 1, 342, and the cases there cited.

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SPRAGGE, V. C.—My brother *Esten* has entered so fully into the facts and law of this case, and has so fully examined the evidence, that it remains for me only to state shortly my views upon the different points presented. I agree with him as to the decree which ought to be pronounced.

As to lots twelve and thirteen in Peterborough, I think that their purchase was virtually made in 1843, at which time, so far as appears, *James Foley* was not insolvent, nor his affairs in such a state as that a fraudulent intent could be inferred under the statute of 13th Elizabeth, even if the purchase had been made with moneys which were his, in the ordinary sense of the term, and not distinguished from his ordinary pecuniary means; but the moneys with which these lots were purchased being derived from the wife and placed at her disposal by mutual understanding and compact between them, tends to divest the transaction of the suspicious character which reasonably attaches to voluntary settlements followed by insolvency. I cannot say that I think *all* the transactions connected with those lots equally above suspicion; the expenditure of partnership funds in the buildings upon them, at a time when the partners were in difficulties and would need all their means to meet their engagements, wears the appearance of a disposition of the funds in this way with a fraudulent intent; but it does not follow that such disposition of funds can be affected under the statute, inasmuch as what was so appropriated to the separate property of the wife could not be taken in execution by creditors; still, as it might be got at in bankruptcy, it may be questioned whether a voluntary settlement of that which might be reached by creditors *in any way* cannot be challenged as void under the statute (*a*).

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(*a*) Dundas v. Dutens, 1 Ves. Junr. 196; Rider v. Kidder, 10 Ves. 360.

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We are however relieved from the necessity of determining whether relief could be given to the creditors in respect of this application of the moneys of the partnership, by the circumstance of the property in question not being included in the trust deed, *advisedly*, and with the assent of those through whose intervention it was obtained. I think the evidence upon this point sufficiently clear, and that it establishes satisfactorily that as well the lots in question as the property of Mrs. *Foley* before marriages were to remain untouched by the trust deed. The creditors may have been satisfied to have included in the trust all that they could take by process of law; it does not appear that anything was concealed from them in relation to these two lots, and they had the advantage of the personal knowledge of Mr. *Rubridge*, who appears to have been as well able as any person in the neighborhood to form a correct judgment upon the question whether or not these lots ought to have passed to the creditors; and he says he never dreamed of including them. It is evident too that *James Foley* became a party to the trust deed with the understanding that they should not be included.

Judgment.

As to lot eighteen in Peterborough and the lot in Percy, I agree that they ought to be inserted in the trust deed, and I think that at the time of these lots being settled by *James Foley* upon his wife the firm of which he was a partner was in such a state as to bring him within the statute of 13th Elizabeth, and that a fraudulent intent must be inferred from the position of his affairs. *Townsevd v. Westacott* seems to establish a just and sensible rule upon this point; but I think that such a state of pecuniary embarrassment is established in this case as existing at the date of the settlement of these lots on Mrs. *Foley*, as would bring it within the older cases, which required that actual insolvency should be shewn. As to the above two lots, I say this as between the parties now

before the court, subject of course to any claim which may be established by the purchasers at sheriff's sale.

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With regard to the lots of lend comprising *Foley's* Point, I cannot profitably add much to what has been said by my brother *Esten*. I think with him that the conduct of *James Foley* can bear no other interpretation than he bought the land with the intention of keeping it as his own, and that he retained that intention until he found that he would have to choose (so far as he could choose) between their going to his uncle and their going to his creditors. The representation which he made upon the occasion of the lands being offered for sale for taxes, first in April, 1844, and again in July following, strongly evince such intention; as no other representation would have served to have given him the whole of the land, while the plain truth would have served his uncle, whom he now professes to have intended to serve, much better. This will be apparent upon considering the provisions of the statutes under which the lands were sold. They provide that the lands shall be put up at two shillings and six pence an acre, and it is in evidence that these lands were in April put up at that price. Even if the intention of *James Foley* had been only to serve his uncle, he would have been best served by a portion of his lands only being sold for taxes, and even at the upset price, a little more than fifty acres would have been sufficient for the purpose; and if there had been competition, a still smaller quantity of land would have been necessary. But if, instead of intended to serve his uncle, he really intended to serve himself, such a sale would not answer his purpose, but only such a sale as is provided for in the event of there being no bidders at 2*s.* 6*d.* an acre. He makes then such a representation as would induce persons not to bid against him, and at the same time as would account for his

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not bidding himself at 2*s.* 6*d.* an acre. There being no bidders at that price, the consequence would be that at the next quarterly sale the whole of the land would in the first instance be put up for sale for the taxes; and this was accordingly done in the month of July following, when the same representation being repeated, competition was prevented and the whole of the land (about 300 acres) were purchased for *James Foley;* and so we see that a representation was made avowedly for the purpose of preventing competition, and was confessedly at variance with the truth, which was precisely such a representation as a man might make who intended to procure the whole land for himself, and were precisely calculated to attain that object, while if his object had been what he now professes, to serve his uncle, the simple truth would have answered his purposes better. Add to this his never communicating the purchase to his uncle, and his evident unwillingness to restore the land to him when applied to by his agent, the conclusion appears to me to be that he bought the land for himself and intended to keep it himself; and if so, it is just and right, as between *James Foley* and his creditors, that they and not he, should keep the land; and, unless the uncle upon being brought properly before the court chooses to impeach the purchase by *James Foley*, and can impeach it successfully, I think that the land so purchased should be included in the trust deed.

Judgment.

With regard to lands purchased at sheriff's sale since the execution of the trust deed, some by Messrs. *Bowes & Hall*, and some by other persons, I think inquiries should be directed, as pointed out in the judgment of my brother *Esten*. The evidence does not shew when the debts were contracted upon which judgment was entered and upon which the executions were issued under which such lands were sold. If contracted after the voluntary settlement of those

lands, a question may arise whether the settlement can be impeached by those creditors, or whether they could treat such settlement as invalid and proceed to a sale of the lands settled as remaining, as against them, the lands of *James Foley;* that point has not been spoken to, and I do not now express any opinion upon it. Questions may also arise under the registry law of Upper Canada. 1852. Gillespie v. Grover.

It was objected at the hearing that the bill was multifarious as regards the defendant *Robertson.* I think it is not so; but the objection not having been taken by demurrer it cannot be taken at the hearing except by the court; and even if open to the objection technically, I think that the question affecting that defendant can be conveniently disposed of in this suit, and that he ought to be retained so far as is necessary as a party. Judgment.

LeTarge v. DeTuyll.

Mortgagee—Costs.

A mortgagee who takes a deed absolute in form, instead of with a defeasance, and then fraudulently denies the right of redemption, setting up the deed as constituting an absolute purchase, is guilty of such misconduct as will subject him to the payment of the costs of the suit. Nov. 23.

The nature of the present case fully appears in the previous reports thereof—*Ante* volume 1, page 227, and *ante* page 369. On the latter occasion the court, in giving judgment, reserved the question of costs, and now proceeded to dispose of it. Statement.

The judgment of the court was delivered by

The Chancellor.—In delivering our judgment in this cause we did not dispose of the question of costs. The plaintiff comes to redeem, and is therefore, *prima facie,* bound to pay costs. But, although that is the general, it by no means the universal Judgment.

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rule. The right of a mortgagee to receive his costs in a redemption suit is expressed by Mr. *Coote* in this qualified way: "On redemption the mortgagee is entitled to his full costs, *unless deprived of them by his own misconduct or mismanagement*" (*a*). In *Dettellin v. Gale* (*b*), Lord *Eldon* distinctly states that a mortgagee's right *to recover* his costs ceases where he himself ceases to act reasonably as mortgagee. "It is said," he observes, "because he is a mortgagee he is to have his costs. That is not of necessity. *Prima facie*, he is to have them certainly. The owner coming to deliver the estate from that incumbrance he himself put upon it, the person having that pledge is not to be put to expense with regard to that; and so long as he acts reasonably as mortgagee, to that extent he ought to be indemnified." And although Lord *Eldon*, with characteristic caution, says that the general rule ought not to be departed from, to the extent of making the mortgagee *pay costs*, without great consideration; still his Lordship remarks that he "does not say the court will not, and is very far from saying the court ought not, to make such a precedent."

Judgment

Now, such a precedent had been made at that time, and has been since followed in a variety of circumstances. For instance, where there has been a tender and refusal of the whole debt and interest, the court has not only denied the right of the mortgagee to recover, but has compelled him to pay the costs of a litigation originating in such inequitable conduct (*c*).

The question then is, whether a mortgagee who takes a deed absolute in form, instead of with a defeasance, and who fraudulently denies the right of redemption, and sets up his deed as constituting an

(*a*) Coote on Mortgages, 347. (*b*) 7 Ves. 584.
(*c*) Lord Middleton v. Eliot, 15 Sim. 531.

absolute purchase, is guilty of such misconduct as ought to subject him to the payment of costs. Now I must confess that I cannot conceive how a mortgagee can be guilty of greater misconduct and oppression; and in that naked case, I am very clear that upon principle, if there be not some established rule to the contrary, the mortgagee should be directed to pay costs of the suit to the hearing. But, so far from finding any established rule to the contrary, the cases, in my opinion, are quite sufficient to warrant a decision in accordance with what seems to me the strict justice of the case. In *Baker v. Wind* (*a*), the deed had been drawn in an absolute form at the particular desire of the mortgagor, and, as it would seem, from improper motives. The mortgagee, however, fraudulently set this up as an absolute sale; and in disposing of the question of costs Lord *Hardwicke* said: "If ever therefore a mortgagee ought to pay costs it is in this case."

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Judgment.

In *England v. Codrington* (*b*), the mortgagee insisted upon having the deed drawn in an absolute form; and upon a bill to redeem he denied that there had been any loan and insisted upon the transaction as an absolute purchase. The Lord Keeper, however, determined that the transaction was one of mortgage, and in disposing of the question of costs said: "the defendant having insisted on the deed as an absolute conveyance, contrary to the real facts of the transaction, and thereby occasioned this suit, let the master tax the plaintiffs their costs to this time."

In this case, then, unless some circumstance can be pointed out sufficient to justify an exception, the plaintiff ought to receive his costs. As to the defendant *DeTuyll*, he is the executor and devisee in trust of *Taylor's* will, and is shewn to have had notice of

(*a*) 1 Ves. Senr. 160. (*b*) 1 Eden. 169.

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the real nature of his testator's title. With respect to him, therefore, the decree will be with costs. The defendant *Rattenbury* stands in a different position. It is not shewn, at least it is not satisfactorily shewn, that he was acquainted with the real nature of *Taylor's* title; and had that been the only question raised by his answer, the plaintiff must have paid him his costs. But he also claimed to be a purchaser for value without notice of the plaintiff's equity. That part of his case, which has occasioned very much of the expense of the suit, wholly fails; as to that extent he ought, as between him and the plaintiff, in justice to pay costs. But upon the whole, we think the ends of justice will be most effectually answered by directing plaintiff to pay to *Rattenbury* his costs; and that the plaintiff do add the same to his own costs, the amount of which the defendants, *DeTuyll* and *Taylor*, must pay.

Judgment.

ROSE v. SIMMERMAN.

Dower—Transfer of.

A widow's title to dower before assignment, although not transferrible at common law, may be the subject of sale and conveyance in equity.

Sept. 7th. and Nov. 23rd.

The bill in this case was filed by the widow and her assignee against *Henry P. Simmerman*, stating that the widow was entitled to dower in certain lands of her late husband: that she had conveyed her right to the plaintiff, *Hull*, who, with her, now brought the present suit. To this bill the defendant demurred for want of equity, &c.

Statement.

On the demurrer coming on to be argued,

Mr. *Freeman*, in support of the demurrer, cited *Watkins* on Conveyancing, 83; *Park* on Dower, 212-3; *Brown v. Meredith* (*a*).

(*a*) 2 Keen. 527.

Mr. *Eccles*, contra, referred to *Meyers v. Lake* (*a*), *Maundrell v. Maundrell* (*b*), Doe *Dettrick v. Dettrick* (*c*), and *Story's* Equity Jurisprudence, sec. 1048 and note.

The judgment of the court was now delivered by

Nov. 23.

THE CHANCELLOR.—The plaintiffs in this suit are *Eunice Rose*, widow of the late *Hugh Rose*, and *Richard Hull*, who claims the beneficial interest in the subject matter of the suit as her assignee. The bill, which prays to have the dower of *Eunice Rose* in lot number nine in the second concession of the township of Nelson assigned, states that *Hugh Rose*, the plaintiff's late husband, was seized in fee simple of the premises in question during the marriage; that he conveyed them to *Paul Cripps*, in fee simple, in the year 1815; that *Paul Cripps*, by his will duly executed, devised them in trust for sale; and that the trustees of *Cripps's* will, in the due execution of the trusts thereof, conveyed them to the defendant in fee in November, 1851. The bill further states that *Eunice Rose*, by an indenture dated the 7th day of October, in the year 1851, assigned her right to dower out of the premises in question to her co-plaintiff *Richard Hull*, for valuable consideration, and thereby empowered him to use her name in any proceeding which he might be advised to adopt, either at law or in equity, for the recovery thereof.

Judgment.

The defendant, by his demurrer, takes two objections to this bill: First—That the assignment through which *Hull* claims is void under the statute of Henry VIII., being the sale of a pretended title within that statute. Secondly—That the instrument in question is, at all events, wholly inoperative, because the widow's title to dower before assignment is a mere

(*a*) Ante vol. 1, p. 305. (*b*) 7 Ves. 567. (*c*) 2 U.C.Q.B.R. 153.

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right which, according to the principles of the common law, cannot be transferred to a stranger by any form of conveyance.

The statements in the bill are insufficient to justify the conclusion that this assignment is void under the statute of Henry VIII. If the actual facts of the case warrant this objection, the plaintiff will be entitled to insist upon it at the hearing, upon a case properly stated for the purpose, and sustained by evidence.

But upon the argument of the demurrer the learned counsel for the defendant relied principally upon the second objection; in support of which he cited Mr. *Watkin's* book on conveyancing, page 328.

Judgment.

It is not to be doubted that the rule of the common law was correctly stated by the learned counsel for the defendant. The common law regards the title of dower, for many purposes, as a mere right of action, and consequently refuses to permit its transfer, except by release to the *terre* tenant, by way of extinguishment. But the question before us is as to the effect of this assignment in a court of equity; how far has the principle contended for been permitted to prevail in this court? Now, the rule of the common law is not by any means limited to this peculiar class of rights, it is based upon a principle of very extensive operation; and we may solve the question now before us by considering how far this rule has been permitted to prevail in equity with respect to other classes of cases falling equally within its principle. The rule is thus stated in *Lampet's* case (*a*): "The common law has provided that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions

(*a*) 10 Co. 48, A.

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and suits, of great oppression of the people, and chiefly of terre tenants, and the subversion of the due and equal distribution of justice." It is observed by Lord *Coke*, that "this rule evinces the great wisdom and policy of the sages and founders of our law;" but Lord *Cowper* says, in *Freeman v. Thomas*, that such notions would not have prevailed in his day. But whether the policy of the common law in this respect be founded upon wise principles, as asserted by Lord *Coke*, or upon refined and technical reasons, as suggested by Lord *Cowper*, it is quite certain that it has been almost wholly disregarded by courts of equity. In *Warmstrey v.* Lady *Tanfield* (*a*), the assignment of a naked possibility was sustained by Lord Keeper *Coventry*. In *Hobson v. Trevor* (*b*). Lord *Macclesfield* decreed the specific execution of an agreement to settle all such lands as should come to the defendant from his father by descent or otherwise, which was something less than a possibility; and numerous other examples may be found in Messrs. *White & Tudor's* Collection of Leading Cases. Now, if the common law rule has been rejected in the various classes of cases to which I have adverted, I know of no principle upon which it should be permitted to prevail in this single case now under our consideration. The reason of the common law in refusing to permit the assignment of a chose in action is as apparent at least as in any other class of cases falling within the rule. Such assignments tend as plainly to champerty and maintenance, and to the "subversion of the due and equal administration of justice," yet it has been long well settled in this court that choses in action may be assigned (*c*). Such assignments operate, not as actual transfers, but by way of contract, entitling the party interested to come here for specific execution (*d*); and as I can discover no principle upon which an assignment of a widow's

Judgment.

(*a*) 1 Cha. Rep. 29.
(*b*) 2 P. W. 191.
(*c*) Row v. Dawson, 1 Ves. Sen. 331.
(*d*) Wright v. Wright, 1 Ves. 409.

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WHITE v. CUMMINS.

Administration suit—Costs.

An executor or administrator has no right to file a bill merely to obtain an indemnity by passing his accounts under the decree of the court. There must be some real question to submit to the court, or some dispute requiring interposition, when he will be entitled to its costs; otherwise he will not receive them. And if it should appear that his conduct has been *mala fide*, or unreasonable, he will be ordered to pay the costs of the defendant.

The bill in this cause was filed by *George H. White* against the widow and infant children of *William Cummins* deceased, who died intestate, praying for the administration of the intestate's estate, to which the plaintiff, being a creditor to a considerable amount, had obtained letters of administration.

Statement. The defendants had appeared and answered; and a motion was made for a summary reference, under the 77th order of May, 1850, upon which the defendants appeared and suggested that the order of reference should reserve further directions and costs until after the master's report. Further directions and costs were accordingly reserved.

The cause now coming on to be heard on further directions and on the question of costs,

Argument. Mr. *Turner*, for the plaintiff, cited *Low v. Carter* (*a*), *Rickford v. Young* (*b*), *Ashley v. Alden* (*c*), to shew that in every case an administrator, trustee, &c., has the right of filing a bill in this court for the purpose of passing his accounts, and obtaining an effectual discharge from all further liability to the estate, and submitted that the plaintiff having acted *bona fide* was entitled to his costs out of the estate.

(*a*) See Brown v. Meredith, 2 Keen. 527.
(*a*) 1 Beav. 426. (*b*) 14 Jurist, 428. (*c*) 16 Jurist, 460.

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Mr. *Mowat*, for the defendants, cited *Cambray v. Draper* (*a*), and *Cummings v. McFarlane* (*b*).

THE CHANCELLOR.—This is an administration suit. The plaintiff is the administrator of *William Cummins* the younger, who died intestate; the defendants are the widow of the intestate and his four infant children, of whom his widow has been duly appointed guardian. The assets amount to 500*l.* 18*s.* 8*d.*; the liabilities to 368*l.* 4*s.* 8*d.* The latter consists of a debt of 104*l.* 13*s.* 2*d.* due to the plaintiff, and a balance of 263*l.* 11*s.* 6*d.* due in various small accounts to fifteen other creditors. The sole question is as to the costs of the suit.

The plaintiff contends that he is entitled to receive his costs from the estate on two grounds. He argues, in the first place, that as an administrator cannot obtain a complete discharge except by acting under the decree of this court, he must have a right in all cases to file a bill for that purpose, and as a necessary consequence, must be entitled to receive his costs. But if the court should be against him upon that point, he contends that the circumstances were such as to justify the plaintiff in filing a bill in this particular case. Judgment.

As to the first point, we cannot accede to the proposition, that an administrator, who, without any special reason to justify that step, files a bill in this court for the administration of the estate, is entitled to receive his costs. The duty of an administrator is twofold; first, to apply the estate to the discharge of liabilities in a due course of administration; secondly, to distribute the surplus amongst those entitled. With respect to the first brach of his duty, an administrator is not subject to any peculiar liability. His duty is that of an ordinary trustee. Now, with respect to

(*a*) 16 Jurist, 735. (*b*) Ante vol. 2, p. 151.

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an ordinary trustee, we hold it to be clear that where he files a bill in this court, without any sufficient reason to justify that course, he, at the least, forfeits his right to receive costs (*a*); and as we can discover neither principle nor authority for drawing a distinction, in this respect, between administrators and trustees, we think that the question of costs must be governed by the same rule. Where difficulties arise he is entitled to the utmost consideration:—he has an undoubted right to the protection of this court. But where there is no difficulty, he has no need of protection; and in that case it is clearly his duty to protect the trust estate from being burthened with the costs of an administration suit, which ought not to be incurred except for the purpose of protection, where protection is really requisite.

Judgment.

With respect to the other branch of an administrator's duty (the distribution of the surplus), his liability is certainly of a peculiar character. He remains liable to undiscovered debts, notwithstanding such distribution; and can only be discharged from that liability by the decree of this court (*b*). In that respect, unquestionably, his position is one of great difficulty and entitles him to the utmost consideration (*c*). But, even then, I apprehend that an executor who insists unreasonably and oppressively upon an indemnity not called for by the circumstances of the case, would have no title to receive costs. I am unable to follow all the reasoning of the Vice-Chancellor in *Cambray v. Draper* (*d*), recently decided. The premises should have led, as it seems to me, to a different conclusion. But, however that may be, the judgment throughout appears to negative very clearly the general proposition here contended for. Now, in the case at present under our consideration,

(*a*) Cummings v. McFarlane, ante vol. 2, 151, and the cases there cited; Porter v. Watts, 16 Jur. 757.
(*b*) Knatchbull v. Fernherd, 3 M. & C. 122.
(*c*) Low v. Carter, 1 Beav. 426. (*d*) 16 Jur. 735.

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no question of the kind to which I have been adverting had arisen. The time for distribution had not arrived; and no demand for distribution had been made by the next of kin. For aught that appears, the parties entitled to the surplus might have been prepared, at the proper time, with the most ample indemnity—with all that the plaintiff himself could have required. Can we say that the filing of this bill, under such circumstances, was other than unreasonable and oppressive, so far as that object was concerned? and, if that be so, then, in that respect also, the plaintiff, in my opinion, fails to make out a case for costs.

It is said, however, that in this particular case there were difficulties with respect to the accounts, sufficient to warrant the filing of the bill. But we are all of opinion that no difficulties are shewn to have existed which a little effort and enquiry on the part of the plaintiff would not have enabled him to overcome (*a*). That effort and enquiry it was his duty to have made; but, instead of doing so, he thought proper to file this bill. The costs of such a suit, under such circumstances, are, in our opinion, improperly incurred, and ought not therefore to be borne by the trust estate. Judgment.

Individually, I incline to the opinion that the facts are sufficient to charge the plaintiff with the defendants' costs; my learned brothers, however, think that enough has not been shewn for that purpose; the decree, therefore, is simply without costs.

ESTEN, V. C.—I think an executor or administrator has no right to file a bill merely to obtain an indemnity by passing his account under the decree of the court; there must be some real question to submit to

(*a*) Firmin v. Pulham, 1 DeG. & S. 99; Penfold v. Bouch, 4 Hare, 271.

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the court, or some dispute requiring its interposition; and in such cases the personal representative will be entitled to his costs, unless his conduct has been *mala fide* or very unreasonable. In the present case, I think the parties respectively should pay their own costs. The adminstrator had no sufficient ground in the circumstances on which he relies; the question of indemnity was not raised, but he appears to have acted *bona fide* and under advice of counsel.

Judgment: SPRAGGE, V. C., concurred.

HERON v. WALSH.

Will—Construction of.

A testator devised all his property, real and personal, to his wife for life or widowhood, and then directed the same to descend equally between his children, A., B., C., D. and E., their heirs (and assigns) lawfully begotten, and, in case of failure of issue, the same property, real and personal, to F., his heirs and assigns. *Held*, that the children took as tenants, in common with cross remainders, amongst them; and that B., C., D. and E. took the share of A., who died before the testator.

The bill in this cause was filed by *Andrew Heron* against *Thomas W. Walsh*, setting forth, that in 1801

October 5th and Nov. 23rd.

lots numbered 15, 17, 18, 19 and 20, in the 11th concession of Walsingham, were by letters patent duly granted to one *Alexander McMillan*, who died in the year 1826 seized in fee of the said premises, and having duly made his last will in writing, dated 23rd February, 1819, whereby, after devising all his property, real and personal, to his wife (since deceased) the testator devised the same to his two sons, *Æneas*, *John* and *Evan McMillan*, and his three daughters,

Statement.

Anne, *Margaret* and *Janet*, their heirs (and assigns), lawfully begotten, and in case of failure of issue then the proper, real, &c., was to descend to his son *Alexander McMillan*, his heirs and assigns; and, in case of failure of issue of him, then to the testator's brother, *Allan McMillan*, his heirs and assigns; that *Evan* died before the testator, and the others (of whom

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Ænus was the testator's heir at law) survived the testator; that *Janet* had since died intestate, leaving *Ænas* her heir at law, and never having disposed of her interest in the said lands; that afterwards, and on the 16th February, 1836, *Ænas* executed a conveyance of all his interest in the said lots 18, 19, and 20 to certain parties named in the bill, but whose estate had since by several mesne conveyances become vested in the defendant: that *Margaret* died in the year 1837 intestate, leaving *Richard Thomas Wilkinson*, her eldest son and heir at law her surviving, and having made no disposition of her interest in the said lands; that *Ænas* died in 1841 intestate, without issue and without having made any further disposition of his interest in the said lands, and leaving the said *R. T. Wilkinson* and the said *Anne*, his co-heir and co-heiress at law respectively, him surviving.

Statement.

That by a deed duly executed, bearing date the 4th of April, 1851, and made between *Joshua Thompson*, then husband of the said *Anne*, and the said *Anne* of the first part, the said *R. T. Wilkinson* of the second part, and the plaintiff of the third part, the said parties of the first and second parts conveyed all their estate, &c., in divers hereditaments including *all* the lands before mentioned, and the fee simple and inheritance thereof, to the plaintiff in fee. The bill prayed a fair partition and division of the property between the plaintiff and defendant, who, it was alleged, were the only parties interested therein.

The defendant answered, admitting all the statements of the bill; and the cause now came on to be heard on bill and answer.

Argument.

Mr. *Mowat*, for the plaintiff, cited Doe *Gorges v. Webb* (*a*), *Green v. Stephens* (*b*), *Fuller v. Fuller* (*c*),

(*a*) 1 Taunt. 234 (*b*) 17 Ves. 64. (*c*) Cro. Eliz. 422.

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Hutton v. Simpson (*a*), *Warner v. White* (*b*), and *Cruise's* Digest, 129, to shew that the words of the will created cross remainders amongst the children of the testator.

Mr. *Turner*, for defendant, referred to *Jarmin* on Wills, vol. 1, page 295.

The judgment of the court was now delivered by

THE CHANCELLOR.—The questions in this cause arise upon the will of *Alexander McMillan*, which, so far as these questions are concerned, is in these words: "I give and bequeath to my loving wife *Marcella McMillan*, after my just and lawful debts shall be paid, and which I order my executor, hereafter to be named, to discharge with as little delay as possible, *the whole of my property, either real or personal, moneys, goods and chattels*, of what kind and nature soever, during her natural life or state of widowhood, and after either change, the same is to *descend equally* between my two sons *Æneas John McMillan* and *Evan McMillan*, and my three daughters *Anne McMillan*, *Margaret McMillan*, and *Jane McMillan*, their heirs and assigns, lawfully begotten; *and in case of failure of issue, then the said property, either real or personal, moneys, goods and chattels*, to descend to my son *Alexandeer McMillan*, his heirs and assigns; and in case of failure of issue of him, then unto my brother *Allan McMillan*, his heirs and assigns."

Judgment.

One of the children of *Alexander McMillan* died in the lifetime of the testator, leaving no issue.

Upon the argument it was contended, first: that the children of the testator take as joint tenants, and not as tenants in common. Secondly, that this will

(*a*) 2 Vern. 722. (*b*) 3 Br. P. C. 435.

does not limit cross remainders amongst the children. Lastly, that the issue of the child who died in the lifetime of the testator are entitled to his share under the devise in the will of *Alexander McMillan*.

It is quite plain that the children of the testator take as tenants in common. Doe *Gorges v. Webb*, and the cases there referred to, establish very clearly that this will is in effect a limitation of cross remainder amongst the children. And there is no room to doubt that those next entitled under the will take the share of the child who died in the lifetime of the testator to the exclusion of his issue (*a*).

ESTEN, V. C.—I am clear that the words "in case of failure of issue," import a general failure of issue both as to the real and personal estate; that the gift over of the personal estate is void for remoteness; that the prior legatees, therefore, took the absolute interest; that they took estates tail in the reality with cross remainders; and that upon the death of *Evan* in the lifetime of the testator, the survivors took at the testator's death *Evan's* portion as an immediate gift, and are therefore entitled to the whole. Judgment.

SPRAGGE, V. C., concurred.

SMITH v. KERR.

Payment out of Court.

Where, upon a sale of lands at the suit of a mortgagee, the purchase money is paid into court, pursuant to the decree; the mortgagor must have notice of any application to pay out to the plaintiff the amount found due to him by the master's report. March 22.

In this case a sale of mortgaged premises had been directed by the decree, and pursuant thereto the purchase money had been paid into court.

(*a*) Warner v. Whyte, 3 Bro. P. C. 435; Fuller v. Fuller, Cro. Eliz. 412; Hutton v. Simpson, 2 Ver. 722.

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Mr. *Read*, for the plaintiff, now moved to pay out the amount found due to the plaintiff by the master's report for mortgage money, interest and costs.

Mr. *Crickmore*, for the purchaser, consented.

Argument.

The *Blind School v. Goren* (*a*), *Parsons v. Groome* (*b*), and *Hawkins v. Dod* (*c*), were cited. to shew that notice of the application need not be given to the defendant the mortgagor—the master's report as between the parties to the suit, shewing conclusively the amount the plaintiff was entitled to receive; but

Judgment.

PER CURIAM—There cannot be any doubt that the master's report, when confirmed, as it has been in this case, is conclusive evidence as to what the plaintiff was entitled to receive at the date of that report; at the same time, for all that now appears, that amount, or some portion of it, may have been paid to the plaintiff. The defendant must have notice of the motion, in order that he may, if he sees fit, be here to say how that is.

Motion refused.

SMITH v. MUIRHEAD.

Set-off.

Dec. 7th, 1852, and Feb. 4, 1853.

Where there are unconnected cross demands equity does not in general to interfere set off one against the other, in the absence of any special circumstances or any agreement, express or implied, that the one should be set-off against the other.

A party who has had an opportunity to set-off his debt at law, and omits to avail himself of that opportunity, cannot afterwards, as a general rule, come to this court to set off such debt against the judgment at law.

Where a party had pleaded payment in a suit at law: *Held*, that he was not thereby barred from afterwards suing for the debt, evidence of which had been unnecessarily given under the plea.

The bill in this cause was filed by *Abraham K. Smith* against *William Muirhead*.

(*a*) 21 L. J. N. S. Ch. 144. (*b*) 12 Beav. 180. (*c*) 1 Hare. 115.

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

Mr. *Vankoughnet*, Q. C., and Mr. *M. C. Cameron*, for defendant.

The arguments of counsel and cases cited appear in the judgment of the court, which was now delivered by

THE CHANCELLOR.—In the month of July, in the year 1835, the plaintiff became bound to one *William K. Smith*, his father, in the penal sum of 500*l.* conditioned to secure an annuity of 25*l.* per annum during the life of the obligee.

Upon the execution of this instrument the annuity, it is admitted, was paid in advance for a period of three years; but it is alleged by the defendant that no further payment was made upon the bond.

On the 13th of March in the year 1847, *William K. Smith* assigned all the arrears then due upon the annuity bound to the defendant, *William Muirhead*, in consideration of the sum of 150*l.*; and in the month of February following he died, having first made his will and appointed *Muirhead* his executor. Judgment.

Muirhead, having proved the will, brought an action upon the bond, to which the defendant, amongst other things, pleaded payment and set-off. The plea of set-off was confined to a claim for rent which is not involved in the present suit; but under the plea of payment he gave evidence of the same items of which he now seeks to avail himself, by way of set-off. The issue upon that plea, however, was found against him and a verdict returned in favor of the now defendant for 325*l.*, the full amount claimed upon the bond.

A writ of error having been brought upon that judgment it was affirmed by the Court of Appeal;

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and, thereupon, the defendant in that action filed the present bill, which prays, "that all further proceedings in the said action may be stayed, and that the residue of the complainant's debt (after deducting the amount recovered upon the bond) may be paid by the defendant; or, if the defendant shall realize the amount of such judgment against the complainant, then that the whole of the complainant's debt, with the costs, may be paid by the defendant: or, if it shall appear that the defendant is not for any reason liable for the debt or the residue thereof, as the case may be, then for an account of the testator's personal estate and payment in due course of administration."

The defendant resists the plaintiff's right to this relief upon several grounds. He argues, in the first place, that in England, prior to the statutes (*a*), the Court of Chancery had no jurisdiction to entertain a suit for the purpose of compelling a set-off of legal demands unconnected in their origin, or by agreement. He argues, secondly, that, since the statutes, at all events, this court will not entertain such a suit in behalf of one who has neglected to plead his set-off at law. And he contends, lastly, that the plaintiff is concluded by the finding of the jury upon the plea of payment.

Judgment.

The plaintiff, on the other hand, contends that the jurisdiction of equity in matters of set-off rests upon clear principles of natural equity; that it existed prior to the statutes upon the subject, and remains unimpaired notwithstanding the regulations thereby introduced. He argues, further, that the finding of the jury upon the plea of payment can only conclude the question of payment, and leaves the ground upon which this suit proceeds—namely, the right of the plaintiff to set-off his cross demand—untouched.

(*a*) 2 Geo. II. c. 22; 8 Geo. II. c. 24.

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I quite agree that the right of set-off, upon which the plaintiff has attempted to sustain this bill, is founded upon clear principles of natural justice. It was well settled in the civil law under the title "compensation;" and, when we consider the full development of this doctrine in the Roman code, and recollect how largely our own rules in relation to this matter, legal as well as equitable, have been borrowed from that source, it will be found difficult to account for its limited adoption in our system of equity jurisprudence. In the language of the civil law "*compensatio est debiti et crediti inter se contributio*" (*a*). Or, according to the pharaphrase of an able commentator, "compensation is the *extinction* of debts of which two persons are reciprocally debtors by the credits of which they are reciprocally creditors" (*b*). "The equity of compensation," says *Pothier*, "is evident; it is established upon the common interest of the parties between whom it is made; it is clear that each of these has an interest to compensate, rather than to pay what they owe, and to have an action to recover what is due to them" (*c*). This is, indeed, the very language of the civil law, "*Ideo compensatio necessaria est, quia interest nostra potius non solvere, quom solutum repetere*" (*d*). And upon the word "*necessaria*" in this text we have the following comment, "*Id est cum lis possit uno judicio definiri. scilicet per actionem et exceptionem, pluralitas seu mullitudo judiciorum non debit admitti, ut quæ incommoda sumptusque. adferat; quinetiam compensationem æquitas poscere videtur, nam dolo facit qui petit quod restituturus est*" (*e*). The civil law doctrines of compensation differ essentially from the right of set-off, but are regulated throughout, as I venture to

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(*a*) Poth. Pand. Lib. XVI., Tit. 11.
(*b*) Pothier on obligations, by Evans, vol. 1. p. 587.
(*c*) Pothier on obligations, *ub. sup.*
(*d*) Poth. Pand. Lib. XVI., Tit. 11.
(*e*) Cor. Jur. Civi. Dion Gothofredi 1615 a (K), Voc. necessaria tit ut supra.

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think, upon principles of strict reason. Compensation is not, as with us, a right of set-off, to be exercised at the option of the parties; but, in the language of *Pothier*, it is the *extinction* of debts, of which two persons are reciprocally debtors, by the credits of which they are reciprocally creditors. This extinction takes place by operation of law, quite irrespective of the acts of the parties; and so complete is the extinction that one who pays a debt under such circumstances, notwithstanding the compensation which, *pleno jure*, had extinguished the cross demands, is obliged to proceed by an action termed "*conditio indebiti*," because the law regards him as seeking to recover a sum paid when nothing was due.

But, notwithstanding this essential distinction between compensation and set-off, it is difficult to understand why equity should not have interfered to set-off unconnected cross demands, irrespective of agreement; because compensation and set-off, although distinct, are obviously based upon the same natural equity, which flows neither from the connection of the debts nor the agreement of the parties; and the further principle upon which the civil law proceeds, which is also independent of the connection of the debts or the agreement of the parties, is allowed in other cases to constitute in itself a sufficient foundation for equitable relief. It is difficult to justify this state of the law on grounds of reason, or to reconcile it with acknowledged principles; and were we now to determine what the rule ought to be, and not what it has been, I should have had little difficulty in acceding to the plaintiff's argument. But the question being what the rule has been, and not what it should be, that must necessarily be determined upon authority. In *Green v. Farmer* (*a*), a case much discussed and carefully considered, Lord *Mansfield* says: "It may give light to this case and

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(*a*) 4 Bur. 2220.

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to the authorities cited, if I trace the law relative to the doing complete justice in the same suit, or turning the defendant round to another suit, which under various circumstances may be of no avail."

"When the nature of the employment, transaction, or dealing, necessarily constitutes an account consisting of receipts and payments, debts and credits; it is certain that only the balance can be the debt; and by the proper forms of proceeding in courts of law or equity, the balance only can be recovered."

"After a judgment, or decree to account, both parties are equally actors."

"*Where there were mutual debts unconnected, the law said they must not be set-off, but each must sue. And courts of equity followed the same rule, because it was the law; for, had they done otherwise, they would have stopped the course of the law in all cases where there was a mutual demand.*" Judgment.

"The natural sense of mankind was first shocked at this in the case of bankrupts; and it was provided for by 4th *Anne*, c. 17, and 5th Geo. II., c. 20, sec. 28. This clause must have everywhere the same construction and effect; whether the question arises upon a summary petition, or a formal bill, or an action at law. There can be but one right construction; and therefore, if courts differ, one must be wrong."

"Where there was no bankruptcy the injustice of not setting-off (especially after the death of either party) was so glaring that parliament interposed by 2nd Geo. II. and 8th Geo. II."

It may be said however, that this is but an *obiter dictum* of a common law judge. That is so. But

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the deliberate opinion of Lord *Mansfield*, upon a point of this sort, and while the proper construction of the statutes of set-off was still unsettled, must carry with it great weight.

The learned counsel for the plaintiff, however, cites *Arnold v. Richardson* [*a*], as a direct authority for the proposition that "the mere existence of cross demands is sufficient to give this court jurisdiction." That case was before Sir *John Trevor* in 1699. The report is extremely meagre; we are neither furnished with the authorities upon which the Master of the Rolls proceeded, nor with the reasons of his decision, beyond the general one "that a discount was natural justice in all cases." *Arnold v. Richardson*, however, as I apprehend it, did not proceed upon the general proposition contended for by the plaintiff, but upon an agreement to set-off, implied from the circumstances. The report states, indeed, that there was no express agreement, but the dealings between the parties were quite sufficient, within the authorities, to imply one; and that is, in my opinion, the true ground of the judgment. Upon the construction which has been suggested this would be a single case, opposed, not only to direct decision, but to the whole current of authority. This very point had been decided shortly before by Lord *Nottingham*, in Sir *William Darcy's* case (*b*), where it was resolved "that if A. owes B. 100*l.* by recognizance, and B. owes A. 50*l.* or 10*l.* upon any security whatever, and A. sues B., that cannot compel A. to pay himself by way of retainer out of what is due to him, *but they must take their mutual remedies; unless there were any agreement to the contrary.*" This decision is in perfect accordance with Lord *Mansfield's* opinion.

Judgment.

In *Curson v.* The *African Company* (*c*), (1682) set-off was ordered, but upon special grounds, which

(*a*) 1 Eq. Ca. Ab. pl. 8; 15 Vin. Ab. p. 129, S. C.
(*b*) 2 Free. p. 28. (*c*) 1 Ver. 121.

tend strongly to negative the general proposition. Lord Keeper *North* ordered "the plaintiff to allow 100*l.* debt that was owing by him to the company; *for that it is the custom of companies* that if they owe a man 100*l.* they will give him credit for so much; *and, therefore, in respect of companies, stoppage is to be allowed as a good payment.*"

In *Downman v. Mathews* (*a*), (1721) there had been mutual dealings between the plaintiff and one *Biss* in the way of their trade, without any payment having been made on either side during several years. *Biss* died intestate, whereupon his personal representative brought an action against the plaintiff, who filed his bill for a set-off. Lord *Macclesfield* said "*that though generally stoppage was no payment,* * * * yet in cases of this nature where it appeared that the mutual dealings between the intestate and the plaintiffs were carried on for several years in this manner without payment of any money on either side, *it was a strong presumptive argument of an agreement to this purpose.*"

Judgment.

Hawkins v. Freeman (*b*), came before the same learned judge under somewhat similar circumstances. It was argued "that there was not any proof of an agreement to set-off one debt against another," but the Chancellor said "in mutual dealings between tradesmen it is reasonable to suppose they intend one debt should be set against the other and the balance only to be paid, as it is per statute of bankrupts; *and therefore the least evidence of such an intent is sufficient. Here is sufficient proof of such an intent between the parties.*"

In *Jeffs v. Wood* (*c*), (1723) Sir *Joseph Jekyll* says: "It is true stoppage is no payment at law, *nor is it of itself a payment in equity,* but then a very slender

(*a*) Pre. Cha. 580. (*b*) 8 Vin. Ab. 559, pl. 26. (*c*) 2 P. W. 129.

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agreement for discounting or allowing the one debt out of the other will make it a payment, because this prevents circuity of action and multiplicity of suits which is not favoured in law much less in equity."

In *Whittaker v. Rush* (*a*), (1761) the master of the rolls says: "it was a rule of justice to set one debt off against another in the Roman law. That rule did not prevail in England for many years. The dealings between bankrupts and other persons first gave rise to its being introduced into England. Equity took it up, but with limitations and restrictions, *and required that there should be a connection between the demands.* In *Downan v. Mathews*, Lord *Macclesfield* said that the mutual dealings raised a presumption that the one should be set-off against the other."

Judgment.

It has been said that the report in *Ambler* is erroneous in attributing to Sir *Thomas Clark* the opinion that the equitable jurisdiction grew out of the statutes of set-off (*b*). But, assuming the report to attribute to him that opinion, and assuming it to be erroneous, still it manifestly was the deliberate opinion of Sir *Thomas Clark*, that the existence of cross demands, without more, was not sufficient to justify equitable interference.

The older authorities then, upon the whole distinctly negative the proposition contended for by the plaintiff. Had it been otherwise, the common sense of mankind would never have been shocked as Lord *Mansfield* has expressed it, by the exclusion of this equitable doctrine in cases of bankruptcy; because, unquestionably, this equity would have been enforced against the assignees as well as against the bankrupt himself, and we should have abundant evidence of its exercise; but I find no trace of the exercise of such a jurisdiction prior to the statute of *Anne*.

(*a*) Amb. 407. (*b*) Freeman v. Lomas, 9 Hare. 112.

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Jones v. Mossop (*a*), however, and *Handford v. Mosely*, there referred to, are cited as recent authorities in favour of the plaintiff. But, looking to previous decisions, it is quite impossible to say that those cases establish the proposition for which they are cited. *Jones v. Mossop* turned, I apprehend, upon the form of the action at law, which obliged the plaintiff to come into equity, and his position as surety for the bankrupt, which circumstances were considered sufficient to except that case from the general rule. To treat it as establishing the proposition that this court will interfere upon cross demands, in the absence of other circumstances calling for equitable relief, would be to place it in direct opposition to cases recently determined by Lord *Cottenham*, and by Sir *James Wigram* himself, upon great consideration. *Rawson v. Samuel* (*b*), was determined in 1841. There, Lord *Cottenham*, adopting the very able argument which had been addressed to him by Vice-Chancellor *Wigram*, then at the bar, determined, upon a careful review of the cases, "that the mere existence of cross demands is not sufficient" (*c*). *Dodd v. Lydall* (*d*), came before Sir *James Wigram* himself in the same year; and on delivering judgment he observes: "Upon the law of the case, my opinion is equally clear. The mere existence of cross demands does not of necessity give a right of equitable set-off; and certainly the mere pendency of an account, out of which a cross demand may arise, will not confer such a right. I had occasion, when at the bar to give great attention to the question of equitable set-off in the case of *Rawson v. Samuel*, and the judgment of Lord *Cottenham* in that case, on appeal, will be found fully to justify the opinion which I now express. It was then decided, that, in the case of cross demands, arising out of transactions not necessarily connected with each other, a court of

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(*a*) 3 Hare. 568. (*b*) C. & Ph. 161.
(*c*) And see Whyte v. O'Brien, 1 S. & S. 551. (*d*) 1 Hare. 337.

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equity is bound to look into all the circumstances of the case, and see whether an equity is made out for blending the two matters together at the expense of possible delay in concluding one of the matters."

The note of *Handford v. Mosely* is not full or satisfactory; and the case has not, I believe, been reported. But it is clear that the plaintiff there was obliged to come into equity. He could not have set-off the rent at law, because it was not due to the defendant alone, but to the defendant and one *Richardson*, who had become joint purchaser of the property; and the case in equity turned, as I apprehend it, upon the agreement, either express or implied, that the rent should be set-off against the note (*a*).

Admitting, then, that the civil law doctrine of compensation is founded in natural justice, I deny its general adoption into our system of English equity (*b*). Equity interfered, indeed, under special circumstances, or upon the foot of agreement; but as to unconnected cross demands, parties were left, in the absence of agreement express or implied, to their mutual remedies. If this be a true view of the law it may serve to reconcile what was said by Lord *Mansfield*, in *Green v. Farmer*, with the opinion attributed to Lord *Eldon*, in *exparte Stephens* (*c*), and to Lord *Lyndhurst*, in *Handford v. Mosely*.

Judgment.

But I am further of opinion, that since the statutes, a defendant who, having an opportunity to set-off his debt at law, omits to avail himself of that opportunity, cannot, as a general rule, come to this court for relief. To entertain such a suit would be to violate the principles upon which the right of set-off rests. It rests upon the natural justice of the thing, and the policy of preventing multiplicity of suits;

(*a*) See the report of the evidence, 10 B. & C.
(*b*) Duncan v. Lyon, 2 Joh. C. Rep. 351.
(*c*) 11 Ves. 24; and see Williams v. Noble, 3 Mer. 618.

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but a defendant who refrains from availing himself of his set-off at law stops the course of natural justice; and to entertain a bill for relief under such circumstance would be to produce the very evil which the rule is intended to obviate—would produce multiplicity of suits, instead of preventing it.

It is unnecessary, however, to argue this point upon principle, because it has been more than once expressly decided. *Dinwidie v. Bailey* (*a*) was a bill for an account and set-off. The defendant filed a general demurrer; and, upon the argument, Lord *Eldon* determined that it could not be sustained upon either ground. With respect to the latter, he said: "It was impossible to sustain the bill without laying down that wherever a person is entitled to a set-off he may come into this court. Again, in *exparte Ross* (*b*), upon a petition to be allowed to set-off a legal demand which the petitioner had omitted to plead in an action brought against him by the assignees of the bankrupt, the same learned judge observed: "But if the petitioner thought proper to plead in abatement instead of pleading a set-off, is he to be allowed to come here to have his mispleading set right, after having tried every other chance? I recollect Lord *Thurlow* refused to give a party the benefit of a legal set-off which he had neglected to plead at law." *Harrison v. Nettleship* (*c*), and *Bateman v. Willor* (*d*), though not precisely in point, are to the same purpose.

Judgment.

I am of opinion therefore that the case, as one of set-off, wholly fails.

The plaintiff contends, however, that his neglect to plead his set-off has not had the effect of extinguishing his cross demand, and that he is, consequently, as

(*a*) 5 Ves. 126. (*b*) Buck 125.
(*c*) 2 M. & K. 423. (*d*) 1 S. & L. 201.

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a creditor of the testator, entitled to payment of his debt or a decree for the administration of his estate. That is admitted. But the defendant contends that the finding of the jury upon the plea of payment negatives the existence of any debt. To which the plaintiff replies that the finding of the jury is immaterial, inasmuch as the evidence adduced at law, and here, is evidence of debt merely and not of payment.

No case was cited in support of this proposition; and it appears to us clearly contrary to law. The facts as alleged are these: On the 2nd of March, 1847, and consequently some days prior to the assignment of the annuity bond to the defendant, an account was stated between the plaintiff and the testator, on which occasion the latter acknowledged the various sums now claimed by the plaintiff, amounting together to 187*l.* 10*s.*, to be due, and signed a paper which states "that the amount is to apply and be endorsed as so much payment on a certain annuity bond I hold against him as seven years and a half annuity paid me thereon to November, 1846." Now, assuming the truth of that evidence, its sufficiency, as proof of payment, does not, in my opinion, admit of any doubt.

Judgment.

But, taking the law to be so, it is clear, I think, that the verdict of the jury has not settled the question before us either way. It negatives, indeed, conclusively, the allegation in the plea," that the plaintiff had paid the amount due upon the annuity bond; but that finding is quite consistent with the present contention, which is that the estate of the obligee is indebted to the plaintiff. According to our law, a cross demand does not constitute payment; and therefore the finding of the jury upon a plea of payment cannot negative the existence of a cross demand.

The question before us, therefore, is one of fact upon the evidence: Has the plaintiff established his

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debt? That is a question by no means easy of solution. If the authenticity of exhibit F. has been established, then, unquestionably, the debt has been established. Apart from the proceedings at law, I should have thought the plaintiff's evidence quite sufficient. But, looking to these proceedings, and considering the difficulty of reconciling the plaintiff's allegation with the admitted facts of the case, I am not prepared to affirm that the debt has been established. But neither am I prepared to say that the plaintiff has wholly failed. As I have just said, the case, apart from the proceedings at law, is sufficiently clear. Of these proceedings we know nothing beyond the fact that a verdict was found against the plaintiff. We know nothing of the facts which attended the trial. We are not prepared, under all the circumstances, to pronounce a decree in the plaintiff's favor upon the evidence now before us, but we think he should have liberty, if he so desire, to establish his debt at law.

Judgment.

MOFFAT v. MARCH.

Registration of judgments.

January 21 and February 4.

A judgment registered after the period fixed by the statute 13th and 14th Victoria, chapter 63, has no priority over a judgment registered under the statute 9th Victoria, chapter 34. Judgments registered under the 13th and 14th Victoria, chapter 63, do not override antecedent charges or conveyances of which the judgment creditor had notice.

The decision of the Court of Queen's Bench in this province, before the late statute for registering judgments, that judgments did not bind the lands of a debtor until a writ against lands is delivered to the sheriff, having been pronounced so long ago, and never having been made the ground of appeal, must be treated as having settled the law on the point.

Of two registered judgments, the second does not, by the creditor placing execution in the sheriff's hands, take effect against the first, as the party having the first may have omitted placing an execution thereon against lands in the sheriff's lands for a year next after the entry of such judgment, the statutory provision in that behalf not applying to two registered judgments, but only to the priority of in such case between a registered judgment and an unregistered judgment.

This was an appeal from the master's report, the grounds of which are stated in the judgment.

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Mr. *Read*, for *Blodgett*, a judgment creditor, who appealed.

Mr. *A. Crooks*, for *Minett* and *Winkoop*, also judgment creditors.

Mr. *Turner*, for *Lyman* and *Kneeshaw*.

Argument.

The judgment of the court was delivered by

THE CHANCELLOR.—Upon a decree directing the master to settle the priority of the several incumbrances in this foreclosure suit he reports, amongst other things, that on the 27th of August, 1850, judgment against the mortgagor, in favor of Messrs. *Lyman* and *Kneeshaw* was duly entered up, and that a certificate thereof was registered in the registry office in the county where the mortgage lands lie, on the 5th of December, 1850; that no writ against lands had been sued out upon that judgment, but that a writ against goods was current at the date of the report.

Judgment.

That a judgment in favor of one *Blodgett* was entered up on the 22nd of November, 1851, and a certificate thereof duly registered on the 24th day of the same month; and that a writ against lands was sued out upon this judgment, and placed in the hands of the proper sheriff, on the 13th of December in the same year.

That on the 10th of March, 1852, a judgment was enterd up in favor of Messrs. *Minett* and *Winkoop*, which was duly registered on the following day.

The master finds that these judgment are to be ranked according to the dates of their registration and upon this finding there are two appeals.

Mr. *Crooks*, on behalf of Messrs. *Minett* and *Winkoop*, contends that his clients are entitled to

priority, because their judgment, having been entered up after the period fixed by the statute 13th and 14th Victoria, chap. 63, is a specific charge, and therefore overreaches the judgment of the Messrs. *Lyman*, which, operating under the previous statute (9th Vic. ch. 34), constitutes but a general lien.

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The master's report is, in this respect, clearly right. It is true that the statute 13th and 14th Vict. ch. 63, makes no exception in favor of prior purchasers, mortgagees or creditors; and one can easily perceive that the omission may give rise to doubtful questions between unregistered deeds, prior to the statute, and registered judgments, subsequent to it; and perhaps in other instances. But, upon the construction of this statute, I cannot conceive a doubt of the propriety of the master's finding in this case. A registered judgment, indeed, constitutes, now, as effectual a charge upon the lands, tenements, and hereditaments of a debtor, as a written agreement signed by him for that express purpose; but it is quite clear that a creditor obtaining such a charge, with notice of prior judgments, would hold subject to them. Here the appellants had notice of the prior judgment, because it was registered, and by the 8th clause of the statute registration is notice. It is perfectly plain, therefore, that the master's report is correct, and this appeal must be dismissed with costs.

Judgment.

In support of the second appeal, Mr. *Read* contends that *Blodgett's* judgment is entitled to priority by reason of his having placed a writ against lands in the hands of the proper sheriff, after the Messrs. *Lyman* had neglected to take that step within a year from the entry of their judgment.

This turns upon the construction of the proviso to the 13th section of the 9th Victoria, chap. 34. That is a question upon which the parties interested, as I

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understand the law of this court, are entitled to the opinion of a legal tribunal; but as that right has been, I am told, denied, it becomes necessary that we should dispose of the case upon our own view of the law.

Prior to this statute it had been determined that the judgments of the then Court of King's Bench in this province did not bind the lands of the debtor until a writ against lands had been delivered to the proper sheriff. The opinion of the court upon that point was not, I believe, unanimous; and, certainly the soundness of the decision has been much questioned; but it has never been made the ground of appeal; and, after so great a lapse of time, we must now treat it, I think, as having settled the law.

Judgment.

Under the old law, such judgments affected lands, both as against purchasers and *inter se*, from the delivery of the writ against lands to the sheriff. But this state of the law was materially altered by the statute in question. The 13th section, having provided for the registration of judgments, enacts, "that every such judgment shall affect and bind all the lands, tenements and hereditaments belonging to the party against whom such judgment is rendered, from the date of recording of the same in the county wherein such lands, tenements, and hereditaments lie, in like manner as the docquetting of judgments in England affects and binds lands." It is quite clear, I apprehend, that under this section registered judgments bound lands, both *inter se* and as against purchasers, from the time of registration. Still registration was not imperative; and, when neglected by all, judgments affected lands, according to the old law, from the delivery of the writ to the sheriff. Thus far there is not, I believe, any room for question. So long as all should either register, or refrain from registering, no difficulty would arise. But it was obvi-

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ously necessary to provide for mixed cases—cases between registered and unregistered judgments—which, had the section ended there, would have brought these different systems into conflict. An unregistered judgment creditor, with a writ in the sheriff's hands, would have undoubtedly acquired a lien, and the question would have been whether the lien so acquired should prevail against a subsequent registered judgment. A prior unregistered judgment, not followed up by a writ, could have occasioned no difficulty; because such a judgment, under the old law, did not constitute a lien. But it was plainly necessary to settle the priorities where the unregistered judgment, being followed up by writ, constituted a charge upon the land; and that is the very contingency, as it appears to us, for which the legislature intended to provide by the remaining clause of this section. The words are, "provided always that no *un*registered judgment, entered after the passing of this act, shall take effect against a *prior registered* judgment, unless the party who shall have the *first registered* judgment shall neglect or delay the putting his execution against lands into the hands of the proper sheriff for one year next after the entry of such judgment." Now is it to be observed, in the first place, that this clause points, in express terms, to conflicts between *un*registered and registered judgment, and not to cases where both have been registered. In the next place, the expressions, "prior registered judgment; the party having the first registered judgment," indicates clearly that the legislature had in view the difficulty which would have arisen in the case before suggested, between a prior unregistered and a subsequent registered judgment. Lastly; The clause is altogether negative in its provisions. It gives no new efficacy to an unregistered judgment; but, on the contrary, deprives it of a priority which it is assumed that it would have had but for this provision, and postpones it, unless

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the creditor who is subsequent in point of time, but prior in point of registration, has neglected to sue out a writ upon his judgment for a year after its entry. This, which is in our opinion the true construction of the passage, confines it to that restrictive effect which its terms import, and at the same time gives to every expression used by the legislature its due significance; while the construction contended for would render the term "unregistered" altogether meaningless, and would give to a provision purely negative an affirmative force which its terms neither import nor warrant.

Judgment.

Upon these grounds we are of opinion that this appeal also must be dismissed; but, under all the circumstances, without costs.

FARWELL V. WALLBRIDGE.

Practice—Substitutional service—Injunction.

Where, after committing a breach of an injunction, the defendant left the jurisdiction of the court, substitutional service of the notice of motion to commit the defendant for the contempt was ordered to be made on his solicitor.

On a motion to commit for breach of an injunction, it is not necessary that the affidavits should state that the writ was under the seal of the court.

This was a motion by Mr. *Mowat* on behalf of the plaintiff, for an order permitting substitutional service of the notice of motion to commit the defendant *Fox*, for breach of the injunction issued in this cause, to be made on his solicitor, on the grounds set forth in the judgment.

Statement.

The nature of the bill, &c. is fully stated in the report of the case on the motion for the injunction—ante volume 2, page 332.

Per Curiam—This is an application for an order for substitutional service of a notice of motion for commitment of the defendant *Fox*, for breach of an injunction granted in the cause. The object of the

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Farwell v. Wallbridge.

suit was to restrain the removal and to procure the specific delivery of certain saw logs claimed by the plaintiff, and of which the defendant had possession himself. Upon the motion for the injunction an issue had been directed in order to determine the property in the logs, and also the possibility of identifying them; and a verdict having been rendered for the plaintiff the injunction had issued, restraining the defendants from removing, or in any way disposing of, or intermeddling with the saw logs. The affidavits on which the application was founded stated the belief of the party that the defendant had committed a breach of the injunction; certain facts strongly calculated to confirm that allegation; and an admission of the defendant to the same effect: they also stated the belief of the party that the defendant had departed beyond the jurisdiction, for the purpose of avoiding imprisonment for breach of the injunction: that he had been absent from his place of residence and his mill, where he carried on his business, for several weeks without leaving any person in charge of the premises, or of his business: that the landlord of the mill had, in fact, taken possession of it: that the plaintiff (who made one of the affidavits) had seen the defendant in Hamilton, at the end of March, when propositions for a settlement were made, which the plaintiff declined to entertain until he had consulted his legal adviser; whereupon the defendant replied that he was on his way to Rochester, but would return in a week, and would accompany him to Toronto to see his legal adviser; but that he had not returned, and the plaintiff had not seen or heard of him since. The affidavits also stated that some of the logs, the subject of the suit, had escaped from the defendant's pond at the breaking up of the water; and that one of the parties making the affidavits had been instructed and employed to look after them: also, that a quantity of sawed lumber had been removed by the defendant from his mill and deposited

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Farwell v. Wallbridge.

in a convenient place for shipment, where the party making the affidavit had examined it. On the day the motion was made the counsel for the defendant asked for time to answer the affidavits, which was granted until the next day of motions. He had, however, been present on the previous motion day, when the application had been made *ex parte*, and had heard the affidavits read, and had taken part in the discussion. On the next day of motions the motion was renewed, and no affidavits in opposition being produced, although ample opportunity had been afforded for that purpose, we think the order should be made for service on the solicitor, and on a grown-up person at the last place of abode of the defendant.

Judgment.

After the service of the notice in the manner directed, a motion was made to commit *Fox*.

Mr. *Turner*, for defendant *Fox*, objected that the affidavits did not shew that the writ was under the seal of the court.

The court, however, overruled the objection, and directed the order for the committal of *Fox* to be drawn up.

CHRISTIE v. LONG.

Statement.

Injunction.

Where a strip of land was vested in the plaintiff (according to the report of commissioners appointed to run the line between two townships), but the defendant claimed the property and had applied to the Court of Queen's Bench to quash the report, pursuant to the statute appointing the commissioners, pending the application the defendant commenced to fell the timber, alleged to be of a valuable description, growing on the strip. The court granted an injunction to restrain such felling until a decision of the motion pending before the Court of Queen's Bench.

This was an *ex parte* application for a special injunction to stay trespass in the cutting of timber.

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Christie v. Long.

The circumstances were somewhat peculiar. The plaintiff was the owner of lot number two, and the defendant of lot number one, in the fifth concession of the township of Walpole, in the county of Haldimand. Many years ago a deputy provincial surveyor, of the name of *Hambly*, had been directed by the government to run the line between the township of Woodhouse, in the county of Norfolk, and the township of Walpole.

Hambly, it appears, had begun and nearly, but not quite, completed the work, the line which he had run not having been carried its full length. If produced, however, it would have fallen forty rods to the eastward of the line between the townships of Townsend and Walpole, which lie respectively Townsend to the north of Woodhouse, and Walpole to the east of Woodhouse. Some years afterwards a deputy provincial surveyor of the name of *Walsh* was employed by the government to perform the work which had been left incomplete by *Hambly*. He commenced the line *de novo* and completed it, but his line was forty rods to the west of *Hambly's*, being in fact a continuation or production of the line between Townsend and Walpole. In this state matters continued for some years, but the latter or *Walsh's* line was the one generally followed. At length an act was passed appointing the commissioner of crown lands and two other persons, commissioners, with authority to determine the true and correct line between Woodhouse and Walpole, any two of them being enabled to act. They proceeded to execute the duty imposed upon them, and, after a full investigation of the matter, finally established *Walsh's* line, but recommended that compensation should be made by the government to the owners of four lots in the township of Woodhouse, whose lots would be curtailed by the adoption of *Walsh's* line. The report was made by the two commissioners who were nominated in conjunction with the commis-

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sioner of Crown lands. This officer confirmed the report establishing the line, but dissented from the recommendation of compensation. The act provided that the report of the commissioners should be final, if the Court of Queen's Bench were not moved against it within six months. A motion had been made against the report within the six months limited by the act, but no decision had been pronounced by the court. A strip of land, forty rods in breadth, belonged to the lot number one or lot number two, owned respectively by the defendant and plaintiff, as before mentioned, according as *Walsh's* or *Hambly's* line prevailed. Upon this strip of land the defendant, claiming it as part of lot number one, under *Hambly's* line, was cutting some valuable timber; whereupon this suit was instituted; and

Statement.

Argument.

Mr. *Price*, for the plaintiff, now applied for an injunction, contending that it did not appear what the Court of Queen's Bench was to do when moved against the report, but supposing that it had authority to set aside the report, or even to establish the line, the only effect of the motion was to render the line adopted by the report not final, and that until set aside it was to be deemed the true line established by law; that the report of the two commissioners named in the act was valid, and could not be less so because unnecessarily confirmed by the commissioner of crown lands; or that that officer's dissent from the recommendation of compensation was immaterial, since it was no part of the report, but only a suggestion; and that the plaintiff must be deemed to be in possession of the strip of land in question.

Judgment.

The court, after taking time to consider, directed an injunction to issue restraining all further cutting of timber on the land in question, and which was set out by metes and bounds.

NOTE.—The Court of Queen's Bench subsequently refused the motion made against the report.

CORNWALL v. BROWN.

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Cornwall v. Brown.

Mortgagee—Costs.

A mortgagee having omitted to give credit on the deed, or in his books, for sums of money paid to him by the mortgagor, his executors, after his decease, claimed a large sum to be due on the foot of the mortgage: the mortgagor tendered a certain amount, saying at the same time that he was willing to pay any additional sum that might appear due after giving him credit for the sums alleged to have been paid. A bill was afterwards filed by the representatives of the mortgagee to foreclose; and on taking the account a sum of between 2*l.* and 3*l.*, over and above the amount tendered, was found to be due. The court, under the circumstances, ordered the plaintiff to pay the costs.

The bill in this case was filed by *Harry Cornwall* and others, the representatives of one *Benjamin Barnard*, for the foreclosure of a mortgage made by the defendant to the testator. When the cause came on to be heard it was contended, and the answer set up, that the defendant had tendered to the executors all that was due upon the mortgage, but which they refused to accept, alleging that a much larger sum was due: thereupon the usual reference was directed to take the accounts between the parties, reserving further directions and the question of costs. Statement.

The master made his report, finding a sum due on the mortgage of about 5*l.*, being about 2*l.* 10*s.* more than had been tendered by the mortgagor to the plaintiffs. The evidence taken before the master shewed that the defendant had tendered the sum of 2*l.* 10*s.* in full, at the same time offering to pay any additional sum for interest, &c., which could be shewn to be due, claiming a payment as having been made on the mortgage, of 100*l.* or thereabouts, during the lifetime of the testator. This the plaintiffs refused to allow, there not being any trace of the credit in the books of the testator, and claimed the whole amount as being due; this the defendant refused to pay, and thereupon the present suit was brought. The cause now coming on for further directions, and on the question of costs,

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Cornwall v. Brown.

Mr. *Brough*, for the plaintiffs, submitted that a mortgagee is always entitled to his costs when any sum is found due to him, and in no case is he deprived of them unless it appear that he has been overpaid or that he has been guilty of misconduct. Here no misconduct can be attributed to the plaintiffs, as they were ignorant of the fact of payment, if in reality it ever were made.

Argument.

Mr. *Morphy*, for the defendant, cited *Coles v. Trecothick* (*a*), *Bunnington v. Harwood* (*b*), and *Jones v. Ryder* (*c*), and asked for the costs of the suit.

Per Curiam.—As a general rule, it is clearly established that a mortgagee, unless in cases of misconduct, is always entitled to his costs of the suit where anything appears due to him on the taking of the account. One circumstance which will induce the court to order the mortgagee to pay the costs of the suit is his refusing to accept the amount due on the mortgage. Here there cannot be any question that *Brown* intended to pay all that was due, and no doubt can be entertained that had the plaintiffs demanded the true amount due the defendant would have paid it: the difference between the amount tendered and the sum found to be due never gave rise to this suit. The fact that the plaintiffs, as executors, were ignorant of the true state of the account cannot make any difference in the result. It was clearly *Barnard's* duty to have endorsed the payments on the mortgage as they were made; had this been done all difficulty would have been avoided. Under these circumstances, therefore, we think that the estate of the testator must bear the expense of this litigation.

Judgment.

Decree nisi for foreclosure—plaintiffs to pay defendant his costs.

(*a*) 2 V. & B. 181. (*b*) 1 T. & R. 477. (*c*) 2 Y. C. C. C. 3.

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ROSENBURGHER V. THOMAS.

Voluntary conveyance.

Rosenburg'er v. Thomas.

April 20 and September 7.

The plaintiff made a promissory note in favor of his father-in-law, which the bill alleged had been given with the express understanding that the principal should never be called in by the payee, notwithstanding which an action was afterwards brought by him on this note, and judgment recovered; the plaintiff thereupon executed a conveyance of his real estate to a third party, in order to defeat the judgment at law; and a bill was afterwards filed to have the grantee declared a trustee for the plaintiff, or for payment of the alleged purchase money. A demurrer thereto, for want of equity, was allowed.

Statement.

The bill in this case was filed by *John Rosenburgher* against *Samuel Thomas*, praying that the defendant might be declared a trustee for the plaintiff, of certain lands conveyed by the plaintiff to the defendant; or for payment of the amount of the alleged purchase money. The bill also sought an account of certain moneys said to have been collected by the defendant on notes placed by the plaintiff in his hands for the purpose of being collected.

As to so much of the bill as prayed relief in respect of the real estate, the defendant put in a demurrer for want of equity, which now came on for argument.

Argument.

Mr. *Read*, in support of the demurrer—This bill is filed to stay proceedings at law, and get back the title to lands voluntarily conveyed by the plaintiff to the defendant, avowedly for the purpose of defeating a judgment at law, and which this court is bound to assume has been properly recovered so long as it remains of record against the plaintiff. Under such circumstances the deeds were clearly against the policy of the law, and this court will not interfere to give to either of the guilty parties any relief in respect of such transaction.

The fact that the plaintiff remained in possession after the execution of the conveyance, cannot be treated as any evidence of the agreement alleged in

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the bill to have been entered into between the parties; such a circumstance is only a badge of fraud, and is one of those facts always relied on as evidence of fraud against creditors; this, however, will not take the case out of the statute. The agreement which the bill states to have been verbal, was made, if at all, after the execution of the deed. On this point he referred to *Howland v. Stewart* (*a*), and *Townsley v. Charles* (*b*).

Leman v. Whitley (*c*), may be relied on by the other side, as warranting the court in granting relief in respect of payment of the purchase money; in that case, however, there was nothing immoral in the conduct of the parties to the transactions, and cannot be received as an authority for this bill being sustained. He referred also to Doe *Roberts v. Roberts* (*d*), *Steel v. Brown* (*e*), *Brackenbury v. Brackenbury* (*f*), *Cecil v. Butcher* (*g*).

Argument.

Mr. *Crickmore*, contra. The deed is stated in the bill to have been executed in order to avoid an inequitable judgment, and one which, under the circumstances set forth in the bill, never should have been recovered against the plaintiff; and the defendant having demurred, admits all the facts to be as stated by the plaintiff. The facts being thus admitted, we contend that there is in fact no legal judgment against the plaintiff, and therefore there was not anything immoral in his endeavouring to escape from the payment of it. [*The Chancellor.*—Assuming that to be the case, is this more than a mere voluntary conveyance, and if so, are you entitled to file a bill to set it aside?] If not, then we have a lien for the amount of the purchase money, on the

(*a*) Ante vol. 2, p. 61. (*b*) Ib. p. 313. (*c*) 4 Russ 423.
(*d*) 2 B. & Ald. 367 (*e*) 1 Taunt. 381. (*f*) 2 J. & W. 391.
(*g*) 2 J. & W. 565.

authority of *Leman v. Whitley*. He also cited *Groves v. Groves* (*a*).

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THE CHANCELLOR.—The portion of this bill which has been demurred to state, in effect, this case: One *Colborne*, father-in-law of the plaintiff, being the holder of a promissory note made by the plaintiff, for £75, payable in six months, with interest yearly, sued and recovered judgment thereon. With respect to the promissory note, there had been an understanding between the plaintiff and *Colborne*, to the effect that the principal should not be demanded under any circumstances, and the interest only in case *Colborne's* necessities should render that necessary. The interest had been paid for one year when the action was brought. The plaintiff having mentioned this inequitable conduct of his father-in-law to the defendant, it was agreed between them that the property in question in the cause should be conveyed to the defendant for the purpose of defeating the judgment. A deed of bargain and sale was accordingly executed and delivered to the defendant, who now refuses to execute a re-conveyance, has registered his deed, and is proceeding to a sale of the property.

Judgment.

The bill makes no case for relief against the judgment. It is stated indeed that the recovery was inequitable, but there is no fact to warrant the statement. The nude promise of the father-in-law affords no ground for equitable relief.

Here therefore there was a fraudulent intent to defeat a just judgment, concurred in by both these parties, and a deed duly executed and delivered in pursuance of it.

The authorities upon the subject were reviewed

(*a*) 2 Y. & J. 163.

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by the Master of the Rolls in *Cecil v. Butcher* (*a*), and it is certainly difficult, as Sir *Thomas Plumer* has remarked, to extract a principle from them. But there is no room to doubt, I think, that under the circumstances of the present case, the plantiff cannot receive any assistance from a court of equity. In Doe *Roberts v. Roberts* (*b*), Mr. Justice *Bayley* says: "There is no doubt that when two persons agree to commit a fraud, neither of them can expect any assistance from a court of law to relieve him against the consequences of it." And in *Curtis v. Perry* (*c*), Lord *Eldon* says:—"The moment the purpose to defeat the policy of the law, by fraudulently concealing that this was his property, is admitted, it is very clear that he ought not to be heard in this court to say that it is his property." And *Birch v. Blagrave* (*d*), proceeded on special circumstances, and decides nothing contrary.

Judgment.

The learned counsel for the plaintiff contends, upon the authority of *Leman v. Whitley*, that if this deed is to stand, his client is entitled to the sum stated in the deed as a consideration, and to a lien upon the estate to secure its payment. We are not now deciding anything contrary to *Leman v. Whitley*, although the principle of that case is not very intelligible (*e*). There the conveyance was made for a perfectly proper purpose. The circumstance upon which we decide the present case was, therefore, altogether wanting there.

I am of opinion, therefore, that upon the demurrer the defendant is entitled to prevail.

ESTEN, V. C.—The bill in this case states that previously to the month of June, 1849, one *Amos*

(*a*) J. & W. 565. (*b*) 2 B. & Ald. 369.
(*c*) 6 Ves. 747. (*d*) Amb. 264.
(*e*) And see 2 Sug. V. & P. 911 Sec. 8 n. 11 Ed.

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Colborne, the father-in-law of the plaintiff, held a promissory note of the plaintiff for £75, and interest; the understanding, however, between him and the plaintiff being that the plaintiff should never be called upon to pay the principal of the note, and that he should not be required to pay the interest of it unless *Amos Colborne's* necessities should oblige him to call for it: that the plaintiff had paid one year's interest on the note, when *Colborne*, in breach of the understanding before mentioned, and from ill-will towards the plaintiff, commenced an action against him for the recovery of the principal and interest due upon the note, and obtained judgment for the whole amount: that on the 25th of June, 1849, the plaintiff (having previously communicated to the defendant the unconscientious proceedings of *Amos Colborne*), with the assent of the defendant, by an indenture dated on that day, between the plaintiff of the first part, his wife of the second part, and the defendant of the third part, in consideration nominally of £450, but in fact without any consideration, and for the mere purpose of defeating the unconscientious proceedings of *Colborne*, conveyed the lands in question in the cause to the defendant in fee: that the plaintiff continued in possession of the premises for two or three months after the execution of the conveyance, in the same beneficial manner as previously, until he was on the point of removing to the State of Michigan, one of the United States of America, when it was verbally agreed between the plaintiff and the defendant that the defendant should go into possession of the premises, and pay the plaintiff such rent for them as they were fairly worth, until, and unless he should sell or desire to keep them, which he was at liberty to do by paying the plaintiff the sum of £450 mentioned in the deed; but if he should be unable to sell, or should not desire to keep them, then he was to re-convey to the plaintiff in fee, free from encumbrances: that the defendant

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went into possesion of the pemises in pursuance of the agreement, and has continued in possession of them ever since, but had never paid or accounted to the plaintiff for the rent or price of them; and, although frequently requested to re-convey them to the plaintiff or to pay him the purchase money or sum of £450 and interest from the time he had taken possession of them, he had refused, and claimed to hold them as his own property, free from all liability.

The bill likewise states the delivery by the plaintiff at the time of making the agreement before mentioned to the defendant, of various notes, accounts, hogs, lumber and property, upon the undertaking of the defendant to collect the notes and accounts, and dispose of the lumber and other property, and remit the proceeds to the plaintiff; that the defendant had accordingly collected many of the notes and accounts, and disposed of much of the lumber and other property, but had never accounted to the plaintiff for the value or proceeds of it.

Judgment.

The bill then states that the plaintiff was desirous of having the defendant declared a trustee for him, of the lands in question, and that he should re-convey them to him in fee, free from incumbrances, and pay him a fair rent for the time during which he had been in the possession of them, or that he should be decreed to pay the plaintiff the purchase money or sum of £450, and interest, for the time that he had been in possession of the lands, find that the plaintiff should be declared entitled to a lien for the amount, and that the defendant should account to him for the moneys collected and proceeds of lumber and other property sold, as before mentioned, and should re-deliver the articles remaining unsold; and it prays relief accordingly, and also an injunction to restrain the defendant from alienating or incumbering the lands, and further relief.

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To this bill, or rather to so much of it as prays any relief with respect to the lands, the defendant has put in a demurrer upon the following grounds :— That the indenture conveying the lands in question to the defendant had, as appeared from the bill itself, been executed by the plaintiff for the purpose of defeating a judgment, which, for aught that appeared, might have been justly obtained and for sufficient consideration , that it did not appear that the defendant was cognizant of, or accessory to, the fraudulent intent with which the deed was executed : that the consideration stated in the deed was the sum of £450, and that the plaintiff had shown nothing entitling him to prove that that was not the true consideration of the deed, and that the agreement stated in the bill was there expressly mentioned to be a verbal one, and therefore that it could entitle the plaintiff to no relief with respect to the lands to which it related. This demurrer is conjoined with an answer as to that part of the case which relates to the personal property. It is obvious that so far as the plaintiff's case rests upon the parol agreement stated in the bill the demurrer, which in effect raises the bar of the Statute of Frauds, furnishes a complete answer to it. The bill, however, must be considered as resting the case likewise upon the deed itself, and in this view must be construed as stating and insisting to this effect—namely, that the lands in question were conveyed to the defendant by the plaintiff by a deed which purported to be for valuable consideration, which however was entirely nominal : that the deed was executed without consideration, and for the mere purpose of disappointing the creditor : that therefore the defendant is a trustee for the plaintiff; or if he should disclaim the trust and insist upon the legal effect of the deed as binding between the parties, that the transaction must be regarded as a sale for valuable consideration, and the purchase money being unpaid, that the

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plaintiff is entitled to have it paid, and to claim a lien on the land for it, until it should be paid.

The answer to this case is, in the first place, that the deed must be taken, according to its purport, to be for valuable consideration, which has been paid; and therefore, that the defendant could neither be declared a trustee for the plaintiff, nor could the plaintiff have any lien on the land. This answer is obviously insufficient, for the plaintiff could clearly shew that the consideration was different from that stated, and at all events that it was unpaid, and claim a lien for it. In the next place, the defendant objects to the whole relief that the deed was executed *ex turpi causa*, and that it did not appear that he was cognizant of it. This, I think, is not the fact. I think the bill states that the defendant was a party to the fraud; and therefore the only question which remains to be considered is, whether the objection that the deed was executed between two parties for the purpose of defrauding the creditors of one of them, when the deed purports to be for valuable consideration, which, however, is not intended to be paid, but the lands are intended to be be reconveyed when the purpose of the deed has been answered, is a complete answer not only to the claim of trust (which it certainly is), but also to the demand of the purchase money.

Judgment.

The question, in another shape, is, whether if A. and B. arrange that A. shall convey certain lands to B. by a deed purporting to be for valuable consideration, which, however, is to be merely nominal and is not to be paid, for the sole purpose of defrauding A.'s creditors, and that when he shall require it the lands are to be re-conveyed to A. by B., and A. afterwards call upon B. to re-convey the lands, and B. refuse, and insist upon the deed as binding between the parties, A. is not entitled to treat it as a pur-

chased, and B. does not become liable to pay the purchase money. It was argued that A. is so entitled and B. so liable; that if B. has a right to insist that the deed, although void as to the creditors, is binding upon the parties, that it is binding upon both parties, and to its full extent; and that if A. must forego his land, B. must submit to pay the purchase money, and A. may file a bill to compel its payment, and claim a lien on the land for it until it be paid. I think, however, that this position is untenable; and that the demurrer offers a complete answer to the bill, and must be allowed with costs (*a*).

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SPRAGGE, V. C., concurred.

WELLANEKS v. FEZAN.

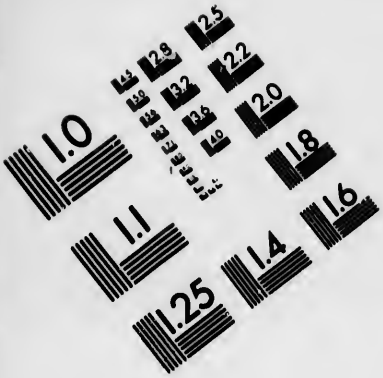
Practice—48th order.

The practice directed to be pursued by the 48th order of May, 1850, does not apply when the cause has been summarily referred under the 77th order.

Statement.

The plaintiff had given to the defendant the notice prescribed by the 48th order of May, 1850, calling upon him to admit certain documents specified in the notice, and appointing a time and place where they could be inspected. The defendant refusing the required admission, a notice of motion was served by the plaintiff on the defendant, calling upon him to shew cause why he should not admit the documents in question, or pay the costs of proving them, whatever might be the result of the cause. No answer had been put in to the bill, and the cause had been referred summarily under the 77th order of May, 1850, the defendant appearing upon the motion, and consenting to the reference. The suit was for the foreclosure of a mortgage, and the decree was in the usual form, directing the account to be taken,

(*a*) Leman v. Whitley, 4 Russell 423.



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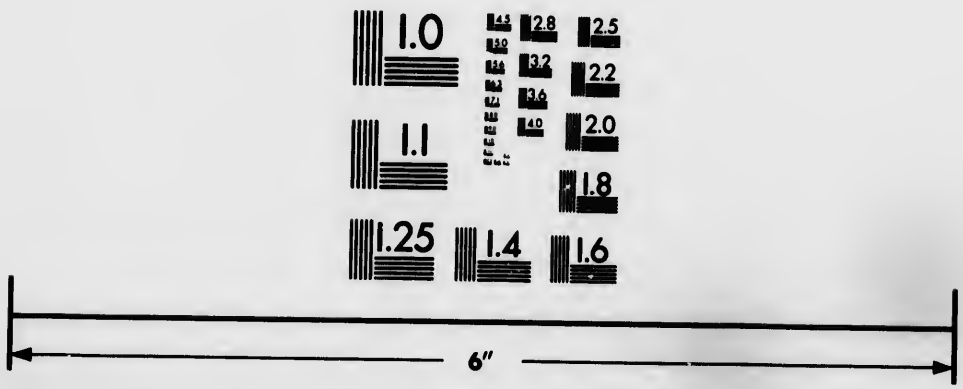

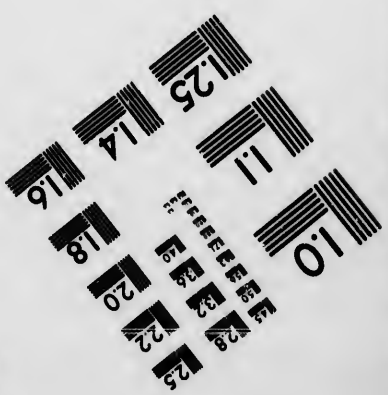

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Wellenbanks v. Fenn.

and on payment of the amount found due a reconveyance, in default foreclosure, but no further inquiries or proceedings were directed, nor any examination of parties or witnesses. The mortgage had been assigned several times, the plaintiff being the fifth or sixth assignee, and the debt was collaterally secured by a promissory note which had been indorsed by the mortgagee, on the assignment of the mortgage. The documents, of which an admission was required, were the mortgage deed and the several assignments of the mortgage, together with the promissory note which has been mentioned, and the indorsement upon it.

Statement.

On the motion coming on for argument—

Mr. *Gwynne*, Q. C., appeared for the plaintiff, and submitted that, under the circumstances of this case the plaintiff was entitled to the admissions demanded, or for an order that the defendant should pay the costs.

Argument.

Mr. *Read* contr, refused to make the required admissions, and contended that in any view of the case the defendant could be required to admit only the documents executed by himself.

As the point was of some importance to the general practice of the court, time was taken to consider it, and now judgment was delivered to the effect that upon the merits of the case it was highly reasonable that the plaintiff should require the defendant to admit the execution of the mortgage and the signature to the promissory note, but not the execution of the several assignments of the mortgage, or the indorsement on the note; but the court was of opinion that the 48th order did not apply when the cause had been summarily referred under the 77th order; and that, even if it did, the motion was unnecessary, inasmuch as the court having directed an account in general terms, without directing any

Judgment.

examination of parties or witnesses, or any further inquiries or proceedings, proceeded upon an assumption of all the facts creating the accountability of the defendant to the plaintiff as being admitted or proved, and any proof thereof in the master's office was not required.

The court, thinking the language of the order clear refused the motion with costs.

ALLAN v. THORNE.

Rectifying Deeds.

A deed, executed in Lower Canada, conveyed certain lands situate in Upper Canada to parties "*and their successors,*" which words it was proved were sufficient to convey the fee simple according to the law of Lower Canada; and it was proved that the intention of the grantors in the deed was to convey the lands absolutely, the court ordered the devisees of the grantor to execute a release of the lands according to the law of Upper Canada.

The bill in this case was filed by *Hugh Allan* and *Charles Freeland* against *Anna Maria Thorne* and *Horace S. L. Wilcocks*, the widow and executor; together with the infant children of the late *Benjamin Thorne;* and stated to the effect that the testator and *Francis H. Heward* had carried on business in co-partnership, as merchants, in the city of Montreal, in that part of the province of Canada which lately formed the province of Lower Canada, under the style and firm of *Thorne* and *Heward*, and had in the course of such business become indebted to divers persons in large sums of money, and that being unable to pay such debts, and for the purpose of paying them as far as possible, had executed an indenture of bargain and sale and assignment, whereby they had transferred all their joint-property, both real and personal, and certain lands belonging to them individually, and which lands and real estate were situate in Upper Canada and were par- Statement.

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ticularly described in the indenture, to trustees, the plaintiffs in this suit, upon certain trusts, for the payment of their joint debts, and the payment of the surplus to them respectively. The bill further stated that this indenture was prepared in Lower Canada; and that through misapprehension of the law of Upper Canada, it did not contain the usual and necessary words of inheritance, for the conveyance of the fee simple of the lands included in it; that the intention of the parties, however, was to transfer their whole estate to the trustees, and that with this view the lands comprised in the indenture had been conveyed by it to the trustees and their successors, which words were sufficient, according to the laws of Lower Canada, to carry the largest estate that the parties making the conveyance had in the lands conveyed; and, as evidence of the mistake under which the deed had been prepared, and of the intention with which it was executed, the bill stated that an indenture had been previously prepared in Upper Canada for the same purpose, and containing substantially the same provisions, and comprising the same property, real and personal, as the first mentioned deed, which indenture conveyed the lands comprised in it to the grantee, his heirs and assigns, so as to pass the fee simple of such lands to him; which indenture, the bill alleged, had been executed by Messrs. *Thorne* and *Heward*, as an escrow, to be delivered as their act and deed upon its being executed or assented to by all the creditors at Montreal; and the bill stated that upon its transmission to Montreal, the creditors, for some reason, determined that another indenture should be prepared for the same purpose and to the same effect; and the indenture which had been executed as an escrow thereupon became void, and the deed first mentioned was prepared and executed. The prayer of the bill was, that the indenture in question might be rectified by the introduction into it of words of inheritance

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sufficient to carry the whole estate of the grantors. The defendants, who were the trustees and devisees (some of them infants) named in the will of Mr. *Thorne*, answered the bill, the infants submitting their rights to the protection of the court, and the trustees submitting to act under its direction. The plaintiffs entered into evidence, and examined amongst other persons, *Francis H. Heward*, formerly partner of Mr. *Thorne*, who clearly proved that it was the intention of the parties to convey, by the two indentures, their entire estate in the lands comprised in them respectively, and the two indentures were executed with precisely the same intention in that respect. He also proved that he had himself executed a deed for rectifying the mistake which had occurred with respect to his own lands. Mr. *Amiot*, a member of the Lower Canada bar, proved that the word "successors" was equivalent to the word "heirs" in the conveyance of real property, by the laws of Lower Canada, and would carry the entire estate of the grantors, and were commonly used in deeds to trustees, curators and tutors, like the one in question.

Statement.

On the cause coming on to be heard;

Mr. *Hagarty*, Q. C., appeared for the plaintiffs.

Argument.

Mr. *Galt*, for the defendants.

Tollet v. Tollet (*a*), was referred to.

The court, after taking time to look into the papers and evidence, gave judgment in favor of the plaintiff, and thereupon a decree was drawn up to the following effect.

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(*a*) W. & Tud. 155.

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This cause coming on to be heard, &c.

Decree.

Order and decree that the said defendants, *Anna Maria Thorne*, and *Horace S. L. Wilcocks*, as devisees and trustees of the late *Benjamin Thorne*, the testator in the pleadings named, do execute such deed of bargain and sale, release and conveyance, to the said plaintiff, of all the reversionary or other estate, title or interest in the lands conveyed to the said plaintiffs, as in the pleadings mentioned, as may now be vested in them, or either of them, under the will of the said *Benjamin Thorne*.

Refer to Master to settle conveyances, &c.

Order costs of all parties to be paid out of the estate.

BETHUNE v. CALCUTT.

Practice—Just allowances.

Under the head of "just allowances" the Master may, on taking the account of subsequent interest, and taxing subsequent costs on a first or subsequent foreclosure, allow a sum paid for insurance since the last foreclosure, and interest, under a provision in the mortgage, although the decree simply directed him on each successive foreclosure to compute subsequent interest and tax subsequent costs.

Statement.

This was a suit by a mortgagee against the mortgagor and several subsequent mortgagees and judgment-creditors, for redemption or foreclosure. The decree had directed the Master to take an account of what was due on the mortgage for principal and interest, and to compute interest on the principal sum to the end of a year from the date of his report, and to tax the plaintiff's costs in the usual manner. On every successive foreclosure he was to compute subsequent interest and tax subsequent costs, and redemption or foreclosure was to follow according as the party paid, or made default in payment of, the amount so found due. The decree also directed that on taking such accounts all just allowances were to be made to the parties.

Under a provision in the deed, the mortgagee was authorised to insure the mortgaged property; and the premiums which should be paid for that purpose, together with interest on them, were to be added to the mortgage debt, and to form a charge on the

property. After several of the subsequent incumbrancers had been foreclosed, the plaintiff paid an additional sum for insurance, and in taking the account consequent on the last of such foreclosures the Master had allowed the additional premium paid for insurance, together with interest on it, and added it to the amount found due by his report. His subsequent report, made upon this occasion, was duly confirmed, and now

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Bethune v. Calcutt.

Mr. *Crickmore*, for the plaintiff, moved for a final order of foreclosure on default in payment of the amount so found due by the Master's subsequent report.

The court, on the motion, doubted whether under the circumstances the order should be made, but, after looking into the pleadings and authorities, were of opinion that it was proper, and accordingly granted the order as prayed.

Ross v. Harvey.

Registry Act—Fraudulent conveyance.

Although the prior registration of a deed executed without consideration confers no title upon the grantee, as against a *bona fide* purchaser for value, still, as the fact of such a deed being upon record will have the effect of creating a cloud upon the title, the court will decree its removal.

The bill in this case was filed by *William Ross*, *James Mitchell*, and *John Fiskin*, against *John Harvey* and *Michael Thompson*; from the statements of which it appeared that the defendant *Harvey*, being indebted to the plaintiffs, had conveyed to them in fee certain lands upon trust, for sale, and after payment of all expenses, to retain their own debt and interest, and to pay the surplus (if any) to *Harvey*. Statement.

The plaintiffs neglected to register their deed, and

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about a twelvemonth afterwards *Harvey*, "intending to defraud the plaintiffs of their security," conveyed the land in question to the other defendant, *Thompson*, in fee, by an indenture which purported to be made for valuable consideration paid by *Thompson* to *Harvey*, but in fact no consideration whatever was paid by *Thompson* for the lands; but on the same day that such indenture was executed *Thompson* caused it to be duly registered, whereby "he acquired the legal estate in the premises in fraud of the plaintiffs." *Harvey*, however, continued in possession of the lands, and the defendant *Thompson* "did not claim such possession, or any interest in the rents and profits of the land."

The bill prayed that *Thompson* might be postponed to the plaintiffs, and that *Thompson's* deed might be delivered up to be cancelled, or that he might be decreed to execute any instrument that might be necessary to relieve any plaintiffs' title of the defect which had attached upon it.

The defendants neither appeared to, nor answered the bill, which was taken *pro confesso* against them both.

Argument. At the hearing Mr. *McDonald* appeared for the plaintiff, but no one appeared for either of the defendants.

Judgment. *Per Curiam.*—This bill is evidently founded in a misapprehension of the law. The plaintiffs suppose that the defendant *Thompson*, by means of the registration of his deed, their own being unregistered, has acquired a legal priority over them. This is a mistake. The Register Act operates in favor only of purchasers for valuable consideration; and it is expressly stated in this bill that *Thompson* paid no consideration for these lands. Under these circum-

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stances some doubt has arisen whether the bill contains a sufficient allegation to warrant an interposition of the court in favor of the plaintiffs. It is considered that the mere circumstance of *Thompson* having received a conveyance of the land in question, purporting to be for valuable consideration, and having registered it, while the plaintiffs neglected this precaution, although he suffered *Harvey* to remain in possession of the land, did not constitute any ground for the interference of the court. It is asserted, however, in the bill, and admitted by both the defendants, that *Harvey* executed the conveyance in question "for the purpose of defrauding the plaintiffs of their security," and that *Thompson* caused it to be duly registered on the day of its execution, whereby he had acquired the legal estate "in fraud of the plaintiffs." We think these passages in the bill amount to an allegation that the defendants executed, and received and registered respectively the deed under which *Thompson* claims, for the purpose of fraudulently acquiring a real or apparent priority over the plaintiffs; and as the deed in question, purporting to be for valuable consideration, has every appearance of conferring such priority, and as the existence of a cloud upon a title is recognised by this court as a sufficient ground for its interposition, we think that the bill discloses a sufficient case to warrant the relief which is sought, and that the plaintiffs are entitled under the circumstances to have a sale under the decree of the court, in which the defendant *Thompson* shall join; and that this decree must be made with costs against both defendants.

Judgment.

1853.

Thompson v. Buchanan.

THOMPSON v. BUCHANAN.

Practice—Dismissing bill.

In moving to dismiss for want of prosecution, it is not sufficient for the certificate of the registrar to state only, that no replication has been filed; it must also state that no further proceedings have been had, and it must be shown when the office copy of the answer was served.

Statement. This was a motion by the defendant to dismiss the bill for want of prosecution. The certificate of one of the deputy registrars stated merely that the answer had been filed on such a day, which was more than four weeks previous to the notice of motion being given, and that no replication had been filed.

Argument. Mr. *McDonald* appeared for the motion.

Mr. *Mowat*, contra, objected that sufficient did not appear to warrant the application, inasmuch as the certificate did not state in the usual form that no further proceedings had been taken since the filing of the answer, but merely that no replication had been filed. The plaintiff may have obtained and served an order to amend. Moreover, it did not appear when the answer was filed, for by the 135th of the old orders the answer is not to be deemed duly filed until an office copy has been served; and the certificate could only be considered as denoting the time when the answer was filed with the registrar, not when the office copy was served.

Judgment. *Per Curiam.*—We concur in the objections taken by the plaintiff to this motion, and must therefore refuse the application with costs.

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Thompson v. Crocker.

THOMPSON v. CROCKER.

Mortgagor—Injunction.

The court will restrain the attaching creditors of an absconding defendant from selling timber improperly cut upon land mortgaged by the defendant to the plaintiff.

The bill in this cause was filed by *Charles Thompson* against *William Crocker* and certain creditors of *Crocker*, who had sued out attachments under the Absconding Debtors' Act, and stated to the effect that the plaintiff had contracted for the sale to the defendant of lot number 20, in the third concession from the Bay of the township of York, for the sum of £1100, payable £100 down, and the remainder by five equal annual instalments of £200 each, with interest, and to be secured in the meantime by a mortgage of the property, which was to be at once conveyed by the plaintiff to the defendant. The conveyance was executed, and the sum of £100 paid accordingly, and a mortgage was executed by the defendant to the plaintiff, whereby the property in question was conveyed by the defendant to the plaintiff, in fee, but subject to redemption on payment of the sum of £1000, by five equal annual instalments of £200 each, with interest. This mortgage was accompanied by a bond from the defendant to the plaintiff, of which the condition was, that the defendant should not, so long as any part of the mortgage money remained unpaid, in any one year cut more than twelve acres of timber, unless he should pay more than the stipulated instalment of £200, and interest, and in this case only to the value of such excess. The sale took place, and the deeds were executed in the month of March, in the year 1851. The defendant had paid only the sum of £100 stipulated to be paid down, and had not paid any part of the instalment of £200, and interest, which became due in March, 1852; he, had however, during the year 1851 cut the timber on six-

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Thompson v. Crocker.

teen acres, besides culling the most valuable timber on the rest of the property. Part of the timber thus felled, not equal in quantity to the excess above the twelve acres of timber, which the defendant was authorised by the terms of the bond to cut, remained on or near the property. The defendant had absconded, and some of his creditors having issued attachments against his property, the sheriff, by virtue of these attachments, had seized, amongst other effects of the defendant, the timber in question, and was about to proceed to a sale of it, as being of a perishable nature. Under these circumstances

Statement.

Mr. *Brough*, for the plaintiff, applied on certificate of bill filed and affidavit, for an injunction to restrain the removal of the timber in question, or in case of a sale, that the proceeds arising from such sale might be paid into court.

Argument.

The application was originally made to the Chancellor, who required further affidavits to be furnished to account for the apparent delay, and to shew that the timber in question formed no part of the twelve acres which the defendant was authorised to cut. These affidavits having been procured, the application was renewed before the Chancellor and Mr. Vice-Chancellor *Esten*, who happened to be at chambers at the time. The judges granted the injunction restraining the removal or sale of the timber, on the principle that the timber in question formed part of the security and was specifically liable to the satisfaction of the plaintiff's claim; and that the attaching creditors stood in no better situation than the defendant *Crocker* himself, who could not have been permitted by such an unauthorised act to convert the plaintiff's specific lien into a mere personal remedy.

Judgment.

IN APPEAL.

1852.

Sheldon v. Chisholm. Dec. 13th and 17th, 1851 and Feb. 26, 1852.

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

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

SHELDON v. CHISHOLM.

Equity of redemption—Sale of reversion.

Held per Curiam—(Blake C. *dissentiente*), that a sale by a sheriff under a writ of *fieri facias* against lands, of the reversion, after a term of 1000 years, had been created by way of mortgage, carries with it the right to redeem the term.

Statement.

The circumstances giving rise to the suit in the court below, and judgment now appealed from, are fully stated in the reports of the case—*Ante* volume 1, page 108, and volume 2, page 178.

Argument.

Mr. *Vankoughnet*, Q. C., and Mr. *Turner*, for the appellants.

Mr. *Brough* and Mr. *Mowat*, for the respondents.

Judgment.

ROBINSON, C. J.—Some time before March, 1822, *George Stewart* made a mortgage in fee to *John Spencer*, of the north halves of lots eight in the first, and of number nine in the second concession of Barton, and broken front number eight in the same township, containing in all 170 acres; or rather, it appears he made an absolute deed to him in fee, taking back a bond to re-convey, in case he (Stewart) should pay Spencer £125 at the times, and in the manner mention in the bond.

On the 2nd of March, 1822, by indenture between *George Stewart* and *William B. Sheldon*, reciting a debt due by bond from *George Stewart* and *James Stewart* to *Sheldon*, of £625, payable on the 3rd of

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March, 1824, with interest from the date of the bond, being of the same date with this indenture, *George Stewart*, for securing that debt, granted, bargained and sold the above-mention 170 acres to *Sheldon* for the term of 1000 years, with proviso, that if he, or *James Stewart*, should pay the £625 by the time aforesaid, with interest, "then the said indenture, and the said term, and every matter, clause and thing therein contained, shall cease, determine, and be absolutely void to all intents and purposes whatever," with covenant to pay the money: that in default *Sheldon* may enter and enjoy; and that in the meantime *G. Stewart* is to continue in possession. Registered the 15th of March, 1824.

On the 28th of February, 1824, *John Spencer*, in consideration of £500, acknowledged in this deed to be paid to him, by indenture of bargain and sale grants, bargains, sells, aliens, releases, &c., to *George Stewart*, the 170 acres of land above mentioned. This is an ordinary bargain and sale in fee, with a covenant for further assurance, containing no recital of the mortgage from *George Stewart* to *Spencer*, nor any statement of *Spencer's* title.

Judgment.

On the 31st of March, 1824, *George Stewart*, by indenture between him and *William Waterberry*, in consideration of £800 acknowledged to be paid to him, granted, bargained and sold to *William Waterberry* (in his actual possession then being) the same 170 acres of land in fee-simple, together with all the hereditaments and appurtenances thereunto belonging; and the reversion and reversions, remainder and remainders, &c.; and also all the estate, right, title, interest, claim or demand whatsoever, of the said *George Stewart*, either in law or equity, of, in, or to the said premises, &c.; *Habendum* in the usual language of bargains and sales in fee, with a general warranty against all persons lawfully or equitably claiming.

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On the 5th of June, 1834, *William Bull Sheldon*, by indenture between him and *John Smith*, in consideration of £1500 alleged to have been paid to him by *Smith*, granted, bargained and sold to *Smith* the said 170 acres of land with the appurtenances, and his, the said *W. B. Sheldon's* interest therein, to hold to *Smith*, his heirs and assigns in fee-simple.

On the 2nd of May, 1837, *William Waterberry* and wife, by indenture between themselves and *David Stewart*, in consideration of £75, of which the receipt is acknowledged, granted, bargained and sold to *David Stewart* the said 170 acres, together with all the hereditaments and appurtenances thereto belonging; and the reversion and reversions, remainder and remainders, &c., and all the estate, right, interest, property, claim and demand whatsoever, either in law or equity, of, in, or out of the said hereditaments and premises, with all the privileges and appurtenances thereunto belonging, to hold to the said *D. Stewart*, his heirs and assigns, for ever. *William Waterberry* covenants that he has done no act to incumber the estate; and the deed concludes with a proviso, that the words "grant, bargain and sell, used in this deed, shall not be taken to be an implied warranty of title, for that the deed is merely intended to pass his interest and estate in the premises."

Judgment.

On the 16th of May, 1837, *David Stewart* and his wife, by indenture between them and *William Chisholm*, in consideration of £75 acknowledged to be paid by *William Chisholm*, did grant, bargain, sell, release, and for ever quit claim to him, his heirs and assigns, the said 170 acres of land (an ordinary bargain and sale in the same terms as the deed to *David Stewart*, except that it contains only a covenant that *Stewart* has done no act to incumber; and it is without any such proviso against implied warranty as is inserted in that deed).

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On the 27th of July, 1841, *Allan McDonell*, Esq., sheriff of the district of Gore, by deed poll under his seal of office, recites that under a writ of *fieri facias* from the Court of Queen's Bench, tested the 4th of November, 1839, at the suit of *John Beals*, against the goods, &c., of *William B. Sheldon*, he had seized as the chattels of *Sheldon* the said 170 acres of land, with all the hereditaments, improvements and appurtenances thereunto belonging: that the said premises and appurtenances since the seizure by him made had, after due notice by him, been exposed to public sale on the 11th of November, 1840, and sold for £75 to *George S. Tiffany*, the highest bidder; and in pursuance of such sale the sheriff grants, bargains and sells to the said *George S. Tiffany*, his heirs and assigns, all the estate, right, title and interest, claim, property, and demand whatsoever; and also the unexpired term of 999 years, which the said *William B. Sheldon* of right had in and to the said land, hereditaments and premises, with all and singular the appurtenances: *to have and to hold* the said tracts, pieces or parcels of land, hereditaments and premises, with the appurtenances, to the said *George S. Tiffany*, his heirs and assigns, as fully and absolutely as he, the said sheriff, could, or ought to grant, bargain and sell the same by force of the statute, and of the said writ of *fieri facias*.

Judgment.

On the 14th of May, 1842, *John Smith*, by indenture between him and *George S. Tiffany*, for divers good causes, &c., and in consideration of five shillings, granted, bargained, sold, assigned, released, enfeoffed, conveyed, and confirmed to *George S. Tiffany*, his heirs and assigns, all the estate, right, title, interest, claim property and demand, term of years yet to come and unexpired, of him, the said *John Smith*, of, in, to and out of the said 170 acres of land, describing them as in the sheriff's deed of the term to *George S. Tiffany*,

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to which deed it refers, the same being annexed to it; together with all houses, &c., and the hereditaments improvements, and appurtenances, &c., thereto belonging: to hold the same—that is, all *Smith's* interest, &c., being the residue of a term of 999 years, formerly granted by *George Stewart* to *William B. Sheldon*, of, in, to and out of the said lands, tenements and hereditaments, with their appurtenances, to the said *George S. Tiffany*, his heirs and assigns.

William Chisholm died in or about the month of May, 1842, having duly made his will on the 27th of March, 1841, whereby he devised to his wife Rebecca the use of one-third of all his real and personal property, till his youngest child shall become of age, the remaining two-thirds to be applied towards the payment of his debts, and the maintenance of his family. He devised to his sons who should attain the age of twenty-one years, and his daughters who should attain the age of eighteen years, and to his wife Rebecca, an equal portion of all his real and personal property (to be divided by his executors when his youngest child should come of age), after paying all his just debts; and he appointed his sons, *George King Chisholm*, *John Alexander Chisholm*, and *Robert Kerr Chisholm*, his executors, to do and perform all such matters and things as to them shall seem meet, and the law shall direct.

Judgment.

On the 14th of January, 1845, *Edward C. Thomas*, Esq., sheriff of the district of Gore, by deed poll recites, that under a writ of *venditioni exponas*, tested the 17th of February, in 7 Victoria (1843), from the Court of Queen's Bench, at the suit of the Gore Bank against the lands and tenements of *William Chisholm*, and of another writ of *fieri facias* from the same court, tested the 24th of June, in the 7th year of Victoria, at the suit of *Isaac Buchanan*, against the lands and tenements of *William Chisholm*, in

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the hands of *George King Chisholm, John Alexander Chisholm* and *Robert Kerr Chisholm*, executors of *William Chisholm*, deceased, "he had seized as of the lands and tenements of *William Chisholm*, whilst living, the lands and tenements following, viz., these 170 acres of land now in question: that the said premises and appurtenances since the seizure by him made, by virtue of the said writs, after due notice, were exposed to public sale on the 12th of November, 1844, and sold to *George S. Tiffany*, the highest bidder, for £41; and the sheriff by this deed, by virtue of the said writs of *venditioni exponas* and *fieri facias*, and by force of the statute, and in consideration of the said sum of £41 to him paid, "granted, bargained and sold, to the said *George S. Tiffany*, his heirs and assigns, for ever, all the estate, right title, interest and claim, which the said *William Chisholm*, in his lifetime, or the said *George Kerr Chisholm, John Alexander Chisholm* and *Robert Kerr Chisholm*, as his executors since the death of the said *William Chisholm*, had of right of, in, and to the said lands, tenements, hereditaments and premises, with all and singular other the premises and appurtenances: to have and to hold the same lands, hereditaments and premises, and all and singular other the premises, to the said *George S. Tiffany*, his heirs and assign, as fully and effectually as he, the said sheriff could, or ought to grant, bargain and sell the same, by force of the statute aforesaid; and the said writs of *venditioni* and *fieri facias* or otherwise."

Judgment.

I have stated these several transactions in their order of time, that their effect upon the title may be the more readily traced.

The plaintiffs, *George K. Chisholm, John Alexander Chisholm* and *Robert Kerr Chisholm*, in March, 1843, filed a bill to redeem, the former in his right as heir at law, and one of the executors of *William Chisholm*

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who died in May, 1842, and the others as his co-executors.

On the 31st of October, 1840, a judgment at the suit of the Gore Bank, had been entered up against *William Chisholm*, in the Queen's Bench, for £487 9s. 8½*d.*; and on the 27th of February, 1841, after a *fi. fa.* against his goods had been returned *nulla bono*, a *fi. fa.* on that judgment issued against his lands, on which the sheriff returned lands seized to the amount of £5, and unsold for want of buyers.

And after *Chisholm's* death—viz., on the 1st of June, 1844, a writ of *venditioni exponas* issued in consequence of this return.

On the 2nd of July, 1840, another judgment at the suit of *Buchanan*, was entered up in the Queen's Bench, against *William Chisholm*, for £412 13s. 4*d.*, on which a *fi. fa.* against goods issued the same day, which was returned *nulla bona*. Judgment.

After *Chisholm's* death this judgment was revived by a *sci. fa.* against his executors, and after judgment on *sci. fa.*, a *fi. fa.* was taken out on the 4th of July, 1843, against the executors, by which the sheriff was commanded to make the debt, &c., of the lands which were of *Chisholm* at the time of his death.

The *venditioni exponas* at the suit of the Gore Bank, and the *fi. fa.* at the suit of *Buchanan*, were respectively put into the sheriff's hands a few days after they were issued; and on the 18th of July, 1844, he sold under these writs all the estate and interest in the land now in question of which *Chisholm* had died possessed, to *George Tiffany*, one of the defendants in this suit, for £41. The defendant *Tiffany* was the attorney for the Gore Bank, in the action on

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which this judgment was entered. The sheriff's deed, as I have already mentioned was made to *Tiffany* on the 14th of January, 1845.

This sale, and the sheriff's deed, were both after the original bill was filed in this cause, but before *Tiffany* had put in his answer, which was on the 17th of January, 1845.

This cause came on to be heard in November, 1849. The points disscussed are very distinctly stated in the report of the case (*a*); and in the judgment of his lordship the *Chancellor*, before whom, and Mr. Vice-Chancellor *Jameson*, the case was heard. The principal point to be considered was, whether the plaintiffs' claiming under *Chisholm* could be held to have any equity of redemption remaining in them after the sale of *Chisholm's* interest under the executions—that is, after the sale of the reversion which he had purchased from *David Stewart*, the assignee of *Waterbury*, to whom *George Stewart* had sold in 1824 all his interest in the land, which interest was his reversion, after the mortgage term which he had granted to *Sheldon*.

Judgment.

The *Chancellor* was in favour of their right to redeem, upon the ground that the *fi. fa.* from the Queen's Bench could not attach upon the equity of redemption; that the reversion alone could be sold under it, as being the only legal interest which *Chisholm* held, and that the equity of redemption not being at that time subject to a common law execution, and so not passing by the sale, it followed that the devisees under *Chisholm's* will held the equitable interest or estate, and could therefore claim to redeem.

(*a*) *Ante* vol. 1, p. 108.

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I understand that Mr. Vice-Chancellor *Jameson* concurred in that opinion, though the report does not expressly state that; but no decree for redemption was then made by the court in accordance with the opinion intimated, because it appeared obvious to them, on inspection of Mr. *Chisholm's* will, that besides his three sons who were executors, his widow and his other children taking an interest under the will ought to have been made parties to the suit; and after some discussion on that point leave was given to amend by adding other parties, and by inserting such statements in the bill as were necessary to shew their connection in interest with the subject matter of the suit.

In April last the case came to the final hearing upon the merits before his lordship the *Chancellor*, and Mr. Vice-Chancellor *Spragge*, who had succeeded to Mr. *Jameson*, Mr. Vice-Chancellor *Esten* having taken no part in the cause in consequence of his having been retained in the cause when at the bar. Upon the last occasion the case was again fully argued, and, as the *Chancellor* observed, very ably; and the result was, that the learned *Chancellor* continued to be of the opinion which he had formerly expressed, that the plaintiffs claiming under the will of *William Chisholm* had a right to redeem notwithstanding the sale of *Chisholm's* reversionary interest under the execution, for he still considered that as the equity of redemption was an interest which the execution could not touch, it could not have been transferred by the operation of the sheriff's sale and the deed made under it: that it became therefore separate from the reversion, and was an interest of which the devisees were entitled to avail themselves. His honor Mr. Vice-Chancellor *Spragge* differed wholly from that view of the case, and gave his reasons very clearly and fully; but though he did not hold the plaintiffs entitled to redeem, yet, as two

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of the judges of the court had formed a contrary opinion, he thought it more fitting under the circumstances of Mr. Vice-Chancellor *Esten* being precluded from taking part in the judgment, that he should not stand in the way of a decree being made, from which, if it were wrong, the defendants could appeal, and be therefore *pro forma* united with the *Chancellor* in decreeing redemption.

The defendants appeal from this decree, objecting that it was plain in the pleadings and evidence that the reversion in fee of the premises in question being vested in the defendant *Tiffany*, the equity of redemption was attendant thereon, and was divested from the plaintiffs, and became vested in *Tiffany*: that the case upon the evidence is one in which the court should at all events have refused redemption under the discretion given to them by the 11th clause of 7 Wm. IV. ch. 2: that certain amendments made in the bill under an order of the court made the 4th of January, 1850, were irregular and improper, and that on that account the bill should dismissed on the hearing; and they object particularly to one of the terms of the decree which holds the plaintiffs entitled to an account of the timber felled on the premises while they were in the occupancy of the defendant *Sheldon*.

Judgment.

As regards the principal question—the effect of the sheriff's sale of the reversion, in depriving plaintiffs of all right and pretence for setting up any equity of redemption as remaining in them, it happens that since the judgement was given which is now appealed from the same point under similar circumstances, has come before the Court of Chancery in a case of *Waters v. Shade* (*a*). The learned Chancellor was unable in that case to give judgment, because he had been counsel in it at the bar; but his Honor Vice-

(*a*) *Ante* vol. 2. p. 457.

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Chancellor *Esten*, in an elaborate and able judgment, took the same view of the question which Mr. Vice-Chancellor *Spragge* had taken in *Chisholm v. Sheldon* and the latter declared that his opinion continued to be such as he had then expressed.

There was another point in the case of *Waters v. Shade*, in which the both learned judges concurred, and which was in their view, decisive against the plaintiff in that case, independently of the question which is now brought up a third time in this suit; so that the decrees which have been made in the two cases are not in fact inconsistent with each other, but in both cases the question whether the sale in execution of a reversion after a mortgage term had been created by the tenant of the fee carries with it to the purchaser at such sale the equity of redemption as incident to the ownership of the fee, came distinctly under consideration, and was fully discussed by the learned judges, and decided opinions expressed upon it. The circumstance that the learned judges have differed so widely in their opinions makes me apprehend that the point may not be so clear as I take it to be; but I confess that my conviction is altogether in favour of the defendants upon the principal question, and so much so that I should not have felt the point to be doubtful if it had not been for this difference of opinion in the court below. There are some points in the case, however, which are to be disposed of before we come properly to the question I have referred to, because the plaintiffs do not rest their right to redeem entirely on the ground that though the sale by the sheriff may have vested the reversion in *Tiffany*, it left the equity of redemption still in *Chisholm's* devisees, on account of the common law execution having no power to affect it. They take higher ground, and insist *first* that there has been no legal sale of the reversion, for that no reversionary interest can be

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sold under a *fi. fa.*: that argument did not receive any countenance in the court below, and I do not suppose that much reliance is placed in it by the plaintiffs' counsel. The British statute 5 Geo. II. chap. 7, expressly provides that "the houses and *lands*, and other *hereditaments and real estates*" in the plantations, "belonging to any persons indebted, shall be liable to, and shall be assets for the satisfaction of debts, and shall be subject to the same process in any court of law or equity in any of the said plantations, for seizing, extending, selling, or disposing of the same, and in like manner as personal estates are seized, extended, sold, or disposed of, for the satisfaction of debts." Of course, unless we could say that an estate in reversion does not come under any of the terms used in this decree, we cannot deny that it may be sold in execution for debt, as goods may; but nothing can be clearer than that a reversion does come under three of the four words used—namely, "lands, hereditaments and real estate;" besides, on strictly legal principle, reversions expectant on terms for years have been always held to be present assets in England for the satisfation of specialty debts; and that being so, the statute 5 Geo. II. chap. 7, makes them equally assets in the colonies, for the satisfaction of simple contract debts (*a*).

Judgment.

The reversion in fee of an estate expectant on a life estate, or a short term of years, is a clear legal estate, which may, according to circumstances, be worth hundreds or thousands of pounds of present value; and on what grounds could we possibly deny the right of a creditor under 5 Geo. II. chap. 7, to have it sold in execution, in satisfaction of his debt? But nothing more need be said on this point.

(*a*) Smith v. Angel, 1 Salk. 354; S. C. 7 Mod. 40. Lord Ray, 783; Villers v. Hanley, 2 Wils. 49.

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which has already in more than one case been assumed in the common law courts of this province to afford no room for doubt.

Then, as a second point, the plaintiffs contend that even if a reversion after an absolute estate for life, or a term of years, can be sold in execution, yet a reversion expectant upon a mortgage term cannot be so dealt with. I can see no ground in reason or authority for our laying down such a distinction. So far as such a position may be attempted to be supported by stating the inconveniences which would follow by a sheriff's sale, transferring merely the reversion, and leaving the equity of redemption with the debtor, the argument is founded on the assumption that the equity of redemption does not on such a sale pass with the reversion, and the effect of the argument must therefore depend on the judgment to be given on that point, so that it need not be separately discussed. On any other ground I see no pretence for raising the question. A man owning an estate of great value, might pledge it for a short term of years, to secure a small debt; and the reversion in his hands, even without any view to redemption of the term, might be present available assets of large value; and no reason can be given why he should hold such an interest (which is in truth, a strictly legal estate) discharged from liability for his debts, notwithstanding the statute 5 Geo. II. The present is, to be sure, not a case of that kind, for the term is one of 1000 years; and it is not very probable that such a reversion would find a purchaser if it were not for the privilege of redeeming the mortgage term; but we cannot judicially draw a line, according to our notion of things, which shall determine when a purchaser must be looked upon as necessarily buying with a view to the equity of redemption (which it is admitted could not at the time of this transaction have been seized and sold in execution

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as an independent interest), and when he may be supposed to have been possibly content to give something for the dry reversion. As Mr. Vice-Chancellor *Wigram* remarked in *Hunter v. Macklem* (*a*) "in principle there is no difference between 200 years and 20 years."

If a dry reversion, expectant on an absolute term of a thousand, or a hundred, or fifty years, could for all we know, be sold for something, how can we say that a reversion expectant on a mortgage term only must be of no value: and if it be of any, the least value, the creditor is entitled to have it sold, *valeat quantum.*

Then, before coming to the main question in the case, I must notice that it has been contended further, that admitting this reversion expectant on the mortgage term could legally be sold in execution, yet the defendant *Tiffany* could not legally be the purchaser, because he was attorney for the Gore Bank, the plaintiffs in one of the executions, and bound to promote their interests in the sale, and so incapable of purchasing for himself. The sale was made under the authority of two writs, in one of which *Tiffany* was attorney for the plaintiff—in the other not. The sheriff treated the sale as made under the authority of the writ in which *Tiffany* was not attorney for the plaintiff; and he paid over the proceeds to that plaintiff; and there is no evidence that *Tiffany* accepted, or was entrusted with any particular agency from his clients to attend to their interests in the sale. It was the sheriff, as a public officer, who controlled the sale, and not *Tiffany;* the latter did not occupy the inconsistent position of buyer and seller, as an agent does when he sells his principal's property to himself. We must presume that the sheriff did his duty, and got the best price he could. I have seen no authority for holding a sale to an

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(*a*) 5 Hare, 240.

attorney void, when made under such circumstances as are shewn here, whatever might be the equity as between his clients and himself, if he had violated any confidence reposed in him by them, and if they were seeking redress from him in consequence, by claiming to have the purchase treated as being made in trust for them. There was certainly no relation of confidence between these plaintiffs and *Tiffany*. They had an interest no doubt, as well as the execution plaintiffs, in the estate bringing as much as could be got for it, but it was for them to take care of their own interests in that respect. It was of no consequence to them whether *Tiffany* bought the property, or the bidder next below him. By forbidding the sale they certainly did what was most likely to damp the bidding. *Chisholm*, it appears, had given but £75 for the same reversion by private sale, and if that was its value, it would not be much out of the common course of things that the same interest was afterwards sold at sheriff's sale for £41. Indeed, if the purchaser could take only the dry reversion, as the plaintiffs contend, without the equity to redeem as incident to it, he had a dear bargain.

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There was still another objection taken on the argument, that this bill being filed in 1843, *Tiffany* could not, while the suit was pending, though before his answer had been filed, change his position, as he has done, by purchasing the reversion, and thereby prejudicing the plaintiff's case; but this is applying a principle that I apprehend belongs to a very different class of cases. If the plaintiff's position in regard to the subject matter of the suit had remained unaltered; and the objection was that the defendant by some transaction with a third party had changed the ground on which he had before stood, in order to evade the plaintiff's remedy, there might be something to be considered, but here it is the change

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which has taken place in the plaintiff's position that is urged by the defendants as having wholly deprived them of the equity on which they rely. If the plaintiffs had sold their reversion, and had parted either impliedly or expressly with their equity of redemption, by conveying it to *Tiffany*, after they had filed their bill, they would, no doubt, have made an end of their suit: and it would have been very absurd in them to contend that they might nevertheless be allowed to redeem because *Tiffany* had no business to acquire the equity while their suit was pending, and could therefore not better his situation by having done so.

Here the public sale under execution must be attended with the same effect, if the equity must accompany the reversion; though it was in itself not an interest saleable under the act. Although the proceeding was against the will of the plaintiffs, yet that makes no difference; if they could not avoid it, it signified nothing to them who became the purchaser. I know no principle on which *Tiffany* could be held prohibited from bidding at the public auction; and surely no such consideration could entitle a court to decree redemption in favor of a party who had lost the interest on which alone he could claim it; supposing that to be the legal consequence of what took place.

Judgment.

I do not think it necessary to remark on various reasons that have been urged on the defendant's side against entertaining in this stage any of these objections—I mean objections founded on the want of proper allegations in the pleadings, and on the nature of the practice and proceedings in equity. I have noticed these various grounds on which the plaintiffs rest their case, independently of the main question, because they were some of them urged with much earnestness; but they seem not to have

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been thought entitled to weight in the court below; and it does not appear to me that the plaintiffs have really any other ground to stand upon unless it be that which was made the main question in the case, and on which they have the judgment of his lordship the chancellor in their favor. That is an opinion evidently not hastily taken up, but formed after much careful consideration, and it is supported by an elaborate and able argument. I cannot differ from it without a strong misgiving that I may be wrong; but I feel satisfied now, as I did early in the argument, that I can bring myself to no other conclusion than that come to in this same case by Mr. Vice-Chancellor *Spragge*, (*a*); whose reasoning appears to me to be perfectly convincing, and to be fully supported by the view taken of the same question by Mr. Vice-Chancellor *Esten* when it was afterwards presented to the court in *Waters v. Shade*.

Judgment.

I should be very unnecessarily wearying myself and the court by going over the ground which has been so thoroughly occupied by the judgments given in the court below; and I shall content myself therefore with saying that on the authorities cited on the part of the defendants, I think it clear that these plaintiffs have not the right to redeem. Everything that I have met with confirms what is laid down by Mr. *Powell* in his work on mortgages, 1 vol. 323, that "if lands in fee be mortgaged for term of years, the reversion in the mortgagor expectant on the determination of the term of years will be assets at law, liable to debts, and will attract the redemption."

This applies to the whole question. The modern case of lord *Downe v. Morris* (*b*), I think is quite in accordance with what the defendants contended for, and I see nothing in *Burgess v. Wheate* (*c*),

(*a*) *Ante* vol. 1, p. 196. (*b*) 3 Hare. 394. (*c*) W. B. Rep. 123.

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that is opposed to it; but on the contrary Mr. Justice *Blackstone* in his judgment spoke of the power of redemption as being clearly an equitable right inherent in the land," and of course following the legal title, (where it has not been separately diposed of) (*a*).

Consider what is the evident justice of this case, *Stewart* being, as the plaintiffs allege, seized of the whole estate in this land, raises money upon it by mortgaging it to *Sheldon* for a term of years, and afterwards he sells all his estate, right and interest in the land, both in law and equity, to *Waterberry;* and this interest comes by subsequent conveyances to *Chisholm*, who buys for £75 what would really have been worth nothing if it had not been the effect of his purchase to put him in *Stewart's* place as owner of the fee, with power to relieve the estate from the incumbrance by paying off the debt and extinguishing the term unless he desired to keep it up as a term attendant upon the inheritance. But *Chisholm* took no separate conveyance of the equity; he merely purchased the reversion, and made himself the owner with the privileges that belonged to that character, and the deed which he took created no separate interest in him such as he might have had if he had purchased a mere equity of redemption, separated from the legal estate. He dies, having devised all his estate to his widow and children, the plaintiffs. Of course they can be in no better situation than he was in regard to the estate, and can claim under him no higher or other interest than he had.

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An execution comes against them, under which the reversion is sold. How, after that, can they

(*a*) 1 Powell on mortgages, 433, 325, & 263, 332, 333; 2 Fonbl. on Eq. 259; Co. Lit., note 208 (*b*) 290 (b); *Cole v. Warden*, 1 Vern. 410; *Plunket v. Penson*, 2 Atk. 290; *Villiers v. Villiers*, 2 Atk. 71; *Whitchurch v. Whitchurch*, 9 Mod. 124; *Hoole v. Sales*, 2 Wils. 329.

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claim a right to redeem? The estate might have been an estate worth £1000 mortgaged only for £100; while they held the reversion they might have availed themselves of the equity which was incident to, or inherent in it, and by paying off the £100 might have acquired the whole beneficial interest, and rightly, for no one could claim to hold anything against them. But *Chisholm* not having redeemed while he owned the reversion, his devisees put in a claim now to redem, which can only be on the ground that they once owned what they own no longer. And if they could be suffered to redeem, what effect could be produced? none,—unless they could properly acquire to themselves the mortgage term which has been in effect extinguished by being purchased by the same person, who has since, under the sheriff's sale, acquired the fee, and who, we have no reason to suppose, can desire to keep the term alive for any purpose.

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I cannot see that we can look upon *Chisholm* as having possessed an interest in the equity of redemption apart from his right to rely upon it as accessory to the reversion which he held; he had in fact, no such separate interest in, or claim to the equity of redemption. Whatever connection he had with the land was solely and strictly as assignee of the reversion; and was gone when the reversion was assigned by act of law, as it would have gone if he or his devisees had alienated the estate by deed.

It seems to me to be to no purpose to consider what would have been the rights of the different parties if *Stewart*, or his assignees, had by a distinct conveyance separated the equitable estate from the legal, and if *Chisholm* had held such an interest under such a title, for nothing of the kind was done. He took the reversion, as the heir of *Stewart* would have taken it; that is, with the equity of redemption,

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which would equally have attended it if the deed to *Chisholm* had simply conveyed the land, or all the legal interest in it, saying nothing about equitable interest or claims; and I have no idea that because *D. Stewart's* deed did, in the usual terms, convey to *Chisholm* all the estate of *D. Stewart*, both in law and equity, there were separate legal and equitable estates vested thereby in *Chisholm*.

The case has not been put, indeed, on that ground. The argument is that the common law execution could not touch the equity of redemption, and therefore it must remain behind. No doubt if *Stewart* had mortgaged in fee and had afterwards conveyed to *Chisholm* his equity of redemption, that would have been nothing on which, as the case then stood, the *fi. fa.* against *Chisholm* or his executors could have attached. But the reversion which *Chisholm* did hold could be sold, and was sold; and the equity

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of redemption, I think, not existing in *Chisholm* or in any one as a separate interest, went with it as many other incidents and privileges would go with an estate, which incidents could not separately be treated as assets to satisfy debts, and could not therefore be sold as separate interests under the writ.

Then let us see how the case stands with the mortgage term created by *Stewart*. It was held by *Sheldon* in security for a debt of more than £700; and according to some of the evidence that might not be much more than the cash value of the property at that time. Some years after the term was created *Sheldon* assigned it, or rather conveyed the land to his son-in-law *Smith*, by such a deed as would have been proper for passing the fee, if he had held it, and which would, of course, pass such interest as he then had. The mortgage debt had then been ten years in arrear, with no means existing in this province on account of the absence of a court of

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equity, or of any provision to supply its place for foreclosing on the one hand, or for redeeming on the other; and *Sheldon* probably assumed that he was at liberty to act as owner of the fee, having obtained possession of the farm by ejectment.

It was surmised, it seems, that this conveyance by him to *Smith* was made for the purpose of putting the property out of the reach of *Sheldon's* creditors; and the creditor (*Beales*) venturing to act on that suspicion, treated the sale as pretended; and had the term for one thousand years sold under a *fi. fa.* at his suit against *Sheldon's* goods; and *Tiffany* bought it (as he swears on his own account) for £75. That was undoubtedly a very low price; for the whole principal of the mortgage debt seems to have been yet due, subject, of course, to reduction on account taken of the profits; and the estate was of ample value to secure it. The common result however of arrangements of this kind among relations which are open to suspicion where there are creditors, is, that the property is sold at a ruinous sacrifice, from a want of confidence in the title. It was a matter of no concern to *Chisholm*, who then owned the reversion, how cheaply *Tiffany* purchased the term. By arrangements afterwards with *Smith*, *Tiffany* acquired a release of his interest; and as the term must have been owned by *Sheldon* or *Smith*, or between them, *Tiffany* must then have become legally seized of it; and certainly without any wrong whatever done to *Chisholm*, who then owned the reversion with the equity belonging to it, and nothing more; having nothing to do with the term but to redeem it, if that was the object with which he bought the reversion, as it probably was; for the act establishing a Court of Chancery, and thus for the first time giving to parties the power of redeeming, had been passed about three months before. The possession of the term gave *Tiffany* a clear right to

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hold the property against the owner till the mortgage debt was paid; an interest which became of no signification, and amounted to nothing in *his* hands, when, in 1844, by the purchase of the reversion at sheriff's sale, he became the owner of the reversion himself,—*Hoole v. Sales, supra.* In thus dealing with the term no injustice has been done to *Chisholm* or to his estate; for *Chisholm* had never anything to do with the term except that by his purchase of the reversion he stood in the same relation to it as *Stewart* had done, having the same equity to be allowed to release his estate from the incumbrance of this mortgage term by paying off the mortgage, and thus being let into the immediate enjoyment of the land.

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That advantage he lost by not redeeming. He and his representatives seem to have let six years pass without an effort; and when his devisees at last sued for redemption, before a decree could be made in their favor, the only ground on which they could claim, it was taken from under them by the judgment and execution under which the legal estate was taken from them, and vested in another.

And now what have *Chisholm's* devisees to redeem? They never owned the term which *Stewart* created when he pledged his land for one thousand years to secure a large debt; they only owned for a time what was left to *Stewart* after he had created that term; and they owned that no longer. *Chisholm's* estate has paid nothing on account of the mortgage debt; and has nothing to pay. All that can be said is that *Chisholm* acquired by private purchase for £75 that which has been sold by public auction on an execution against his estate for £41; the difference, not greater than frequently occurs in such cases, being easily accounted for by his heir throwing, at one time, impediments in the way of

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the sale, though he afterwards became a bidder at the auction. If, upon the case before us, *Tiffany* could be compelled to receive payment of his mortgage debt from these plaintiffs, what should be the consequence? The reversion, it has been held, has, without doubt, passed to *Tiffany*; but the court are called upon to act upon this mortgage term of one thousand years for the benefit of *Chisholm's* devisees, and thus in effect to make them the beneficial owners of the estate, and not *Tiffany*.

I do not see what pretence they can have for expecting this. The case, it seemed to me, was treated during the argument as if *Stewart*, being possessed of a term for one thousand years, had mortgaged that term for a debt, and as if the term had passed thus encumbered into the hands of *Chisholm*; but nothing of this kind took place. The mortgage term itself was an incumbrance upon the estate in fee; *Stewart* having the whole estate, in cumbered it with this defeasible term. If he had mortgaged in fee, as is more usual here, then he would have retained a plain equity of redemption and nothing more. Equity would have looked upon him as still the owner and entitled to free his estate from the incumbrance by paying off the debt; and surely neither he, nor his heir, nor his assignee, could be in a worse situation because he incumbered his estate for a term only, than they would be if he had mortgaged the fee. The difference is that if a *fi. fa.* had come against himself after he had mortgaged the fee, he would then have been found seized only of an equity of redemption, which, at that time, could not have been sold in execution, though now, since the passing of a late statute, it may be; but the estate being mortgaged for years only, he held still the reversion in fee, which at least entitled him as much to redeem as if he had retained no legal estate. But if a *fi. fa.* had come against him and been executed

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in his life time, that reversion would have been seized and sold as "land," "hereditament" and "real estate," under 5 Geo. II.; and then what would he have had to redeem? and on what ground could he have applied for redemption? He had never owned a term that was incumbered, and that he could still be equitably entitled to redeem.

There is no doubt, and we cannot shut our eyes to the fact, that a dry reversion after a term of one thousand years is worth nothing; and that any person purchasing it must do so relying on his right to redeem as attendant upon it, and giving it in truth its only real value.

And so it may be fairly said that in selling the reversion under the *fi. fa.* the sheriff was putting up what nobody could be expected to bid for, except with a view to the reversion; so that in fact and effect the sheriff was assuming to sell the equity which the law did not then allow to be done. But why should the legal estate which he could sell—that is, the reversion—be of less value in the hands of the legal purchaser of it than if it had passed into the hands of the same purchaser by inheritance or devise, or by a conveyance which professed to transfer simply the reversion; in all which cases the right to redeem would follow, the estate having never become a separate interest, by being made the subject of a separate and distinct transaction? It must follow it, as much as a right of common, or of way, or a right to vote, or any other privilege which the legal estate might confer upon its owner.

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The case of *The King v. Abbott* (*a*), seemed to me at first sight to give some countenance to what the plaintiffs are contending for; and I was startled by

(*a*) 3 Price, 178.

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the marginal note of it, which, without explanation or comment, is extracted from the report, and inserted in one of the treatises upon mortgages, as if it were the enunciation of a clear legal principle. "G." (it is said) "having a fee simple in lands mortgaged for a term of one thousands years, he has no longer any estate or interest in the lands higher than an equity of redemption."

This has the appearance of being an authority for holding that *Chisholm*, the owner of the reversion in this case, had nothing that the sheriff could sell; for if it be literally true in a legal sense that he had not any estate or interest but the equity, then the judgments in *Scott v. Scholes* (*a*), and *Metcalf v. Scholes* (*b*), would show that he had nothing that the sheriff could touch. How the case would be if the term had been for ten years instead of a thousand, leaving a reversion worth perhaps some thousands of pounds, we are not told in the case of the *King v. Abbott*; nor at what point between ten years and a thousand, the court could judicially say that the reversioner had some "estate higher than a mere equity." No doubt it is true that what remains of an estate after a term of 1000 years, is nothing of value except as it is connected with the equity of redemption; it is not the *higher* interest in that sense; and it was reasonably decided therefore by the court in the case reported in *Price*, that the money paid by the purchaser at an auction sale of both the reversion and the term must be looked upon as paid for the term rather than for the reversion; and as it was for the latter only which the commissioners of the bankrupt in that case could be looked upon as disposing of, the court treated the sale of the term as the substantial thing, and held that the sale therefore was not in effect a sale of the

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(*a*) 8 E. R. 467. (*b*) 2 New Rep. 461.

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property of the bankrupt, who did not own the term; and it did not come within the spirit of that clause in the statute which dispenses with the payment of auction duties upon sales made of a bankrupt's property.

The case, when examined, will be found to have no application to the question now before us.

It cannot be denied that in 1844 an equity of redemption, where it formed a separate interest, and the only interest of a debtor as in the case of a mortgage in fee, and as it might perhaps exist in other cases, could not have been sold upon a *fi. fa.* against lands; and, supposing that law to have continued unchanged to this time, and that we were bound to hold as a consequence of it that when the owner of fee simple estate has mortgaged for a term of years, and his reversion is afterwards sold in execution to satisfy his debts, under the statute 5 Geo. II. the purchaser does not take with it the equity of redemption, but that it remains behind and continues the property of the debtor, and is a separate equitable estate in his hands: then we see how this must have operated in a case where an estate of large value had been mortgaged for a long term *to secure* a small debt, and where consequently the reversion, with the privilege of redeeming, may be worth thousands of pounds. The creditor of the reversioner would in that case lose his remedy for the satisfaction of his debt, notwithstanding the plain intention of the statute 5 Geo. II. that the real property of his debtor *quantum valeat* should be assets for the satisfaction of his debt, for no one would give a shilling for a reversion if a term of 1000 years must stand in the way of his possession, which term another person, and not he, could claim the right to redeem. A separation of the equitable from the legal estate by act of law, when it would

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work this injury, and for no purpose of justice to any other party, would seem to be wholly opposed to the principles on which many cases have been decided. I refer, among other authorities, to Mr. *Butler's* note to Co. Litt. 290 (*b*), and to the cases cited in it of *Whitchurch v. Whitchurch* (*a*), *Villiers v. Villiers* (*b*), and *Hoole v. Sales* (*c*).

Indeed if that must have been the consequence of selling under an execution, the reversion of tenant in fee expectant on the expiration of a term of years, it would seem to make it almost a necessary consequence that such reversions could not be made legal assets subject to a common law execution, whatever might appear to have been otherwise the intention and effect of the statute 5 Geo. II.

None of the English authorities referred to can be precisely applicable to the case before us, because they do none of them relate to sales under common law executions of reversions in fee, such sales being clearly not allowed in England, but permitted here (as has been assumed) under the 5th Geo. II. We have to ask ourselves, in the first place, is a reversion, a hereditament or real estate, saleable under 5 Geo. II. chap. 7, sec. 6? I think we must say it is, as indeed we have already in other cases where the mortgages were not in question. Judgment.

Then if a reversion is sold which is subject to a mortgage term, and if the equity of redemption of the term has never been in any manner separated from the reversion, and was held by the debtor no otherwise than as incident to the legal estate, will or will not the equity of redemption go with the reversion to the purchaser at the sheriff's sale, by reason of the

(*a*) 2 P. W.'s 236, 9 Mod. 127. (*b*) 2 Atk. 71. (*c*) 2 Wils. 329.

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privity merely, and as incident to the reversion, or, as the books express it, will it not necessarily be attracted by it, never having up to the time of the sale been separated from it? I think we must hold that it will; and it is on this point that Co. Lit. 208 (*a*) note, 290 (*a*) note, Fitzgibbon 99, 2 Wils. 331, 2 Atkins 71, 9 Mod. 127, Hardress 498, and the other authorities I have mentioned, seem to me to be conclusive; I mean upon the principle of the thing. It may be, though I do not see it clearly, that some inconvenience may follow from allowing a legal estate so incumbered by a mortgage term to be sold under 5 Geo. II., if the equity of redemption must be attendant on it; but that, I think, would only shew the propriety of some legislative provision, and would not enable us to refuse to give effect to the statute 5 Geo. II., ch. 7.

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In our discussions of the various considerations attending this case, it has been suggested as a difficulty, that as a mortgagor is bound by his covenants to pay the mortgage money, he takes care when he assigns his equity of redemption by his own act to make his vendee covenant to save him harmless against the mortgagee; which it is right he should do, because all the vendee has given in such cases was the value of the property above the incumbrance; and the intention always is that he is to pay off the mortgage, which indeed, he cannot avoid, if he keeps the estate, because that is subject to the charge.—But the supposed difficulty is, that by allowing the equity of redemption in effect to be sold in execution, if it must pass as attendant upon the reversion, the reversioner is not protected against his liability for the mortgage money. In this case, however, the fact is that *W. Chisholm* being himself only an assignee, his liability, if he had sold by deed to *Tiffany*, would have ceased upon his parting with the estate; and so there can be no pretence for keeping up the term

for his protection. I refer on this point to 1 Sug. Vend. & Purch, 64, 313, ; 3 Sugden V. & P. 64 ; 1 Fonbl. 350 ; 1 B. & P. 21 ; 3 Y. & Coll. 96 ; 1 Merivale 244 ; 3 Molloy 64 ; 1 Vez. & B. 8 ; 1 Br. C. C. 52 ; 7 T. R. 185 ; 7 Vez. 337.

I do not see why such a case as this might not happen in England ; where the mortgagor, being owner of a term, has mortgaged the land for a less term, his remaining interest could, as I suppose, be sold under a *fi. fa.*, against his goods, (*a*) and would not the equity of redemption go with it ?

George Stewart, when he assigned, might, and if necessary to his protection, he should have taken a covenant to protect himself ; and if he did not, I see no reason why for his security we should say that the equity of redemption upon the subsequent transaction or sale growing out of his assignment, such as he chose to make, should not attend the reversion sold by the sheriff ; and it certainly is not necessary to make an exception from the general rule on *Chisholm's* account, for I take it neither he nor his estate is liable for the mortgage money. Whatever difficulty there might be other cases, there can be no difficulty of that kind in the present case ; and, at any rate, how could a right in *Chisholm's* devisees to redeem spring out of any such considerations ? In the first place, there is no occasion to protect them, for they are not liable ; and in the next place, how could their holding the equity of redemption as a separate interest constitute such a protection as they could have a right to look for ? What would be the consequence of allowing them to redeem ? What right can they have to possess themselves of a term of 1000 years in this property, by paying what in

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(*a*) Bro. Ab. Pledgs. pl. 24, Com. Dig. Executions C. 4.

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this, or any other such case, might have no proportion to the value of the estate?

The argument for the plaintiff seems to amount in effect to this,—dismissing for the present their other objections, and applying ourselves to this one point: "We admit," they may say, "that the reversion was saleable under the writ, as being a legal estate. We admit that *Chisholm* held the reversion with the equity of redemption incident to it, as *Stewart* did, after he had made the mortgage, taking both from *Stewart* under the same conveyance, with no intention shewn of separating them, but on the contrary with the evident intention that he should take and hold both together: We admit that it is a general principle of law (that is, of the law of equity) that where the equity of redemption of a mortgage term has not been severed by being made the subject of a separate transaction and transferred as a separate interest, it is in general attracted by and attendant on the reversion, through all its assignments, and this whether the reversion is transferred by conveyance, devise, descent, escheat, or any act of the party or of the law. But we apprehend there might in some cases be difficulty, or rather injustice, in allowing this consequence to follow, because the mortgagor would not have the same recourse upon the purchaser of the reversion at sheriff's sale to indemnify him against all claims for the mortgage debt, for which as mortgagor he remains at all times liable, on his covenant to pay, and against which in England he usually does take care (though I should say scarcely ever here) to protect himself, by taking a covenant or some kind of engagement (and equity will enforce any such undertaking as manifestly just) from his assignee when he transfers the estate to him. As he has no opportunity of doing this on the compulsory sale by the sheriff, the argument is, that it will not do to allow such sale to affect the equity of redemption,

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though it may divest and carry the reversion; that the equity being on this ground withheld, it must remain in *Chisholm's* devisees; and that we cannot therefore deny them the right to redeem."

In answer to this, we must ask, how is it in England? When the owner of a long term mortgages a part of it, his reversion would clearly be saleable under a *fi. fa.* against his goods and chattels, when all the same consequences would follow as are suggested here.

What protection is there to the mortgagor when the reversion passes by devise or inheritance, or escheats, more than in this case?

The effect of yielding to this argument, would be to prevent an almost universal consequence from following in this case, and for a reason which clearly can have no application to this case; in other words on account of an inconvenience which might be felt in some other case of which the circumstances must be essentially different. Judgment.

Chisholm and his devisees, taking as they did through assignment from the mortgagor, the moment they parted with the reversion the relation was gone which alone could ever have given the mortgagor a right of recourse against them for the mortgage debt; they are clearly in no danger, they have nothing to be protected against, and are liable to no one, so there can be no pretence for their retaining the equity in order to protect them. That consideration only applied, I think, to the assignment by *Stewart* to *Waterberry*.

In other cases, where there might be a call upon the mortgagor, after he had assigned his interest, equity has all the remedy in its power, which it can exercise in any case for compelling the assignee

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to do justice. If he has given a covenant, there is a plain legal remedy. If he has not, nor made a satisfaction of any kind even by parol, still equity would raise an obligation on him in conscience to indemnify the mortgagor, as it is most clear he ought, if he goes into possession, and receives the rents and profits.

But after all, this argument, if there be anything in it, must go the length of preventing the sale of any reversion on a *fi. fa.* where it is subject to a mortgage term; for if it can be done in any case, it should be admitted in this, where *Chisholm* having been a mere conduit pipe, or intermediate assignee, he has no claim to retain the equity of redemption (the term he never had) for his protection; and before we can give any force to the argument, we must look on him as still holding the reversion as well as the term. If that were so, then his right to redeem would be clear; on any other principle I believe he can have none;

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for it would be contrary to all authority to determine, that, having no interest in the estate, he should be allowed to redeem; and contrary to all reason, for anything that is shewn, that he should be admitted to have an equitable right to call on the court to resuscitate the term, and interpose it as an absolute term for 1000 years between him and the holder of the fee. And who is there among the parties concerned in these transactions that has not the same remedy against *Tiffany* in regard to the mortgage money that he should have had upon any ground against *Chisholm's* devisees?

If there is any ground for objecting to *Tiffany's* purchase, is it not confined to the circumstance of his being the holder of the mortgage, and afterwards buying the reversion which extinguishes the mortgage? And yet what difference can it make to *Chisholm's* devisees, or to any one, whether he bought at the sale or any stranger?

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He has the control of the mortgage, no doubt; but what injury follows from that under the circumstances of this case?

How would it have been in a case in which an objection of this kind would apply the most plainly? Suppose just after *Stewart* had given his mortgage to *Sheldon* a *fi. fa.* had come against him, and *Sheldon* had bought his reversion at the sale; he, like any other bidder, would have bid only for what was above the incumbrance—*i. e.*, he would have bought subject to it, and would have given so much less. He might have said, "I am entitled to £800 out of the estate already; I will give so much beyond that, for instance £50." Could he still have sued *Stewart* for his mortgage money? Of course not, for he would have been paid in his purchase. *Stewart* therefore would have run no risk.

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Then look at *Tiffany's* positions. His purchase of the mortgage is not complained of by any one; he bought the mortgage for £75; why it should have gone for so little does not appear. Perhaps, as the mortgagee had been many years in possession, and there was talk about improvements, it may have been unknown or uncertain what might be the balance found on taking an account, and how much therefore the acquisition of the mortgage would entitle the purchaser to claim. At any rate that was a matter among themselves. *Sheldon* declares it was not his property but *Smith's*. *Smith* has acquiesced in *Tiffany's* purchase, and dealt with him as owner, on terms which he has not complained of, though he gave *Tiffany* £400 for the purchase, which he made for £75. He has *Smith's* conveyance, to whom *Sheldon* assigned by deed, which he at least cannot dispute, and therefore, independent of his purchase under the *fi. fa.* against *Sheldon*, must be entitled to the term.

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Beales, the plaintiff in the *fi. fa.*, is not complaining, and is no party before us; and, so far as this transaction has gone, I see no reason why *Tiffany* should not have the benefit of his purchase of the mortgage term. Then, as to his purchase of the reversion, if there is any fair ground for charging him with fraudulent misrepresentation, he should be attacked for that fraud. I see nothing in the evidence before us that gives to these plaintiffs any imaginable claim or pretence for coming between him and the enjoyment of what he has bought under the execution (*a*).

And on the whole, if a reversion be a legal estate, as undoubtedly it is, and one which may be worth much, or little, or nothing, according to the circumstances of each case, then it was assets under statute 5 Geo. II., for the satisfaction of *Chisholm's* debts. If so, then it has been legally sold, and legally conveyed by the sheriff; and a court of common law in an ejectment could not refuse to recognize the purchaser as the legal owner, by reason of any consideration growing out of an equity which the law does not take into its consideration. Then equity must follow the law; and must equally admit that the reversion passed; and if so, can they on any, and what ground refuse to acknowledge that the equity of redemption is attendant on the ownership of the estate? I see no sufficient ground on which we could hold in this suit that the sale of the reversion to *Tiffany* was void; and if not, then I can imagine no reason whatever why *Chisholm*, if living, or his devisees now, should be looked upon as entitled to redeem the mortgage. I do not understand what they can have to do with it.

Judgment.

I think this bill should be dismissed.

(*a*) 3 Sugd. V. & P. 228; 1 Sugd. V. & P. 11; Tweddell v. Tweddell, Br. C. C. 101, 152; Exp. Du Cane, Buck 18; Exp. Marsh, 1 Madd. 148; Stratford v. Twynham, Jacob. 418; Bac. Alt. Mortgage E.; Dunbar v. Leru, 1 Br. P. C. 3.

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I might have expressed in much less compass the conclusion I have come to, but this is a question on which the judges of the court of equity whose peculiar province it is to deal with such rights have differed widely in their opinions, and have supported their respective views with great ability. They all understand the subject better than I can pretend to, but it is clear they cannot all be right; and having to determine between them according to the best judgment I can form, I think it is due to them, as well as to the parties, to shew that I have at least endeavored to view the question in its different bearings, and to dispose of such considerations as belong to it.

THE CHANCELLOR.—I continue to be of opinion that the deed executed by the sheriff of the Gore District on the 14th of January, 1845, did not affect the equity of redemption of the mortgage term, which, notwithstanding the deed, remains still in the present plaintiffs, who are therefore entitled to relief in this suit. Having already delivered more than one judgment in this case in the court below, I feel myself relieved from the necessity of repeating here those grounds of my opinion which were then stated, and to which I now beg leave to refer; but, as I have the misfortune to differ from many of my learned brothers, it will be proper that I should advert briefly to the reasons upon which the arguments principally relied on in support of the opposite doctrine have failed to convince my understanding; and also to some particulars in which that doctrine is, as I humbly conceive, subversive of the best established principles of courts of equity in relation to mortgage contracts.

Judgment.

Before adverting to such of the arguments as appear to call for observation, I would remark that most, if not all of them, seem to fall short of the real question in the case. They elucidate the abstract

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nature and incidents of an equity of redemption; they tend more or less conclusively to establish the proposition that the equity of redemption of a mortgage term created by a tenant in fee simple is by equitable intendment annexed to the inheritance, and will therefore pass under a general conveyance or devise of the reversion, but all that has been, or may be admitted, consistently with the plaintiff's case. The real question is, whether, under existing circumstances, the equity of redemption was not severed, by the law of equity, upon the sheriff's sale; whether, upon established principles, the court of equity could have come to any other conclusion than that the equity of redemption was still subsisting in the plaintiffs, notwithstanding that sale.

It is said that an equity of redemption of this class is incapable of existing *per se*, separate from the reversion; and it is contended that the assignment of such an interest to a stranger would not have the effect of giving him an absolute interest in the term upon payment of the mortgage debt (*a*). The argument is material, if it be true that the mortgagor cannot sever the mortgage term from the reversion. If the assignment of the equity of redemption by the mortgagor to a stranger, or the reservation of it to himself in a conveyance of the reversion would not produce such a severance, then there may be room to contend that a court of equity will not give a separate existence, where it could not have been communicated by the act of the party; but upon this point I have never been able to conceive the slightest doubt. It is clear, I apprehend, upon first principles, that the assignment of the equity of redemption by the mortgagor to a stranger, under such circumstances, would have the effect of severing the reversion from the term which would thenceforth become a term in gross, to the benefit of

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(*a*) *Ante* vol. ii. 201, *et seq.*

which, as an irredeemable term, the assignee would become entitled upon payment of the mortgage debt. And it is equally plain, I think, that the reservation of the equity of redemption of the term to the mortgagor, upon a conveyance of the reversion in fee to stranger, would have the same effect. Upon this question I should hardly expect to find authority; but the dictum of Lord *Raymond* in *Whitchurch v. Whitchurch* (*a*), where he is speaking of a mortgage term, seems pertinent. "But where a man hath a term for years, which by intendment of law only attends the inheritance, certainly he hath a power to sever such a term from the inheritance, and if he should assign it to one man, and mortgage the inheritance to another, in such case the term should not attend the inheritance, but it becomes a term in gross; and why should not a man have the like power to do the same thing by will, if he thinks fit?"

Judgment.

It is said that to decree the plaintiffs entitled to redeem would be to create a new estate, a term absolute for 1000 years (*b*). I confess myself unable to apprehend the force of this argument. It is true that until condition broken the estate is conditioned but upon breach of the condition the term becomes absolute, thenceforth incapable of being determined except by re-conveyance or surrender. Payment of the mortgage money after the time fixed has not the effect of causing the term to cease, but only entitles the mortgagor to call for a re-conveyance of his estate; such a re-conveyance, however, is not the creation of a new estate—an absolute term of 1000 years but the transfer of the old mortgage term.

It is said that "every owner of an estate when he places a burden upon it must retain the right to discharge such burden" (*c*). That seems to me to

(*a*) 9 Mod. 127. (*b*) *Ante* vol. ii. 203. (*c*) *Ante* vol. ii. 471.

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assume, not to solve, the question. The burden is the mortgage debt. That is placed, not upon the whole estate, but upon the term carved out of it. That burden, no doubt, the owner of the term—the estate burdened—has a right to discharge. But the very question here is, who in equity is the owner of the term.

It is said (*a*) "after a mortgage for a term of years has been carved out of the fee, the estate of the mortgagor is not wholly equitable; he has a legal estate; and a legal and and equitable estate cannot subsist in the same lands, at the same time, in the same person. If the right to redeem the term could be considered a separate estate, it could not subsist as such, but would merge in the legal inheritance, both as being a chattel interest, and also being an equity; for it is said every owner of lands in fee simple has a legal and beneficial estate: but they are inseparably united, because a legal and equitable interest in the same land cannot exist at the same time in the same person; and the sheriff, when he sells and conveys the lands of this person, transfers both the legal and beneficial interest."

Judgment.

If that argument be understood to advance as a universal proposition "that a legal and equitable estate cannot subsist in the same lands at the same time, in the same person," then I humbly conceive that the proposition so laid down cannot be sustained. In *Phillips v. Bryden* (*b*), the Master of the Rolls said, "another position was maintained in a latitude that would create infinite confusion; that, where there is in the same person a legal and equitable interest the former absorbs the latter. I admit that where he *has the same interest in both, he ceases to have the equitable estate, and has the legal estate,*

(*a*) *Ante* vol. ii. 472. (*b*) 3 Ves 126.

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upon which this court will not act, but leave it to the rules of law. But it must be understood always with this restriction; and it holds only where the legal and equitable estates are co-extensive and commensurate. But I do not by any means admit that where he has the whole legal estate and a partial equitable estate, the latter sinks into the former, for it would be a disadvantage to him." And in the course of the same judgment he adds, "I admit, where the person is seised of the estate at law, and of the same estate in equity, he cannot have a *subpœna* against himself. There is nothing upon which equity can act. The equitable estate is absorbed; the better phrase is, that it no longer exists. *But when for the purpose of justice it is necessary that it should exist, that circumstance shall not put the party entitled into a worse condition.*" And in *Forbes v. Moffatt* (*a*), where the equity of redemption has been deeded to the mortgagor in fee, and the question was, whether the charge had merged, Sir *William Grant* states the law thus:— "The owner of a charge is not, as a condition of keeping it up, called upon to repudiate the estate. The election he has to make is, not whether he will take the estate or the charge, but whether, taking the estate, he means the charge to sink into it or to continue separate." And again: "Upon looking into all the cases, in which charges have been held to merge, I find nothing which shows that it was not perfectly indifferent to the party in whom the interest had united whether the charge should or should not subsist; and in that case I have already said it sinks."

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That the proposition is not universally true, is therefore abundantly clear upon the authorities; but if the passage is to be understood as stating the

(*a*) 18 Ves. 390.

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general, not the universal rule, then it is irrelevant to the present argument, the question being whether the general rule is applicable to the present case.

It is said (*a*): "Suppose a mortgage for 1000 years to be paid off, and that the owner of the fee, instead of taking a release under the Register Act, were to have the term assigned to attend the inheritance, the equitable interest in the term—that is, the right to the protection of the term—is a part of the beneficial ownership of the fee simple; and it could not be contended that the right or interest could not pass to the purchaser from the sheriff. The case supposed, it is said, is not distinguishable from the right to redeem the mortgage term."

Judgment:

I freely admit that there is, for some purposes, a close analogy between an attendant term and the equity of redemption of a mortgage term. But it is, I humbly conceive, to assume the question, not to prove it, to say that an unsatisfied mortgage term must pass under a sheriff's deed became a satisfied mortgage term—which is in equity an attendant term—confessedly does so. It is in perfect accordance with the principle of equity that a satisfied mortgage term—that is, an attendant term should pass by a conveyance which carries the fee, if there be no circumstance to induce a court of equity to sever it, because the whole law upon the subject is a fiction of equity to accomplish that end. But the attendant term wants altogether that which constitutes the distinguishing feature in the unsatisfied term—namely, the equity of redemption; and the whole question is as to the effect of that difference.

It is argued that the doweress, the tenant by elegit, the judgment creditor, are permitted to redeem

(*a*) *Ante* vol. ii. 473.

under the circumstances of the present case, and that by parity of reason the purchaser at sheriff's sale must have the same right.

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I venture to think, with great respect to those who use the argument, that there is in it an obvious fallacy arising from the use of the word "redeem," in two senses wholly distinct. When the doweress, or the tenant by elegit, or the judgment creditor redeems, in the only sense in which redemption is permitted to parties, the estate remains in their hands a redeemable interest. Equity, indeed, permits them to remove the mortgage term out of the way, but that being done, the ultimate equity of redemption is in the mortgagor—the equitable incidents of the contract as between mortgagor and mortgagee remain intact; but redemption in the sense contended for here is nothing less than the acquisition of the whole estate—the destruction, as I shall presently shew, of the rights of the mortgagor, and the subversion of the law properly applicable to the mortgage contract (*a*). Lastly, it is said "that the doctrine contended for by the plaintiff would be productive of this anomaly, that the estate would be at one time real and at another time personal, devolving to the heir or devisee as real estate; and yet if a sheriff's sale intervene, vesting thenceforth in the personal representative as personal estate."

Judgment.

I answer that objection by stating that no such anomaly in fact exists. It was not contended on behalf of the plaintiff, so far as I recollect, and is not, I think, the just consequence of the doctrine impugned. The reversion in fee, with the equity of redemption, devolved upon *Chisholm's* devisees. The reversion is sold by the sheriff, but the equity of

(*a*) *Ante* vol. ii 474.

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redemption does not revert to the personal representative, as supposed, but remains in the devisees.

But the arguments to which I have been hitherto adverting do not appear to me to be of any real weight in the determination of the point under consideration; the true question being, as before intimated, whether, under the circumstances of this case, and upon the settled principles of equity applicable to these circumstances, the equity of redemption of this term must not be held to have been severed from the reversion in fee. As this question arises upon a statute applicable exclusively to the colonies, direct authority is not to be expected, but the case of attendant terms supplies a clear analogy. And if it be true that the attendancy of terms is governed by the conscience and discretion of the court; and if such terms, even when expressly limited to attend the inheritance, are frequently sev-

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ered in furtherance of right, then, if the severance of the equity of redemption in cases circumstanced like the present be necessary to the ends of justice, the applicability of the doctrines in relation to attendant terms, will not, I apprehend, be denied. Now, the rule of equity as to the severance of attendant terms was stated very distinctly by Lord *Nottingham* in *Nurse v. Nerworth* (*a*), cited in argument. In that case a term, expressly limited to attend the inheritance, had been mortgaged, and one of the questions was, whether, notwithstanding such merger, equity could decree relief. The Chancellor's own note of what passed upon that point is this—"For the first part of the question, to break it a little, I said that the attendancy of long leases upon the inheritance is always governed by the conscience and discretion of the court; and *ergo*, we see that in cases of debts,

(*a*) 3 Swan, 606.

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and to preserve assets, this court will sever the attendancy." And in pronouncing judgment after argument, he said—"admitting the law so to be, and that in consequence hereof the term for 99 years is merged by the accession of the fee simple to it, whether any further consideration can be had of it in equity, I conceive there may, for by the equity of the *common law* estates extinguished are still in *esse* to some purposes."—*Lillington's* case. But chancery suffers no extinguishment; as, for example, lessee for years in trust marries a wife who hath the freehold, and so becomes seized of a freehold *in autre droit*, which is utterly inconsistent with a term in his own right; yet in 25 C. 2, *Thorn v. Newman*, ruled no merger." And in combating the arguments against that view, Lord *Nottingham* said—"The greatest doubt is because the father was tenant in fee simple of the reversion and *cestui que trust* of the term; so that now, if the posthumous son be relieved, the will must work by fractions—viz., it must be a good will in equity for the term by executory devise, and a void will in law for the reversion; *and another consequence of this is, that the term which was created to attend the inheritance shall now be severed and become a term in gross. I think these consequences so far from being absurd, that I hold them both to be just and necessary.*" And a little further on he observes—"It is true it hath obtained in law that these words are no sufficient description of an infant *in vente sa mere*, though it might fairly enough have been adjudged otherwise; but then let the law take place upon the estate at law, but as to the trust of the lease this court will admit no such construction; for, though the term was originally to attend the inheritance, yet, where the inheritance is carried away by a rigorous construction the term shall not follow it, but is instantly severed by the law of equity, and becomes in gross. So that the lease and reversion are not a twisted estate, as Mr.

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Pemberton called it, but the term is untwisted from the inheritance by act of law—the law of this court; and *ergo*, though equity revive this term, notwithstanding the merger, yet it cannot revive it as attendant, as he for his client would fain have had it. The attendancy of long leases upon the inheritance is always governed and controlled by the conscience of the court." The authority of this case was questioned in argument; but upon the point for which it was cited it will be found, I apprehend, to contain a correct statement of the law of the court at the present day. Lord *Hardwick's* statement of the doctrine in *Willoughby v. Willoughby*, is equally explicit; and *Nurse v. Nerworth* was cited with approbation by Lord *Cottenham* in *Whittle v. Henning*, recently under his consideration (*a*). In that case, by the marriage settlement of Mr. and Mrs. *Henning*, £2000, the property of the wife, was vested in trustees in trust, to pay the income to the husband for his life, and then to the wife for her life, and then to pay the principal to such child of the maraiage, and in such manner as the parents should appoint. An appointment of this sum was duly made in favor of the son of the marriage, and he had executed a deed assigning and releasing all his reversionary interest in the fund to his mother, her executors, administrators and assigns, *to the end that the life interest of the mother might merge in this reversionary interest of the son*, and be enlarged thereby into an immediate absolute interest, expectant on the death of the father; and the father assigned and surrendered all his interest in the fund to his wife *to the intent that such his life interest might be merged and extinguished in the interest of the wife, and that the fund should become absolutely vested in her.* Under these circumstances a joint petition was presented by the father, mother, and her son, praying that the

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(*a*) 2 Phil. 736.

fund in court might be transferred to the son, upon the authority of several cases which had been then recently decided by the Vice-Chancellor of England, according to which the deed in question would have had the effect of merging the reversionary interest of the wife in the other interests conferred upon her by her husband and son. Lord *Cottenham* refused to make the order, observing—"Is there then a merger which defeats this rule? Legal merger there cannot be; *but if there had been, equity would not permit a merger at law to defeat equitable estates and interests.* Such has been the rule at least since the time of Charles II., as is proved by *Thorne v. Newman, Nurse v. Nerworth.*"

But, the argument, I apprehend, does not so much question the existence of the doctrine as deny its applicability to the present case. It is said that equity disannexes a term from the inheritance only where that becomes necessary in furtherance of right; and that the severance of the equity of redemption here is not necessary to the ends of justice, but an arbitrary interference with the rights of property, uncalled for by the circumstances of the case; and *Goodright* on the demise of *Hoole v. Sales* (*a*) is referred to. But that is a decision with reference to a satisfied mortgage term. It is a case therefore governed, *prima facie*, by the principles applicable to attendant terms, and so quite irrelevant to this discussion—the controversy here being, not the rule, but its applicability to the present case. This is apparent from the very first sentence of Chief Justice *Wilmot's* judgment. He says, "*It is observable there are no creditors in this case to incline a court of law or equity to sever the term of years from the fee.*" This sentence, while suggesting the rule and the exception, negatives the existence of any

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(*a*) 2 Wilson, 329.

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circumstances to induce a court of law or equity to sever the term from the fee—negatives the existence of any circumstance to bring that case within the exception—but that is the very question here.

In determining whether there are circumstances here sufficient to induce a court of equity to deal with this equity of redemption as still subsisting, severed from the reversion, it is necessary to bear in mind the complex character of these mortgage contracts. When, as in the present case, the debt is secured by a mortgage of real estate, accompanied by a covenant, it has been determined that the mortgagor is entitled to proceed upon all his securities at the same time, he may bring actions of ejectment and covenant, while proceeding in equity to foreclose. But courts of common law take no notice of the equitable incidents of the contract. The mortgagee having recovered possession by ejectment, the mortgagor is without remedy in these courts; and in his action of covenant he may be entitled to recover judgment and sue out execution for the whole debt, while, having been in actual occupation of the estate, the result of an account in equity might be to shew the whole debt discharged. This rigid application of the strict principles of the common law gave rise to an equitable jurisdiction, proceeding upon wholly different principles—upon principles designed to give effect to the just rights of both debtor and creditor, which may be said to have now drawn to itself the whole law of mortgage. This new jurisdiction was not established without strenuous opposition from the courts of common law: but it was established, and the necessary result of its establishment is, that the legal rights of the mortgagee, while subsisting at the present day for some purposes, are ultimately controlled by courts of equity upon equitable principles. It is true, as a general rule, that equity will not restrain the

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mortgagee from proceeding at law, either in ejectment or upon his covenant; but those proceedings are necessarily subject to eventual control. Were it otherwise—were it in the power of the mortgagee to sever the legal from the equitable incidents of the contract, the whole law of mortgage would obviously be subverted. If the law of mortgage, established by courts of equity, in opposition to the doctrines of the common law, is to prevail, the mortgagee, necessarily, must be bound by the result of the account in equity. He must restore the pledge upon payment of the sum there found due to him. If found to have been overpaid, upon the principles of accounting established in equity, but disregarded at law, he will be decreed not only to restore the pledge but also to repay the excess. But if he have disabled himself from restoring the pledge, he will be restrained from enforcing his legal remedies.

Judgment.

Now, keeping in view these incidents of a mortgage contract, let us look to some of the consequences of the doctrine contended for, and see whether it does not lead *ad absurdum et impossibile.* Suppose the reversion in fee expectant upon an unsatisfied mortgage term to have been sold by the sheriff at the suit of a stranger to the mortgage contract, I ask what is the effect of that sale? Is the sheriff's vendee bound to pay the mortgage debt, or is he not? Suppose the purchaser bound to pay the mortgage debt, is not that in substance to make the debt an incumbrance upon the reversion? And may it not have the effect of defeating in toto the security of the judgment creditor? Take the case of a short term, or of a term nearly expired. The mortgage debt may be more than the value of the whole estate, and yet, the term being short, the reversion may be a very valuable interest. If the sheriff's sale have the effect of severing the term, and consequently the equity of redemption of the term, from the reversion;

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or if, to use Lord *Nottingham's* expression, it be severed by the law of this court upon such sale, then the judgment creditor has an available security for his debt; the reversion in fee, apart from the mortgage debt, being, upon the hypothesis, sufficient for its payment. But if, according to the doctrine contended for, the reversion in fee and the equity of redemption of the term be in fact but one interest, so that it is absurd to suppose the one to have passed without the other, then the judgment creditor is without security; because the mortgage debt being more than the value of the whole estate, and the purchaser of the reversion being bound to discharge that debt, a sale will be obviously impossible. The mortgage debt becomes as to such sales an incumbrance upon the reversion.

Judgment.

It may be said that the case supposed is not likely to arise: that consideration, however, cannot affect the argument. If the proposition contended for by the defendants be true, it must be, I apprehend, universal. The doctrine proceeds upon principles in no way affected by such accidental circumstances, upon the absolute oneness and indiscerptibility of the equity of redemption and the reversion in fee. If the proposition, "that when a mortgage for years is created the residue of the estate remaining in the mortgagor is one entire legal estate so inseparably blended as to constitute but one estate, and that a legal one, which would pass under legal process to the purchaser from the sheriff" (*a*) be tenable, then the operation of the sheriff's deed upon such an interest can neither depend upon the comparative value of the term and the reversion, nor upon the proportion between the mortgage debt and the value of the whole estate. The interests are either separable or they are not. If inseparable, both must pass,

(*a*) *Ante* vol. ii. 474.

whatever be the condition of the estate, and the unreasonable consequences to which I have adverted must follow.

But suppose the purchaser to have acquired the equity of redemption without incurring any obligation to pay the mortgage debt, then will such a sale have the effect of depriving the mortgagor of his equitable rights under the mortgage contract; it will vest in the sheriff's vendee the right to redeem the pledge and the account in equity incident to that right, whilst it will leave the mortgagor subject, upon his covenant, to everything from which he may not be able to prove a legal discharge; and in a case circumstanced like the present, where the mortgagee has been long in possession, and where a bill has been filed alleging the debt to have been paid through the medium of such occupation, the mortgagor may yet be compelled to pay the whole debt (for I presume that a court of law would not fix an occupation rent and set it off on the action of covenant), when the result of the account in equity might be to shew the whole paid; or, it may be, a debt due to the mortgagor. In the meantime the right to file a bill to redeem and take this very account would have passed to the sheriff's vendee. Thus would the sale by a stranger of a strictly legal estate, under common law process, have the effect of depriving the mortgagor of the equitable remedies, while leaving him subject to the legal liabilities of his contract. Such a doctrine would sever the legal from the equitable incidents of the mortgage, upon some supposed merger of the equity of redemption in the reversion, in a way, as I humbly conceive, contrary to the clearest principles of equity, and subversive in such cases, of the whole law of mortgage.

Judgment.

It is said, however, that the same inconvenient consequences would follow the sale of the reversion

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by the tenant in fee simple. I do not accede to that proposition. It is not denied that the equity of redemption of the term would pass under a general conveyance of the reversion in fee. There is nothing repugnant to reason either in the contract or its consequence. The vendor has it in his power, under such circumstances, to exact from the vendee an indemnity against the mortgage debt; or perhaps this court would raise an equity, irrespective of contract. But, should the mortgagor sell the equity of redemption, intending to remain liable to the payment of the mortgage debt under his covenant, there is no law which prohibits that. It is his own choice.—*Modus et conventio vincunt legem:* but it is one thing to occupy such a position voluntarily, quite another to be placed there upon supposed principles of equity.

Judgment.

Take another case. Assume the mortgagee to have himself recovered judgment upon the collateral covenant, and to have caused the reversion in fee to be sold thereunder, pending a suit in this court to redeem; in that event all the inequitable consequences before pointed out would of course ensue, with this addition, that the result would have been brought about by the act of the mortgagee. Thus, one of the parties to a contract would be enabled by his own act to vary, as against the other party, the whole law applicable to that contract. The mortgagee, by enforcing his common law remedies—through the medium of a judgment and execution at law—would deprive the mortgagor of the benefit of those equitable doctrines by which the contract ought to be governed. The natural order of things would be reversed—the equitable incidents would be controlled by the legal, instead of the legal being controlled by the equitable. But this additional consequence would follow in the case now under consideration. The mortgagee, of course, would be

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entitled to receive the amount levied upon his judgment. But the doctrine contended for excludes the mortgagor from any after account in relation to this sum, though realized from the sale of property unaffected by the mortgage contract. The sheriff's vendee having acquired the equity of redemption, would be entitled, of course, to file his bill to redeem; and in that proceeding it would be open to *him* to contend, I presume, that the judgment upon which the mortgagor's estate had been sold, and under which he had himself acquired the equity of redemption, had been in fact satisfied in the view of a court of equity before the sale, by perception of the profits of the mortgage estate. He too would be entitled, I presume, to credit in the mortgage account, for the amount levied under the execution. He would be entitled to redeem upon payment of the balance due; without payment, if the mortgage debt should be found to have been paid; and possibly the result might be to shew the mortgagee indebted to him. But even that result would be unproductive of advantage to the mortgagor—a state of things, as I humbly conceive, irreconcileable with reason, justice and established law.

Judgment.

But assume the mortgagee to have himself become the purchaser in the case last suggested, (for there is no principle, I apprehend, which precludes a plaintiff at law from becoming a purchaser under his own writ) and the results will be still more startling. The mortgagor asserts, it may be, as in this case, that the debt has been greatly reduced, if not wholly paid off, by the mortgagee's occupation of the estate, and files his bill to redeem. The mortgagee, on the other hand, having recovered judgment for the full amount of the mortgage debt (for occupation rent cannot, I presume, be set off) sues out execution thereon; causes the reversion in fee to be offered for sale; and becomes himself the purchaser. Now

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according to the doctrine contended for, this transaction—this purchase for which nothing is paid, concludes the whole question between the parties, and vests in the mortgagee the entire estate, in fee simple, discharged from all liability to account. Is there any principle or authority which would warrant us in attributing to this proceeding such an effect? It is the established practice of the court to revive the equity of redemption, even after foreclosure, where the mortgagee proceeds to enforce his legal remedies; but, according to this doctrine, the mortgagee is permitted by one and the same act to enforce his legal rights, and acquire an absolute property in the estate pledged. What is this but to empower the mortgagee, in effect, to oust the jurisdiction of this court;—to enable him to deprive the mortgagor of his equitable remedies;—to subvert, in short, the whole law applicable to mortgage contracts?

Judgment.

Then, if the doctrine laid down by Lord *Nottingham* be correct; if the attendance of terms be governed by the conscience and discretion of the court; if the term itself, and by parity of reason the equity of redemption of the term, be severable by the law of equity in furtherance of right, the applicability of that doctrine to the class of cases at present under consideration is, I humbly conceive, clear of all doubt. In holding the equity of redemption to have been severed from the reversion, we preserve the rights and interests of all parties—mortgagor, mortgagee, and creditors, intact. In determining it to have passed under the sheriff's deed, we confound the rights and interests of all. There is no direct authority upon the point. The case is new and must be determined upon principle; and surely reason and justice require that, in determining the effect of the sheriff's sale, equity should regard the interest sold in the same light in which it was regarded by the court which directed that sale. But the court of

law, necessarily in order to any sale, looked upon the term and reversion as quite distinct estates. The equity of redemption was not sold. It cannot be alienated by virtue of legal process; because courts of law not recognizing the equitable principles by which the law of mortgage is governed, the sale of an equity of redemption, under a common law writ, would be repugnant to reason, and necessarily productive of injustice. And yet it is said that equity, in determining the effect of that sale, is bound to regard the equity of redemption as having been merged in the reversion, and as having passed by virtue of a sale in which its very existence was ignored. When Lord *Cottenham* was asked, upon the authority of several decided cases, to apply the doctrine of merger to a new case, under a new species of conveyance contrived for the purpose of affecting injuriously the rights of a married woman, he said, "Is there then a merger which defeats this rule? legal merger there cannot be; but, if there had been, equity would not permit a merger at law to defeat equitable estates and interests. Such has been the rule at least since the time of Charles the II. Will it then, when there is no legal merger, introduce the doctrine of merger into trusts, solely for the purpose of defeating trusts, and destroying its own jurisdiction in the protection of the interests of married women?" I adopt the reasoning and language of that eminent judge as strictly applicable to the present case. Legal merger there cannot be; but, if there had been, equity would not permit a merger at law to defeat equitable estates and interests; and I ask, with him, shall we, where there is no legal merger, introduce the doctrine of merger, solely for the purpose of defeating equities, and destroying our own jurisdiction, and, I will add, repudiating our own duty, in the protection of the interests of mortgagors.

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Upon the whole, differing as I do from my learned

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brothers with infinite distrust of my own judgment, it is my duty to declare that my understanding remains unconvinced by these arguments. I am clearly of opinion that the court of equity, acting upon its own principles, was bound to regard the equity of redemption of the term as severed from the reversion by the law of equity, and wholly unaffected by the deed of January, 1845.

I have passed over many of the points made in the able argument addressed to the court; not that these points seemed to me unimportant, but because they became immaterial in the view I had taken of the case. Had my opinion been different upon the main question, I must still have decided in favor of the plaintiffs, because, in that view, Mr. *Mowatt's* argument upon the construction of the statute appears to me unanswerable.

Judgment.

Upon the other points of the case I retain the opinion which I expressed in the court below; and, assuming the equity of redemption to have passed under the sheriff's deed, I continue to think that the facts appearing in the defendant's answer and upon the evidence are such as to call for further enquiry, according to the settled practice of the court (*a*).

MACAULAY, C. J., commenced by saying that he had bestowed his best attention upon this case, and the more anxiously in consequence of his being obliged to differ from the learned Chancellor, for whose opinion he entertained the very highest respect, and from whom he differed with every distrust of his own judgment. He said that he in the first place endeavoured to obtain as clear an impression as he could of the full meaning of what are termed "reversions, equities of redemption," and of such equities being *inherent* in the *land*, in the belief that clear

(*a*) Lord Clanstown v. Johnstone, 3 Fes. 170, and 5 Ves. 277.

perceptions, on these points, would go far to solve the present difficulty. 1852.

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Bearing in mind that this is the case of the owner in fee having mortgaged for one thousand years, by indenture of bargain and sale, for a pecuniary consideration, without any reservation of rent, with a proviso for the cesser of the term upon payment of a named sum at a fixed day, which was not paid, and that after default the estates of both mortgagor and mortgagee were assigned until they became united in the appellant *Tiffany*, the Chief Justice proceeded to read the definition and meaning of a reversion as explained in Co. Lit. 22 *b*, and 142 *b*, *Dighar v. Grenville* (*a*), and *Throckmorton v. Tracy* (*b*), *Preston* on estates 89, *Lynett v. Parkinson* (*c*), and other authorities; from all which it appeared to him that a reversion was the residue of an estate left in the grantor, awaiting, to commence in possession, the determination of the particular estate granted out by him, and the returning of the land in possession to the grantor, his heirs and assigns, after such particular estate determined; and that when a term for years is determinable on condition, the reversion is the residue of the estate, awaiting only the performance of the condition, upon which event it was to become an estate in fee simple in possession, as it was before the term was created; the application of which to mortgage terms was obvious. Judgment.

He then mentioned the incidents to reversions, such as rent, fealty, curtesy and dower, citing Gilb. on rents, 58, 62, 63, 173, Co. Lit. 23 *a*, 130, 143 *a*, 151 *b*, and sec. 228, 331, and other authorities; shewing that a sum in gross was not so incident. He also remarked upon the necessity of attornment

(*a*) 2 Vent. 328. (*b*) Plowden, 152 to 158. (*c*) 1 U.C.R.C.P. 98.

1852.

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in the creation of vested terms for years at common law, and of the power of the reversioner to destroy them by suffering a recovery until the statute 21 H. VIII. ch. 15, and of the privity of estate subsisting between the landlord and tenant.

He then remarked upon the rule of the common law which treated assignees of reversons as strangers, and prevented their becoming entitled to the benefits, or responsible for the obligations of conditions, covenants, &c., until the statute 32 H. VIII. c. 34, made provision on that subject; referring for an exposition of this statute to Lit. sec. 347 and Co. Lit. 215 *a*, &c., and particularly to No. 12 of the commentary. He noticed that this statute related only to conditions incident to the reversion, or for the benefit of the estate, as rent, meliorations, &c., and not for the payment of any sum in gross; also referring to *Shepherd's* Touchstone 150 to 183 and the authorities therein stated; he inferred that in mortgage transactions the right to the benefit of the condition, or to tender or pay the money *at the day*, did not at law pass to the assignee of the reversion *before the day* as incident—Ba. Ab. tender A.. Com. Dig. condition G. 1. O. 1 2, forfeiture, A. 6, Co. Lit. 205-8, 215, 219, and various other authorities respecting conditions and the rights of assignees of reversions to tender or perform the same at law.

Judgment.

He then proceeded to explain that conditions, &c., were not viewed in the same light in equity, but that in equity the assignee of the reversion before or after default might pay the mortgage debt at or *after* the day, in relief of the estate and in aid of his reversion; which shewed that in equity the right to perform such condition was regarded as incident to the estate, and not merely as substantially and independently transferred by other operative words

contained in the assignment; (*a*) and that therefore the equity of redemption was the mere creature of courts of equity, (*b*) founded upon the doctrine that notwithstanding the legal effect of the mortgage equity still imputed the ownership of the land to the mortgagor, and considered the real estate (so far as affected by the mortgage) only pledged to secure the debt; that this equity therefore sprung from the land, and was not derived collaterally or exclusively from the assignment of the proviso or condition.

He then referred to *Throckmorton v. Tracy*, (*c*), *Crabbe* S. 86, and provincial statute, 4 W. IV. ch. 1, sec. 59, touching the meaning and effect of the word "land;" from whence, in reference to the authorities in which it is laid down that the equity of redemption is inherent in the land *Pawlett v. Attorney General* (*d*), *Maddox v. Maddox* (*e*), *Casborne v. Scarf* (*f*), and the doctrine of trusts, by analogy to which the equity of redemption is adopted and enforced (*g*), he inferred that *land*, in its most comprehensive sense, embraced both the reversion in fee and the term for years; and that the equity of redemption was inherent in the estate or ownership of the land—that is, in the estate or interest—which equity contemplated as still reposing in the mortgagor in relation to both the reversion and term, and which would also have been in him *at law* had no mortgage been made; wherefore in the case of the owner in fee mortgaging for years, it was inherent in the reversion in fee, and in the term for years, (so far as equity acknowledges such mortgage terms), jointly or together, the reversion, in the eye of equity, having an expansive

Judgment.

(*a*) Powell on Mortgages, by Coventry p. 273; Burton on Real Property, p. 453, S. 1468; Foote on Mortgages, p. 216.
(*b*) Crabbe on Real Property S. 2262. (*c*) Plowden 145 to 162.
(*d*) Hard. 465. (*e*) 1 Vesey, sen., 61. (*f*) 1 Atk. 602.
(*g*) Powell, 250 *b* A.; Plowden, 352; Lewin on Trusts; Wright v. Wright, 1 Ves. sen. 410-11; Brown v. Cole, 14 Sim. 427.

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meaning, and being all the estate or interest in the land which equity recognizes as continuing and remaining in the mortgagor, exclusive of the pledge made of the legal term; that in law and equity the reversion contained the whole estate, except the term at law, which equity included, and with it the right to rescind it and place the legal estate in *statu quo* by coalition or by re-uniting it at law to the legal reversion from which in equity it had never been severed, or by making it attendant upon the inheritance.

He then cited authorities to shew that the assignee of the reversion in fee awaiting only the cesser of a mortgage term for years to become the pernor of the profits and seized of an estate in fee in possession, was entitled to redeem; (*a*) and that if an ordinary assignee could do so, there was no substantial difference between his case and that of an assignee of a sheriff under an execution at law; (*b*) wherefore equity followed the law, (*c*) and treated the mortgagor as owner, and as such entitled to be relieved against the forfeiture (the legal estate being only regarded as pledged) it seemed to follow that the

Judgment.

(*a*) Co. Lit. 208 *a* (1); Powell 343; 12 Cruise's Dig. 139 40, Pre in Ch. 218; 1 Dick. 249; Coote 514, 5, 6, 7; Crabbe S. 2265, 6, 7; Cole v. Warden, 1 Vern. 410; Bonham v. Newcomb, ib. 214; Viscount Downe v. Morris, 3 Hare 394; S. C. 8 Jur. 486 and 13 L. J. ch. 337; Jones v. Meredith, Bunb. 347; Skeffington v. Whitehurst, 3 Y. & C. 1 46; 1 Dow. P. C. 18; Park on Dower, 141 350; Burgess v. Wheate, 1 Eden 177; Lloyd v. Lander, 5 Mad. 290; Vin. Ab. Mortgage Q. Pl. 10 20; Lovell's case, 1 Salk. 85; Pratt v. Jackson, 1 Brown P. C. 222; Butler v. Bernard, 2 Free. 139; Cubbidge v. Boatwright, 1 Russell 549; 1 Powell on Mortgages, 972, note *p*; Brown v. Stead, 5 Sim. 535.

(*b*) 1 Rolls Ab. 894 pl. 5; Smith v. Cooke, 3 Atk. 379; Izod v. Lamb, 1 C. & J. 46; Tindall v. Warre, Jacob 212; Scott v. Scholey, 8 East. 467, Legg v. Evans, 6 M. & W. 36; Plunket v. Penson, 2 Atk. 293; Mayor &c. of Poole v. White, 15 M. & W. 571; Doe Jarvis v. Cumming 4 U. C. Q. B. R. 390; Imp. Stat. 5 Geo. II. ch. 7; 1 Inst. 18 *b.*; S. 12; ib. 315; S. 567; 3 Cruises Dig. 435; 5 Co. pl. 5; Lewin on Trusts, 12 527, 8, 9; 1 H, B. 433, 9 443, 4; 4 T. R. 94, 9; Platt on Covts. 525; 1 Ex. R. 457; 2 Ex. R. 732; 3 Ex. R. 407.

(*c*) 3 Cruise's Dig. 450; 1 Atk. 604; Stileman v. Ashdown, 2 Atk. 609; Fawcet v. Lowther, 2 Ves. Sen. 304; 1 Eden, 225, 6 259.

1852.

Sheldon v. Chisholm.

sheriff's vendee under an execution at law of a legal reversion expectant upon a mortgage term for years, or his assignee, was entitled to redeem the mortgage.

That no separation of the reversion in fee from the equity of redemption or right to redeem would take place by construction of law or equity; (*a*) and that no special equity would result from or arise out of a transfer so accomplished as distinguishable from a transfer by the direct act of the judgment debtor, whereby the legal term in pledge and determinable upon satisfaction of the debt secured could be turned into a term in gross, or to a right reserved to the debtor to redeem it, and thereupon to turn it into a term in gross for his benefit, instead of its becoming a satisfied term to attend the inheritance. (*b*) That no such equity could arise merely in favor of supposed creditors, if none appeared, nor from the possible complexity or reduced state of the account, as between the mortgagor or his assignee and the mortgagee or his assignee; (*c*) nor did the assignee of the reversion, as a purchaser at sheriff's sale, incur any personal or other liability to the mortgagor or mortgagee in respect of the mortgage debt, or otherwise than as the land or term was debtor and he in conscience bound to account for rents and profits, whether to the mortgagee or mortgagor, in the event of the latter being afterwards compelled to pay the debt; and that the effect would be the same, whether the reversion was purchased by the mortgage creditor or sold to a stranger; the maxim of *caveat emptor* would equally apply in either case. That if the whole reversion passed by the

Judgment.

(*a*) Amhurst v. Litton, Fitsgibbon 99; Young v. Burdett, 5 Bro. P. C. 54.

(*b*) Hoole v. Sales, 2 Wil. 331; Foster v. Eddy, 13 Jurist 761.

(*c*) 2 Shepherd's Touchstone, 179; Evelyn v. Evelyn, 2 P. W. 664; Scott v. Beech, 5 Mad. 96; Earl of Oxford v. Lady Rodney, 14 Ves. 417.

1852.

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sheriff's deed nothing would remain to the previous owner, for a surrender to work upon or sink into, not even a scintilla (*a*). That if the respondents could be admitted to redeem, and the term was assigned to them, they would only hold it as a mortgage redeemable by *Tiffany*, unless they held it as a satisfied term to attend the inheritance. That no equity arises either from the inefficacy of a common law execution to transfer the equity of redemption with the reversion, or from the mere circumstances that such transfer was made under legal process, and *in invitum*, and not by the debtor himself (*b*).

From all which he was led to the conclusion, that a legal reversion in fee expectant upon a mortgage term for years might be sold under a writ of *fieri facias*, under the 5th Geo. II. ch. 7, if not controlled in equity by injunction or otherwise; and that as a judgment creditor, before a sale, may be admitted to redeem, so may the purchaser after sale; and that whenever the next vested right is a legal reversion in fee, awaiting for possession and enjoyment only the cesser of a mortgage term for years, and upon which the reversion (without more, and unobstructed by any other estate intervening to take precedence, or to hinder or delay him) would become entitled to the profits, might demise *in presenti* or maintain ejectment, such reversioner is entitled to redeem the mortgage by whatever term his interest or right to do so may be defined.

Judgment.

He then mentioned the fact, that the mortgage to *Sheldon* operated in the first place only by estoppel,

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(*a*) Hooker v. Nye, 4 Tyr, 776; Lynett v. Parkinson, 1 U. C. R. C. P. 104, 5; Cornish v. Searell, 8 B. & C. 471; S. C. 1 M. & R. 703.

(*c*) Biddulph v. Biddulph, 2 P. W. 286; Anonymous, 2 Vent. 359; Villiers v. Villiers, 2 Atk. 72; Best v. Stamford, 1 Salk. 154; Mole v. Smith, Jacob, 496; Lee on Abstracts, 115, 453; Adams' Equity, 52.

until *Spencer* reconveyed in fee to *George Stewart* after which the term by estoppel became a term in interest.

Also, that although only possessed of a term for years, *Sheldon* had executed a deed in fee to *Smith* as *Smith* did to *Tiffany*, but that the effect would only be to transfer the term or interest to which they were rightly entitled.

Also, that *Smith* was in possession under *Sheldon's* deed, when *Waterberry* assigned to *David Stewart*, and he to *William Chisholm*, but that such possession did not seem to affect the reversion, or the right or power to assign the same.

That an execution creditor may purchase, and by parity his attorney, so far as respected the execution debtor; (*a*) and that fraud was neither alleged nor proved (*b*).

Judgment.

That the reversion being obtained by *Tiffany*, pending the respondent's bill to redeem, did not seem to invalidate the sheriff's assignment, or prevent a merger of the legal term with all its incidents in the legal reversion in fee; (*c*) and that it was unnecessary to consider the statute 7 Wm. IV. ch. 2, sec. 11, or the effect of the case of *Smith v. Simpson* upon the present occasion.

He concluded by saying that on the whole he thought *Tiffany* combined the two characters of assignee of the mortgage for years and of the reversion in fee, and was therefore both mortgagor and mortgagee—the hand to receive as well as to pay; wherefore the term was merged and at an end, and

(*a*) Stratford v. Twyman, Jacob 421.
(*b*) Wilde v. Gibson, 12 Jur. 527.
(*c*) Brydges v. Brydges, 3 Ves. 126; Merest v. James, 6 Mad. 118; Tyler v. Lake, 4 Sim. 358.

1852.

Sheiden v. Chisholm.

the debt discharged or extinguished, and that by reason of such coalition (even though the Court of Chancery did not admit a merger, but held that the respondents could redeem him as assignee of the mortgage) he could, on the other hand, forthwith redeem them as assignee of the reversion, a right resulting from the privity of estate, the language of the mortgage, and the rules of equity; wherefore the same end was accomplished, and a final end put to the matter as between the parties to these proceedings, by reversing the decree and dismissing the bill.

Judgment.

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AN

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of conjugal rights, desertion would be sufficient to warrant a decree for alimony. (*Semble.*)

5. Desertion, although insufficient in itself to warrant a decree in England, does, when coupled with other acts of cruelty, form a material ingredient in determining a wife's right to relief.

Severn v. Severn, 431.

AMENDING BILL.

Amendment of bill—in what cases, under the orders of May, 1850, it should be allowed at the hearing of a cause.

Street v. Hogeboom, 128.

APPEAL.

A defendant appealed from an order directing his committal for breach of an injunction, and moved this court to stay proceedings under the order pending the appeal, which was refused.

Gamble v. Howland, 281.

CANCELLATION OF DEEDS.

In 1819, one Street agreed in writing with one Ryckman to furnish the latter with certain supplies, in consideration of which Street was to receive from Ryckman a conveyance of certain lands; and the agreement was deposited with one Benson. The supplies were only partly furnished; but in 1824 deeds were prepared by Ryckman of the lands to be conveyed, and were handed to one Shook to be delivered to Street on getting up the agreement. Shook delivered the deeds to Street on getting an order on Benson for the agreement; but, on his presenting the order, it was found that the agreement was not forthcoming. The agreement afterwards got into Street's possession, and no explanation was afforded of this. In 1825 the deeds were accidentally destroyed by fire. Several actions of ejectment, appeared to have been afterwards brought, and with varying results; and in 1850 a bill was filed by Street's devisee of part of the property against the defendant who claimed under Hiles, to whom Ryckman had sold and conveyed the property in 1832. The bill, which prayed for a conveyance and for the cancellation of the subsequent deeds under which the defendant claimed, was, under the circumstances, dismissed with costs.

Street v. Hogeboom, 128

CONSTRUCTION OF DEEDS.

See "Principal and Surety," 2.

CONTRACT.

Setting aside.

One H. a clerk in the office of the Bursar of King's College, (where all business connected with the sale of the lands of Upper Canada College was transacted,) procured a contract to be executed by the University for the sale of certain of such lands to J. The defendants alleged that H. had acted as J.'s agent in the matter, but the court was satisfied that J.'s name had been used by H. for his own benefit, and that the contract was in breach of H.'s duty as such clerk as aforesaid, and therefore ordered the contract to be rescinded with costs.

U. C. College v. Jackson, 171.

CORRECTION OF DEEDS.

Where a debtor made a conveyance to a trustee, for the

benefit of his creditors, of all his lands, and a schedule annexed to the deed purported to contain the whole thereof, it was afterwards discovered that, either designedly or by mistake, some of the debtor's lands had been omitted from the list: *Held*, that a bill would lie to correct the schedule, on the ground of fraud or mistake.

Gillespie v. Grover, 558.

COSTS.

1. In suits for alimony, the plaintiff, when she succeeds, is entitled as a general rule, to her full costs of suit.

Soules v. Soules, 113.

2. Where a defendant would have been entitled to coss of suit up to the hearing but for an offer which the plaintiff made by letter, after the answer was filed, to accept a sum he named, and to which in a particular view of the matter which he mentioned, he thought he would be entitled if he failed in establishing the larger claim he made by his bill, and by which offer it was proposed that each party should pay his own costs, but the court decided both against the larger claim and the view referred to, but granted a decree for an account on a different footing, which, it was alleged, would result in shewing the amount mentioned in the letter to be about the true amount: *Held*, that these circumstances did not entitle the plaintiff to have the costs reserved until the taking of the account.

Covert v. The Bank of U.C. 246.

See also "Executor" 4.
"Mortgage" 4, 5.

DECREES.

It is essentially requisite to the perfect completion of a decree that it should be passed and entered.

Drummond v. Anderson, 150.

DISMISSING BILL.

In moving to dismiss for want of prosecution, it is not sufficient for the certificate of the registrar to state only that no replication has been filed; it must also state that no further proceedings have been had, and it must be shewn when the office copy of the answer was served,

Thompson v. Buchanan, 652.

DOWER

1. A person equitably entitled to lands (in this case a person who had not paid up his purchase money or obtained a conveyance) created a mortgage thereon containing a power of sale in default of payment; the power of sale was not exercised until after the death of the mortgagor; afterwards the widow of the mortgagor filed a bill against the purchaser for dower in the mortgaged premises. A demurrer thereto, for want of equity, was allowed: dower attaching only to such equitable estates as the husband dies seized of; the sale when made having relation to the time of creating the power, and thereby over-reaching the title to dower which had in the meantime attached.

Smith v. Smith, 451.

2. A widow's title to dower before assignment, although not transferable at common

law, may be the subject of sale and conveyance in equity.

Rose v. Simmerman, 598.

EQUITY OF REDEMPTION.

Equity of redemption—Sale of reversion.

Held per Curiam—(Blake C. *dissentiente*), that a sale by a sheriff, under a writ of *fieri facias* against lands, of the reversion after a term of years, had been created by way of mortgage, carries with it the right to redeem the term.

Sholdon v. Chisholm, 655.

EXECUTOR.

1. Payment of a legacy in full is a *prima facie* admission of assets to pay all the legacies in full, because, if the assets are not sufficient for this purpose, all the legacies must abate in proportion, but it is open to explanation.

Coleman v. Whitehead, 227.

2. When an executor pays some legacies and makes provision for the others, he has not conclusively admitted assets, because the provision which he has made for the unpaid legacies may have proved insufficient, without any fault being attributable to him.—*Ib.*

3. Where two legacies were payable at the expiration of a year after the testator's death, and another legacy would not be payable for twelve years, and did not bear interest in the meantime, and the executor paid the legacies immediately payable — sufficient property to all appearance remaining to meet the future legacy—and let the residuary legatee into the enjoyment of the residue, on his undertaking to pay the legacy when it became due out of the assets; and subsequently, with the assent of the executor, a portion of the personal residue was appropriated to the satisfaction of a devise of land worth a certain sum, or its proceeds: *Held*, that the executor had not so admitted assets as to warrant a personal decree against him at once.—*Ib.*

4. An executor or administrator has no right to file a bill merely to obtain an indemnity by passing his accounts under the decree of the court. There must be some real question to submit to the court, or some dispute requiring interposition, when he will be entitled to his costs; otherwise he will not receive them. And if it should appear that his conduct has been *mala fide*, or unreasonable, he will be ordered to pay the costs of the defendant.

White v. Cummins, 602.

FORECLOSURE.

1. A summary reference for foreclosure had been made, and on proceeding in the Master's office it was discovered that there were several registered judgments against the defendant. The plaintiff thereupon moved to amend the decree by inserting a direction to the Master to enquire and report upon the priorities, &c., of the judgment creditors, which was accordingly ordered on payment of costs, and with a reservation of further directions.

Moffatt v. March, 163.

2. Upon default in payment by a mortgagor of any instal-

ment of, or of interest upon, mortgage money, the mortgagee has a right to call in the whole amount secured by the mortgage.

Sparks v. Redhead, 311.

3. Where the day appointed by the Master's report for payment of the mortgage money found due by the report fell upon a Sunday, the court refused to make a final order of foreclosure.

Holcumb v. Leach, 449.

FRAUDS—STATUTE OF

Whether a letter written by a third person, and signed by him, addressed to the intended wife, and delivered to her by the intended husband, with a knowledge on his part of its contents, evidencing an agreement for a settlement by him, would be a sufficient writing within the Statute of Frauds signed by the agent of the party to be charged—*Quære.*

Gillespie v. Grover, 558.

FRAUDULENT CONVEYANCE.

Although the prior registration of a deed executed without consideration confers no title upon the grantee, as against a *bona fide* purchaser for value, still, as the fact of such a deed being upon record will have the effect of creating a cloud upon the title, the court will decree its removal.

Ross v. Harvey, 649.

GUARDIAN.

This Court will, upon the petition of the guardian duly appointed by the Court of Probate or Surrogate interfere summarily, and order the person of the infant to be delivered into the custody of such guardian, when there is danger of the infant being removed out of the jurisdiction — although no suit is pending in court respecting the infant's estate.

Re Gillrie, 276.

INFANT.

See "Guardian."

INJUNCTION.

1. Where a warehouseman had delivered warehouse or transfer receipts to a party for one thousand barrels of flour, and afterwards delivered out some portion thereof at the instance of the party who had left it in his custody, on the understanding that the quantity so delivered out should be made up by other flour to be brought to his warehouse, and it appeared that such a course of dealing was in accordance with the usage of the trade, the court refused an injunction to restrain the delivery of flour subsequently brought by the same party to the warehouse, although such latter flour had been assigned *bona fide* to the plaintiff, who had made advances thereon after it was stored, and although such flour had not been manufactured at the time of giving the warehouse receipts.

Wilmot v. Maitland, 107.

2. This court will restrain a vendor of goods from selling property previously contracted to be sold, if the vendee has not been negligent in carrying out his part of the agreement.

McLean v. Coons, 112.

3. In 1845 the plaintiff obtained an injunction restraining the defendant from suffering to continue any dam whereby the natural flow of the river, on which they both had mills, should be interfered with, to the injury of the plaintiff's rights. To this bill no answer was ever filed, but a motion to dissolve the injunction was made and refused; and, in the same year, the plaintiff recovered a verdict against the defendant at law, in respect of the same matters. An arrangement was then made between them that the dam should remain, and that each party should have the exclusive use of the water for a certain portion of every day, and this agreement was acted upon for nearly seven years. The defendant then began to make a limited use of the water all day; and contended that, from some improvements he had introduced into the machinery of his mill, this would not interfere with the plaintiff's rights. The plaintiff denied this, and moved to commit for contempt. *Held*, that the delay was no answer to the motion; that the defendant having abandoned the agreement, the plaintiff had a right to fall back on his injunction; that on this application, the propriety of granting the injunction originally was not a proper subject of consideration; and the court being of opinion that the continuance of the plaintiff's dam was a breach of the injunction, ordered the defendant to stand committed in two weeks, unless, in the meantime, he obeyed the injunction.

Gamble v. Howland, 281.

4. Where a strip of land was vested in the plaintiff (according to the report of commissioners appointed to run the line between two townships), but the defendant claimed the property and had applied to the Court of Queen's Bench to quash the report, pursuant to the statute appointing the commissioners, pending the application the defendant commenced to fell the timber, alleged to be of a valuable description, growing on the strip. The court granted an injunction to restrain such felling until a decision of the motion pending before the Court of Queen's Bench.

Christie v. Long, 630.

5. The court will restrain attaching creditors of an absconding defendant from selling timber improperly cut upon land mortgaged by the defendant to the plaintiff.

Thompson v. Crocker, 653.

LACHES.

See "Specific Performance."

LEGACIES—PAYMENT OF.

See "Executor," 1.

LESSOR AND LESSEE.

Where a lease contains a covenant on the part of the lessee for a renewal of the term or in default, payment of improvements, the option rests with the lessor either to renew or pay for the improvements; and the lessee cannot compel a specific performance of the contract to renew.

Hutchinson v. Boulton, 391.

MORTGAGE—MORTGAGEE—MORTGAGOR.

1. In 1821 the plaintiff mortgaged three properties (in Belleville, Kingston and Camden, respectively) to secure a debt payable in the following year. It was not then paid. Payment was urgently demanded in 1827; the mortgagees being then in great pecuniary difficulties, and the debt still remaining due, the mortgagees sold and conveyed, with absolute covenants for title, the property in Belleville, for what appeared to have been about its value at the time, and they gave credit for the amount on the mortgage. This property afterwards passed through several hands and was bought by the present owner in 1837, who subsequently made considerable improvements on it, and dealt with it as absolute owner. *Held*, that this property was not redeemable by the mortgagor on a bill filed in 1840, and that the effect of the sale and transfer by the mortgagees of the portion of the mortgaged property was to transfer to the purchasers a part of the mortgaged debt, proportioned to the value of the property transferred as compared with the whole property mortgaged.

McLellan v. Maitland, 164.

2. The holder of £2000 government debentures, the payment of which depended on certain contingencies, assigned them to the defendants, and delivered to them his bond to secure the interest upon which the Bank passed the full amount to his credit. Subsequently the defendants obtained from the debtor security for the principal, as well as the interest, and for another debt which he owed them. The debtor about the same time, assigned his interest in the debentures to G. S. B.; and the defendants afterwards accepted a release of part of the mortgaged property in part payment of the amount secured by the mortgage. The mortgaged property was then sold by the defendants for much less than the amount of the debentures, which were afterwards paid in full by the government. It appeared from the defendants' books and their communications with the government, that they did not consider themselves entitled to both sums. *Held*, that the plaintiff, who was the assignee of G. S. B.'s interest in the debentures, was entitled to the proceeds of the property sold.

Covert v. The Bank of U.C. 249.

3. When default in payment by a mortgagor of any instalment of, or of interest upon, mortgage money, the mortgagee has a right to call in the whole amount secured by the mortgage.

Cameron v. McRae, 311.

4. A mortgagee who takes a deed absolute in form, instead of with a defeasance, and then fraudulently denies the right of redemption, setting up the deed as constituting an absolute purchase, is guilty of such misconduct as will sub-

ject him to the payment of the costs of the suit.

LeTarge v. DeTuyll, 595.

5. A mortgagee having omitted to give credit on the deed, or in his books, for sums of money paid to him by the mortgagor, his executors, after his decease, claimed a large sum to be due on the foot of the mortgage: the mortgagor tendered a certain amount, saying at the same time that he was willing to pay any additional sum that might appear due after giving him credit for the sums alleged to have been paid. A bill was afterwards filed by the representatives of the mortgagee to foreclose; and on taking the account a sum of between £2 and £3, over and above the amount tendered, was found to be due. The court, under the circumstances, ordered the plaintiff to pay the costs.

Cornwall v. Brown, 633.

6. The court will restrain the attaching creditors of an absconding defendant from selling timber improperly cut upon land mortgaged by the defendant to the plaintiff.

Thompson v. Crocker, 653.

See also "Parol Evidence."

NOTICE.

See "Parol Evidence," 1.

OPENING PUBLICATION.

Where publication had passed shortly before a motion to open was made by the plaintiff, and it appeared on the motion that the defendant had examined witnesses but the plaintiff had not examined any; and the plaintiff and others swore that his evidence was material, and that the delay had arisen from the poverty of the plaintiff; publication was opened on payment of costs.

Taylor v. Shoff, 153.

PAROL AGREEMENT.

See "Specific Performance," 2.

PAROL EVIDENCE.

1. Where a party made an assignment of his estate by way of mortgage, but the instrument creating the incumbrance purported to be absolute, and no change of the possession ever took place, the tenant of the mortgagor continuing to hold possession: *Held per Curiam*, that this was not such a possession by the mortgagor as would affect a purchaser from the mortgagee with notice of the interest of the mortgagor.—(Esten, V. C. *dissentiente.*)

Greenshields v. Barnhart, 1.

2. LeTarge v. DeTuyll, ante vol. 1, page 227, approved of. —*Ib.*

3. The doctrine of the admissibility of parol evidence on the question of mortgage, or no mortgage considered.—*Ib.*

4. Under the circumstances set forth in this cause, as reported ante vol. 1 page 227, decree made to let plaintiff in to redeem.

LeTarge v. DeTuyll, 369.

5. Whether a deed absolute on the face of it, nothing more being shewn, parol evidence will be admitted to shew the conveyance was intended to operate as a security only (*Quære*).—*Ib.*

6. Upon the question wheth-

er a deed absolute in its terms, was really intended as a security merely, an unsigned memorandum of the transaction made at the time, for the use of the parties, by the attorney's clerk who drew the deed for them, was held sufficient to let in parol evidence.

Holmes v. Matthews, 379.

7. Parol evidence does not become admissible in this class of cases, because of a note in writing sufficient to take the case out of the Statute of Frauds, but because of the existence of some fact which evinces the real intention of the parties to have been different from that expressed in the deed.—*Ib.*

8. Where an absolute deed appeared from parol evidence (which under the circumstances was admissible) to have been intended as a security only, and the defendant, the devisee and executrix of the grantee, swore that she believed the equity of redemption, if any, was put an end to by a subsequent parol agreement between the parties, casual conversations by the mortgagor with third persons, from which such an agreement was attempted to be inferred, were held insufficient proof of it, though it was said that the mortgagor had claimed no interest in the property from the time of the alleged agreement until after the death of the mortgagee—a period of about ten years.—*Ib.*

POWER OF SALE.

See "Dower," 1.

PARTIES.

To a suit for the foreclosure of a mortgage, in which the wife of the mortgagor has joined to bar her dower, the wife is not a necessary party; and, if made a defendant, the bill as against her will be dismissed with costs.

Moffatt v. Thompson, 111.

PARTNERSHIP.

1. Where a memorandum had been made in partnership books, and signed by one of the partners, stating that such partner was indebted to his co-partner in a certain amount, and such co-partner subsequently sued for, and insisted upon being paid that sum, notwithstanding that it was evident from the entries in the books that the sum so claimed was not due; the court, upon a bill filed by the partner who had signed the memorandum, directed an account of the partnership dealings to be taken, with costs to be paid by the defendant up to the hearing.

Garven v. Allen, 238.

2. In a partnership suit the usual decree had been made, and the master made a general report, finding that a certain balance was due from the defendant to the plaintiff, but that all the partnership assets had not been realized. After this report had been signed, the defendant applied for leave to carry into the master's office and prove a charge and discharge. It appeared that the defendant had been guilty of gross negligence in omitting to bring these papers into the master's office, and no explanation was now attempted of his neglect to do so; but the

court was of opinion that the report was erroneous in finding a sum to be due from the one party to the other before the assets were realized and the liabilities paid; and as the report which had been made could not be acted upon, the defendant's application was granted on terms.

Smith v. Crooks, 321.

3. The proper method of taking partnership accounts in a very special case, discussed and illustrated.

Davidson v. Thirkell, 330.

4. Allowances made to an incoming partner in respect of misrepresentations made to him by his co-partners, as to the liabilities of the business when he joined it.—*Ib.*

5. In such a case the master was held to have jurisdiction to charge the guilty parties with either interest or trade profits, on the advances which such misrepresentations rendered it necessary for the incoming partner to make.—*Ib.*

6. Interest allowed to and against each partner on advances by and to him during the partnership.—*Ib.*

7. One partner (A) was held to have been properly allowed by the master for buildings which such partner had erected for the purposes of the business without the sanction of, or reference to his co-partner, during a period that the existence of any partnership between them was not recognized by either; the one (A) affirming it had been put an end to by sheriff's sale, which the other (B) denied, affirming on his part that an award was valid which, amongst other things put an end to it, and which award the first (A) impeached, the court having afterwards held that the partnership continued notwithstanding both sheriff's sale and award, and having directed the accounts to be taken accordingly.—*Ib.*

Practice—Partnership—Fraud.

8. In a suit to wind up the affairs of a partnership, on the ground of alleged misconduct on the part of one of the partners and the confidential clerk and manager of the partnership business, the court, having reference to the facilities for investigating matters of account before the master, gave the clerk leave to carry in and prove any claim he had against the firm for his services, although it was clearly established that he had been guilty of gross misconduct and might have been left to pursue his remedy at law for his demand, if any; and directed sufficient of the partnership funds to be reserved to satisfy the claim, in the event of his succeeding in establishing it.

Newton v. Doran, 353.

9. Where partnership business was carried on in buildings erected by the funds of the firm upon lands for part of which the patent from the crown had issued in the name of one of the partners, parol evidence was received to show whether the land was separate or joint property.—*Ib.*

PRACTICE.

1. Where a defendant had applied to open publication,

and an order was made for that purpose on payment of costs, it was subsequently discovered that the plaintiff had proceeded to set the cause down for hearing without taking out the rules to produce and pass publication; and the defendant thereupon moved to strike the cause out of the papaper of causes for hearing; the motion was refused with costs.

Hamilton v. Street, 122.

2. In January 1841 an original decree of foreclosure had been made; in pursuance thereof the master made his report; and in May of the same year the cause was set down for hearing on further directions, but the decree then pronounced was not drawn up or any entry made thereof. A motion now made to allow the plaintiff to draw up and enter *nunc pro tunc* the decree on further directions, from minutes alleged to have been prepared by the registrar, was refused.

Drummond v. Anderson, 150.

3. It is essentially requisite to the perfect completion of a decree that it should be passed and entered.—*Ib.*

4. Where the plaintiff, suing on behalf of himself and the other next of kin of an intestate, alleges in his bill, but does not prove, that the next of kin are too numerous to be made parties by name; that some are resident out of the jurisdiction and others unknown, the court will either allow the cause to stand over to supply this proof, or will direct an enquiry by the Master as to the next of kin.

Musselman v. Snider, 158.

5. In decrees for specific performance of a contract for purchase, a time for payment of the purchase money should be limited, or, in default, the bill dismissed.

McDonald v. Elder, 244.

6. In such cases also the decree should direct a set-off between the unpaid purchase money and the costs.—*Ib.*

7. The plaintiff has *prima facie* a right to have the reference directed to the Master resident in the county wherein the bill is filed.

Macara v. Gwynne, 310.

8. Under the order of this court abolishing exceptions to the Master's report, the appellant occupies the same position as under the old practice he would have done before the Master on bringing in objections, and with that single restriction the whole case is open to him on the appeal.

Davidson v. Thirkell, 330.

9. It is contrary to the ordinary course to charge partners with what but for their wilful default they would have received.—*Ib.*

10. When the day appointed by the Master's report for payment of money found due by the report, fell upon a Sunday, the court refused to make a final order of foreclosure.

Holcumb v. Leach, 449.

11. A plaintiff having proceeded in the cause by filing a traversing note, as directed by the thirty-second order of May, 1850, afterwards moved

exparte to remove the traversing note from the files of the court and to allow the plaintiff to proceed upon a notice of motion to take the bill *pro confesso*, which had in the meantime been served : the motion was refused.

Tylee v. Bartchardt, 449.

12. Where a notice of motion had been given for Good Friday the court refused to entertain the motion at the next sitting.

Fitzgerald v. Phillips, 535.

13. On a motion to commit for breach of an injunction, it is not necessary that the affidavits should state that the writ was under the seal of the court.

Farwell v. Wallbridge, 628.

Practice—48th order.

14. The practice directed to be pursued by the 48th order of May, 1850, does not apply when the cause has been summarily referred under the 77th order.

Wellbanks v. Fegan, 643.

15. Under the head of "just allowances" the Master may, on taking the account of subsequent interest, and taxing subsequent costs on a first or subsequent foreclosure, allow a sum paid for insurance since the last foreclosure, and interest, under a provision in the mortgage, although the decree simply directed him on each successive foreclosure to compute subsequent interest and tax subsequent costs.

Bethune v. Calcutt, 648.

16. In moving to dismiss for want of prosecution, it is not sufficient for the certificate of the registrar to state only that no replication has been filed ; it must also state that no further proceedings have been had, and it must be shewn when the office copy of the answer was served.

Thompson v. Buchanan, 652.

See also "Production of Documents."

PLEADING.

1. The title to land conveyed upon trust being in dispute between the person creating the trust, being a defendant to the suit, and one of the other defendants, and the plaintiffs being entitled to have this land sold if it really belonged to the author of the trust, the question between him and his co-defendant must be decided in the suit.

Gillespie v. Grover, 558.

2. Where a defendant is not concerned in the whole of the suit, and the part in which he is interested can be properly separated from the rest, he can object to the frame of the bill ; but this principle does not apply where the parts of the suit, being in their nature properly the subject of one suit, are not interwoven, but one follows the other, and the part in which the objecting defendant is interested must first be disposed of and be dismissed from the suit before the other part can be entered upon.—*Ib.*

PRINCIPAL AND SURETY.

Principal and Surety.

1. Where a surety covenanted to pay certain advances made by the creditors of the principal to him on a certain day, or so soon as certain timber should be sold at Quebec, and before the time appointed

arrived and whilst the timber was being conveyed to Quebec, an agent of the creditors obtained from the principal debtor a confession of judgment and sued out execution thereon, under which the timber in question was sold: *Held*, that this was such a dealing between the parties as discharged the surety from any further liability under the bond.

Dickson v. McPherson, 185.

Construction of deeds—Principal and surety.

2. The effect in equity of the instruments which came in question in the Bank of British North America v. Jones (8 Upper Canada Queen's Bench Reports, p. 86) considered; and *held* by the Chancellor, to be the same as that case decided the true construction thereof at law to be.

Per Esten V. C.—The effect in equity is a mere transfer of the rights of the Bank as mortgagees, and

Per Spragge, V. C,—The effect in equity is *prima facie* an absolute sale of the notes and steamboat, not subject to redemption; and the plaintiffs, to do away with this effect must impeach the deed; which was not done by the bill in this case.

Sherwood v. B'k of B.N.A. 457.

PRO CONFESSO.

1. In applications to take bills *pro confesso* under the 33rd order of May, 1850, the order to be pronounced is left a good deal to the discretion of the court.

Perrin v. Davis, 161.

2. After an order to set down a cause to be taken *pro confesso* is made, a subpœna to hear judgment need not be served, and all subsequent proceedings may be *exparte*, unless otherwise directed.—*Ib.*

PRODUCTION OF DOCUMENTS.

1. Whatever discovery a defendant would have been bound to give by anwer with respect to documents in his possession must now be furnished by the affidavit in answer to a motion to compel production under the 31st order of May, 1850, and the ground upon which he relies to excuse production must be stated with the same particularity. Where, therefore, a party filed a bill claiming title as heir-at-law of an intestate, and called upon the defendant to produce deeds, &c., and in answer to a motion to compel production the defendant put in an affidavit stating that the deeds in his possession did not prove the plaintiff's title, without furnishing any description so as to enable the court to judge of the effect proper to be given to this general allegation, such affidavit was held not to be sufficient, and production of the documents ordered.

Nicholl v. Elliott, 536.

2. As a general rule, a plaintiff in equity is entitled to a discovery not only of that which constitutes his own title, but also of whatever is material to repel the case set up by the defendant; and as a part of that discovery, to the production of such documents as are material for the same purpose. Where, therefore, a bill was filed by a person claiming under a devisee, and in opposi-

tion to a motion to compel the production of deeds, the defendant swore that the alleged testator had not made any valid will—it being sworn that he was not of sound mind when the supposed will was executed—the court ordered the deeds to be produced.

Lawlor v. Murchision, 553.

3. Where a defendant neglects to put in an answer, and the plaintiff files a traversing note under the 32nd order, the plaintiff is entitled to an order for production of documents pursuant to the terms of the 31st order.

Wilson v. Thompson, 557.

RECTIFYING DEEDS.

A deed executed in Lower Canada conveyed certain lands situate in Upper Canada to parties "and their successors," which words it was proved were sufficient to convey the fee simple according to the law of Lower Canada, and it was proved that the intention of the grantor in the deed was to convey the lands absolutely, the court ordered the devisee of the grantor to execute a release of the lands according to the law of Upper Canada.

Allan v. Thorne, 645.

REGISTRY ACT.

Registry Act—Fraudulent conveyance.

Although the prior registration of a deed executed without consideration confers no title upon the grantee, as against a *bona fide* purchaser for value, still, as the fact of such a deed being upon record will have the effect of creating a cloud upon the title, the court will decree its removal.

Ross v. Harvey, 649.

REVERSION.

Held per Curiam, (Blake, C. *dissentiente*)—that a sale by a sheriff, under a writ of *fieri facias* against lands, of the reversion after a term of 1000 years had been created by way of mortgage, carries with it the right to redeem the term.

Sheldon v. Chisholm, 655.

SPECIFIC PERFORMANCE.

1. The defendant had for some time used part of the plaintiff's land as a mill-pond, and differences existed between them in relation thereto, to put an end to which they entered into a written agreement that the plaintiff should sell to the defendant as much of the land as was, or had been overflowed by the water of the mill-pond, for a price which was proved to be much beyond the intrinsic value of the piece of land so sold. To carry into effect this contract, the plaintiff had the ground surveyed, but the survey was erroneous, and the deed which the plaintiff thereupon tendered, comprised, in consequence, less land than the defendant was entitled to have. The defendant refused this deed, procured a new survey to be made and tendered a new deed for execution by the plaintiff; and this deed the plaintiff refused to execute. When the first instalment of the purchase money became due the defendant tendered it, but did not pay it, in consequence of the non-execution of the conveyance. The defendant continued to use the land for a mill-

pond, and gave no intimation of his intention to abandon the contract, and twelve months afterwards the plaintiff filed a bill for a specific performance of the contract, which was decreed without costs. (Blake, C. diss.)

Paul v. Blackwood, 394.

2. Where a person already in possession of property entered into a contract with the agent of the proprietor for the purchase of the property, and it was the interest of both parties that the purchaser should go on making improvements, and did so, with the knowledge of the agent, without objection on his part, the improvements are such an acting on the contract as will take the case out of the Statute of Frauds.

Jennings v. Robertson, 573.

3. Where the agent of a person resident out of this province sold, by parol, half a lot of land of the principal, and afterwards wrote and sent to him a letter in which the agent detailed the terms of the contract, but mentioned the whole instead of the half of the lot, and the mistake was clearly proved; whether this would be a sufficient note in writing to satisfy the provisions of the statute.—*Quære.—Ib.*

4. One K., in 1835, purchased from the defendant part of lot number one, being a portion of a block of land owned by the latter; and two years afterwards agreed for the purchase of fifty feet additional land, and then erected his fences, enclosing on the north twenty-seven feet, on the west six feet, and on the south a quantity of land, which could not now be defined, additional to the original purchase. Of the land so enclosed K., and those claiming under him, remained in undisputed possession for about ten years, with the knowledge of the defendant, who acted as agent for some years in respect of this property and was constantly in the habit of visiting it whilst the fences were in the course of erection. The plaintiff having purchased this property from K. afterwards purchased from defendant the remainder of a lot situate on the south thereof, whereupon he removed the southern fence that had been erected by K., in order to put all the land into one parcel. On a plan of the property made by the defendant, a lane had been laid out on the south of the original purchase seventeen feet wide, and on the west another lane, six feet whereof were comprised within the limits of lot number one. K's fences enclosed the six feet on the west, and were supposed to have embraced the seventeen feet lane on the south, which, together with the twenty-seven feet to the north, made in all fifty feet. The vendor subsequently sought to recover possession of the strips of land to the north and west, whereupon the plaintiff filed a bill to restrain the action at law and and for a conveyance of the land. No place could be assigned to the fifty feet, unless the twenty-seven feet and six feet, formed part of it; and it having been established that

the purchase money for the fifty feet had been paid, the court made the decree as prayed, with costs.

Howcutt v. Rees, 527.

See also "Practice," 4.

SUBSTITUTIONAL SERVICE.

Where, after committing a breach of an injunction, the defendant left the jurisdiction of the court, substitutional service of the notice of motion to commit the defendant for the contempt was ordered to be made on his solicitor.

TRAVERSING NOTE.

See "Practice," 9.

VOLUNTARY CONVEYANCE.

The plaintiff made a promissory note in favor of his father-in-law, which the bill alleged had been given with the express understanding that the principal should never be called in by the payee, notwithstanding which an action was afterwards brought by him on this note, and judgment recovered; the plaintiff thereupon executed a conveyance of his real estate to a third party, in order to defeat the judgment at law; and a bill was afterwards filed to have the grantee declared a trustee for the plaintiff, or for payment of the alleged purchase money. A demurrer thereto, for want of equity was allowed.

Rosenberger v. Thomas, 635.

WAREHOUSEMAN.

(RECEIPTS OF.)

Where a warehouseman had delivered warehouse or transfer receipts to a party for one thousand barrels of flour, and afterwards delivered out some portion thereof at the instance of the party who had left it in his custody, on the understanding that the quantity so delivered out should be made up by other flour to be brought to his warehouse, and it appeared that such a course of dealing was in accordance with the usage of the trade, the court refused an injunction to restrain the delivery of flour subsequently brought by same party to the warehouse, although such latter flour had been assigned *bona fide* to the plaintiff, who had made advances thereon after it was stored, and although such flour had not been manufactured at the time of giving the warehouse receipts.

Wilmot v. Maitland, 107.

WIFE.

Semble—Wife entitled to a provision out of her equitable inheritance, the husband not maintaining her, and his assignee seeking the aid of the court to make her interest available. Gillespie v. Grover, 558.

WILL—CONSTRUCTION OF.

A testator devised all his property, real and personal, to his wife for life or widowhood and then directed the same to descend equally between his children, A., B., C., D. and E., their heirs (and assigns) lawfully begotten, and, in case of failure of issue, the same property, real and personal, to F., his heirs and assigns. *Held*, that the children took as tenants, in common with cross remainders, amongst them; and that B., C., D. and E. took the share of A., who died before the testator.

Heron v. Walsh, 606.

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