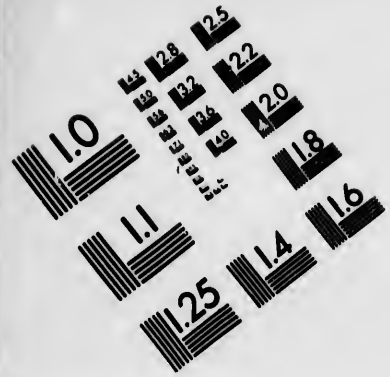
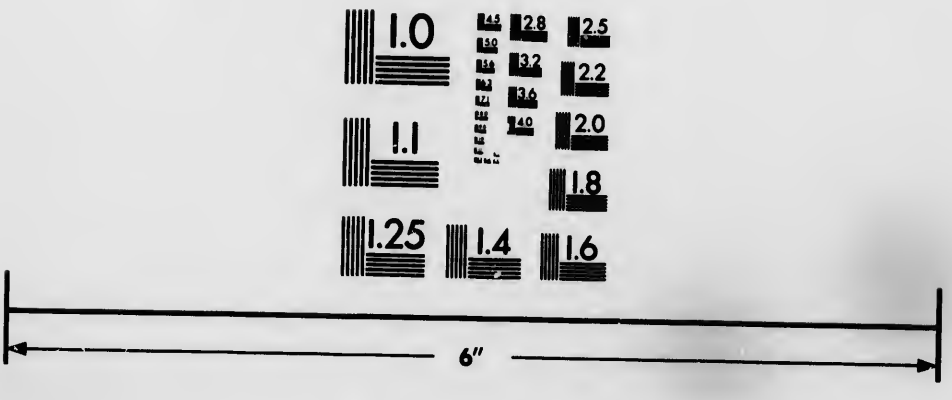
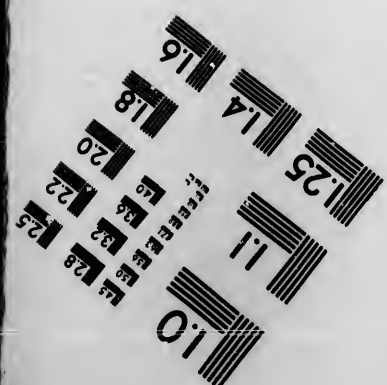
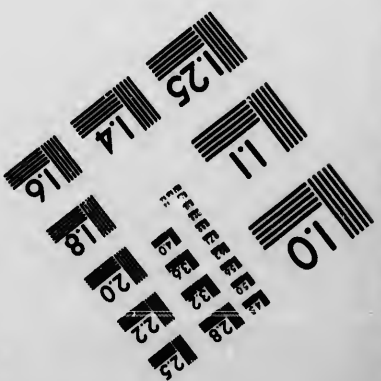


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

CIHM
Microfiche
Series
(Monographs)

ICMH
Collection de
microfiches
(monographies)

Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques

Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured covers/ Couverture de couleur
- ☐ Covers damaged/ Couverture endommagée
- ☐ Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- ☐ Cover title missing/ Le titre de couverture manque
- ☐ Coloured maps/ Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- ☐ Bound with other material/ Relié avec d'autres documents
- ☑ Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- ☐ Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

- ☐ Coloured pages/ Pages de couleur
- ☐ Pages damaged/ Pages endommagées
- ☐ Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☑ Quality of print varies/ Qualité inégale de l'impression
- ☐ Continuous pagination/ Pagination continue
- ☑ Includes index(es)/ Comprend un (des) index

Title on header taken from:/ Le titre de l'en-tête provient:

- ☐ Title page of issue/ Page de titre de la livraison
- ☐ Caption of issue/ Titre de départ de la livraison
- ☐ Masthead/ Générique (périodiques) de la livraison

☑ Additional comments:/ Commentaires supplémentaires: Pages 363-370 are repeated. Pages 455, 457-458 & 518 are incorrectly numbered pages 439, 441, 448 & 618.

This item is filmed at the reduction ratio checked below/ Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
							✓				

The copy filmed here has been reproduced thanks to the generosity of:

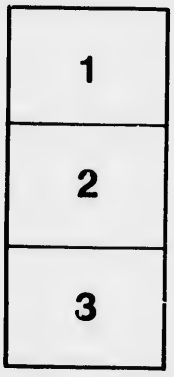
National Library of Canada

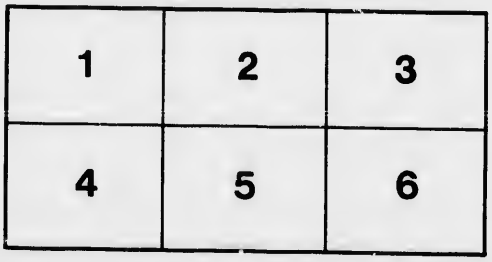
The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol ⟶ (meaning "CONTINUED"), or the symbol ▽ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:





L'exemplaire filmé fut reproduit grâce à la générosité de:

Bibliothèque nationale du Canada

Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole ⟶ signifie "A SUIVRE", le symbole ▽ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.

REPORTS OF CASES

ADJUDGED

IN THE

COURT OF CHANCERY,

OF

UPPER CANADA:

DURING THE YEAR 1856.

BY

ALEXANDER GRANT, Esquire,
BARRISTER-AT-LAW.

VOLUME V.

TORONTO:
HENRY ROWSELL,
KING STREET.

1857.

ROWSELL & ELLIS, PRINTERS, KING STREET, TORONTO.

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

" " WILLIAM HUME BLAKE, *Chancellor.*

" " JAMES BUCHANAN MACAULAY, and WILLIAM HENRY DRAPER, { *Chief Justice of the Court of Common Pleas.*

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

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

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

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

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

" " JOHN H. HAGARTY, " " "

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

HENRY SMITH, ESQUIRE, *Solicitor-General.*

A

TABLE

OF

CASES REPORTED IN THIS VOLUME.

Versus is always put after the name of the plaintiff.

TABLE

OF

CASES CITED IN THIS VOLUME.

Page.
. 586
. 121
. 209
. 194
. 406
. 477
625
364
471
336
563
537
272
236
475
349
550
585
546
237
328
336
121
620
343
474
566
260
204
359
500
201

REPORT OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

DURING THE YEARS 1853 & 1854.

IN APPEAL.

[*Before the Hon. the Chief Justice of Upper Canada, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Mr. Justice Draper, the Hon. Vice-Chancellor Esten, the Hon. Mr. Justice Burns, and the Hon. Vice-Chancellor Spragge.*] July 1 & 2 and Sept. 22, 1853

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

MATTHEWS v. HOLMES.

Mortgage—Parol evidence.

The decree of the Court of Chancery in the cause of *Holmes* v. *Matthews* (*ante* volume 3, page 379) reversed, and the plaintiff's bill dismissed with costs.

The circumstances under which parol evidence should be admitted to give to an absolute deed the operation of a mortgage between the parties considered and discussed.

Statement.

This was an appeal from the decision of the Court of Chancery, as reported in the third volume of these reports.

The bill in the original cause was filed by *John Holmes* (the respondent), as assignee of the bankrupt estate of *Alfred T. Jones*, against *Catherine Matthews* (the present appellant), stating:

1853. Matthews v. Holmes.

"That at the time of the issuing of the said commission the said *Alfred T. Jones* was entitled to the equity of redemption of certain freehold property in the said town of London, being lots eleven and twelve on the south side of Dundas street east, and lots eleven and twelve on the north side of King street east, in the said town of London, which he, the said *Alfred T. Jones*, had assigned and transferred to *Edward Matthews*, late of London aforesaid, since deceased, by an indenture or assignment, under the hand and seal of him, the said *Alfred T. Jones*, bearing date the second day of September in the year of our Lord one thousand eight hundred and forty, to secure to the said *Edward Matthews*, nominally, the sum of one hundred pounds, which was stated to be the amount of a loan then made by the said *Edward Matthews* to the said *Alfred T. Jones*; but which sum of one hundred pounds was not in fact owing, but only a part thereof was owing, from the said *Alfred T. Jones* to the said *Edward Matthews* on the said second day of September, one thousand eight hundred and forty, and such part was alone in fact secured by the said assignment.

Statement

"That the said one hundred pounds was the sum then stated to be lent and advanced by the said *Edward Matthews* to the said *Alfred T. Jones*; but the said *Edward Matthews* retained and withheld out of the said sum of one hundred pounds the sum of fifteen pounds—an illegal bonus on the said loan—in addition to the legal rate of interest thereon; and the said *Edward Matthews* paid to the said *Alfred T. Jones* the sum of forty-four pounds out of the said one hundred pounds, and the remaining forty-one pounds he paid to the Government of this province for arrears due on the said lots; and on the twentieth day of January, one thousand eight hundred and forty-three, he, the said *Edward Matthews*, as assignee of the said *Alfred T. Jones*, under the said indenture or assignment, applied for and received letters patent from the crown for the said lots, and became the owner in fee thereof, subject to the equity of redemption of the said *Alfred T. Jones* in the said lots, on payment by him, the said *Alfred T. Jones*, of the sum of eighty-five pounds, and interest from the said second day of September, one thousand eight hundred and forty.

"That after the said second day of September, one thousand eight hundred and forty, and before the said bankruptcy of the said *Alfred T. Jones*, the said *Edward Matthews* became possessed of the legal estate in certain premises in the said town of London, being the west part of lot seventeen on the north side of Dundas street in the said town, on which said premises there was erected at the time he, the said *Edward Matthews*, became possessed as aforesaid, a building, consisting of a shop and dwelling house, the property of him, the said *Alfred T. Jones*, as he, the said *Edward Matthews*, when he so became possessed, well knew; and for a time after he, the said *Edward Matthews*, became possessed of the said premises he, the said *Alfred T. Jones*, remained in possession of the said house and shop as of his own property, and he, the said *Edward Matthews*, about the same time made various repairs on the same at the request of, and being employed by, the said *Alfred T. Jones*, and charged the said *Alfred T. Jones* for such repairs, and 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 all the land on which it stood; but afterwards the said *Edward Matthews*, as owner of the said land on which were erected the said house and shop, ejected the said *Alfred T. Jones* from the said house and shop, and took the same himself, and he, and those under him, have ever since been in possession of the same, and received the rents and profits thereof, and claimed and held the same as their own, and the said house and shop are held and claimed as her own by the defendant hereto as holding or claiming under the said *Edward Matthews*, and the said house and shop are worth more than the said sum of eighty-five pounds and interest thereon; and your orator believes, and the said *Alfred T. Jones* believes, that there is in fact nothing now due on the security of the said premises so assigned to the said *Edward Matthews* as aforesaid by the said *Alfred T. Jones*.

Statement.

"That the said *Edward Matthews* has since the said assignment departed this life, leaving a will, whereby he devised all his real estate, and all his interest in real estate, to *Catherine Matthews*, the defendant hereinafter named, whom he also by his said will appointed

1853. his sole executrix, who has since proved the said will in the proper court, and is entitled as executrix of him, the said *Edward Matthews*, to receive the principal money and interest, if any there be, due on the security of the premises aforesaid.

Matthews v. Holmes.

"That your orator was, on the twenty-fifth day of June, one thousand eight hundred and fifty-one, duly appointed assignee of the estate and effects of the said *Alfred T. Jones* by an order made on that day in the Court of Bankruptcy for the County of Middlesex, and your orator, as such assignee, is entitled to the equity of redemption in the said premises; and, by an order of the same date made in the said court, in pursuance of the statute in such case made and provided, your orator was authorized and directed to take proceedings to redeem the said premises for the benefit of the creditors of the said *Alfred T. Jones* who have proved their debts in the said court; and the creditors of the said *Alfred T. Jones* have, and your orator as assignee as aforesaid has made and caused to be made application to the said defendant, *Catherine Matthews*, to come to an account in respect to the said mortgage money and interest, and to receive the same, if any there be due, and reconvey the said mortgaged premises upon payment thereof, and of any costs due in respect of the said security, but the said defendant has not done so. To the end, therefore, that the said *John Holmes*, as assignee as aforesaid, may be let in to redeem the said mortgaged premises, and that the same may be conveyed to him, as such assignee as aforesaid, upon payment of the principal money and interest and costs due and owing, if any there be, upon the said security, and if it shall appear that there is nothing due on the said security, that the said *John Holmes* may be so let in to redeem without costs, or that the defendant may be ordered to pay his costs of this suit; and if the said debt shall appear to be overpaid, then that the said defendant may be ordered to repay to your orator, as such assignee, what has been so overpaid, with his costs of this suit. And that for the purposes aforesaid, all proper directions may be given and accounts taken, and that in taking the said accounts the Master may be directed to enquire and state the value of the said house and shop on the premises hereinbefore in that behalf mentioned, being the west part

Statement.

of lot seventeen on the north side of Dundas street, in the town of London, and to give credit to your orator, in the said account, for its value." 1853. Matthews v. Holmes.

The defendant, *Catherine Matthews*, by her answer stated as follows:

"She doth not believe that the said *Alfred* was, at the time of the issuing of the commission of bankruptcy against him, as in the said bill mentioned, entitled to the equity of redemption of the property in the said bill in that behalf referred to. And this defendant, speaking to the best of her information and belief, further saith no part of the sum of one hundred pounds which is mentioned in the instrument in the bill mentioned of the second September, one thousand eight hundred and forty, as the consideration of such instrument, was retained or withheld as a bonus on the loan alleged by the said bill to have been made. And this defendant further saith she believes that *Edward Matthews* in the bill named did not sign during his lifetime, and this defendant saith she hath not signed, and she doth not believe any other person interested under his will hath signed since his decease, any writing manifesting or proving any trust or confidence, or any declaration or creation of any trust or confidence of any of the hereditaments in respect of which relief is sought in and by the said Bill: nor was the interest claimed therein in and by the said bill put in writing and signed by the said *Matthews* in his lifetime, or by this defendant or any other person interested under the will of the said *Matthews* since his decease, or by any agent of the said *Matthews*, or this defendant, or any person interested as aforesaid thereunto lawfully authorized by writing or otherwise: nor is there any contract in writing between the said *Alfred* or the said plaintiff and the said *Matthews* in respect of any equity of redemption in the same hereditaments or any part thereof, and signed by the said *Matthews*, or by this defendant, or by any other person interested under his will, or by any other person thereunto by the said *Matthews* or by this defendant or by any person interested as aforesaid lawfully authorised. And this defendant claims the benefit of the Statute of Frauds as a bar to the plaintiff's claim. Statement.

1853.

Matthews v. Holmes.

"And this defendant further, speaking in manner aforesaid, saith that the said *Matthews* received possession of the said property not long after the execution of the said assignment, and remained in such possession until his death, which took place on the twenty-second day of June, one thousand eight hundred and fifty. And this defendant saith she hath been in possession thereof ever since, for the benefit of the persons therein interested, under the will of the said *Matthews*. And this defendant, further speaking in manner aforesaid, saith that the taxes on the said premises were during the same period paid by the said *Matthews* in his lifetime, and by this defendant since his death, for the benefit of the persons interested under his will. And this defendant further saith that, so far as this defendant hath been able to discover, the said *Alfred* did not make any claim to any equity of redemption in the said property for some time before his bankruptcy, and did not claim it at the time of his bankruptcy, and that it was never claimed under his bankruptcy until some time after the death of the said *Matthews;* that in case it should appear that by the original agreement the said assignment was intended merely as a security for a loan (which this defendant believes to have been the case) the equity of redemption therein was, this defendant hath no doubt, subsequently disposed of to the said *Matthews*, and thus put an end to by mutual agreement. And this defendant relies on the Statute of Limitations as constituting a bar to the plaintiff's claim; and also relies on the lapse of time and the acquiescence of all parties as constituting such bar independently of the Statute of Limitations.

Statement.

"And this defendant further, speaking to the best of her information and belief, saith, in regard to the west part of lot No. 17, on the north side of Dundas street, in the town of London, that the said *Matthews* bought, and received a conveyance of, the same on or about the twenty-ninth April one thousand eight hundred and forty-two from one *Aby B. Jones* and his wife, the said *Aby* being the owner thereof in fee, subject to a mortgage previously executed thereon to *George J. Goodhue*, and another mortgage to the said *Matthews:* the latter being for the sum of two hundred pounds, of which the sum of one hundred and ten

pounds four shillings and sixpence was received in cash by said *Aby*, and the residue was for a debt of the said *Alfred*, who is a brother of the said *Aby*. That the said purchase expressly embraced, and was by all parties intended to embrace, and understood as embracing, the building in the said bill mentioned as well as the land; that the consideration for such purchase was three hundred and fifty pounds, and was the full value of the building and land together, and would have been far too much for the land without the building; that the said *Alfred* knew of the sale, while the same was matter of negociation between the said *Aby* and the said *Matthews*, and at the time the same was completed, but never forbade the sale nor pretended that the same should be subject to his claim for the building, or that the said *Matthews* should either pay or be accountable to him therefor. And this defendant believes no claim for the value of the said building was ever afterwards made by the said *Alfred*, nor by any other person, until long after the death of the said *Matthews*. That in October, one thousand eight hundred and forty-four, the said building was destroyed by fire. And this defendant insists that the claim now made in respect thereof, if it could ever have been sustained, has become barred by the Statute of Limitations, and also by the lapse of time independently of that statute.

Statement.

"And this defendant relies on every other objection to the plaintiff's claims in respect of all the matters referred to in his bill, which the facts of the case and the evidence in relation thereto may warrant. And this defendant verily believes the claims set up in the said bill are trumped up claims, for which there is no foundation in equity or in law: and which the said *Alfred* hath induced the said plaintiff to put forward, in consequence of the property which the bill seeks to redeem having very lately risen in value, the same being near the intended railroad depot; and that this suit is really for the benefit of the said *Alfred*."

The decree of the Court below declared the assignment a security, and directed a reference to the Master at the town of London, to "take an account of what (if anything) is due and owing to the defendant for principal money and interest, on the

1853. Matthews v. Holmes. mortgage security in the pleadings mentioned; and in taking such account the said Master is to make to the parties all just allowances; and in case the said Master shall find that any thing remained due to the said defendant at the time of filing the plaintiff's bill, it is ordered that he do tax to the said defendant her costs of this suit and add the same to what shall remain due for principal and interest; and upon the said plaintiff paying to the said defendant what shall remain due for principal, interest and costs as aforesaid, within six months after the said Master shall have made his report, at such time and place as the Master shall appoint,—It is ordered that the said defendant do reconvey the four lots comprised in the said mortgage security, being lots numbers eleven and twelve on the south side of Dundas street, and lots numbers eleven and twelve on the north side of King street, in the town of London, free and clear of all incumbrances done by her, or any claiming by, from or under her, and deliver up all deeds and writings in her custody or power relating thereto, upon oath, to the said plaintiff or to whom he shall appoint. But in default of the said plaintiff paying to the said defendant such principal money, interest and costs aforesaid, by the time aforesaid,—It is ordered that the plaintiff's bill of complaint do stand dismissed out of this Court, with costs to be paid by the said plaintiff to the said defendant, and it is hereby referred to the said Master to tax the same. But in case the Master shall find that there was nothing due to the said defendant at the time of filing the said bill, then this Court doth reserve the consideration of further directions and costs. And this Court doth order and decree that the plaintiff's bill of complaint do stand dismissed out of this Court, in so far as the same relates to lot number seventeen on the north side of Dundas Street, in the town of London, without prejudice to the plaintiff filing a new Bill in regard thereto, as he may be advised."

Statement.

From this decree the defendant appealed, assigning as reasons for such appeal— 1853.

Matthews v. Holmes.

"1. Because, as to the lots 11 and 12, there was no sufficient admissible evidence of the alleged equity of redemption claimed by the plaintiff below having existed.

"2. Because, if there was sufficient admissible evidence thereof, there was likewise sufficient admissible evidence that the same had been surrendered or abandoned, and had ceased to exist before the plaintiff's bill was filed; or if not, the relief sought for should not, under the circumstances, have been granted without an inquiry or issue being first directed as to the same.

"3. Because, having reference to the nature of the plaintiff's case, the lapse of time which occurred after the transactions in question took place and before the filing of the bill, the conduct and dealings of the parties in the mean time, the proceedings in bankruptcy, the death of *Matthews*, the non-production of the assignment to him, and all the other circumstances of the case, as mentioned in the answer or appearing by the evidence, the plaintiff was not entitled to the relief granted to him by the decree in respect of the said lots. Statement.

"4. Because, as to lot number 17, the bill should have been dismissed absolutely; and not without prejudice to a new bill being filed."

The respondent's reasons in support of the decree were—

"1. That the transaction between *Alfred T. Jones* and *Edward Matthews* in the bill mentioned, of September one thousand eight hundred and forty, was manifestly a mortgage transaction; and the decree is right in permitting the assignee of the said *Alfred T. Jones* to redeem the premises assigned at that time to the said *Edward Matthews* as in the bill stated, and the right to redeem the said premises has not been barred by any such means as in the answer stated or in any way.

1853.

Matthews v. Holmes.

"2. That the evidence read in the cause was sufficient to prove the said transaction to be in fact a mortgage, because parol testimony of that fact was properly admissible in the cause, and sufficient evidence of that description was adduced; and because, even were that evidence not sufficient, the evidence of Mr. *Wilson* and Mr. *Becher*, and the Exhibit B by them referred to, afford written evidence of the real nature of the contract sufficient to take the case out of the operation of the Statute of Frauds, and sufficient to let in the parol testimony to prove the nature of the contract.

"3. That the evidence in the first and second reasons herein before referred to is the more clearly admissible, because it is not denied by the answer but in a manner admitted, that the transaction aforesaid was originally a mortgage.

"4. That although in the answer of the appellant it is suggested to the effect that the said *Alfred T. Jones* parted with his equity of redemption in the said premises to the said *Edward Matthews*, there is no sufficient evidence on the part of the appellant in support of any such allegation, and no evidence whatever of any sale or assignment, legal or equitable, of the said equity of redemption.

Statement.

"5. And that for other reasons, and particularly for the reasons mentioned in the judgment of the Court below, the said decree ought to be sustained and this appeal dismissed with costs."

Owing to the frequent reference to the exhibits filed on the hearing, in some of their Lordships' judgments, it is thought advisable to set them forth here:

EXHIBIT A.

(*In the original the numbers are written out in words.*)

"Memorandum of an agreement entered into at London, Province of Canada, this 20th day of July, in the year of our Lord 1841, between *Aby B.*

NOTE.—Both parties admitted that an unsuccessful search had been made in the Government office for the assignment from *Alfred T. Jones* to *Matthews*; and the same could not therefore be produced.

1853.

Matthews v. Holmes.

Jones, of the town of London, and province aforesaid, hair-dresser, on the one part; and *Edward Matthews*, of the same place, architect, of the second part,

"WITNESSETH that I, *A. B. Jones*, have this day bargained and sold to the said *Edward Matthews* the west part of my property, containing 21 feet on the north side of Dundas street, bounded by Mr. *Dickson's* property on the west, and a shop now in the occupation of Mr. *Hugh Falconer* on the east, and running back to North street; and I hereby covenant and agree to convey the same to the said *Edward Matthews* as soon as Mr. *Wilson* returns. And I, the said *Edward Matthews*, agree to pay for the above named property £350, in manner following: £200 to release a mortgage now held by said *Edward Matthews*, and £150 in part of releasing a mortgage held by *George J. Goodhue*, the first payment of which will become due in January next, and the remainder annually until the full sum of £150 shall be paid.

"In Witness whereof we have set our hands and seals, the day first above written.

"A. B. JONES.
"EDW. MATTHEWS.

"Signed in the presence of *John Wilkinson*."

Statement.

EXHIBIT B.

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	
	Do. on account	21	17	6	
	Due on Lots 11 and 12, above which Mr. Matthews is to pay Government	42	18	0	
	Cash check to balance ...	110	4	6	
					£300 0 0

[Endorsed on which are the following memoranda: "Memorandum from A. T. and A. B. Jones," and "£300 loaned for one year."]

1853.

Matthews v. Holmes.

EXHIBIT C.

£110 4s. 6d. *London, 3rd Sept.*, 1840.

The Bank of Upper Canada will pay A. B. Jones the sum of one hundred and ten pounds 4s. 6d. cy.

EDW. MATTHEWS.

W. W. STREET, Esq., Office at London.

Endorsed A. B. JONES.

EXHIBIT D.

[What has been called Exhibit D comprises three separate slips of paper, which were produced wafered together, and are as follow.]

(No. 1.)

London, 31*st December*, 1841.

Mr. A. T. JONES,

To EDW. MATTHEWS, *Dr.*

1841.

Statement.

Dec. 11.	To a carpenter fixing supports to joists, putting in lap-studs, and making good work insufficiently performed by C. Griffith, 2½ days, at 7s. 6d.	£0	18	9
	To 28 ft. lumber, and 4 lb. nails to do.....	0	4	4
		£1	3	4 Cy.

(No. 2.)

DUNDAS STREET.

Paid towards lots..... £41 18 2½

Exclusive of some charges at the present moment that cannot be recollected; subject, nevertheless, to a deduction of between £2 and £3, the amt. of his act. against me.

NOTE.—On the back of this slip of paper there are the following figures in a different hand:

43	1	9½
41	18	2½
85	0	0

(No. 3.)

£1 10s. 0d. Cy. *London, 22nd Jan.*, 1842.

Received from A. T. Jones six dollars on account.

EDW. MATTHEWS.

1853.

Matthews v. Holmes.

EXHIBIT E.

(*One piece of paper.*)

£12 18s. 9½d. Cy. *London, 10th June*, 1841.

Received from Edw. Matthews the sum of twelve pounds 18s. 9½d. cy. on act.

A. T. JONES.

£11 14s. 5d. Cy. *London, 10th June*, 1841.

Received from Edward Matthews the sum of eleven pounds fourteen shillings and five pence, being for money paid to the sheriff on my account.

A. T. JONES.

EXHIBIT F.

Schedule of debts due to the creditors of A. T. Jones.

John Holmes, London, notes and cash	£57	0	0
George Oliver, for shoemaking	2	13	0
J. C. Brown, Toronto, note in execution.....	40	0	0
E. Matthews, London, four notes paid but not given up	64	15	0
D. Deney, Hamilton, execution	28	0	0
L. Freeman, London, balance on security	13	0	0
John Balkswell, " balance on account	3	0	0
L. Peters, " execution	0	15	0
—— Smith, Buffalo, N. Y., note	3	10	0
R. Smith, London, order on E. Matthews, not paid.....	6	0	0
E. Ritchie, Hamilton, note payable April 1st, 1845, endorsed by A. Wheeler, and secured by F. Miller's note for £6 0s. 0d.	....		
Doctor Lee, London, Dr.'s bill	....		
L. Perrin, balance on cognovit	6	0	0
A. B. Jones, of London, money paid and interest	59	0	0

Statement.

(Signed) A. T. JONES.

EXHIBIT G.

(*Being Alfred T. Jones's affidavit in bankruptcy.*)

"I, ALFRED T. JONES, of London, Coffee-House keeper, do swear that the accounts of my creditors, contained in the Schedule made and signed by me, and now in the hands of the assignee chosen by my creditors, is in all respects just and true, according to the best of my belief and knowledge, excepting the equitable claim I may have against *Edward Matthews* for about sixty odd pounds. And I do further swear that I have delivered to *James Hamilton*, Esquire, sheriff of the London District, all my estate, except such

1853. Matthews v. Holmes.

parts as are by law exempted from attachment, and such as have been necessarily expended for the support of myself and family; and all my books of account, deeds and papers relating to my said estate, that were in my possession or power when the same were demanded of me by the said sheriff; and that I have delivered to the said assignee all such of my said estate, books, deeds and papers, as have since come to my possession; and that if any other estate, effects, or other things which ought to be assigned and delivered to the said assignee shall hereafter come to my knowledge or possession, I will forthwith disclose or deliver the same to the said assignee; and I do further swear that there is not any part of my estate or effects concealed, made over, or disposed of in any manner for the future benefit of myself or my family, or in order to defraud my creditors.

(Signed) "A. T. JONES.

"Sworn at London, in the London District, this 25th day of May, 1844, before me, Henry Allen, Judge of L. D. Court."

Statement.

EXHIBIT H.

(*Being the inventory referred to in said affidavit.*)

"Inventory of the estate, real and personal of *Alfred T. Jones*, under a Commission of Bankruptcy issued by *Henry Allen*, Esquire, Judge of the London District Court, on the 22nd day of March, 1844, viz.:

"1 30-inch stove, with 2 drums, 10 lengths of pipe, 4 elbows; 1 cooking stove, 6 lengths of pipe, 1 elbow and cooking apparatus complete; 1 coffee boiler, 2 pails, 1 axe, 1 carpet about 14 yards square, 1 hearth rug, 4 chairs, 1 black-walnut bedstead, 1 cherry do., 2 straw beds, 3 pairs blankets, 1 pair sheets, 4 pairs pillow-cases, 4 cases, 3 looking-glasses, 1 washstand and basin, half a dozen plates, half a dozen cups and saucers, half a dozen knives and forks, half a dozen German silver table spoons, 1 teapot, 1 milk jug, 2 pitchers, 3 oyster knives, half a dozen razors, 1 pair curling tongs, 2 pair scissors, 1 hone, 1 pair curtains, 1 pair red moreen curtains, 1 day book, 1 ledger, a package of notes and accounts.

(Signed) "JAMES HAMILTON,

"London, March, 1854. *Sheriff, L. D.*"

1853.
Matthews v. Holmes.

EXHIBIT I.

"Memorandum of an agreement entered into, this twentieth day of February, in the year 1843, between *Edward Matthews* of London, architect, and *Thomas Craig*, of the same place, stationer: that is to say, the said *Edward Matthews* demises and lets to the said *Thomas Craig* the shop, dwelling-house and premises he now occupies, on Dundas street, in London aforesaid, next door east of the house occupied by Mr. *Thos. C. Dixon*, hatter, for one year, to commence from the 20th day of February, instant, at the yearly rent of £50, of lawful money of C. W., to be paid quarterly, on the 20th day of May, August, November and February next. And the said *Thomas Craig* covenants with the said *Edward Matthews* to pay the said rent at the times and in the manner aforesaid, over and above all rates, taxes and assessments, and to yield and deliver up the same at the expiration of this lease, in such repair as they now are, wear and tear, and accident by fire or tempest excepted, and to give three months' notice previous to the end of the term herein demised, if he intends to leave them; not to sublet without the consent in writing of the said *Edward Matthews*. And the said *Edward Matthews* covenants with the said *Thomas Craig* that he shall have peaceable and quiet possession of the said shop and dwelling-house, and premises during the said year hereby demised to him, provided the rent be duly paid as aforesaid; and to give to the said *Thomas Craig* three months' notice to quit at any time he may require the house thereafter. In witness whereof, the parties hereto set their hands and seals, this twenty-third day of February, 1843.

Statement.

"EDWARD MATTHEWS.
"THOMAS CRAIG.

"Signed, sealed and delivered in the presence of T. C. DIXON."

EXHIBIT J.

(*Exhibit J. & K. are the notes filed in bankruptcy by Matthews, as follow.*)

£18 15s. 7½d. *London, 18th July*, 1842.

Ten days after date I promise to pay to *Edward Matthews*, or bearer, the sum of eighteen pounds fifteen shillings and sevenpence halfpenny, with int., for value received.

(Signed) A. T. JONES.

Witness, JAS. A. WILKINSON.

1853.

Matthews v. Holmes.

EXHIBIT K.

£39 1s. 6d. Cy. *London, 1st January*, 1842.

Three months after date, I promise to pay to *Edward Matthews*, or bearer, the sum of thirty-nine pounds 1s. 6d. cy. with int., for value received.

(Signed) A. B. JONES.

EXHIBIT L.

1839.

"Memorandum of bills paid for building of house on Lot No. 17, North side of Dundas street, London, rendered to and paid by *Alfred T. Jones*."

To bill paid Smith, Matthieson and Moore, London.

The items of which were set forth, amounting in all to £10 9 7

1839.

	To P. Macdonald for frame	£46	15	0
	To finishing joiner's work	57	10	0
	To check on Bank to pay for lumber	15	0	0
	To cash for lumber £2, to lumber from Putnam's, £10 13s. 4d. .	12	13	4
Statement.	To McCam, for drawing lumber, 12s. 6d.; to A. T. Jones, 10s.	1	2	6
June 8th.	To McKnight for lumber, £4 8s. 3d.; 11th, to Dyer, for lumber, £2 0s. 3d.	6	8	6
" 21st.	Shingles, £1 2s. 6d.; to Pierce, 15s.; 28th, to Mr. Hull for lumber, 16s. 11d.	2	4	5
July 4th.	McKnight for lumber, £2; 27th, to P. Johnston, 8s. 9d.	2	8	9
" 14th.	James Bailey, £6 10s.; 15th, to Elles for lumber, 11s. 3d.	7	1	3
Sept. 13th.	Ashbury, 12s. 6d.; 21st, to lath boards, £2 8s. 3d.	3	0	9
	Cash to Kimball for frame	11	15	0
	To amt. of account brought down	£166	9	6

1839.

To bill paid Joyce and Matthews.

Items given in detail, and the amt. of account brought down is ... £5 1 9

1839.

To bill paid Lawrason and Co., London.

Items also given, and amount of bill brought down £6 0 4

1839. 1853.

To bill paid Mr. A. Kerr & Co., London.

June 20th.	2 pair hinges	£0	6	3	Matthews v. Holmes.
" 11th.	5 lb. nails	0	2	6	
	Amount of account brought down.	£0	8	9	

1839.

To bill paid J. W. Garrison, London.

Aug. 27th.	To 5 doz. screws, 2s. 9d.; Aug. 27, 1 box glass, £2 12s. 6d. ..	£2	15	3

1839.

To bill paid C. Combs, London.

Jan. 17th.	To 25 lb. hone	£0	4	4½
	Paid Jackson	0	15	0
	Amount of account brought down	£0	19	4½

Paid A. Kerr and Co.,	£0	8	9	
" J. W. Garrison .	2	15	3	
" Smith & Moore, and Co.	10	9	1	
" Lawrason & Co.	6	0	4	
" Joyce and Mat. thews	5	1	8	Statement
" Combs.....	0	19	4½	
Building Acct.	166	9	6	

Amount of act. in full £192 3 11½

London, February 19, 1841.

1839.

	Amount of act. brought forward.	£192	3	11½
	To E. Matthews' bill, sworn to by Mr. Steads in the examination	21	15	0
Feb. 19th, 1841.	To Mr. John Bouser's bill for painting	10	0	0
	Amount of account brought down	£214	3	11½

1853. 1841.

Matthews v. Holmes.

Sept. 15th. To frame in the rear, sworn to by Caleb Griffiths, joining the aforementioned building on Lot 17, north of Dundas street, London	13	0	0
To Mr. J. Craig, bill for privilege of building additions, sworn to in the examination	5	0	0
To Mr. Edward Matthews, bill for joiner work on the additions, and finding lumber and nails for the same, sworn to by George Washington in the examination	75	0	0
To Mr. George Washington, bill for plastering the new additions, sworn to by him in the examination	12	10	0
To bill from Mr. Putnam and others, in lathing, lime and nails, for new additions	5	0	0
Amount of act. in full, brought down.	£324	13	11½

Statement. London, December 1st, 1841.

EXHIBIT M.

Comprises—1. The petition of *A. B. Jones* and plaintiff, for a meeting to appoint a new assignee in place of *Matthews*, deceased.

2. The order (May 29, 1851) for the meeting (June 13, 1851) made on the said petition.

3. The authority of the judge in bankruptcy (25th June, 1851) for the institution of the present suit.

4. The affidavit of *Alfred T. Jones*, filed in bankruptcy in support of the said petition, as follows:

"In the Court of Bankruptcy for the County of Middlesex, in the matter of *Alfred T. Jones*.

"*Alfred T. Jones*, of London, in the said county, the above named bankrupt, maketh oath and saith that in the year of our Lord one thousand eight hundred and forty one this deponent borrowed from *Edward Matthews*, late of London, aforesaid, the sum of one hundred pounds, to be repaid the said *Edward Matthews* in one year; to secure the payment of which said sum this deponent gave the said *Matthews* an

1853.

Matthews v. Holmes.

assignment of his interest in lots eleven and twelve south of Dundas street east, and lots eleven and twelve north of King street, in the town of London, for which no patent had yet issued from the Crown, That forty pounds, part of the said sum, was applied by the said *Matthews* to the balance due to the Crown for the said lots, with this deponent's assent; and this deponent received the balance, less fifteen pounds, which the said *Matthews* retained as a bonus for the said loan. That the said *Matthews* afterwards obtained the said patent from the Crown, subject, however, as this deponent is advised, to the right of this deponent, or those who claim under him, to redeem the said premises, on payment of what is actually due on account of the said loan. That at the time of the said loan the said *Matthews* agreed verbally not to take out the patent for the said lot, or apply then, or during the time of the re-payment of the said loan; but that the said *Matthews*, in breach of his agreement, applied for the said patent before the time agreed upon, and obtained the patent accordingly.

(Signed) "A. T. JONES."

"Sworn before me, at London, in the County of Middlesex, this 13th day of June, 1851.

"JAS. E. SMALL."

Statement.

5. The bond (dated 23rd June, 1851) of the plaintiff *John Holmes*, *Aby B. Jones*, and *Mareus Holmes*, to the creditors in bankruptcy of *Jones*, conditioned for the indemnification of the creditors against the costs of this suit.

Mr. *Mowat*, for the appellant, argued in favour of her reasons, and the following are some of the authorities he referred to:

Argument.

Defendant may confess the existence of a parol trust, and yet claim the benefit of the Statute of Frauds (*a*). Here the parol evidence is inadmissible, as well as insufficient to establish the existence of any fiduciary relation, or the fact that the deed was intended to operate otherwise than as an

(*a*) *Story's* Equity Jurisdiction, sec. 768.

1853. Matthews v. Holmes.

absolute conveyance of all *Jones's* interest in the property assigned—*Le Targe* v. *De Tuyll* (*b*), *Howland* v. *Stewart* (*c*), *Greenshields* v. *Barnhart* (*d*), *Tull* v. *Owen* (*e*). Here nothing that is shown to have taken place between *Matthews* and *Jones* was sufficient to evidence the existence of an equity of redemption outstanding—*Lord* v. *Kellett* (*f*), *Wiggins* v. *Peppin* (*g*), *Egg* v. *Barnett* (*h*), *Cooper* v. *Turner* (*i*), *Sellen* v. *Norman* (*j*), *Lucas* v. *Novosilieski* (*k*), *Colsell* v. *Budd* (*l*), *Dickin* v. *Ward* (*m*), *Bealey* v. *Shaw* (*n*). Independently of every other consideration, the delay which has occurred in filing the bill offers a sufficient defence to the suit—*Smith* v. *Clay* (*o*), *Haworth* v. *Bostock* (*p*), *Sibbering* v. Earl of *Balcarras* (*q*); and the death of one of the parties to the original transaction gives additional weight to the objection on the ground of delay.—*Jackson* v. *Jackson* (*r*).

Argument.

As to any presumption that might be said to arise, he referred to *Best* on Presumptions, page 42; *Taylor* on Evidence, secs. 97 and 116, and the cases there cited. There is a material variance between the pleadings and proofs—*Mundy* v. *Joliffe* (*s*), *Gresley* on Evidence, 171. The first transaction was at most rather a sale with a conditional right to re-purchase than a mortgage, and in such cases time is extremely material—*Williams* v. *Owen* (*t*), *Joy* v. *Birch* (*u*), *Davis* v. *Thomas* (*v*). After the proof in bankruptcy, there can be no suit in equity—*Clark* v. *Capron* (*w*). Dismissal of the bill without prejudice to filing a new one never takes place in a case of this kind—*Stevens* v. *Guppy* (*x*), *Lindsay* v. *Lynch* (*y*), *Woollam* v.

(*b*) Ante vol. 1, p. 227. (*c*) Ante vol. 2, p. 61. (*d*) Ante vol. 3, p. 1.
(*e*) 4 Y. & C. 202. (*f*) 2 M. & K. 2. (*g*) 2 Bear 404.
(*h*) 3 Esp. 197. (*i*) 2 Sta. 498. (*j*) 4 C. & P. 82.
(*k*) 1 Esp. 296. (*l*) 1 Camp. 29. (*m*) 15 Jur. 834.
(*n*) 6 East. 208. (*o*) 3 B.C.C. 639. (*p*) 4 Y. & C. 16.
(*q*) 3 DeG. v. S. 735. (*r*) 9 Ves. 604. (*s*) 9 Sim. 413.
(*t*) 12 L. J. N. S. ch. 207. (*u*) 4 C. & F. 89.
(*v*) 1 R. & M. 506. (*w*) 2 V. Jr. 668. (*x*) 3 R. 185.
(*y*) 2 Sch. & L. 1.

Hearn (*a*), *Mortlock* v. *Buller* (*b*), *Macnamara* v. *Arthur* (*c*); and even an inquiry should not be directed—*Bellamy* v *Sabine*. (*d*). 1853. Matthews v. Holmes

Mr. *R. Cooper*, for the plaintiff, in the Court below, supported the respondent's reasons, and adduced in support of them the cases cited in the Court below, and the views taken by the Court in pronouncing judgment.

Sept. 22. Judgment.

ROBINSON, C. J.—The principal object sought by this appeal is the reversal of the decree of the Court of Chancery in regard to the four lots 11 and 12 on King street and Dundas street, alleged in the bill to have been mortgaged by *Alfred Jones* to *Edward Matthews*, now deceased; the defendant *Catherine Matthews* being the executrix and devisee of *Edward Matthews* and the plaintiff *Holmes*, the assignee of the bankrupt estate of *Alfred Jones*. The decree recognizes a right of redemption in the assignee of *Jones's* estate; and whether the court was warranted by the evidence in determining that the transaction between *Alfred Jones* and *Matthews* was in fact a mortgage, although the conveyance executed by *Jones* was in its terms absolute, and that an equity of redemption was subsisting in *Jones* at the time of his bankruptcy, are the questions to be considered. I will read the substance of the bill and answer, which are short. [His Lordship here stated the pleadings].

The assignment made in September 1840, by *Alfred Jones* to *Matthews*, which is the foundation of the suit, was not produced in evidence by either party. Its non-production is accounted for by the assertion that it cannot be found in the government office. No precise evidence was attempted to be given of its contents.

In disposing of the case without knowing the exact terms of the deed, we are acting rather in the dark; for

(*a*) 7 Ves. 211. (*b*) Ves. 292. (*c*) 2 B. & Be. 349. (*d*) 2 Ph. 425.

1853.

Matthews v. Holmes.

we cannot be certain from anything in evidence that it may not contain some recital or provison which, if it were seen, would at once make the case perfectly plain on one side or the other. All that we know of it is, that both parties seem content to describe it as an absolute assignment to *Matthews* of all *Alfred Jones's* interest in the four lots; and in the absence of any more particular account of it, we must suppose that it contained nothing besides; that is, no intimation that it was made on any condition or understanding, or was intended to be anything more or less than a *bona fide* transfer for valuable consideration of all *Alfred Jones's* interest in the four lots.

It ought to have been shown what was the precise interest taken by the defendant in those four lots under the will of her husband, because when the plaintiff finds it material to insist on admissions made by the defendant in her answer, it becomes important to know whether the defendant holds the whole interest in the lots, and for her own benefit solely; or whether she holds in any manner as trustee for others. Whatever effect might be given to her admission, as taking the case out of the Statute of Frauds, so far as her own interests were concerned, such admissions could never be allowed to prejudice the interests of others.

Judgment.

Taking the case as it stands upon the testimony, if there were no difficulty in regard to the admissibility of any of the evidence under the Statute of Frauds, or upon the principle of evidence which precludes parol testimony from being admitted in order to vary the terms and effect of a written contract, I should still not have been disposed to decree redemption; for, looking at all the evidence, and coupling it with the fact of the possession having always followed the assignment, I am not in fact convinced by it that *Jones* held any equity of redemption. My conviction is rather that if there was by verbal agreement a right reserved

to him to regain his property by paying the £100 in a year, he had freely given up that right, and had agreed that *Matthews* should take out the patent and hold the property absolutely in satisfaction of the debt. His own testimony appears to me to be unworthy of confidence, when it is carefully considered and contrasted in its different parts, and when his conduct in relation to the property and his statement made in the bankruptcy court are taken into view; to say nothing of the bias from interest which it can hardly be doubted he has, when we read his answers. He advanced no such pretence while *Matthews* lived, who could best have resisted the attempt to impugn the deed, but he was silent, for more than ten years, and first sets up this claim to redeem after *Matthews's* death; and this too, in a case in which he admits that the deed which he had made was in fact absolute in its terms, and when he must therefore have known that he had no mortgage deed to stand upon.

1853.

Matthews v. Holmes.

Judgment.

In this respect the case of *Haynes* v. *Hare* (*a*) is strongly in point, and the language of Lord Loughborough applies with great force. Independently of all rules of evidence, whether grounded on the common law or imposed by statute, we should look, I think, with great suspicion upon such a case.

When the deed between the parties shews the transaction to have been a mortgage, there is in general no difficulty arising from the fact of the mortgagor delaying to apply for redemption so long as he comes within twenty years, because his right in equity is patent on the face of the instrument, though there may sometimes, even in such a case, be peculiar circumstances which, when proved on the other side, will lead the court to refuse redemption to a party coming within twenty years. But when the deed given is on the face of it an absolute assignment, and the party who has

(*a*) 1 H. Bl. 659.

1853.

Matthews v. Holmes.

given it attempts to cut it down to a mortgage by evidence of conversations and of circumstances *dehors* the deed, he should at least come with reasonable promptness—not after many years of acquiescence in a possession consistent with the absolute deed; and not after the death of the party who may be alone able to repel any attempt to engraft additional terms upon the written instrument. He stands more on the footing of a person calling for specific performance of an alleged agreement, though he is in form suing for redemption.

Looking at the whole evidence, I should, on that ground, have been inclined to dismiss the bill. But there are other things to be considered.

Here *Jones* never held any legal estate in this land, but only at most an equitable interest as a contractor for purchase from the Crown. *Matthews* does not stand exactly in the position of a party who having taken a mortgage of an estate for years obtains, during his temporary interest, a renewal of the term, when courts of equity will regard him as holding in trust for the mortgagor. *Matthews* did not by his own act merely and without the privity of *Jones*, enlarge the interest which he took from him. On the contrary, *Jones* absolutely assigned all his interest in the four lots to *Matthews* expressly, that the latter might, by completing from his own funds the payments to the government, obtain a patent in his own name for the fee, which legal estate *Jones* never held, and therefore could not mortgage, and cannot claim, in the ordinary sense of the term to *redeem* or get back, because he never held it nor any claim, correctly speaking, to have it *re*-conveyed to him, because he had not conveyed it, nor was ever in a condition to convey it. He may, nevertheless, perhaps be properly allowed to gain his object by a decree made in a suit, which is in point of form a suit for redemption; but in substance and reality

Judgment.

1853.

Matthews v. Holmes.

what he asks for under such a state of facts is to have carried into effect an alleged agreement on the part of *Matthews* to convey to him something which he *Jones* never held, and which *Matthews* first acquired from the Crown, paying the larger part of the price himself. The principles which govern suits for specific performance, as regards laches and otherwise, apply to the facts of such a case, I think, more reasonably than those principles which govern ordinary suits for redemption of an interest which has been conveyed conditionally by a mortgagor.

Then here the plaintiff has not, as was done in *England* v. *Codrington*, (*a*) and in *Cripps* v. *Gee*, (*b*) and in other cases of that class, set out the case truly as regarded the nature of the deed itself, and then set forth such facts *dehors* the deed as he relies on for establishing a case of fraud, entitling him to alter, by parol evidence, the contents or rather the effect of a written instrument, and relieving him from the difficulty imposed by the Statute of Frauds. He does not charge any fraud in obtaining a deed in terms different from those which had been verbally agreed upon. He does not complain of any refusal to execute a defeazance, nor of the breach of any promise, nor of any want of good faith: he alleges no mistake. On the contrary, any one would infer from his bill that *Jones* had given a deed to *Matthews*, which was plainly a mortgage on the face of it. He says, "that *Jones* by indenture assigned the lots to *Matthews* to *secure* nominally £100, *which was stated to be* the amount of a loan then made by *Matthews* to *Jones*," (as if it were so stated in the assignment itself,) "but which sum was not in fact owing, but only a part, and that such part was alone in fact *secured by the said assignment.*' And in the prayer of his bill he speaks of the premises as "the said mortgage premises." He gives no

Judgment.

(*a*) 1 Eden 173. (*b*) 4 Br. C. C. 472.

1853. Matthews v. Holmes

intimation that he had any proof to offer inconsistent with the terms of the deed, or that he had any fraud to complain of. I should have expected from the terms of the bill, to see on the face of the assignment that it was a mortgage, and not a sale. The bill does not prepare us for evidence of anything collateral that would be inconsistent with the contents of the deed. The plaintiff appears to rely on the deed only for proving his case; and ought he to be permitted to give evidence of an alleged fraud to support his case against the deed, of which fraud he has given no intimation in his bill?

The plaintiff's own witnesses swear that the deed was in fact an absolute assignment, which is certainly inconsistent with all that the plaintiff has alleged in his bill. And, admitting that he is at liberty nevertheless to go into a case of which no intimation is given in the bill, and which is apparently opposed to the statement of the assignment being made as a security,

Judgment.

we have then to consider whether he has given such evidence as the law permits to be received for establishing a trust, and especially in opposition to the language of a written instrument; and next, whether, if the evidence be in its character admissible, it is sufficient, after both sides have been heard, to convince us of the truth of the allegation, which is not merely that *Jones* was at one time entitled to redeem, but that he continued to be so entitled up to the time of his bankruptcy, so that an equity of redemption devolved upon the plaintiff as his assignee.

I cannot say that I see these points made out by evidence that could be legally received, or that is in fact sufficient to warrant a conclusion in the plaintiff's favor, admitting that we are at liberty to entertain and act upon it.

Upon the first point—what evidence is admissible for this purpose—we must govern ourselves by the English

decisions in courts of equity, having no authority to apply other rules, and we need feel no desire to travel out of them; for I think in general all persons will find their interests adequately protected, when the principles of the English decisions on this point are carefully observed. (*d*).

It would be tedious and useless to go again into an examination of the cases and authorities that have lately been referred to in this court, in the cases of *Greenshields* v. *Barnhart*, and *Howland* v. *Stewart*. I concurred in those decisions, and feel it my duty to abide by them till they are overruled by a higher court. It is particularly important in this country, and especially at the present time, that we should not be less cautious than courts of equity are in England, in allowing conveyances of lands which are absolute on the face of them to be reduced to conditional conveyances, by accepting parol evidence to contradict the terms of a deed, and to alter entirely the position of the parties.

Judgment.

We know that for many years past it has been common as between English and Lower Canadian merchants and their debtors in Upper Canada, and as between the merchants in our large towns and their customers in the country, to accept lands at a valuation in payment of debts when there was no hope of payment in money. In many cases the grantors in such deeds have been well pleased to make such arrangements, and free themselves from liabilities which they had no prospect of being able to extinguish otherwise, and the grantees in such deeds have no doubt in many cases accepted the land with reluctance at the time, allowing for it more probably than they believed to be its actual value. I dare say in some instances where absolute conveyances have been taken, there has been

(*d*) 4 Y. & Coll. 192; Howland v. Stewart, Appeal U. C., 2 Chancery Reports 61; Cooto on Mortgages, pages 57, 58; 2 Drury & Warren, 369; 1 Br. C. C. 92; 1 Ves. Jr. 241; Story's Equity Jurisprudence, sec. 1531.

1853. a confidence between the parties, that if the debtor should be able within a reasonable time to pay the original debt and interest, and should desire to get back his land, his creditor would be willing, if he still held the land, to accept the money and to re-convey, though where there has been no intimation of such an understanding inserted in the deed, and no memorandum in writing taken to that effect, the probability is that in most of such cases it was not a matter of stipulation, but a mere reliance that the grantee would be found willing to do what he did not in fact in any manner bind himself or engage to do, and what he would have declined to bind himself to do, if he had been asked.

Matthews v. Holmes.

Now within the last year or two, in many cases, lands in this country which have been made over by debtors to their creditors in satisfaction or in part discharge of their debts, and not in security merely, have risen immensely in value, from the operation of causes unlooked for, and tending to enhance their price to a degree greatly beyond what could have been anticipated.

Judgment

I allude to the many great railway projects which are at present being actively proceeded in, and in the way of being certainly accomplished by the aid of English capital, which has been freely embarked in them to the amount of some millions sterling. This has had the effect of suddenly raising the value of lands so as in many cases to double or treble it, and in some cases to raise it ten or twenty fold. What a temptation such a state of things affords to just such fraud and perjury as the Statute of Frauds was meant to protect people against!

Twenty years, where the transaction was plainly one of mortgage, are allowed for redeeming. How can people who have in good faith taken conveyances under

such circumstances as I have stated deal with confidence with the lands which they have accepted actually and *bona fide* in satisfaction of debt? how can they venture to sell them, or improve them, or reckon upon them as their own, if within that time they are liable to be dispossessed upon any parol evidence that witnesses may be got to give of what they have heard talked of in respect of the transaction before, or when it took place, or afterwards? Surely while the principle continues to be recognized that the terms of a writing are not to be contradicted by verbal evidence, and until the Statute of Frauds is repealed, every man ought to be able to rest secure in the enjoyment of what his deeds assure to him, when he is conscious of no fraud and knows there was no mistake, and when he knows that he really never has done or agreed to anything inconsistent with the terms of the writings which he holds. If we are to set the statute wholly on one side, upon any suggestion or surmise of fraud that a bargainor at almost any distance of time may choose to make, look at the danger that must follow.

1853.

Matthews v. Holmes.

Judgment.

With our experience in courts of justice, we cannot doubt the possibility of procuring false testimony of alleged verbal understandings in regard to transactions, where the property at stake is so valuable as to afford a strong temptation to a dishonest mind to resort to any artifice. We know too, that witnesses without actually intending to mislead others, may mislead them from having been misled themselves. They may fancy that they have heard what they did not hear; they may have misapprehended remarks and observations made in their presence about matters in which they had no concern; they may have mistaken suggestions and propositions for agreements; or expressions of kind gratuitous intentions for promises meant to be legally binding, and may have supposed that to have been spoken of as finally settled which was only the subject of a negotiation, and a negotiation which may, without

1853. their knowledge, have terminated at last in a manner very different from anything they were aware of.

Matthews. v. Holmes.

The case before us strongly illustrates what I am speaking of. Here we have four lots of land, which at the government price in 1840 would have been worth in all about £50, and which *Jones* had two or three years before contracted to buy partly from the government and partly from an individual who had bargained for them with the government, for about £60 in all; of which he had only paid a part. While they are lying in his hands, unimproved and not materially, if at all, increased in value, he makes an absolute assignment of all his interest in them (in other words, of his unperformed contract to buy them) to *Matthews*, who takes possession, as *Jones* himself has sworn, and always afterwards retains it. Seven or eight years after (in 1849), from the great increase of the town of London, and still more, I suppose, from the anticipation of the certain and speedy accomplishment of one or more projected railways to pass through or near the town, these lots are valued by the public assessors at £350. Yet, though *Jones* is living there, and not in affluent circumstances, and though *Matthews* is living in the same place with him, and is perfectly responsible, we hear nothing of any right of redemption in these lots. In 1850, *Matthews* dies. In 1851, it becomes known that a great line of railway is being actually constructed, which is to pass through London; that the station will be just at that part of the town where these lots are; and that these lots, which in 1840 were worth about £60, and for which *Jones* had perhaps not paid £20 when he assigned his equitable interest in them, could now be sold for a thousand pounds or more.

Judgment.

Then for the first time, and after *Matthews's* death, *Jones*, who had in the meantime become bankrupt, goes to his assignee, whom he had himself not long

before procured to be substituted in the place of *Matthews*, who had been the official assignee, and gets him to assert on behalf of the bankrupt estate a right to redeem these four lots, of which right to redeem nothing had been heard from the time that *Matthews* took out the patent for them in his own name till the time of his death; and in August 1851 a bill is filed against *Matthews's* executrix and devisee, describing the deed given in 1840 as a security only, and not as an absolute conveyance, and praying redemption, as of course, without pretending in the bill any fraud, or oppression, or deception, or mistake; and then *Jones* supports this case, which he has procured his assignee to set up, by swearing that though the conveyance which he made was on the face of it absolute he had nevertheless by verbal understanding a right to redeem, which he had never surrendered or relinquished.

This is a strong instance of the temptation which I have spoken of; and in the evidence given by *Jones* himself in this case there is abundant evidence of the danger to others which may arise from such temptation, if parol evidence should be allowed to change the position of the parties, for when *Jones* is pressed, he does not deny that there is an understanding between him and the new assignee who is carrying on this suit that he will sell the lots to the assignee for £400, if he is allowed to redeem; he swears that he thinks them now worth £1000, and that besides the interest he feels in seeing his debts paid, he expects to be further benefited by this suit by getting anything that may remain after his creditors are satisfied.

Judgment.

The effect of the temptation that will present itself under such circumstances is but too evident in this case, for it is clear that *Alfred Jones* gave testimony that was so manifestly untrustworthy on the very face of it, that the court below felt it to be unsafe to trust to it. They did in fact discredit it in some important

1853.

Matthews v. Holmes.

particulars as to one portion of the case; and no one, I think, can read it without feeling that the evidence of the two *Jones* respecting these transactions ought to receive but little, if any weight, where it is uncorroborated by evidence from other sources.

I have not alluded, however, to the particular facts of this case at this moment for any other purpose than as exhibiting strongly the danger of trusting to parol evidence for purposes of this kind, in the circumstances in which very many people stand in this country; and the wisdom of those rules of evidence and of the Statute of Frauds, which in general exclude it, or which at least are admitted to do so, as I apprehend the effect of English decisions.

Judgment.

In the case of *Le Targe* v. *De Tuyll*, though I do not question the propriety of the decision upon the facts in evidence, and in the judgment in the court of Chancery in the case now before us (*a*), there seems to me, and I say so with great submission, to be a tendency in the language of the court to adopt a latitude in dealing with these cases which does not appear to be permitted by the English decisions.—The judgment given in this court in *Howland* v. *Stewart*, I think, states the principle as strongly in favor of the reception of parol evidence as we are warranted in stating it; and I refer to that case with the less hesitation, because, though I concurred in the judgment, it was prepared and delivered, not by myself, but by one of my learned brothers, who has been familiar in equity with the application of such principles. I think we cannot safely go farther than is laid down there, and by the judgment of this court in *Greenshields* v. *Barnhart*. (*b*)

We cannot properly accede, I think, to the broad way in which it has been stated in argument, that parol

(*a*) Ante vol. 3, p. 369.
(*b*) See judgment in Privy Council in appendix A, to this case.

evidence may always be received to vary or contradict a deed upon the question of mortgage or no mortgage, because the very question involves an inquiry into an imputed fraud. The argument seems to be this: Because it *would be* fraudulent in any man to set up a conveyance as absolute, which it was intended he should hold only as a security, (though it was made absolute in its terms), therefore you are at liberty to shew by any kind of evidence, and without regard to what is contained in the seventh clause of the Statute of Frauds, that the grantee in the deed did verbally agree that his absolute conveyance should be acted upon and used by him only as a security.

The reason of the thing, I think, lies the other way. The law does not presume that any man has acted or desires to act fraudulently, but presumes the contrary, until the fraud is shewn. If, therefore, it be the general law of the land that any agreement respecting an interest in land, or any trust or confidence in regard to land, must be manifested by writing, signed by the party who is to be charged by the agreement, or who is competent to declare such trust, then the last case in which such written evidence ought to be dispensed with would seem to be a case in which the verbal evidence of any such agreement offered would, if received and credited, go to fix the charge of fraud upon a party.

Judgment.

The statute was designed as a protection against fraud and perjury, and surely a party may say with truth that he is grievously injured if he is not only made to lose his estate upon parol evidence of an alleged trust, admitted contrary to the statute, but to lose his character with his estate, in consequence of the court coming to a conclusion upon parol evidence that he has been guilty of a fraud in claiming a right to abide by his deed and in denying the parol evidence of an agreement inconsistent with it.

1853.

Matthews v. Holmes.

I confine this remark to cases where the deed is attacked only by parol evidence, and where none of those circumstances have been made to appear, which in the view of courts of equity have seemed to open the way to the reception of parol evidence as necessary for the purpose of ascertaining what was the real nature of the transaction, after it has been made manifest by written evidence legally admissible, or by the conduct or admission of the party, that the transaction could not have been such as the deed represents it to have been.

Even this latter class of cases has seemed not to be free from difficulty, as to the extent and objects for which parol evidence may be admitted; but what I do not accede to is, that a party holding an absolute conveyance of an estate is liable to have his interest cut down to a mortgage by parol evidence alone of his verbal admission, at the time of making the deed or afterwards, or by any mere verbal statements of witnesses as to the nature of the transaction. He may have actually bought an estate for a sum which at the time was its reasonable value, and in a few years it may become worth three times that sum, which would afford a strong temptation to a dishonest vendor to set up the pretence that the money which he actually accepted for the sale of the land was money lent to him on security of the land, and not the price for the purchase. Where in any such case the purchaser knows that there is no pretence whatever for attempting to place the transaction in that light, what greater security could he imagine it in his power to have for protecting him in his right than that he holds a deed which states the transaction truly, which deed he knows he obtained by no deception, and which was executed under no mistake, and that he has done nothing inconsistent with his true character of purchaser? If he were nevertheless told that his vendor might possibly find a witness who would swear that he knew the transaction

Judgment.

1853.

Matthews v. Holmes.

was a loan and not a sale, or that he heard the grantee in the deed admit it; and were told, further, that on such evidence being given there would at once arise a question of fraud to be inquired into, which would open the way to the reception of all kinds of testimony, and would put the statute out of the question, and for the time render inoperative the rules of evidence which apply to written instruments; he must find it hard, I think, to reconcile himself to that doctrine. It is very true, he might be told it is a great fraud in him to claim the benefit of an absolute deed when he knows that nothing more than a pledge was intended; but he might naturally answer that that was assuming the fraud against him without legal proof, in order to make the proof of it appear legal; and he might well remonstrate that the first fraud was in the grantor attempting to destroy an honest deed by the *viva voce* evidence of false witnesses; the very fraud which a statute has been wisely passed to prevent.

Judgment.

Every one of the provisions of the Statute of Frauds which requires written evidence in certain cases might be nullified in the same way; that is, by calling it a fraud to insist on a writing, and then admitting parol evidence in order to disappoint the assumed fraud. So, as to the principle of evidence which entitles a man to repose upon a deed with the confidence that it cannot be shaken by verbal evidence of intentions contrary to the deed, a man takes a bond for £1000, being a debt honestly due to him, and a witness is brought to swear that the bond should only have been for £500, and that he heard the obligee say so.—Would it not startle him to be told, what so far is quite true, that it is a very dishonest act to attempt to enforce a bond for £1000 which was meant to have been given for £500, and that because that would be fraudulent, therefore the parol evidence must be heard and may be allowed to prevail against his bond?

1853.

Matthews v. Holmes.

No doubt such a foundation may be laid by admissible evidence of fraud, accident, or mistake, as will enable courts of equity to give relief against them, whatever writings may stand in the way; and to avail themselves of parol evidence in assisting them to get at the truth, when it has first been made manifest to them that the written evidence is not to be relied on; but there must be something stronger in the case than the mere oral statements of witnesses in opposition to the contents of the written instrument.

In the case of *Tull* v. *Owen*, (*a*) this is strongly and clearly maintained. It is true there are cases in which very eminent judges in equity have so expressed themselves as to afford support to the doctrine in its full extent; that for the purpose of deciding upon the question of mortgage or no mortgage parol evidence is always admissible—that is, under all circumstances, and not merely in aid of other proofs; but almost invariably, I think, in such cases something appears in the report of the case which shews you that, either from the admissions in the answer or from something in the conduct of the parties in dealing with the property, or in recognizing a debt as still due, a foundation has been laid for holding that the deed cannot be suffered to be advanced as an absolute title, and then parol evidence has been called in to explain what the true nature of the transaction was. I do not mean to say that all that has been held and done from the beginning in this way is easy to be reconciled with reason and acts of Parliament, but that there are such limits to the reception of parol evidence in these cases as I have endeavoured to describe. And if in any case a court has gone the length of acting upon the naked principle that whether mortgage or no mortgage is always a question which opens the door unreservedly to the reception of parol evidence, it has been held

Judgment.

(*a*) 4 Y. & Coll. 191.

1853.

Matthews v. Holmes.

to be an error, which subsequent decisions have corrected. In the American courts, this subject has not been dealt with uniformly in the different States; generally speaking, I believe they do allow there more readily and more unreservedly than in England the reception of parol evidence for the purpose of reducing to a mortgage a deed which on the face of it imports a sale. In the judgment given below in this cause, a case of *Strong* v. *Mitchell*, decided by Chancellor *Kent*, in the State of New York, in 1819, was relied upon as a determination that parol evidence was admissible in such cases to prove that a mortgage was intended, and not an absolute sale. If we could take that case as laying down the principle without qualification or reserve, it would stand opposed to many other decisions of the same very learned and experienced judge. (*a*) The note of the case is short; the facts are not stated in the judgment, and the statement of them given by the reporter is too meagre and in too general terms to enable us to see upon what foundation the court proceeded. If the judgment as to one point in the case is correctly reported, it is so much against the current both of English and American authorities that I do not think the decision one by which we could consent to shape our course. The defendant, it is said, there admitted in his answer that *after the assignment was executed* he gave the assignor at his request time to return the money and take back the assignment; and this admission in the answer was stated in the judgment as reported to be sufficient to authorise the court to presume a mortgage against the absolute terms of the assignment. (*b*) Now it is so much opposed to the current of American as well as English authorities, to hold that a conveyance which was really an absolute sale at the time can by a subsequent expression of a willingness to reconvey on a return of

Judgment.

(*a*) 1 Johnson 119, 273; 319 Moran v. Hayes.
(*b*) Crabbe on real property, sec. 2201–2.

1853.

Matthews v. Holmes.

the purchase money be turned into a mortgage, that I do not imagine that case was carefully reported. It could only have been meant that the admission strengthened other evidence which tended to shew the transaction originally a mortgage.

But I will now remark on the evidence by which the plaintiff attempted to support this case. I mean only as it relates to the four lots 11 and 12 on Dundas street, and 11 and 12 on King street.

The admission of the defendant in her answer cannot, I think, in fairness, have the stress laid upon it which was attempted in the argument. "In case (she says) it should appear that by the original agreement the said assignment was intended merely as a security for a loan (*which she believes to have been the case*), the equity of redemption, she has no doubt, was subsequently disposed of to *Matthews*, and put an end to by mutual agreement."

Judgment.

Mrs. *Matthews*, the defendant, was no party to the transaction, and we are not to assume that she had any personal knowledge of it; the probability is, that she had not—she speaks doubtfully; she may believe it because the plaintiff has so stated the transaction, and as if the deed itself would shew it, and because she did not know the contrary. She may have expected that the deed when produced would shew that such was the case. She is speaking of what she may have had no knowledge of, and may have imbibed an erroneous impression from erroneous statements being made to her. It has been quaintly said by courts on several occasions that what the defendant says he believes the court will believe; but that surely must be where he speaks of a matter in which he has been an actor, or respecting which, if the fact were otherwise than as alleged by the plaintiff, he could scarcely

have been ignorant. Here the defendant says, "if the deed were at first intended as a security, as you represent it, which I believe it was, I have no doubt by mutual agreement that intention was changed." 1853. Matthews v. Holmes.

She speaks only hypothetically, and states her impression to be that if *Jones* had any equity of redemption, he had relinquished it. It is not pretended he ever had any such equity by the terms of any writing, or was ever in a position to claim it except under some verbal understanding contrary to the deed, which verbal understanding could of course, without writing, be abandoned at any time.

Then, as to the exhibit B.: the contents of that small account do not clearly import a loan at that time of the money paid as the balance. The words indorsed on it, "£300 loaned for one year," are not shewn to have been written by Mr. *Matthews* or by his authority, or to have been ever seen by him. They are signed by no one, and it would be wholly against the Statute of Frauds to hold that this was a writing "manifesting a trust and signed by the party" (*a*), when it is signed by no one; and where no authority from *Matthews* is shewn for giving such an account of the transaction. Judgment.

No one could be made to lose his estate by a memorandum made by his attorney or his clerk, for all that appears, without his authority, expressing the notion entertained by such attorney or clerk of a transaction which took place the day before, and which notion may have been an erroneous one. All that we know of this paper besides its being in the writing of Mr. *Wilson's* clerk, is, that it was produced in the court by Mr. *Wilson* when called as a witness on the part of the plaintiff. As to the evidence of *Alfred*

(*a*) Cooper 192.

1853.

Matthews v. Holmes.

and *Aby Jones*, besides the objection to its admissibility, I do not suppose that the court attached any weight to it, after the very strong observations upon their conduct and statements which were made by the court in delivering their judgment. The only other witness who speaks as if he had any knowledge of the true state of the transaction in 1840 between *Alfred Jones* and *Matthews* is Mr. *Wilson*, who being an attorney acted in the matter, as it seems, for both parties. He had good means of knowing what was the nature of the transaction which led to the making of the deed of 2nd September, 1840. He had no interest or motive, that we can imagine, for misrepresenting it, and would be incapable, as we must all be persuaded, of doing so. His statement leaves no doubt on my mind that the deed was in fact executed upon the understanding between *Matthews* and *Jones* that the £100 advanced or paid on account of these four lots might be repaid with interest at the end of a year and the lots redeemed, though I have no doubt that it was not through any fraud or mistake, but with the concurrence of *Jones* that the assignment was made in the form it was, the understanding being in the nature of a privilege to re-purchase being reserved of which *Jones* did not avail himself, rather than that the assignment was not *bona fide* a sale. But then also we must not forget that, in the absence of any proof of fraud or mistake, this parol evidence of Mr. *Wilson* could not be allowed to create a trust contrary to the very terms of the deed in opposition to the Statute of Frauds, and in the absence of proof or allegation of fraud or mistake—the principle being that stated by Mr. Justice *Story* in his treatise on equity jurisprudence (sec. 1531) (*a*), "that the same general rule prevails in equity as at law, that parol evidence is not admissible to contradict, qualify, extend or vary written instruments, and that the interpretation of

Judgment.

(*a*) See also 2 Freeman 87; 2 Atk 496; 1 Alk 272; 2 Ball & B, 278; 2 Freeman 150; 2 Ch. Ca. 275.

them must depend upon their own terms. But that in cases of accident, mistake or fraud, courts of equity are constantly in the habit of admitting parol evidence to qualify and correct and even to defeat the terms of written instruments."

Though I fully believe Mr. *Wilson's* evidence therefore, and am in fact convinced that *Jones* was to be allowed to obtain a reconveyance of his interest if he paid back the money in a year, I do not feel myself at liberty to act upon the evidence as sufficient to establish legally the fact of mortgage; and if I were at liberty, still it shews a right to redeem existing only upon a verbal understanding inconsistent with the terms of a deed not charged or shewn to have been executed in its present form under any deception or mistake. All that could be said in such a case is that it would be fraudulent in *Matthews*, if he were living, to insist upon the effect of his deed contrary to his verbal understanding; but that would only be true if that understanding, created as it was by parol, had continued unaltered, and was not changed or abandoned by verbal agreement, as it might be.

Judgment.

It would be no fraud to refuse to recognize what no longer existed; and the evidence is strong, I think, to shew that if any such verbal understanding ever existed it was put an end to. During the ten years that *Matthews* lived he remained in possession; there was no proof that any debt was claimed by him as due from *Jones* on account of any of the monies for which the land was taken. Though *Jones* swears that within three or four years after 1840 the value of the lots rose to £400, nothing was heard then or till six years afterwards, when *Matthews* died, of *Jones* claiming any interest in them, legal or equitable; and when he became bankrupt, he neither held himself out as entitled to any such interest, nor admitted himself to be debtor to *Matthews* upon any loan secured by these

1853. lands, but on the contrary made a statement on oath inconsistent with either and with what he has now sworn in support of this suit.

Matthews v. Holmes.

When I consider these facts, I see no reason to doubt the truth of the evidence of *Alexander Griffith*, *Morrison* and *McDonell*, which shows that whatever was the verbal understanding at first as to the deed being a security, that verbal understanding) which could create no equity requiring a formal release) was cancelled and put an end to before the patent was sued out by *Matthews* in 1843 from the Government in his own name, which I believe from the whole tendency of the evidence was with the assent of *Jones*, and with the intention in which he was concurring that the lands should be in fact absolutely the property of *Matthews* and the debt extinguished. Three years had then gone by, or nearly so; and I have no doubt that any verbal understanding about redeeming had been abandoned. It probably involved no sacrifice on the part of *Jones* to give it up at the end of the year, as the lots then stood in regard to value; and my conviction is, that if *Matthews* were now living no such bill as this would have been filed. The attempt not only to set up an equity of redemption, but to establish that it was not even necessary to pay anything in order to redeem, for that *Matthews* had all the time been debtor to *Alfred Jones* in a large sum on account of the lot No. 17, and the kind of evidence by which the latter pretence was endeavoured to be established, has to my mind a most unfavourable complexion—so much so, that independently of all legal difficulties, the bill should in my opinion have been dismissed, and with costs.

Judgment

Upon that part of the case which respects the lot 17, the decree, being favourable to the defendant, is only complained of as leaving it open to the parties without prejudice to advance the same claim in effect

in another shape. I do not think we should encourage appeals upon what must in such cases be a matter of discretion; but if I were judging of the matter in the first instance, I should have been disposed, upon the evidence which relates to that part of the case, to dismiss the bill without this reservation.

1853.

Matthews v. Holmes'

Upon the case generally, I cannot but notice its close resemblance in its principal features to the one which I have before referred to of *Haynes* v. *Hare*, where Lord *Loughborough*, then Chief Justice of the Common Pleas, afterwards a great equity judge, was called upon to interpose upon equitable grounds in a common law court, in a manner which it was competent for the court to do if they had thought the case warranted it. There the court was called upon to interfere by directing satisfaction to be entered upon a judgment, and certain securities to be given up, on parol evidence of an agreement between the parties that an annuity was to be redeemable on certain terms. The parol evidence of the alleged understanding was given, as in this case, by the attorney of the party to whom the annuity was granted, which party was then dead. His Lordship discountenanced the idea that on the testimony of a witness to a parol communication between the parties, a term can be added to a contract which does not appear in the instrument by which that contract was established.

Judgment.

Mr. Justice *Buller*, sitting for the Chancellor, had dismissed a bill to redeem that had been filed in the same case, on the ground that parol evidence could not be received in contradiction to the annuity bond, but he recommended an application to the Court of Common Pleas, in which the judgment on the bond was entered.

There had not been so long an acquiescence in that transaction before *Haynes* died, to whom the bond

1853. Matthews v. Holmes.

and judgment were given, as in this case there was in the possession and claim of ownership by *Matthews*, and no longer time had elapsed between the transaction and the setting up a claim to redeem than had elapsed in this case. Lord *Loughborough*, in disposing of the application for the equitable interposition of the court, said: "It is not necessary to cite any case to prove the proposition that parol evidence of a parol communication between the parties ought not to be received to add a term not inserted in the special agreement which they have executed; and for this plain reason, that what passed between them in that communication may have been altered and shifted in a variety of ways, but what they have signed and sealed was finally settled. It would destroy all trust; it would destroy all security, and lay it open, unless the parties are completely bound by what they have signed and sealed. But it is said that admitting the general rule, the particular circumstances of the testimony given by the attorney for the party forms an exception. The court would certainly feel itself under no difficulty which way to act, if the party for whom he was attorney were before the court; but he being dead, and no discovery appearing to have been made by him, the circumstance of the attorney for the party being a witness to invalidate the security against the representative of his employer, seems to be a strong confirmation of the general rule. There is nothing so dangerous as to permit deeds and conveyances, after the death of the parties to them, to be liable to have new terms added to them on the disclosure of the attorney in a matter in which he could meet with no contradiction."

Judgment.

There is no doubt this feature in the case now before us, that there is something besides mere verbal evidence of verbal admissions. There are notes and receipts, and an affidavit and certain memoranda, which afford uncertain and inconclusive evidence of the nature of

1853.

Matthews v. Holmes.

the transactions between *Jones* and *Matthews*, some of it bearing in favor of one side, and some of the other.

That which is most relied upon on the part of the plaintiff is the paper marked B; but independently of the evidence, which tends to shew that any understanding as to redemption which may have existed in 1840 was afterwards altered by mutual assent, I do not feel myself at liberty, upon any principles of evidence, to take that as conclusive evidence of mortgage.—There is on one side the absolute assignment, admitted to have been executed by *Jones* the day before this paper is dated; and on the other, the loose memorandum signed by no one, not written by *Matthews*, nor shewn to have been written by his dictation, or with his knowledge. There was no evidence given *aliunde* of the cognovit spoken of in it, or of any proceedings under such cognovit, and no evidence of any attempt ever made by *Matthews* to proceed against *Jones* for any sum mentioned in it as for a debt due to him—no claim made by him against *Jones's* bankrupt estate for any such debt; but, on the other hand, a solemn declaration by *Jones* on his oath, which is quite irreconcileable with the existence of such a debt.

Judgment.

On the whole evidence, I cannot think this a case in which redemption can safely and properly be decreed. I think the rules of evidence, the positive provisions of the Statute of Frauds, and the weight of authority in adjudged cases are against it; and I take it to be most important that we should carefully keep ourselves within the limits which have been established. It is true that the temptation to misrepresent a transaction of this kind may press either way. The man who has taken an absolute deed, but upon a verbal understanding to allow redemption, may be tempted by a great rise in value to deny the verbal understanding and set

1853. Matthews v. Holmes.

himself up as the absolute owner, relying on his deed. That is quite as dishonest, and may in general be harder in its consequences than the fraudulent attempt to set up a right of redemption contrary to the truth. But there is this material difference to be borne in mind: the man who has really and truly made an absolute purchase without any understanding or intention to the contrary, can do no more for his safety, than to see that his deed shall clearly and truly state the transaction; and if he should be made to lose his estate notwithstanding, it could not be said that it was by any fault of his own. On the other hand, when a person who has knowingly and intentionally given an absolute deed, contenting himself with a verbal reservation of a right to redeem, finds the verbal understanding denied, and loses his privilege in consequence, he must feel and admit that he suffers from his own folly and want of common caution in putting his hand and seal to a writing which misrepresented the nature of the transaction to which he was a party.

Judgment.

The safety of all men will be best consulted by the steady application of those rules which impose upon men the necessity of being careful that the conveyances and agreements which they do execute shall be consistent with the truth. In this case, I think the decree ought to be reversed, and the bill dismissed with costs.

THE CHANCELLOR—The question principally discussed in the Court below,—and it was the only one upon which we entertained any doubt—was whether the assignment from *Jones* to *Matthews* was absolute, or by way of security. Upon that question I am led to believe that the great majority of my learned brethren concur in the judgment, and it is unnecessary therefore that I should add anything to the observations already made.

1853.

Matthews v. Holmes.

It is said, however, that the assignment may have been intended to operate as a conditional sale. That has not been suggested either by the pleading or in the evidence; and, if I recollect rightly, no new point was made in argument. In doubtful cases the Court always lean in favour of treating the instrument as a security; but to treat the assignment in this case as a conditional sale, would be directly contrary to the statement in the answer, for the defendant says "that in case it should appear that by original agreement the said assignment was intended merely as a security for a loan (which this defendant believes to have been the case), *the equity of redemption thereon was, this defendant hath no doubt, subsequently disposed of to the said Matthews.*" The answer, therefore, not only does not support, but it positively negatives, this hypothesis.

It is said, however, that the equity of redemption "was subsequently disposed of to *Matthews.*" That is the allegation in the answer. But there is not the slightest evidence of any contract, either written or verbal, to that effect, or of any negotiation, even, upon the subject. The defendant relies upon certain admissions said to have been made by the bankrupt shortly after the original contract. Now it has been always felt, I believe, that evidence of that sort is most unsatisfactory; because every person conversant with the administration of justice has experienced the facility of fabricating, and the difficulty of contradicting such evidence. But the evidence in this case appears to me to be peculiarly liable to objection. In the first place, the admissions have not been put in issue by the pleadings; and what has occurred here proves, I think, the practical wisdom of Lord *Cottenham's* observation in a recent case, when, refusing to bind a party by an admission proved under such circumstances, he said, "it would be a way of giving facility for producing false evidence, and be very dangerous and injurious to the general interests of suitors." Again; the admis-

Judgment.

1853.

Matthews v. Holmes.

sions of which evidence has been given in the case were not admissions made to any persons having an interest in the property, or in the course of any contract respecting it, but consist of mere casual conversations with masons and carpenters in the employment of the bankrupt, which occurred more than ten years before they gave their evidence. If such loose conversations would be insufficient even to affect a party with notice, can they be sufficient to prove a conveyance of his estate? Lastly, there are some things in the evidence itself, or the manner in which it was taken, which are calculated to arouse suspicion. *Caleb Griffiths* is the first witness on the subject of these admissions; and it appears from the evidence of *Pomroy* that the defendant relied, at first, upon his evidence exclusively. But his statements were quite discordant. He at first affirmed the alleged admission; then he denied it; and, lastly, he reäffirmed it. Finding his own evidence impeached (with much reason,

Judgment.

I think), this man brings forward a witness of the name of *McDonnell*, a carpenter, and the solicitor for the defendant thinks it necessary to swear this person to the truth of his statement before he is produced to give his evidence in the cause. That course has not been approved, and shows, I think, that those who had better means of forming a judgment than we can have had no great confidence in their own witness. *Wright*, who had been an apprentice of *Matthews*, swears that *Jones* admitted a sale to *Matthews* in the year 1841. I do not believe that *Jones* assigned his interest to *Matthews* in the year 1841, if he ever did so; but the testimony of this witness shews how little reliance the court ought to place upon the evidence of casual conversations said to have occurred at a remote period; for in his cross-examination he says, "*I do not recollect whether he made use of the words 'that he had sold' to Mr. Matthews, or that he had only 'turned them out in security.'*" Now that was the only point of any importance in his evidence.

1853.

Matthews v. Holmes

It is felt, I believe, that the evidence would have been insufficient if the original mortgage had been drawn up in the ordinary form; but it is said that as this transaction was from the first irregular, the assignment being absolute in form, Mr. *Matthews* may not have felt it necessary for his protection to furnish himself with strict proof of an assignment, and that he is therefore entitled to a more favourable construction of the evidence. Now it appears to me that the premises ought to lead to a directly opposite conclusion. It is quite true that the manner in which the transaction was conducted was from the first irregular. Mr. *Matthews*, instead of proceeding in the ordinary way, thought proper to pursue a course which the Court regards as fraudulent; he took an absolute assignment, when the transaction was really one of loan and security, without executing any defeasance, either incorporated in the deed or separate from it. Now, when difficulties arise from that mode of dealing, courts of equity are in the constant habit, I apprehend, of visiting the consequences upon the lender, and not upon the borrower. In *Cotterel* v. *Purchase* (*a*), Lord *Talbot* said, "In the northern parts it is the custom in drawing mortgages to make an absolute deed with a defeasance 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 defeasance may be lost and then an absolute conveyance is set up. I would discourage the practice as much as possible." That observation of Lord *Talbot*, which has the sanction of the ablest judges in equity, appears to me to be peculiarly applicable to this country. Not only has there been a habit here of taking absolute deeds with separate defeasances; but the still worse habit, pursued by the defendant, of taking an absolute deed without executing any defeasance, has prevailed very extensively; but so far from finding in that circumstance any

Judgment.

(*a*) Cas. Temp. Tal. 61.

1853.

Matthews v. Holmes.

ground for placing a more favourable construction upon the evidence of the lender, it appears to me to afford the strongest possible reason to require the utmost strictness of proof. It affords such latitude for harsh and oppressive conduct on the part of lenders, and this power has been so often used harshly and oppressively within my own experience, that I feel it to be an especial duty of a court of equity in this country to guard the equity of redemption, under such circumstances, with peculiar care,—to be jealous of presuming a release in favour of a lender who pursues so exceptionable a course.

Judgment.

But it is said that the plaintiff has been dilatory in his application to the court,—that he should have insisted on his right to redeem before *Matthews* obtained the patent from the Crown,—and that this court under the circumstances ought to refuse relief. The law of the land, in my opinion, has not made the plaintiff's right to this estate dependant upon the discretion of this court in any such sense. To argue that the plaintiff should have insisted upon his rights before *Matthews* took out the patent, is in my opinion an utter subversion of the contract of the parties; for the sum due to the government formed a very large item in the loan from *Matthews* to *Jones*, and I am quite at a loss to discover how it could have constituted such an item except upon the hypothesis that *Matthews* had agreed to make this advance on behalf of *Jones;* and the fact that *Matthews* did what it was always intended he should do, can hardly afford ground for the argument that the plaintiff should be deprived of his equity of redemption. I see nothing either in the delay which has arisen, or in any other circumstance proved in the cause, sufficient to bar the plaintiff's right. The difficulty has arisen, throughout, from the conduct of *Matthews*. In the first place, he takes an absolute assignment when he should have taken a conditional one. Then, assuming the existence of

some contract for the acquisition of the plaintiff's interest, that might have been settled conclusively, as Lord *Eldon* has expressed it, by two lines, but he neglects to adopt that simple course. But assuming, on the other hand, that no such contract existed, which is, in my opinion, the proper conclusion from the evidence, then the difficulty has arisen quite as much from the delay of *Matthews* as of *Jones*,—it was the duty of the former to foreclose as much as it was of the latter to redeem. But had the delay been much more considerable, it could not have been allowed, I think, to weigh against the plaintiff under the circumstances of the present case. Such, at least, would seem to be the opinion of Lord *Talbot;* for in the case to which I before alluded, he says, "Otherwise the lengthened time would not have signified; for they who take a conveyance of an estate as a mortgage, without any defeasance, are guilty of a fraud, and no length of time will bar a fraud."

Judgment.

Upon the whole case, if this evidence is to be regarded as sufficient to prove a conveyance of the plaintiff's interest, I know of no reason why it should not be so had the plaintiff been seized in fee simple, for this court regards the equity of redemption as the fee simple; and, taking that view, I can only repeat here, what I said in the court below, that I know of no security for men's titles if they are allowed to be shaken by loose casual conversations, said to have occurred at a distant period, and that with persons wholly unconnected with the estate in point of interest.

Macaulay, C. J. C. P.—In my view of this case, it is not necessary to decide whether upon a bill to redeem against the holder of an estate under a deed absolute on the face of it—such bill alleging it to have been by way of security only for the loan of money, and not an absolute transaction of sale—the

1853. Matthews v. Holmes.

defendant, an alleged mortgagee, can in his answer deny any written evidence of the condition alleged, or that the estate was to be redeemable, and so rely upon the Statute of Frauds as a defence, and then proceed to admit that, in fact, it was intended to be a security, as alleged in the bill; and, by way of further answer, set up as a defence that the equity of redemption had been released, extinguished, or otherwise put an end to. This seems to be an unsettled point, notwithstanding the inconsistency of a defendant in a redemption bill setting up as a defence in his answer the absence of written proof to show a deed absolute in terms to be indefeasible, and yet at the same time, in the very same answer, not only admitting in writing under his hand that it was only intended to operate as a security, but swearing to its truth. How any doubt can exist upon a point in which the equity would be so clear, seems strange. One object of the bill must be discovery on this head; and if the fact be admitted in the answer, why should the plaintiff be put to other proof thereof? It is not analogous to cases at law, in which, by pleas in denial, the *onus* of proof is thrown upon the plaintiff to establish his case by written or other legal evidence.

Judgment.

In the present case, the defendant is not an original party, but represents the alleged mortgagee; and when, in her answer, after relying upon the non-existence of written proof, and the Statute of Frauds, she expresses her belief that the assignment from *Alfred T. Jones* to her testator and deceased husband was intended merely as a security for a loan, and then alleging that the equity of redemption had been put an end to by subsequent arrangement, she may fairly be considered as founding such belief upon the facts afterwards appearing in evidence, and expressing conscientiously her moral conviction on the subject. No other knowledge derived from admissions of her testator, or otherwise, is suggested or imputed in the

1853.

Matthews v. Holmes

bill, or avowed in the answer; and, considering her position as a mere representative party, I am not satisfied that the rule mentioned in *Potter* v. *Potter* (*a*), that what the defendant believes the Court will believe, strictly applies. If it were adopted in such a case as this, other interests, and at all events the interests of devisees, might be prejudicially affected by the Court believing, without proof, a state of things which the party may have believed upon insufficient grounds, or with an imperfect knowledge of the facts, or of his legal or equitable rights.

But, notwithstanding the plea of the Statute of Frauds, and without resting upon the defendant's admitted belief, I think the rules of equity allow of an instrument of conveyance absolute in its terms being shown to have been intended only to secure a loan of money, or a debt, &c., by other collateral proof than a formal defeazance under seal, or even an express written admission to such effect; and that the question is, in this case, to be determined under the guidance of such rule.

Judgment.

The bill relates to two separate and distinct properties and transactions, which are therefore to be considered separately and in succession.

1st—As to lots Nos. 11 & 12, south of Dundas and north of King Street, assigned by *Alfred T. Jones* to *Matthews*, the defendant's testator.

2d—As to the house that was erected upon lot No. 17, north of Dundas Street, first mortgaged and afterwards conveyed in fee by *Aby B. Jones* to the said *Matthews*.

The first question then is, whether there be evidence to prove that the assignment from *Alfred Thomas*

(*a*) 1 Ves. Senr. 274.

1853.

Matthews. v. Holmes.

Jones to *Edward Matthews*, made the 2d September, 1840, in consideration of £100, whereby *Jones* absolutely assigned to *Matthews* all his right, &c., as vendee of the Crown, of, in, and to, lots Nos. 11 & 12 south of Dundas Street, and Nos. 11 & 12 north of King Street, in the town of London, was made upon a sale and purchase of the land, or only in security to secure £100 money lent. The evidence to establish the latter—*dehors* the deed, and irrespective of mere oral statement as to the nature of the transaction—is, that, on the same day *Aby Bedford Jones* conveyed to the said *Matthews* the west part of lot No. 17, north of Dundas Street, in the said town of London, but whether in fee-simple, or whether absolutely, or by way of mortgage on the face of it was not expressly proved, and the deed was not produced; that on the same day a statement in writing was drawn out by the articled clerk of Mr. *Wilson*, the attorney for both parties, who prepared the conveyance, &c., (see exhibit B), and a cheque, dated 5th September, 1840, was given for the balance, £110 4s. 6d. (exhibit C)—the exhibit B being endorsed "Mem. from *A. T.* and *A. B. Jones*, £300 loaned for one year," in whose handwriting not proved; that the statement was made out in duplicate, and was delivered to each party, and the one in evidence seemingly (but not clearly appearing) produced by the defendant's solicitor at the examination of witnesses before the master at London, (I infer it to have been so;) that, on the 20th July, 1841, (before the expiration of the year, reckoned from the 2d September, 1840), *Aby B. Jones* agreed in writing with the said *Matthews* to sell the west part of his property (as therein described), and said to be the same part, or rather a portion of that part of lot No. 17. that had been mortgaged to *Matthews*, as aforesaid, to be conveyed as soon as Mr. *Wilson* (meaning his attorney) returned, and for which *Matthews* was to pay £350, as follows:—£200 to release a mortgage then held by said *Matthews*,

Judgment.

and £150 in part of releasing a mortgage held by Mr. *Goodhue* for £150. (See exhibits A & B.)

1853.

Matthews v. Holmes.

Mr. *Becher*, who was clerk of Mr. *Wilson*, attorney for both parties, in drawing the papers executed in September 1840, being called as a witness for defendant, proved entries in Mr. *Wilson's* day-book, on the 3d September, 1840; in which *Alfred T. Jones* and *Aby B. Jones* are made debtor to him for

1. *Mortgages* to Mr. *Matthews*, and memorial, £1 10s.

(As if only one memorial, and more than one mortgage.)

2. Taking cognovit for £300.

3. Old cognovit; 4. Old bond.

5. Memorial to *Ferguson's* deed; which means, as designated by *Ferguson's* deed, a title-deed to a prior holder for the aforesaid lot No. 17.

Judgment.

6. To pay for registering *Ferguson's* deed; and

7. To pay for registering mortgage to *Matthews*. (Printed case, page 22.)

In addition to the above evidence, both Mr. *Wilson* (called by the plaintiff), and Mr. *Becher* (called by the defendant), declared their knowledge that *Matthews* did at that time advance or lend to the *Jones'* £300, which was secured by the mortgages and cognovit, &c., mentioned in the day-book; and, in her answer, the defendant expresses her belief that the transfer of the lots Nos. 11 & 12 was originally made to secure a loan.

That the conveyance from *Aby B. Jones* of lot No. 17, in September 1840, was a mortgage to secure

1853.

Matthews v. Holmes.

£200, seems the only just inference from the exhibits, especially the agreement dated the 20th July, 1840.

It was conveyed absolutely by deed dated the 29th April, 1842.

Upon the subject of parol evidence, to establish, *aliunde*, that a deed absolute on the face of it was made only as a security, I expressed my opinion in the case of *Greenshields* v. *Barnhart*, and I still adhere to the views then expressed. I have since seen the last part of *White* and *Tudor's* Equity Cases (*a*); and the notes of the American editors, pages 433-4-5-6 of the reprint, vol. 3d, express what I take to be, in substance, the true rule.

Applying the cases to the present, I think there is proof of circumstances, *dehors* the deed, assuming it to be absolute in terms (for it is not before us, that its contents may be seen), to raise an equity, by which, affirming the instrument, it may be regarded as nevertheless a security only, according to *Davis* v. *Symonds* (*b*), where what I take to be the true principle is enunciated (*c*).

Judgment

Then, admitting the assignment to have been originally accompanied with a collateral condition resting in parol, the questions are—Is it to be regarded as a conditional purchase—as I understood Mr. *Mowat* among other things to contend—or as strictly a mortgage security? And if the latter, then whether redemption ought now to be decreed under the circumstances? The leading facts are, that, before the assignment *Alfred T. Jones* and *Aby B. Jones* had transactions together—especially in relation to a house erected upon the lot No. 17, to be hereafter mentioned—and that *Alfred T. Jones* also had

(*a*) See American reprint, 3 vol., being vol. 2 of part 2d., and the notes at page 760–418.
(*b*) 1 Cox 402. (*c*) Howland v. Stewart, ante vol. 2, p. 61; Le Targe v. De Tuyl, ante vol. 1, p. 221.

1853.

Matthews v. Holmes.

transactions with Matthews, who was a builder by trade; that for some previous debt he, *A. T. Jones*, had confessed judgment to him (*Matthews*) for £125, and also owed him a further sum of £21 17s. 6d. upon other accounts; that *Aby B. Jones* owned the lot No. 17 in fee, and that *Alfred T. Jones* held the lots Nos. 11 & 12 under an executory contract for the purchase thereof in fee from the Crown, part of the purchase-money (amounting to about £41 or £42) remaining to be paid, and no letters patent of grant having been issued; that in this state of things, and in order to secure *Matthews* in the sum of £300, *Aby B. Jones*, on the 3d September, 1840, mortgaged to him lot No. 17 for £200, payable in one year, with interest—and the said *Alfred T. Jones*, on the same day, assigned to him, in terms absolute on the face of it, the four lots numbered 11 & 12, but really as a security for £100, with interest at 6 per cent., to be repaid in one year. It would seem (for though not strictly proved, I do not understand it to be denied) that, at the same time, both *Aby B.* and *Alfred T. Jones* gave a joint confession of judgment to the said *Matthews* for a true debt of £300,—but when payable is not proved, nor was the cognovit itself produced to show. That the £300 so secured was made up as follows:—*Alfred T. Jones'* old cognovit or debt of £125, and an additional account of *Matthews* against him for £24 17s. 6d., were deducted; the sum of £42 18s., due on lots Nos. 11 & 12, which *Matthews* was to pay Government, was retained by him, and he gave his cheque to *Aby B. Jones* for £110 4s. 6d., making together the full sum of £300, as shown by the exhibits A & B, and the evidence taken in the cause. That on the 10th June, 1841, *Alfred T. Jones* gave two separate receipts to *Matthews*—expressed to be on account—the one for £12 18s. 9½d., and the other for the sum of £11 14s. 5d., making together £24 13s. 2½d. These receipts were produced by the defendant's counsel—(see the cross-examination of *Alfred T. Jones*, a witness

Statement.

1853.

Matthews v. Holmes.

for plaintiff, at page 14 of the printed case)—but on what account those payments were made was not explained or proved; that on the 20th July, 1841, *Aby B. Jones* entered into an agreement with *Matthews* to sell to him the west part, or 21 feet of lot No. 17, as I understand it, including the part on which the house in question in this case had been erected—the price to be £350, made up of the mortgage *Aby B. Jones* had given thereon to *Matthews* for £200, and another mortgage he had previously given to Mr. *Goodhue* for £150. (See exhibit A.)

On the 3d September, 1841, the year expired at the end of which the £100 was to have been paid, in redemption of *Alfred T. Jones'* assignment to *Matthews*; but it was not paid.

Judgment.

That on the 31st December, 1841, *Matthews* rendered an account against Mr. *A. T. Jones*, as for so much paid to a carpenter, on the 11th December, 1841, for fixing supports to joists, &c., and for making good work insufficiently performed by *C. Griffith*, 18s. 9d., and labour, &c., 4s. 4d.; in all, £1 3s. 4d. Also annexed thereto is a memorandum as follows:—"Dundas Street, paid towards lots, £41 18s. 2½d., exclusive of some charges at the present moment that can't be recollected, subject nevertheless to a deduction of between £2 and £3, the amount of his account against me." This seems to be in *Matthews'* handwriting, and imports that the sum paid towards the lots was by him, and that the £2 or £3 was the amount of his (*Alfred T. Jones'*) account against him (*Matthews.*) (Exhibit D, No. 2.)

It is stated that the middle paper, respecting the £41 18s. 2½d, is mutilated, or has the appearance of having been mutilated; but I have not had an opportunity of inspecting the originals, they not being on the files of the Court of Chancery.

That, on the 1st January, 1842, *A. T. Jones* gave his promissory note to *Matthews* for £39 1s. 6d., payable in three months, with interest. (See exhibit K.)

That, on the 22d January, 1842, *Matthews* gave a receipt to *A. T. Jones*, of that date, for £1 10s. (six dollars), on account. (Exhibit D, No. 3.)

That, on the 29th April, 1842, *Aby B. Jones* conveyed the part of lot No. 17 to *Matthews*, in fee.

That, on the 18th July, 1842, *Alfred T. Jones* gave another promissory note, of that date, to the said *Matthews*, for £18 15s. 7½d., payable in ten days, with interest, for value received.

That, on the 20th January, 1843, the Government grant for lots Nos. 11 & 12 to *Matthews*, in fee, was sealed. (See bill, p. 2.)

Judgment.

When *Matthews* actually entered into possession is not clearly shown. *Alfred T. Jones*, at page 15, says, he had been in possession ever since the assignment, or shortly after, and paid the taxes. *Alexander Griffith* says, *Matthews* repaired the fence in 1843, and in the same year drew stones on the lot, and the possession has continued ever since. *John Wright* represents that *Matthews* was possessed in 1842, and the lands remained unimproved, otherwise than being fenced, &c.

In the early part of 1844, *Alfred T. Jones* became bankrupt, and he deposed to his schedule, the 25th May, 1844. (See exhibit G.) The inventory, schedule and affidavit contained no mention of the equity of redemption now set up; but the schedule of debts due by him includes one to *Matthews* of £64 15s., for four notes paid, but not given up; and the deposition affirming the schedule contains these words —"Excepting the equitable claim I may have against

1853. Matthews v. Holmes.

Edward Matthews for about sixty odd pounds." He seems to have obtained his certificate before 1846.

That *Matthews* was appointed one of *Alfred T. Jones'* assignees, when not stated, apparently in 1844, and so continued until his death, on the 22d June, 1850.

That, since his death, *Alfred T. Jones* rendered an account against his estate to the amount of £3 or £4, which the defendant's agent paid, and he (*Jones*) gave a receipt in full of all demands.

The question of *Alfred T. Jones'* right to redeem, or rather to obtain from the defendant a conveyance of the lots 11 & 12, granted in fee to *Matthews*, is to be considered mainly with a view to the state of things existing at the time of his bankruptcy in the spring of 1844; for after that, his affairs were in the hands of assignees, and nothing was afterwards done by him or them directly affecting this property, or expressly compromising any claim that might exist thereto.

Judgment.

The subsequent conduct of *A. T. Jones* is, however, material as respects his credibility, and in other respects may bear indirectly upon the matter in issue, and therefore afford auxiliary evidence.

Adverting to the original transaction: In the first place, I do not think the charge of usury sustained; and, in the second place, I think it is quite clear that the bill is not proved in other particulars, as a comparison of the facts therein stated with the evidence even of the two *Jones'*, or of *Alfred T. Jones* alone, will shew. The bill states a circumstantial transaction of loan and mortgage; whereas it is clear there was no such loan, and, if there was any usurious discount or overcharge, it must have been accomplished in a mode different from that stated. It would not seem that at the time of the assignment and mortgage of the 3rd September, 1840, *Alfred T. Jones* received any money at all from *Matthews* unless through his brother

1853.

Matthews v. Holmes

Aby B. Jones—for the two securities were given to secure together £300, though in distinct sums. Of the £300 *Aby B. Jones* mortgaged his lot 17 for £200, but only received in cash £110 4s. 6d., the residue going to the credit of his brother *Alfred T. Jones*, for whom he in effect assumed £89 15s. 6d., being the difference. Of the £300, £189 15s. 6d. went to the benefit of *Alfred*, being £125—£21 17s. 6d. and £42 18s. 0d. as above explained. It is plain, therefore, that (if this was the real transaction) *Matthews* did not lend *Alfred T. Jones* any money at that time, but exonerated him from a former debt, partly assumed by and included in *Aby B. Jones'* mortgage, and the residue in the assignment by way of mortgage of *Alfred T. Jones*, and making, with £42 18s. retained for balance of the government purchase, £100.

Judgment.

Then, turning to the transaction as it affected lots 11 and 12 and *Alfred T. Jones*, it appears that if he paid *Matthews* £100 in a year he was to have the land re-assigned; but, to entitle *Matthews* to that sum, it would be incumbent on him to pay the balance due the government, to the extent of £42 18s.; because, irrespective of that, *Alfred T. Jones* would only have owed him £57 2s., which last sum, with the £89 15s. 6d. assumed by *Aby B. Jones*, made up together the amount of *Alfred T. Jones'* previous debt to *Matthews* of £125 and £21 17s. 6d.—£146 17s. 6d. The £89 15s. 6d. rested between *Alfred T. Jones* and his brother; because, when *Matthews* afterwards purchased the reversion in fee of lot No. 17, at £350, including the mortgage of *Aby B.* to himself for £200, he (*Matthews*) was thereby paid or satisfied the £89 15s. 6d. so far as respected both the brothers. Then, if *Matthews* kept the lots Nos. 11 and 12, without more, he would pay therefor £100—*i. e.*, the balance of *Alfred T.'s* debt £57 2s., and the amount paid by him to government for the balance of the purchase money £42 18s., according to exhibit B; but £41 18s. 2½d.

1844. Matthews v. Holmes.

according to exhibit D, No. 2. When *Matthews* paid this money is not clear; the last mentioned exhibit is without date, and does not express. He must have paid it before the patent was sealed on the 20th January, 1843. *Alfred T. Jones* did not pay *Matthews* £100, or any part thereof, on the 3rd September, 1841, nor is there any satisfactory proof that he paid any portion thereof at any time afterwards. We have then to consider the question whether the equity of redemption that accrued to *Alfred T. Jones* on the 3rd September, 1841 (if not previously cancelled), subsisted in the spring of 1844 when he became a bankrupt; or, putting the question in another form, whether redemption ought now to be decreed in favour of his assignee, under all the circumstances of the case.

Judgment

We have it in evidence that between the day of the assignment and the expiration of the first year *Matthews* had paid £24 13s. 2½d. to, or on account of *Alfred T. Jones*, for some consideration not shewn. That within such year he had contracted with *Aby B. Jones* for the absolute purchase of all or part of the lot No. 17, that had been mortgaged at the same time and made redeemable at the same period as lots Nos. 11 and 12, and which contract was perfected by a conveyance on the 29th April, 1842. The sale by *Aby B. Jones* to *Matthews* is alleged by him to have proceeded from the urgency of *Matthews* (see page 10), who was pressing for his mortgage money; whereas it would not have become due for upwards of a month after the agreement to sell (see exhibit A), and the final transfer did not take place for upwards of a year afterwards. It looks rather as if *Matthews*, before the day arrived, had made arrangements for the purchase of the equity of redemption in 21 feet of lot No. 17, which might have been expected not to be redeemed by *Aby B. Jones* on 3rd Sept., 1841; and as if *Aby B. Jones*, to prevent an actual default unpro-

vided for at the day, had anticipated its arrival by the agreement with *Matthews* dated the 20th July, 1841. 1853. Matthews v. Holmes.

Alfred T. Jones does not appear to have been a party or privy to this arrangement, although it included the house of which he was then in possession and in which he now, through his assignee the plaintiff, claims to have held a large interest. It is, however, a circumstance not to be overlooked. What took place between *Matthews* and *Alfred T. Jones*, if anything, before or after the 3rd September, 1841, relative to the assignment of the 3rd September, 1840, or its redemption, the evidence does not distinctly shew. The case must therefore be judged of by the circumstances which do appear, and the inferences to be drawn from the whole of the case as it comes before us.

It has been said, though I perceive no evidence on the point, that *Matthews* was not to take out the government patent in his own name within the year, however it might be necessary for him to pay the balance of the purchase money in the meantime to prevent a forfeiture of the sale. It does appear that he did refrain from obtaining the patent till long after the year had expired—namely, until January 1843. Then, whether the assignment be regarded as only a conditional sale, or strictly as a mortgage security, is it a just inference that *Alfred T. Jones* a year and more after his default, was in January 1843 acquiescing in *Matthews* obtaining the patent in his own name; and, if so, whether it be a further equally just inference that under whatever (undisclosed) arrangements existed between them, such acquiescence was intended to be equivalent to a relinquishment of any equity he might otherwise have asserted against the land, notwithstanding its unconditional grant in fee to *Matthews*, if *Matthews* had thus acquired the legal estate against his will, or without any other assent than the original assignment itself involved? It is to be observed that Judgment.

1853. Matthews v. Holmes.

all rests in parol, the written assignment was absolute. It is by parol evidence, partly in collateral writings, and partly by oral evidence shewn to have been conditional, (whether as a conditional sale or a mortgage security,) such condition may therefore have been extinguished or abandoned by parol; and if parol evidence be admissible to support the bill, it must, I suppose, be equally so to resist it. No subsequent transaction, unless it be stated in exhibit D No. 2, shews or imports the assertion on *Alfred T. Jones'* part, or the admission on *Matthews'* part, that an equity of redemption continued down to and at the sealing of the patent. And the exhibit D No. 2 does not seem to imply more than that *Matthews* had paid the balance to government, and which of course *Alfred T. Jones* would be obliged to reimburse as part of the £100 to entitle him to a reassignment. It being produced without date between two other papers, the one dated the 31st Dec., 1841, and the other the 22nd Jan., 1842, together with the promissory note dated the 1st Jan., 1842, for £39 1s. 6d., does not prove that this memorandum was delivered at that period. If it bears the appearance of mutilation, that renders it the more suspicious; and if it be urged that the promissory note raises the presumption that it was included therein, the answer presents itself, that there is no specific proof of what constituted the consideration of this note; and that when paid, the £41 18s. 2½d. was otherwise secured by the mortgage and included in the confession of judgment for £300, if such an instrument as the last was executed as alleged in support of the allegation that the assignment was originally conditional.

Judgment.

It is to be further observed that the interest assigned was not a vested legal estate in these lots 11 and 12, otherwise than so far as made such by the statutes 4 and 5 Vic. ch. 100, and 12 Vic. ch. 31 (*a*). His (*A.*

(*a*) See Westover v. Doe dem. Henderson in this court, not reported.

T. Jones') interest was otherwise purely equitable as vendee of the crown under an executory agreement, and the estate in fee remained in the crown otherwise than as by an equitable fiction—treating that as done which was agreed to be done, although confessedly not done, and which it is often the object of the suit to have done—the property could be considered his already, without grant. It was well known to the parties that this assignment would enable *Matthews* to obtain the patent. If not resisted, nothing more was required as between *Alfred T. Jones* and the crown, and as between themselves all rested in parol; the patent was afterwards allowed to issue without remonstrance on *Jones'* part; and *Matthews*, being in possession, became clothed with the legal estate in fee on which we are asked to engraft the equity that previously existed in relation to the assignment of the executory contract of sale and purchase.

1853.

Matthews v. Holmes.

Then we find *Matthews* in actual possession of the land, though no buildings had been erected thereon; and such possession is retained until he died, and is still continuing in his devisee. We also find *Alfred T. Jones* giving another promissory note to *Matthews* for £18 15s. 7½d., dated the 18th July, 1842.

Judgment.

It may be said of the foregoing notes that the very sums indicate their having been given upon some specific account, or upon settlements of account, which may have been quite irrespective of the mortgage debt of £100 upon the lots in question, and relating to other transactions. It may have been so, and probably was so; but nevertheless they shew that *Alfred T. Jones* was largely indebted to *Matthews* on other accounts, and in connection with his bankruptcy shew how little prospect he had of paying off the £100 with the arrears of interest, and his schedule admitted that he stood indebted to him upwards of £60, unless some equitable claim not therein specified, and not having

1853.

Matthews v. Holmes.

relation to these lots, could prevail to meet the amount and cancel it. The omission to include or mention this alleged equity of redemption in his schedule or affidavit of assets is excused by reference to Mr. *Becher's* evidence, (page 22); but if Mr. *Becher's* impression is quite correct, his answer shews that at the time of *Alfred T. Jones'* bankruptcy the land was not by him considered worth more than the charge against it, and consequently that the assignees would not be likely to advance the amount to accomplish its redemption. In short, it was not then considered worth mentioning. Such is the excuse now offered for the omission and delay. We also find it sworn to by *Alfred T. Jones*, on the 13th June, 1851, that *Matthews* applied for the patent before the time agreed upon, and obtained it accordingly, contrary to the fact. *Matthews* died on the 20th June, 1850, a year before such statement was sworn to, and this bill was afterwards filed on the 14th August, 1851, nearly 11 years after the assignment was made, and nearly 10 years since it became redeemable on payment of £100 and interest, and upwards of eight since the patent issued; *Alfred T. Jones* having in the meantime become bankrupt and obtained his certificate. *Matthews* having died before this claim was advanced, his explanations of the dealings between himself and the *Jones'*, especially *Alfred T. Jones*, cannot be had; and still it is argued that if by the aid of any collateral facts contrary to the import of the assignment and of the subsequent patent, it can be established by any evidence admissible in a court of equity that the assignment was made as a security only, and not intended to operate as an absolute transfer, an equity of redemption accrued to and must be recognised in *Alfred T. Jones*, unless its extinguishment can be proved by a release or some other unequivocal act of cancellation on the part of *Alfred T. Jones*, and that in the absence thereof the plaintiff is as of course entitled to redemption.

Judgment

1853.

Matthews v. Holmes.

I am not disposed to view it in this light. In the case of *Simpson* v. *Smith*, in this court, afterwards appealed to the Queen and Privy Council (*a*), I was taught by the judicial committee that I had viewed that case in too abstract a light, and without that discrimination and practical application of understood principles and adjudged cases which the circumstances called for and required; for in one part of the printed report of the judgment as delivered by the Right Honourable *Pemberton Leigh*, it is said "that the case had been argued as if there was a law in England by which a mortgage was absolutely redeemable during a period of twenty years, unless there was a voluntary release of the equity of redemption on the part of the mortgagor, but that the law was no such thing; that the law did not go beyond this, that if he rely simply on the title, not any dealings between the parties, but simply on the title as a bar to the right of the mortgagor to redeem his estate, then he must shew the full period of twenty years; that it did not go beyond that. That a dealing between the mortgagor and mortgagee might take place, notwithstanding that interval which he apprehended might very easily alter that relation." Now what took place on the argument in England I know not; but, here, I understood one branch of the argument to have rested upon the transactions that had occurred as conclusively establishing *acquiescence;* and in expressing my humble opinion, I said I did not think that the evidence was sufficient to establish the defence on the ground of acquiescence; but in England much stress was laid upon the evidence there was to show it, and the Privy Council seem to have adopted that view. The considerations that I afterwards mentioned which would have operated with me in refusing redemption, if a matter of discretion, I doubt not include some facts that might properly be regarded as evidence of acquiescence with others not entitled to be so considered, but not less cogent; at all events, if the granting or withholding

Judgment

(*a*) See the judgment in the Privy Council in Appendix B.

1853.

Matthews v. Holmes.

redemption after long delay—though within twenty years—be a matter for the exercise of judicial discretion, as from that case I learn it is, then I think the soundest and most discreet course on this occasion is to decline it, and to leave the state of the title in *statu quo* at the time of *Matthews'* death, subject only to the operation of his will.

In this view I am afraid I must be wrong, differing as I do from the learned judges of the court below, and who are no doubt much more conversant with such questions and better able to determine them according to the rules of equity than I can pretend to be.

Judgment.

I decline redemption for the reasons already stated, and because, under all the circumstances of the case (obscure though some of the transactions no doubt are), I think it a just inference that the patent issued to *Matthews* with the concurrence or consent of *A. T. Jones*, unclogged with any equity in his favour; although, considering the value of the lands at that time, *Matthews* may not have paid any additional consideration therefor, otherwise than as it may have been considered in other transactions, not susceptible of explanation now that he is dead and gone. The pecuniary affairs of *A. T. Jones* tend to the inference that he made whatever he could of his interest in these lots in his subsequent dealings with *Matthews*, and to repel the conclusion that *Matthews* left them isolated, dormant, and overlooked, clogged with an equity of redemption, which it was manifestly in his power to have procured the release of, seeing how *A. T. Jones* was indebted to him. I find no trace of *Matthews* having sought to enforce the confession of judgment for £300, or of any part thereof (and I suppose he could not have done so if inclined, after releasing *Aby B. Jones* as to £200, and after *Alfred T. Jones* had obtained his certificate as a bankrupt), nor of *Alfred T. Jones* treating these lots as still redeemable by him either

1853.

Matthews v. Holmes.

before or after the patent; on the contrary, all the facts not resting on mere oral assertion, (and *they* are conflicting) tend to shew that both acted as if all *A. T. Jones'* interest therein was at an end, and *Matthews* held possession and obtained the grant unopposed. The bankrupt, *Alfred T. Jones*, did not include it in his schedule, nor did *Matthews* advance the £100 or any part thereof as a debt against him, although both did specify another claim arising out of subsequent transactions. Both acted as if all relative to these lots had in some way or other been mutually closed and terminated, as it might have been, without memorandum in writing. *A. T. Jones'* equity having been created and existing in parol may have been terminated in the same way; though not now susceptible of proof, it seems to me a reasonable inference. The facts and evidence might be compared and discussed at still further length; but what I have said will shew the grounds upon which I am led to dissent from the decree, and to think that the bill should be dismissed on the grounds of acquiescence, in *Matthews* obtaining the fee simple absolute; such acquiescence being evidenced by possession, silence, other transactions, &c., to which may be added the death of *Matthews* and the danger of disturbing a title fairly acquired by a deceased person, so far as I can satisfactorily trace (*a*).

Judgment.

I may make this further remark, in reference to the death of *Matthews*, that had a bill been filed against him in his life-time, it would have been in his power to make explanations and to prove transactions of which those who now represent him may be entirely ignorant; and that had he lived and been made a defendant in the present bill, he would have been admissible as a witness on his own behalf, in November 1851, when the evidence was taken, according to the opinion of the Court of Queen's Bench, though not, I believe, according to that entertained by the Court of

(*a*) 3 Ves. 40, 1 H. B. 659, 8 T. R. 328.

1853. Chancery. The act 14 & 15 Vic. ch. 66, extending the admissibility of evidence, was passed the 30th of August, 1851, and repealed by 16 Vic. ch. 19, sec. 13, the 10th November, 1852, saving all things lawfully done under the repealed act, and continuing them as to all actions commenced between the 30th August, 1851, and the passing thereof: at all events, in either event *Matthews* would have had the opportunity of answering upon oath—a privilege of which the delay that was suffered to take place has deprived him.

Matthews v. Holmes.

It may be that mine is not a sound or just view, or in accordance with the real merits, if they had been more clearly shewn and understood. I can only say it seems to me the safest and most satisfactory course, guided by the lights I possess on the subject.

I will only add, that the temptation the enhanced value of real estate in some localities may at times hold out, to disturb and re-open bygone and closed transactions, should induce the Courts to be cautious and sure in interfering to admit stale equities on the one hand, as they should be readily disposed to grant relief, notwithstanding disappointment to legal holders, when a paramount equitable right is satisfactorily made out and sustained.

Judgment.

As to the other branch of the case, I think the bill should be dismissed with costs.

I do not think the case stated is proved, or that anything is shewn entitling *Alfred T. Jones* to be recognized as entitled to a pecuniary allowance from *Matthews* in respect of the house in question.

It may be very true that he assisted his brother in building the house, and the £200 mortgage shews there must have been transactions between them. It was *Aby B. Jones* who owned the estate, mortgaged

1853.

Matthews v. Holmes.

it, and then sold it to *Matthews*, and his title thereto in law and equity is not denied; but it is said *Matthews* (*a*) was to sell to *Alfred T. Jones* on terms as favorable as he had purchased, or compensate him for his claims against the house; or at all events, that, after he had acquired the title, he not only encouraged *Alfred T. Jones* (who was in possession) to make large additional improvements thereto, but actually did the carpenter work himself and rendered accounts therefor against him, and that such demands really constituted the consideration for the promissory notes given by him to *Matthews* in the year 1842 (*b*) and remaining in *Matthews'* hands not given up at the time of *Alfred T. Jones'* bankruptcy in 1844, and that this was the equitable claim against *Matthews* for about £60 mentioned in *Alfred T. Jones'* affidavit, sworn the 25th May, 1844 (Exhibit G.) (*c*).

Judgment.

It appears *Craig* leased part of the house from *Alfred T. Jones* in 1841 at £35 a-year, and entered in July, and *Jones* occupied the remainder; that the land was conveyed by *Aby B. Jones* to *Matthews* the 19th April, 1842, under a contract of sale dated the 20th July, 1841; and that he (*Craig*) paid *Jones* one or more quarters' rent.

Alfred T. Jones says in his evidence that the premises were worth £50 a year, and that he occupied rent free for eighteen months, which would make £75 —that is, after his brother had sold to *Matthews*. On the 20th February, 1843, *Matthews* leased the premises to *Craig* (Exhibit I.) at £50 yearly rent; *Matthews*, as purchaser, became entitled to the rents in July, 1841, and it is probable *A. T. Jones* left in February, 1843, which would be about eighteen months afterwards.

Then as to the work done apparently within that

(*a*) pp. 9, 10, 13, of printed case.
(*b*) pp. 13, 14.
(*c*) See also his evidence to that effect at page 14, amplified at page 16 of the printed case.

1853. Matthews v. Holmes.

period, according to the evidence, the account put in by *Alfred T. Jones* (Exhibit L.) does not from June 1830 to the end of that year shew anything as paid to *Matthews*, not even the £5 1s. 8d., unless *Joyce* and *Matthews* mean the same person; and, if so, it is not for work, but for nails, glass, &c.; or the bill for £21 15s., forming part of Exhibit L. and Exhibit B., the correctness of which *Alfred T. Jones* denies in his evidence.

There is nothing in 1840 or in 1841, until September, when a bill of *Matthews* for joiner work is put down at £75, but no such bill is forthcoming. Now, in the first place, the account or entries from which this account (Exhibit L.) was made out is suppressed, and not at all satisfactorily accounted for; though only three weeks had elapsed between his first and second examinations, within which period he says he prepared the one filed from it. On his second examination he says, "the bill from which this is taken is similar to it, but was not correctly made out—I don't know where it is—I have not it—I had it when this one was made, but, not thinking it would be wanted, threw it away."

Judgment.

In the second place, the account said to have been rendered by *Matthews* against *Alfred T. Jones*, and stated by *Washington* at page 16 of the printed papers to have been left with him, is not produced to corroborate the oral statements of witnesses.

Indeed the best evidence does not seem to have been brought forward; such as accounts rendered.

Even the allegations respecting Exhibit B. coming to *Alfred T. Jones'* hands, and his delivering it to Mr. *Daniels*, are not confirmed by him—See his evidence at pages 15 and 16, and the evidence of *Aby T. Jones* at page 21 of the printed papers.

1853.

Matthews v. Holmes.

Alfred T. Jones does not assert any contract to purchase the premises between *Matthews* and himself, except a verbal one. At page 13 of the printed case he says, "At the time Mr. *Matthews* bought from *A. B. Jones* the part of lot 17 spoken of, Mr. *Matthews* well knew that I had an interest in the house, and we then entered into an agreement verbally that he was to let me have the premises purchased from me at the same price he paid my brother, or to pay me for my interest in the house, and that I was in the meantime to remain in possession. The sum to be allowed me for the house was not named." And why, without more, he should be improving the same by additional buildings, and hiring *Matthews* to do the work to be paid for by him while *Matthews* owned the property, I cannot understand. The Statute of Frauds might well apply to such a case. If *Alfred T. Jones* lived in the house eighteen months rent free, the erection of the additions may have been an equivalent, but it is mere conjecture. If *Matthews* had previously done work to the house, it might be considered as absorbed in his subsequent purchase of the estate, but the work in question is alleged to have been performed after he (*Matthews*) owned it.

Judgment.

Moreover, four notes of *Alfred T. Jones* to *Matthews* are not proved; the only two in evidence are dated respectively the 1st January and 18th July, 1842, and together amount only to £57 17s. 1½d.

If they are the same notes, then *Alfred T. Jones* does not very satisfactorily account for his equitable claim against them, considering their dates.

I do not understand him to say that *Matthews* ejected him from the house, or that he did not voluntarily leave it.

Further; if, after *Matthews* purchased of *Aby B.*

1853.

Matthews v. Holmes.

Jones, a liability existed or was understood to exist, that he was to allow *Alfred T. Jones* a sum not definitively settled, but a large sum equal at least to £60, why should he afterwards be paying or giving his notes to *Matthews* for making an addition to his own house, and in which *A. T. Jones* had no longer any interest beyond mere occupancy at the will of *Matthews;* why was not his claim set off or urged as a set off; and why did he make such an improvement through *Matthews*, if not in lieu of rent? To such questions the evidence does not present to me satisfactory answers. I find no trace of any contract of sale in the notes given or in any other unquestionable quarter. It rests upon *A. T. Jones'* bare assertion. Even the £5 alleged to have been paid to *Craig* is not proved by his evidence; he merely says he charged for the privilege from three to five pounds, probably—not that he was paid any sum.

Judgment.

When we look to *Caleb Griffith's* evidence, it appears that he erected the frame of the new building spoken of in the fall of 1841, for *A. T. Jones;* and then turn to Exhibit D. No. 1, under date of 11th December, 1841, the charge of *Matthews* against *Alfred T. Jones*, "to a carpenter fixing supports to joists, putting in lap studs, and making good work insufficiently done by *C. Griffith*, £1 3s. 4d."—not for work done by *Matthews* himself—and compare them with other undoubted facts both antecedent and subsequent to that day, it does not argue that *Matthews* had already done the joiner-work and rendered an account therefor to the amount of £75 to *Alfred T. Jones* (*a*). It rather looks as if *A. T. Jones*, as to that portion of the building erected by *Griffith*, was bound to *Matthews* to have it done for him in some specific way.

I cannot say the evidence impresses me with the

(*a*) See the latter charges in Exhibit L. and Washington's Ev. p. 16; see also Craig's Ev. p. 17 of the printed case.

conviction that *Matthews* did agree to sell lot 17 to *A. T. Jones* as he alleges, or promised to pay him for an interest in the house, the amount of which is not pretended to have been mentioned much less agreed upon, and which nothing tangible in the proof enables me to ascertain.

To refuse relief, may be unjust; to grant it, might be equally so; and I think the only safe course is to refrain from interfering by dismissing the bill for want of sufficient proof.

So far as the case bears analogy, or can be likened to contracts of sale or resale, *Alfred T. Jones* is not shewn to have been able, ready, prompt and eager (*a*).

Judgment.

BURNS, J.—The plaintiff's counsel in this case rests his argument to prove the decree to be right upon two propositions: *first*, that there is sufficient appearing from the defendant's answer, and from written documents and memoranda, upon which to engraft the parol evidence to establish that the transaction between the original parties was a mortgage, and once being so, it required a release of the equity of redemption to be shewn in order to destroy it; and, *secondly*, that as the question is mortgage or no mortgage in this case, parol evidence is sufficient without anything upon which to fasten it, and so, whichever way the case shall be treated, the decree is right.

With regard to the second point, the matter has already engrossed the attention of this court in the cases of *Howland* v. *Stewart* and *Greenshields* v. *Barnhart* upon appeal in those cases, and little more can be said or added to the views there expressed. To the cases cited in those decisions I will add the case of *Rosamond* v. Lord *Melsington*, mentioned in the note to *Pym* v. *Blackburn* (*b*), in which case Lord *Kenyon*, when Master of the Rolls, held that parol evidence was not

(*a*) 1 Hare 352. (*b*) 3 Ves. 40.

1853.
Matthews v. Holmes.

admissible to redeem an annuity bond. That case must have been decided some time between 1783 and 1787. The same doctrine was held by Mr. Justice *Buller* in *Haynes* v. *Hare*, reported in 1 Henry Blackstone 659, while he sat for the Lord Chancellor, in a similar case, for the redemption of an annuity. If it be the law that in cases of mortgages parol evidence is receivable without any fact, act, or conduct of the mortgagee extrinsic the deed, established inconsistent with the terms of the deed, it may well be asked why and wherefore do we see in all the reported cases that the judges have made themselves astute to find something upon which to attach the parol evidence? Although no English case has said expressly in so many words either that it is not the law to receive parol evidence without something else of the nature or character I have mentioned upon which to engraft it, or that it is the law to act upon the naked unassisted parol evidence, yet we cannot do otherwise, as it appears to me, than believe such evidence is not receivable, and because, as Lord *Thurlow* says in *Whitchurch* v. *Bevis* (*a*), "though not expressly, yet by the current of opinion." Lord *North* seems to have been of opinion that a parol agreement to redeem would have been sufficient; but Lord *Thurlow* distinctly disavowed such to be his opinion; yet Lord *Thurlow* was the first to establish the position that an equitable mortgage or lien could be created by parol agreement with deposit of the title-deeds. *Russel* v. *Russel* (*b*) was decided before *Whitchurch* v. *Bevis;* and though he thought there might be an equitable lien thus created by parol, yet I take it to be clear from all his decisions he never thought a mere parol agreement would give the right to redeem where an estate had been conveyed without such an agreement expressed in writing. The soundness of his decision as to the creation of an equitable mortgage or lien by parol was much questioned by both Lord *Eldon* and Sir *William Grant*. In *Ex parte*

Judgment.

(*a*) 2 Bro. C. C. 559. (*b*) 1 Bro. C. C. 269.

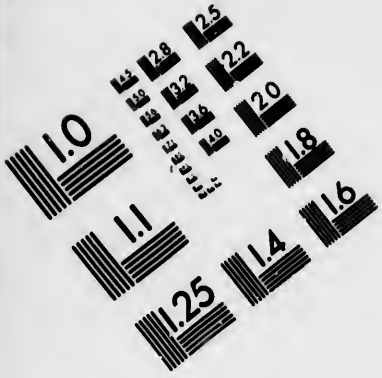
1853.

Matthews v. Holmes.

Haigh (*a*) Lord *Eldon* says—"The case of *Russel* v. *Russel* is a decision much to be lamented; that a mere deposit of deeds shall be considered as evidence of an agreement to make a mortgage. That decision has led to discussion upon the truth and probability of evidence, which the very object of the Statute of Frauds was entirely to exclude." Sir *William Grant*, in *Norris* v. *Wilkinson* (*b*), speaking of *Russel* v. *Russel*, says—"So that whether the interest in land did or did not pass, was to depend upon the testimony of witnesses, and not on any written contract between the parties. I do not see why there should be such a disposition to relieve parties from the necessity of attending to the requisitions of the statute. There is no case where a man is willing to part with his title-deeds in which he would not also be ready to sign a memorandum of two lines specifying the purpose for which he had parted with them. By dispensing with any written evidence of the contract, an opening is left for all the fraud and perjury which the statute was calculated to exclude." In *Ex parte Whitbread* (*c*) Lord *Eldon* again says—"All this goes to prove that, departing from the rule given by the statute, we have no rule to go by; and it is better that men should be taught, as I hope they will be by this decision, that where they mean to have an interest in an estate, they should have two or three lines in writing." In a case before Lord *Hardwicke*, reported 9 Modern 284, we find similar language used. The bill in that case set forth that the ancestor of the defendant had agreed to secure a debt of £400, of which £300 was to be by a mortgage upon certain property, and £100 by his bond. The deeds had been deposited with a solicitor to prepare the mortgage, and he was instructed to prepare the bond. Before the instruments were ready for signature, the person died, and the object of the suit was to have it decreed that the creditor had a lien on the

Judgment.

(*a*) 11 Ves. 403. (*b*) 12 Ves. 197. (*c*) 19 Ves. 212.



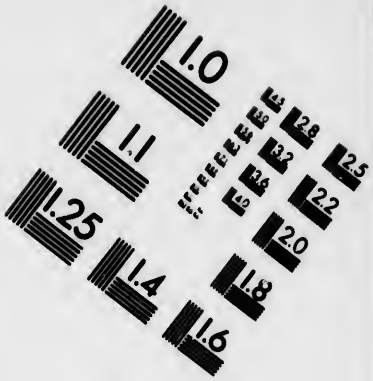
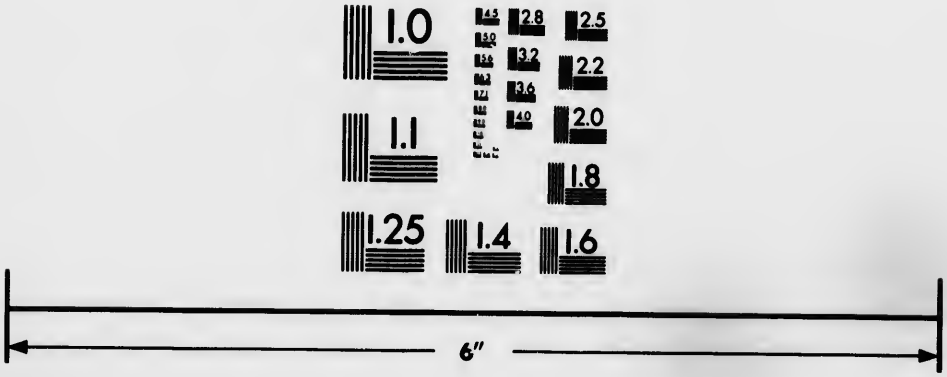
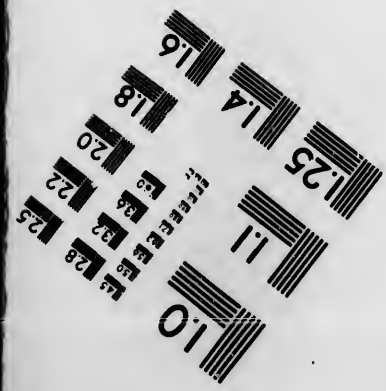
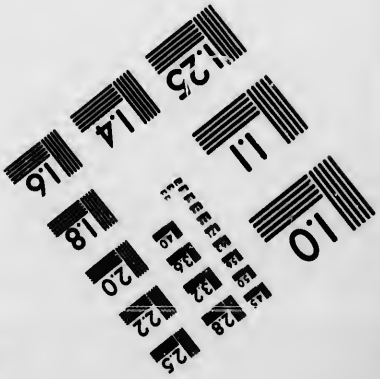


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

1853.

Matthews v. Holmes.

estate for the amount agreed to be secured by mortgage; and secondly, that the heir should be decreed to execute a bond for the £100. The agreement to give the bond was fully proved. The first part of the case was given up in the argument, but it was insisted that the heir should be decreed to give the bond. Upon this branch of the case, Lord *Hardwicke* said: "If the bill had been brought against the ancestor, the court would have decreed the bond in the common form; but the case is different when a bill is brought against the heir, for nothing can bind him but what creates a lien upon the land, which a parol contract cannot do, because of the Statute of Frauds and Perjuries. And it would be a thing of most dangerous consequences to extend agreements by word of mouth in the diffusive manner contended for, viz.: that which is verbally contracted to be done is as though it was done; for this would be taking away the conveniences of the statute, and would throw agreements into the same looseness and uncertainty as before that act of parliament." It is scarcely possible to believe that such judges would have used the language I have quoted, or have been so hostile to the doctrine of an equitable lien being created by parol, if it had been the law of the court, or the doctrine of equity, that a person who had to all appearance a complete estate in fee simple, and who asserted such to be the case, and relied upon it, was liable to have it cut down to a mortgage upon mere naked unassisted parol testimony. The proposition that the effect of the absolute conveyance may be controlled by parol evidence, branches out into two lines of argument; first, that if there be an agreement for mortgage, and that is carried out by means of an absolute conveyance with a verbal agreement that there may be a redemption, the matter can be treated as one of contract, in which the execution of the conveyance may be considered as part performance, and so the court will enforce the other part; and secondly, that it is in case of mortgage *ipso facto*

Judgment.

1853.

Matthews v. Holmes.

a fraud in the mortgagee to take an absolute conveyance, although it may be done upon the express agreement, and by the desire of the mortgagor, that his right to redeem shall rest entirely in parol, without any writing. With respect to the first, the answer to it is, that whatever was agreed upon verbally between the parties before the execution of the deed can be looked upon but in the light of treaty, and that when the parol agreement is reduced to writing, the parties can no longer proceed upon the parol agreement (*a*). The execution of the deed is not part performance of the contract, but is the contract itself. Lord *Cottenham* explains what is reported to have been said by him in *Hammersly's* case (*b*), in the case of *Lassence* v. *Tierney* (*c*). Upon the execution of the conveyance, his estate is at once transferred, and from that moment, if the deed manifests no interest remaining in the transferror, then, if he has no writing of any kind to prove an interest in the land, the transferror is clearly within the terms of the statute, for no verbal agreement made after the execution of the deed can alter the case (*d*). The doctrine of part performance, to enable a contract to be carried out, is based upon the fact that the agreement is a completed agreement, and there can be no part performance where there is no completed agreement (*e*). With regard to an interest in lands, there can be no agreement by parol, and therefore the execution of the deed is no part performance of any completed agreement, but must necessarily be the agreement itself (*f*). With regard to the second line of argument, suppose the evidence in a case where the defendant denied in every respect that the transaction was a mortgage should prove just

Judgment

(*a*) Vide Smith v. Henley 1 Phil. 291.
(*b*) 12 Clk. & Fin., 61. (*c*) 1 Mac. & G., 551; 14 Jur., 182.
(*d*) 15 Jur. 1115.
(*e*) Vide Lady Thynne v. The Earl of Glengall, 12 Jur. 805.
(*f*) Vide the remarks of Vice-Chancellor Parker in Martin v. Pycroft, 21 Law. J., ch. 448.

1853. Matthews. v. Holmes.

what I have supposed, can it be said the parties have not a right to rest an agreement in parol if they please? Is there any fraud in the making of the agreement in that way, if the transferror wishes that it should be so? The fraud consists in the non-fulfilment of the verbal contract at a future time; but that fraud cannot be carried back and attached upon the original contract unless the transferree was the cause why the instrument was drawn originally as it was; and there might be reason from his after conduct to suppose and believe he meditated a fraud from the beginning. The reasoning is obviously within a circle, thus: parol evidence must first be received to prove that the absolute conveyance was intended as a mortgage; that being established, the inference then is, that a fraud was intended, and because a fraud is meant to be committed, therefore the evidence is receivable to prove the transaction to be a mortgage. The nearest approach to such a position is the case of *Pember* v. *Mathers* (*a*), which was a bill filed to compel the defendant to give a bond to indemnify the plaintiff against rent and covenants contained in a lease upon a parol agreement. The distinction, however, drawn by Lord *Thurlow* is this, that when the assignment of the lease was the party taking it objected for the want of the indemnity, and then the other agreed to give the bond, and his Lordship was of opinion it was then to be considered within the rule of law that it was a fraud; but he distinctly recognized the rule that parol evidence cannot be admitted to increase or diminish a written agreement. Sir William *Grant*, remarking upon this case, in *Clarke* v. *Grant* (*b*), declined to say how far it would be proper to go the length of it, and on the ground of it, to decree specific performance. *Pember* v. *Mathers*, however, is far short of what is contended for in the case before us, because the instrument in that case was executed, as found upon an issue directed

Judgment.

(*a*) 1 Bro. C. C. 54. (*b*) 14 Ves. 520.

to be tried, upon the consideration that the defendant had engaged to give the bond to indemnify. 1853.

Matthews v. Holmes.

I have not the means of access to the decisions of the courts of the United States, with the exception of such cases as have been decided by Chancellor *Kent*. Most certainly, in all his decisions, he has discovered something upon which he has attached the parol evidence, in order to constitute the transaction a mortgage, and consequently to grant redemption. In the American edition of Mr. *Coote's* work on mortgages there is collected a number of decisions of different courts of the United States, which would seem to favour the position contended for by the plaintiff's counsel; but I cannot think Chancellor *Kent* ever went the length now contended for. The effect of many of the decisions of the American judges is easily to be accounted for, however, when we know that they do not profess to be based upon the common law, but seem rather intended to build up a system peculiar to themselves, and agreeable to their own notions and ideas of equity. In a decision of the assistant V.-C. *Sandford*, of the State of New York, reported in the New York Legal Observer, vol. ii., page 233, he uses this language: "It is true that our courts have proceeded far beyond the courts of any other state or country in which the common law prevails, in the admission of parol evidence to invalidate contracts in writing and under seal." Judgment.

There is a valuable comment upon the conflict of authority upon this point in the American notes to the case of *Woollam* v. *Hearn*, 28th of *White's* Leading Cases in Equity. How far parol evidence will be received to cut down the absolute conveyance, appears by no means to be settled in the United States' courts. There are in the notes in question extracts from the judgment given in a recent case directly at variance with the doctrine laid down by

1853. Matthews v. Holmes.

Mr. Justice *Story*, and in affirmance of, and in accordance with the doctrine of the English authorities. (*a*) I make an extract of two passages: "There being no written memorial of any condition or defeazance, neither the public interests nor the established principles of equitable jurisprudence will allow a court of either equity or law to admit parol testimony, in opposition to the legal import of the deed and the positive denial in the answer, unless a foundation for such evidence had been first laid by an allegation, and some proof of fraud or mistake in the execution of the conveyance or of some vice in the consideration. This rule, though it may operate harshly in a particular case, is nevertheless so salutary and conservative, that an inflexible adherence to it is necessary for effectuating the policy of the Statute of Frauds and Perjuries, and of giving proper security to property, and full effect to solemn contracts in writing." After commenting upon the facts and evidence in the case, the judgment proceeds thus: "The circumstances to which we have just alluded might be admissible for corroborating (as they might do in some degree) evidence of fraud or mistake or illegality of consideration, but should alone never be deemed sufficient as a foundation for the introduction of witnesses to testify merely that an absolute conveyance, executed fairly, legally, and understandingly, was intended between the parties as a mortgage."

Judgment

The enactment of the Statute of Frauds, that any interest in or concerning lands shall be in writing, is not peculiar to the law of England. The civil law, as administered in France, required that mortgages should be in writing, and be made in the presence of public notaries. In this respect it differed from the Roman law; for under it a covenant or agreement stipulating it to be a mortgage might be made even without any indenture or writing, and without the presence or

(*a*) Thomas v. M'Cormack, 9 Dana 460.

assistance of any public officer whatever. When the deed was once made, the civil law in regard to it, unless there should be a forgery, is thus laid down: "Proofs in writing are those which are drawn by some written act, such as a contract, a testament, or other writing which contains the truth of the fact in question. People put down in writing contracts, testaments and other acts, in order to preserve the proof of what has been done by the testimony of the persons themselves, who express therein their intentions. Seeing the force and validity of proofs by writing consists in this, that they are a testimony which the persons who are parties to the said acts give against themselves, and a testimony which is unchangeable, there can be no better proof of what has passed between them than what they themselves have expressed of the matter. This strength of written proof is the reason why we do not receive contrary proofs by witnesses. Thus he who would call in question a testament that is made according to form, pretending to prove by wit- Judgment.
nesses either that the testator had altered his will, or that his intention was otherwise, would not be admitted to make such a proof; nor he who should offer to prove by witnesses that he had not received a sum of money for which he had given an acquittance. When the written acts are according to form, not only are contrary proofs not received, but even not so much as a hearing is granted to one of the parties who should desire to have the witnesses to an act examined j[illegible]ially, in order to make some change in the act, or [illegible]explain it. For besides the danger of some infidelity on the part of the witnesses, the act having been committed to writing only with design that it might remain unchangeable, its force consists in remaining always the same as it was made at first." (a). I have been unable to come to the conclusion that parol evidence is receivable in cases of mortgages unless there be something

(a) Dom. Civil Law, sects. 2019, 2020, 2021, 2022, 2025.

1853. Matthews v. Holmes.

in the conduct of the party denying the transaction to be a mortgage inconsistent with the deed, or there be some writing, fact, or thing, independent of the parol evidence, to establish the position that the deed does not truly speak the agreement of the parties, and upon which to attach the evidence in order to explain the matter. Of course it must be understood that I do not mean to apply these remarks to cases of fraud or mistake. The difficulty of the case seems to rest upon the point—what constitutes fraud. If parties choose to rest their cases upon parol agreements, as regards an interest in lands, I can see no reason for drawing any distinction between cases of mortgage and any other case, beyond the length the cases have already gone.

Judgment.

The next question is, whether there are any sufficient circumstances upon which to attach the evidence in this case, that the plaintiff has still a right to redeem. I shall assume, because I think the evidence warrants the conclusion, that the transaction originally by the *Jones'* with *Edward Matthews* was a loan of money, and security given for it. If things had remained simply in that state, then, that position being once established, the burthen of proof that it was changed or altered would fall upon the party asserting it. This case, in my opinion, mainly turns upon whom the *onus probandi* lies. The plaintiff brings this suit to redeem, alleging that he, as the representative of the bankrupt estate, still may treat the matter as a loan, and security taken for it. In order to determine this question, it is necessary to examine, with some degree of minuteness, the facts. We find that it was before the 3rd September, 1840, the loan was effected, and, as stated, for one year. The £300 loaned was £200 upon the Ferguson lot, and £100 upon the four lots, and the memorandum respecting the transaction included the four lots as well as the Ferguson place. The Ferguson place belonged to *A. B. Jones*, to which he had a title in fee.

1853.

Matthews v. Holmes

The four lots belonged to the bankrupt, and he held a right from Government for purchase, and there was still due of the purchase money £42 18s. Mr. *Matthews* retained in his hands the £42 18s., and accounted for the remainder of £300 to the two *Jones'*. A legal mortgage was created upon the Ferguson place, and an absolute assignment of the four lots was made to Mr. *Matthews*. It appears also that Mr. *Matthews* took a security, by way of confession of judgment, for £300, which, though not expressly stated to be the same debt, yet being proved in the way it has been, in connection with Exhibit B, there can be little doubt that it refers to the same debt. With regard to the Ferguson place, it would appear that both of the *Jones'* were engaged in building a house, and at the time of the mortgage the bankrupt was living in the house. Before the expiration of the year, Mr. *Matthews* purchased from *A. B. Jones* the equity of redemption in the Ferguson place, and on 20th July, 1841, a memorandum of agreement was signed, and *A. B. Jones* agreed to convey the same at a future time, which is admitted to have been done on 29th April, 1842. *Matthews* allowed the bankrupt to remain in possession of the Ferguson lot, and it appears that it was in February 1843 that *Matthews* finally assumed possession and control of that lot, for his lease to *Craig* was to commence on the 20th of February, 1843. The patent was not obtained by *Matthews* till the 20th of January, 1843, for the four lots, and he did not assume possession of them till 1843. He did not clothe himself with the legal title until after the expiration of fifteen months from the time at which the bankrupt should have redeemed them. Thus we have a clear sale of the equity of redemption in one portion of the premises given in security, that being the legal estate, the other being an equitable interest only remaining upon the assignment until *Matthews* obtained the patent, and he appears to have assumed the possession of the two properties nearly about the same time. Things

Judgment.

1853.

Matthews v Holmes.

were in this state, so far as disclosed by the documents, at the time of the bankruptcy. The reason why the bankrupt did not disclose a right to these four lots, if he had any, at the time he obtained his certificate, is to my mind altogether unsatisfactory, and seeing that the different accounts of the *Jones'* are so confused, and in some instances contradictory; I think no reliance can be placed upon the reason that they were omitted because they were not considered worth anything. And if it be true that they were not then considered worth anything beyond the amount due *Matthews*, that affords a strong reason for supposing that the bankrupt had either given them up to *Matthews*, or had abandoned them, as I shall hereafter allude to. It is important now to consider the frame of the bill, and how the facts bear upon it. The bill is of a two-fold character—first, in respect of the four lots, and secondly, in respect of the house and shop on the Ferguson lot. As to the four lots, the bill claims that the bankrupt

Judgment.

made an assignment of them to secure the loan of £100, without stating within what time the amount was to be repaid, but asserts that the patent was obtained by *Matthews* on the 20th of January, 1843, subject to the equity of redemption of the bankrupt, and that it so remained till the bankruptcy. In the affidavit of the bankrupt, sworn the 13th of June, 1851, and made for the purpose of verifying his petition in the Bankrupt Court, in order to obtain a fresh appointment of an assignee, he says that the loan was made in 1841, to be repaid in a year, and "*that at the time of the said loan the said Matthews agreed verbally not to take out the patent for the said lot, or apply then, or during the time of the repayment of the said loan, but that the said Matthews, in breach of his agreement, applied for the said patent before the time agreed upon, and obtained the patent accordingly.*" Such an agreement as this, or such a breach of it by *Matthews*, is not stated or charged in the bill, nor has any evidence been offered on the part of the plaintiff to

sustain it. The case made by the bill leaves one to suppose that no circumstance existed which could have any bearing for the purpose of relieving the defendant from the necessity of establishing that the bankrupt had released his right to redeem. The facts, however, being so different from the bill; the statement being so different at different times, and not sustaining the bill; and *Matthews* not having acquired the title till long subsequent to the time when repayment should have been made to him; the bankrupt not making any claim at his bankruptcy, or when he obtained his certificate, afford strong presumption against the presumption which would be raised if the case rested upon the Exhibits A. and B., coupled with Mr. *Wilson's* testimony, if that testimony were properly receivable; and though the general rule is, that there is no presumption against a presumption, yet the subsequent facts in this case are so strong to rebut the first presumption as compels me to say the *onus probandi* of establishing—after *Matthews* had obtained the patent for the lots, and after the conduct of the bankrupt exhibited in the Court of Bankruptcy, and his declaration that he had sold the lots, that the transaction still subsisted as a mortgage—lay upon the plaintiff: and herein his evidence, in my opinion, wholly fails. The presumption is, after seeing the facts, acts, and conduct of the different parties, that *Matthews* did not separate the transactions, and convert the one estate into an absolute one, and leave the other still as a defeasible one. This, combined with the facts which I shall hereafter allude to, convinces me that the burthen of proof that the transaction still continued an open one, as for loan of money and security for it, after the patent obtained, lay on the plaintiff to establish; and, as I have said, he fails to do so. The next point is, whether the defendant's answer will help the plaintiff in any respect. No part of the answer has been used by the plaintiff; but still it is argued that it contains sufficient to prevent the defendant relying upon the Statute of

1853.

Matthews v. Holmes.

Judgment.

1853.

Matthews v. Holmes.

Frauds, or at all events is sufficient to keep alive the transaction as a mortgage. The passage is this: "That in case it should appear that by the original agreement the said assignment was intended merely as a security for a loan, (which this defendant believes to have been the case), the equity of redemption therein was, this defendant hath no doubt, subsequently disposed of to the said *Matthews*, and thus put an end to by mutual agreement." This passage by no means prevents the defendant, who is only executrix, from relying upon sufficient evidence to be adduced on the part of the plaintiff to prove the case. The answer says no more than what I believe myself, that originally the transaction was a loan and security for it; but the plaintiff's case fails to convince me that it remained so, and I think he was bound under the circumstances to prove that it did so remain; and that is all that this passage amounts to. The second feature in the bill relating to the house and lot on the Ferguson lot is this: It asserts that after the 2nd of September, 1840, *Matthews* became possessed of the legal estate, and there was at the time erected thereon a shop and dwelling house, the property of the bankrupt, which *Matthews* well knew, and for a time after *Matthews* became possessed of the premises the bankrupt remained in possession of the house and shop as his own property: that *Matthews* made various repairs at the request of the bankrupt, and charged for such repairs, and fully admitted the bankrupt to be the owner of the house and shop, although he, *Matthews*, was the owner of the land on which it stood: that afterwards *Matthews*, as the owner of the land, ejected the bankrupt from the house and shop, and took the same himself. Now, the evidence not only rebuts all claims of equity upon *Matthews* in respect of this house and shop, but it has a considerable bearing upon the question respecting the four lots. So far from being ejected, he voluntarily abandoned it. He swears in his evidence, "After the new addition was finished, and

Judgment.

I had settled with him, Mr. *Matthews* wanted me to take a lease of the premises from him, which I refused, and soon afterwards I left the premises." The interest in the house, and the arrangement respecting it, according to the bankrupt's account of it, is this: "At the time that Mr. *Matthews* bought from *A. B. Jones* the part of Lot 17 spoken of, Mr. *Matthews* well knew that I had an interest in the house, and we then entered into an agreement verbally 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 I was in the meantime to remain in possession. The sum to be allowed me for the house was not named." It is important to bear in mind that the agreement for purchase of the equity of *A. B. Jones* was made on the 20th of July, 1841, and the consideration, £350, of which £200 mortgage to *Matthews* would be due in September, 1841, and another mortgage to Mr. *Goodhue* for £150, the first payment upon which would be due on the 1st of January, 1842, and the conveyance from *A. B. Jones* to complete this matter was not received until the 29th of April, 1842. The amount of *Matthews'* debt, proved in the Bankrupt Court, appears to have been £64 15s., of which there were two promissory notes, one given on the 1st of January, 1842, and the other on the 18th of July, 1842. When the bankrupt obtained his certificate, he made oath that he had given an account of all his estate, "excepting the equitable claim I may have against *Edward Matthews* for about £60." In his evidence he swears: "I had never made up my mind what Mr. *Matthews* had owed me upon that house; but I considered that he owed me an equitable claim of £60 upon it. I meant that this claim was a set off to the notes proved by him." Whether such a claim be well founded to the £60 is by no means clear, for the bankrupt again says—"I did not pay anything in the shape of rent to Mr. *Matthews* for the house in

Judgment.

1853.

Matthews v. Holmes.

Dundas Street, from the time my brother sold it to Mr. *Matthews*, until I left it—about eighteen months. I should think the whole premises were worth £50 a year." *Craig* leased the premises in February, 1843, at £50 a year. The bankrupt does not say whether there was any agreement for extension of time that he would have to purchase at the same price his brother sold to Mr. *Matthews;* and without some agreement for that purpose, £200 would be due to Mr. *Matthews* in September, 1841. The first payment to Mr. *Goodhue* would not be till 1st January after. Now we find that all the building and repairs spoken of must have taken place before the first payment was due to Mr. *Goodhue*, and before the deed executed by *A. B. Jones* to Mr. *Matthews*. The bankrupt remained in possession all the year 1842, for upwards of a year after the payment would be due to Mr. *Goodhue*, and till the second payment would fall due on that debt, and without paying Mr. *Matthews* anything; and then when he was required to take a lease of the premises, he voluntarily abandons them. After the voluntary abandonment of the house and shop, and this evidence as to the extent of the claim, and setting it up as a set off to the notes proved in the Bankrupt Court, it is impossible to suppose any claim can now exist so as to attach on the same. The strong feature and bearing this part of the case has upon the four lots is this, that if the plaintiff's position—namely, that he can claim for the value of the bankrupt's interest in the house as a liquidation of so much of the loan upon the lots now—it was equally available at the time of the bankruptcy for the same purpose. The stating of one equitable claim only, and that made without claiming it to be applied upon any other equitable claim, argues very forcibly that no other equitable claim then existed. We see that the transaction respecting the whole of the property was blended together at the outset. Before the expiration of the time for redemption, we find the mortgage upon the legal estate converted, as respects

Judgment.

one brother, into a complete perfect estate. According to the other brother's account, it was agreed that he might purchase, or be paid for his house. After remaining in possession for eighteen months without either alternative being carried out, and paying no rent, he abandons the house. When no redemption is shewn to be asked for, or sought, as respects the four lots, within the time limited for purchasing the house and Ferguson lot, if there were any time for it, or if there were an agreement for the purchase of that property, that the time is suffered to elapse, leaving the absolute assignment which might enable *Matthews* to obtain the legal estate just as it was; and the patent not obtained until after the bankrupt plainly saw, as the just inference is, that he could not purchase the Ferguson lot back, and must abandon it; it is by no means improbable, that it is true as suggested by the answer that the bankrupt and *Matthews* had an understanding respecting the four lots. Indeed the facts, circumstances, and evidence, lead my mind to the conclusion irresistibly that it must have been so. Neither party has offered any evidence to shew what has become of the cognovit or how it has been dealt with. If the *Jones'* had discharged that by other ways, then it being, if it were so, a security for the £300, they would have been entitled to a reconveyance; but as respects the £200 of this sum, it was cancelled by the release of the equity of redemption in the Ferguson lot. The explanation respecting this matter was a fact much better known to the *Jones'* than the defendant, who is here in a representative capacity; and therefore according to the rules of evidence, if such explanation is requisite to elucidate the case, it lay upon the party within whose knowledge it was to give the information. If that cognovit were held as a still subsisting security against the *Jones'*, it would afford argument for believing that the bankrupt did not forego or abandon his equity, as respects the four lots. On the other hand, if that cognovit had been given up to the *Jones'*

Judgment.

1853.

Matthews v. Holmes.

it would afford irresistible evidence of the truth of the defendant's suggestion. The evidence offered on the defence could not, of course, shew that the bankrupt had formally released his equity of redemption; but the matter being as it was, in the position of enabling *Matthews* to clothe himself with the legal estate at any time, they were so situated, in my opinion, as to enable the bankrupt to be deprived of his equity, so long as it so remained in that situation, by his agreement, acts and conduct, without any formal instrument for the purpose. Admitting that he had, at one time, an understanding with *Matthews*, as to the purchase of the Ferguson lot; and then seeing that he voluntarily abandoned that which was the most valuable of the properties at that time; and finding as we do, that it was not until then that *Matthews* obtained his patent for the four lots, and coupling these facts with the evidence of the witnesses who speak of conversations with the bankrupt as to his having sold and disposed of the lots to *Matthews*, and who speak of a time anterior to his having obtained the patent and subsequent to the agreement, if there were any, for the purchase of the Ferguson property: and when, from the evidence, we may suppose his willingness to be rid of the one property as well as the other for the debt then due; and joining these with the facts and circumstances of no claim made in the Bankrupt Court to any equity of redemption, and not then stating there was any debt due Mr. *Matthews* beyond the notes mentioned in the bankrupt's schedule of debts due by him, are sufficient in my opinion to cast the burthen of proof upon the plaintiff, to establish his proposition that when Mr. *Matthews* obtained the patent it was still subject to the equity of redemption which at first existed upon the right of completing the purchase from the Crown—in a case of this kind, where one of the parties comes for redemption after the death of the other party, who could have given us the information of how the matter really stood between them. Add to this the fact that

Judgment.

1853.

Matthews v. Holmes

the parties now seeking to redeem had it in their power to show whether the debt was still a subsisting debt, independent of the assignment, by giving some evidence to clear the mystery respecting the cognovit, and have given us no information upon the subject, I think we should presume nothing in their favour. The bankrupt must at the time he delivered the schedule of his debts, and made oath to it, have considered that the debt incurred in respect of the four lots was extinguished, otherwise he was bound to have stated it as a debt still due by him. That a security was held for it could not, and he could not have been advised that such circumstance would, be any reason for not stating it as a debt still due by him. If this debt was extinguished, the right to redeem would be gone with it; and if not extinguished, the plaintiff could have shewn that fact, without it being left to inference.

Judgment.

If we take it in this case that the absolute assignment of the contract with the government for the purchase of the four lots was made upon the condition that it was in security for a loan of money to be repaid in a year—and to establish that proposition the exhibit B. is properly proved and furnishes written evidence—then the utmost effect which can be given to it is, that it is an imperfect mortgage by contract, because the legal estate was not and could not be thereby transferred. Looking at this matter in that light, I do not see why it is not competent for the defendant to insist that the bankrupt could by parol waive his right to redeem, and allow *Matthews* to clothe himself with the legal title by obtaining the patent without there being a formal instrument for the purpose. In cases of contract, I take the current of authority now to establish that to rebut an equity the contract may be shewn to be dissolved by parol, where clearly an end is put to it *in toto*. (*a*) If there ever was a case in which there

(*a*) Price v. Dyer, 17 Ves. 356; Coles v. Trecothick, 9 Ves. 250; Robinson v. Page, 3 Russ. 119; Story Eq. Juris., sect. 770; 3 Wood. L. 57; Sug. V. & P., ch. 3, sect. 9.

1853.

Matthews v. Holmes.

might be an abondonment of all right on the part of the bankrupt to redeem, or an agreement to discharge or forego the equity resulting from the first agreement without formally doing so by an instrument in writing, this is the case; for there was no legal interest in the land to be released, nor was there before the patent obtained any equitable interest in the land itself in the assignment of the contract, but only an equitable interest in a contract of purchase from the Crown, which had been assigned.

The case of *Massey* v. *Johnson* (*b*) has a considerable bearing upon this question. The plaintiffs were mortgagees and were suing the defendants as executors of the mortgagor upon the covenant for payment of the mortgage money. The defence to the action was that the estate was insufficient to pay the mortgage money: that there were three other mortgagees in the same situation: that the defendants were the devisees of the legal estate, and executors of the deceased mortgagor: that they had received assets, which, after making certain deductions, amounted to the deficiency on each mortgage; and that thereupon it was agreed between the plaintiffs and the defendants and the other mortgagees that no suit for the administration of the assets should be instituted, and that the assets should be divided ratably between the mortgagees, and should be paid to them in satisfaction of the sums due, over and above the estimated value of the estates; *and that all the respective rights to the mortgaged property should henceforth be wholly barred, extinguished, satisfied and discharged*, and the mortgagees should henceforth become absolute owners, both at law and in equity, of the mortgaged estates, and that the covenants in the declaration should be satisfied and discharged in consideration of the premises. The plea then averred payment to each mortgagee, and that the several rights and equities of redemption of the defen-

Judgment.

(*b*) 1 Ex. Rep. 241.

dants were barred and extinguished. The issue raised by the replication was, that it was not agreed, nor did the defendants pay to the plaintiffs the sum of money in the plea mentioned. It will be observed that the averment, that the equities were barred and extinguished, was not in issue. At the trial, Chief Baron *Pollock* held the plea could not be proved by parol, but required a writing, and the plaintiff was allowed to recover. Upon motion against the verdict, the judgment of the court was given by Baron *Rolfe*. The court say it was unnecessary to say at that stage of the proceedings whether the plea, if proved, would be a good bar. Baron *Rolfe* says—"It must be admitted that no agreement to convey an equity would be binding unless in writing, because a court of equity treats the equity of redemption as the land itself—at all events, as an interest in land; and if in this case it were essential to support the plea that a binding agreement to convey the equity of redemption should be proved, the plea would have been held bad on demurrer for not stating the contract to be in writing; and to make it good, a contract in writing must have been proved. But this plea would have been good on demurrer, even if it had been expressly stated that the contract was by parol; for the agreement by the plaintiff to forego the balance of his mortgage debt above the value of the estate, on his receiving his share of the assets, would be obligatory on him, and the receipt of that share a satisfaction for the estate, though there was no binding agreement on the defendant to convey the equity of redemption; for the agreement of the other mortgagees to take their shares also is a good consideration for giving up the claim for the residue of the debt against the defendant." It was decided there was no necessity to prove an agreement in writing.

1853.

Matthews v. Holmes.

Judgment.

In the case before us, as the matter stood between the parties, there was no occasion to do more than extinguish the debt, for the extinguishment of the debt

1853.

Matthews v. Holmes.

before the patent was obtained left *Matthews* free to apply for it unclogged with an equitable claim of the bankrupt, and therefore leaves no room to apply the proposition once a mortgage always a mortgage until a release executed.

The plaintiff's evidence fails, in my opinion, to establish that when *Matthews* obtained the patent there still subsisted a right in *Jones* to redeem; and therefore I think the decree should be reversed, and the bill be dismissed with costs.

Judgment.

SPRAGGE, V. C.—It being once established that the instrument of the 2nd of September, 1840, assigning to *Matthews* lots 11 and 12 on King street and Dundas street, was only a mortgage and not an absolute sale of these lots; and the relation of mortgagor and mortgagee being thus established between *Alfred T. Jones* and *Matthews*, it must lie upon the latter to shew, by clear and satisfactory evidence, *that* he acquired, and how he acquired the equity of redemption.

In the original transaction, the principal thing was a loan of money; that it was secured upon land, was a mere accessory. *Alfred T. Jones* remained, in the view of equity, the owner of the land: the defendant must shew how that ownership was changed. The non-payment of the money lent certainly had no such effect. Nothing could effect such change short of a purchase by *Matthews* from *Jones* of that land, or *Jones'* ownership of it, commonly called the equity of redemption. Anterior to such purchase the land was merely a mode of security; and the principle upon which courts of equity permitted the borrower to redeem his land after *legal* forfeiture was, that it was unreasonable that the lender should retain for his own benefit that which was intended as a mere pledge.

I think it material to define the real position of the parties in the eye of equity, though the doctrine be a

trite one; because the notion is often entertained that a mortgagor conveys away his estate to the mortgagee, retaining a bare right to redeem. This is not the equitable doctrine; but on the contrary, the mortgagor retains his estate, and remains owner—the mortgagee holding the land simply as a pledge; and it results from this doctrine that a change of ownership must be shewn —a purchase by the mortgagee of the mortgagor's estate—before the right to redeem can be denied. 1853. Matthews v. Holmes.

It has been said by a high authority that a release of the equity of redemption may be inferred from the dealings of the parties in respect of the estate mortgaged. This, however, is a doctrine which it would be dangerous to apply except with great caution. No mere dealings between the parties the nature of which may be unexplained, and which may or may not have had relation to the mortgage transaction, can safely be admitted for the purpose. No conclusion arrived at from a mere balancing of probabilities should be held sufficient; nothing, in fact, short of a course of dealing between the parties in relation to the mortgage property or the mortgage money, inconsistent with the continued subsistence of the relative position of mortgagor and mortgagee. If there be danger in the admission of evidence to shew a deed absolute in its terms, a mortgage—of cutting down a man's fee simple estate to a mortgage security—the danger is certainly not less in the admission of evidence to shew a pledge for the payment of a debt an absolute fee simple estate in the creditor. The thing to be proved is nothing less than the transfer of the ownership of an estate from the one to the other. Strictly and properly, this should be evidenced in writing under the hand of the party whose estate is transferred. In the absence of that, the inference should be irresistible, from circumstances clearly proved, that such transfer had taken place. The mind of the court must be satisfied that it has taken place, and that the circumstances proved are not Judgment.

1853.

Matthews v. Holmes.

referable to anything else. I feel clear that nothing short of this can warrant a court of equity in denying redemption. It is not a matter in which it has *discretion* to exercise; for until the equity of redemption is released by the act of the parties, or by lapse of time, the estate remains in the mortgagor, and that estate cannot, I apprehend, be divested at the discretion of the court. I do not see any sufficient ground for reversing the decree of the court below.

Judgment.

Per Curiam (the Chancellor and Vice-Chancellors dissenting)—The decree of the court below reversed, and the bill dismissed with costs.

Whereas the above-named appellant did on the thirtieth day of October one thousand eight hundred and fifty-two present her petition of appeal unto this court, praying that a decree of the Court of Chancery of Upper Canada made in a certain cause in that court, wherein the said respondent was plaintiff and the said appellant was defendant, and bearing date the sixth day of April one thousand eight hundred and sixty-two, might be reversed or varied; and whereas the said appeal came on to be heard before this court on the second day of July last, whereupon, and upon debate of the matter, and upon hearing read the pleadings and evidence in the said cause, and upon hearing what was alleged by counsel for both parties, this court was pleased to defer pronouncing judgment until this day: whereupon this court doth hereby order, adjudge, and decree that the said decree of the said Court of Chancery be and the same is hereby reversed, and that the bill of complaint of the said respondent do stand dismissed out of the said Court of Chancery with costs: and that with this declaration the cause be remitted back to the said Court of Chancery to do therein as shall be consistent with this order.

Order.

APPENDIX A.

In the Privy Council, Friday, December 9th, 1853.

BARNHART v. GREENSHIELDS.

Judgment was delivered by the Right Hon. *Thos. Pemberton Leigh*, as follows.

The appellant in this case undertakes to make out against the respondent *Greenshields* two propositions—First, that the transaction with himself, the appellant, and *Paterson*, though in form an absolute sale, was in effect a mortgage; Secondly, that the respondent, at the time he took his security or advanced his money, had notice that *Paterson* was only a mortgagee.

Upon the first point, if it were necessary to decide it, we should perhaps take further time for consideration; our impression is, that the evidence upon that subject is sufficient to establish the appellant's case.

Upon that assumption we proceed to the consideration of the second question. The notice insisted upon in the case is both actual and constructive notice. It is said that the possession of the property, at the time of the assignment to the respondent, was such as, of itself, to affect him with notice of the appellant's title, that the appellant was in possession and *Paterson* out of possession, and that this circumstance was sufficient to put the respondent upon enquiry; but that, in addition to this, the respondent is proved to have had distinct notice from several individuals of the appellant's title, or, at all events, information which made it his duty to ascertain by further enquiry what the title of *Paterson* really was.

We will consider the law and the evidence, as they apply to the possession and to the conversations, separately.

With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of the land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that this equity of the tenant's extends not only to interests connected with his tenancy, as in *Taylor* v. *Stibbert*, 2nd *Vesey*, jun., but also to the interests under collateral agreements, as in *Daniels* v. *Davison*, and *Allen* v. *Anthony*, the principle

being the same in both classes of cases—namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact is bound, according to the ordinary rule, either to enquire what that interest is, or to give effect to it whatever it may be.

This is the doctrine to be collected from the judgment of Lord *Rosslyn* in the case of *Taylor* v. *Stibbert*, and from the earlier authorities to which he refers; and the decision itself and the principles upon which it is rested are approved of by Lord *Redesdale* in his judgment in *Crofton* v. *Ansley*, 2nd *Schoales* & *Lefroy*. The language of Lord *Eldon*, in *Daniels* v. *Davison*, which was decided in 1809, is to the same effect; and when some years afterwards, in *Allen* v. *Anthony*, he had again occasion to consider the subject, he states the rule in these words: "It is so far settled as not to be disputed that a person purchasing when there is a tenant in possession, if he neglects to enquire into the title, must take subject to such rights as the tenant may have." The rule is stated in the same way by *Sir James Wigram*, in his most elaborate judgment in the case of *Jones* v. *Smith*, 1st *Hare:* "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," and, referring to the authorities which I have mentioned, he adds, "For possession is *primâ facie* evidence of seizin in fee." The last case on the subject, *Bayley* v. *Richardson*, in 9th *Hare*, rests on precisely the same principles; and although in the argument of this case at the bar it was suggested that the language of the learned judge in that case goes farther, and lays down that it is the duty of the purchaser to make enquiries of a tenant in possession not only for the purpose of protecting himself against any interest of the tenant, but for the purpose of guarding against interests of other persons, it is clear from the context that such is not the meaning of the words used, and in fact we are confirmed in that opinion from the learned judge himself, who states that it was not his intention to give any other meaning to it than that contained in the judgment.

In all the cases to which we have referred, it will be observed that the possession relied upon was the actual occupation of the land, and that the equity sought to be enforced was in behalf of the party so in possession. There is no authority in these cases for the proposition that notice of a tenancy is notice of the title of the lessor; or that a purchaser, neglecting to enquire into the title of the occupier,

is affected by any other equities than those which such occupier may insist on. Whatever authority there is upon the subject is the other way. In *Oxwith* v. *Plummer*, which is reported in *Vernon*, it is said to have been ruled that the possession of the under tenant was not sufficient to affect a purchaser with notice, and that case is generally regarded as a decision that a purchaser without notice cannot be affected by the circumstance of the vendor having been out of possession for many years.

It must be observed of that case, that it is reported not only in *Vernon's* Reports and *Bacon's* Abridgment, to which reports we were referred at the bar, but that there is a full and fair, and apparently accurate report in *Gilbert's* Reports, by which the decision appears to have proceeded entirely on the ground that there was no covenant to surrender the copyholds, and that in truth there was no intention to include them in the plaintiff's mortgage, so that no question could arise as to notice.

But, whatever may have been the grounds of the decision in that case, the rule itself appears to have been adopted and recognized by the courts. It is referred to with approbation by Vice-Chancellor *Wigram* in *Jones* v. *Smith*, and by Lord *St. Leonards* in his valuable treatise on vendors and purchasers.

If we apply these principles to the case before us, there is no doubt as to the result. There is not the least pretence for saying that the appellant was ever in the actual possession of the land. *Bennett's* statement to that effect is directly contradicted both by *John* and *Charles Barnhart*, and is wholly unworthy of attention. As to the actual possession there appears to be no doubt. We take the statement of *John Barnhart* to be so far true. He says, that he had the management of the property as agent for the appellant; that in 1831 he let it to Mr. *Proctor*, who remained in possession until May 1834, when he let it to *Freedy*, who remained in possession till 1841, since which time he, the witness, has been in the actual possession. He says that the tenants paid their rents to him as landlord, but that he made the lettings and received the rents as agent for his son, the appellant. It is clear, therefore, that at the date of the assignment to the respondent in 1839, and his advances, Freedy was the tenant in possession, by whose interest in the lands, whatever they were, the respondent might be bound. It is not necessary to consider in what character *John Barnhart* let the lands and received the rents. The statement that he acted merely as agent for the appellant is not

very consistent with the fact that he never accounted to his alleged principal for a shilling of the rents, and with other passages in his evidence, and is in direct opposition to the oath of *Charles Barnhart*, who swears that his father held the lands under a lease from the appellant made in the year 1835, for a term of 18 or 19 years, or longer, and that he, *Charles*, was an attesting witness to the lease. It is sufficient to say that, in our view of the case, there was no possession of the land which could in any manner affect the respondent with notice of the appellant's title.

We now come to the parol evidence of notice. Upon this subject the rule is settled that a purchaser is not bound to attend to vague rumours—to statements by mere strangers; but that a notice, in order to be binding, must proceed from some person interested in the property.

Upon examining the evidence, it is found to consist entirely of alleged conversations of different individuals with the respondent. None of these conversations are either charged or in any manner alluded to in the bill, and although the old rule of court upon that subject appears to be relaxed, yet, in judging of the weight to be given to such evidence under such circumstances, we agree with the respondent's counsel that it must always be remembered that if such conversations had been alleged, they might have been denied; and if sworn to by only a single witness, could not have prevailed against the defendant's denial, and that if not denied they might have been explained by the introduction by the defendant of other circumstances which would altogether have destroyed their effect.

The first witness on this subject, *Bennett*, we wholly disregard; his evidence to which we have alluded, on the 9th interrogatory, is so directly contrary to the truth, that his loose testimony to the 8th is not entitled to the smallest attention. His evidence, besides, is open to the objection that the notice alleged to be given by him proceeds from a person who had no interest in the property, and clearly knew nothing about it.

The next witness to whom we will refer is *Charles Barnhart*, who is the son of *John* and brother of the appellant. He does not seem entitled to much more consideration than *Bennett;* but if his statement be true, to what does it amount? He says, "I told him, the respondent, that the land did not belong to *Paterson*, and that the plaintiff had to my knowledge purchased it of the college, or of the clergy, I am not sure which. He then said, *Paterson* tells me he has a title for it, and I said I do not believe it." What fact is there

stated in the conversation in the least degree inconsistent with *Paterson's* ownership? The land had been purchased by the plaintiff, and had by him been assigned to *Paterson* without the knowledge of the witness.

The last witness on this subject is Mr. *Hammond*, against whom no circumstance appears at all to discredit him. His statement is this: that in 1839 the respondent asked him who owned the lot in question, *Paterson* or *Barnhart*; "I told him I always thought that *Barnhart* owned it; that he had rented it to one *Freedy*, and appeared to be in possession of the place." He then says, on cross-examination, "When I mentioned *Barnhart*, I meant *John Barnhart*, the father. I know nothing of the plaintiff having anything to do with it. I had no authority from any of the *Barnharts* to say who owned it, nor yet from *Paterson*." This witness was a mere stranger, without any interest in the estate, and so far from giving any notice of the appellant's title, he was himself totally ignorant of it.

It would be inconsistent with the security of all property, and with every rule and principle of equity, upon such evidence as this to affect the conscience of the purchaser. The respondent appears to us to have acted with proper *bona fides*; he took his mortgage from a party who had the original contract in his possession, who had taken an absolute assignment of that contract, and had himself, as it appeared by the contract itself, paid all the instalments which had been paid upon it subsequent to the date of his assignment. We are satisfied that the respondent had no actual notice, real or constructive, of the appellant's title.

The objection stated in the opening, that there was no consideration in the assignment to *Paterson* or any receipt for the purchase money, was very properly given up in the reply. The receipt is acknowledged in the body of the deed, and it is not the custom in Canada, as it is in England, to have an additional acknowledgment at the back of the deed.

We have felt it due both to the importance of the case, in principle, and the remarkable learning and ability with which it has been discussed by the learned judges in the court below, and also by the counsel at this bar, to go thus fully into the grounds of our opinion, but we can have no hesitation in advising her Majesty to affirm the decree complained of with costs.

Decree affirmed with costs.

APPENDIX B.

SMYTH v. SIMPSON.

[*In the Privy Council before Mr. Baron Parke, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan, 25th of June,* 1850.]

Judgment was delivered by the Right Hon. *T. Pemberton Leigh*, as follows.*

Had their Lordships entertained any doubt in this case, they would have heard the respondent's counsel, before coming to a decision; but it really appears to us that the case admits of no doubt at all.

The first question which is made is, whether the Canada Chancery Act authorized the court of Chancery in that country to refuse the right of redemption when it appeared the mortgagee had been in possession for a period of twenty years without recognition of the mortgagor's right.

It is said, that the object of that act was to introduce into Canada the law of England relative to mortgages, and that the application of that law in Canada, in this particular case, would entitle the plaintiffs in the suit to redemption of the property.

Now, in order to see what the intention of that act is, it is necessary to consider what the state of the law in Canada was at the time when the act passed in respect of mortgages, and, as we understand, it was this: when a mortgage was made, giving the legal title to the mortgagee, the mortgagee might permit, as he usually does here, the mortgagor to continue in possession, and as long as that arrangement went on, and the mortgagee brought no ejectment, the relative position of the parties was the same as it would be in this country. If the mortgagee were desirous of converting his mortgage into an absolute and indefeasible title, in this country, he must proceed by bill of foreclosure, unless he procures a release of the equity of redemption.

* The facts of the case are fully set forth in the report of this case in the appeal in this province, in the 2d Volume of the Upper Canada Jurist, page 129, and in the report of the case before The Privy Council, 7 Moore 205. From the frequent reference to this decision in cases coming before our courts, it has been considered advisable to reprint the judgment for the advantage of parties residing at a distance from Toronto, and who probably may not have ready access to the original report.

In Canada, there was no court in which any such right could be exercised; there was no court that could decree a foreclosure; and all that the mortgagee could do there was to recover possession by an action of ejectment; while on the other hand, the mortgagor, if he desired to redeem the property was entitled under the statute 5 Geo. II, ch. 7, sec. 4, at any time during the pendency of that action, to come in, and, by payment of the mortgage money, put a stop to the action, and retain possession of his property.

That being the law there, what is the situation of a person who having obtained possession, and thereby done all he could to obtain an absolute title, proceeds to sell the property? Why, he is in this situation; he has a title which, at all events, is a perfectly good possessory title, which there is no law to disturb; persons deal with him on that assumption; they treat it as an absolute legal title; lay out money in buildings and improvements, and deal with the estate as their own. In this state of things the Canada Chancery Act is passed, which establishes for the first time a Court of Chancery in Canada, and directs that the general rules and principles of the courts of equity in England shall be administered in the Court of Chancery in Canada; but we feel that we cannot administer those principles with justice between the parties in respect of mortgages, because, by the law of England, no absolute title can be obtained except by foreclosure, and in Canada during all the period in which the transactions in this case took place there was no possibility of obtaining a right of foreclosure. On the other hand, there was no mode of obtaining the right of redemption, except in the particular form I have mentioned, and therefore it was necessary (and with a providence which one does not always see in acts of Legislature, a provision is found here) to guard against the inconvenience of applying strictly to one state of circumstances a series of laws and principles which were introduced with respect to another.

Now, the case has been argued as if there was a law in England, by which a mortgage is absolutely redeemable after (*a*) a period of twenty years, unless there has been a voluntary release of the equity of redemption on the part of the mortgagor.

The law is no such thing. The law does not go beyond this, that if the mortgagee rely simply on the title acquired by possession, there being no dealing between the parties

(*a*) The report is "*after*," it clearly should be "*during*."

as a bar to the right of the mortgagor to redeem, then the mortgagee must show uninterrupted possession for the period of twenty years. The rule does not go beyond that. A dealing between the mortgagor and the mortgagee may take place notwithstanding that interval, which might very easily alter that relation.

Now the act provides, in terms as extensive as it is possible for language to furnish, not merely for the circumstances under which redemption shall be extinguished, but for the question, whether redemption shall be decreed or not, under the peculiar circumstances of the case.

Then, if such be the spirit, as we think it is, of the Canada act, what are the circumstances here? And is it possible to state circumstances which more strongly illustrate the enormous injustice of doing what it is contended the Court of Chancery in Canada ought to have done in this case?

The mortgage was made in 1810; in 1819 judgment was recovered upon the mortgage debt. In 1825, not one single shilling, as far as it appears, of principal or interest having been paid, steps are taken for the purpose of extinguishing, as far as they could extinguish, any right which the mortgagor might have in the property, and to put up the property to sale, which we agree must be considered as the mere machinery; but still it is notice to the mortgagor that at that time the mortgagee means to convert his mortgage title into an irredeemable title, and to prevent any right of redemption on the part of the mortgagor.

At this period, in 1825, it is quite clear that *Smyth*, the mortgagor, was in possession of the estate. Now, if he chose to exercise his right of redemption, what had he to do? Simply to refuse to deliver up possession of the lands, and require an action of ejectment to be brought against him, and when that action of ejectment was brought, to bring the money into court and put a stop to the proceeding.

But is that the step which he takes? Why, instead of taking that step, it is distinctly stated here, that he, being under no apprehension that he had power or right to resist the proceeding, retired from the possession of the land, and removed the machinery from the mill. What could he do more? he had given up the legal estate; he had conveyed the legal estate; he gave up the possession, having the power by retaining that possession to enforce the right of redemption, if that right of redemption still subsisted.

But, instead of taking these steps, he voluntarily retires from the possession, knowing that the mortgagee is doing

all he can for the purpose of making his title, which was previously a redeemable title, an irredeemable title, and thus barring his right of redemption.

Now, after that, is it possible for us to say that he had, subsequent to that period, a right, by any means then existing in the law, to enforce that claim of redemption? Yet, after this, after this property had been sold, it is here again stated, that so far from any harshness being practiced against the mortgagor, after the purchase has been made by *Simpson*, the property is offered to *Smyth*, if he will pay the mortgage debt and redeem it. He did neither; and under these circumstances the property passes from hand to hand, and the vendor and purchaser might well consider the title a title at that time absolutely incapable of being disturbed by any process of the court.

It appears to us, therefore, that under these circumstances there never was a case in which a court was more fully justified in refusing the right of redemption; that the decree, therefore, is perfectly right, and that the appeal must be dismissed with costs.

NOTE.—The notes of the opinion pronounced by the Hon. Mr. Justice Draper having been mislaid during the publication of the case, it was impossible to insert it in its proper place.

DRAPER, J.—I agree that the evidence in this case sufficiently makes out that *Alfred T. Jones* was entitled by the transactions between himself and *Edward Matthews* to redeem lots 11 and 12 south side of Dundas-street east, and lots 11 and 12 north side of King Street east, in the town of London; and that the agreement gave him a right to redeem within a year from the date of the assignment—viz., 2nd of September 1840.

The entry in Mr. *Wilson's* books, proved by Mr. *Becher*, dated the 3rd of September 1840, explains the nature of the transaction.—*Matthews* received two conveyances designated "Mortgages" in that entry: one of them was the assignment from *Alfred T. Jones* of the lots for which *Matthews* on the 20th of January, 1843, obtained a grant under the great seal from the Crown; the other was the mortgage on lot number 17, executed by *Aby Jones*. As an additional security, *Matthews* also got a *cognovit actionem* for £300.

Afterwards *Aby Jones* sells number 17 to *Matthews* absolutely—exhibit A, dated the 20th of July, 1841, shews this, and refers to the mortgage for £250 previously given to *Matthews*.

The two brothers, *Alfred T.* and *Aby Jones*, blended their interests together in this transaction, as the exhibit B shews; which also shews that £200 of the £300 (the whole sum to be advanced by *Matthews*) was secured on number 17, and £100 on the lots on King and Dundas streets, for which lots *Matthews* afterwards obtained the grant from the Crown.

I can readily understand why a different course was taken in reference to these two securities. *Aby Jones* had the fee simple in number 17 and mortgaged at first: afterwards he made an absolute conveyance or release of his interest, the necessity for which would be self-apparent to *Matthews*, in order to give him a perfect title. *Alfred Jones*—having no fee simple,

APPENDIX C.

HOLMES v. MATTHEWS.

This case was afterwards appealed to the Queen in Council, where it was argued before *The Right Hon. the Chancellor of the Duchy of Cornwall, The Right Hon. the Judge of the Prerogative Court*, and *The Right Hon. Sir Edward Ryan;* and judgment therein was pronounced on Thursday the 29th of March, 1855, by

THE CHANCELLOR OF THE DUCHY OF CORNWALL.—The bill in this case was filed by the assignee in bankruptcy of *Alfred Thomas Jones* for redemption of a mortgage alleged to have been made by the bankrupt.

This bill having been dismissed, the plaintiff has appealed to her Majesty in Council.

The defendant in the suit and the respondent in the appeal

---

but only an uncompleted purchase from the crown, which could not be assigned otherwise than absolutely because it was intended *Matthews* should obtain the grant, and only an absolute agreement would be acted upon in the Commissioner of Crown Lands' office—did assign absolutely, though reserving a right to redeem within a year—a period fixed as against him by his own affidavit as well by his evidence.

It appears on the evidence of Mr. *Wilson* that the mortgage money secured on lot number 17 became due in a year, but at what time the cognovit might be enforced by execution is not, so far as I can see, proved. I gather that the same period of one year was limited for that purpose, as it is obviously a security for the two debts of £250 and £100.

On the 29th of April, 1842, *Aby Jones* absolutely conveyed and released number 17 to *Matthews* in fee. The grant for the other lots to *Matthews* bears date in January following. It was no doubt applied for, and the balance due to the crown was paid by him some time before.

But nothing is shewn as to the cognovit. It is not pretended by the plaintiff that it is an existing security, available to *Matthews'* estate. The £200 for which it was a security was satisfied by the release from *Aby Jones*. Then only the £100 secured on the King-street and Dundas-street lots would remain due. But according to the plaintiff's case it was still a continuing security for that sum.

I think, weighing all the evidence, the inference is exceedingly strong that at or about the time when the arrangement was made between *Aby Jones* and *Matthews* releasing lot number 17 to the latter, a similar arrangement was entered into between *Alfred Jones* and *Matthews*, in pursuance of which the grant from the crown was taken out. The cognovit then would be of no value, for both debts would have been extinguished.

The inference that the original transaction between *Alfred Jones* and *Matthews* was one of loan and security recognizes the right of the former to redeem. If it were an ordinary mortgage the estate would in equity belong to *Jones*—subject to the debt;—and it would be incumbent on the

is the widow, devisee, and personal representative of *Matthews*, the supposed mortgagee.

It appears that in 1840 *Jones* had contracted to purchase from the crown certain plots of building land in the town of London, in Upper Canada. A part of the purchase money only had been paid, and further payments were necessary before any grant from the crown could be obtained; *Jones*, therefore, had a mere equitable title.

Matthews was a builder, and he appears previously to the date of the transactions out of which the present question arises to have had various transactions in business with *Alfred Thomas Jones*, as well as with his brother *Aby B. Jones*. On the result of these transactions a balance was due to him from the two brothers, who had a joint interest in some landed property, though not in that which is the subject of our consideration.

On the 3rd of September, 1840, an account having been made out shewing the amount then due to *Matthews*, two deeds were executed—one by *Aby B. Jones*, and the other by *Alfred Thomas Jones*—in favor of *Matthews*.

With the former of these deeds we have nothing to do; the

---

holders of the security to shew that the mortgagor had parted with the estate; otherwise he would be treated as the true owner, subject to the charge.

But, under the circumstances of this case, I think the burden of proof is shifted, and that it is incumbent on the plaintiff to establish that the right to redeem is still subsisting.

It is by parol evidence that the existence of such a right has been established; though it appears to me there was a foundation laid by extrinsic facts sufficient to admit the evidence. Among these facts the giving the cognovit for £300 is one to which I attach much weight: and I must observe that the entire silence of *Alfred T. Jones* as to this security in his evidence in this cause and during the proceedings in his bankruptcy, coupled with the absence of any allusion to it in the plaintiff's bill and the fact that the right of *Aby Jones* to redeem was released, go far to convince me that a similar release was agreed upon between *Alfred Jones* and *Matthews*. This is a matter resting in the knowledge of the former, and of which the plaintiff as his assignee is, I presume, to be considered equally cognizant. The defendant is in no such position, so that the death of *Matthews* does in effect give an advantage to the plaintiff—if he is permitted to withhold the truth on this point or to abstain from entering into any explanation upon it. And this fact of *Matthews's* death makes it also questionable whether, according to the views expressed in *Hugues* v. *Hure* (1 H. Bl. 659), the evidence of Mr. *Wilson* should have been received; and without it I do not well perceive how the plaintiffs' case could have been upheld.

I have no difficulty in accounting for the absence of a written release of *Alfred Jones's* right to redeem. I really feel no doubt—assuming such an arrangement as I have suggested to have taken place—that any writing on the subject was considered to be unnecessary. *Matthews* held an absolute assignment of *Alfred Jones's* right and interest, which was only in a contract to purchase—as yet unfulfilled on his part;—and as no legal estate

latter—the deed executed by *Alfred Thomas Jones*—contained an assignment of *Jones's* interest in the plots of land already mentioned in consideration of £100 paid or to be paid by *Matthews*.

It would be of the greatest importance to see this deed, but it has been lost; no draft or copy of it is in evidence; and we must collect its terms, and the contract between the parties, from the evidence of Mr. *Wilson*, the solicitor employed by *Matthews* on the occasion, the fairness and accuracy of whose statement are not open to the least suspicion, and are sufficiently established by the documents to which he refers.

Wilson says—"I am aware that in 1840 Mr. *Matthews* agreed to advance to *A. B. Jones*, the last witness, £200 upon the part of lot No. 17 of which he speaks (called then the "Ferguson Lot"), and to *A. T. Jones* in the bill named, £100 upon lots Nos. 11 and 12, south, on Dundas-street, and upon lots Nos. 11 and 12, north, on King-street, in the town of London, for one year"—(there are two "years" here, which must be a mistake)—"to each at 6 per cent. per annum. There was no bonus, I am sure;" and he states why there could not be. He says—"The advance was made up in this way: *A. B. Jones* owed Mr. *Matthews*, on a cognovit then in my hands for a previously existing debt, £125. Mr. *Matthews* had an account, exclusive of the cognovit, of £21 17*s.* 6*d.*;" and then he states the particulars. He then says —"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 in fact was security for the said loan of £100, with interest at 6 per cent., to be repaid in one year." He then refers to

---

had ever become vested in him, and would not be, if the grant issued in the name of *Matthews*, I can well believe that these parties supposed they had done all that was necessary when they cancelled all the securities held by *Matthews* against *Jones*; and it is not until after the time fixed for payment had expired, and until after the settlement with *Aby Jones*—which involved a partial satisfaction of the cognovit—that *Matthews* took out the grant. From that time until the death of *Matthews*, though we find much scattered through the evidence consistent with the idea that *Alfred Jones* had absolutely released all his rights, we find not one fact, not one assertion of his retaining any claim or interest in these lots, not even when he was called upon by the proceedings in his bankruptcy to have disclosed all his liabilities, of which, according to his present statements, the cognovit formed one—as well as all his assets—which on the same statements included this right to redeem. Upon these facts I agree in the conclusion, which will be explained at length by my learned brother *Burns*,—with whom I have conferred fully, —and therefore feel it unnecessary to say more. As to lot number 17, I think the plaintiff fails entirely.

an exhibit, marked "B," which is printed in the appendix at page 11, and in which it is stated that the sum of £100 was to be advanced on lots Nos. 11 and 12. It then states the particulars of which the whole £300 was made up, and upon it there is entered this memorandum, "Memorandum from *A. T.* and *A. B. Jones*," and "£300 loaned for one year."

There is then the evidence of a gentleman of the name of *Becher* who confirms this memorandum, and who also refers to a bill of items which was made out at the time, from which it appears that the cognovit of £300 was given by these parties to *Matthews*.

By this evidence it sufficiently appears that the intention of the parties was that within some time, and upon some terms, *Alfred Thomas Jones* should have the power of putting an end to *Matthews'* interest under the assignment; but what were the particular terms of the agreement is left entirely in the dark. The inference from the endorsement on the memorandum, as well as from Mr. *Wilson's* testimony, is, that the transaction as a loan was to end at the expiration of one year. The probability therefore is, that at the end of that period some arrangement would take place between the parties, by means of which either the money would be repaid or the property be taken in payment of the debt.

It appears from *Wilson's* evidence that *Matthews* contemplated the probability of the latter alternative; and it is sufficiently clear from all the evidence that the property was of little, if at all, more value than the £100 at the time of the assignment, and for more than twelve months afterwards.

Now the question in this case is, whether the facts appearing in the case are sufficient to justify a court in holding that either by the terms of the original agreement between the parties, or by subsequent arrangement between them, such right of repurchase or redemption, whichever it might be, had been diverted from *Jones* at the date of his bankruptcy. The facts in favor of such presumption are very strong.

The year during which, according to *Wilson's* evidence, the money was to remain on loan would expire in September 1841. Dealings had continued to take place between *Jones* and *Matthews*, in the course of which, if any arrangement was necessary, it might be made. It is distinctly sworn both by *Macdonnell* and *Morrison* that in 1842 *Jones* told them he had sold the lots to *Matthews*.

Macdonnell says—"In 1840 I wanted to buy the lots in King-street and Dundas-street, east, mentioned in the pleadings, from Mr. *Jones*. I was building for *Jones* at this time. He said he did not want to sell them at that time. In 1842

I spoke to him about them again. He told me he had sold them to *Matthews*. His brother told me the same." It is not therefore idle conversation, but a statement made upon an occasion which required important truths to be told.

Then *Morrison* says—"I had a conversation with *Jones* (*Alfred T.*) previous to a government sale of lots in 1842, I think. I wanted to buy from him an acre on King-street. He told me he had sold his right to *Matthews*, and referred me to *Matthews*, who told me he would not sell, as he intended to build upon the land himself. I am sure that *Jones* told me he had sold his right to Mr. *Matthews*."

The evidence of *Alexander Griffiths* to the same effect cannot be relied upon.

On the 20th of January, 1843, a grant, by letters patent, of the lots in question is made by the crown to *Matthews* as the absolute owner, with the privity of *Jones*, and from that time *Matthews* remains in possession of the land as owner.

No claim is made to the £100 and interest on the one hand, or any right on the part of *Jones* asserted in the land on the other.

Early in 1844 *Jones* became a bankrupt, and *Matthews* was the assignee under the commission.

At this time, if the appellant's case be well founded, the bankrupt was indebted in the amount of £100 to *Matthews*, and the estate in question, subject to the mortgage, constituted part of his assets.

In May 1844 he makes an affidavit stating in detail his debts and his assets, yet no allusion is made to this debt due to *Matthews*, nor to this equity of redemption. Can there be stronger evidence that the transaction had been closed—that the estate had been given up in discharge of the debt? What makes the inference still stronger is, that the bankrupt, in his affidavit, mentions a claim to a sum of money which he says is due to him from *Matthews*. The bankrupt afterwards obtains his certificate under the commission, at what time does not distinctly appear, but it is plain that it was in or before the year 1846. After this there is no reason to suppose that he was under the control of *Matthews*, the assignee. *Matthews* remains in possession of the property as owner, dealing with it as such up to the time of his death in 1850. Before his death the property had increased so much in value that in 1849 it was valued by *Stead*, one of the witnesses, at £350; yet during *Matthews'* lifetime no pretence is set up by *Jones* that he has any right, legal or equitable, to the property, although he was aware of its increased value.

On the 22nd of June, 1850, *Matthews*, who alone could

speak to all the transactions that had taken place between himself and *Jones*, died; and sometime afterwards, as appears from his own statement, *Jones*, the bankrupt, suggested that a new assignee should be appointed under the commission of bankruptcy against him for the purpose of recovering this property, which had now, by the accident of a railway being in contemplation, become of the value, as he says, of £1000. The whole of the debts under the commission appear, by *Jones'* affidavit, to have been under £300; so that *Jones* himself is the person on whose behalf and for whose benefit, more than for any other person, the suit is instituted. *John Holmes*, a creditor for £57, is appointed assignee. *Marcus Holmes* and the bankrupt's brother, *A. B. Jones*, who is stated to be a creditor for £59, give security to the creditors against the costs of the suit; and under these circumstances the bill is filed, and the two *Jones* are brought forward as witnesses to support the case. Neither from the position in which they stand, nor from the mode in which their evidence is given, can we place any reliance upon their testimony.

The case then comes to this: If we look only to the contents of the written instruments, and take them to be such as the witnesses represent them, we have an absolute assignment of his equitable interest by *Jones* to *Matthews* in 1840, and the legal title granted to *Matthews* in 1843 in conformity with the assignment, and an undisturbed possession under it till the time of his death.

If, on the other hand, we take into the account the parol evidence of the circumstances which took place when the assignment was made and subsequently, we find on the one hand reason to believe that the assignment was not intended to be in the first instance absolute and unconditional; but we find, on the other, strong evidence that either by the effect of the original contract, or by subsequent dealings between the parties, any rights which *Jones* might have had were discharged before the grant from the crown was made.

The onus in this case is altogether upon the appellant. It is incumbent upon him not only to raise a case against written instruments, but to rebut the presumption which the conduct of the parties affords that the title as it now stands is consistent with the real intention of the parties. He has besides to satisfy us that a judgment determining that he has failed on these points is erroneous. He has not succeeded in doing so; and though we do not consider this as a clear case, and are not surprised at the difference of opinion which it has excited in the court below, where the case has been examined and discussed by the judges, according to the different views

which they took of it, with the care, learning, and ability which the experience of former cases has led us to expect from them, we must advise her Majesty to affirm the decree complained of.

Considering the circumstances under which the suit was instituted, we cannot but regard it as a speculation in which the bankrupt has induced the appellant to embark, and we shall have no hesitation in recommending that the respondent's costs of the appeal should be paid by the appellant.

GOODEVE v. MANNERS.

Trust deed void in part—Lottery.

Nov. 27, 1854; Feb. 12, 1855.

A debtor conveyed his real estate to trustees for the benefit of his creditors, to be disposed of by the trustees, first by a lottery, and failing that plan of disposition, then in trust, to sell as the trustees should deem most advantageous: *Held*, that although the deed was void as to the trust for a lottery, it was valid as to the other trusts therein declared.

A conveyance of property for the benefit of creditors may create a valid and irrevocable trust, although none of the creditors are either parties or privy to the deed; and when in its inception it is not so, subsequent dealings or communications between the debtor or his trustees and the creditors may render the trusts irrevocable.

The plaintiffs in this case were *George M. Goodeve* and *William Corrigal*, and the defendants by the bill as amended were *Henry Ruttan*, *George Morss Boswell*, *Thomas Eyre*, *Charles Bellwood*, and *Robert Charles Manners*.

Statement.

The principal facts of the case were, that *George Manners*, father of *Robert Charles Manners*, had in his lifetime, and on the 16th day of May, 1848, executed a deed of conveyance to the defendants *Ruttan*, *Boswell*, and one *Robens*, since deceased, of certain lands in the county of Northumberland, in trust, that they or the survivors or survivor of them might dispose of the same by lottery, or in the event of their being unable so to dispose thereof to the satisfaction of the trustees, then to sell and dispose of the said premises by public auction or private contract, and the moneys arising from the lottery or sale

1855.

Goodeve v. Manners.

were to be applied in paying off a mortgage on the estate in favor of the defendant *Boswell*, (which mortgage he subsequently assigned to the defendant *Bellwood*), and after payment of the amount due on such mortgage the balance to be distributed amongst the several creditors of the said *George Manners*. That the plaintiffs, after the execution of the deed of trust, and on the 17th day of July, 1848, recovered a judgment in the Court of Queen's Bench against *George Manners*. Notwithstanding this, however, the plaintiffs had, after the execution of the deed, received from the trustees a number of the lottery tickets for the purpose of disposing thereof. The lottery never took place, and in the month of October, 1850, the sheriff of Northumberland proceeded to sell the estate upon a writ of *venditioni exponas* sued out against lands, at which the plaintiffs became the purchasers at a trifling amount; and this bill was filed to set aside the trust deed, on the ground that the same had not been executed *bonâ fide*, but with a view to delay creditors; and the prayer was that the deed might be declared void and inoperative, and that the plaintiffs had the equity of redemption in the premises freed therefrom; an account of what was due the defendant *Bellwood* on foot of the mortgage security held by him; or for a sale of the premises and application of the purchase money to paying off the mortgage and the debt due the plaintiffs, and the amount paid by them at sheriff's sale.

Statement.

The defendants by their answers denied all *mala fides* in the execution of the trust deed, and insisted that the plaintiffs by their acts in relation thereto were estopped from impugning the transaction.

The cause, having been put at issue and witnesses examined, now came on to be heard on the pleadings and evidence.

Argument.

Mr. *Vankoughnet*, Q. C., and Mr. *Strong*, for plain-

1855.
Goodeve v. Manners.

tiffs, cited *Smith* v. *Hurst* (*a*), *Wallwyn* v. *Coutts* (*b*), *Acton* v. *Woodgate* (*c*), *Gibbs* v. *Glamis* (*d*), *Hamilton* v. *Houghton* (*e*), *Mallan* v. *May* (*f*), *Price* v. *Green* (*g*).

Argument.

Mr. *Brough*, for the defendants, cited amongst other cases *Caillaud* v. *Estwick* (*h*), *George* v. *Milbanke* (*i*), *Noreutt* v. *Dodd* (*j*), *Pickstock* v. *Lyster* (*k*), *Meux* v. *Howell* (*l*), *Law* v. *Bagwell* (*m*), *Simmonds* v. *Palles* (*n*), *Kirwan* v. *Daniel* (*o*), *Field* v. Lord *Donoughmore* (*p*), *Griffith* v. *Ricketts* (*q*), *Lilly* v. *Hays* (*r*), *Hutchinson* v. *Heyworth* (*s*), *Hughes* v. *Stubbs* (*t*).

The points taken by counsel are sufficiently stated in the judgment of the court.

February 12, 1855.

Judgment.

THE CHANCELLOR.—In the month of April, 1848, *George Manners*, one of the defendants to the original bill, being seized in fee simple of the premises in question in the cause, mortgaged them in fee to *George Morss Boswell*, another of the defendants, to secure £700. This debt was made payable, as I gather, by quarterly instalments of £25 each. On the 16th day of May, in the same year, *Manners*, being indebted to various persons in a considerable amount, conveyed his equity of redemption in these premises, which constituted in fact his whole real estate, to four persons upon trust, to dispose of the property by lottery, and to apply the proceeds to the discharge of the mortgage debt first, then to the payment of all the other creditors of *Manners*, either in full or ratably, according to circumstances; and, if the lottery scheme

(*a*) 17 Jur. 30. (*b*) 3 Mer. 707. (*c*) 2 M. & K. 492.
(*d*) 11 Sim. 584. (*e*) 2 Bligh 169. (*f*) 11 M. & W. 652.
(*g*) 13 M. & W. 695, S. C. 16 M. & W. 346. (*h*) 1 Anst. 381.
(*i*) 9 Ves. 190. (*j*) 1 Cr. & P. 100. (*k*) 3 M. & S. 371.
(*l*) 4 East. 1. (*m*) 4 Dr. & W. 406. (*n*) 2 J. & La. 489.
(*o*) 5 Hare 493. (*p*) 1 D. & W. 227. (*q*) 7 Hare 299.
(*r*) 5 A. & E. 548. (*s*) 9 A. & E. 375. (*t*) 1 Hare 476.

1855.

Goodeve v. Manners.

should fail, then upon trust, to sell the property in such manner as the trustees should think advisable, and to dispose of the proceeds in the manner before provided. That appears to me to be the correct construction of the deed. On the 12th of October, 1850, Mr. *Ruttan*, who was then the sheriff of the county, sold *Manners'* interest in the property in question under a writ of *venditioni exponas*, at the suit of the Commercial Bank, and the plaintiffs became the purchasers at £37—an amount little more than sufficient to pay the sheriff's fees; and a deed having been duly executed in pursuance of that sale, the plaintiffs file their bill praying either that the deed of the 16th of May, 1848, may be set aside as fraudulent and void; or, if it can be sustained, then that the trusts may be carried out under the direction of this court.

Judgment.

It is argued, in the first place, that the deed of the 16th of May, 1848, was not a *bonâ fide* conveyance in trust for creditors, but a colorable proceeding devised for the protection of *Manners'* property, which the parties never intended to carry into effect. I have not the slightest doubt upon this part of the case. I find nothing in the evidence to justify such a conclusion. The whole arrangement was made openly, as Mr. *Eyre* swears, and upon consultation with the creditors. The deed when executed was not withheld by the debtor, but was open to the inspection of the creditors, as is sworn, I think truly, by Mr. *Andrews;* and a memorial of it was immediately registered, in which, contrary to the ordinary practice, the trusts of the deed were fully stated. The trustees were not in the employment or subject in any way to the control of *Manners;* they were persons of respectability and station, and three of them at least had a material interest in the success of the project. Mr. *Boswell* was a very large creditor; Mr. *Robins* was the agent of the Commercial Bank, the largest simple contract creditor by far; Mr.

1855.
Goodeve v. Manners.

Eyre was a creditor to a considerable amount; and the fourth trustee, Mr. *Ruttan*, was and is the sheriff of the county—a person not very likely to be selected by a fraudulent debtor seeking to screen his property from execution. After the deed was executed every effort was made to give the matter publicity; the property was advertised for months in the public papers and was placarded about the walls of the village, and many of the creditors appear to have been employed, the plaintiffs certainly were so, to carry the objects of the deed into effect. Lastly, *Manners* and his trustees, who were examined by consent, as I understand, all swear that the conveyance was executed in good faith for the benefit of *Manners'* creditors. Now these circumstances furnish, as it appears to me, a distinct negative to the case of fraud alleged by the plaintiffs' bill. As to the perfect *bonâ fides* of the transaction I have no doubt.

Judgment.

It is said, however, that the deed of the 16th of May, 1848, was a merely voluntary deed, without consideration, and revocable at any moment by the mere act of *Manners;* and if such be its true character, it is argued, I presume correctly, that it cannot prevail against the execution of a *bonâ fide* creditor. The point is one of great practical importance, and although the authorities are very numerous, it cannot be said that the principles applicable to it have been accurately defined. In *Walwyn* v. *Coutts* (*a*) a distinction was taken by Lord *Eldon* between a trust for the benefit of a particular individual, the object of the settlor's bounty, and a conveyance in trust for creditors. Admitting that in the former the trust when created would be irrevocable, upon the principle established in *Ellison* v. *Ellison* (*b*) and the other cases of that class, he decided that in the latter class the trust though created remained revocable at the

(*a*) 3 Mer. 707, and 3 Sin. 14. (*b*) 6 Ves. 656.

1855.

Goodeve v. Manners.

option of the debtor, the trust in such cases being, in his opinion, a trust for the debtor himself and not for his creditors; or, as the principle has been sometimes expressed in such cases, that the relation of trustee and *cestui qui* trust does not in fact arise. The principle to be deduced from *Walwyn* v. *Coutts* is expressed by Lord *St. Leonards* in this way: "that if a man, without communication with his creditors, make a provision for paying them for which they have not bargained, he may, before the execution of the trusts, destroy them" (*a*). That proposition appears to me to be too large. It lays down a rule applicable to all cases, without reference to the provisions of the deed or the circumstances of the transaction; but, so interpreted, the language would convey a meaning which the learned judge himself did not, I apprehend, intend. The doctrine laid down in *Wilding* v. *Richards* (*b*) is more accurately expressed. Vice-Chancellor *Knight Bruce* there says: "An instrument in favor of creditors, though in form a deed of trust, *may have been intended to be an instrument in effect of agency*—a mere direction to a person in the relation of steward or agent, or in an analogous position, as to the mode of distributing or applying the property of the person executing the deed, without any intention on his part of creating in any other person a right against him. It is established that in such cases if the court, having the deed before it, is satisfied that the intention was so, the intention is to have effect given to it, though in form the deed be a deed of trust. *But it is not rendered necessary by the authorities on this subject to say that every deed in favor of creditors, to which no creditor is a party, is an instrument of that description.*"

Judgment.

Vice-Chancellor *Wigram* explained the principle of *Walwyn* v. *Coutts* in the same way. "The difference

(*a*) Simmonds v. Palles, 2 J. & L. 505. (*b*) 1 Coll. 664.

1855.

Goodeve v. Manners.

in principle," he says, "between the two classes of cases is marked and obvious; but to decide to which of the two classes a given trust deed belongs is often a task of difficulty; it depends upon the intention of the author of the deed, to be collected from the deed itself and such surrounding circumstances as may be admissible in aid of the interpretation of the deed."

And in *Smith* v. *Hurst* (*a*) Sir *George Turner* states the result of the cases upon this subject in these words: "They, the cases, appear to me to result in this—that in cases of deeds vesting property in trustees upon trust for the benefit of particular persons, the deed cannot be revoked, altered or modified by the party who has created the trust; but that in cases of deeds purporting to be executed for the benefit of creditors, *the question whether the trusts can be revoked, altered, or modified, depends upon the circumstances of each particular case.* It is difficult at first sight to see the distinction between the two classes of cases; for in each of the classes a trust is purported to be created, and the property is vested in the trustees; but I think the distinction lies in this: in cases of trust for the benefit of particular persons, the party executing the trust can have no other object than to benefit the persons in whose favor the trust is created; and, the trust being well created, the property in equity belongs to the *cestui qui* trust as much as it would belong to them at law if the legal interest had been transferred to them; but in the case of deeds purporting to be executed for the benefit of creditors, and to which no creditor is a party, *the motive of the party executing the deed may have been either to benefit his creditors or to promote his own convenience; and the court then has to examine into the circumstances for the purpose of ascertaining what was the true purpose of the deed;* and the examination does not stop with the deed itself,

Judgment.

(*a*) 17 Jur. 30.

but must be carried on to what has subsequently occurred, because the party which has created the trust may by his own conduct, or by the obligations which he has permitted his trustee to contract, have created an equity against himself."

Walwyn v. *Coutts*, even when thus qualified, must be admitted to have established a very refined distinction; but, however refined, it has been considered by very learned judges as well founded in reason and justice (*a*), and it must be regarded at the present day as the settled law of the court. Now the learned judges who decided *Garrard* v. Lord *Lauderdale* (*b*) profess to have decided it upon the authority of *Walwyn* v. *Coutts;* and so far as the principle of that case was applicable, *Garrard* v. Lord *Lauderdale* cannot be impeached, but beyond that it cannot be any longer regarded as a binding authority.

Judgment.

In *Acton* v. *Woodgate*, (*c*) decided shortly after *Garrard* v. Lord *Lauderdale*, Sir *John Leach* says: "In the case of *Garrard* v. Lord *Lauderdale* it seems to have been considered that a communication by the trustees to the creditors of the fact of such a trust would not defeat the power of revocation by the debtor. It appears to me, however, that the doctrine is questionable, because the creditors, being aware of such a trust, might be thereby induced to a forbearance in respect of their claims which they would not otherwise have exercised."

In *Brown* v. *Cavendish*, (*d*) Lord *St. Leonards*, having quoted the language of Sir *John Leach* to which I have just adverted, says: "When I first read that case I made this observatien in the margin, 'This has always been my opinion;' but in stating this I do

(*a*) Bill v. Canton, 2 M. & K. 503.
(*b*) 3 Sim. 1, and on appeal, 2 Russ. & M. 451.
(*c*) 2 M. & K. 495. (*d*) 1 J. & L. 635.

1855.

Goodeve v. Manners.

not mean to bind myself to hold that in every case a representation to a creditor will give him the benefit of the trust. It must depend on the character of the representation and the manner it is acted on."

In *Kirwan* v. *Daniel* (*a*) Vice-Chancellor *Wigram* says: "So far as *Garrard* v. Lord *Lauderdale* follows *Walwyn* v. *Coutts*, as reported, but misreported, in *Merivale*, I shall assume its authority to be unimpeachable; but the case of *Garrard* v. Lord *Lauderdale* went much further than *Walwyn* v. *Coutts*, for in that case the creditors were named as parties to the deed of the third part; the trustees gave notice of the deed to the creditors (of whom the plaintiff was one) who were named as parties of the third part, and whose debts were to be paid, and the court held that the notice was immaterial. The case, to that extent, was, I believe, a case of the first impression; and the decision was certainly a surprise on those in whose favour it was pronounced (*b*). The argument was that the deed, *per se*, gave no interest to the creditors; and if that were admitted, then it was said a simple notice to the creditor of a deed which, *per se*, gave him no interest, could not enlarge the effect of the deed. That may be true so far as the effect of the deed is concerned; *but the argument omits the material consideration, that, although the notice may not alter the effect of the deed, it may alter the position of the creditor;* and courts both of law and equity have repeatedly decided that where a creditor on whose behalf a stake has been deposited by the debtor with a third person receives notice of that fact from the stakeholder, the notice will convert the stakeholder into an agent for and a debtor to that creditor; and those cases have been decided on the ground that the creditor may have forborne to sue. The late cases at

Judgment.

(*a*) 5 Hare 499.

(*b*) The learned Vice-Chancellor himself had argued the case both in the court below and on appeal.

law which were cited at the bar (*a*) are very strong, *and in principle I cannot distinguish them from a trust in equity, as in Garrard v. Lord Lauderdale.*"

1855.

Goodeve v. Manners.

The law upon this subject, then, I take to be this: a conveyance of property for the benefit of creditors may create a valid and irrevocable trust, although none of the creditors are either parties or privy to the deed; and when the conveyance is not in its inception a valid and irrevocable trust, it may become so by subsequent dealings or communications between the debtor or his trustees and the creditors, which may give them an indefeasible interest under the deed. If *Garrard* v. Lord *Lauderdale* is supposed to decide anything contrary, then I can only say that it is opposed to the current of modern authority, and that *Wilding* v. *Richards* (*b*), *Griffith* v. *Ricketts* (*c*), and *Smith* v. *Hurst*, appear to me to be decisions directly in point.

Judgment.

Now, to apply these principles to the present case. It is quite clear, I think, that this deed was not revocable, by the mere act of *Manners*, as against either *Boswell* or *Eyre*. *Boswell's* debt was payable, under his mortgage, at a distant date; but under the power of sale in the trust deed he became entitled to immediate payment. *Eyre* was a simple contract creditor to a considerable amount, and entitled as such to be paid *pari passu* with the other simple contract creditors. I am quite unable to discover any ground upon which it could be held that the deed was revocable as to either (*d*). It is said, indeed, that *Eyre* did not sign as creditor, but only as trustee, and *Smith* v. *Hurst* is cited as in point. But it has no application. The conclusion at which the court arrived in that case,

(*a*) Lilly v. Hays, 5 A. & E. 548; Hutchinson v. Heyworth, 9 A. & E. 375.
(*b*) Ub. sup.
(*c*) 7 Hare 299.
(*d*) Wilding v. Richards, ub. sup.; Griffith v. Ricketts, ub. sup.

1855.

Goodeve v. Manners.

both upon the deed itself and from the extrinsic evidence, was that the arrangement was made without any reference to the protection of the trustee—nay, that the provisions of the deed evinced an intention to exclude him, and that he must be taken, consequently, to have signed only in his capacity as trustee. There is nothing of that sort in this case. Both the deed and the evidence lead to the opposite conclusion. *Wilding* v. *Richards* and *Griffith* v. *Ricketts* are in point.

There is much in the deed itself and in the circumstances under which it was executed which convinces me that a valid trust for the benefit of creditors, and not a mere deed of arrangement, was the thing intended by these parties (*b*). But it is unnecessary to enlarge upon that point, because I am satisfied that the subsequent dealings between the debtor or his trustees and the creditors was such as to give them an indefeasible interest under this deed. It is quite impossible to deny, upon the evidence before us, that the existence of this trust was communicated to the creditors. The fact is sworn to by several creditors, as well as by *Eyre* and *Andrews*, who were the active agents in the business; but what places the truth upon this point beyond doubt is, that the fact was distinctly stated in the advertisements which appeared for months in the public papers, and was placarded in the hotels and other public places of Cobourg; and in the receipt for lottery tickets, signed by the plaintiffs themselves, they acknowledged to have received them *from the trustees*, and the tickets themselves were signed, as I gather, by *Eyre*, on behalf of all the trustees. I have not the least doubt, therefore, that the fact was communicated to the creditors. Then *Eyre* swears that between May and October he exerted himself in every possible way to carry out the trusts of the deed, with the

Judgment.

(*a*) Griffith v. Ricketts, 7 Hare 308.

approval of most if not of all the creditors, most of whom, and amongst that number the plaintiffs, became agents for the sale of lottery tickets, with the right to apply the proceeds of sales to the payment of their debt. Now I am clearly of opinion that as to all such creditors (and that includes, I believe, the whole body) *Manners* ceased to have any power to revoke the deed; the creditors acquired, then, if they had not before, an indefeasible interest, which this court is bound to protect.

It is said, however, that the provision for the sale of this property by lottery was illegal, and that the whole deed is therefore void. This argument was but faintly pressed; it was made without comment, and no case was cited. Upon the argument the objection struck me as having some weight, but my present impression is that it cannot be maintained. Admitting that the sale of this property by lottery would be illegal under several imperial statutes in force here (*a*), and admitting therefore that the trust for that purpose was nugatory, it does not follow, I apprehend, that the deed is for that reason absolutely void. The court is not asked to assist in carrying out this illegal provision. The creditors repudiate it, and wish to have the ulterior trust—namely, the trust for sale—which is of course perfectly legal, carried into effect; and to that they are in my opinion entitled (*b*). But, if the parties think it worth their while, the case may be spoken to on that point, for it was not discussed upon the argument.

Judgment.

ESTEN, V. C.—I think in this case the deed was not made with any fraudulent intention, but on the contrary, with a sincere desire and purpose to secure

(*a*) 10 & 11 Wm. III. c. 17; 12 Geo. II. c. 28; 8 Geo. I. c. 2, sec. 36; Allport v. Neete, 1 C. B. 974

(*b*) De Themmines v. De Bonnesal, 5 Russ. 288; Shortt v. Taylor, 2 Phil. 801; Morgan et al. v. Horseman, 3 Taunt. 240; Doe dem. Thompson v. Pitcher, 6 Taunt. 359; Morgan v. Leathe, 8 East 231.

1855.

Goodeve v. Manners.

the satisfaction of all the debts due from the grantor *Manners;* and that, whether the trust as regards the lottery was void or not, the rest of the deed is perfectly good. I think also that the deed was not originally intended as a deed of agency or management, so as to be revocable by the grantor, but was in its inception a trust for the benefit of the creditors, which they might enforce.

But, supposing the contrary to be the case, I think that such communications took place between *Manners* through his authorised agent and through the plaintiffs and other creditors as rendered it from that time an irrevocable trust for the benefit of those parties. At the date therefore of the sheriff's sale, under which the plaintiffs claim, the estate stood in this position—namely, that it was held by the trustees upon trust for sale, and to pay the plaintiffs and other creditors, and to pay the surplus to *Manners.*

Judgment.

It is quite clear that the deed was communicated to the creditors with the intent that they should rely upon it as a secure provision for the payment of their debts, so that they might not proceed against *Manners* in the meantime. None of them expressed or intimated dissent, but having informed themselves of the nature of the deed as much as they thought requisite, acquiesced in it; and some of them, including the plaintiffs, received tickets to dispose of in furtherance of the object. Without undertaking to define the sort of communication in every case which would be requisite to deprive the debtor of his power of revocation over a deed of this nature, I am clear that the communications in the present case were sufficient for that purpose. What interest then did *Manners* retain in this property, and did any interest whatever pass to the plaintiffs under the sheriff's sale of 1851? It is clear that they could purchase only such interest as *Manners* had, and that to give effect to the sale in question it

must be such an interest as could be affected by a *fieri facias* against lands under which the plaintiffs' purchase was made. 1855. Goodeve v. Manners.

Upon the authority of the case of *Ricketts* v. *Griffith*, the interest of *Manners* under this deed seems to have been personal, and therefore could not pass under a *fieri facias* against lands; but, supposing no conversion into personalty to have been worked by the deed, was this ultimate interest in the surplus or residue of the lands remaining after the satisfaction of the trusts of the deed such an interest as would pass under a *fieri facias* against lands? I think not. It does not appear to have been rendered subject to legal process by the statute 5 Geo. II. ch. 11, or any subsequent statute. The plaintiffs' only right, then, is to obtain an execution of the trusts; and the bill must be dismissed with costs except so far as it is adapted to that end.

Judgment.

SPRAGGE, V. C.—The immediate purpose intended to be answered by the trust deed was no doubt a sale of the property in question by means of a lottery, and contains some provisions in regard to it which at first sight have a suspicious look; the provision that tickets should not be sold without the consent of Mr. *Manners* is a restriction of the power of the trustees, and a retention of power by the debtor, which might enable him to prevent them from carrying out the trust, and so may afford some evidence that the trustees were only intended to be Mr. *Manners'* agents, to act or not to act under the deed, as he might think fit: but the deed certainly was not acted upon in that spirit either by *Manners* himself or the trustees, and that restrictive provision remained a dead letter, the tickets being offered for sale to every one indiscriminately. Another provision which has been pointed to as evidence of the same intention is that which limits the placing of tickets in the hands of creditors—to those creditors

1855.

Goodeve v. Manners.

whose debts should be admitted by Mr. *Manners;* but inasmuch as the moneys received for such tickets were to be retained by the creditors in payment *pro tanto* of their debts, it was necessary to provide some mode of ascertaining who were creditors and to what amount, otherwise trust moneys might have got into the wrong hands. The mode of ascertaining this provided by the trust deed certainly gave *Manners* a check upon the sale of the tickets, which might have been abused, but which certainly was not; for we find that tickets were placed in the hands of a number of creditors, these plaintiffs among them, and refused to none; and I may observe with respect to the provisions in the trust deed which are now objected to, that no exception appears to have been taken to them at the time, though the creditors, and particularly the plaintiffs in this suit, were made fully aware of all the provisions which the trust deed contained. There is nothing to lead to the conclusion that the provisions in question were inserted with any view to defeat, or to enable *Manners* to defeat, or obstruct the execution of the trust. I think the evidence shews that the trustees did endeavour in good faith to carry out the trust. And first, as to the contemplated lottery; it seems to have been looked upon by the creditors as a feasible scheme whereby their debts would at an early day be paid in full. Mr. *Manners* may have looked forward to a surplus for himself if the scheme were fully successful: the trustees were selected principally with a view to inspire public confidence, and none of the creditors appear to have regarded it otherwise than with approbation.

Judgment.

Whatever other objections the lottery scheme may be open to, it seems clear to me from the evidence that it was not intended or used as an instrument for preserving the property for the use of Mr. *Manners*, but that it was devised as a ready means, advantageous to all parties, for converting it into money for the

payment of his debts. No indefinite or distant period was fixed, but a particular time and occasion which gave more than ordinary chances to its success; and in placing in the hands of the creditors themselves the means at once of paying themselves and of carrying out the scheme, if it could be carried out, the trust deed presents a feature more than ordinarily favorable to creditors. 1855. Goodeve v. Manners.

The trust for sale otherwise than by lottery is next to be considered. It is not left in the option of Mr. *Manners* to say when it shall be resorted to; but the deed provides that the trustees are to judge whether the fund raised by lottery tickets (supposing only a portion of them should be sold) is equal to the value of the land, or to what it could be sold for otherwise, and if not, then that they should sell the land as in their discretion they should deem most advantageous, in order to carry out the intentions of *Manners* as expressed in the deed; which expressed intentions were to satisfy the mortgage debt on the same land to *Boswell*, and to pay and satisfy all just and lawful debts due to the creditors of *Manners*. Judgment.

Now such a trust is consistent, I think, with the deed being merely an instrument of management for the benefit of the debtor, and of which he would be the only *cestui qui* trust; or with it being a deed for the benefit of creditors in which they are *cestuis qui trustent*, and which would not be revocable by the debtor.

I think that this deed belongs to the latter class. Of the four trustees named in the deed two were creditors, and a third, *Robins*, cashier in Cobourg for the Commercial Bank, who were also creditors; and *Robins*, it appears in evidence, was named a trustee because of his official position. The trust is specifically for the payment of one debt, that to *Boswell* as mort-

1855.

Goodeve v. Manners.

gagee, as well as generally for the payment of all other debts; and the trust deed was communicated to the debtors—certainly to a number of them.

In the case of *Walwyn* v. *Coutts* all these circumstances were wanting, and in *Garrard* v. *Lauderdale* all but the last. Lord *Cottenham*, in *Bill* v. *Cureton*, (*a*) in referring to those cases, says that the rule as established by them is adopted to promote the views and intentions of the parties, and he proceeds: "A man who without any communication with his creditors puts property into the hands of trustees for the purpose of paying his debts, proposes only a benefit to himself by the payment of his debts—his object is not to benefit his creditors; it would therefore be a result most remote from the contemplation of the debtor if it should be held that any creditor, discovering the transaction, should be able to fasten upon the property and invest himself with the character of a *cestui qui* trust."

Judgment.

In *Wilding* v. *Richards*, Sir *J. L. Knight Bruce* agrees in the views above taken by Lord *Cottenham*, and remarks that it is not intended necessarily by the authorities on the subject to say that every deed in favor of creditors in which no creditor is a party is a mere instrument of agency: and he adds, "The court in each case must be guided by the particular circumstances."

In *Acton* v. *Woodgate*, Sir *John Leach* questions the ruling of Sir *Launcelot Shadwell* in *Garrard* v. Lord *Lauderdale*, that a communication of the fact of the trust by the trustees to creditors would not defeat the power of revocation by the debtor: he questions it upon the ground that the creditors being made aware of such a trust might be thereby induced to a forbearance in respect of their claims which they would not

(*a*) 2 M. & K., at p. 511.

otherwise have exercised; and in *Kirwan* v. *Daniel* Sir *James Wigram*, also quoting the ruling in *Garrard* v. Lord *Lauderdale* upon this point, observes that the argument in its favor omits the material consideration that although the notice may not alter the effect of the deed, it may alter the position of the creditors. I think it must be held at the present day that a trust deed communicated to creditors is not revocable. The late case of *Smith* v. *Hurst* favors the same view.

In this case no doubt the fact prominently communicated was the lottery, and it is not improbable that most of the creditors paid no attention to the circumstance of there being any other trust; but it is clear, I think, that the whole trust was communicated, for it appears that the trust deed was carried round to the creditors, and that when carried to the plaintiffs they examined its contents; in addition to which the whole trusts of the deed were placed upon record in the office of the county register *in extenso*, which it was not at all necessary to do to give to the deed any advantage which registration could give to it. I cannot but think that if a bill had been filed by any creditor of Mr. *Manners* on behalf of himself and other creditors to enforce the execution of the trusts of the deed, it could not have been pretended by him or his trustees that the deed was a mere instrument of agency, which he could revoke, and that the creditors had acquired no rights under it. The frame of the deed, the circumstances under which it was prepared, and the acting of the parties under it, convince me that such an objection, if raised, could not have been sustained.

Judgment.

The case made by the bill is, that the deed was made by *Manners* with a fraudulent intention of making such a disposition of his property as to prevent its being taken in execution by his creditors, and that he knew and intended that the trusts of the deed

1855.

Goodeve v. Manners.

were never to be acted upon. There is no evidence to sustain this, but much in disproof of it. Of the trustees who have been examined as witnesses, Mr. *Eyre* and Mr. *Boswell* are very explicit and direct as to the good faith in which the deed was executed, and its being intended for the benefit of creditors; and the latter gentleman, a county court judge, says he always considered the trustees compellable by the creditors to execute the trusts of the deed, and supposed that they abstained from doing so because Mr. *Manners* devoted £100 a year of his income towards the liquidation of his debts. Of the other trustees, one, Mr. *Robins*, is dead, and the other, Mr. *Ruttan*, appears from defect of memory to have forgotten almost everything in relation to the matter.

Judgment.

The best opinion I can form in this case is, that the trust deed is not a deed of agency, but that the trustees were thereby constituted trustees for the creditors of *Manners;* and further, that the trusts were so communicated to the creditors as to make them *cestuis qui trustent*, even if the deed has not made them so.

The recent case of *Smith* v. *Hurst*, before Sir *George Turner*, is not, I think, an authority for the plaintiffs. In that case there was but one trustee, and he was the confidential solicitor and agent of the defendant *Hurst*, and though a creditor, it clearly appeared he was not a trustee in that character. The trust was personal to the trustee, would expire with his life, and gave him power to resign. *Hurst* left the country shortly after executing the deed, up to which time and for some time afterwards the deed was kept secret from creditors; he left evidently to avoid being pressed for the payment of his debts, and to enable his trustee as agent to make better terms with his creditors. Upon the point of the trustee taking the trust not as a creditor but as agent for the debtor, Sir *George Turner* remarks: "Such a deed, although upon the

face of it for the benefit of the creditors, is in truth a deed for the benefit of the debtor; and the creditor who accepts it takes it not for his own benefit, but for the purpose of carrying out the views and objects of the debtor in fraud of his other creditors; he becomes a party to the fraud of the debtor, and being a party to the fraud, he cannot, I think, be in any better position than the debtor who perpetrated it." In more than one passage of his judgment the learned Vice Chancellor says that the deed itself and the conduct of the parties under it must determine the question as to whether such a deed is a mere deed of management or in good faith for the benefit of creditors. The inquiries directed shew how important Sir *George Turner* considered a communication of the trust to creditors; and the decree was made without prejudice to the right of any of the creditors who should be found to have adopted or acted upon the deed.

1855.

Goodeve v. Manners.

Judgment.

Smith v. *Hurst* appears to me to differ from this case in the whole character of the transaction; and, looking at the language of the learned judge who decided it, the decree pronounced and the inquiries directed, I think its tendency is to support this deed as a deed for the benefit of creditors, and irrevocable.

MILLER v. GORDON.

Answer of married woman.

May 19, 1855. A married woman had been served with an office copy bill as well as her husband, but no joint answer was put in, and an order was obtained and served upon her directing her to answer separately and apart from her husband; no answer having been put in after the expiration of a month from the service of that order, a motion was made for an order *pro confesso* against her. The court refused to make the order, and directed a second office copy of the bill, together with an order, to be served upon her directing her to answer separately from her husband within a time limited after service of that order.

Statement. In this case an order to answer separately had been obtained and served upon Mrs. *Gordon*, wife of the defendant *Gordon;* and no answer having been put in, a motion was made on a former day to the judge in chambers for an order to take the bill *pro confesso* against her. The judge referred the question to the full court.

Judgment. On this day Mr. *Strong*, for the plaintiff, renewed the application, when the court refused the order asked for, and directed the plaintiff to serve a second order on Mrs. *Gordon*, ordering her to answer separately from her husband within one month after service upon her of such order, together with an office copy of the bill.

NOTE.—Probably the order would have been made as moved for had the first order for Mrs. *Gordon* to answer separately contained notice of the time within which such answer was to be put in, and had a second office copy of the bill been served upon her.

FOSTER v. EMERSON.

Will, construction of—Statute of Limitations—Improvements.

June 26 & 29, July 1, and October 9, 1854.

A testator by his will, amongst other things, directed as follows: "Sixthly. I will and order that the portion of my real estate and premises severally bequeathed to my two sons, and also the portion bequeathed to my four daughters, shall be severally and separately valued; and if either one shall be found to have a greater proportion or share thereof than the other, he or they shall pay back to the other, in such manner, such amount as will make each one of them equal sharer of my real estate and premises as heretofore bequeathed to them my said children." On a bill filed for a declaration of the rights of all parties under the will, *Held*, that each child was entitled to an equal share of the estate devised.

A father, being desirous of assisting his sons, put them in possession of portions of his real estate, and frequently expressed his intention and determination to convey such portions to the sons; during the continuance of such possession, however, the father was frequently on the premises assisting with his advice and directing the actions of his sons in improving the property, and conveyed an acre to one of the sons, and subsequently sold a valuable portion of the premises occupied by the same son: by his will the father devised his lands to be divided between all his children. *Held*, that the sons had not under the circumstances acquired a title under the Statute of Limitations 4 Wm. IV. ch. 1.

A testator placed his two sons in possession of certain portions of his real estate, intending to convey or devise the same to them, but during his lifetime retained the full control of the property; notwithstanding this, the sons made valuable improvements upon their respective portions. Upon a bill filed after the decease of the father for a distribution of the estate, the court refused to make to the sons any allowance in respect of such improvements.

Statement.

The bill in this case was filed by *Thirball Foster* and *Phœbe* his wife, *Mary Miller* and *Auby Ruttan*, widows, against *John Emerson*, *Richard Davis*, *Daniel Canniff*, *Joseph Canniff*, *Richard Nugent* and *Harvey Fowler*, setting forth at length the will of *John Canniff*, deceased, whereby he appointed the defendants *Emerson*, *Davis* and *Fowler* executors of his estate; and, amongst other devises, by the sixth clause directed as set forth in the judgment of the court.

The plaintiffs *Phœbe*, *Mary* and *Auby* and *Elizabeth Nugent*, deceased, wife of the defendant *Richard Nugent*, were the four daughters of the testator, and *Richard Nugent* was made a defendant as administrator of the goods and chattels of his deceased wife.

1854.

Foster v. Emerson.

The bill charged that the shares devised to the two sons, the defendants *Canniff*, were respectively of as much value as the whole estate devised to the four daughters, and that a valuation of the devises respectively should be made under the decree of the court.

Statement.

The prayer of the bill was, that the trusts of the will might be declared and carried into effect under the decree of the court, and that the rights and interests of the plaintiffs and of the defendants *Canniff* and *Nugent* under the will might be ascertained and determined: and for an administration of the estate.

The defendants answered, and the cause having been put at issue, evidence at great length was gone into by the plaintiffs and the defendants *Canniff*.

Mr. *Wilson*, Q.C., and Mr. *Turner*, for plaintiffs.

Mr. *Vankoughnet*, Q.C., and Mr. *Mowat*, for the defendant *Joseph Canniff*.

Argument.

Mr. *Read* and Mr. *R. Cooper* for defendant *Daniel Canniff*.

Mr. *Macara* for the defendants, the executors and *Nugent*.

The nature of the evidence taken, the arguments of counsel and cases cited, sufficiently appear in the judgment of the court.

October 9.

Judgment.

THE CHANCELLOR.—The bill in this suit is filed by three of the devisees under the will of *John Canniff*, praying, besides the usual account of the personal estate, that the rights of all parties should be declared andthe trusts of the will executed.

The first question in the cause arises upon the sixth paragraph of the testator's will, which is in these

1854.

Foster v. Emerson.

words: "Sixthly. I will and order that the portion of my real estate and premises severally bequeathed to my two sons, and also the portion bequeathed to my four daughters, shall be severally and separately valued; and if either one shall be found to have a greater proportion or share thereof than the other, he or they shall pay back to the other, in such manner, such amount as will make each one of them equal sharer of my real estate and premises as heretofore bequeathed to them my said children."

The plaintiffs contend that upon a proper construction of this clause each child is entitled to an equal share. The defendants *Joseph* and *Daniel*, on the other hand, insist that the testator intended to equalize the three portions into which he had divided that part of his real estate devised to his children, thus making his sons equal as between themselves, and giving to each a portion equal to that devised to his four daughters.

Judgment.

It must be admitted that the passage is obscure, whatever view may be taken of it; the expressions are inaccurate, and the structure of the sentence extremely awkward. But upon the whole we think the plaintiffs entitled to prevail. The early part of the sentence does certainly favor the defendants' view. Still the construction is doubtful. It admits of the interpretation contended for by the defendants, and the conclusion indicates, in our opinion, a clear intention that all the testator's children should share equally in his bounty, and more than outweighs the doubtful expressions in the introduction. We determine that point, therefore, in favor of the plaintiffs.

In the next place, the defendants *Joseph* and *Daniel* set up a title paramount to the will, each insisting that he was seized in fee, at the time of the testator's death, of the particular portion devised to him. This

1854.

Foster v. Emerson.

defence turns upon the construction of the 16th and 19th sections of 4 Wm. IV. chap. 1, and raises an important, and, with reference to the state of the authorities at least, a difficult question upon the construction of that statute (*a*).

The 16th section provides, "That no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued; and the 19th section (*b*) provides, "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined."

Judgment.

Now the defendants contend that upon a proper construction of the 19th section every tenancy at will is determined, necessarily and for all purposes, at the expiration of one year from its commencement, at the latest; that a right of entry accrues to the owner then, in virtue of the statute, without any act of his own, and that if he fails to bring his action within twenty years from that period his title becomes extinct, unless he can prove either payment of rent or an acknowledgment in writing in the meantime.

The authorities in support of this construction are certainly of great weight. Sir *Edward Sugden*, in the last edition of his book on vendors, page 627,

(*a*) The 2nd section of the imperial act 3 & 4 Wm. IV. c. 27.
(*b*) The 7th section of the imperial statute.

1854.

Foster v. Emerson.

says: "This, (*a*) therefore, is a direct decision, that forty years' possession, although not adverse in the sense of that expression under the old law, will gain a title. And this is established to be the true principle by the case of *Nebean* v. *Dor*, (*b*) in the Exchequer chamber, where the court were all clearly of opinion that the second and third sections of the act have done away with the doctrine of non-adverse possession, and that, except a case falling within the 15th section, the question is, whether twenty years have elapsed *since the right accrued, whatever be the nature of the possession.*"

And in a later case (*c*) the Court of Queen's Bench observed, that the effect of the second section was to put an end to all questions and discussions whether the possession of lands, &c., be adverse or not; and if one party has been in the actual possession for twenty years, whether adversely or not, the claimant whose original right of entry accrued above twenty years before bringing the ejectment is barred by this section."

Judgment.

Then, applying these remarks to the 7th section, the one now under consideration, he says: "As possession or receipt of profits is thus made necessary to prevent time from running against the owner, it became necessary to lay down some rule as to the occupation of tenants, particularly of tenants at will. This was accomplished, as we have seen, in the case of possession by a tenant at will, by making the right of the person entitled subject thereto to bring an action or make an entry of distress, to commence either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy is to be deemed to have

(*a*) Doe v. Bramston, 3 Ad. & Ell. 63. (*b*) 3 M. & W. 894.
(*c*) Culley v. Taylorson, 11 A. & E. 1008.

1854.

Foster v. Emerson.

determined; which, as we have before suggested, seems to make the time run, at the latest, at the expiration of such one year."

And in "The Concise and Practical View of Vendors," published in 1851, the same learned writer observes: (*a*) "When there is a tenant at will the right of a person subject thereto accrues at the determination of the tenancy, or at the expiration of one year after the commencement of the tenancy, when it is to be deemed to have determined. *This has been supposed to put an end to a continuous tenancy at will, though there may be a new one every year;*" and he cites *Doe* v. *Page* (*b*) and *Doe Goody* v. *Carter* (*c*); and see the observations of Mr. Justice *Paterson* during the argument.

Judgment.

To the cases already cited we must add *Doe Perry* v. *Henderson* (*d*), decided by the Court of Queen's Bench in this province, in which the learned Chief Justice appears to sanction the construction contended for by the defendants; and *Doe Quinsey* v. *Canniff* (*e*), in which one of the present defendants succeeded in an action of ejectment upon the title now in question.

It must be admitted then in favor of the defendants, that these cases tend at least to establish the proposition for which they contend—namely, that every tenancy at will is necessarily determined at the expiration of one year from its commencement, and that if the owner fail to bring his action within twenty years from that date, he will be barred, whatever may have been the dealings between the parties in the interim.

But it must be observed in the first place, that this proposition is directly opposed to the declared inten-

(*a*) P. 358. (*b*) 5 Q. B. 767. (*c*) 9 Q. B. 867.
(*d*) 3 U. C. Q. B. 486. (*e*) 5 U. C. Q. B. 602.

1854.

Foster v. Emerson.

tion of the learned commissioners by whom the statute was prepared. They say in their first report that great practical difficulty has arisen in determining what is adverse possession, and when it shall be considered to have begun. This must generally, they add, be left as a question of fact for a jury; but there are some rules of law, *presumptiones juris et de jure, which absolutely prevent the possession from being considered adverse*, and the expediency of which is considered very questionable, as they do not seem necessary for preserving rightful claims, and they greatly impair the healing tendency of the Statute of Limitations. *One of these rules is, that a possession which began rightfully cannot be considered as having become wrongful*—that is, adverse against the rightful owner—by being merely continued after the right of the party in possession had determined; *and it appeared to them that it should be open to a jury to find that adverse possession began from the determination of the rightful estate of the party.*" If the construction contended for be the true one, it is quite clear that the statute is directly opposed to the intention and object of those who framed it.

Judgment.

The inconvenient and unjust consequences likely to result from such a state of the law have been pointed out so clearly and forcibly both by Sir *Edward Sugden* in his work on vendors, and by the learned Chief Justice of this province in *Doe Perry* v. *Henderson*, that I need not do more than allude to them on the present occasion.

Lastly: The rule supposed to be laid down by the statute would seem to be a wanton and mischievous interference with the rights of property. Tenancy at will is an estate known to the law. It is competent to parties, of course, to create it. If it be competent to parties to create it, it must be also competent to them to continue it at their pleasure; and if it be competent

1854.

Foster v. Emerson.

to parties to continue it at their pleasure, and they do in fact continue it, the statute cannot run so long as it exists. In other words, tenancies at will are not necessarily in all cases determined by the statute at the expiration of one year.

In the view of these difficulties we are driven to ask ourselves whether a construction productive of such inconvenient consequences is the necessary or even the natural construction of this act of parliament. It certainly is not the necessary construction: there is obviously another, and, as it appears to us, a more natural construction. The legislature may have meant to provide for the simple case where no dealings take place between the parties subsequent to the creation of the tenancy. Upon that construction the statutory determination of the tenancy at the expiration of one year from its commencement would not take effect either where the parties have dealt with it subsequently as a subsisting tenancy, or where there has been an actual determination by the landlord himself. In this view the statute is freed from the difficulties to which I have adverted, and would be in exact accordance with the recommendation of the commissioners by whom it was framed. The presumption of law of which they speak in the report just quoted would be at an end, as to tenancies at will, at the expiration of a year from their commencement, except when the tenancy had been continued or determined by the act of the parties; and in these instances the question would be for the consideration of the jury.

Judgment.

In *Doe Bennett* v. *Turner* (*a*), Lord *Campbell*, then Attorney General, argued with great force that the statute only determines a tenancy at will when there has been no actual determination by the landlord; and in *Randall* v. *Stevens* (*b*), recently determined by

(*a*) 7 M. & W. 226; Turner v. Doe v. Bennett, 9 M. & W. 643.
(*b*) 18 Jur. 128.

the Court of Queen's Bench, his lordship took occasion to state from the bench the view which had been urged by him in argument in *Doe Bennett* v. *Turner*. The point was not decided, however, in that case; and the learned judge expressed a doubt whether the construction suggested by him could be adopted in the then state of the authorities, except by a court of appeal. 1854. Foster v. Emerson.

Whatever may be the ultimate determination of that question, the other branch of the proposition—namely, that a tenancy at will is not determined by the statute at the expiration of a year from its commencement when the parties continue to deal with it as a subsisting tenancy—appears to me to be equally clear in reason and upon authority.

It is difficult to maintain that a tenancy at will is necessarily determined by operation of law, at the expiration of a year from its commencement. When a tenancy at will has been created and there are no subsequent dealings between the parties, then the statute determines the tenancy at the expiration of a year, and the period of limitation prescribed by the statute begins to run from that time. That is quite consistent with reason. But when both landlord and tenant deal with it after the expiration of the year as a subsisting tenancy, it is no longer possible for either, consistently with reason, to rely on the statutory determination. The tenancy cannot be at one and the same time a subsisting and a determined tenancy; and when the parties deal with it as subsisting, they can no longer contend that it is determined by the statute. Judgment.

But Doe *Groves* v. *Groves* (*a*) is a distinct authority on the subject. In that case *William Hart* died intestate in January, 1798, seized in fee and in possession

(*a*) 10 Q. B. 486; and see Doe Stanway v. Rock, 4 M. & G. 30.

1854.

Foster v. Emerson.

of the hereditaments in question. His widow, *Martha Hart*, and his son and her only son and heir at law *John Hart*, a minor, above 14 years of age, survived him. On the death of *William Hart*, *Martha* and *John* inhabited a house with a garden, &c., part of the hereditaments, and continued to do so until the marriage of *Martha* with *Thomas Groves*, the defendant, in December, 1798. Defendant, on his marriage with *Martha*, went to inhabit the same premises, and continued to reside there with *John Hart* until *John Hart* left the premises in 1805, and after his departure down to the date of the action; defendant's name was over the door as a dealer in beer and tobacco, and the license for tobacco was taken out in his name, and he paid a chief rent and was assessed to the poor's rate. He also paid off a mortgage on the premises. Between 1805 and 1841, *John Hart* (to use the language of the admissions in the cause), "occasionally resided two or three weeks at a time in the dwelling house inhabited by the defendant and his wife, being part of the hereditaments in the declaration mentioned, as part of the family of the said defendant and his said wife; and the said *John Hart* so resided with the said defendant and his said wife at the time of her death in 1841, and remained at the said dwelling house a short time, not exceeding three weeks, after." In 1842, the surviving husband procured the son, *John Hart*, to execute a mortgage of the property, and the money was paid by the son to the husband.

Judgment.

In ejectment by the mortgagee against the husband, the case came before the Court of Queen's Bench upon a motion for a non-suit, the court being at liberty to draw inferences of fact from the evidence and admissions, and the learned judges were unanimously of opinion that the verdict should be entered for the plaintiff.

Lord *Denman* says, "I think that the court exer-

cising the functions of a jury ought to presume that the defendant was tenant at will to his son-in-law. There is ample evidence to admit such presumption. This is incorrectly likened to a case of estoppel. It is merely a question which of two suppositions is the most consistent with the facts in evidence." 1854. Foster v. Emerson.

Paterson, J., says, "I do not say that a party having a legal title to an estate conveys it away by mere equivocal acts which may amount to an admission of title in another. But here the defendant's title rests merely on the Statute of Limitations; *and his acts may well amount to an admission that during the period in question he was in fact tenant to another.*"

Erle, J., says, "The question is whether the estate of the heir at law is defeated by certain acts *in pais*, relied on by the defendant. The lessor of the plaintiff was clearly entitled and his title recognised in the plainest way by the defendant; *but the defendant's answer is, that he occupied as apparent owner for twenty years. To this the reply is that the real owner came now and then and lived with him. If I had been in the place of the jury, I should have held that this shewed that the defendant was in reality tenant at will.*" Judgment.

This case, which establishes very clearly the proposition for which the plaintiffs contend, is not questioned anywhere, so far as I have been able to find; on the contrary, although it is directly opposed to the doctrine propounded by Sir *Edward Sugden*, that learned writer states it at length in his recent essay on the Real Property Statutes, without expressing the least doubt as to its authority. At page 26, he says, "although a man has been in possession twenty years as apparent owner, yet the rightful owner may shew that the possession was not such as the statute will give effect to." In proof of this proposition, he cites

1854.

Foster v. Emerson.

Doe v. *Groves*, and continues: "The defendant said that he occupied as apparent owner for twenty years. To this the reply was, that the real owner came now and then and lived with him." And he then cites the judgment of *Paterson, J.*, already quoted: and again, at page 59 of the same work, he says, "as we have already seen, a man's acts during his occupation may amount to an acknowledgment that he is tenant at will; and therefore where a stepfather occupied for twenty years as apparent owner, but the stepson, the real owner, went now and then and lived with him, it was ruled that this submission shewed that he held as tenant at will during the whole of the period."

This may be thought perhaps a strong case upon the circumstances; but it proceeds upon a clear principle. It establishes that when the act of the parties cannot be reconciled except with a rightful holding of some kind, and no other tenancy is shewn and no rent paid, in that state of things a jury ought to presume a tenancy at will, which being found, prevents the operation of the statute. (*a*)

Judgment.

Now, assuming this to be a sound exposition of the law—and we hold it to be so—the present case appears to us to be free from doubt. Without entering upon an examination of the evidence in detail, it is manifest from the testimony on both sides that the defendants took possession under their father, in the hope that he would one day make them a title; and that the subsequent acts of the parties lead irresistibly to the conclusion that the defendants occupied throughout the whole period as tenants at will to the testator.

The defendants, indeed, assert a positive unconditional promise of the testator to make them absolute owners of their respective shares. But it is perfectly

(*a*) Turner v. Doe dem. Bennett, 9 M. & W. 646.

clear, we think, upon the testimony adduced by the defendants themselves, that no such absolute unconditional promise was ever made. For a long time the testator seems to have intended these properties for his sons; and he, no doubt, frequently expressed that intention, but he never meant to relinquish his control over the property; on the contrary, he seems to have formed from the first a firm determination to make them dependant upon his bounty; and it is equally clear that they perfectly understood that to be their position.

1854.

Foster v. Emerson.

Then the acts of the parties all through consist exactly with that state of things. After the defendants had been let into possession we find the testator constantly there encouraging them with his advice and assistance. When *Joseph* becomes involved with *McKenzie*, we find the testator paying a large sum to extricate him from his difficulty. When *Daniel* sets about the erection of a mill, we find the testator there directing and assisting in the operation; and throughout the whole period, so far as we can discover, the testator was in the habit of sending for and receiving from both contributions of flour, bread and such things as were necessary in his circumstances.

Judgment.

We have, besides, a long series of transactions peculiar to *Joseph's* case, which are of great weight, if not quite conclusive in the plaintiff's favor. It is established that when applications were made to *Joseph* for the purchase of portions of the property in question, he was in the habit of referring the parties so applying to the testator; and the evidence furnishes numerous instances of sales made under such circumstances, the purchasers paying their purchase money to, and receiving their conveyances from the testator, and continuing in undisturbed possession with *Joseph's* assent.

The circumstances to which I have just alluded are

1854.

Foster v. Emerson.

wanting in *Daniel's* case; but two facts of equal, if not greater force, have been established against him. It is proved that in the year 1840 he accepted from the testator a conveyance of one acre of the property in question, including the site of his dwelling house, and in the same year he joined his father in a lease of another, and that a valuable portion of the property, to one *Holton*.

It is said, however, that these transactions took place more than one and twenty years after *Daniel* had been let into possession; and it is argued that they are consequently immaterial and cannot have the effect of divesting the fee simple already vested in *Daniel* by the statute. But that argument obviously proceeds in a circle. The question is, had the estate been transferred to the defendant by virtue of the statute. Now if the just inference from these facts is, that at the time of their occurrence and previously

Judgment.

the defendant was tenant at will to the testator then they are obviously material, not as divesting an estate already vested, but as establishing that it never did vest in the defendant.

This point was incidentally determined in *Doe* v. *Groves*, for the mortgage in that case was executed five and thirty years after the commencement of the tenancy, and yet it was justly considered to be a circumstance of great weight. Sir *Edward Sugden*, in his comment on the case, says, "We may observe that the circumstance that the son-in-law acted as owner in raising money on the property at the request and for the benefit of the stepfather, long after the period when time *per se* would have been a bar, was also entitled to great weight."

It is argued, however, that the defendants here were neither tenants at will nor tenants of any other description, and that the case, consequently, is not

governed by the 19th section, but falls within the provisions of the first clause of the 17th, which enacts that "when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed or have discontinued such possession or receipt, then the right to make an entry shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received."

But, in our opinion, that section has not any application to the present case. It provides for cases where there is no privity between the owner and occupier; but here the defendants were unquestionably admitted into possession by the testator, and enjoyed at his will. In that respect the case is similar to, but much clearer than many of those to which I have referred, all of which were treated as falling clearly within the 7th section of the English act, which corresponds with the 19th of the provincial statute.

Judgment.

Upon this branch of the case, therefore, our opinion is in favor of the plaintiffs. The evidence leads irresistibly, as we think, to the conclusion that these defendants occupied throughout the whole period at the will of the testator. In *Doe* v. *Groves* the court presumed a tenancy at will upon what may be considered, perhaps, slight circumstances; but in the present case the evidence appears to us to leave no room for doubt.

Assuming the Statute of Limitations to fail them, the defendants set up an equitable claim growing out of their large expenditure upon these properties, on the faith of the testator's promise to make them a title.

1854.

Foster v. Emerson.

If the defendants had been able to establish the fact upon which this argument rests, the case would have been open to a different consideration; but that fact we have already declared is not, in our opinion, borne out by the evidence. Large improvements were made—the evidence shews that; but it also shews that the testator had all along determined not to part with his control over the property, and that the defendants were well aware of that determination. They made the improvements, therefore, relying merely on the testator's bounty. In that view of the evidence they have no equitable claim either to the property itself or to an allowance for their improvements.

The property involved in this suit is of considerable value, and it must be admitted that our judgment bears hardly in some respects upon the defendants. The question upon the Statute of Limitations is; moreover, of great public importance; and the general current of the authorities may be thought, perhaps, to run counter to the opinion we have expressed. Upon all these grounds we have considered the case with great attention, and it is a consolation to us to know that if the parties are dissatisfied with our judgment the institutions of the country afford a convenient mode of bringing the matter before a higher tribunal without subjecting them to any unreasonable expense or delay.

Judgment.

ESTEN, V. C.—The question in this case is, whether the suit is barred by the Statute of Limitations 4 Wm. IV. c. 1, and it turns upon the construction of the 19th clause of that act, which is a verbatim copy of the one in the English act, and therefore the English cases are authorities for our guidance in this matter. The views entertained respecting the construction of this clause appear to have varied. At first it was supposed that the time began to run from the end of

1854.

Foster v. Emerson.

a year after the commencement of the tenancy at furthest, and from a determination of the tenancy only if it took place before that time (*a*). Then it was supposed that the tenancy might be deemed to have determined at the end of a year, so as to give a start to the time, and yet that it would actually continue, and might be afterwards determined by an act of the lessor, whereby the tenant would become tenant by sufferance; but that this would not affect the currency of the time unless a new tenancy at will were created (*b*). It is obvious that it would have been much simpler and more natural to have considered, as our own Court of Queen's Bench did in *Doe* v. *Henderson* (*c*), that the tenancy determined at the end of the year, and that the act of the lessor, which would have been a determination of it if it had continued, went for nothing. The English cases are not all very intelligible; and it appears to me that much unnecessary perplexity has been introduced into the consideration of this question. It was afterwards decided that the tenancy might be shewn to have continued beyond the end of the year by any circumstances evincing a friendly understanding between the parties respecting the land (*d*). Lastly, it was suggested by Lord *Campbell* in *Randall* v. *Stevens*, that any act of the lessor which would be a determination of the tenancy, supposing it to have continued after the end of the year, would give a new start to the time. This view supposes the tenancy to continue after the end of the year, and the words "from the determination of the tenancy, or from the end of a year after its commencement" to mean whichever shall last happen. If this construction should prevail it would open the door very wide for the admission of exceptions to the bar of the statute, as anything which would operate a determination of the tenancy, whether

Judgment.

(*a*) Sugden's Concise Views, p. 358, and 2 V. & P. 612.
(*b*) Doe v. Turner, 7 M. & W. 226. (*c*) 3 U. C. Q. B. 486.
(*d*) Doe v. Groves, 10 Q. B. Rep. 486.

1854.

Foster v. Emerson.

the secret act of the lessor or the act of God, as the death of either party, would make the time begin *de novo*. This doctrine rests wholly upon the extra-judicial opinion of the present Lord Chief Justice of England, which, however, must be admitted to be entitled to great weight. I should myself think it more reasonable to hold that the tenancy must be deemed to have determined at the end of the year unless it is shown to have continued beyond that time, and that an act or circumstance which if it had continued beyond the end of the year would be sufficient to work its determination, cannot itself show such continuance: but this fact must first be shewn by other evidence. Three points may safely be considered as settled by the decisions: first, that the time will begin to run from the end of a year after the commencement of the tenancy, unless it be shewn to have continued beyond that time; at all events, if nothing have occurred after that time which would

Judgment.

have worked its determination, supposing it to have continued. Second, that the tenancy may be shewn to have continued beyond the end of a year after its commencement by evidence of any facts or circumstances indicating a good understanding between the parties relative to the land (*a*). And third, that any fact evidencing the existence of a tenancy at will within twenty years before the commencement of the action will be an answer to the statute (*b*). A fourth point must be considered doubtful—namely, whether it is sufficient to shew an act or circumstance within twenty years, which, if the tenancy had continued, would have worked its determination. The present case is, I think, free from difficulty. With respect to *Daniel Canniff*, I consider the evidence as shewing that the tenancy continued until the death of the testator without interruption. With regard to *Joseph Canniff*, the tenancy seems to have been determined

(*a*) Doe v. Groves, ubi supra. (*b*) Doe v. Burton, 15 Jur. 990.

1854.

Foster v. Emerson.

by the entry of the testator in 1837; but a new tenancy at will was created afterwards, which continued until his death. The material facts in regard to *Daniel Canniff* are, the lease to *Holton*, the conveyance to himself, and the several declarations and acts of the testator deposed to by his own witnesses, which evidence he has read, and has thereby made such declarations and acts binding upon him; and the dealings between the testator and *Daniel Canniff* to the time of the testator's death, as deposed to by the witness *Macdonald*, whose evidence is totally uncontradicted and appears entirely worthy of credit. The lease and conveyance are the strongest possible recognition of the testator's title as regards the parts of the property comprised in them respectively, and the whole property was confessedly held under the same title; the acts and declarations I have adverted to, although proved for a very different purpose and in order to strengthen the defendant's title, do in fact shew that both father and son perfectly understood that the property was the father's and that he intended to give it to the son, and the dealings between the parties evince a general good understanding subsisting between them in relation to the land; for which purpose it does not seem to me material whether the father was charged in account with what he received or not, although my conclusion from the evidence is, that he was supplied by his sons with what he needed free of charge. The facts relating to *Joseph Canniff* are of the same description, but more numerous and of a stronger kind. The testator appears to have procured whatever wood he wanted from *Joseph's* part without objection; the same dealings occurred between them as between the testator and *Daniel* to the time of the testator's death; and in addition, the testator alienated various portions of *Joseph's* part of the property, and *Joseph* submitted to it.

Judgment.

In many of the cases it is said that the statute has

1854.

Foster v. Emerson.

abolished the distinction between adverse and non-adverse possession, and this no doubt is true. Before the statute the time did not run unless the possession was adverse; now the time runs whether the possession was adverse or not, or although there has been no possession at all; it will not run, however, in favor of a tenant against his landlord, and therefore the lessor of the plaintiff can always shew, in answer to a plea of the statute, that the defendant has held as his tenant; and where there has been possession it becomes necessary to ascertain of what nature this possession was, that is to say, whether as tenant or not, although no particular sort of possession, and indeed no possession at all, is requisite to give operation to the statute.

Judgment.

It was considered by the court in the case of *Doe Perry* v. *Henderson* that where the twenty years had elapsed no subsequent act or acknowledgment would avail, because the title had become extinct and could not be revived by any mere acknowledgment. I believe no authority was cited in support of this doctrine; but it is probably true as an abstract proposition, of which one of the parts is that the title has become extinct. It is apprehended, however, that where an act or dealing is shewn at any distance of time after the commencement of the tenancy which indicates that a tenancy at will then existed, the intendment is that it has continued during the whole time unless it has been determined in the interim by act of the parties or the act of God, and then that a new tenancy at will has been created. In neither event will the time have run at all, or the title have become extinct. Thus, for instance, suppose a person to be let into possession in 1820 as tenant at will, and that in 1845 he acts as only a tenant at will would act, the intendment is that he has continued to hold as tenant during the whole 25 years; or, if either party has died during that time, or has done any act which amounted to a determination of the will, then

1854.

Foster v. Emerson.

the conduct of the defendant in 1845 shews that a new tenancy at will was created afterwards. The case of *Doe* v. *Burton* above cited is very important in this view; there it was not known how the defendant had obtained the possession, nor how long he had enjoyed it; the twenty years might have elapsed twice over, but within twenty years of the commencement of the action he had entered into a contract with the lessor of the plaintiff for the purchase of the estate; this act shewed him to have been their tenant at will, and of course the presumption was that he had not previously acquired an absolute title, otherwise he would never have acted as he did.

The result of holding that the sons occupied as tenants at will to their father until his death is, that the suit is in time. This decision, no doubt, conflicts with those of our Court of Queen's Bench in *Doe Perry* v. *Henderson* and this very case of *Doe* v. *Canniff*. In the latter case no authorities appear to have been cited, the law, I suppose, being considered as settled. In *Doe Perry* v. *Henderson* the case of *Doe* v. *Groves*, with which it conflicts, was not cited, even if it had been decided. The judgment of the court was in accordance with the other authorities cited, except perhaps *Doe* v. *Rock* (*a*), and with the original opinion of Sir *Edward Sugden*, and with the law as it was then understood. I need not say that these two judgments are entitled to the highest respect, and we should probably feel bound to follow them if they did not, in our apprehension, conflict with authorities which our courts of common law equally with ourselves are bound to respect.

Judgment.

With respect to the construction of the will, it appears, after considerable doubt, that an equal division was intended by the testator, and therefore the

(*a*) 6 Jur. 266, and 4 M. & G. 30.

1854.

Foster v. Emerson.

two sons must pay suitably to the daughters what will suffice to raise their respective shares to an equal amount with their own.

This decision may seem to press hardly upon the defendants, the sons of the testator. It is, however, in accordance with his intention, and he was much better acquainted with the merits of the case than we can possibly be. His perfect possession of his faculties and free agency when he made his will are not doubted nor impugned.

I think, under the circumstances, the decree should be without costs to the hearing.

Judgment.

SPRAGGE, V. C.—The first inquiry is, what was the relative position of defendants *Daniel* and *Joseph Canniff* to their father, the testator, upon their first obtaining possession of the land in question. There was not a mere discontinuance of possession on his part, and there certainly was no discontinuance within the technical meaning of the term; nor was there any dispossession, for they did not dispossess him; but their possession was with his assent, and a tenancy was created as to each of them with his father.

I think there can be no doubt that each of them on obtaining possession became tenant at will to his father. The rules applied by the statute of 1834 to discontinuance or to dispossession are not the same as those applied to tenancy at will: the distinction, therefore, is material.

The possession of both *Daniel* and *Joseph* from the time of their obtaining possession from their father was not such a possession as would be adverse under the old law. The question under the new state of the law created in Upper Canada by the act of 1834 appears to be, whether the tenancy at will originally

created did or did not continue to exist after the expiration of a year from the time of its creation. 1854. Foster v. Emerson.

No question arises in this case, upon any actual or presumed determination of the tenancy, so as to raise the question as to a subsequent accrual of right of entry, from the date of which the time of limitation should run, as was the case particularly in *Bennet* v. *Turner* and the recent case of *Randall* v. *Stevens*. Here there was a possession undisturbed from the first by *John Canniff* the father; and the questions are, first, whether under the statute it is open to the plaintiffs to shew that the tenancy at will continued to within twenty years of action brought (or in this case the death of *John Canniff*) by shewing acts evidencing a continuance of such tenancy; and secondly, whether upon the evidence acts and dealings between the parties are shewn which do in fact evidence a continuance of the tenancy.

Judgment.

I take it to be the meaning of the statute, and so determined by adjudged cases, that the tenancy at will shall be *deemed* to have determined at the expiration of one year from its commencement only where no other determination of the tenancy is shewn; and that where another determination of the tenancy is shewn, either before the expiration of the first year or within twenty years after it, the statute begins to run from that other determination; and in such case the legal presumption is not resorted to. Thus, at the expiration of twenty-one years from the commencement of the tenancy, if nothing has occurred in the meanwhile to rebut the legal presumption, it shall take effect, and the tenancy be deemed to have determined twenty years before; but if there has been during any portion of that time an actual determination, then up to that actual determination the tenancy must have continued, for there could be no determination of that which had no existence at the time. In

1854.

Foster v. Emerson.

such a case the only evidence of the continued existence of the tenancy after the first year is the fact of its being put an end to at some subsequent period, if indeed that fact can properly be called evidence of its previous existence. Perhaps the more correct view is, that the legal presumption does not arise until after the twenty-one years have expired; and if anything occurs to rebut it within the twenty-one years, it does not arise at all; and until the twenty-one years have expired, the continued existence of the tenancy at will is a legal consequence of the tenure.

Now if, during any period subsequent to the first year, there be shewn by evidence the existence of a tenancy at will, we must necessarily find a determination of such tenancy, if at all, *after* that period, and the statute runs from that determination.

Judgment.

My view is this, that each time a tenancy at will is shewn to be existing, that is, for the purposes of the statute, the commencement of the tenancy. Both in *Doe Bennet* v. *Turner* and *Randall* and *Stevens*, the tenancy for the purposes of the statute was held to commence, not from its original commencement, but after its determination; and if there must be a determination after an existence shewn, for the statute to run at all, it would follow that the statute could not run for any period anterior to such existence shewn; or, at the least, that there must be a determination, actual or presumptive, after such existence shewn, from which the running of the statute must thenceforth be computed.

Upon this principle, as I understand it, the case of *Doe Groves* v. *Groves* was decided. In that case a much larger period of possession had occurred than was necessary under the statute to bar the right of the person otherwise entitled, but he shewed a state of circumstances during this period between himself and

1854.

Foster v. Emerson.

the person in possession which, in the judgment of the court, shewed the existence from time to time of a tenancy at will; and the court held that the party in possession could not go behind the latest of the periods at which the existence of such tenancy was shewn in computing the time from which the statute should run.

The case of *Doe Groves* v. *Groves* is of course binding as an authority upon this court, being the construction put by the English Court of Queen's Bench upon the corresponding clauses of the Imperial act from which our real property act of 1834 is taken, and I think it a sound and reasonable construction of the act. In the previous case of *Stanway* v. *Rock* the court must have taken the same view, otherwise the circumstances which are offered to shew the subsequent existence of a tenancy would have been discarded from the consideration of the court, as tending only to shew a fact which if shewn would not be material.

Judgment.

The opinion which I have formed does certainly conflict with *Doe Perry* v. *Henderson*, in the Court of Queen's Bench of Upper Canada; but *Doe Groves* v. *Groves*, besides being an authority binding upon us, was not cited to the court in that case, and the report of the case may not indeed have reached the province at that time.

Upon the second point which arises upon the application of the statute to this case, whether upon the evidence acts and dealings between the parties are shewn which do in fact evidence a continuance of the tenancy at will, I do not propose to go at all minutely into the evidence; I agree in the conclusion drawn from it by the other members of the court, and that as to both of the defendants. One cannot read the evidence without seeing that they occupied the property throughout the whole period literally at the will of their father; that their occupation was at no

1854.

Foster v. Emerson.

time independent of his ownership; that a certain degree of control, never questioned by them, was exercised from time to time by him. Each party presents his own view as to the flour, lumber, &c., received at various times by the father. I think it was neither strictly by way of rent nor as mere bounty. The sons appear to have felt this to be their position; they were occupying land by the permission of their father, and which they expected would become their own at his death, and he required from them and they rendered to him such products of the land as he needed or thought fit, and that, because they so occupied and he was still owner. I do not suppose it entered into the mind of any of them that what was so rendered was a mere gift to the father, or something which under the circumstances it would be merely illiberal or unfilial to refuse; which they might withhold if they thought fit, and which the father was not entitled to as a matter of right. The fact of entries having at one time been made (or if always made) does not alter the character in which these things were given and received, nor the footing upon which the parties understood themselves to be.

Judgment.

The sending to the father to claim the property against a third person was another circumstance. This occurred in 1832, and was the act of both the sons after consultation, although the land claimed was only a portion of that occupied by *Joseph*.

The entering and cutting firewood wherever and whenever the father required it was an assertion of right on his part not questioned on theirs.

There are other circumstances, some applying exclusively so the portion of land occupied by *Daniel*, others to that occupied by *Joseph;* among the former is the father assisting and directing at the erection of mills in 1825, and repairing the flume in 1826; the

father in 1840, at the request of his son *Daniel*, joining in the lease to *Holton;* there is also the conveyance by the father to *Daniel* of a small piece of the land he then occupied, upon which his dwelling-house was situated. Of the circumstances applying to the portion occupied by *Joseph*, the sale of various portions from time to time by the father is one of the strongest; and it is strengthened rather than weakened by the fact that this was generally done after consultation with *Joseph*, and with some deference to his wishes; the sale of a site for a tannery was an instance of this. The circumstances attending the dispute and arbitration with *McKenzie* shew a dealing with the land inconsistent with a right in *Joseph* independent of his father.

1854.
Foster v. Emerson.

With regard to those circumstances which relate to one portion of the land only, not to both, I am not satisfied that they are not evidence affecting both, at least when what occurred in relation to the portion occupied by one brother was known to the other; for both had possession under the same circumstances and with the same view, and every act of ownership acquiesced in by one, of which the other was cognizant, could not but make that other aware of the position in which the father held them both, for he certainly held and treated both of them as upon the same footing. There is quite enough, however, without pressing this view, to shew that the sons held not independently of, but at the will of their father, and that up to a period sufficiently late to save the Statute of Limitations; certainly much more is shewn in this case than in *Doe Groves* v. *Groves*.

Judgment.

Another point raised upon the hearing was, that *John Canniff*, the father, by placing the sons in possession and leading them to expect that he would devise the property to them by his will, upon the faith of which they, with his knowledge and assent, made

1854.

Foster v. Emerson.

great improvements, and then disappointing that expectation by clogging the devise with a qualification, was guilty of a fraud, which entitles the sons to the land which they were thus led to expect.

I do not think that this case at all falls within the rule. In such a dealing between father and son there is no concealment, and the parties clearly understood one another; there is no engagement on the part of the father to devise the property by will, but merely an expressed intention; and when the son makes improvements, he does it because of his confidence that his father will carry out his intention, and in some cases probably in the belief that the hardship of depriving him of the land under the circumstances might operate upon the father's mind as an additional inducement to abide by his intention. To hold it to be fraud in the father to deviate in his will from his previously expressed intention, only by reason of such

Judgment.

expressed intention and the making of improvements, would not only be stretching the rule beyond its proper limits, but would be mischievous in its effects; for it would deter fathers from allowing to their sons the possession and usufruct of lands intended for them, lest it should fetter them in the exercise of the discretion which they desire to retain in the disposition of their property by will.

In regard to the sixth clause of the testator's will, it is somewhat obscurely expressed; but after considering it a good deal, I think it will bear no other construction than that put upon it by the Chancellor.

WALLACE v. JAMES.

1854.

May 23 and Nov. 13.

Partnership—Forgery.

One of two partners carried on the business of bill broker on his own account, and in that capacity received from the plaintiff several sums of money, by checks and proceeds of drafts on the plaintiff, as the price of certain promissory notes, and the money was by the broker paid into and used with the partnership funds. It was afterwards discovered that these notes had been all forged by the broker, who absconded, and the remaining partner executed a deed of assignment of all the joint effects to trustees for the benefit of all their creditors. Upon a bill filed for that purpose the court held that the plaintiff had a right to be paid his claim out of the partnership assets. [SPRAGGE, V. C., *dissentiente*].

The bill in this case was filed by *Patrick Wallace* against *Robert James*, junior, *John A. Torrance*, and *George A. Pyper*, and the pleadings and evidence in the cause shewed that from the 1st of September, 1850, until about the 1st of March, 1852, *Edward Godrich* and *John J. Matthews* carried on business as merchants in co-partnership, under the style or firm of "*Matthews & Co.*;" that during that period the plaintiff had employed *Matthews*, who carried on, separately and for his own benefit, business as a bill broker, to buy promissory notes from time to time for him; that plaintiff paid him money for the purchase of notes; but the money, instead of being so applied, was paid in generally to the funds of the firm of *Matthews & Co.*, and the notes delivered by *Matthews* to plaintiff proved to be forgeries; and that warrants had been issued for the apprehension of *Matthews* on the charge of forgery, who had, however, absconded from the province; and then for the first time plaintiff became aware of the fact that the said notes were forged instruments. That on or about the 2nd of March, 1852, *Godrich*, by deed, assigned all his interest in the partnership assets to the defendants,—the principal creditors of the co-partnership in trust, after paying expenses, to divide the proceeds of the said assets ratably amongst themselves and such other of the creditors as should execute the deed within four months from the date thereof; and the deed contained a release of *Godrich* on the part of the creditors executing the same in respect of claims

Statement.

1854. Wallace v. James.

against the partnership; that the plaintiff and defendants duly executed the deed within the four months; but afterwards the defendants refused to pay any dividend to the plaintiff.

The bill prayed that plaintiff might be declared a creditor of the estate, and that the defendants might be ordered to pay him the same dividend as the other creditors of the firm.

Mr. *Mowat* for the plaintiff.

Argument.

Mr. *Brough* and Mr. *Galt* for the defendants.

Nov. 13.

THE CHANCELLOR.—Several questions raised at the hearing were eventually abandoned, so that the plaintiff's right to be paid the amount which he claims from the partnership funds is the only point which remains for our consideration. Upon that point the case is this:—Both partners resided in this city, where they carried on business in partnership as general merchants. *Matthews*, at the same time, carried on a separate business as a bill broker, and previous to the transactions in question he had been employed in that capacity by the plaintiff (then resident at a distance) to a considerable extent. At various times during the latter part of 1851 and the beginning of 1852, *Matthews* proposed to purchase for the plaintiff what he represented as four promissory notes, purporting to be made and endorsed by persons of credit; and the plaintiff agreed to become the purchaser at certain amounts, which were paid to *Matthews* either by checks in his favor or by his drafts on the plaintiff payable at sight. These drafts and checks were all indorsed in the partnership name by *Matthews*, and so indorsed they were paid by him to the credit of the partnership account with their banker in this city, and the proceeds were applied, without further arrangement, to the general purposes of the partnership. Shortly after

Judgment.

1854.

Wallace v. James.

these occurrences *Matthews* absconded, when it was discovered that the securities sold to the plaintiff were not genuine, but, with many more, had been forged by *Matthews;* and the question is, whether the plaintiff has a right to be paid his debt from the partnership accounts which have been assigned to the defendants in trust for all creditors.

It is quite clear that the promissory notes sold to the plaintiff were all forgeries, and his right to treat the money paid by him, under such circumstances, as money had and received by *Matthews*, to his use, is not denied (*a*); but it is said that there is no privity between the plaintiff and the partnership, and it is argued that the money which they clearly received cannot for that reason be considered as money had and received to the plaintiff's use. But in my opinion that argument cannot be sustained, whether the transaction is considered as an assignment of these choses in action, or as a payment of the plaintiff's money into the partnership funds; for, looking at it as an assignment of choses in action, these checks and drafts, upon which the money was paid, never were the rightful property of *Matthews*. They had been obtained by gross fraud, and were transferred to the partnership improperly and without consideration; and it follows, I think, that the moneys which were received upon those accounts by the partnership were moneys had and received to the plaintiff's use. (*b*) Viewed in the other light, as money paid into the partnership funds, the plaintiff's right to recover appears to me to be equally clear.

Judgment.

This money had been obtained by a gross fraud; the consideration on which it had been paid had wholly failed; it was therefore money had and received to the plaintiff's use; and being money had and received

(*a*) Jones v. Ryde, 5 Taunt. 488.
(*b*) Mangles v. Dixon, 3 H. L. 702; Down v. Halling, 4 B. & C. 330.

1854.

Wallace v. James.

to the plaintiff's use in the hands of *Mathews*, it remained such in the hands of *Mathews* and *Godrich*, because it is impossible for them to say that they received it *bonâ fide* and without notice of the plaintiff's rights. (*a*)

This appears to me to be a much clearer case in favor of the plaintiff than *Marsh* v. *Keating* (*b*), cited in argument. There *Fauntleroy*, one of the partners in the house of *Marsh, Sibbald & Co.*, forged a power of attorney for the sale of stock belonging to Mrs. *Keating* without the knowledge or concurrence of his copartners. The money received upon a sale effected under that forged power was paid to the credit of the partnership at their bankers in the city of London; but the other partners had no knowledge that the payment had been made. The partnership did not derive any benefit from the transaction, for the amount was drawn out by *Fauntleroy*, by whose direction it had been paid, and there was no entry respecting it in any of the partnership books. The argument upon which the defendants rely here was very much pressed in that case; but the House of Lords determined that the money obtained by *Fauntleroy* under the forged power of attorney, having been paid to the credit of the partnership at their bankers, was money had and received by the partnership to the use of Mrs. *Keating*. Here the securities were transferred to the partnership without consideration; the monies realized thereby were placed to the partnership account, and it is not alleged that any concealment was attempted.

Judgment.

It is said, however, that *Emly* v. *Lye* (*c*) is a clear authority in favor of the defendants, but that case does not appear to me at all applicable. There was no

(*a*) 1 Addison on Contracts, p. 78; Hudson v. Robinson, 4 M. & S. 478; Follett v. Hoppe, 5 C. B. 226; Jacaud v. French, 11 East 317.
(*b*) 2 Cl. & Fin. 250; and see Calland v. Lloyd, 6 M. & W. 26.
(*c*) 15 East 7.

fraud there. The money was not advanced upon a forged instrument, but upon a genuine bill of exchange drawn by a partner in his individual name. The advance was not made to or on the credit of the partnership, but upon the discount of the bill; and it is difficult to discover a principle upon which the holder of such a bill could recover its amount from the partnership. The proceeds when received were the proper monies of the individual partner, to be disposed of at his pleasure. They became, by his rightful act, the property of the partnership, and the subsequent dishonor of the bill could not make the monies had and received to the use of the holder. Our decree, therefore, must be for the plaintiff, with costs.

ESTEN, V. C.—The case of *Marsh* v. *Keating* (*a*) seems to me to have been decided on the principle that a person possessed of a sum of money belonging to another, and in breach of his duty paying it into a bank to his own credit, and the bankers having the means of knowing before they pay it over that he had no right so to pay it, the real owner may maintain an action for money had and received to his use against the bank. The defendants in the case cited had the means of actual knowledge, and therefore the case was treated as if *Fauntleroy* had been a stranger; but the question is, whether constructive knowledge must not always exist when the party paying the money is himself a partner in the house to which it is paid. Judgment.

Calland v. *Lloyd* (*b*).—A person possessed of money belonging to another to keep, deposits it with a banker to the credit of a third person; the true owner giving notice of his title to the banker before he pays it over, can recover it in an action for money had and received.

Clarke v. *Shee* (*c*).—Agent applies monies of his

(*a*) 2 Cl. & F. 272. (*b*) 6 M. & W. 26. (*c*) 1 Cow. 197.

1854.

Wallace v. James.

principal, contrary to his duty, in the purchase of lottery tickets, against the act of parliament, so that he himself could not have recovered the money, the principal may maintain an action for money had and received. It shews that a party receiving money *mala fide* cannot set up the want of privity where the agent cannot himself recover it.

Sims v. *Brittain* (*a*) seems to depend on the plaintiff's having sanctioned the course of dealing between their deceased copartners and the defendants, and authorized the defendants to treat the deceased partner as their creditor.

I see no reason to doubt from the authorities that if an agent pay the monies of his principal, contrary to his duty, to a third party, to his own credit, they may be recovered by the principal from such third party in an action for money had and received to his use, whenever such third party ought not *ex æquo et bono* to retain the monies,—as, where he paid no consideration, or had notice, or had given no credit, or would not otherwise be damnified by repayment of the money. The question which we have to decide is, whether *Wallace* could maintain an action for money had and received to his use against *Matthews* and *Godrich* for the amount in question in this cause; for if he could he ought to be admitted to a participation in this fund. Now it cannot be and is not, as I understand, denied that when these monies were deposited by *Matthews* to the credit of the firm they were the monies of *Wallace*. The defence which *Matthews* and *Godrich* make, or rather which the trustees are making for them, is, that *Matthews* alone, and not the firm, is liable to the plaintiff—in other words, they say in effect that these monies, which were the monies of *Wallace*, became by the act of *Matthews* our monies; we owe them to *Matthews*,

Judgment.

(*a*) 4 B. & Ad. 375.

and he owes them to you—that is to say, they found a title to the monies in question upon the wrongful act of one of themselves. This, I think, they cannot do. As *Matthews* himself could not, so neither can *Matthews* and *Godrich* found a title upon the wrongful act of *Matthews*. The property in the monies was not altered by the unauthorized loan to the firm; they were still the monies of *Wallace;* and as *Matthews* could not receive them except to the use of *Wallace*, so neither can *Matthews* and *Godrich*. Then they appear to have been received without consideration, nor does it seem that the firm could be damnified by their repayment.

1854.

Wallace v. James.

For aught that appears, these monies may never have been paid by the firm to any one; *Matthews* may have drawn nothing since they were deposited, or no more than was in the firm before; and the mere obligation to repay somebody cannot form any consideration, because the firm may as well repay one person as another. But even such arguments as these would not, it appears, avail the defendants in this case; for the receipt of the money being a partnership transaction, the partners were identified in it, and *Godrich* must be deemed to have had notice of all that *Matthews* knew. He knew therefore that this was *Wallace's* money, and that *Matthews* was disposing of it in a manner contrary to his duty to his principal; and all the cases seem to shew that when the depositary has notice of the breach of trust at the time of the deposit, the action may be maintained. It may be suggested that *Wallace* reposed confidence in *Matthews* in this transaction; that this confidence has led to the mischief; and that it would be inequitable to allow *Wallace*, under such circumstances, to recover the money from the firm. But I think the confidence of *Wallace* is answered by the confidence of *Godrich*. If the confidence of *Wallace* enabled *Matthews* to receive monies and apply them to the use of the firm, which

Judgment.

1854.

Wallace v. James.

was an advantage to the firm, the confidence of *Godrich*, in entrusting *Matthews* with the powers of a partner, enabled him to commit the injury (if any) which the firm has sustained at his hands. I don't think any negligence can be imputed to *Wallace*. My conclusion is, that the action could have been maintained against *Matthews* and *Godrich*, and therefore that the plaintiff is entitled to a participation in this fund.

I think the plaintiff is entitled to a decree with costs.

SPRAGGE, V. C.—I find difficulties in the way of arriving at the same conclusion as the other members of the court, which I will shortly state.

In the first place, I doubt, as to a portion of the monies in question, whether at the time they reached the hands of *Matthews* and *Godrich* they were the monies of the plaintiff: that portion, I mean, which was procured by the discount at the City Bank of *Matthews'* drafts upon the plaintiff. As I understand such a transaction, and as the business was transacted in this instance, drafts drawn by *Matthews*, and indorsed with the name of the firm, were carried to the bank, and the bank was asked to advance money upon them; and money—the money of the bank—was advanced upon them to the firm, upon the credit of the names of *Matthews* and the firm, and upon the faith of their representation that the drawee (the plaintiff) would accept them. The bank, upon advancing the money, became holder of the paper, and transmitted it to the plaintiff for his acceptance; upon his acceptance he became liable to pay; but up to that time he had not become liable, for he had received no value. He had, it is true, certain spurious, worthless bits of paper, which he believed to be genuine and valuable; but if he had discovered that they were forgeries before he accepted the drafts, he

Judgment.

1854.

Wallace v. James.

of course would not have accepted them, and certainly was not bound to accept them. Up to that time he had incurred no liability either to pay money or to accept drafts; and before that time these monies in question—the monies of the bank—had reached the hands of the firm. The plaintiff afterwards paid these monies, not to the firm, but to the bank in discharge of the liability which he had incurred to the bank by accepting the drafts; and by such payment the bank was reimbursed the advances which it had made to the firm. When the plaintiff made his payment to the bank, the monies paid did not pass into the hands of the firm or go to their credit, but were simply retained by the bank as its own monies. All that can be said in regard to it is, that the firm had the benefit of that payment; but how? Not by receiving the monies so paid, but by being thereby released from responsibility in respect of other monies previously advanced from another quarter; and I find it difficult to make out that the monies so previously advanced, and which were the only monies received by the firm in respect of these drafts, were the monies of the plaintiff. Judgment.

The monies received upon the plaintiff's cheques seem to stand upon a different footing: they were the monies of the plaintiff when in the hands of *Matthews*, and he paid them over to the firm by placing the cheques to the credit of the firm at the bank, and in that way the firm received these monies of the plaintiff.

Another difficulty which I have, applies to the whole case. The plaintiff dealt with *Matthews* not as a member of the firm, but individually as his agent or broker. He trusted him and placed confidence in him in that capacity, and when *Matthews* sent him certain paper as genuine he believed it to be so, and took it as such, and sent the agreed purchase money for that paper to him as his agent; and it was a mere accident, so far as the plaintiff was concerned, that any portion of it

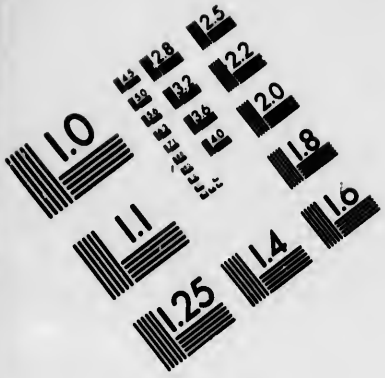
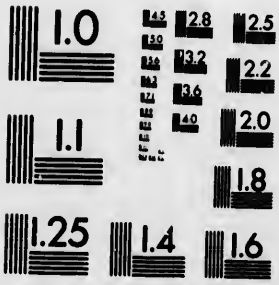
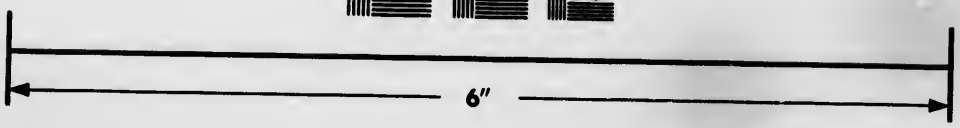
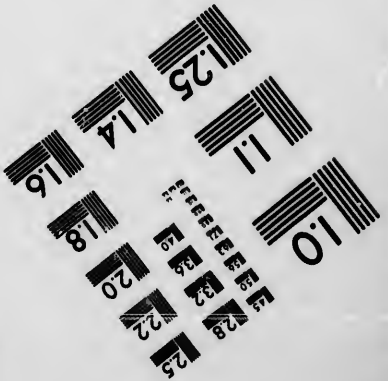


IMAGE EVALUATION
TEST TARGET (MT-3)







Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

1854.

Wallace v. James.

reached the hands of the firm. If *Matthews* had made a direct use of it for his own purposes, the monies would of course have been lost to the plaintiff; and if he made an indirect use of it for his own purposes, I am not satisfied that the circumstance of its passing through the hands of the firm gives any equity to the plaintiff to recover it from them.

The case of *Stone* v. *Marsh* (*a*)—one of the cases arising upon *Fauntleroy's* forgeries—differs from this case in an essential point. The firm in which he was a partner dealt in the business out of which the liability arose: to act for others in the selling and transfer of stocks was part of their ordinary partnership business; and their acting as agents for others, without sufficiently examining whether they were duly constituted agents, was held to be negligence on their part. They received monies as agents for another, when in fact they were not such agents, and they allowed one

Judgment.

of their firm to use such monies as he thought fit, whereas if they had been agents, as they believed themselves to be, they should have seen that the money reached the hands of their principal. Having acted as agents, and the supposed principal electing to treat them as such, they were not permitted to deny their being agents, but were held responsible as such. I confess, however, that the case of *Jacaud* v. *French* (*b*), and the language of Lord *Ellenborough* in that case, go far to establish the principle, that knowledge by one partner in a firm, in relation to any transaction of the firm, is knowledge by the whole firm; and if the firm of *Matthews* and *Godrich* are affected by the knowledge of *Matthews* that these monies received by the firm were received by *Matthews* in respect of these spurious notes, the firm would be liable to repay these monies.

In the case in *East*, however, the plaintiff sued to recover the amount of certain acceptances which had

(*a*) 9 D. & R. 643. (*b*) 12 East, 317.

1854.

Wallace v. James.

been paid to a firm in which one of themselves was a partner; so that to allow the plaintiffs to recover would have enabled one to recover who had already received payment. I am not prepared to say that the same principle will not apply where one of a firm is defendant, and in an action for money had and received as well as in an action on a bill of exchange; but an action for money had and received is emphatically styled an equitable action, and in that form of action technicalities are not allowed to prevail against the justice and equity of the case: and certainly such cannot be less the case when a party comes into this court.

In the case of *Marsh* and *Keating*, upon appeal, *Parke*, *B.*, remarks forcibly upon the extreme negligence of the other partners in the firm of which *Fauntleroy* was a member. He seems to treat it as a material point in the plaintiff's case, when he might have rested it, if the doctrine in the case in *East* is applicable to such a case, simply upon the knowledge of one of the partners (*Fauntleroy*) of all the facts connected with the transaction in question, and upon such knowledge affecting all his partners—a point upon which he does not rest the case at all.

Judgment

In this case, between the plaintiff and the firm of *Matthews* and *Godrich* there was no agency or pretence of agency, nor any negligence, that I can see, on the part of *Godrich:* but *Matthews*, carrying on a separate business for his own account, receives monies in that separate business, and, keeping no separate account of his own, pays them to the credit of the firm; and not only has the firm no duty cast upon it to see to the application of those monies, but it would be a matter of course not to question *Matthews'* right to draw out those monies, or equivalent sums, as he should see fit: in fact, the other partner, knowing the nature of the business carried on by *Matthews*, would assume that he would require equivalent sums to purchase the

1854.

Wallace v. James.

negotiable paper in which he dealt; there was therefore no negligence in allowing *Matthews* to draw out such sums, or to the same amount as he might see fit. These monies being applied to discharge the liabilities of the firm, or forming part of a fund out of which certain of its liabilities were discharged, does not appear to me to change materially the substantial merits of the case, if it appears that *Matthews* drew out for his own use, not for the purposes of the firm, as large a sum as he so paid in, because between himself and the firm he would do so as a matter of course.

The monies in question (apart from the difficulty first suggested) were paid by the plaintiff to his trusted agent in payment for what his agent palmed upon him as genuine, but which turned out to be worthless. These monies this agent paid to an innocent party, or lent to an innocent party, and the amount of monies so paid or lent was withdrawn from the innocent party, who had however made use of them in the meantime. The plaintiff is also an innocent party, and seeks to make the loss fall upon the other. I cannot see his equity to do so—first, because the loss was through the misconduct of his agent, and he should have seen that what he received from his agent was what his agent represented it to be, or if he trusted to his agent's representation, he must abide the consequence of his misplaced confidence;—there is no reason why a third party, a stranger to the transaction, should suffer the loss;—and, secondly, the plaintiff must shew —which I think he does not—a stronger equity to recover these monies from the firm than the equity of the firm to resist payment.

Judgment.

I have assumed that *Matthews* drew from the funds of the firm for his own purposes—a separate business —to as large an amount as he paid in. If this does not sufficiently appear, it might be made the subject of inquiry.

I feel the force of the reasons which have influenced the other members of the court; and I can only say in regard to the points to which I have adverted, that they have created doubts in my mind which I have not been able to overcome. 1855. Wallace v. James.

AUSMAN v. MONTGOMERY.

Election to proceed at law or in equity.

A defendant having allowed the plaintiff to proceed with his suit in this court as well as at law for the same object, afterwards applied for an order on the plaintiff to elect in which court he would proceed; the court granted the order, but directed the defendant to pay so much of the costs at law as had been incurred after defendant became aware that the relief sought in both suits was the same. Feb. 2.

This was a motion for an order on the plaintiff to elect in which court he would proceed under the circumstances set forth in the judgment.

Mr. *Jones* for the application.

Mr. *Brough* contra.

SPRAGGE, V. C.—The bill is filed for the specific performance of an agreement to secure to the plaintiff the payment of an annuity by the defendant, and for an account of the arrears. On the 26th of June last the plaintiff obtained an order to set down the cause to be taken *pro confesso;* and on the 26th of September last he obtained his decree for such specific performance, and for the payment of an arrear of £50, abandoning any claim in this suit for previous arrears, as he had recovered judgment at law for such previous arrears. Judgment.

Between the order to take the bill *pro confesso* and the decree—i. e. the 10th of August last—he instituted a suit at law for the recovery of the last arrear of £50,

1855.

Ausman v. Montgomery

for the payment of which he afterwards obtained his decree. His action at law and his suit in this court were prosecuted by different solicitors; the defendant employed the same solicitor in both. That solicitor makes affidavit that, after the amended bill was served upon him, he applied to the plaintiff's solicitor for time to answer it; by whom he was informed that it was not his intention in this suit to ask for the arrears of the annuity, but for security for future instalments only: that, in consequence, no answer was put in and no one attended on behalf of the plaintiff at the hearing of the cause: and that he, the defendant's solicitor, first heard of the decree being for the arrears of £50 on the taxation of the costs on the 11th of December last. This affidavit is not contradicted. The solicitor for the plaintiff in this suit makes no affidavit. The defendant himself swears that he was not aware of any decree being made against him for the payment of any arrears of annuity until the latter part of December. In the mean time, the action at law for the recovery of this arrear of £50 was proceeded with, the defendant pleaded to it, and a verdict was recovered against him for £51 15*s.*; the excess being the amount of interest from the time the annuity fell due; and the plaintiff is now entitled to judgment and execution.

Judgment.

It is clear, and is not denied, that the bill and the decree in this suit comprehend the cause of action at law, and that the plaintiff is now in a position to enforce payment of the same sum in each suit (*a*). I think the defendant might have come to this court for an injunction to restrain the proceedings at law, upon the plaintiff's obtaining his decree; probably, indeed, after his order to take the bill *pro confesso* as soon as proceedings at law were commenced. He abstained from applying to this court in the belief, as it appears, that the plaintiff sought different remedies in the differ-

(*a*) Wilson v. Wetherhead, 2 Mer. 406.

1855.

Ausman v. Montgomery

ent courts; but after learning the full effect of the decree in this court, he went to trial at law in January last. At that time it appears to have become a mere question of costs between the parties, the plaintiff being willing to rest upon his remedy in this court, if paid his costs at law; and the defendant hoping to succeed at law, and thus receive instead of paying the costs at law. The plaintiff's attorney, as a reason for proceeding at law, says that a doubt was entertained whether the arrears of annuity could be recovered in this suit; the case of *Carrick* v. *Young* (*a*) is express to the point, if any doubt could exist: besides, his bill praying an account of such arrears had been taken *pro confesso* before he commenced proceedings at law. I can see no good reason for the proceedings at law: though if such proceedings can be in any case excusable, it would be where, as in this case, the payment of an annuity is withheld from a person dependent upon it for support.

Judgment.

An objection to this application is, that it is made after considerable delay. This delay is accounted for up to the 11th of December, but not since; and after that the trial at law has taken place. I think the more proper form of application would have been for an injunction, and that it should have been made promptly after the 11th of December. The defendant seems to have preferred to take his chance of succeeding at law and obtaining his costs of that action. If he were now applying for an injunction, I think he could have it only on the terms of paying the plaintiff's costs at law since that date: and such I think, upon the merits, is his position now.

Ordinarily it is of course to put a plaintiff to his election, upon its appearing that he is suing at law and in equity for the same cause of action; but, as was said by Lord *Eldon*, in a case reported in

(*a*) 4 Mad. 437.

1855.

Ausman v. Montgomery

Swanston of *Carwick* v. *Young* (*a*), (which appears to be the same case as I have referred to in *Maddock*), there is no case in which the court would not modify the rule according to circumstances. I think a proper order would be, that the plaintiff do elect in which court he will pursue his remedy; and that if he elect to proceed in this court, it be a condition to his being confined to this court that the defendant pay him his costs incurred at law since the 11th of December last; and that if he should elect to proceed at law, his bill in this cause should be dismissed without costs.

GOODWIN v. WILLIAMS.

Mortgage—Injunction.

February 5.

The solicitor of a mortgagee in a suit of foreclosure, after a decree of absolute foreclosure, purchased the mortgagor's interest in the premises; the decree so pronounced was subsequently set aside, and a decree *nisi* directed to be drawn up directing, *inter alia*, a sale of the mortgage premises, and that all judgment creditors should be served with the decree and made parties to the suit: notwithstanding this, however, the solicitor, who was also a judgment creditor of the mortgagee, proceeded upon his judgment and was about to sell the mortgage premises under execution: the court, upon a motion made in the cause, restrained the solicitor from proceeding with his execution, and ordered him to pay the costs of the application.

Statement.

This was a foreclosure suit brought against *Richard Williams* and certain persons, to whom, after executing the mortgage to the plaintiff, he had assigned his interest in trust for himself and family. After the final decree of foreclosure had been pronounced, it was discovered that the proceedings in the cause were void, in consequence of process never having been served upon one of the defendants or brought to his knowledge in any way, and a motion having been made to open up the proceedings, this was done, and a new decree was drawn up directing the mortgage premises to be sold and the proceeds applied, first, in

(*a*) 2 Swan. 239.

payment of the mortgage debt, interest and costs appearing due to the plaintiff, and the remainder to be paid to the judgment creditors of *Richard Williams* according to their priority, who had obtained judgment before the assignment in trust: and it being alleged that the creation of the trust was a fraud upon creditors, the decree directed that all judgment creditors should be served with a copy of the decree, and be bound by the proceedings in the cause in the same manner and to the same extent as if they had originally been made parties: this proceeding being warranted by the general orders of the court of 1853: one object of this proceeding, amongst others, being to give the plaintiff or any of the judgment creditors, whether prior or subsequent, an opportunity to question the *bona fides* of the transaction between *Richard Williams* and his trustees. It appeared that the solicitor of the plaintiff had a judgment against *Richard Williams* for a debt due to himself, and that after the final decree of foreclosure had been pronounced he purchased from *Goodwin* his interest in the premises and when that decree was set aside and pending this suit was enforcing his judgment at law, by proceeding to a sale of the mortgagor's interest in the property, alleging that the trust deed was void, and therefore, although his judgment was subsequent to the date of the assignment in trust, he had a right to sell the land at sheriff's sale. This the defendants, the trustees, objected to, as it was evident that a property sold with several judgments standing against it, although some were disputed, would in reality be given away, and it was alleged that it was the intention of the solicitor to become himself the purchaser at sheriff's sale.

1855.

Goodwin v. Williams.

Statement

Mr. *Mowat*, for the defendants, now moved, upon notice, for an order continuing the interim injunction which had been issued against the plaintiff's solicitor, restraining him from proceeding to a sale of the mort-

Argument.

1855. gage premises under the execution issued by him at law against *Richard Williams*.

Goodwin v. Williams.

He referred to *White* v. *Beasley* (*a*), *Largan* v. *Bowen* (*b*), *Sumner* v. *Kelly* (*c*).

Mr. *Hector*, contra.—The rule is, that a mortgagee has a right to proceed both at law and in this court to recover his mortgage debt; and admitting, as is contended by the other side, that the solicitor is in reality now the plaintiff, this rule would apply here. He objected also that the application could not be made by motion merely, but should have been by bill or petition.

He cited *Rankin* v. *Harwood* (*d*), *Whittaker* v. *Wright* (*e*), *Dillon* v. *Coppin* (*f*), *Jones* v. *French* (*g*), *Foster* v. *Deacon* (*h*), *Mussel* v. *Morgan* (*i*).

Judgment. *Per Curiam.*—The rule contended for by the plaintiff is applicable only when the proceedings are to enforce the same debt; and no case has been cited, nor are we aware of any, where, after a plaintiff had obtained a decree, such as the one in this cause, he has been allowed to proceed to sell the mortgage property itself, and that upon an execution obtained at law for a totally independent debt: In the absence of the most direct authority, the court would be slow to countenance such a proceeding, as it is evident that any sale under such a state of things—that is, offering to dispose of this property subject to mortgage and judgments, upon which there are no means of ascertaining what, if any amount, is due—would in fact be throwing the property away. Under the circumstances, we think the solicitor must be looked upon as the real

(*a*) Ante vol. ii. p. 660.
(*b*) 1 Sch. & Lef. 296.
(*c*) 2 Sch. & Lef. 398.
(*d*) 2 Ph. 22.
(*e*) 2 Hare, 310.
(*f*) 4 M. & C. 647.
(*g*) 1 Hogan. 450.
(*h*) 3 Madd. 394.
(*i*) 3 B. C. C. 74.

plaintiff, and which properly speaking he ought to have been made, by amendment. As such, it is clear he is bound to await the taking of this account under the decree, in which proceeding the opportunity will be afforded him of shewing that the assignment in trust was fraudulent. In the meantime the proceedings at law must be restrained, the injunction already granted must be made perpetual, and the costs of this application must be paid to the defendants.

1855.

Goodwin v. Williams.

The Attorney-General v. Garbutt.

Grant from the Crown—Mistake.

April 12.

Although the crown will be permitted to shew mistake in law or fact, in respect of its grant, when it would not be open for an individual to do so, still the evidence must not be such as to make out a *primâ facie* case only.

Where a cause was brought on to be heard at the suit of *The Attorney General* for the repeal of a grant of land alleged to have been issued in mistake, and the evidence adduced did not sufficiently establish the mistake, the court directed the cause to stand over for the purpose of adducing further evidence.

Statement.

This was an information by *The Attorney General* against *Mary Dorland*, *William Garbutt*, and *Sabra Anne*, his wife, setting forth that on or about the 30th of August, 1797, one *Mary Pruyne*, deceased, in her lifetime the wife of one *Matthew Pruyne*, of Ernestown, yeoman, obtained an order of the Executive Council of Upper Canada for a grant of 200 acres of land, as the daughter of one *Simon De Forest*, a United Empire Loyalist, under which order, in the year 1801, lot No. 11 in the 4th concession of Haldimand was located in her name: that on the 27th of May, 1798, *Mary Dorland*, widow of *Thomas Dorland*, formerly widow of *Stephen Fairfield*, theretofore called *Mary Pruyne*, she being the sister of the said *Matthew Pruyne*, obtained a like order, upon which order a description for patent issued in her name for lot No. 30 in the 3rd concession of the township of Cramahe, and the

1855.

Att. General v. Garbutt.

patent therefor dated the 17th of May, 1802, issued to her by the name of *Mary Pruyne:* that subsequently to the last mentioned order in council the said *Mary Pruyne* (and in or about the month of March, 1799) married one *Stephen Fairfield*, deceased; and after his death she became the wife of one *Thomas Dorland*, also deceased: that though the description for the patent which was to issue for the lot in Haldimand was made and issued in the name of *Mary Pruyne*, daughter of *Simon De Forest*, yet through some mistake or misapprehension in the office of the surveyor-general or commissioner of crown lands, or some other department, or on the part of some other officer of government, as to the identity of the person intended in the said last mentioned description, the patent for the said land, bearing date the 30th of June, 1804, issued to and in the name of *Mary Fairfield*, wife of *Stephen Fairfield*, she being the same person as the *Mary Pruyne* secondly above named: that one *Sisson Wait*, who was in possession of the lot in Haldimand, presented a petition to the executive government, setting forth amongst other things that about seventeen years previously he purchased, for £150, the said lot from *Simon E. Pruyne*, the eldest son and heir-at-law of *Matthew Pruyne* and *Mary Pruyne*, his wife (whose maiden name was *De Forest*), since which time he had been in possession of and improving upon the same, and had cleared about 60 acres, and erected buildings thereon: and this petition was the first information the government had of the mistake having been committed.

Statement.

The information further alleged that though the patent for the lot in Haldimand was in the possession of the said *Stephen* and *Mary Fairfield*, or in that of *Archibald* and *Benjamin Fairfield* (brothers of *Stephen*), also deceased, no use was attempted to be made of it to the prejudice of *Wait;* but, on the contrary, those parties during their lives disclaimed having any

1855.

Att. General v. Garbutt.

right to the patent, or the land comprised therein. But the defendant, *William Garbutt*, having obtained possession of the patent about the year 1841, upon or shortly before the death of *Benjamin Fairfield*, and pretending title to the land thereby granted in right of his wife, the other defendant, as being the sole daughter and heiress-at-law of the said *Archibald Fairfield* and *Mary*, his wife (whose maiden name was *Mary Holden*), and who, the defendants pretend, was the patentee named in and intended by the said patent by the name of *Mary Fairfield*, had commenced an action of ejectment against *Sisson Wait* to recover possession of the lot in Haldimand.

The prayer was for an injunction to restrain the action of ejectment, the cancellation of the patent issued to *Mary Fairfield*, and for further relief.

Statement.

The defendants *Garbutt* answered, insisting that they were entitled to the land, the patent having been properly issued and intended for *Mary Fairfield*, wife of *Archibald Fairfield*.

The cause having been put at issue, evidence was gone into, the material parts of which are stated in the judgment.

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

Mr. *Mowat* for the defendants *Garbutt* and wife.

The information had been taken *pro confesso* against the defendant *Dorland*, who disclaimed at the hearing.

Judgment.

ESTEN, V. C.—This is an information at the suit of *The Attorney General* to set aside a patent for mistake. The learned counsel for the plaintiff contended that it was sufficient for the crown to suggest mistake, and to offer probable evidence of mistake, and that thereby

1855.

Att. General v. Garbutt.

the necessity was imposed on the opposite party of shewing that there was no mistake; while the learned counsel for the defendants assimilated this case to the ordinary case of rectifying a deed between private individuals. I do not assent to either of these propositions. On the one hand, a patent prepared *ex parte*, by passing through a variety of public offices, without any particular interest in any one to see that it is correct, stands on a different footing in this respect from a solemn deed made *inter partes*, under the personal supervision of the parties concerned, whose vigilance is stimulated by self-interest; and, on the other hand, it would be of dangerous consequence, and would shake titles, to hold that the crown has nothing to do but to suggest a plausible theory of mistake to impose upon the opposite party the necessity of disproving the mistake. The fact of mistake in these cases must be established, like other facts, by such evidence as excludes all reasonable doubt upon the subject.

Judgment.

The case suggested by the information is, that two *Mary Pruynes*, sisters-in-law, both daughters of United Empire Loyalists, about the same time obtained land-board certificates, orders in council, warrants, and descriptions; that the land in question—lot No. 40, in the 4th concession of Haldimand—was described in 1801 in favor of one *Mary Pruyne*, and through some transposition or confusion of papers the patent for this lot was, in pursuance of this description, issued to the other *Mary Pruyne* (who had in the meantime become *Mary Fairfield*) by that name. I need not say that such a mistake as the one suggested would be sufficient, if established by evidence, to vitiate a patent under the act of parliament.

The defendants *Garbutt*, on the other hand, allege that there was another *Mary Fairfield* in the same family, wife of the eldest brother, *Archibald*; and that the patent in question was intended for her, and issued

1854.

Att. General v. Garbutt.

without any mistake whatever. It is not disputed that the facts are as stated by the information up to the issuing of the description which has been mentioned in favor of *Mary Pruyne*; and *Mary Pruyne* (afterwards *Fairfield*) also obtained a description for a lot in Cramahe, and received a patent for this lot. It is proved that *Mary Fairfield* last named never claimed the lot in question; while, on the other hand, it appears that the patent for it continued in the family, and was delivered by *Benjamin Fairfield* (another brother) to the defendant *Garbutt*, as the son-in-law of *Mary*, wife of *Archibald Fairfield*, as if it had been intended for her; and that her children have claimed and disposed of the lot in question as their own by descent from their mother. It is also a remarkable fact that this grant is to *Mary Fairfield* generally, and not as the daughter of a U. E. Loyalist, according to what we were told, and, as appears from two patents which have been produced and some evidence, was the invariable practice. It also deserves mention that the patent for the lot in Cramahe was issued to *Mary Fairfield*, formerly *Pruyne*, in her maiden name of *Mary Pruyne*, and that only a year intervened between the respective certificates, orders, warrants, and patents of these parties.

Judgment.

Had we been satisfied that the patent in question had been delivered to and intended for *Mary Pruyne*, afterwards *Fairfield*, we should have been disposed, I think, to declare it void; but we are not satisfied of this fact. It does not appear that the patent was issued in pursuance of the appropriation in favor of *Mary Pruyne*. The note in red ink on the description No. 8035, which was supposed to indicate this fact, was not made at the time, as was supposed, but in 1820, and possesses no authority. I am not satisfied that this patent may not have been issued to *Mary*, the wife of *Archibald Fairfield*, quite irrespectively of the appropriation in favor of *Mary Pruyne*, either

1855.

Att. General v. Garbutt.

without reference to the description issued to her, or by making use of this description for a different purpose from that for which it was originally intended.

It is certainly very probable that this patent may have issued to the wrong person through an accidental confusion or transposition of papers, but in the present state of the evidence the case does not exceed a probable conjecture. I cannot consent to set aside a patent on this ground; but I think that much more evidence can probably be obtained than has been hitherto adduced, and that it is a proper case for further inquiry.

SPRAGGE, V. C.—The crown and the subject certainly do not stand upon precisely the same footing in regard to shewing mistake in their respective deeds, in grants from the crown and agreements and deeds between individuals, it being open to the crown to shew itself misinformed in matters of fact, and mistaken in its law, in cases where it would not be open to a subject to avoid or reform his deed upon the same grounds. Still it is not sufficient, I apprehend, for the crown to shew only a *primâ facie* or probable case, as is contended by Mr. *Wilson;* but such evidence must be laid before the court, in order to the repeal of a patent on the ground of mistake, as will convince the mind of the court to a reasonable degree of certainty that the patent was issued in mistake. At the same time, apart from the reasons to be found in the works upon the subject of prerogative, and the attention of the crown being engaged in affairs of state, it is more easy to believe that mistake has occurred in the case of the crown than of individuals, because in dealings between individuals there are two or more individuals each watchful for his own interest, and careful that it shall not be prejudiced by the insertion of anything not really agreed upon between the parties; but in the case of a grant from the crown

Judgment.

1855.

Att. General v. Garbutt.

it is not so, and that not theoretically only, but practically; and as a matter of fact, a grant is much more likely to be made by the crown varying in its terms and effect from what is intended, or to a different person from the one intended, than that the like errors should occur in written instruments between individuals; the sharp-eyed vigilance of *interest* is wanting; and when a grant is made to one, other than the one intended, it is made behind the back of the one intended, and generally on the *ex parte* application of the one to whom it is made; so that the party really concerned is not present to look after his own interests. These considerations, however, merely amount to this: that the improbabilities which the mind has to surmount in getting at a mistake in a dealing between individuals exist in a much less degree when the alleged mistake is in a grant from the crown to a subject. But still, if from great lapse of time, from the absence of documents which might throw light upon the subject, from the death of those cognizant of the truth of the transaction, from the obscurity of meaning in the grant itself, or from any other cause, the court cannot see what the truth is with the distinctness necessary to interfere *safely*, the court would do wrong to interfere at all; and it appears to me that such reasons against interference apply with as much force where the crown is concerned as where the question is between individuals.

Judgment.

Upon a mere balancing of probabilities, I should incline to think that the patent in this case was issued to the wrong person—that is, to *Mary Fairfield*—taking her to be the same person as *Mary Pruyne*, daughter of *Simon De Forest;* but I am not *convinced* that such was the case, especially when I discard from my mind what I may happen to know or believe to be the practice of the land-granting offices. What indeed was the practice in those days—upwards of fifty years ago

1855.

Att. General v. Garbutt.

—we can gather only from the papers before the court and the little that is said in evidence.

If it was shewn that a patent could issue from the Secretary and Registrar's office only to the person named in the description sent from the Surveyor General's office: suppose, for instance, the case of *Mary Pruyne* (formerly *De Forest*) abandoning her location in Haldimand, and locating her right of grant elsewhere, so that the Haldimand lot became disposable otherwise, and the government thought proper to grant it to one *Mary Fairfield*—if it were shewn that in such a case a patent could not issue to *Mary Fairfield* without a fresh description naming *Mary Fairfield*, it would tend to shew that the crown believed that the patentee was the same person as *Mary Pruyne*, daughter of *De Forest*. Again: the crown ought to be able to shew, and may be able to shew by the records of its public offices, *how* it was that this patent came to issue to *Mary Fairfield*, who applied for it,

Judgment.

and upon what representation. The patent itself is so vague in the description of the grantee that it leaves the intention of the crown obscure, when it might have been very plain; it names her without any addition, whether of spinster, wife, or widow, and without describing her parentage; and for aught that appears it may have issued to her as assignee of the person named in the description, for assignments might be made with the sanction of local land-boards, as appears by one of the papers put in; whether even that was necessary where the land granted was in the Home district, does not appear. It certainly is not issued to the grantee in the same character as the description issued to *Mary Pruyne*—that is, as a U. E. Loyalist—a circumstance which in my mind very much weakens the inference that it was *intended* to be issued to the same person, as the evidence from two other patents produced, and from oral testimony, goes to shew that patents to U. E. Loyalists issued to them in that character. This is simply to *Mary Fairfield* of Ernestown.

1855.

Att. General v. Garbutt.

Whether it was taken out by or on behalf of *Mary* or *Maria*, wife of *Stephen Fairfield*, or of *Mary*, wife of *Archibald Fairfield*, under whom the defendants *Garbutt* and wife claim, is a material question; if on behalf of the wife of *Stephen Fairfield*, now the defendant *Mary Dorland*, and who disclaims it, it would tend strongly to shew mistake, because she, as well as the daughter of *De Forest*, was a *Mary Pruyne*, each the daughter of a U. E., and each located in the same manner and the same character for two hundred acres of land. She married *Stephen Fairfield* in 1809, between the issuing of the description and of the patent in question; and if an application were made for her patent, the mistake might not improbably occur of issuing it by mistake for the wrong land. But against this are two facts—one, that a patent for her own land issued to her *afterwards* in the following year in her maiden name, *Mary Pruyne*, and that she was not *Mary Fairfield* of Ernestown, but of Cramahe; while *Mary*, wife of *Archibald*, under whom the *Garbutts* claim, may have been properly described of Ernestown; besides the fact of its not describing the grantee as a U. E. The evidence as to the wife of *Stephen* being called *Maria* instead of *Mary* is of no weight; for in the land-board report, order in council, warrant, description, and patent of her own lot in Cramahe, she is called *Mary*.

Judgment.

One of the main points of the plaintiff's case, upon which I understand him strongly to rely, turns out to be fallacious. If indeed the words in red ink in the description No. 8035 put in, "Patent of land to *Mary Fairfield*, 30th June, 1801. See Register B. in secretary's office, K., page 281;" and the words, also in red ink, "daughter of *Simon De Forest*," the latter under the words "*Mary Pruyne*, U. E.," had been words added in the secretary's office to the description furnished by the Surveyor-General *at the time of the patent issued* to *Mary Fairfield*, it would

1855.

Att. General v. Garbutt.

have been entitled to great weight; but instead of being made at that date, as was supposed at the hearing, it was evidently not made till 1820. In that year, as I gather from a description of the same lot in *Haldimand* (description No. 12,557), *Mary*, daughter of *De Forest*, who had then become *Mary Maclear*, applied for a patent deed for that lot, and upon the 20th of July of that year a description is issued to her upon the certificate of the secretary dated the day before, that no patent had been completed to *Mary Pruyne* on the old description No. 8035. This he certainly would not have certified if the words which I have referred to in red ink had been upon the description in his office at the time; whether it was ever there does not appear, for the paper produced is from the Surveyor-General's office. The inference from the papers seem to me to be plainly this—the first description, issued in or before 1801, and numbered 8035, was to *Mary Pruyne*, intended for the

Judgment.

Mary Pruyne who was daughter of *De Forest*. No patent of the lot issued to *Mary Pruyne*, but one did issue to *Mary Fairfield*. *Mary*, daughter of *De Forest*, then *Mary Maclear*, applied for a patent in 1820, and the secretary then certified with *literal* truth that no patent for the lot had issued to *Mary Pruyne*, omitting to state that it had issued to *Mary Fairfield*. Upon this a description was issued to *Mary Maclear*, when it was discovered that a patent had issued to *Mary Fairfield*, and then, and not before, the red ink note was made, and this stayed the patent to *Mary Maclear*, and the new description prepared for her was no further acted upon, but as is noted on description 8035, was "filed with stayed descriptions." If this hypothesis be correct the red ink note loses all the value attached to it at the hearing. It is nothing more than a memorandum in 1820 as to a bare fact which took place in 1801, and the words "daughter of *Simon De Forest*," could then be only the note or inference of the person who made the memorandum that the *Mary Pruyne* named in

the description was the daughter of *Simon De Forest*, which was the fact. It does not go even so far as a note that the person to whom the patent issued was or was supposed to be the daughter of *Simon De Forest*.

It appears from the papers put in that the information in this case is filed in consequence of a petition presented to the head of the Government by one *Sisson Wait*, who claims through the daughter of *Simon De Forest:* he purchased about the year 1834. His petition is reported upon in May, 1851; when presented does not appear. The long delays of *Mary*, daughter of *De Forest*, in making her claim are so extraordinary as to be almost suspicious. She was entitled to a patent in 1801, but does not appear to have applied for it till 1820. She then learns that it has issued to another person, and she even then takes no step, but sells about fourteen years afterwards to *Sisson Wait*, and he takes no step to repeal or correct the patent till about 1851, and thus a delay occurs of fifty years.

Judgment.

It may be that the difficulties and doubts which have been suggested are capable of removal. I can scarcely doubt but that more light can be thrown upon the subject than we have as yet, and that probably by both documentary and oral evidence. The evidence of Mrs. *Dorland* is not given, nor that of either of the two parties upon whose affidavits the report of the commissioners of crown lands is in part founded. I think it is proper that the cause should be allowed to stand over to allow further evidence to be given. Moreover, I think the plaintiffs' counsel were misled as to the nature of the evidence furnished by the descriptions put in.

Without further evidence, I think the case made by the information not sufficiently supported by the evidence to entitle *The Attorney General* to a decree.

1855.

GOULD v. HAMILTON.

Dec. 20, 1854. March 5. April 30, and June 30, 1855.

Specific performance—Parol evidence—Submission in answer.

A vendor executed an agreement to convey certain premises and receive back a mortgage for part of the price payable by instalments, but omitted to say that the mortgage should be made payable with interest: in a suit brought to enforce specific performance of the agreement and to compel the vendor to accept a mortgage without interest, parol evidence was admitted to shew that the real understanding of the parties was that interest should be made payable by the mortgage.

Where a suit was brought to compel the acceptance of a mortgage, for part of the purchase money, without interest, and the defendant in his answer thereto swore, "I have always said that I was ready and willing and have offered to complete the sale of the said property to the plaintiff, provided interest on the unpaid purchase money was included in the mortgage;" and also, "I submit and insist that unless the plaintiff will consent to pay interest on the unpaid purchase money aforesaid, he is not entitled to any relief in this court." The court treated these statements as submitting to a decree for specific performance, with interest reserved by the mortgage, and made a decree accordingly.

The bill in this cause was filed by *Joseph Gould* against *William Hamilton*, for the specific performance of a contract for the sale of certain lands in the township of Uxbridge.

Statement.

It appeared in evidence that the defendant had agreed to sell the premises in question to the plaintiff for the sum of £4,750, part of which was to be paid down and the balance secured by mortgage, payable in eight years. The memorandum evidencing the agreement made no mention of interest on the unpaid purchase money; the terms of it were "five hundred pounds down on completing the writings, and five hundred pounds a year until the whole is paid; said balance to remain on mortgage"—and three months were given to the purchaser to accept the proposition.

Shortly after the execution of the agreement, plaintiff paid £500 and took a receipt for it, and on that occasion the defendant remarked to plaintiff that the sum so paid was not sufficient to meet what defendant had to pay government on account of the land, but added, "however, there is the interest on the £4000

1855.

Gould v. Hamilton.

which will make up enough." This conversation was repeated by plaintiff to a third party, who was examined in the cause, who asked plaintiff why he had not drawn the defendant's attention to the fact of the balance not carrying interest: to which plaintiff replied, "he did not want to have a flare-up with *Hamilton*, and that he would find it out soon enough." *Gould* subsequently tendered a deed and mortgage to defendant for execution, but he refused to execute the former or accept the latter unless the balance of unpaid purchase money was made payable with interest.

Thereupon the present bill was filed, seeking specific performance of the agreement according to the strict language of the instrument; that is, to compel defendant to accept a mortgage for £4,250, payable in eight years, without interest.

Statement.

The defendant, in his answer, swore that he never would have agreed to the sale in the manner he had unless upon the understanding that interest was to be made payable on the unpaid purchase money; that he had always been ready and willing and had offered to complete the sale provided interest on the unpaid purchase money was included in the mortgage: and the defendant by his answer also submitted and insisted that unless the plaintiff would consent to pay interest on the unpaid purchase money he was not entitled to relief.

It was shewn that the property rented for about £250 a year, and that from this source defendant derived his chief means of support. Evidence was gone into at considerable length in presence of the court, but the foregoing, together with the statement of facts set forth in the judgment, will be sufficient for a proper understanding of the case.

Mr. *Wilson*, Q. C., and Mr. *Hector*, - plaintiff.

1855.

Gould v. Hamilton.

Dr. *Connor*, Q. C., and Mr. *Vankoughnet*, Q. C., for defendant.

For the plaintiff it was contended that nothing was shewn which could prevent plaintiff obtaining the relief sought in this suit; that the defence set up by the answer was not one of mistake, but only an omission of some stipulation, which it was not pretended had been discussed or mentioned between the parties—*Walker* v. *Walker* (*a*), *Willan* v. *Willan* (*b*), *Curzon* v. *Bellworthy* (*c*), *Evans* v. *Lewellyn* (*d*), *Joynes* v. *Statham* (*e*), were cited on behalf of the plaintiff.

For the defendant it was contended that the whole manner of carrying on the transaction was suspicious, and that the evidence of *Perry* gave a strong indication of fraud: he states the agreement was drawn by himself, and only one copy of it made; after it was signed he says that he "agreed to take a share if it could be got without interest."

Argument.

Bayley v. *Collett* (*f*), *Ashton* v. *Dalton* (*g*), *Birch* v. *Joy* (*h*), *Talbot* v. *Hamilton* (*i*), were, amongst other cases, referred to.

At the conclusion of the argument, his Lordship the Chancellor stated that he entertained no doubt of the right of the defendant to shew by parol what the intention of both parties was in making the agreement; and, without imputing fraud or any other improper motive to any person concerned, it was clear, he thought, that to enforce the agreement in the manner sought by this bill would be a harsh exercise of the discretion of the court; but, as the other members of the court desired to look into the pleadings

(*a*) 2 Atk. 98; S. C. 6 Ves. 335, note.
(*b*) 16 Ves. 72.
(*c*) 22 Eng. Rep. 1.
(*d*) 2 B. C. C. 150.
(*e*) 3 Atk. 388.
(*f*) 23 L. J. 230 ch.
(*g*) 2 Coll. 565.
(*h*) 3 H. L. Ca. 565.
(*i*) Ante, vol. 4, p. 200.

and evidence, time would be taken for that purpose, and judgment pronounced at an early day.

1855.

Gould v. Hamilton. March 5.

THE CHANCELLOR said he had looked into the pleadings and evidence since the argument, and that he still continued of the opinion that the defendant was entitled to a decree in his favor.

ESTEN, V. C.—In this case the *onus probandi* may be said to rest on the defendant, as the agreement *primâ facie* imports the absence of interest; but it is apprehended that if the defendant succeed in raising a reasonable doubt as to the intention, the court could not make a decree in favor of the plaintiff for a conveyance of the property on payment of the purchase money without interest. Now, it cannot be doubted that the defendant has succeeded to this extent. I am strongly inclined to think, not only that he intended to reserve interest, but that the plaintiff either intended and expected to pay it, or, as the defendant had not mentioned interest, had the agreement drawn in the way it was with the view of availing himself of the omission if possible. It seems there should be a decree for specific performance;—the purchase money to be paid with interest, and the plaintiff must pay the costs of the suit.

Judgment.

SPRAGGE, V. C.—This bill is filed for the specific performance of an agreement, entered into by the defendant on the 4th of March, 1854, whereby he agreed to sell to the plaintiff two parcels of land for £4000, and a third parcel for £750. The terms of payment are thus expressed: "Five hundred pounds down on completing the writings, and five hundred pounds per year until the whole is paid, said balance to remain on mortgage." By the same agreement the plaintiff was to have three months "to accept" the bargain. The agreement does not provide that the instalments should be paid with interest; the plaintiff

1855. tendered for the defendant's execution a mortgage, by which the instalments were made payable without interest, which the defendant refused to execute because it omitted to provide for the payment of interest. Parol evidence has been given to shew that the true understanding and intention of the parties was that interest should be payable on the unpaid purchase money, and two questions are made; one, whether parol evidence is admissible to shew this, and the other, whether the parol evidence which has been given does shew it.

Gould v. Hamilton.

Upon the first point: its reception does not stand open to the common objection that parol evidence cannot be received to vary a written instrument. It is here offered to rebut the *primâ facie* equity of the plaintiff to a specific performance of a written agreement, which written agreement it is contended, and the evidence is adduced to prove, does not contain the true agreement between the parties; and for that purpose, I believe, there can be no doubt that parol evidence is admissible.

Judgment.

Then, as to the effect of the evidence: what passed between *Gould* and *Hamilton*, and what was said by *Gould* to others, all tend to shew that both parties understood and intended that interest was to be paid, and no expression used by either party tends to shew the contrary; and I think this material, because the non-payment of interest would certainly be a departure from general usage in the like cases, and would be more likely on that account to call for specific remark than if interest were intended to be paid.

To take first the evidence of *Bolster:* on the day of the bargain *Gould* told him that he was to pay £4000 for the one portion of the property and £750 for the other, and asked him his opinion of the value of the property; *Bolster* told him he thought it cheap at that

1855.

Gould v. Hamilton.

price, considering the probability of having a railroad in the vicinity. It appears by the evidence of *Finch* that *Gould* computed £1025 as the difference made by the payment or non-payment of interest, and I take it from the evidence of *Perry* that *Gould* believed that he *might* have to pay interest, and that he was aware that interest would be looked for by *Hamilton*. In telling *Bolster* the price he was to pay he must have known that he was understood to mean that he was to pay interest upon the unpaid purchase money, otherwise the price he named was less than the true price by £1025. I think it fair to infer therefore that he was aware that *Hamilton* understood that he was to receive interest, and that he himself understood that he was to pay it.

The evidence of *Widdifield* as to what took place the day before the bargain strengthens this: £4000 is named by *Hamilton* to *Gould* as his price (exclusive of the west half). And *Charles Richards* gives evidence that on the 9th (the day of the bargain) *Gould* asked *Hamilton* what time he would give him to pay for the property, and that *Hamilton* said he might take his own time. This answer necessarily implied that interest was payable; for if not, the vendor was in effect telling the purchaser that he might name his own price; and the sum that he, the vendor, had named as the price of the land, was no longer the price, but some other sum, to be virtually fixed by the purchaser.

Judgment.

Gould's relation to *Bascom*, and also to *Bolster*, of what passed on the occasion of his paying to *Hamilton* the first instalment of the purchase money, is also material. *Bascom* thinks that it was on that occasion, and it probably was so. *Hamilton* said something about interest, *Bascom* asked *Gould*, naturally enough, if he had challenged him about the interest, or told him that he was not to pay interest, and *Gould* said that he had not. He seems to have related what

1855.
Gould v. Hamilton.

passed more at large to *Bolster*. The first instalment was £500, and *Hamilton* remarked to *Gould*, when receiving that payment, in allusion to a sum still due upon the land to the Clergy Reserve fund, that the payment was not sufficient to pay off that charge, but that there was the interest on the unpaid purchase money, which would suffice; and *Gould* said he made no remark upon this, as he did not wish to have a *flare-up* with *Hamilton*, and *Hamilton* would find it out soon enough.

The least that can be drawn from this is, that *Gould* was conscious all the while that *Hamilton* understood that their agreement was that interest should be payable; for he spoke of it as a thing agreed upon to the person most interested in setting him right if he was wrong. But I think it is a just inference from what passed, that *Gould* himself understood the agreement in the same way; for he does not correct *Hamilton* when he gives him to understand that he is to pay him interest. I cannot understand his not doing so if he understood that interest was not payable. It was too material an ingredient of the bargain for the parties not to have thought of it. I think that *Hamilton's* telling *Gould* that he might take his own time for payment necessarily implied that it was payable; and I can only account for *Gould's* silence when *Hamilton* spoke of interest as payable upon one theory, that knowing *Hamilton* understood interest to be payable, and himself also understanding it to be so, but intending in his own mind to take advantage of the omission to provide for it in the written agreement, he yet felt a natural repugnance to own to *Hamilton* that he intended to take that advantage.

Judgment.

The evidence of *Perry*, as to the agreement between *Gould* and himself, *Saxon* and *Paxton*, that each of the three latter should have a fourth of the property in case it could be got without interest, is conclusive

1855.

Gould v. Hamilton.

to this point, that it was not agreed or understood that interest was not to be payable; and I think that that agreement goes far to shew that it was understood, though not expressed in writing, that interest was to be payable.

The material part of the contract of purchase was drawn by *Perry*. On the same morning, but before the agreement was made, *Perry* and *Gould* went together to look at the property, and *Perry* says he cannot say whether on that occasion he and *Gould* had any conversation about purchasing in partnership. On the same day, however, after the contract was signed by *Hamilton*, the agreement for a share, if the property could be got without interest, was entered into: so that, even assuming that there was no intentional omission in the contract with *Hamilton*, *Gould* and *Perry* were very quick-sighted in perceiving that interest was not provided for; and *Gould* at least was very careful to conceal that circumstance from *Hamilton*.

Judgment.

Then, to look at the agreement itself: it was drawn, or the material part of it—that settling the price and terms of payment, by *Perry*—under circumstances which are not wholly free from suspicion. It is a mere informal memorandum of agreement, from which a conveyance to *Gould* was to be drawn and a mortgage from *Gould* to secure the balance of the purchase money;—*Gould* was to have three months to confirm or annul the bargain;—and there is nothing in the agreement to exclude the payment of interest. As to the last point: if interest is not provided for, as a general rule, it is not payable; but this instrument, drawn in the shape, and under the circumstances that it was drawn, furnishes no evidence that interest was not intended to be paid: any one upon reading it might be doubtful whether interest should be payable. Mr. *Bolster*, upon its being shewn to him by *Gould*,

1855.

Gould v. Hamilton.

saw nothing but an omission to provide for its payment; and I may mention an instance of such omission in an instrument very carefully drawn: I allude to the conditions of sale under which an extensive and valuable property in this city was sold in a number of lots by auction; those conditions of sale were either drawn or settled by a conveyancer in considerable practice: the vendors were themselves professional men, and the auctioneer one in the habit of selling real estate: many purchased without noticing the omission; indeed it did not appear that more than one person did notice it. One of the purchasers claimed to be exempt from interest, and the matter came before this court. I only refer to that case to shew that very little weight is to be attached to the absence of a provision for interest as *evidence* that interest was not intended to be paid; for in that case it was very clearly made out that interest was to be paid.

Judgment.

I think that the circumstance that the agreement for purchase was binding only upon *Hamilton* is against the plaintiff; for while it was yet at his option whether to complete the contract or not, he was fully aware, if he was not so, as I believe he was, from the first, that *Hamilton* had entered into the agreement understanding it in a sense materially different from that in which he, *Gould*, intended to enforce it against him—this at the least; for I think that *Gould* himself understood it in the same sense as *Hamilton*. His electing to complete the agreement in a sense which made it a different agreement from what *Hamilton* believed he was entering into, is a degree of unfairness which I think brings him within the principle of not coming into court with clean hands.

Mr. *Batten*, in his treatise, says: "The court insists that the conduct of the party seeking its aid be free from all reproach; he must have been guilty of no fraud, or misrepresentation or unfairness, or have even attempted anything of the kind." And among the

cases which he cites in illustration is that of *Ellard* v. Lord *Llandaff* (*a*), before Lord *Manners*. In that case there was a lease for lives, and the last life was *in extremis:* this was known to the lessee, who was applying for a new lease, offering to surrender the old one, and he did not disclose the fact to the landlord: he obtained an agreement for a new lease, the consideration being the surrender of the old one, and attempted to enforce the agreement in equity; but Lord *Manners*, in refusing specific performance, quoted the words of Lord *Hardwicke*, in *Buxton* v. *Lyster* (*b*), that "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 this case the court will not decree a specific performance:" and Lord *Manners* proceeds, "all the material facts must be known to both parties; and is it not against all principles of equity that one party, knowing a material ingredient in an agreement, shall suppress it, and still call for a specific performance?" In the case cited the court refused to execute the agreement because the party obtaining it left the other party under a mistaken impression as to a material fact. In this case the party obtaining the agreement left the other party under the impression that he was entering into a different agreement from that which he executed, and he, the plaintiff, concluded the agreement and made a payment upon it, concealing from the other party that the agreement which he intended to enforce was different from that which the other party believed it to be. There was a suppression and unfairness in all this that I think disentitles the plaintiff to the aid of this court.

Judgment.

I cannot doubt that *Hamilton* understood and intended that interest should be payable, and that *Gould* throughout knew that *Hamilton* understood and intended this. I am almost equally free from doubt

(*a*) 1 B. & B. 241. (*b*) 3 Atk. 383.

1855.

Gould v. Hamilton.

that *Gould's* understanding of the original agreement was the same; that the minds of the two contracting parties agreed upon that point; but that their agreement was not correctly expressed when reduced into writing, and that *Gould* determined to take advantage of the error in the written agreement. I think, therefore, if that written agreement were enforced, this court would not be compelling *Hamilton* to execute the agreement which he and *Gould* entered into, but something else which *Gould*, the party coming here, knew at the time that *Hamilton* did not intend, and which, as I conclude from the evidence, he did not understand or intend himself.

I think that specific performance should be refused, with costs.

After the judgment had been pronounced,

Judgment.

Mr. *Hector*, for plaintiff, asked that a decree for specific performance, with interest on unpaid purchase money, might be drawn up, and contended that the defendant had, by his answer, submitted to a decree in this shape—no other construction could reasonably be placed upon the language used by him—*London* and *Birmingham* Railway v. *Winter* (*a*), *Ramsbottom* v. *Gosden* (*b*), *Martin* v. *Pycroft* (*c*), were cited.

Dr. *Connor*, Q. C., objected to any decree being made other than dismissing the bill with costs: the bill prayed simply for a decree in the form which the plaintiff alleged he was entitled, and not in the alternative, if the court should think him entitled to that relief.

The Court thought the statements in the answer amounted to a submission to a decree, if interest were ordered to be paid on the unpaid purchase money, and directed the decree to be drawn up in that shape, and the plaintiff to pay the costs of the cause.

(*a*) 1 C. & R. 57. (*b*) 1 V. & B. 165. (*c*) 15 Eng. Rep. 376.

WITHAM v. SMITH.

Sheriff's sale—Parties.

March 22, and June 4, 1855.

Semble—That this court would entertain a bill for the purpose of compelling a sheriff to convey property sold under an execution: but to such a bill the execution debtor whose property has been sold must be made a party.

Where a sheriff had sold property under an execution at common law, but before any deed was executed by him a settlement was effected by the debtor with the execution creditor, who thereupon desired the sheriff to refrain from completing the sale, and the sheriff accordingly refused to convey the property to the purchaser at sheriff's sale, who thereupon filed a bill against the sheriff to compel him specifically to perform the alleged contract, but it appeared that no memorandum evidencing the sale had been made or signed by the sheriff—

Held, that the contract must be in writing, under the Statute of Frauds.

The bill in this cause stated that in the month of August, 1854, or about that time, and before the seizure thereinafter mentioned, the defendant, John Smith, then and still being the sheriff for the County of Brant, had placed in his hands and received for execution a certain writ of *Fieri Facias*, issued out of the Court of Queen's Bench at Toronto, in a certain cause in the said court then pending, wherein one *Henry N. Titus* was plaintiff and one *Albert M. Titus* was defendant, the said writ having been issued at the suit of the plaintiff in the said cause against the goods and chattels of the said defendant in the said cause. Statement.

That shortly after the receipt of the said writ by the said defendant *John Smith*, as such sheriff, he, the said sheriff, under and by virtue of the said writ, duly seized upon a certain unexpired term in a lease which the said *Albert M. Titus* then held and had in a certain shop and premises, situate in Colborne-street, in the town of Brantford, in said county of Brant; and also upon certain trade fixtures in said shop, then being goods and chattels of said *Albert M. Titus*, seizable under said writ of *Fieri Facias*.

That the said defendant as such sheriff, after making such seizure, duly advertised the said shop and fixtures

1855.

Witham v. Smith.

for sale, under said writ of *Fieri Facias*, by public auction, on and for the 24th day of the said month of August; and the said unexpired term of years and said fixtures were duly exposed to sale by him the said sheriff on that day, and on that day by him duly sold; and that the plaintiff at such sale became the purchaser of the said unexpired term, which was still unexpired, and trade fixtures, at and for the price or sum of £206; and the officer and agent of the said sheriff conducting such sale duly entered the name of the plaintiff (at the foot of the written conditions of sale, shewing the terms upon which the sale was conducted) as the purchaser of said unexpired term and fixtures at and for the price of £206; that the plaintiff had made or caused to be made to the said defendant as such sheriff an application specifically to perform the said contract of sale, and to execute to the plaintiff an assignment of the unexpired term of said lease and to deliver to the plaintiff the said trade fixtures being in the said shop, but the said defendant had not done so: the prayer was for a specific performance of the contract by the defendant.

Statement.

The defendant answered, setting forth at length the facts stated in the judgment, and submitted to act in the premises as the court should direct.

Mr. Read, for plaintiff: The defendant being an officer of a common law court is no ground of objection to this court interfering in the manner desired; on the other hand, if he were allowed to withhold completion of the contract, it would have the effect of destroying all confidence in sales by sheriffs; here the plaintiff only wants the sheriff's deed to enable him to obtain possession of the property sold.—He referred to *Doe Hughes* v. *Jones* (*a*), *Tierman* v. *Wilson* (*b*), *Burnham* v. *Daly* (*c*).

Argument.

(*a*) 9 M. & W. 372. (*b*) 6 Johns. C. R. 411. (*c*) 11 U.C.Q.B.R. 211.

1855.

Witham v. Smith.

Mr. *Crickmore*, for defendant: Before the sale was completed by the execution of a deed the judgment debtor paid the debt and put an end to the sale: besides, there is no written contract, within the Statute of Frauds, binding on the defendant,—if even this court will interfere with a sheriff in the discharge of his duty under a common law process.

June 4th.

The judgment of the court was delivered by SPRAGGE, V. C.—The plaintiff files his bill as purchaser at sheriff's sale of the unexpired term in a certain lease of a shop and premises in the town of Brantford, and of certain trade fixtures in such shop. The sale took place on the 24th of August last. The stock-in-trade was sold at the same time, and one *Reynolds* became the purchaser. The bill is filed against the defendant as sheriff of the county of Brant, and prays specific performance of the contract entered into, as the bill alleges, by the sheriff to sell and convey to the plaintiff the unexpired term. By the terms of the sale the purchase money was to be secured by promissory notes, to be indorsed by some person to the satisfaction of the judgment creditor at whose suit the property was sold. It is unnecessary to refer to this point further than to say, that upon the evidence before us the purchaser, the plaintiff in this suit, was guilty of no default, but acted with diligence and promptitude with a view to carry out the conditions of the sale.

Judgment.

On the part of the judgment creditor, nothing was done to carry out the sale: he did not accept the proposed security, nor did the sheriff; although every thing that could reasonably be done by the purchaser was done, even to the extent of offering to pay the purchase money in cash, in lieu of giving promissory notes. The purchaser was thus unable to complete his purchase; and, after the lapse of a few days, an arrangement was made between the judgment creditor

1855.

Witham v. Smith.

and debtor, whereby the leasehold premises and shop fixtures were transferred to the purchaser of the stock of goods, upon what terms does not appear, except that it was in satisfaction in whole or in part of the judgment debt; and the sheriff thereupon, under the direction of the creditor, refused to complete the sale to *Witham*, who filed his bill for specific performance.

The first difficulty is one of parties. In a similar case in this court (*Beamish* v. *Ruttan*) the court held that the execution debtor, whose property it was alleged had been sold, was a necessary party. It was *his* property that was the subject of the alleged contract of sale by the sheriff, and which it was sought to transfer to the plaintiff; and it was considered that he was the party really interested in resisting what was thus sought, and not the ministerial officer, who had no interest one way or the other.

Judgment.

It would be necessary, therefore, if there were no other defect in the plaintiff's case, that the cause should stand over in order to the making of the execution debtor a party.

But there appears to be another defect, which goes to the root of the plaintiff's case. Such a contract as the one sought to be enforced must be in writing, under the Statute of Frauds, and its being upon a sheriff's sale appears to form no exception. In the contract put in there is no signature by or on behalf of any one as vendor, and this is a bill against a vendor. It is true that the only defendant on the record does not take the objection, but another defendant must be added who may take it. And further, we think that it was not competent to the sheriff, under the circumstances, to admit a contract so as to bind others interested. Here there was an incomplete sale, not binding upon the sheriff, or upon either party to the suit in which the sale was made: while the sale was thus

incomplete, an arrangement was made which rendered its completion unnecessary; and we are not prepared to hold that it was the duty of the sheriff, under these circumstances, to complete the contract thus incomplete between himself and the purchaser; and if such was not his duty, he could not be in a position now to make that a completed agreement by his admission which was not so when his duty properly ceased.

1855.
Witham v. Smith.

Upon the question of jurisdiction raised by the defendant, it is not absolutely necessary to decide: but we see no good reason to doubt it. The defendant says that he was a public officer of a court of common law, acting in the course of his duty in execution of the process of that court, and that if it was his duty to complete this sale and convey the property to the purchaser, it is the province of the court whose officer he was to compel him by order of court, or by mandamus or otherwise, to do that duty.

Judgment.

It would seem to be an answer to the objection that the court does not interpose to compel him to do his duty as a public officer; but having entered into a contract in that capacity with a third person, a right springs up on the part of that person to have that contract enforced, and the proper forum for enforcing that right is this court. This court would interfere therefore not to compel a sheriff to perform his official duty, but to give effect to an equity which has accrued to a third person: upon this point, however, we do not mean to give any decided opinion. We think the bill must be dismissed with costs.

LONG v. GLENN.

Mortgagee—Costs—Practice.

Nov. 13, 1854.

Where, after a mortgage debt had been reduced to a sum of about one pound fourteen shillings, the mortgagee, who had taken an absolute deed, distrained for forty pounds, claiming that amount to be due: the court, upon a bill filed by the mortgagor to redeem, refused the mortgagee his costs.

Where a plaintiff in a redemption suit moves for a summary reference, and seeks to deprive the mortgagee of his costs, a case should be made for that relief upon the pleadings, and the question of costs should be included in the reference to the Master.

Statement.

This was a redemption suit, and after the master had made his report, finding a sum of one pound fourteen shillings due to the defendant as mortgagee, the cause now came on to be heard on further directions and costs.

Argument.

Mr. *Barrett*, for plaintiff, cited *Cornwall* v. *Brown* (*a*), and asked that plaintiff might be paid his costs.

Mr. *Crickmore*, contra, cited *Daniel's* Practice, page 1526, to shew that a mortgagee is always entitled to receive his costs when the account is in his favor.

The judgment was now delivered by

Judgment.

THE CHANCELLOR.—This is a redemption suit. The plaintiff asks for costs. That is a question of great practical importance in this country. The mortgagee, of course, is entitled *primâ facie* to receive his costs; but that is not a universal rule; a mortgagee may be deprived of his costs, or he may be ordered even to pay them (*b*). But when a mortgagor thinks himself entitled to that sort of relief which is contrary to the ordinary rule in mortgage suits, a case should be made upon the pleadings; and when a decree is pronounced upon motion, as this was, a mortgagor insisting upon this should take care to have the question of costs included in the reference to the Master, if the affidavits are insufficient to enable the court to dispose of it on the motion. It may be impossible, otherwise, to give such relief on further directions (*c*). The reservation

(*a*) Ante vol. 3, p 633. (*b*) Le Targe v. De Tuyl, ante vol. 3, p 595.
(*c*) Dunstan v. Patterson, 2 Phill. 341.

of costs simply, will not do, for such an order would not justify any enquiry on the subject of costs in the Master's office; and the materials to enable the court to dispose of the question on further directions would therefore, in a great majority of cases, be wanting.

Had the question of costs been included in the reference to the Master in this case, it is quite possible that the plaintiff might have been entitled to receive his costs. It has been laid down that a mortgagee taking possession incurs thereby an obligation to have his accounts always ready (*a*). Still the neglect of this duty has been held sometimes to be insufficient to deprive the mortgagee of his costs, even when the account has been against him, if unaccompanied with misconduct (*b*). It may be found, perhaps, that some such obligation attaches to mortgagees generally; but, without determining that, it may be laid down, we think, that when a mortgagee *misrepresents* the state of the account, and is guilty of vexatious and oppressive conduct, which necessitates the suit,—under such circumstances, a mortgagee at least forfeits his right to receive costs. The right of a mortgagee to receive costs was carried at one time to a great extent,—to an extent hardly reconcileable with reason or justice (*c*). That has been relaxed, but it is difficult to understand why mortgage cases should not be governed by the general rule (*d*). Why should not the costs of the suit fall upon the party who is found to be in the wrong, and whose conduct has caused the litigation?

Judgment.

But, without going beyond decided cases, we think that the present defendant cannot receive his costs. It is admitted that the mortgage debt never exceeded twenty-one pounds. Before the filing of the bill this

(*a*) Binnington v. Harwood, Tur. & Russ. 477; Archdeacon v. Bowes, 13 Price, 363.

(*b*) Snagg v. Frizell, 3 J. & L. 383.

(*c*) Gammon v Stone, 1 Ves. sen. 339; Hodges v. Croydon Canal Co., 3 Beav. 86.

(*d*) Millington v. Fox, 3 M. & C. 338; Lord Nelson v. Lord Bridgeport, 10 Beav. 305; Hunter v. Nockolds, 2 Phil. 540; Green v. Briggs, 6 Hare, 632.

1854.

Long v. Glenn.

debt had been reduced to one pound fourteen shillings. In this state of the account the mortgagee, who had taken an absolute deed, assumed to act as the owner in fee, and distrained for forty pounds, which he claimed to be due to him as landlord. This suit was the consequence of that unwarranted and oppressive act; and the defendant in his answer, although he admits that he is a mere mortgagor, still claims twenty-one pounds and interest to be due on his security. These facts appear upon the pleadings and by the Master's report, and they are at least sufficient, in our opinion, to deprive the defendant of his right to receive costs. Had the reference to the Master been different, it is not impossible that the decree might have gone further; but, as the matter stands, we know nothing of the dealings between the parties, or of the manner in which the mortgage debt was reduced; and for that, as well as other reasons to which I have already alluded, the decree must be without costs.

Judgment.

Montgomery v. Ford.

Setting aside sale.

A building society having a mortgage containing a power of sale on default, advertised for sale the mortgage property, and at the auction it was stated by the auctioneer that the price to be paid for the premises was to be over and above the amount of certain other mortgage debts against a portion of the same estate. At the auction, one of the directors, who was also solicitor to the society, bid off the property in his own name, though it afterwards appeared that he had acted only as agent for a third party; after the sale, the purchaser bought up the interest of the other mortgagees, who had already commenced proceedings to foreclose, carried on the foreclosure suit and obtained a final decree of foreclosure, no notice being taken of the fact of the money having been paid to the mortgagees; before this order was obtained, however, the mortgagor claiming to have the surplus of the purchase money over and above the amount of the mortgage under which the property was sold, filed a bill for that purpose, when the agent of the purchaser swore that he had not intended to bid the sum he did in addition to the amount of the mortgage paid off. The court set aside the sale, and gave the mortgagor leave to redeem: The Chancellor dissenting, who thought the sale already made should be carried out and the surplus of the purchase money paid to the mortgagor.

The bill in this cause was filed by *John Montgomery* against *David B. O. Ford*, The Farmers' and Mechanics'

1855.

Montgomery v. Ford.

Building Society and *John Severn*, stating that on the 5th of April, 1845, the plaintiff executed to *Jonah Hugill* and *Charles Cooper* a mortgage on two hundred acres of land in Uxbridge, and twenty acres on Yonge-street, to secure £736 5*s.* 1*d.* and interest; on which mortgage *Hugill* and *Cooper* had instituted a suit of foreclosure and had obtained a decree and report, but no final order had been made.

That on the 29th of September, 1849, plaintiff executed another mortgage to the *Building Society*, and on the 16th of December, 1850, a second mortgage to the society of eighteen acres of the said twenty, together with other lands in Essa, Eldon and Medonte, each of such mortgages containing a power of sale on any default; and default having been made, the society, on the 29th of June, 1853, sold in one lot, all the lands embraced in their mortgages; and that one of the printed conditions of sale stated that "the terms of payment are ten per cent. cash down, the balance in one month, at which time the purchaser shall receive his conveyance subject to a prior mortgage now foreclosed of £766 14*s.* 7*d.*" Statement.

That the prior mortgage so referred to was that to *Hugill* and *Cooper*, but which had not been finally foreclosed, nor were they in a position to do so, and the true state of the proceedings in that suit was well known at and before the sale to *Ford*.

That *E. C. Jones* the solicitor of the company in the suit of foreclosure and in the matter of the said sale and otherwise, became the purchaser of the premises as agent for *Ford* for the sum of £570, in accordance with the conditions of sale, which together with the amount due on the prior mortgage was greatly less than the value of the property sold; that *Ford* had paid the £570 to the *Building Society* and paid off the

1855. first mortgage and obtained an assignment thereof to himself.

Montgomery v. Ford.

The bill further alleged that on the 20th day of November, 1849, the plaintiff sold and conveyed the lot in Uxbridge comprised in the first mortgage to the *Building Society* to the defendant *Severn*, and at the same time executed to *Severn* a mortgage on the twenty acres in the township of York, to secure him against any loss on account of the first mortgage covering the Uxbridge property; that *Ford* insisted on the sale and made claim to the Uxbridge lot and the two acres, part of the twenty acres in the township of York, which had not been mortgaged to or sold by the *Building Society*—and that the society refused to pay plaintiff the surplus of the purchase money.

Statement.

The prayer of the bill was that *Ford* might be ordered to convey the lot in Uxbridge to *Severn*, and the two acres in York to the plaintiff; and the *Building Society* ordered to pay to plaintiff the surplus money in their hands: or that the sale might be set aside in consequence of *Jones* having acted as solicitor for the society and for the purchaser, and in that case that plaintiff should have liberty to redeem.

The defendants *Ford* and the *Building Society* answered; the bill as against *Severn* was taken *pro confesso*—and the plaintiff having put the cause at issue, evidence was taken before the court, the nature of which, as also the defence set up, is sufficiently set forth in the judgment.

Mr. *Mowat* for the plaintiff.

Mr. *Brough* and Mr. *McDonald* for the defendants *Ford* and The *Building Society*.

The defendant *Severn* did not appear.

1855.

Montgomery v. Ford.

For the plaintiff it was contended that although the rule of this court is that the solicitor of the vendor acting also on behalf of the purchaser is a ground for setting aside any sale that might be effected, still, if the vendor chooses to do so, he may adopt the transaction and insist upon the sale being carried out. Here the purchaser feeling how untenable the transaction is, offers to give up his purchase on being paid the amount expended by him; this offer, which the plaintiff would willingly accept, he is unable to take the benefit of, in consequence of the amount required. No declarations said to have been made by the auctioneer at the time of the sale can possibly affect the right of the plaintiff to have this sale carried out according to the strict language of the printed conditions of sale. Argument.

For the defendants it was submitted that the expression in the conditions of sale of being subject to *Hugill's* mortgage did not mean that the purchaser was obliged to pay that off in addition to the sum bid at the sale; on the contrary, the evidence shows that at the sale the auctioneer distinctly stated that the purchaser would be entitled to the benefit of the foreclosure suit then pending; rather than adopt the construction contended for by the other side, *Ford* would prefer giving up the whole purchase upon being repaid his outlay.

The Chancellor.—For reasons which were fully stated at the hearing of this cause, and which I am about to recapitulate, I am of opinion that the plaintiff is entitled to the decree which he asks. Judgment.

The facts, so far as they are material to my judgment, were shortly these: In the year 1845 the plaintiff mortgaged certain freehold property, including two hundred acres of land in the township of Uxbridge, and twenty acres on Yonge street, to *Hugill* and *Cooper*, to secure £750.

In September 1849, he mortgaged eighteen of the

1855. Montgomery v. Ford.

twenty acres on Yonge street, with certain other freeholds, to the Farmers' and Mechanics' *Building Society*, to secure £300. This security did not include the Uxbridge lot, and it covered only eighteen of the twenty acres previously mortgaged to *Hugill* and *Cooper*. This deed contains a power of sale.

In November of the same year, (1849) the plaintiff sold the Uxbridge lot to the defendant *Severn*, and he at the same time executed a mortgage on the Yonge street property in favor of the purchaser, to secure him against the *Hugill* mortgage, which covered the Uxbridge lot.

In December, 1850, the plaintiff executed a further mortgage in favor of the *Building Society*, to secure £200. The premises comprised in this and the previous mortgage to the *Building Society* are the same, and both securities contain a power of sale.

Judgment.

Subsequent to all these transactions, the precise date does not appear, *Hugill* and *Cooper* filed their bill of foreclosure against *Montgomery* alone, and in January, 1853, the ordinary decree was pronounced. The Master's report, which was made in May, 1853, finds the mortgage debt to be £766 14*s.* 7*d.*, and directs the same to be paid on the 24th of October then next, being six months from the date of his report.

On the 29th of June in the same year the *Building Society* caused the premises comprised in their mortgages to be put up to sale under the powers contained in their securities, and upon that occasion *Mr. Jones*, then one of the directors of the company and their solicitor, was declared the highest bidder. Mr. *Jones* signed the contract in his own name, but he acted in the matter as the agent for the defendant *Ford*.

Shortly after the sale it was arranged between

Hugill and *Ford* that the amount due on *Hugill's* mortgage should be paid by *Ford*, and in pursuance of that arrangement the full amount was paid a day or two after the time fixed by the Master's report, and thereupon *Hugill* and *Cooper* assigned the mortgaged premises, &c., to *Ford*.

The *Building Society* and *Severn* were made parties to the foreclosure suit in the Master's office, and appeared by their respective solicitors; but by some strange neglect, or misconception of the practice, no further notice was taken of their securities, and the final order of foreclosure against *Montgomery* was obtained upon an affidavit of nonpayment by him at the time fixed by the Master's report.

Upon the facts to which I have briefly adverted, the plaintiff prays that the *Building Society* may be ordered to account to him for the balance of the purchase monies after deducting the amounts due on foot of their securities, and that the defendant *Ford* may be ordered to convey the two acres on Yonge street to himself, and the Uxbridge lot to the defendant *Severn*. Or, in the alternative, that the sale may be set aside.

Judgment.

The plaintiff's right to the relief specified in the second alternative was very properly conceded, at the hearing by the learned counsel for the defendant, because it is quite clear that Mr. *Jones'* position precluded him from becoming the purchaser of this property either on his own behalf or as agent for *Ford*, and the sole question therefore is as to the plaintiff's right to the other relief.

The plaintiff insists that *Ford* was bound by his contract to pay off the whole of the *Hugill* mortgage, and that having paid it off, he is now bound to reconvey the two acres on Yonge street and the Uxbridge lot,

1855.

Montgomery v. Ford.

free from incumbrances. The defendant insists, on the other hand, that he is entitled to throw this debt upon the two acres and the Uxbridge lot, and that the plaintiff has no right to redeem either property except on payment of the full amount due on foot of *Hugill's* mortgage.

This question depends, to some extent at least, upon the conditions of sale, which, so far as they are material, are in these words: "The terms of payment are ten per cent. cash down, the balance in one month, at which time the purchaser shall receive his conveyance, subject to a prior mortgage now foreclosed of £766 14*s.* 7*d.*" It is said that, upon the proper construction of this condition, and upon the whole evidence, the purchaser is entitled to hold the two acres and the Uxbridge lot until he is paid the full amount due upon the *Hugill* mortgage; that he is entitled, in other words, to have these two poroperties applied to disencumber the estate purchased by him from the *Building Society*. I cannot agree in that view of the case. The amount due on foot of the *Hugill* mortgage forms, in my opinion, a part of the consideration which the purchaser agreed to pay for the property conveyed to him by the *Building Society*.

Judgment.

It will help the solution of this question, I think, if we suppose the sale to have been made by *Montgomery* himself. Suppose *Montgomery*, having two estates, to execute a mortgage of both in *Hugill's* favour, and then to sell the equity of redemption of one subject to that mortgage. What would be the effect of such a contract? Under such circumstances the purchaser would be clearly bound, I apprehend, to pay off the mortgage. Two other conclusions, and only two, suggest themselves to my mind as possible. It would be open to the purchaser to contend that it had been the intention of the parties to throw the mortgage debt either wholly upon the other estate, or ratably

upon both estates in proportion to their respective values. But, in my opinion, neither hypothesis would be admissible, because each would involve the absurdity of a sale without a price. In neither event would the price depend upon the value of the estate sold, but it would depend either upon the value of that which had not been sold, or upon the comparative values of the two. Now surely that is a contract into which neither vendor nor purchaser would willingly enter. It would be the obvious interest of both parties to settle the price to be paid by the purchaser in the first instance, instead of leaving that to depend upon the value of an estate not the subject of contract, or upon the comparative value of the two estates, a question much more complex and difficult of solution than it would be to determine the value of either separately. To interpret the contract of these parties in that way would be to force upon them a construction repugnant to reason, and contrary to the ordinary course of dealing between man and man.

1855.

Montgomery v. Ford.

Judgment.

But not only are the views which have been suggested —and they are the views for which the defendant contends—repugnant to reason, but they are also, as it seems to me, contrary to the letter and spirit of such a contract. The sale is of an equity of redemption, subject to an outstanding mortgage. But, upon the construction for which the defendant contends, the sale would be not subject to, but discharged from the outstanding mortgage: discharged, either absolutely, upon the one hypothesis, assuming the purchaser entitled to throw the whole burthen upon the second estate, or *pro rata*, if the burthen is to be borne by the two estates in proportion to their value. But, assuming such an intention to exist, the contract would be, not for the sale of the equity of redemption subject to the outstanding mortgage, but for the sale of the fee simple, either wholly discharged from the mortgage, on the one hypothesis, or subject to some

1855. indefinite portion of the debt on the other; and it is not unreasonable to suppose that in either event some mode of expression would be adopted less inconsistent with the actual intention of the parties than that which has been adopted here.

Montgomery v. Ford.

Now all the reasons applicable to this hypothetical case are equally applicable, as it seems to me, to the one under consideration. When *Mr. Jones* bid £570 for this estate, it is quite clear there was no intention on the one side to sell, or on the other side to purchase, the fee simple at that price. The sum offered was no more, I apprehend, than a third of the value of the estate mortgaged to the *Building Society* alone. Now, if we assume the intention to have been to sell the estate for £560 in addition to £766 due on foot of outstanding mortgages, the case is quite free from difficulty, the purchase money is clearly ascertained, and approximates to the value of the estate; but upon the hypothesis for which the defendant contends, the purchase money was wholly uncertain, depending upon the value of two estates never taken into account; the purchase was not "*subject*" to the mortgage, as the condition expressed it, but discharged from the mortgage to the extent of the two estates; and in the event of the estates being of less value than the amount due on the *Hugill* mortgage, the purchaser would acquire, in effect, not the estates offered for sale only, but those estates, with two others not included in the mortgage to the *Building Society*, and over which, of course, they had no power of sale. But, had such been the intention of the parties, it cannot be doubted, I think, that it would be distinctly expressed. The right of the purchaser to throw the *Hugill* debt on the two estates would have been plainly stated. To have omitted it would have been inconsistent with their own interest, and a plain breach of their duty to the mortgagor.

Judgment.

But there is another argument which seems to me

1855.

Montgomery v. Ford.

to be almost, if not quite, conclusive against the defendant's hypothesis. The *Building Society* had no authority to sell the lots upon the terms for which he contends. The sale took place under the power contained in both mortgages. That is stated in the answers of both defendants; and the amount which they claim to retain is the amount due on foot of both securities; now it was not competent to them to sell the property comprised in their mortgages to satisfy the amount due on both securities, except subject to the *Hugill* mortgage; because, long prior to the execution of their second mortgage, the Uxbridge lot had been sold to *Severn*, in fee simple, with an indemnity against the *Hugill* mortgage. The effect of that transaction was to give *Severn* a right to throw the whole of the *Hugill* mortgage upon the other portion of the estate, a right which the subsequent mortgage to the *Building Society* could not, and did not affect. But the case set up by the answer is wholly subversive of what I take to be *Severn's* undoubted right. The defendant insists that if *Severn* desires to redeem the Uxbridge lot, he can only do so on payment of the full amount of *Hugill's* mortgage. And indeed, if the argument cannot be carried that length it must fail altogether, for there is no room to infer one intent as to the two acres and another as to the Uxbridge lot. But there is not the slightest foundation for the claim set up by the answer as to the Uxbridge lot; and to infer an intention to sell upon such terms, under the circumstances, would be to do equal violence, as it seems to me, to the letter and spirit of the contract between the parties.

Judgment.

It has been supposed, I believe, that the words "now foreclosed" import a benefit intended for the purchaser, and that they have a tendency, consequently, to strengthen the defendant's argument. But those words lead, in my opinion, to the opposite conclusion. The expression is ambiguous, and must be

1855.

Montgomery v. Ford.

construed with reference to the state of circumstances at the time the instrument was drawn. Now at that time *Hugill* had obtained a decree of foreclosure; the *Building Society* and *Severn* had been made parties in the Master's office; and upon non-payment of the *Hugill* mortgage at the time fixed by the decree, *Hugill's* title would have become absolute, and the power of sale under which the *Building Society* was proceeding would have been, of course, at an end: their security, to that extent, would have been defeated. It was a matter of vital importance for the *Building Society*, therefore, to sell before *Hugill* was in a position to obtain the final order, and it was their obvious duty to inform purchasers that a decree of foreclosure had been obtained by the first mortgagor, and unless the amount due on foot of that security was paid off before the time fixed by the decree, the title acquired and the power of sale would be defeated. That appeared to me to be the true effect of the words in question; and in that view they have no tendency to impair the force of the argument for the plaintiff; on the contrary, it derives from them, in my humble judgment, great additional force.

Judgment.

But, although this condition of sale is extremely material, yet the question does not seem to me to turn altogether, or even principally, on that; for the real question to be solved is what price did *Mr. Jones* bid for the property at the sale, and upon that point the parol evidence removes all doubt. *Mr. Crew*, who is both the manager of the society and the auctioneer who conducted the sale, says "the biddings were of sums of money over and above the amount due on the mortgage. The property was sold, subject to the mortgage. *Mr. Jones's* bidding was of £570, and he to pay off the mortgage." That evidence is certainly explicit. It tallies exactly with the conditions of sale, as I understand them, and frees my mind from all doubt as to the real nature of the contract between the parties.

1855.

Montgomery v. Ford.

But is said that the purchaser labored under a mistake as to the subject matter of the sale, and that the contract, therefore, ought not to be enforced against him. If I were satisfied as to the truth of the premises, I would probably agree to the conclusion. But I am not satisfied that there was any mistake as to the subject matter of the contract. The plaintiff's case is stated distinctly in the bill, and it is clear from the evidence of *Mr. J. R. Jones* that the same points had been pressed upon the attention of the defendants before this suit had been instituted. But no trace of the mistake now insisted on is to be found in the answer. The defendant relies exclusively upon the legal effect of his contract. That consideration alone would be conclusive, perhaps; but the case fails equally, as it seems to me, upon the evidence. *Mr. Jones* swears, it is true, that he misapprehended the legal effect of the contract, and that no doubt was so, but it affords no ground for the relief which is now asked. The property comprised in the security held by the *Building Society* was sold, subject to *Hugill's* mortgage. That was the intention, in my opinion, of both vendor and purchaser. The real effect of that transaction was to entitle the plaintiff to a conveyance of the two acres on Yonge street, and *Severn* to a conveyance of the Uxbridge lot. In that respect the defendant, or rather his agent *Mr. Jones*, was under some misapprehension. He mistook the legal effect of the contract into which he entered; but that would not afford any ground for setting aside the contract as between the defendant and the *Building Society*, and *a fortiori* cannot bar the relief claimed by the plaintiff on behalf of himself and *Severn*, to which, in my opinion, they are clearly entitled.

Judgment.

ESTEN, V. C.—The question in this case is whether Mr. *Ford* should be compelled to reconvey the Uxbridge lot and the two acres on Yonge street, discharged from the mortgage, to the defendant *Severn*

1855.

Montgomery v. Ford.

and the plaintiff respectively. This depends on the intention of the parties at the sale. The right which the *Building Society* could confer was to redeem the first mortgage and hold the Uxbridge lot and the two acres until a proportionate part of the mortgage money was paid. This is, I think, *primâ facie* the effect of a sale of part of the mortgaged premises in all cases. The purchaser may intend to purchase, discharged of the mortgage, or it may be intended that he shall discharge it entirely so as to exonerate the other lands; but in either of these cases evidence of the fact is necessary. In the present case the evidence shows that the intention of the parties accorded with their *primâ facie* rights.

Judgment.

The conditions of sale evince that the purchaser was to have the benefit of the partial foreclosure that had taken place; Mr. *Jones'* evidence is strong to the same point, and Mr. *Crew's* is, I think, not inconsistent with it. All that he means to say, I think, is that the £570 was to be paid to the *Building Society* without any reduction on account of the mortgage. They were to receive that amount clear, and the purchaser was to dispose of the mortgage, but after he had done that Mr. *Crew* says nothing as to what his rights were to be. I am certain that if he had been asked the question he would have said that the purchaser was to have the benefit of the foreclosure, as he said at the sale. Under these circumstances it would be highly unjust to compel Mr. *Ford* to reconvey the Uxbridge lot and the two acres discharged from the mortgage, and therefore the first branch of the relief prayed must be refused. I think, however, and indeed it was so understood at the hearing, that the sale should be set aside. Mr *Jones*, the solicitor, could neither purchase for himself nor for another person. I express no opinion as to the impropriety of selling the whole property in one lot. I think each party should pay his own costs to the hearing; and the subsequent costs and further directions reserved.

1855.

Montgomery v. Ford.

SPRAGGE, V. C.—It was conceded at the hearing that the purchase made by the defendant *Ford* through his agent Mr. *Jones*, that agent filling the character which he did relatively to the vendors, cannot be sustained; and the question that remains is, whether *Ford* can properly be compelled to take the lands sold, comprised in the mortgages to the *Building Society*, as he cannot obtain any other lands or any rights under the prior mortgage of *Hugill* and *Cooper*. Upon this branch of the case, I think it must be looked upon as a bill by a vendor to enforce the specific performance of an agreement to purchase against an unwilling vendor; because the *Building Society* were trustees to sell in a certain event which had happened; and I apprehend that any defence which the purchaser might make, if the *Building Society* were enforcing this sale, or if it had been a sale by the owner of the land himself, may be made in this case by the defendant *Ford*. His defence is that what he can get under his purchase is substantially less than the terms and conditions of sale held out to him that he was to get; and that, it would not be denied, I suppose, is a good answer to such a bill.

Judgment.

To take, first, the case of a purchaser who knows nothing upon the subject beyond what he learns from the particulars and conditions of sale: Taking the words literally, they amount to an absurdity; unless understood as a *layman* might very well understand them, that no redeemable interest remained in the mortgagee —that is, as to the lands comprised in the foreclosed mortgage; the purchaser would then conclude that upon paying off that prior mortgage, he would have the benefit of that foreclosure to the same extent as the holder of the foreclosed mortgage, whose interest and rights he would acquire upon paying it off, so that by paying off that mortgage and by the sale he would acquire the entire interest in all the lands comprised in the prior mortgage and in that to the *Building*

1855.

Montgomery v. Ford.

Society; for he would conclude that if the mortgage were foreclosed no interest could remain in the mortgagee, and if he paid off the mortgage none could remain in the holder of the mortgage. It would be no answer to say that this could not be; that it would be inconsistent with the rules and principles upon which a court of equity deals with mortgages. It could not justly be an answer in the mouth of one whose own act had led another into the error.

But it is said that in this case there was no error, and that the agent of Mr. *Ford* purchased with a full knowledge of all the circumstances. It is true that there was no final order for foreclosure, and that Mr. *Jones* was aware of this; but there was a decree and report made in pursuance of it, that in case *Montgomery* did not redeem in October following he was to stand foreclosed; that he would not redeem might be reckoned upon pretty confidently, under the circumstances; and if he did not, he was to stand foreclosed.

Judgment.

The report was erroneous, but it stood confirmed as an act of this court unimpeached by *Montgomery*, or any one else at that time; and it does appear to me too much to say that Mr. *Jones* knew that the report was erroneous, for although a professional gentleman, he is a practitioner at common law only, not in this court, and I can scarcely doubt that he believed that *Montgomery* would stand foreclosed if he did not redeem. The facts then, as he knew and understood them, differed from the facts set forth in the particulars and conditions of sale only in this, that the latter stated that the mortgage was foreclosed, while with his knowledge of facts he understood that it would be foreclosed unless *Montgomery* redeemed in October; but the latter was almost as far from the true state of the case as the former, and would, if true, have been almost equally favorable to him as a purchaser.

The case then comes to this—the vendor of an estate misstates a fact affecting the estate in an important

particular, but he comes nevertheless to enforce the sale upon the ground that although he did mistake, the purchaser was not misled. If he comes upon this ground, surely he must shew very clearly indeed that the purchaser was not mistaken. If any reasonable doubt can remain whether the purchaser was not mistaken, it would be hard to force the purchase upon him, and it can hardly lie in the mouth of the vendor to ask it. With what Mr. *Jones* did know, and with that erroneous report to mislead him he might very well believe that his purchase would give him collateral advantages beyond the mere purchase of the land sold; upon his evidence, being called by the defendant as a witness, he has sworn that he thought he should acquire a right to the two acres in York in the *Hugill* mortgage, and I have no reason to doubt what he says. It is urged, that if he knew all the facts his ignorance of the law would not avail him: as a general rule this is true; but I do not think that it can be allowed to prevail in a case where the party invoking the rule has himself misstated the legal effect of facts in the transaction which he seeks to enforce in his dealing with the party against whom he urges the rule; it would be allowing him to say, I was ignorant of the law and misstated it to you, and although my misstatement may have misled you, you are not thereby excused, for you are bound to know that the law as I stated it to you was erroneous; as little would it be reasonable, as I cannot but think, in this court to hold the defendant bound to know the law when a judicial document of this court helped to mislead him as to the law.

Judgment.

Upon the whole, I think that this purchase ought not to be enforced against Mr. *Ford*, and that the relief which the plaintiff is entitled to, is to have the sale set aside, and that each party pay his own costs.

HEWARD v. HARRIS.

Division Court—Injunction.

April 17 & 19, 1855. The plaintiff had subscribed a sum of money to aid in the erection of a parish church in the City of Toronto, with a view of raising such a sum as would enable the church-wardens to erect the church on the old site, so as to avoid leasing off portions of the land about the church used as a burying ground. Subsequently at a meeting of the vestry the plan of building was changed, by reason of which in making the excavations for the foundation of the church the graves of several members of the plaintiff's family were disturbed; thereupon the plaintiff addressed to the vestry clerk a letter annulling his subscription, and refused to pay it. A suit having been instituted in the Division Court for the recovery of this subscription, a motion was made in this court for an injunction to stay such action. The court, under the circumstances, refused the application, with costs.

Quære, whether this court will in any case grant an injunction to restrain an action in the Division Court.

Statement.

This was a suit brought by *Francis H. Heward* against *Thomas D. Harris* and *Lewis Moffatt* as trustees of the parish church of St. James, in the City of Toronto, and the bill filed stated that the church having been totally destroyed by fire, it became necessary to reconstruct the same; that the parcel of land on which the church had stood was held by trustees for the purpose of such erection and a burial ground, in which the remains of the early inhabitants had been interred, and amongst others the father and other members of the plaintiff's family had been buried, and described the situation of the graves.

That shortly after the destruction of the church it had been proposed by certain members of the congregation to lease off a portion of the burying ground for building purposes generally, so as to derive therefrom means for the purpose of erecting the new church; which proposal, if carried out, would have disturbed the graves of the plaintiff's family and other persons, the surviving relations of whom, as well as the plaintiff, were greatly shocked thereby; to avert which a large meeting of the congregation was called early in the year 1850, at which it was agreed that the new church should be erected on the foundations of the

1855.

Heward v. Harris.

old one, and should occupy the same site excepting so far as the change in the architectural design might make a slight extension thereof necessary, so that the graves should remain undisturbed, and that such new church should be a parish church, and not cost more than £10,000, as would appear by the books of the vestry.

That subsequently to this agreement a subscription was opened for the purpose of raising by voluntary gift funds in aid of the new church, to which the plaintiff on or about the 13th of March, 1850, subscribed his name for £20.

That the subscription list so opened was in the terms following:—

"Whereas it has been proposed to lease off a portion of the burial ground attached to St. James's Church, in the City of Toronto, Canada West, for the purpose of rebuilding the Church destroyed by fire on the 7th of April, 1849.

"And, whereas a large portion of the congregation of the said church are desirous of preventing the leasing of the same by entering into a subscription, in order to raise the sum of ———— Statement. in aid of the funds for the erection of the said church.

"Now, we the undersigned, in consideration of the ground, or any portion of the said church-yard not being leased but reserved for ever, in accordance with the original deed of trust, do hereby, for ourselves and our legal representatives, bind ourselves to pay to the building committee of St. James's Church for the time being, or their legal representatives, the sums of money set opposite to our names, in manner following: viz., at six, twelve, eighteen and twenty-four months, in equal instalments by notes of hand, which said notes of hand are to be dated from the day of the date of the contract for rebuilding the St. James's Church.

"Toronto, March 13th, 1850."

"For Mrs. *Heward* and family—*F. H. Heward*—twenty pounds. £20—'Parish Church only.'"

1855.

Heward v. Harris.

That the list had been presented to the plaintiff by *William Wakefield*, then the vestry clerk of the church and the agent of the defendants the churchwardens, and also member of the said building committee, to whom plaintiff stated that such gift of plaintiff was upon the distinct understanding and condition that the new church should be built upon the foundations of the one destroyed and without any change of site, so that the graves of the plaintiff's relatives might not be disturbed; which condition was assented to by *Wakefield*; and it was then understood and agreed between the plaintiff and *Wakefield* that the condition of plaintiff's subscription was that no graves should be disturbed, not only by not leasing, but by not rebuilding otherwise than on the original site.

That subsequently, in September, 1850, and without any assent of plaintiff, some new proposal was adopted for deviating from such agreement, and for rebuilding the church in the middle of the said parcel of land, and not on the foundations or site of the old one; in consequence of which the graves of the plaintiff's relatives were disturbed and destroyed, which being contrary to the express understanding and condition upon which plaintiff had subscribed the sum of £20 and to the whole spirit and intent of such subscription, the plaintiff immediately thereupon revoked his subscription by a letter dated 6th of September, 1850, addressed to the said *William Wakefield*, which letter was set forth in the bill, and which the plaintiff had hoped would be considered by the defendants as cancelling the said subscription, and in fact plaintiff believed they had so regarded it until he was recently served with process sued out of the Division Court for the recovery of the said subscription. The prayer of the bill was for an injunction to stay the action in the Division Court.

Statement.

The defendants answered the bill, setting forth, that before the resolution authorising the leasing of a

portion of the grounds attached to the church was rescinded, some one, without the authority of the vestry, prepared the said subscription list, and was presented by *William Wakefield* to the plaintiff and several other persons, but who, in doing so, acted only in his private and individual character and not as vestry clerk, and his object in procuring signatures thereto was to show the members of the church that it was unnecessary to lease the said land, and was so used at a meeting of the vestry held on the 25th of March, 1850; and the persons then present were influenced in deciding that the resolution for leasing should be rescinded, but no explanation was ever given to the defendants either by *Wakefield* or the plaintiff, of the subscription having been made upon the condition stated in the bill; but on the contrary, *Wakefield* at a subsequent meeting of the building committee, strenuously urged that the new church should be erected in a more central part of the ground than the position of the old one, in order, as he said, to prevent any attempt to lease any portion of the said ground, threatening to destroy the list of subscribers which he had procured unless his wishes were complied with, and finally prevailed upon the committee to accede to his views; and in their report they recommended such change of position to be made: and at a meeting of the vestry, held in the month of July, 1850, a resolution was passed adopting the said report.

Statement.

Numerous and lengthy affidavits were filed on both sides, but as they do not throw any new light upon the point in dispute, it is unnecessary to notice them further.

Mr. *A. Crooks*, for the plaintiff, now moved for an injunction in the terms of the prayer of the bill—citing *Davis* v. *Simmonds* (*a*), *Major* v. *Major* (*b*), and *Martin* v. *Pycroft* (*c*).

(*a*) 1 Cox, 402. (*b*) 1 Drew. 165. (*c*) 16 Jur. 1125.

1855.

Howard v. Harris

Mr. *Morphy*, contra.—The judge of the Division Court has power to give effect to any equitable defence that plaintiff may consider he has to the action there, and will no doubt do so if brought before him; besides, the statements are such as to render it doubtful whether or not the court will be acting properly in restraining the legal rights of the defendants.

Argument.

The judgment of the court was now given by—

April 19.

Judgment.

Esten, V. C.—We think the plaintiff not entitled to an injunction in this case. The ground of our decision is, that, even assuming Mr. *Wakefield* to have been the agent of the vestry, (and on any other supposition the plaintiff could not possibly have any claim), his authority must be measured by the terms of the written instrument in question, from which it appears that he was authorized to make a particular contract on behalf of the vestry; that the plaintiff engrafted two important terms upon this contract, not communicated to the vestry, while the contract in form pursued the authority, and thereby the vestry was misled to enter into contracts with third parties; that a loss must consequently fall on some one, and should in our judgment fall on that party who has dealt with the agent in a manner not within the scope of his authority without communication with the principal, while he has at the same time appeared to pursue the authority, and so has misled the principal to his prejudice. We do not wish unnecessarily to express any opinion as to whether it is necessary to resort to this court to restrain proceedings in the Division Court, prosecuted against equity and good conscience, or whether the Division Court itself has not full power and jurisdiction to do complete justice in such a case; nor do we find it necessary to decide whether in fact Mr. *Wakefield* was the agent of the vestry on the occasion alluded to, or whether he might not more properly be regarded as the agent of the parties with whom he

entered into the collateral stipulations, which have given rise to the present controversy. As to the words "Parish Church only" attached to the plaintiff's subscription, it is difficult to attach any precise or certain meaning to them: at all events, we think they conveyed no intimation of the actual stipulation entered into between the plaintiff and Mr. *Wakefield*, and therefore we lay them out of the case altogether. 1855. Heward v. Harris.

The injunction must be refused, with costs.

TOMLINSON v. HILL.

Dower—Wild land assessment.

A sale of land for taxes, under the Wild Lands Assessment Act, destroys the right of the widow of the owner to dower. June 13, and Sept. 24.

This was a bill of dower by the widow of a former owner of the premises out of which dower was claimed. It appeared from the pleadings and evidence that the defendant was the vendee of a party who had purchased, at the sheriff's sale of land for taxes, the premises in question. Statement.

Mr. *R. Cooper*, for plaintiff, referred to *Bright* on Husband and Wife, volume 1, page 387.

Mr. Morphy for defendant.

The judgment of the court was delivered by— Sept. 24.

THE CHANCELLOR.—This is a suit for dower. The property out of which dower is claimed was sold by the sheriff during the life-time of the plaintiff's husband, for arrears of taxes, and a conveyance was executed under the statute; and the only question is, whether the conveyance so executed is a bar to the plaintiff's claim. It is quite clear, I think, that the land tax is made a a charge upon the property itself, to the payment of which all persons having any interest in the land are Judgment.

1855. Tomlinson v. Hill.

bound to look; and it follows that a conveyance by the sheriff in pursuance of a sale for arrears of taxes operates as an extinguishment of every claim upon the land and confers a perfect title under the act of Parlialiament. This bill, therefore, must be dismissed with costs.

BABY v. THE MUNICIPAL COUNCILS OF KENT, ESSEX, AND LAMBTON.

Principal and surety.

Mar. 8, 9 & 10, and Nov. 13. 1854

The treasurer of the united counties of Kent, Essex and Lambton, having become defaulter, actions were commenced against him and his sureties respectively; afterwards, in consequence of a proposition from the treasurer, the warden, with the consent of the council, settled with the treasurer, and took his confession of judgment for £1,000, and a confession from one of his sureties for a like amount, being together equal to the amount of the defalcation then ascertained, and released the actions against them; the treasurer's second surety did not take any part in this arrangement. Afterwards a further defalcation was discovered, and thereupon the councils proceeded against the second surety of the treasurer, and obtained judgment against him for £1,000. Upon a bill filed to restrain that action the court granted a perpetual injunction for that purpose, although the warden and the attorney of the councils in the action at law swore that their rights as against the second surety were intended to have been reserved.

Statement.

This was a bill filed by *Charles Baby* against the Municipal Councils of *Kent*, and *Essex*, and *Lambton*, *William Gaspe Hall* and *Jean Baptiste Baby*, setting forth that by a bond dated 9th of October, 1846, the plaintiff and defendant *Hall* joined as sureties for the defendant *Baby* as treasurer of the then Western district, the plaintiff and *Hall* in £1,000 each, and defendant *Baby* in £2,000, conditioned for the due performance of his duty as such treasurer; that default was subsequently made by the treasurer, and *Hall*, plaintiff and the treasurer became liable to actions in respect thereof; and the defendants, the Municipal Councils, having become entitled to the bond under the statute 12 Vic., ch. 91. sec. 175, on the 30th of July, 1850, brought three several actions against the treasurer

and his sureties, since which time the counties of *Essex* and *Lambton* had by proclamation been set apart from the county of *Kent*; and that plaintiff had not any good defence to the said action.

That subsequently the Councils, believing that they would have difficulty in establishing the defalcations alleged against the treasurer, without the knowledge, consent, or concurrence of the plaintiff, and without any attempt to make him aware of their intention, agreed, verbally, or by some instrument in writing, though not under seal, to extend, and did extend to the treasurer and *Hall* the time for the payment of the full amount alleged to be recoverable by the Councils upon the bond until the 1st day of January, 1852, to the damage of the plaintiff, whose remedy over against the principal and *Hall* for repayment of, or contribution to, any amount he might have been compelled to pay under the bond was thereby postponed; that the consideration for such extension of time was the execution of cognovits by the treasurer and by *Hall* for £1,000 each. Statement.

That this arrangement was entered into in consequence of an application by one *Vidal*, acting as agent of *Hall* and the treasurer, to the Councils, offering these confessions; whereupon, by resolution of the Councils adopting the report of the finance committee, the warden was empowered "to take such legal steps as he might deem expedient against all parties implicated, for the collection of the debt; empowering him, however, at the same time, to complete the accompanying arrangement offered (that proposed by *Vidal*), or any other which he, in conjunction with the legal advisers of the counties, might think beneficial to the interests of the united counties;" under which authority the warden, in conjunction with *John Prince*, Esquire, the legal adviser of the counties engaged therein as well as in the actions brought by them at

1855.

Baby v. Mun. Coun.

law, entered into the arrangement already stated; after which, and on the 9th day of October, the plaintiff for the first time learned that the arrangement had been entered into by means of a letter addressed to him by said *Prince*, wherein he informed the plaintiff that "the arrangement come to last evening at *McDonell's* between him and the warden on behalf of the counties, and Mr. *Vidal* on behalf of Mr. *Jean Baptiste Baby* and *William Gaspe Hall*, was this: that Mr. *Jean Baptiste Baby* should give a cognovit for one thousand pounds (in full of all demands), payable the first day of January, one thousand eight hundred and fifty-two; and that *William Gaspe Hall* should do the same, and that the two actions against these gentlemen should be released. The above arrangement was carried out before the warden left, which he did last evening:" that the defendants pretended that these transactions did not discharge the plaintiff. The prayer was for a declaration that plaintiff was discharged, and an injunction to restrain the proceedings at law against the plaintiff. After the institution of this suit plaintiff gave a conditional confession of judgment in the action at law, reserving his right to prosecute this suit.

Statement.

The defendants the Counties answered, insisting that plaintiff was aware of and assented to the arrangement, and that the facts stated in the bill would, if true, afford the plaintiff a defence at law.

The cause having been put at issue as to the defendants, the Municipal Councils, evidence was taken before the court and under commission.

Mr. *McDonell*, the clerk of the counties and their attorney in the actions at law, stated that it was intended and agreed that *J. B. Baby* and *Hall* should each give confession of judgment for £1,000, and that proceedings should still be taken against the plaintiff, and releases were given to *Hall* and *J. B. Baby*; no other

writings were given; and that as far as he knew, the plaintiff was not aware of Mr. *Vidal's* proposition being carried out until informed of it by Mr. *Prince's* letter: the plaintiff was also examined by the defendants, and he swore that he knew nothing of the arrangement which had been entered into until after its completion. *George Hyde*, the warden of the counties, swore that it never was intended, by what was done, to discharge plaintiff, and that he had informed plaintiff, on the street, of the intended settlement. Mr. *Vidal* was also examined on behalf of the Councils, and in the course of his evidence swore, "an arrangement was agreed to between Mr. *Samuel McDonell*, on behalf of the Councils, and myself, on behalf of Messrs. *Hall* and *Jean Baptiste Baby*, that two cognovits should be given in full of all claims of the Councils against the treasurer; one of such cognovits to be given by *J. B. Baby* and *Hall* jointly; the other by *Charles Baby*. *Charles Baby* was no party to this arrangement, and when it was proposed to him he rejected it. The matters in question, between the Councils and the treasurer and *Hall*, were afterwards compromised, without *Charles Baby* being present. I fancy it must have been the intention of the Councils to release *Charles Baby*, because they gave up the bond of the treasurer and sureties, of whom *Charles Baby* was one." Mr. *Prince* was also examined; from his evidence it appeared he had been retained as counsel in the three actions at law against the treasurer and his sureties; that the settlement stated in the pleadings had been effected in the manner set forth; and that when he wrote the letter to the plaintiff his "impression was that the two cognovits then given by *Hall* and *Baby* settled all the claim of the Councils against *Jean Baptiste Baby* and his sureties. Sometime afterwards I stated that impression to Messrs. *Hyde*, the warden, and *McDonell*, in the presence of Mr. *Baby*, the above plaintiff." Several other witnesses were examined, but the evidence already stated shews the

1855.

Baby v. Mun. Coun.

Statement

1855.
Baby. v. Mun. Coun.

chief points proved, besides which it was shown that subsequent to the taking the confession from *Hall* and *J. Baby* further defalcations on the part of the treasurer were discovered, up to which time it was never intended to demand more than £2,000 in all from the treasurer and his sureties.

Mr. *R. Cooper*, for the plaintiff:—The release executed by the Warden discharging *Hall* and *Jean Baptiste Baby* did not reserve any right to proceed against *Charles Baby*. The evidence of *Hyde* and *McDonell* as to what they intended and thought would be the effect of this arrangement cannot prevail to control the legal effect of the written document; and if even the paper so executed had reserved such a right, it would still be doubtful if the surety would remain liable; besides, here the Councils obtained all they claimed. The subsequent discovery of further defalcations could not renew the liability of plaintiff. It is shewn that plaintiff was not present at the settlement with *Hall* and the treasurer; had he been so, there can be no doubt that he would have protested against the Councils' taking security for any sum less than the full amount of their claim; having obtained that and discharged the principal, they cannot be heard now to assert any claim against the plaintiff on the ground that a greater amount was in fact due, and which they could then have ascertained. He referred, amongst other cases, to *Cross* v. *Sprigg* (*a*), *Vyner* v. *Hopkins* (*b*), *Bonser* v. *Cox* (*c*), *Hodgson* v. *Hodgson* (*d*), *Dickson* v. *McPherson* (*e*).

Argument.

Mr. *Brough*, for the counties of *Essex* and *Lambton*. The plaintiff could have had the full benefit of these objections in the action at law, and he must be taken to have concurred in the arrangement entered

(*a*) 2 McN. & G. 113.
(*b*) 6 Beav. 110.
(*c*) 6 Jurist 889.
(*d*) 2 Keen 704.
(*e*) Ante vol. 3, page 189.

into with *Hall* and the treasurer: at law he could have pleaded time given to principal; therefore he had a good defence at law, if the facts were as he now states them to be, had he chosen to avail himself of it. The instrument produced is not in fact a release by the Councils, but merely an agreement to discharge the parties. 1855. [Baby v. Mun. Coun.

[The Chancellor.—In most of the cases it will be found that the discharge of the principal has been effected by executing a covenant not to sue; reserving the right to sue if the surety require it to be done. Here an absolute release has been given, or as you term it, an agreement to discharge. Under these circumstances I think, it will be found that the right to sue the surety is gone.]

It is clearly shewn that it was intended to reserve the rights of the Councils as against the plaintiff; it would now be inequitable to permit him to take advantage of a mere technicality. He referred to the Marquis of *Breadalbane* v. Marquis of *Chandos* (*a*), *Wason* v. *Wareiny* (*b*), *Mayhew* v. *Crickitt* (*c*), *Smith* v. *Winter* (*d*), *Heath* v. *Key* (*e*). Argument.

Mr. *Turner*, for the county of *Kent*.—The question now raised has already been decided by the court of Queen's Bench, in The Municipality of *Kent*, &c. v. *Baby* (*f*). The plaintiff cannot now come to this court—*White* and *Tudor's* Leading Cases, 365.

Mr. *Crickmore*, for the defendants *Hall* and *Baby*, submitted to be bound by decree of the court.

Mr. *R. Cooper*, in reply.—The case as reported in the Queen's Bench does not set forth the facts cor-

(*a*) 2 M. & C. 711.
(*b*) 15 Beav. 151.
(*c*) Swans, 185.
(*d*) 4 M. & W. 454.
(*e*) 1 Y. & J. 434.
(*f*) 9 U. C. Q. B. K. 34.

1855. rectly; the paper signed by the warden, it is shewn, did not reserve any right to sue. The judgment of that court was given, therefore, under a misconception of the facts of the case.

Baby v. Mun. Coun.

November 15 THE CHANCELLOR.—I have read over the pleadings and evidence in the case since the hearing, and am confirmed in the opinion which I then expressed.

It is clear that the plaintiff executed the bond upon which the defendants have recovered judgment at law as surety for the treasurer of the then County of Kent. That appears upon the face of the instrument. It is admitted that the action against the principal was compromised on the 8th Oct., 1850, when a confession of judgment was executed by him, payable fifteen months after date. And it is not denied that, *primâ facie*, the surety was thereby discharged.

Judgment. The case made by the answer is, that the steps taken by the defendants were sanctioned by the plaintiff. But that case fails wholly upon the evidence; and the only arguable point made at the hearing was, that the right to proceed against the plaintiff was reserved by the defendants, and formed a part of the compromise. It is unnecessary to consider whether that defence is open under the pleadings, because we have considered all the evidence; and it is better to dispose of the case upon the merits, and not upon a technical objection of that sort.

The solicitors engaged in effecting this compromise differ widely in their accounts of what passed. The attorney for the defendants asserts that their right to proceed against the plaintiff was expressly and distinctly reserved. But that is positively denied by the attorney for the other parties. They differ *toto cœlo*. It becomes necessary, therefore, to weigh the respective statements, and consider them in connection with the other evidence.

1855.

Baby v. Mun. Coun.

There is no improbability in *Vidal's* account. It is clear that the defendants were willing to compromise their claims against all parties at £2,000, and that they offered to accept a confession of judgment from the principal debtor and his co-surety, *Hall*, for one-half the amount, and from the plaintiff for the other half. It is also clear that the plaintiff refused to accede to that arrangement, because a judgment had been recovered against him already as the surety for the deputy-treasurer, for £1,000, part of that very defalcation, and he insisted that his liability ought not to be extended beyond that amount. In that state of things *Vidal* proposed that the defendants should accept a confession of judgment from the principal debtor for £1,000, and should take an assignment of the judgment already obtained against the plaintiff for the remaining thousand, reserving a right, if they chose, to proceed with their action against the plaintiff; that would have been a very favorable arrangement for the co-surety, *Hall*, *Mr. Vidal's* client, for he would have been released thereby from all liability; but beyond all doubt, it was not adopted. The defendants confessedly insisted upon having a confession of judgment from *Hall* for half the debt. The proposal was, that the defendants should accept a confession of judgment from the principal debtor for £1000, reserving a right to proceed against the plaintiff, but relinquishing all claim against *Hall*. That was rejected. According to the actual arrangement the other half of the debt was secured by *Hall*, and the defendants were collaterally secured by the judgment for £1,000 already recovered against the plaintiff. *Mr. Vidal* represents that as a final arrangement. His allegation is, that there was no reservation of the right to proceed against the plaintiff; and I must confess that his statement is, in my opinion, much more probable than the one advanced by the other side. The arrangement, as represented by him, approaches closely to the one which the defendants had already expressed their willingness to adopt.

Judgment.

1855.

Baby v. Mun. Coun.

Looking at the other testimony, it is material that *Hyde*, then the warden of the Municipal Council, and the agent by whom this compromise was effected, does not confirm the account of the matter given by Mr. *McDonell*. He swears indeed that the Councils never intended to relinquish their right to sue the plaintiff. But that is not enough. The right must have been reserved; and he nowhere alleges that that was done.

Then, *Whyte*, who was present on the occasion, and who had been employed by the defendants in investigating the treasurer's accounts, differs from *Mr. McDonell*, and confirms the evidence of *Vidal* and *Prince* in several important particulars.

But *Mr. Bullock*, who was at that time treasurer of the county, and who was also present, confirms *McDonell*. He says, "*Colonel Prince* gave instructions as to the mode of drawing out the papers, releasing *Hall* and *D. Baby, and he directed them to be drawn so as not to discharge Charles Baby, (the plaintiff) but to express that the suits were to proceed against him.*"

Judgment.

Now *Mr. Prince* attended this meeting as counsel for the defendants. Both *McDonell*, the attorney, and *Hyde*, the warden, acted under his instructions; and looking at the state of the evidence, his testimony becomes of vital importance. But Mr. *Prince*, so far from confirming *Bullock's* statement, swears that he considered the arrangement of the 8th October as final, and that the plaintiff was thereby discharged. But, what is much more material than the present recollection of any of the witnesses, we have the letter of Mr. *Prince*, written to the plaintiff on the day after the compromise, congratulating him that the whole matter was at an end. That Mr. *Prince* should have forgotten, at the time of the examination, all the circumstances stated by Mr. *Bullock*, is not

probable; still it is possible; but that he should have written that letter at the moment is impossible, except upon an hypothesis, which the defendants do not suggest; and it furnishes, in my opinion, a conclusive answer to the defence set up. A decree in favor of the defendants, in the face of such evidence, coming from their own agent, would be without precedent. 1855. Baby v. Mun. Coun.

But Mr. *Prince's* evidence is materially confirmed and the plaintiff's case greatly strengthened, by the fact that the instruments executed by these parties contain no such stipulation as that spoken of by Mr. *Bullock*. The right to proceed against the surety is not reserved. It was argued, indeed, that the contract between the parties must be gathered from the instrument, and that parol evidence could not be received to vary them. That argument is certainly entitled to great weight (*a*), but it is not necessary to determine the point; for, assuming those documents not to amount to formal releases, which appears to have been the opinion of the court of Queen's Bench (*b*), and assuming parol evidence to be admissible, still they constitute at least a written memorandum of the terms of compromise, signed by the agent of the defendants. Now, it will not be denied, I apprehend, that documents of that sort would constitute important evidence, under any circumstances; but in a case circumstanced like the present, where the parol evidence is so conflicting, they must be regarded, I think, as conclusive between the parties. Judgment.

For these reasons I am of opinion that the plaintiff is entitled to a decree with costs.

ESTEN, V. C.,—I think a mutual understanding that the remedy against the plaintiff should be reserved, cannot be intended in the face of the evidence of

(*a*) Ex parte Clendinning, Buck. 517; Wyke v. Rogers, 1 De G. M. & G. 408.
(*b*) 9 U. C. Reports, 34.

1855. Baby v. Mun. Coun.

Prince and *Vidal*, and therefore that the plaintiff was discharged by the effect of the arrangement between the counties and *J. B. Baby* and *Hall*.

The plaintiff is therefore entitled to a perpetual injunction, restraining the action commenced against him, and I think the decree should be with costs.

SPRAGGE, V. C., concurred.*

Rev. on appeal 7 Gr. 276

GRAY v. SPRINGER.

Specific performance.

March 17th and October 15th. 1854.

The parties to an agreement differed as to its proper construction on one point, which the plaintiff at first refused to give up, and the defendant in consequence treated the agreement as at an end: the court thought there was some ground for the claim set up by the plaintiff though he had subsequently abandoned it, and, under the circumstances, decreed a specific performance of the agreement; but without costs. [The Chancellor dissenting.]

Statement.

The bill in this cause was filed by *Thomas Gray* against *Oliver Springer*, and stated that by an agreement, dated the eighteenth day of August, 1853, signed by the defendant, the defendant contracted to lease to plaintiff certain freehold property in the city of Hamilton, therein described or referred to, for three respective terms of five years each, for the sum of £2 10*s*. a year per foot frontage on King-street, for the first term of five years; £3 per foot for the second term of five years, and £3 10*s*. per foot for the third term: that plaintiff had applied to the defendant specifically to perform the said agreement on his part,

---

* NOTE—In Price v. Barker (24 L. J. N. S. Q. B. 130), reported since the decision in this case, the obligees in a bond of suretyship released the principal, but stipulated that such release should not operate to discharge any of the sureties in the bond. In a suit subsequently brought against one of the sureties, the court held this release operated only as a covenant not to sue.

but that he had not done so; and prayed for a specific performance of the agreement. 1855.

Gray. v. Springer.

The following is a copy of the agreement entered into between the parties:—

"*Hamilton, August 18th*, 1853.

"Memorandum of agreement made between *Oliver Springer* and *Thomas Gray*.

"*Springer* agrees to lease to *Gray* the vacant corner on King and MacNab-streets on the following terms:

"First. The frontage on King-street shall extend to the centre of the hall in the building now in course of erection by *Springer*, which shall be a common hall to both the adjoining buildings.

"Second. The first term shall be five years, to be dated and commenced from the day of the execution of the lease, at £2 10*s.* per year per foot on King-street, payable quarterly, with the right to *Gray* to demand a new lease for another five years at £3 per foot, with the right to *Gray* to demand another new lease for another five years at £3 10*s.* per foot, each lease subsequent to the first to contain privileges as extensive as those in the first: taxes to be paid by *Gray*.

"Third. That if *Gray* shall choose not to ask for a new lease at the expiration of the first or second term, *Springer* shall pay him the value of all buildings and improvements made by *Gray*, according to a valuation to be made by parties to be chosen. Statement.

"Fourth. *Gray* shall build in a style to correspond with the shop which *Springer* is now erecting, with brick, having front on MacNab-street. The building to extend back to the alley, 64 feet, and one-half of party wall to be paid by *Gray*.

"Fifth. All buildings erected and all improvements made by *Gray* are to be paid for by *Springer*, at a valuation, on the expiration of the third term of five years.

"Sixth. Leases in duplicate, containing the usual powers and covenants and embodying this agreement, shall be prepared by *Springer*, who shall bear one-half of the expense thereof.

"Seventh. This agreement is entirely conditional on

1855.

Gray v. Springer.

Springer showing to the satisfaction of *Gray* that he has a good unincumbered fee simple in the premises, with a right to give these leases; or, in the event of his not being able to do this, then a condition that *Springer* indemnify *Gray* to the satisfaction of *Gray* against all claims and damage to arise therefrom.

"Eighth. On *Gray* continuing the wall in rear beyond that in course of erection by *Springer* to the alley, *Springer* is to give *Gray* the use of a privy on the adjoining premises. In the event of *Springer* extending his wall and using any wall erected by *Gray*, he shall pay *Gray* one-half the value thereof.

"Ninth. The lease shall be ready, executed by *Springer* and tendered for acceptance to *Gray*, within one month from this date; and time shall, at the option of *Gray*, be of the essence of the contract, so far as this clause is concerned.

"Tenth. The lease, although mentioned above to be given by *Oliver Springer*, may be given by his father, *David R. Springer*, if he have the title.

"(Signed) O. SPRINGER,
THOMAS GRAY."

Statement

The defendant, by his answer, objected that the agreement was too vague and uncertain to decree specific performance thereof: that a proper lease of the premises had been executed and tendered to the plaintiff, which he had refused, and thereby disentitled himself to any relief: that the lease had been settled by a professional gentleman on behalf of the plaintiff and defendant, except a trifling difference in the amount of rent in consequence of the plaintiff insisting on a deduction for one-half of the breadth of a certain wall mentioned in the agreement, and which was on his side of the hall in the agreement also mentioned, which question was submitted to the architects of the building intended to be erected on the premises in question, and they decided against the plaintiff: that on the rejection of the lease tendered to plaintiff, the father of the defendant, who was the owner of the property, relying on the agreement with plaintiff being at an end,

1855.

Gray v. Springer.

determined to build on the land himself, and entered into contracts for the purpose with the builders who were then building on the adjoining property for the defendant: that the buildings were immediately commenced and a large sum expended before plaintiff took any steps to enforce his agreement; and submitted that if a decree were made in favor of plaintiff, it should only be on terms of plaintiff paying for the expenditure that had taken place on the property and making all other just allowances.

Mr. *Morphy* and Mr. *Barrett* for plaintiff.

Mr. *Mowat* for defendant.

October 15th

Judgment.

THE CHANCELLOR.—This suit is for the specific performance of a contract for a building lease in the city of Hamilton. The contract is in writing, and bears date the 18th of August, 1853. It provides, amongst other things, that the term shou.. commence from the day of the execution of the lease, which was to be prepared by *Springer*, the lessor, and tendered for acceptance within one month from the date of the contract; and, as to the clause of which I am speaking, time was to be of the essence of the contract, at the option of *Gray*. Differences arose subsequently as to the construction of the agreement, in consequence of which *Springer* broke off the negotiations respecting the lease, and *Gray* thereupon filed his bill for specific performance.

I find it difficult to arrive at any conclusion in this case quite satisfactory to my own mind, because here, as in most cases of specific performance in this country, the negotiations have been so loosely conducted that it is impossible to obtain a correct narrative of the transaction. Frequently professional men are not employed at all; and when they are employed, matters are managed with so little attention to business-like regu-

1855.

Gray v. Springer.

larity that the court, when difficulty supervenes, instead of finding a clear and connected narrative of events in the correspondence and statements of the professional agents, is left to grope its way to some probable conclusion from a mass of facts without sequence or coherence.

In the present case it is clear that the defendant prepared a draft lease in accordance with the contract; that it was submitted to the plaintiff for approval on the 23rd of August, and that it found its way, shortly afterwards, into the hands of Mr. *Leggo*, his professional adviser. So far is clear, but all the subsequent steps of the transaction are involved in obscurity.

On the 30th of August a lease, prepared in duplicate, and executed by the lessor, was tendered to the plaintiff for acceptance; this lease the plaintiff, on the same day, declined to execute, on the general ground that it differed from the contract *in many particulars*, without specifying any; and one difficulty in the case is to determine the real ground on which the parties then differed. The defendant alleges that the lease tendered was an exact copy of the draft of the 23rd of August, as settled by Mr. *Leggo*. Mr. *Leggo*, on the other hand, swears that he never did settle the draft lease; that the alterations in it, and the additions to it, which are in his handwriting, embrace but a part of his objections; and that if the defendant had acquiesced in them he would have still insisted upon the other grounds of objection. Now, had the draft lease been accompanied, as it should have been, with a detailed statement of all the plaintiff's objections, the difficulty of which I am speaking never could have arisen.

Judgment.

That question must now be considered as set at rest, because the learned counsel for the plaintiff, Mr. *Morphy*, admitted very fairly at the close of the argument that the real and only difference between

1855.

Gray v. Springer

the parties was as to the rent of a small portion, about six or nine inches of land, being one-half the space on which the party wall had been erected. That admission was very properly made, because it is clear from the evidence of *David Springer*, of *Clarke*, and indeed of Mr. *Leggo* himself, that the fact was so. That is the only substantial respect in which the lease prepared by the plaintiff differed from that prepared by the defendant.

It is established, then, that the parties differed on the 30th of August as to the rent of these few inches of land, and that but for such difference the contract would have been then completed. Now there is no room for doubt as to that point upon the agreement. The language is express. It subjects the defendant to rent at so much per foot from the corner of MacNab street to the middle of the common hall, which includes the space in question. Indeed, this can hardly be considered a matter of controversy; for Mr. *Leggo*, in his evidence, admits that he is unable to suggest any other construction; and, upon the argument, Mr. *Morphy* admitted that to be the true construction of the agreement. That was not, in my opinion, an inequitable arrangement, under the circumstances; but, however that may be, it was clearly the agreement of the parties.

Judgment.

Within a week from the 30th of August, as I gather, another interview took place, which is very important, in my view of the case. At that date Mr. *Leggo* had withdrawn from the negotiation; to adopt the language of his evidence, he had given up the attempt to obtain a proper lease, and told the plaintiff to settle it with the defendant. We have no other account, therefore, of the occurrences which took place at the interview in question except that furnished by *David Springer*. He alleges that the plaintiff contended very strongly, on that occasion, for an abatement of the rent to the

1855.

Gray v. Springer.

extent of one-half of the party wall, arguing that if the defendant persisted in claiming the whole rent, he, the plaintiff would insist on his rights under the contract, according to which he might block up half of the common hall, break down into the cellar underneath, and build from the centre to the rear of the lot. He alleges that the plaintiff declared that he never would execute a lease binding him to pay rent for more than half the party wall, upon which the witness affirmed that he should never have a lease upon any other terms, and thereupon they parted.

The rights which the plaintiff claimed on the occasion as belonging to him under the agreement are pretty much those claimed by his solicitor on the former interview. Mr. *Leggo* says, "Another matter of dispute was this, defendant claimed that although the plaintiff was to pay for half the frontage, yet after running back through the centre of the hall to the back of the building, he was not entitled to half the rear of the lot. I contended that he was entitled to half of the whole lot." And, again: "amongst the objections I then made, I said that the plaintiff objected to include the portion of the hall and the wall by the side of it in the frontage for which rent was to be charged." Now it is perfectly clear, in my opinion, that there was no pretence, either in the agreement or the evidence, for the claims advanced by the plaintiff. They are equally opposed to the letter of the agreement and the understanding of the parties.

Judgment.

Nothing further took place between the parties until the 19th of September, when the plaintiff caused a lease to be tendered to the defendant for execution. As I have already said, the lease so tendered by the plaintiff agrees in most respects with the one which had been tendered by the defendant; but it leaves the rent an open question, and it countenances, at least, the rights claimed by the plaintiff. That lease the defend-

ant, on his part, refused to execute; and it is admitted that the plaintiff never offered, either then or at any other period, to accept a lease in accordance with what is now admitted to be the true construction of the agreement.

1855.
Gray v. Springer.

The bill was filed on the 22nd of September; but previous to that time the defendant had commenced to build on the property in question, and when the case was brought to a hearing, on the 17th of March in the present year, a valuable building had been either completely finished or was nearly so.

Now, I am of opinion that the plaintiff is not entitled under such circumstances to a decree for specific performance. The contract was for a building lease, the house to be in accordance with the plans of the lessor, the term and the rent to commence from the day of the execution of the lease. On the 30th of August the defendant executed and tendered a lease in exact accordance with the agreement. I say in exact accordance, because it was accepted as such, except as to the rent of the party wall, as to which the defendant was clearly right. But the plaintiff insisted then on something which was not warranted by the agreement, and refused to accept any lease unless this was conceded. On his subsequent interview with *David Springer* he insisted upon his previous demand, and deliberately refused to carry out the agreement upon what is now admitted to be its true construction; and the form in which the lease tendered on the 19th of September was prepared, must be regarded as a reiteration of both propositions. Indeed the plaintiff appears to have insisted upon this right up to the moment that his case was brought to a hearing. Now, in pursuing this course, he disentitled himself, in my opinion, to a decree for specific performance. He comes here demanding something beyond his legal rights: insisting that the conscience of the defendant is bound to a literal

Judgment

1855.

Gray v. Springer.

performance of this contract. But the specific execution of the agreement, which he asks us to decree against the defendant, is the very thing which he himself deliberately refused to perform; and having deliberately refused to perform the agreement according to its plain meaning, there is no foundation on which a decree for specific execution would rest. Such a decree would subvert the principle upon which the whole foundation of this equity is founded. The defendant was entitled, in my opinion, to treat the contract as at an end, and to deal with the property as his own, without waiting the result of this suit; and, having done so, it follows, in my opinion, that this bill must be dismissed.

Judgment.

ESTEN, V. C.—My view of this case is, that the plaintiff has never receded from the agreement or desired to repudiate it; but, on the contrary, has always been anxious for its fulfilment. He certainly for some time refused to accept a lease binding him to pay rent for the half wall in question, but this was because he thought it unjust and that the point had been decided in his favor by *Clarke*, which I think it probably was. Under these circumstances *David Springer*, after the interview with *Clarke*, executes the lease and returns home; but learning that the plaintiff objected to it, he has another interview with the plaintiff, which terminates by the plaintiff saying that he would never pay rent for the half wall, and by *Springer* saying that he should never have the lease otherwise, which implied that he might still have it upon the terms. The contract thus remained open; and within a reasonable time, and before *Springer* had put an end to it, the plaintiff set himself right by tendering a lease, which, although perhaps not exactly correct in all respects, surrendered the whole matter in dispute. *Springer*, on the other hand, did not act with that ordinary prudence which would have dictated that, before he took any decided steps, he should at least give the

plaintiff notice that unless he executed the lease within a week, or some other reasonable time, he should consider that contract as at an end, and proceed to build. The plaintiff's proceedings were extremely prompt. As soon as *Springer* began to make the excavation for the foundation, he tendered a lease, and the bill was filed before the cellar was begun. I think the plaintiff prepared his lease as conformably as possible to the defendant's views, and more so than he himself thought was right, for the sake of peace, and thereby shewed a great desire to bring the matter to an amicable termination. 1855. Gray v. Springer.

The lease which the defendant tendered was not such as the plaintiff was bound to execute, but he accompanied his rejection of it with an intimation that he was ready to execute a proper lease, and would indeed file a bill to compel its execution. I think there should be a decree for the plaintiff, but without costs, as his conduct led to, without excusing, the difficulty which occasioned the suit. The plaintiff, I understand, is willing to pay the expense of erecting the buildings which the defendant was to build; in fact, to adopt them; otherwise there might be a difficulty in giving him relief, as he should have applied in time to restrain the erection of buildings which he intended to repudiate. Judgment.

SPRAGGE, V. C.—I do not think that the plaintiff has disentitled himself to a specific performance of the agreement for lease referred to in the pleadings.

I have no doubt, upon the evidence, that he was always willing and desirous to complete the agreement; and that no bad faith is imputable to him in the transaction.

The lease which the defendant prepared contained provisions not to be found in the agreement, and which are not matters of course in such a lease, and was one

1855.

Gray v. Springer.

which the plaintiff was not bound to execute: whether he would have executed it if his views on the subject of the party-wall had been acceded to by the defendant, is another question. I think it not improbable that he would; but, finding the defendant insisting upon the very letter of the agreement upon one point, he was unwilling to enter into stipulations beneficial to the defendant which under the lease he was not bound to do: and I understand his allusions to other points not in the lease to have been in the same spirit, amounting in effect to this: that if the defendant took advantage of one unreasonable provision not understood or intended by the plaintiff, he, the plaintiff, might, on his part, take advantage of other matters left open to him by the agreement: using those matters as a weapon to drive the defendant from what he considered his unreasonable position in respect to the half party-wall.

Judgment.

As to the reference to *Clarke*, I think the plaintiff understood that it was to be left to *Clarke* to say what was reasonable and just between the parties: not the mere construction of the agreement upon this point; and *Clarke* himself, unless his memory entirely fails him, thought so too. The fact of the plaintiff going away angry does not negative this, as it appears to me; for his anger may have been not at *Clarke's* decision, which, as *Clarke* understood the reference, was in the plaintiff's favor, but at the defendant's or his father's insisting upon the *construction* of the agreement only having been referred to *Clarke*. *David Springer*, the father, is the only person who insists that the construction only was referred. The defendant's answer does not, but rather intimates that the general question raised by the plaintiff was the question referred; and I should say that the question being referred to an architect, whose profession would enable him to say what was usual in most cases, it was left to him generally. Each one, however, appears to have considered the decision of *Clarke* to be in his own favor, and each one, I think, then, acted unreasonably.

1855.

Gray v. Springer

It was a very small matter to quarrel about, and temper and some obstinacy probably existed on both sides. I cannot say, however, that the plaintiff insisted upon more than what he conceived to be his rights, and what he was advised were his rights by the professional gentleman under whose advice he acted. I do not think that his tendering a lease afterwards, conceding most of the points upon which he had insisted, is a circumstance against him, as he did it, as it is sworn, for the sake of peace.

Judgment.

The defendant, in his answer, submits that the agreement is in many respects too vague and uncertain in its terms to be decreed to be specifically performed. This seems strange in the mouth of a member of the legal profession, by whom the agreement thus characterized was drawn, and who professed to have carried it out by an instrument which the other party to the agreement was bound to execute. I think it is not too vague and uncertain, and that the plaintiff has not shewn sufficient ground against its being specifically performed. I think the defendant was hasty in commencing to build himself, but I understand that the plaintiff offers to reimburse him the cost of the building, so far as it has proceeded; so that there will be no hardship (not even a hardship brought upon himself) in confirming the agreement.

McMaster v. Phipps.

Registry Act—Equitable liens.

Dec. 11, 1854, and Feb. 12, 1855.

The recent Registry Act, 13 & 14 Vic. ch. 63, has not made any change in the rights of equitable incumbrancers.

A deed of trust was executed by a debtor, and by a mistake in setting out the metes and bounds, a portion of the property intended to be conveyed was omitted; subsequently to which a creditor obtained and registered a judgment against the debtor:

Held, that the assignees in trust were entitled to have the mistake rectified, and that the lien of the judgment creditor did not attach upon the land.

The plaintiffs in this case were *William McMaster*, *Robert James* the younger, and *James Mitchell*,

1855.

McMaster v. Phipps.

assignees of *William A. Clarke*, who, and one *William B. Phipps*, were made defendants to the suit.

Statement.

The bill set forth that *Clarke* having become involved, had executed a conveyance of all his estate to the plaintiffs in trust for the benefit of his creditors, many of whom had executed the deed; that in copying the metes and bounds of one piece of property so intended to be conveyed by *Clarke*, a mistake had been made of one hundred feet in width and running the whole depth of the lot, which was situated on Yonge Street, close to the city of Toronto, and consequently the same did not pass under the trust deed: that the plaintiffs had sold this property at auction, and the purchaser upon investigating the title discovered the omission, when the attention of the plaintiffs was for the first time drawn thereto, who thereupon pointed out the error to *Clarke*, and obtained from him and his wife a conveyance thereof to them upon trusts similar to those declared in the original assignment to them.

The bill further stated that *Phipps* had, between the time of executing the first and second deed of trust, obtained judgment at law against *Clarke* and duly registered the same, and *Phipps* insisted that thereby a lien or charge was created upon the portion of land so omitted.

That the purchaser refused to complete the purchase until the land was released from this judgment of *Phipps:* that the plaintiffs had applied to *Phipps* to release this property from his judgment, but which request *Phipps* refused to comply with.

The prayer of the bill was that it might be declared that the said judgment was not under the circumstances any lien upon the land and premises, and that *Phipps* might be ordered to release and discharge the same from his judgment.

1855.

McMaster v. Phipps.

Phipps answered the bill, admitting the principal facts to be as stated in the bill. It was shewn that several of *Clarke's* creditors had executed the trust deed before *Phipps* had obtained his judgment.

Mr. *Hagarty*, Q. C., for plaintiffs, now moved, under the orders of 1853, for a decree directing the deed of trust from *Clarke* to the plaintiffs to be rectified by introducing the proper metes and bounds.

Mr. *Strong*, for defendant *Clarke*, submitted to such decree as the court might think the plaintiffs entitled to.

The defendant *Phipps* in person.

February 12.

Judgment.

THE CHANCELLOR—It is established beyond doubt that a portion of the property intended to have been conveyed, and which should have been included in the conveyance, was omitted by mistake, and it follows that the plaintiffs are entitled to have this mistake corrected as against *Clarke* the grantor. That portion of the estate which was omitted from the conveyance by mistake belongs to them in the eye of this court, and they are entitled to call for a conveyance. The defendant does not contest that proposition, but he contends that under the provisions of the 13th & 14th Vic. ch. 63, the plaintiffs' equitable title cannot prevail against his registered judgment.

That opens several questions upon the construction of the Registry Act, which has not received as yet, so far as I am aware, any judicial interpretation. The first difficulty which naturally presents itself is to determine whether the statute applies to any instrument other than "deeds and conveyances," properly so called; because if it be clear that the statute does not embrace instruments by which estates are affected in equity only, it would seem to follow, that it cannot

1855.

McMaster v. Phipps.

apply to the present case. A similar question arose upon the construction of the Irish Registry Act (*a*), and Lord *Redesdale* determined that all instruments by which lands were affected in any way whatever were within that act. It may be doubted perhaps, whether Lord *Redesdale* meant to determine more than that the statute embraced all *conveyances*, not only regular legal conveyances, but such as affected the equitable interest only. But his language is much more extensive. He says (*b*): "I think therefore it must be understood from that clause to have been the intention of the legislature *that in whatever manner lands could be affected by any instrument*, that instrument must be brought upon the registry to give it effect against a subsequent *deed* duly registered;" and again, "the intention was to make priority of registry the criterion of title, to all intents and purposes whatsoever." Lord *Redesdale* meant to determine, I think, that the Irish statute included contracts and other instruments not coming within the designation "deeds and conveyances."

Judgment.

It is true that Sir *Edward Sugden* speaks doubtingly of Lord *Redesdale's* decisions upon the subject; but they have been sustained: and, without relying on the great learning and ability of the learned judge by whom they were decided, it is admitted the reasoning on which his lordship proceeded is of great cogency; and I am inclined to think that if the matter were *res integra* it ought to prevail. Then, assuming Lord *Redesdale's* decisions on the Irish statute to be sound, they seem to me to govern the present case. The expressions in both statutes are the same, "deeds and conveyances," and in that under our consideration there are the words "whereby any lands &c. in Upper Canada may be in any wise affected *in law or equity*," which are not to be found in the Irish statute; and,

(*a*) 6 Ann. 92.
(*b*) Latouche v. Lord Dunsany, 1 S. & L. 158,

apart from the particular expressions used, the argument from general intention appears to me to be much stronger in the present case than upon the Irish statute. 1855. McMaster v. Phipps.

Assuming that to be the true construction, it follows necessarily, that in cases affected by the Registry Act the legislature must have intended to deprive purchasers for value without notice of that protection which equity was in the habit of affording them. Previous to the statute a purchaser for value, with the legal estate, could not have been affected by a contract of which he had not notice. A plea of purchase for valuable consideration without notice would have been a complete bar. But if contracts be within the act, that is no longer true; a registered contract would prevail, whether the purchaser have or have not notice (*a*).

Taking that to be the true construction of the act, it is said to follow, *a fortiori*, that a registered deed must prevail over equitable interests of whatever nature, unless brought in some way or other upon the registry. That proposition, if true, would put an end to the doctrine of this court, that notice of a prior equity is equivalent to registration, and that in such a case, consequently, priority of registration is of no avail. But that conclusion cannot, I think, be maintained. The doctrine to which I refer had been long recognized as the established rule of the court, and if the legislature had intended to interfere with it, I have no doubt that an express provision to that effect would have been found in that statute. But the statute contains no such provision, probably because the legislature felt the force of Lord *Redesdale's* observation, who, speaking of the Irish statute, said, "this does not exclude anything which affects the conscience of the party himself, who claims under the registered deed; *it never was the intention of the legislature to give a priority of right* Judgment.

(*a*) Drew v. Earl Norbury, 3 J. & L. 267.

1855. McMaster v. Phipps.

to commit a fraud." I take it to be as clear therefore, since this statute passed as it was before, that actual notice is equivalent to registration.

What effect has this statute, then, upon equitable rights which have not been created by deeds, conveyances, or written instruments of any sort, but which arise upon parol agreements, or grow out of the conduct of the parties? what is its effect upon parol contracts partly performed? or upon that species of resulting, trust where land has been purchased with the money of one and the conveyance taken in the name of another? or upon that large class of cases where deeds are set aside by this court for fraud, or for undue influence, or upon grounds of public policy as between guardian and ward, attorney and client, &c? It is quite obvious that the statute has no application to such cases. It settles the priority between conflicting deeds or instruments, (if that be the correct construction), which admit of registration; but it does not affect to deal with equitable rights which do not arise upon any deed or written instrument, and as to which, therefore, the provisions of the registry laws are wholly inapplicable. The language and scope of the act shew that equities of this sort were not in the contemplation of the legislature: and indeed, as to them, legislative interference was wholly unnecessary, for a purchaser for value without notice was always protected, and I have already shewn that a purchase with notice is not within the act at all.

Judgment.

The provisions of the statute in relation to purchasers being such, its effect upon judgment creditors remains to be considered. Previous to the statute purchasers and judgment creditors stood upon an entirely different footing. A purchaser without notice having the legal estate was always protected; but a judgment creditor was in an entirely different position. A judgment creditor does not contract for any particular estate, or

1855.

McMaster v. Phipps.

even for a lien upon any particular estate; and therefore a plea of purchase for valuable consideration without notice would have been utterly repugnant to the nature of his interest. He had indeed, in virtue of his judgment, a general lien, or *quasi* lien, upon the estate of his debtor. But that lien was confined, and in reason it should have been confined, to property in which the debtor had the beneficial as well as the legal interest. To have permitted a judgment creditor to fasten upon property because the legal interest was in the debtor, although in substance it belonged to another, would have been contrary to the plainest principles of justice; this court held therefore that the judgment attached only upon the beneficial interest of the debtor, and was in the constant habit of protecting equitable rights, in opposition to the legal claims of the judgment creditor. Now it must be admitted that this state of the law has been altered to a considerable extent by the recent statute. For some purpose judgments are treated as conveyances, and when registered deeds and judgments come into competition the legislature have declared that they are to take effect according to the date of registration; and an unregistered conveyance is void against a subsequent registered judgment. If that be the effect of the statute, and I am inclined to think it is, then it goes much beyond the English act from which it was borrowed, and its provisions seem hardly consistent with principles of natural justice, for it enables a judgment creditor to realize his debt from property in which the debtor has no beneficial interest. Still, whatever may be our view as to the policy of the act, it is our duty of course to give effect to its provisions. But there is nothing in the act which places a judgment creditor on the same footing for all purposes as a purchaser. It is true indeed that in cases coming within the operation of the act an effect has been given to registration which was previously unknown; but there is nothing in the act which entitles a judgment creditor, in cases unaffected by the registry law, to the rights of

Judgment.

1855.

McMaster v. Phipps.

a purchaser for value without notice. In such cases a judgment has no greater effect since the statute than it had before. It attaches upon the beneficial interest of the debtor, and upon that only, and does not displace existing equities.

But if that were otherwise; if it could be shewn that upon the proper construction of the act a judgment creditor stands for all purposes in the position of a purchaser; still it will not be contended, I suppose, that he stands in a better position. Now I have shown that a purchaser with notice of an existing equity takes subject to it, and a judgment creditor cannot claim to be regarded with more favour than a purchaser. Assuming the construction for which the defendant contends therefore, he would have been bound to shew that at the time he recovered his judgment he had no notice of the plaintiffs' equity. But no such case is set up. It is admitted, on the contrary, that the defendant at that time had full notice of the plaintiffs' rights.

Judgment.

Upon the whole, my opinion is, that the case is not within the Registry Act. Upon the execution of the conveyance under which the plaintiffs claim, they acquired the whole beneficial interest in the estate, and as to that portion the legal estate in which remained vested in *Clarke*, he was a trustee for them, and they are entitled, therefore, to be protected from the entering judgment (*a*). But in any view of the act, they are entitled to prevail, as it seems to me, against the present defendant.

Esten, V. C.—The question arises in this case, whether the registered judgment of the defendant should not prevail over the equitable claim of the plaintiffs. This depends upon two other questions—first, whether the Registry Act by implication extin-

(*a*) Langton v. Horton, ubi sup.; Taylor v. Wheeler, Ver. 564; Burgh v. Francis, 3 Swan. 536 *n*; 2 Sug. V. & P. 1023 & 1134.

guishes equities of this description as against a registered deed or judgment; second, whether the Registry Act elevates a judgment creditor abstractedly to the position of a purchaser for valuable consideration, having equal equity with a specific purchaser or incumbrancer. I think both of these questions should be answered in the negative. First, I think that equities of this nature are not extinguished by implication (they are certainly not expressly avoided) as against a registered title by the Registry Act, and that the case of equitable mortgages is only mentioned *exempli gratia*; and, second, that the character of a judgment creditor is not essentially altered by the operation of the Registry Act as a purchaser. He is still a general incumbrancer, not having equal equity with a specific claimant.

These two principles exclude *Mr. Phipps* in this instance. The right of the plaintiffs was not affected by the Registry Act, and the only defence that *Mr. Phipps* could raise against it was, that he was a purchaser for valuable consideration without notice. But a judgment creditor, we have seen, cannot avail himself of this defence against a purchaser of the particular estate, (as I think the plaintiffs in this case are,) not having equal equity with him. The result is, that the claim of the plaintiffs must prevail, if the facts warrant it. On this point it cannot be doubted, I think, that the parcel of land in question was omitted from the deed by mistake, and that the deed ought to be rectified in that respect in favor of all creditors who became parties to it within the time limited, or before the registration of the judgment.

Judgment.

SPRAGGE, V. C.—I think that the plaintiffs are entitled to have their deed reformed as prayed by their bill, upon these grounds: that they are purchasers for valuable consideration of certain lands which it was intended by the vendor as well as by themselves

1855.

McMaster v. Phipps.

should be conveyed to them; that by a mistake in the description inserted in the conveyance a certain portion of these lands did not pass by the conveyance, and the plaintiffs have an equity to have that portion now conveyed to them by reforming their deed of conveyance or otherwise, unless some other right superior to theirs intervene. A superior right is claimed on the part of a judgment creditor who has recovered and registered his judgment in the county in which the lands in question lie since the registration of the conveyance to the plaintiffs; and who claims to stand upon the same footing as a purchaser for valuable consideration without notice registering his conveyance of lands, intended to be conveyed, but not conveyed by the previously registered conveyance.

Judgment.

I do not think that he can under the statute, as certainly he cannot in reason, stand upon the same footing. Before the passing of the statute 13 & 14 Vic. ch. 63 the claim of the judgment creditor to have execution of such lands would have been held clearly inadmissible in this court; for the lands would in equity be the lands of the purchaser, though not yet conveyed to him, and if a purchaser for valuable consideration, as I take these plaintiffs to be, his equitable right is saved to him by the express words of the statute; for the second section, making registered judgments a charge upon the lands of the debtor, has this proviso: "provided nevertheless that nothing herein contained shall be deemed, or taken to alter or affect any doctrine of courts of equity whereby protection is given to purchasers for valuable consideration without notice." In other words, the rights of such purchasers remain as they were before; and unless the right of these plaintiffs would have been affected by a judgment recovered against the person from whom they were entitled to a conveyance, it is not affected by the statute. It appears to me that this proviso, saving the rights of purchasers for valuable consideration from

being affected by registered judgments, is sufficient for the decision of this case. 1855.

McMaster v. Phipps.

There is another ground however upon which, I think, the plaintiffs' rights were unaffected by the judgment. I am of opinion that the statute does not place registered judgments upon the same footing as registered conveyances to purchasers for valuable consideration. The whole scope of this and the former statute, making registered judgments bind lands (9 Vic. ch. 34), appears to me to be against it. The former statute, after providing for the registration of the certificate of judgment, goes on to enact 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 the recording of the same in the county," &c. The second clause of the last statute does not use the word "belonging," but is couched in less popular and more legal phraseology, but equally confines the effect of registration to lands remaining in the judgment debtor at the time of registration. It provides that registration of a judgment shall operate as a charge upon all lands in the county to which the judgment debtor *at the time of the registering of the judgment* or afterwards should be seized, possessed or entitled at law or in equity, or over which he might have any disposing power exercisable for his own benefit without the assent of any other person; and further, that every judgment creditor shall have such and the same remedies in a court of equity against the lands so charged by virtue of the act as he would be entitled to in case the judgment debtor *had power* to charge the same, and had, by writing under his hand, agreed to charge the same with the amount of the judgment debt. Judgment.

It is too plain for argument, that neither by this clause, nor by the corresponding clauses in the former act, is any effect given to the registering of a judg-

1855.

McMaster v. Phipps.

ment as to lands in which the judgment debtor has ceased to be interested; the words "belonging" and "at the time of registering such judgment" are as explicit as words can be; and the provision, that the remedy in equity should be the same as if the judgment debtor *had power to charge*, and had by writing agreed to charge, excludes the application of the statute from lands over which he had ceased to have such power.

The statutes have thus defined *what lands* shall be affected by a registered judgment—that is, lands in which at the time of its being registered the judgment debtor had title or interest; no other lands are affected under the statute.

Then comes the third clause, which creates whatever difficulty can be created under this branch of the act, because, and only because, it mentions a purchaser or mortgagee for valuable consideration and a judgment creditor together; but this difficulty seems to me to be more in appearance than in reality, for in reading the third clause, we must read with it the second, and we then see what lands are affected by a registered judgment; and the only question then is, whether, under the general words of the third clause, we are to make a registered judgment apply to lands to which it is not applied by the second, and from which the application is almost in terms excluded by the second, the office of the second clause being to define what lands should be so affected. There is nothing in the third clause to give *a new subject matter* for a registered judgment to operate upon; its only office is, so far as registered judgments are concerned, to prescribe how they shall stand as to lands in the county *upon which they operate*, relatively to unregistered conveyances; and this, although it may limit the operation of the provision to after-acquired property, is, I think, its true construction. A subsequent

Judgment.

clause makes registration itself notice; otherwise the necessity for, and the effect of such a provision would be greater; but whether its operation be great or small, or whether it may have been inserted to provide against unforseen consequences, there is no reason for giving to it an effect which, reading the second clause of the act, it appears never to have intended to have. The existence of that second clause makes all the difference between judgment creditors and purchasers for valuable consideration, for there is no equivalent provision as to the latter in this or any other statute. 1854. McMaster v. Phipps.

To test it, I would put this case,—suppose the second clause had made judgments a charge only upon a certain class of lands, or had expressly, or by implication, excluded lands held by a particular tenure, could it be held that the third clause gave it a wider operation, because, treating of conveyances as well as judgments, it used the general terms lands and tenements or hereditaments? I apprehend there could be no hesitation in holding that judgments were not thereby made to affect any lands to which they were not applied by the second clause. I can see no substantial difference between the case supposed and this; although in the case supposed the true construction is more obvious. Judgment.

If the statute would bear no other construction than to make judgments a charge upon lands which had ceased to be the lands of the debtor, it would be necessary so to construe it, whatever violation of principle it might involve, and however unjust and mischievous might be its consequences; but I think that its true construction is otherwise. The policy and justice of the registry laws as between purchasers do not apply to judgment creditors. There is reason for prefering a purchaser for value who has registered without notice to one who has a conveyance which he has neglected to register; because, finding no conveyance from his grantor registered, he has reason to

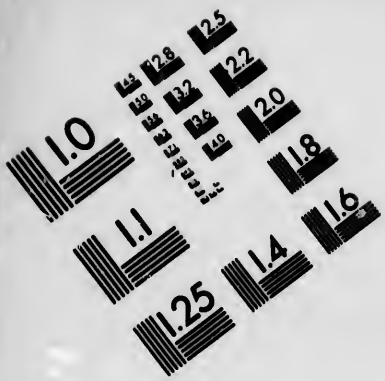
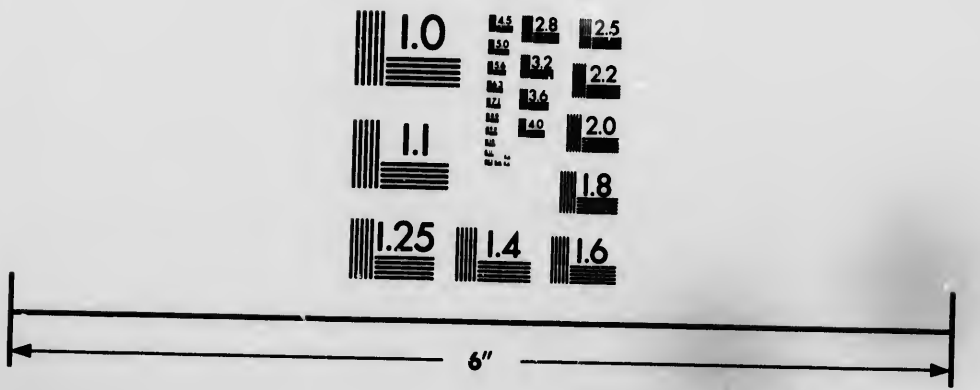
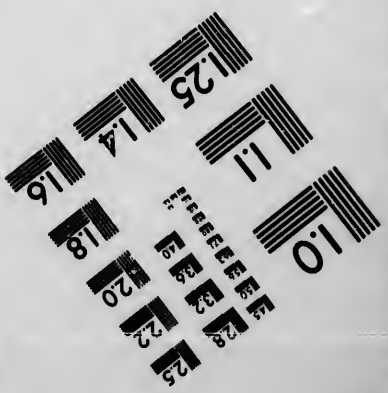


IMAGE EVALUATION
TEST TARGET (MT-3)





Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

1855.

McMaster v. Phipps.

believe that no such conveyance exists; but there is no reason for satisfying a judgment debt by the sale of lands which do not belong to the judgment debtor; and, as I read the statute in question, it provides that it shall be satisfied only out of lands which do belong to him.

Since this case was heard, the question as to the construction of the statute has been ably argued by Mr. *McDonald* in the case of *Ross* v. *Platt*, against the construction, which I think the proper one. I am glad that it has been so, for in the case now in judgment the defendant, a layman, appeared in person, and offered in defence certain circumstances of hardship which could not influence the decision of the case. The legal point having been since argued, I have in considering the case given the same weight to the arguments of Mr. *McDonald* as if they had been advanced in this case.

Judgment.

I rest my judgment in this case upon the two grounds which I have stated; because I have not been prepared to assent to the doctrine that equities arising out of instruments incapable of registration, or out of dealings between parties, are to prevail against a subsequent purchaser for valuable consideration without notice, who has duly registered his conveyance; but the doctrine having been propounded by the other members of the court, and made the ground of their decision of this case, it becomes of course the law of this court.

Declare, That the piece of land of one hundred feet wide on Yonge Street, and running the whole depth of the lot or parcel of land in the said bill mentioned, was, by mistake, omitted from the indenture of the Seventeenth day of June in the year of our Lord One Thousand Eight Hundred and Fifty-Four, in the said bill also mentioned. Also declare, that by reason thereof the judgment of the said defendant *William B. Phipps* is not a lien or charge upon the said lands and premises, so by mistake omitted from the said indenture.

Decree.

Order and decree, That the said defendant *William B. Phipps* do forthwith execute a release to the said plaintiffs of the said lands and premises so by mistake omitted to be comprised in the said indenture. Refer it to a judge of this court to settle the said release, in case the parties differ about the same.

SIMPSON v. GRANT. 1855.

Crown—Specific performance—Costs.

This Court has no jurisdiction to set aside a grant of land made by the Crown upon a deliberate view of all the circumstances of a case, and in the absence of fraud or mistake. Ap. 11 & 25; Nov. 13 & 27, 1854, and Feb. 12, 1855.

This Court cannot enforce against the Crown specific performance of an order in council.

An order in council was made after the passing of the statute 7 Wm. IV. ch. 118, and before 4 & 5 Vic. ch. 100, appropriating land to certain religious purposes. *Held*, that under the 27th section of the latter statute the Governor in council had power to revoke such appropriation.

The 3rd section of the latter statute, giving authority to the Governor in council to adjudge upon claims to free grants of land under any order in council then in force, applies to located lands on which improvements have been made as well as to other lands.

Where defendants had set up in their answer several grounds of defence on which much evidence was gone into, and the court, without going into these defences, dismissed the plaintiffs' bill on a ground not argued at the bar, and which might have been taken by demurrer to the bill, it was—*Held* (*Esten, V. C., dissentiente*), that the defendants were, notwithstanding, upon the authorities, entitled to the whole costs of their defence.

The bill in this case was filed by *Daniel Simpson, John Macdowell, Finlay McFee, William McMillan, Angus Macdougall, Donald Fraser*, and *Archibald McFarlane*,—on behalf of themselves and all other persons constituting the Presbyterian congregation in the town of London in connection with the Church of Scotland, and of all persons living and the representatives of all persons deceased who had contributed to the erection of the church and making the improvements mentioned in the bill,—against *John Michie* (since deceased), *James Grant, John Birrell, John Dimond, William Begg, James McLaren*, and *George M. Gunn*. The *Attorney-General* was also made a defendant. Statement.

The facts of the case and the object of the bill appear in the judgment of the court.

Mr. *Mowat* for the plaintiffs.

Mr. *McDonald* for the defendants.

As the arguments of counsel related entirely to questions raised by the answer and evidence as also to

1855. Simpson v. Grant.

the doctrines of the respective church bodies interested in the litigation, and the decision does not turn upon these points, the arguments are not given.

The judgment of the court was now delivered by

Nov. 13th.

THE CHANCELLOR.—The lands in question in this cause are lots 6, 7, and 8 north of east North-street, and lots 6, 7, and 8 south of Duke-street, in the town of London.

In the year 1841 a petition was presented to his Excellency the Governor-General of this Province by "certain members of the Established Church of Scotland, then resident in London," praying that several parcels of land in that town should be appropriated as the site of a church, "for the accommodation of the members, and as a place of burial."

Judgment.

In the year 1842 a committee of the executive council advised "that lots 6, 7, and 8 north of east North-street should be appropriated to the Kirk of Scotland;" and on the 31st of January in that year his Excellency the Governor-General in council was pleased to approve of that advice. The argument proceeded upon the assumption that this order embraced the whole land in dispute; but that would seem not to be the case. So far as I can discover, the order in council is confined to the three lots which lie to the north of east North-street, which constitute, I believe, about one-half of the property.

Under this order in council a church was erected shortly afterwards upon some portion of the property in question with funds supplied principally, I presume, by members of the Established Church of Scotland, then resident in London, but contributed partly by Presbyterians resident in other localities, and partly by the members of other christian denominations; and

the church was completed, and the congregation duly organized, in the month of October 1843. 1855.

Simpson v. Grant.

Previous to that date the Church of Scotland had been greatly agitated, and the mind of the nation deeply stirred, by a question which, viewed as a question of church government merely, was certainly one of great magnitude and importance. That agitation led to the disruption of the Established Church in May 1843, and the consequent formation of a new communion, known, I believe, as the Free Church of Scotland, which numbers amongst its adherents a very large majority both of the clergy and laity of the former Established Church.

The non-intrusion controversy was practically unimportant in Canada, and for some time the Presbyterian Church here treated it as a question with which they had not any concern; but in July 1844 a disruption similar to that which had taken place in Scotland occurred here, which resulted in the formation of the communion now known as "the Presbyterian Church of Canada," which sympathizes with the principles of the Free Church of Scotland, and disavows all connection with the Established Church in that country. The disruption was, I believe, general; and the evidence leaves little room to doubt that a great majority of the congregation of London joined "the Presbyterian Church of Canada." Judgment.

On the 6th of February, 1845, a petition was presented to his Excellency in council by certain Presbyterians resident in London, which, after stating the disruption that had taken place both in Scotland and in this country, represented that a great majority of the congregation at London had joined "the Presbyterian Church of Canada," and prayed that the land in question in the cause might be conveyed to certain trustees in trust for the congregation of that communion. On

1855.

Simpson v. Grant.

the 9th of April, 1845, his Excellency in council was pleased to issue a commission authorizing the persons therein named to inquire on the spot and report upon the following particulars:—First, on whose application the land was reserved for a Presbyterian church; secondly, by whom the funds were raised for building the church; thirdly, by whom the unpaid debt is now payable; fourthly, what portion of the original parties adhere to the Established Church of Scotland; fifthly, what portion of the congregation in London adhere to the Established Church of Scotland; sixthly, whether there is any clergyman appointed to the church; seventhly, whether members of the Church of Scotland in other parts of the Province did not assist in the erection of the church. It is unnecessary to state particularly the report of the gentlemen appointed by the order in council, which was made on the 28th of the following month: it furnishes information on the several heads of inquiry, the substantial correctness of which I see no reason to doubt.

Judgment.

On the 24th of December, 1845, his Excellency in council was pleased to order that the lands in question in the cause should be granted to certain persons in trust for the congregation of the town of London, in connection with the Presbyterian Synod of Canada. The minute of the committee of council states the question between the parties, the issue of the commission, and the report of the commissioners, and then draws from the whole the conclusion that the course recommended was the one most conducive to the welfare of those inhabitants of London interested in the question.

On the 6th of June, 1846, a memorial was addressed to the government by the Presbytery of Hamilton, pressing strongly the claims of the adherents to the residuary church in the town of London, and praying that the order of the 24th of December, 1845, should

1855.

Simpson v. Grant.

be rescinded; and in the course of the same year several petitions to the same effect were presented by the plaintiffs on behalf of those whom they represent; but on the 12th of June, 1847, a patent deed issued, conveying the property to the defendants in trust for the Presbyterian church of the town of London in connection with the Presbyterian Synod of Canada. This bill is filed, under the circumstances just stated, by the plaintiffs, on behalf of themselves and all other persons constituting the Presbyterian congregation of London in connection with the Church of Scotland, praying—first, that new trustees may be appointed to hold this property in trust for the Presbyterian congregation of London in connection with the Church of Scotland; or, second, that the patent may be rescinded, and that a new patent may be issued upon the like trusts; or, lastly, that the patent may be rescinded, and the plaintiffs allowed to petition the crown for a grant of the lands in question.

Judgment.

It is argued, on behalf of the plaintiffs, that the order in council of January, 1842, was a valid declaration of trust, binding these lands, and that the appropriation of the property by the defendants to the use of the Free Church was a breach of trust which this court would restrain. These questions were argued by the learned counsel on both sides with great ability and research. But there is a previous question which is, in our opinion, conclusive against the plaintiffs, and which precludes the necessity, therefore, of considering those points upon which so much of the argument at the bar turned. It is necessary to determine, first, whether there were any means of enforcing specific performance of the order in council of January, 1842, against the crown; for, if there were no means of enforcing specific performance of that order against the crown, and if the crown, upon a deliberate view of all the circumstances, and in the absence of fraud or mistake, thought proper to issue letters patent to

1855.

Simpson v. Grant.

the defendants, it follows, we think, that the court has not jurisdiction to set aside such grant.

Now I am of opinion that there were no means of enforcing specific performance of that order in council, either at the common law or under the statutes. I had occasion to consider that question carefully in *Westover* v. *Doe Henderson* (*a*), and having stated the grounds of my opinion at length in that case, it is unnecessary to repeat them here.—See *Boulton* v. *Jeffreys* (*b*). It is true that the decision of the Court of Appeal was in favor of the plaintiffs; but that was a case of sale, and the judgment turned on the express declaration of the legislature respecting receipts for purchase money, and the effect to be given to them, and has no application to the case now before us.

It is clear, I think, that this court has no common law jurisdiction to decree specific performance of this order in council against the crown; but if that were doubtful, it has been settled, I think, by the express declaration of the legislature. At the period in question the crown had no power, I apprehend, to make a free grant of land for the purpose specified in (*c*) the order in council; the legislature had prohibited that. The order in question was therefore unwarranted; and when the power of the crown was revived by the 4 & 5 Vic. ch. 100, this order in council, if sanctioned, was subject, I apprehend, to the infirmity attached to all such orders by the statute of which I am speaking. Now the 27th section of that act, which enabled the crown to make free grants for religious purposes, provides "that it shall be lawful for the Governor, by and with the advice of the Executive Council, to set apart and appropriate such of the said public lands as shall be deemed expedient to be so set apart and appropriated for the site of market-places, gaols, court-houses,

Judgment.

(*a*) Not yet reported. (*b*) 2 U. C. Jur. 74.
(*c*) 7 Wm. IV. ch. 118, sec. 1.

places of public worship, burying-grounds, schools, and for other like purposes; *and at any time before the issue of letters patent to revoke such appropriation and setting apart, as may seem expedient.*" That clause appears to me to be an explicit recognition of the right of the crown to make the grant complained of in the present case. But if the applicability of the 27th section were doubtful, this case would seem to fall within the provisions of the 3rd, which declares "that all claims to free grants of land arising out of or under the authority of any order in council, or other regulation of the government now in force, shall be adjudged upon and determined by the governor of this Province, by and with the advice of the Executive Council."

1855. Simpson v. Grant.

It is argued that these clauses relate only to unlocated lands; but I see nothing to limit their application to such cases. On the contrary, the recent statute (16 Vic. ch. 159), which may be looked at, I apprehend, to assist in the construction of the previous act, enables the crown to cancel sales, as against a purchaser who had made improvements and paid the consideration.—See *Armstrong* v. *Campbell* (*a*).

Judgment.

We are of opinion, for these reasons, that the bill in this case must be dismissed, with costs.

When judgment was pronounced, counsel for the plaintiffs suggested that, as the point upon which the case turned had not been taken in the argument, and was such as might have been taken by demurrer to the bill, plaintiffs ought not to be charged with the general costs of the cause, and asked that the case might stand over to be spoken to on the question of costs. The cause having stood over accordingly, now came on for argument on that point.

Nov. 27th.

(*a*) 4 ~~C. B. U. C. 15.~~ U. C. C. P. 15

1855.

Simpson v. Orant.

Mr. *Mowat*, for plaintiffs, cited *Hill* v. *Reardon* (*a*), *Jones* v. *Davids* (*b*), *Sanders* v. *Benson* (*c*), to shew that as the defendants could have taken the point upon which the cause turned by demurrer, they were not entitled to receive their costs; the greater portion of the costs had been incurred in taking evidence, which would have all been avoided had the defendants chosen to demur, and which he contended they were bound to do, or lose their costs of taking the evidence necessary to establish the issues needlessly raised by the pleadings.

Mr. *McDonald*, contra—Although a defendant may think he has a clear ground of demurrer to the relief sought by the bill, it may turn out upon argument that he was in error, and, instead of receiving, be compelled to pay costs. Under these circumstances, he submitted, the court would never say that a defendant must demur or lose his costs, unless in a very clear case. He referred to *Moore* v. *McKay* (*d*).

Judgment. Feb. 12th.

THE CHANCELLOR.—When judgment was pronounced in this suit, we thought that the bill should be dismissed with costs, but, by consent of the parties, counsel were heard again upon the question of costs. Since the re-argument I have examined the cases cited, besides many more, but none of them furnish a principle which would justify us in depriving the defendants of what must be now considered as, at least, their *primâ facie* right. Mr. *Mowat* argued that this case ought not to be governed by the general rule, because the question upon which the case eventually turned might have been raised by demurrer; and, as the defendants had neglected that cheap and expeditious mode of terminating the litigation, he contended that they ought not to receive costs. In support of that view four cases were mentioned, which do tend certainly, more or less,

(*a*) 2 S. & S. 431. (*b*) 4 Russ. 277. (*c*) 4 Beav. 350. (*d*) Beaty, 282.

1854.

Simpson v. Grant.

to support the plaintiffs' argument; but it will be found, I think, that none of them support the proposition for which they were cited. It is undoubtedly true that the court discourages anything like an oppressive use of the rules by which its practice is regulated, and parties are not permitted to adopt a tedious and expensive mode of procedure when an expeditious and inexpensive one is open, and would be equally effective: that is a sound principle, the efficacy of which I should be sorry to limit or infringe; and it will be found, I think, that the cases which have been cited only furnish particular instances of its application. But the plaintiffs' argument goes much further. To sustain their construction it should be shewn that when a bill presents numerous issues of law and fact, a defendant contesting the issues of law is bound, at the peril of costs, to have those issues disposed of upon demurrer; but there is nothing in the authorities which have been cited to warrant such a proposition, and it is quite impossible to sustain it on the principle to which I have adverted.

Judgment.

In *Hollingsworth* v. *Shakeshaft* (*a*) the *sole* question in the cause arose upon the construction of a will which was fully set out in the bill. The matter might have been determined, therefore, quite as effectually upon demurrer as in any other way; and the Master of the Rolls said, "As the defendant has not thought fit to adopt that course, *and having regard to the other circumstances of the case to which I have adverted*, I shall dismiss the bill without costs. In pursuing this course I am following the rule adopted by Lord *Langdale* in *Sanders* v. *Benson*." Now the *single* question in *Sanders* v. *Benson* (*b*) was as to the liability of an equitable assignee of leaseholds in possession to the covenants in the lease; and that question might have been raised by plea quite as well as by bringing the cause to a hearing. Yet that case, single and simple as it is, is

(*a*) 14 Beav. 492. (*b*) 4 Beav. 350.

1855.

Simpson v. Grant.

not rested on the broad proposition for which the present plaintiffs contend. The marginal note is, "Bill dismissed, without costs, on the ground of the defendant not having (in a simple case) raised his defence by plea." But that is not quite accurate; for it is manifest that Lord *Langdale* does not rest his decision on that principle alone. His language is, "I have considered the costs of this case, which, *primâ facie*, would belong to the defendants; and if they had put in a plea stating that point of objection which has prevailed, undoubtedly they would be entitled to these costs; but they have put in a long defence, and stated that the defendants had no interest whatever in the lease, and have raised points which it appears to me are not sustainable. I therefore think the justice of the case is satisfied by dismissing the bill without costs."

Judgment.

In *Hill* v. *Reardon* (*a*) the case turned upon the jurisdiction of the Court of Chancery to entertain an appeal from the commissioners under the acts and conventions for indemnifying British subjects for the confiscation of their property by the French revolutionary government. The Master of the Rolls decided against the plaintiffs on that ground, with the observation as to costs—"Let the bill be dismissed, but without costs, *because of the novelty and importance of the question*, and because the defendants might have had the opinion of the court upon the question of jurisdiction by a demurrer."

In *Jones* v. *Davids* (*b*) the plaintiffs, having joined the testator in a bond as surety, had paid it off after the testator's death; and the question was, whether he could rank upon the estate as a specialty creditor. That simple question, which was the only one in the cause, might have been disposed of effectually upon demurrer; and, as the defendant neglected to adopt that course, the Master of the Rolls dismissed the bill

(*a*) 2 S. & S. 431. (*b*) 4 Russ. 277.

1855.

Simpson v. Grant.

without costs. These cases fall far short of the proposition for which the plaintiffs contend. They tend to shew that in a plain case, when all the questions can be effectually disposed of upon demurrer, a defendant is bound to adopt that course at the peril of costs; although I may remark that costs were not refused upon that single ground in any of them except the last. The decisions are rested indeed upon a different principle, and they weaken, therefore, instead of establishing, the argument for which they were adduced. But it is abundantly clear, both upon reason and authority, that there is no such general rule as that contended for. *Shaw* v. *Lawless* (*a*), which came before the House of Lords upon an appeal from the Court of Chancery in Ireland, establishes that very clearly. That case turned entirely upon the construction of a will, and might have been effectively disposed of upon demurrer. The defendant put in an answer impeaching the plaintiff's character; but that part of the case failed upon the evidence, and was abandoned at the hearing (*b*), and the question turned entirely upon the construction of the will. Lord *Plunkett*, however, dismissed the bill with costs, and his decision was affirmed in the House of Lords. If *Lawler* v. *Shaw* was rightly decided, there cannot be any doubt as to the case now before us. This is not a case which raises a single or a simple question capable of being disposed of upon demurrer; it is a case of considerable complication; and the defendants have put in an answer which raises several important questions of law and fact which could not have been raised at all by demurrer. Now in pursuing that course they only exercised, as a general rule, their undoubted right; and I am wholly at a loss to discover any principle which would warrant the limitation of that right in the present case. It is true, or it may be true, that the question upon which our judgment proceeded might have been raised by

Judgment.

(*a*) 5 Clk. & F. 129. (*b*) 1 Ll. & Gould Temp. Sugden, 558.

1855. Simpson v. Grant.

demurrer; but there is nothing in that circumstance which authorizes the court to prescribe that or any other particular ground of defence.

ESTEN, V. C., thought that under the circumstances of the case, the parties should pay their own costs.

SPRAGGE, V. C., concurred in the views expressed by his Lordship the Chancellor.

Per Curiam.—[ESTEN, V. C. diss.] *Bill dismissed with costs.*

HOLCOMB v. NIXON.

Injunction—Sale of vessel.

Oct. 17th; Nov. 12th.

The owner of several steamers, who was carrying on business as a forwarder, sold one of them to another forwarding firm, and upon the sale covenanted that he would not directly or indirectly have any interest in any vessel navigating the St. Lawrence below Ogdensburg at any time thereafter; and also that he would not dispose of two other steamers then owned by him to any person or persons for the purpose of navigating the St. Lawrence below Ogdensburg. Afterwards the proprietor transferred his business as forwarder, and sold the two other steamers to persons having full knowledge of this covenant, who notwithstanding commenced running the vessels on the St. Lawrence below Ogdensburg. Upon a bill filed for that purpose the court held the owners bound by the covenant entered into by the original proprietor, and granted an injunction restraining them from navigating the river below Ogdensburg with those vessels.

The bill in this cause was filed by *Samuel Frost Holcomb*, of the city of Hamilton, and *James Henry Henderson*, of the city of Montreal, trading under the firm of "*Holcomb* and *Henderson*," against *James Nixon*, *John E. Swales* and *John O. Nixon;* and as amended set forth that the plaintiffs having been carrying on business as forwarders and carriers of goods and merchandize, chiefly between the city of Hamilton and Montreal, and also partly from Quebec to the various ports which can be reached thence westerly on the various lakes and waters, and also between such last-mentioned ports respectively, did

sometime in February, 1855, purchase from one *Michael Wilson Browne*, of Hamilton, a certain steamer called the "Britannia," for the purpose of carrying on their said trade, which they still continued to carry on: that the purchase of the said steamboat by the plaintiffs was made with the view of doing away with any opposition that *Browne* or any future owner of his boats might offer to the plaintiffs in carrying on their business as carriers and forwarders from any of the said ports below Ogdensburg.

That at the time of such purchase *Br[illegible]e* was the owner and proprietor of two other steamers called the "Saint Nicholas" and "The Banshee," which up to that time had been used by *Browne* in navigating for hire the waters of Lake Ontario, and not in navigating the river St. Lawrence below the town of Ogdensburg, in the State of New York; and upon the sale of the "Britannia" to the plaintiffs *Browne*, in consideration thereof, covenanted and agreed under his hand and seal with the plaintiffs that he the said *Browne* would not at any time thereafter directly or indirectly have any interest in any vessel navigating the waters of the river St. Lawrence below the said town of Ogdensburg, and also that he would not dispose of the said steamboats "Saint Nicholas" and "Banshee" to any person or persons for the purpose of navigating the waters of the said river St. Lawrence below the aforesaid town of Ogdensburg. Statement.

That since the purchase by the plaintiffs, *Browne* had sold the steamboats "St. Nicholas" and "Banshee" to the defendants, who, before and at the time of such sale, had due notice and were well aware of the covenant so entered into by *Browne* with the plaintiffs; and that at the time of such sale *Browne* informed the defendants that in consideration of the purchase by the plaintiffs of the "Britannia" he had covenanted and agreed with the plaintiffs that neither he nor any

1855.

Holcomb v. Nixon.

person or persons to whom he might sell the steamboats "St. Nicholas" and "Banshee" should or would use the same for the purpose of navigating the waters of the river St. Lawrence below the town of Ogdensburg.

That in the month of August, 1855, the defendants had navigated for hire the river St. Lawrence with the "St. Nicholas" from the town of Oswego, in the state of New York, to the city of Montreal, the said city of Montreal being situate on the St. Lawrence below the town of Ogdensburg; and that the plaintiffs believed the defendants intended to continue so to navigate the said river, and unless they were restrained from so navigating the said river the plaintiffs would sustain great loss and damage.

The bill prayed an injunction restraining the defendants from so navigating the river St. Lawrence with the said steamers, and for further relief.

Statement.

Affidavits setting forth the facts as stated in the bill were filed, and *Michael Wilson Browne* had been examined *vivâ voce* before the court under the orders of 1853: his evidence bore out the statements of the bill as to his having informed the defendants of his covenant with the plaintiffs.

A motion for an injunction in the terms of the prayer of the bill was now made.

Mr. *Mowat* and Mr. *Galt*, for the plaintiffs, cited *Nicholls* v. *Stretton* (*a*), *Whittaker* v. *Howe* (*b*), *Barfield* v. *Nicholson* (*c*).

Dr. *Connor*, Q. C., and Mr. *Vankoughnet*, Q. C., *contra*, referred, amongst other cases, to *Tallis* v. *Tallis* (*d*) *Mallon* v. *May* (*e*), *Van* v. *Cope* (*f*), *Turner* v. *Evans* (*g*), *Kemp* v. *Sober* (*h*).

(*a*) 7 Beav. 42. (*b*) 3 Beav. 383. (*c*) 2 S. & S. 1. (*d*) 1 E. & B. 391. (*e*) 11 M. & W. 653. (*f*) 3 M. & K. 269. (*g*) 2 Deg. McN. & G. 740; S. C. 2 E. & B. 512. (*h*) 1 Sim. N. S 517.

1855.

Holcomb v. Nixon.

The arguments of counsel appear in the judgment.

THE CHANCELLOR.—In the early part of this year one *Browne*, a forwarder, then resident at Hamilton, and the owner of several steam vessels employed in his business, sold one of those steamboats, the *Britannia*, to the plaintiffs, and upon the occasion of that sale entered into a covenant with the plaintiffs in these terms, "And the said party of the first part (*Browne*) doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree, to and with the said parties of the second part (the plaintiffs), that he, the said party of the first part, shall not have, directly or indirectly, any interest in any vessel navigating the Saint Lawrence below Ogdensburg at any time hereafter; *And also*, that he will not dispose of the steamers *St. Nicholas* or *Banshee* to any person or persons for the purpose of navigating the St. Lawrence below Ogdensburg." Some months subsequent to the sale of the *Britannia*, *Browne* transferred his business of forwarder to the defendants, and as part of that transaction he sold to them the steamer *St. Nicholas*, giving them notice, however, of the covenant into which he had entered with the plaintiffs. The defendants are now running the *St. Nicholas* between Hamilton and Quebec, and the object of this motion is to restrain them from running her below Ogdensburg.

Judgment.

It is not alleged that this sale was colorable, or that *Browne* sold the boat for the purpose of being used in the navigation of the Saint Lawrence below Ogdensburg; but the contention is that the agreement entered into by *Browne* is, in effect, an engagement that these boats should not be employed in that navigation,—a covenant by which every subsequent purchaser with notice is, it is said, bound. In support of this contention it is argued that the first covenant is, in effect, an agreement that *Browne* would not run any boat in which he then had, or in which he might there-

1855.

Holcomb v. Nixon.

after have any interest, below Ogdensburg; and the agreement, so understood, amounts, it is argued, to a covenant that no such boat should be used thereafter on that portion of the river, just as a covenant by a purchaser of land that he would not build upon it, or carry on any trade there, would bind the land in the hands of every purchaser with notice of the covenant, and *Tulk* v. *Moxhay* (a) and *Kemp* v. *Sober* (b) were cited.

I cannot agree in that construction of the first branch of this agreement. Upon that interpretation, every vessel which *Browne* then owned, every vessel which he might thereafter own, nay, *every vessel in which he might thereafter have any interest, however minute*, would be for ever excluded from the navigation of the Saint Lawrence below Ogdensburg, although *Browne's* interest had altogether ceased. That would be a most extraordinary covenant for a forwarder and shipowner to enter into; and before placing such a construction upon the contract of these parties, we ought to see very clearly indeed that such was their intention. But, so far from discovering any such intention in the instrument itself, the language appears to me to have been selected with a manifest view to its exclusion. The words are, that *Browne* "shall not have, directly or indirectly, any interest in any vessel navigating the Saint Lawrence below Ogdensburg at any time hereafter." Now that is not the language which any person who meant to bind *Browne's* vessels specifically, in the way contended for, would have employed. The covenant, so far from excluding any class of vessels from navigating the Saint Lawrence below Ogdensburg, applies exclusively to vessels so employed, and stipulates, with respect to such, that *Browne* is not to have any interest therein. This mode of expression indicates very clearly, I think, that it was not the intention

Judgment.

(a) 2 Phil. 774. (b) 1 Sim. N. S. 517.

1855.

Holcomb v. Nixon.

of these parties to bind vessels once owned by *Browne* in the hands of third parties, but to bind *Browne* himself,—to get rid, in other words, of the opposition of an established forwarder. For that purpose *Browne* covenants that he will not have any interest thereafter in any vessel running below Ogdensburg, and a breach of that covenant would probably entitle the plaintiffs to an injunction, under some circumstances at least; but that covenant has no application to vessels in which *Browne* had ceased to have an interest, for there is nothing in it which binds, or was intended to bind, vessels in the hands of subsequent purchasers.

I would have arrived at the same conclusion, I think, if the covenant had been in express terms that *Browne* would not employ any vessel he then owned, or which he might thereafter own, in this particular navigation; for there is a plain and broad distinction, as it seems to me, between a covenant that *Browne* would not employ any of his vessels in that way, and a covenant that no vessel, once owned by him, should be so employed, even after his ownership should have ceased; and I know of no principle, and am not aware of any authority, which would warrant us in treating covenants which seem to me so entirely different as equipollent. But the precise language employed is important in the construction of the subsequent covenant, because it shews that the parties to this instrument had the distinction to which I have alluded present to their minds, and that they meant to bind *Browne* personally, and not the property.

Judgment.

The construction contended for appears to me to be inadmissible on this principle also, that it would render the second covenant insensible. Upon the argument for the plaintiffs, the *St. Nicholas* and *Banshee* were bound specifically by the first covenant—they were perpetually excluded thereby from the navigation. But, assuming that to be the true construction.

1855.
Holcomb v. Nixon.

the subsequent covenant, "that those boats should not be sold for such a purpose," would be repugnant to the first, or, at the least, insensible, because, upon the hypothesis, the boats were bound specifically already, for whatever purpose sold; and, *e converso*, the existence of the second covenant shews very distinctly, I think, that the argument as to the first ought not to prevail.

It is argued, however, that whatever may be the true construction of the first covenant, the second is at all events specific, and amounts to an engagement that the *St. Nicholas*, however owned, should never be employed in navigating the St. Lawrence below Ogdensburg. But such a construction of the second covenant would be, in my judgment, quite unwarranted. The words are, "And also, that he will not dispose of the steamers *St. Nicholas* or *Banshee* to any person or persons for the purpose of navigating the Saint Law-

Judgment.

rence below Ogdensburg." Now I must repeat, with respect to this covenant, what I said in effect when speaking of the former—viz., that a covenant that the *St. Nicholas* should never be employed in navigating the St. Lawrence below Ogdensburg appears to me to be plainly and essentially different from a covenant that *Browne* would not dispose of her for that purpose. Had the parties to this agreement intended the former, I have no doubt that a simple and direct mode of expression would have been adopted; and the peculiar phraseology employed in this as well as the former covenant, convinces me that *Browne* did not mean, throughout, to do more than covenant for his own acts. I am of opinion, therefore, that neither singly nor together can these covenants be construed into an undertaking that the *St. Nicholas* should never run below Ogdensburg.

It is said, that unless the construction contended for by the plaintiffs be adopted the agreement will fail to

1855.

Holcomb v. Nixon.

effectuate the intention of the parties, and will become practically inoperative, owing to the difficulty of determining the purpose of the sale in any given case. I do not feel the force of this observation. I know, indeed that *Holcomb*, in his affidavit, states that his intention was to prevent this steamboat from being run by any person below Ogdensburg; but the intention of the parties must be collected from the instrument itself, and from such circumstances as are admissible in aid of the construction, and not from the affidavits of the parties; and if we place upon the covenant the construction which, upon the whole instrument, we believe that the parties themselves intended, it cannot be said that we thereby defeat their intention. If the parties intended a more extensive covenant, that intention should have been expressed in the instrument; but I do not believe that a more extensive covenant was intended; and if the covenant, as expressed, fails to afford the plaintiffs all the protection which they now desire, it still affords them all for which they stipulated, or which they have now any right to ask. Neither can I agree that the covenant so understood would be practically inoperative; on the contrary, it would have, as it appears to me, a very important practical effect. I have said that, in my opinion, the parties to this agreement did not intend, by the first covenant, to bind *Browne's* vessels from running below Ogdensburg, but only to prevent *Browne* from so employing them so long as they continued his property, thereby guarding in effect against any opposition from *Browne* as an established forwarder; and the object of the second covenant may have been, and I believe was, to guard against the opposition of other established houses in that trade, so far as the nature of the contract would permit. Now by the contract, as I understand it, the plaintiffs do accomplish that object, to a limited extent certainly, still to an extent very material to their interests; for upon this construction the covenant would have a twofold effect, it would exclude any

Judgment.

1855. Holcomb v. Nixon. active agency on *Browne's* part in getting up an opposition to the plaintiffs—at least, it forbids the use of the boats for that purpose: and, in that view, the language would apply principally to a purpose conceived by *Browne* himself. But apart from any purpose in *Browne's* mind, a sale of either of the boats for the purpose of navigating the St. Lawrence below Ogdensburg is expressly forbidden; and that stipulation, literally construed, would probably have the effect of preventing a sale to any person or persons already engaged in that particular trade, and that, I am inclined to think, was all that the parties had in contemplation. It is true that, in determining the purpose of the sale, the parties might, probably would, have to solve a difficult question of fact; but that difficulty is incident to the nature of their contract, and is not greater than arises in numberless cases where the question is one of intention.

Judgment. Upon this part of the case, therefore, I retain the opinion expressed by my brother *Spragge* and myself on the former motion; but subsequent reflection has convinced me that the opinion which I then ventured to express, as to the effect of the covenant so understood, was erroneous. Conceiving, then, that this agreement must receive the same interpretation as against *Browne* and his assignee, and being of opinion that *Browne* had not covenanted that this boat should not be run below Ogdensburg, but only that he would not sell her for that purpose, (to which opinion, on both points, I still adhere), it seemed to me to follow that to enjoin the defendants from employing the boat in the way complained of, would be to bind *Browne's* assignee by a covenant much more extensive than that into which *Browne* had entered; but, for the reasons which I am about to state, I am now satisfied that I ought to have arrived at a different conclusion. *Browne*, it is true, did not, in my view of the agreement, covenant that this vessel should not run below Ogdensburg; but

1855.

Holcomb v. Nixon.

he did covenant that he would not sell her for that purpose; and, having entered into that covenant, a sale by him for that purpose would have been an illegal act, which this court, I have no doubt, would have restrained; and as *Browne* could not have sold, neither could the defendants have purchased in contravention of the covenant, for they could not legally acquire that which they knew that *Browne* had no legal right to give. And, as it would have been illegal for the defendants to have purchased this vessel for the purpose of running below Ogdensburg, it seems to me to follow necessarily that any subsequent application of her to that purpose must be equally illegal. The fallacy lies in supposing that the illegal purpose must have existed at the time of the sale. That is not so. The application of property to a purpose for which it would have been illegal to purchase it, must be illegal; for when property is purchased, it is in strictness purchased, so far as the buyer is concerned, for every purpose to which he may subsequently choose to apply it. It may be said, therefore, with strict propriety, that the defendants purchased this vessel for the purpose to which they are now about to apply it, and as that purpose is contrary to the covenant, and therefore illegal, it ought to be restrained; and, upon that ground, I am of opinion that the plaintiffs, if this agreement be legal, are entitled to the relief they seek (*a*).

Judgment.

It is argued, however, that these covenants impose an unreasonable restraint upon trade, and that they are therefore illegal and void. We need not consider whether the first covenant is or is not objectionable on that ground, because if the second covenant be valid, that will be sufficient for the plaintiffs' purpose. But it is said that the second covenant is equally objec-

(*a*) Lumley v. Wagner, 1 D. M. & G. 604, and the case cited; Lumley v. Wagner, ub sup; Barfield v. Nicholson, . & S. 1; Stevens v. Benning, 1 Jur. N. S. 74; Sweet v. Carter, 11 Sim. 572.

1855.

Holcomb v. Nixon.

tionable with the first, inasmuch as it restricts these two steam vessels from navigating the Saint Lawrence, to an extent unnecessary for the plaintiffs' protection, and is therefore unreasonable and void. It must be admitted that this argument possesses considerable force; for if *Browne* may legally impose an unreasonable restriction upon himself in relation to these two vessels, a similar restriction in relation to his whole stock in trade would be equally legal—that is, *Browne* might legally bind himself by an unreasonable covenant affecting his whole trading capital, which would be directly contrary to the proposition of Chief Justice *Best* in *Homer* v. *Ashford* (*a*)—viz., "That any deed by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom would be void." But this argument is specious, rather than solid. A purchaser of land may legally limit the uses to which it is to be applied. He may covenant not to build there, or not to carry on any trade whatever. The legality of such covenants are not to be questioned; and I know of no principle which prevents the purchaser of a chattel from subjecting his ownership to a like limitation. And if *Browne*, upon the sale of these vessels, might legally exact such a covenant from the purchaser, it follows, I think, that a restrictive covenant entered into by himself for valuable consideration would be equally binding. And it cannot be said with truth, as it seems to me, that the covenant in the present case has the effect of subjecting the capital of the defendants to an unreasonable restraint, or indeed to any restraint at all. For, suppose that the owner of the vessel had determined upon having her broken up, and that he had carried out that resolution by a sale of her materials, as such, with a covenant from the purchaser that the vessel should be broken up, and should not be any longer employed as a steam vessel; could the purchaser

Judgment.

(*a*) 3 Bing. 322.

object to the legality of that covenant on the ground that it subjected his capital (the steam vessel) to unreasonable restraint? I apprehend not; for the steam vessel never formed any part of his capital. He purchased the materials merely, and only paid a proportionate price; and if the materials, as such, are useless in his trade, he is at liberty, of course, to realize their value by sale; and it would be obviously absurd to say that the covenant had imposed any restraint whatever on his capital. And, in a like way of reasoning, these defendants never were the unqualified owners of the vessel now in question. The capital which they invested in the purchase was not the actual value of the *St. Nicholas*, but it was the value of that boat, subject to certain restrictions imposed by the owner. They purchased a vessel which was prohibited from running below Ogdensburg, and if, in consequence of that restriction, she fails to answer their present purpose, they can realize her value by sale; but they purchased her with that disability; and it is obvious, I think, that the covenant does not place a restraint upon anything which they can properly call their own. For these reasons, it seems to me that the argument which was addressed to us on the hearing of the motion cannot be sustained. The effect would be to entitle the defendants to that which they neither purchased nor paid for, and to deprive the plaintiffs of rights for which they paid a valuable consideration,—to transfer to the defendants the property of the plaintiffs; and I am therefore of opinion that an injunction ought to issue.

Judgment.

ESTEN, V. C., concurred.

SPRAGGE, V. C., was absent when judgment was pronounced.

1855.

WADSWORTH v. MCDOUGALL.

Award—Practice.

Sept. 17th. Nov. 12th. **Where a case has been referred to arbitration, and an award made, such award must in all cases be made an order of the court, before any other order in the cause can be made.**

The bill in this cause had been filed to restrain the defendant from retaining a mill-dam in the river Humber whereby the lands and premises of the plaintiffs had been damaged. After evidence had been taken at great length before the court, the cause was referred to the arbitration of *Walter Shanly*, Esquire, civil engineer, who made his award, deciding against the right of the plaintiffs to an injunction, and ordering them to pay the costs of the suit:—The award had never been made an order of court, and while in that state, a motion was made to the court for an order of reference to the Master to tax costs and that the plaintiffs should pay the same.

Statement.

Mr. *Mowat*, for the defendant, cited *Smith's* Chancery Practice (*a*), *Salmon* v. *Osbone* (*b*), *Wood* v. *Taunton* (*c*), *Heming* v. *Swinnerton* (*d*).

Argument.

Mr. *Crickmore* contra.

Nov. 12th. The judgment of the court was now delivered by

THE CHANCELLOR.—All matters in difference in this cause were referred to arbitration by an order of court, and the question before us, is, whether a motion can be made to enforce the award before it has been made an order of court. In *Wood* v. *Taunton*, which is, I believe, the latest decision upon this subject, Lord *Langdale*, upon a review of the authorities, decided this question in the negative. That case is not satisfactory to my mind, the point had been decided the other way, after argument, in *Salmon Osbone*, a case entitled to the more weight from the fact that *Ormond*

Judgment.

(*a*) Vol. 2, p. 436. (*b*) 3 M. & K. 429. (*c*) 11 Beav. 449.
(*d*) Cooper tem. Cott. 386; S. C. 5 Hare, 350.

v. *Kinnersly* (*a*), in which the question had been determined differently by Sir *John Leach* himself, was cited as directly in point, notwithstanding which the opinion of the Master of the Rolls was clear that the award must be made an order of court. In *Wilkinson* v. *Page* (*b*), Sir *James Wigram* directed an enquiry as to the practice, and his decision was in conformity with the opinion of Sir *John Leach* in *Salmon* v. *Osborne*. I am aware that the question in *Wilkinson* v. *Page* was somewhat different, but the precise point now before us was involved, and appears to me to have been in effect decided. *Salmon* v. *Osborne* is right, I think, on principle, and it has been so considered by most writers of eminence. Mr. *Cooper* observes in his learned note to *Heming* v. *Swinnerton* (*c*), that the authority of the cases upon which Lord *Langdale* decided *Wood* v. *Taunton* had been always doubted by the profession; and Mr. *Russell* accedes to that opinion (*d*). It is probable, however, that our decision would be in conformity with the case before Lord *Langdale*, but for the consideration to which I am about to advert. When the reference is under the statute of Wm. III. it is clearly settled, as it would seem, that the award must be made an order of court. In *Russell* on Arbitration and Awards, it is said, at page 539, "We have before stated that the usual practice requires that the award must be made an order of court before any steps can be taken to compel obedience;" and he cites 2 *Smith, C. P.* 451, 3rd ed. Now, if the award must be made an order of court when the reference is under the statute, we know of no reason for dispensing with that step in other cases. Upon principle it would seem to be necessary in all; and it is certainly convenient that the practice should be uniform; and we are therefore of opinion that in all cases the award must be made an order of court.

Judgment

(*a*) 2 S. & S. 15. (*b*) 1 Hare 276. (*c*) 1 Coop. T. Cott. 421.
(*d*) Russell on Awards, 536.

1855.

DOUGALL v. LANG.

Crown lands—Trustee.

April 4 & 5. Sept. 22.

The plaintiff having purchased at sheriff's sale all the interest of a bargainee of the crown to certain lands, placed the defendant in possession; afterwards the Crown Lands Department advertised these lands, amongst others, for sale at a stipulated price. The rule of the department in all such cases was that the occupant of any such lands was entitled to a right of pre-emption, and the defendant concealing the nature of his holding, applied for and became the purchaser of those lands and obtained a patent therefor, after notice to the government of the claim of the plaintiffs: Upon a bill filed for that purpose, the court declared the defendant a trustee of the lands, and ordered him to pay the costs of the suit.

Boulton v. *Jeffrey* [reported in 2 U. C. Jurist, p. 74], remarked upon.

Statement.

This was a bill filed by *John Dougall* and *James Dougall* against *Joseph Lang*, and under the circumstances therein set forth, which clearly appear in the judgment, prayed that the defendant might be declared a trustee for the plaintiffs of lots numbers twenty-eight and twenty-nine in the first concession of the township of Plympton, and that he might be ordered to convey the same to the plaintiffs free from incumbrances.

The defendant answered the bill, and the cause having been put at issue, witnesses had been examined on both sides, and the cause now came on for hearing upon the pleadings and evidence.

Argument.

Mr. *Mowat*, for the plaintiffs.—The question to be decided is in what capacity the defendant went into possession, whether as tenant merely, or with a right to purchase. If the transaction by the defendant with the government had taken place between subject and subject it would be a clear case for declaring the defendant a trustee for the plaintiffs. Where the title is derived by the alleged trustee from the crown, the same rule must prevail.

Keech v. *Sanford* (*a*), *Tastor* v. *Marriott* (*b*), *Cane* v. Lord *Allen* (*c*), *Owen* v. *Williams* (*d*), *FitzGibbon* v. *Scanlon* (*e*), *Cummings* v. *Forrester* (*f*), *Spence* on

(*a*) 1 White & T. 32. (*b*) 2 Amb. 668. (*c*) 2 Dow, 285.
(*d*) 2 Amb. 734. (*e*) 1 Dow. 261. (*f*) J. & W. 334.

Equity, page 298; *Lewin* on Trusts, pages 203, 240, were referred to. 1855. Dougall v. Lang.

Mr. *R. Cooper*, for the defendant.—*Lang* was not tenant of the plaintiffs, the fact being that the plaintiffs never had acquired any right whatever to these lands, the sale by the sheriff being ineffectual to affect the the rights of *Watson*, the original bargainee of the crown.

Boulton v. *Jeffrey*, clearly in point to shew that after the executive have exercised their judgment in the matter this court will not interfere with the rights of the grantee of the crown. He also cited *Martyn* v. *Kennedy* (*a*), *Phillips* v. *Pierce* (*b*), *Ricketts* v. *Bodenham* (*c*).

Sept. 22.

ESTEN, V. C.—It is clear that *Lang* went upon the land with the consent or by the permission of *Dougall*, and under an arrangement with him, or on the understanding that he would probably purchase it at a price to be agreed upon, and in the meantime that he was to live on it and maintain his family. It is probable he thought *Dougall* then entitled to the land in some way.

Dougall's title not being recognized by the government, the lots were offered for sale, and in default of *Watson* or his representative applying to redeem them, a preference was offered to *Lang* as the occupant. He attends the sale, of which it does not appear that *Dougall* had notice, and purchased; but as there was not another bidder, attempts, according to the suggestion of Mr. *Williams*, to repudiate the preference and purchase generally as any stranger. *Watson* made considerable improvements, but they were in a delapidated condition when *Lang* took possession. He, however, availed himself of them to a certain extent, repaired and inhabited the house; used the log house as a granary; completed the clearance which had been begun and

(*a*) Ante vol. 2, p. 80. (*b*) 5 B. & C. 433. (*c*) 4 A. & E, 447.

1855.

Dougall v. Lang.

added to it, and also erected a small log cow-house and barn, and cleared two acres. *Dougall* in fact had no title, as the sole ground of his title was the sheriff's sale, which conferred none. When *Watson* absconded, however, he took possession, as Dr. *Hyde* was his care-taker for some years. I think *Lang* went upon the property as care-taker or tenant of *Dougall*, and that he never divested himself of that character; as to do this effectually he should have re-instated *Dougall* in possession. It would seem that if *Dougall* had been the original purchaser and had made the improvements, or had claimed under a valid assignment from *Watson*, there could be no doubt that *Lang* would have been a trustee of the preference extended to him as the occupant, and should have availed himself of it for *Dougall's* benefit, and could not repudiate it, and purchase for his own benefit, as a third person might have done, without reinstating *Dougall* in possession and disclosing to the government that *Dougall* was in fact the occupant, in which case the preference would have been offered to *Dougall*, affecting to purchase for his own benefit, as a stranger; without doing this he would become equally a trustee for *Dougall*. Does it make any material difference that *Dougall* in fact had no title? that he was neither the original purchaser nor claimed under a legal assignment from him, and that *Lang* went into possession under him probably in ignorance of the infirmity of his title? After the best consideration I can give the case, I think not; and that *Lang*, having recognized *Dougall's* title by going into possession under him, must be deemed to have purchased as the occupying tenant, and as trustee for *Dougall*. Then, does it make any difference that the matter has been under the consideration of the government, and that they have in a manner decided it? The case of *Boulton* v. *Jeffray* has been relied on in this view. It seems to me quite impossible to hold that a trustee can retain a purchase made in breach of his duty for his own benefit, although the crown, with full knowledge of

Judgment.

1855.

Dougall v. Lang.

the facts, has decided in his favor; and the true and only principle established by *Boulton* v. *Jeffrey*, I think, is that a patent is not to be disturbed on account of supposed equities existing before it was issued, which could exist only by favor of the crown, and therefore did not exist in point of law at all, and which the crown, with full knowledge of all material facts, has ignored. Should a patent issue under such circumstances, without full knowledge of the facts on the part of the crown, it could be revoked. It is quite a different proposition to say that this court is to permit a trustee to have the benefit of a purchase made in violation of his duty. Lord *Eldon* has said that this shall not be permitted, although the effect be that the property reverts to the seller or lessor. I think this purchase was made by *Lang* in breach of his duty as a tenant, and that he cannot be permitted to hold it. The court does not interfere with the sale of the crown, which, having parted with the land and received the purchase money, has no further interest. I may say that the crown was under a considerable misapprehension as to the facts.

Judgment.

I think *Lang* should be decreed to convey the property in question to *Dougall*, on payment of what he paid for the land, with interest; *Lang* accounting for the rents from the time of sale. The decree should be with costs.

SPRAGGE, V. C.—*Watson*, the original bargainee of the crown, was in possession of the land in question for a number of years; he was in actual occupation and made improvements: he left the country in debt to the plaintiffs, among others; his interest in the land in question was put up to sale by the sheriff upon execution in his hand, and the plaintiffs became purchasers and went into possession. They afterwards placed a Doctor *Hyde* in possession, and he continued to occupy the place as their tenant or care-taker for

1855.
Dougall v. Lang.

some two or three years, when he left it; and it then remained unoccupied for somewhat about the same period, when it passed into the occupancy of the defendant. Thus far, there is no dispute as to the facts. The extent and value of the improvements made by *Watson* are represented differently by different persons—by some as inconsiderable, by others as very considerable, and by one, Mr. *Hyde*, they are estimated as having cost £272 10*s*. I do not look upon this as very material; but the character in which the defendant acquired possession is so.

That he was put into possession by the plaintiffs, or rather by *James Dougall*, who was resident in Upper Canada, is proved beyond question; according to the evidence of *Andrew Lockhart*, the defendant's brother-in-law, he was placed in possession by *James Dougall*. *Lockhart* says that he went into possession with a view to purchase the land if he liked it, the price to be afterwards fixed upon between him and the plaintiffs. From the evidence of other witnesses it is clear that he occupied the land under the plaintiffs, and according to the evidence of one of them, *Scott*, the defendant's own account of his possession was that he had a lease of the place from Mr. *Dougall* for five years—that he was to clear up what was chopped, and not to chop any more until that was done; and *Scott* says that when the defendant was asked to join in some voluntary road work, he said it was no object to him as he was only a tenant; he also informed the same witness that he expected to purchase from Mr. *Dougall;* and another witness, *Archibald Young*, says that the defendant told him that he was a tenant of the plaintiffs. From the evidence of *Lockhart*, I gather that the defendant arrived with his family from the lower part of the province, upon his, *Lockhart's* suggestion, with a view to settle in the western part, and *Lockhart* being at the time in the employ of the plaintiffs, was instrumental in bringing about the arrangment under which the

Judgment.

defendant became occupant of the premises; that he went into possession without any definite agreement to purchase, but with an idea of becoming the purchaser if he liked the place and he and *Dougall* could agree upon the terms of purchase. 1855. Dougall v. Lang.

It was not shewn that he knew at the time the nature of the right or claim under which the plaintiffs held the land; but it is to be observed that in all his written communications there is no assertion of his ignorance upon that point, although they abound in complaints against the plaintiffs, and again and again refer to their want of title, and in some of his letters he speaks of their claim resting only upon the sheriff's deed. It is highly probable that both the plaintiffs and the defendant thought at the time that the interest of *Watson* had passed by the sheriff's deed to the plaintiffs.

I infer from the evidence that defendant proposed to *James Dougall* for the purchase of the land at first under the idea that the sheriff's deed had conferred some right upon the plaintiffs, but it may have been merely with a view to removing a claim which might be an obstacle in the way of his own purchase from the Government. Judgment.

Be this as it may, there is nothing to shew that the relative position of the parties, that of landlord on the one side, and that of tenant on the other, was at any time put an end to; and if this be so, then the occupancy of the place by the defendant was all the while the possession of the plaintiffs; they occupied the place by their tenant, the defendant; and he certainly represented to the government that he was the occupier of the place; he received a certificate in that character from the government agent; his duty was to have transmitted that certificate to the real occupier—the person under whom he held. But instead of doing so, he adopted the character in which he was addressed, availed himself of its advantages, and acquired the title

1855.

Dougall v. Lang.

behind the back of his landlord, and adversely to him and in a character which belonged not to him but to his landlord; his own representation induced the government to deal with him in a character in which they dealt with those who filled the character in truth filled by his landlord, and the visible occupation obtained by him from the plaintiffs was used by him to give color to his representations to the government. As early as January 1850, he applies to the government to purchase as having settled upon the land, the original locatee having left the country, and he refers to a former application made by him two years before. No allusion is made to his being in possession under the *Dougalls*, and in his subsequent applications and correspondence up to the time of the sale in March, 1852, he refers to them only when forced to do so, and then in the light of rival claimants; his own claim resting upon possession and improvements—theirs upon their purchase at sheriff's sale, which claim he had been desirous of purchasing from them when he supposed that they had the title to it. The effect of those representations upon the government is manifest enough, for it was recommended by the committee of the Executive Council upon the defendant's petition, that the land in question should be sold, in order that the petitioner, as the occupant, might have the opportunity of purchasing; and that they understood an independent occupancy is shewn by the letter from the Commissioner of Crown Lands to the agent, *Williams*, which states that the department was ignorant that *Lang* had occupied as tenant of the *Dougalls;* and a stay of the sale which had taken place in the meanwhile was directed.

Judgment.

It is not necessary to the decision of this case to comment upon the duplicity of the defendant offering by letter of 6th February, 1852, to purchase from the *Dougalls*, making no allusion to his applications to the government, and in his letter of the 11th of the same month to the Commissioner of Crown Lands saying

1855.

Dougall v. Lang.

that he had applied to *Dougall* to buy the land, but that he could give no title; nor is it necessary to comment upon the conduct of the government agent, Mr. *Williams*, who seems to have lent himself strangely to the defendant; but I cannot help remarking upon the inconsistency of the latter, for after being furnished after the sale by *James Dougall* with evidence of the defendant's position in regard to him, with an offer to furnish more if necessary, he writes to him under date of 7th May, 1852, to say "I am quite satisfied as to your position and that of Mr. *Lang*, with regard to lots 28 & 29 in the front concession, Plympton, and will report to the Hon. the Commissioner of Crown Lands, fully;" yet in his letter of 6th September, 1852, to the Commissioner of Crown Lands (after unaccountable delays in sending the plaintiff's papers to Quebec), he says "It appears that although Mr. *Lang* went upon the land with the consent of Mr. *Dougall*, he never formally acknowledged him as landlord," and he recommends that the sale to *Lang* should be confirmed. Judgment.

But to revert to the main question between the parties: The sale was intended to be made to the occupant of the premises—the order for sale clearly shows this; the plaintiffs in truth were the occupiers, by their tenant, the defendant; but he, discarding his true position, represented himself as the occupier, and in that character purchased and has obtained the legal title.

In an ordinary suit this would be a clear case; but it is said that the grantor being the Crown, and having, after hearing the claims of both parties, decided in favor of one of them, that decision is final; and the other of them, however clear his title to relief, if the grantor had been a private individual, has no title to such relief where the grantor is the Crown; and the case of *Boulton* v. *Jeffrey* is relied upon.

1855.

Dougall v. Lang.

That case appears to decide no more than this, that where the party obtaining the patent has been guilty of no fraud, misrepresentation or concealment; where the Crown has exercised its discretion upon a view of all the circumstances, the parties litigating those claims before the Crown having had the opportunity of presenting them for consideration, that in such a case the same equities cannot be made the subject of a suit in equity.

From the subsequent case of *Bown* v. *West*, also before the Court of Appeal, it would appear that where facts on which the bill is founded have not been decided upon by the government or in any manner brought under their notice, the party disappointed of the patent could not be excluded from a court of equity; and I infer that it was not by any means the opinion of the Court of Appeal that the question as to who of several parties was entitled to a patent, having been considered by the crown, should in all cases be a bar to the assertion of equitable rights between the same parties in a court of equity; more than one passage of the judgment in *Bown* v. *West* is to that effect; among them is this—"These dealings in this country respecting land of which the legal estate is still in the Crown, or of which the Crown has divested itself after it had become the subject of contracts and agreements between individuals, are very likely to give rise to peculiar equities, which the courts here may have to decide upon without the aid of cases adjudged in England upon the same points." The dealings alluded to were in regard to Indian lands, Indian lands being the subject of that suit; but the language is equally applicable to the dealings in regard to other ungranted lands, and was probably intended to be general.

Judgment.

This further remark also may be made in regard to the case of *Boulton* v. *Jeffrey*, that the language used in reference to a suit not being sustainable in equity

upon equities, urged before, and considered by the Crown, was unnecessary to the decision of the case; "because," as was said by the learned Chief Justice, "the court, independently of it, and upon the facts shewn by the parties, are of opinion that the plaintiff did not make out a claim for such a decree as he prayed for."

1855.

Dougall v. Lang.

Now here the defendant made a fraudulent use of his actual occupation against his landlord, and obtained a grant in a character which his landlord filled, and not himself; the grant was intended for the person occupying, and that was not the defendant, but the plaintiffs; the patent therefore was issued to the defendant in mistake, a mistake induced by his own fraud, and the party entitled and intended was the plaintiff. The position of the defendant, according to his own shewing, does not make for him: he says he went into possession intending to purchase; he cannot, I take it, be in a better position than if he had contracted to purchase, and had been let into possession, his vendor having an infirm title, and he purchasing an adverse title; the rule in such a case is, that the purchaser cannot set up the adverse title so acquired against his vendor, but that the vendor is entitled to have it upon reimbursing him. Here the case is stronger against the purchaser; for the possession thus acquired he used as the means of acquiring a title against (to put his own case) his vendor.

Judgment.

What is very material in this case as distinguishing it from *Boulton* v. *Jeffrey* is, that the very foundation of the plaintiff's equity in this court was not, so far as appears, brought under the notice of the Crown, upon the decision of the case. Mr. *Dougall*, it is true, had stated it in a letter to an officer of the Crown, the Commissioner of Crown Lands; but that upon which the Crown proceeded appears in a report of the committee of council, which was approved in council on the

1855.

Dougall. v. Lang.

19th November, 1852. In that report, *Dougall's* claim is stated as resting upon his purchase at sheriff's sale, and on the other hand, the defendant's purchase at the sale made by the government agent under order in council is stated in his behalf, and no reference whatever is made to the relative position of the parties; in fact the real equity of the plaintiffs is wholly ignored; and it recommended that the patent should issue to the defendant upon the facts stated, the all-important fact being omitted, and it is to be presumed, and indeed appears certain, not being presented to the Crown.

This does appear to me a clear case for relief, and I do not think that the case of *Boulton* v. *Jeffrey* is an obstacle to it.

James v. Freeland.

Specific performance.

April 16th and June 4th.

The defendant agreed for the purchase of a factory situate near a small stream, intending to carry on in the building his occupation of soap and candle manufacturer. After the contract had been entered into the defendant discovered that he would not have a right to throw the refuse of his factory into the stream, and without the privilege of so using this stream the property would be useless for the purpose he had intended to apply it to, and of which the vendors were aware at the time of entering into the contract: *Held*, notwithstanding, that the vendee was bound to complete the contract, although the vendors had not pointed out this fact at the time of the sale.

The bill in this suit was filed by *Robert James*, *William McMaster* and *James Mitchell*, the trustees of the estate of *William A. Clarke*, an insolvent, against *Peter Freeland*, praying for the specific performance of a contract for sale of the premises previously used by *Clarke* as a sheep-skin factory.

The defendant, by his answer, objected that he had, with the knowledge of the plaintiffs, become the purchaser of the property for the purpose of carrying on his trade of soap and candle manufacturer, and the chief inducement to purchase was the existence of a

small stream passing through the premises, which would furnish him with water and a ready means of getting rid of the refuse matter formed in the course of his trade; that but for this he would never have become a purchaser, and it was only after the contract had been signed that he became aware that the party occupying these premises could not use the stream in such a manner as to injure the waters. It appeared from the evidence of *Clarke* that he had been sued by parties occupying premises lower down the stream for polluting the water in the carrying on of his business, and scientific men gave evidence that the refuse from a soap manufactory was much more injurious than the matter thrown in from the business which had been carried on by *Clarke*, and that no filter that could be contrived would prevent the injurious effects of such refuse matter. *Clarke*, it appeared, had a filter constructed which, when properly attended to, prevented to a very great extent any injury to the water of the stream from the matter thrown in from his manufactory. Statement.

An objection was also taken, by the answer, that a portion of the land agreed to be sold was not vested in the plaintiffs, a strip of one hundred feet on Yonge-street by the whole depth of the lot having been omitted from the conveyance to them as trustees. This objection was subsequently removed by the decree in the case of *McMaster* v. *Phipps*, reported ante page 253.

Another objection urged in defence was, that the delays unavoidable in making a title to defendant, consequent upon the defect in plaintiffs' title, would operate most injuriously on defendant, as his object was to obtain immediate possession, he having sold, and agreed to give up possession at an early day, the premises in which he had for some time been carrying on his business.

1855.

James v. Freeland.

The cause now came on for hearing by way of motion for a decree, pursuant to the orders of 1853.

Mr. *Hagarty*, Q. C., and Mr. *Strong*, for plaintiffs.

The only ground for resisting the decree asked is, that defendant will not be allowed to injure his neighbour residing further down the stream; the principle of *caveat emptor* applies strongly to this case.

Had this property been destroyed by fire after the execution of the contract, that would have formed no objection to a decree for a specific performance; much less should an objection be allowed to prevail when it turns out to be merely that defendant has not a right to do something which in itself is illegal, but which, notwithstanding such illegality, he fancied he was acquiring a right to do.—*Howell* v. *George* (*a*), *Kimberley* v. *Jennings* (*b*), *Harnett* v. *Yielding* (*c*), *Hawkes* v. *The Eastern Counties Railway Company* (*d*), *Webb* v. *The Direct London & Portsmouth Railway Co.* (*e*), *Dart* on Vendors, 554, *Lucas* v. *James* (*f*).

Argument.

Mr. *Mowat*, contra. The facts bearing upon the point principally argued are free from doubt. This is not a case of greater or less suitableness, but one of utter uselessness for the purposes intended. Under the circumstances appearing in this case the court will not exercise its peculiar jurisdiction and enforce specific performance.—*Paul* v. *Blackwood* (*g*), *Ramsden* v. *Hylton* (*h*), *Wedgwood* v. *Adams* (*i*), *Dart* on Vendors, 570.

This is really a question of title, as plaintiffs might have acquired a title to the water of the stream by prescription, by agreement with the owners further

(*a*) 1 Mad. I.
(*b*) 6 Sim. 340.
(*c*) 2 S. & Lef. 549.
(*d*) 16 Jur. 1051.
(*e*) 16 Jur. 323.
(*f*) 7 Hare, 410.
(*g*) Ante Vol. IV. p. 550.
(*h*) 2 Ves. Senr. 304.
(*i*) 6 Bea. 600.

down the stream, or by grant from the crown.— *Pulsford* v. *Richards* (*a*) was also referred to. 1855. James v. Freeland.

The judgment of the court was now delivered by

Esten, V. C.*—This is a suit for the specific performance of an agreement for the purchase of some property known as "*Clarke's* Sheepskin Factory." The suit is resisted by the defendant, the purchaser, on the ground of laches—the non-disclosure of a material fact to the purchaser on the part of the vendors, and the unsuitableness of the property, the subject of the purchase, to the purpose for which it was known to be designed. On this last point, which was the one principally relied upon, many cases were cited by the defendant's counsel, and amongst these *Howell* v. *George* (*b*), the Coffee-house case mentioned at 2 Ves. Sen. 307, ——— v. *White* (*c*), *Wedgwood* v. *Adams* (*d*), and *Lucas* v. *James* (*e*), may be specially noticed. With the exception of the Coffee-house case and the case in *Swanston*, these cases seem to establish that where to enforce specific performance of an agreement would subject one of the parties to a very serious inconvenience not foreseen or sufficiently weighed beforehand, the court will decline to exercise its extraordinary jurisdiction, and will leave the party to his legal remedy. The learned counsel for the defendant endeavored to liken this case to the one I have described. On the other hand, several cases were cited by the counsel for the plaintiffs which shewed that where purchases of land, very often at extravagant prices, have been made by railway companies for purposes which they have been unable to carry into effect, they have nevertheless been compelled to complete them; and it certainly seems to be well understood that inability to accomplish the purpose for which a

Judgment.

* The Chancellor was absent during the argument.

(*a*) 17 Beav. 87.
(*b*) 1 Madd. I.
(*c*) 3 Swan. 108.
(*d*) 6 Beav. 600.
(*e*) 7 Hare. 410.

1855.

James v. Freeland.

purchase has been made affords no reason why it should not be carried into execution. The Coffee-house case was one in which a house having been purchased to be used as a coffee-house, it was found that a proper chimney could not be constructed in it for that purpose, and Lord *Talbot* refused specifically to enforce the contract. In the case in *Swanston* an agreement had been made for a lease of a way-leave to a colliery, which was intended to afford a communication between the colliery and a river. After the agreement had been made some other persons acquired the lands between the field across which the way-leave was to have been and the river, and the defendant was unable to obtain the expected lease of the colliery itself. The court refused to compel the specific performance of the agreement. The case in *Hare* was the purchase of a house by a gentleman for the residence of his family, including several daughters. It was discovered after the purchase that a disorderly house existed in the neighborhood, which rendered it impossible to apply the property purchased to the purpose for which it was designed. The purchaser was nevertheless compelled to complete the contract.

Judgment.

The case which we have under our consideration bears a certain resemblance to all the cases that I have mentioned; and yet some distinction must exist between these cases, for otherwise the decisions pronounced in them would be in direct conflict to each other. It might seem almost impossible at first view to distinguish the present case from either the Coffee-house case or the case in *Swanston;* it is, however, equally difficult to distinguish it from the case in *Hare;* and yet if we followed both these cases in the determination of the present case, we would pronounce diametrically opposite decisions of the same case. The Coffee-house case was decided by a judge of the highest authority; I am not quite certain who decided the case in *Swanston:* they are both, however, short cases, and

1855.

James v. Freeland.

meagerly reported. It is remarkable that the Coffee-house case is referred in the text books, when it is cited, to the class of cases relating to compensation for defects in the thing purchased. It may be that the building was sold as a coffee-house, so that it might have been considered as something different from what was bought and sold; and the question might have been, whether the defect was matter of compensation, or whether the specific performance of the contract should be refused. In this event the distinction between that case and the present would be, that here the property in question is not sold as a soap and candle factory. The advertisement published before the sale did not point to this purpose at all, and the conversations that took place between the parties involved, I think, no departure from the advertisement. In the case in *Swanston* the subject of agreement was a way-leave to and from a colliery, which in fact, as the party failed to obtain a lease of the colliery, did not exist. Whether this circumstance is sufficient to account for the decision I do not know. I think the present case can hardly be distinguished from the case in *Hare*. In both cases the characteristic feature is, that the purchaser has, through oversight, purchased a property which is unfit for the purpose for which it was designed. The rule on this subject seems to be, that if the subject matter of the purchase, as it exists, is less than that which was bought and sold, the question is, whether compensation can be made, or specific performance should be refused where the subject, as it was bought and sold, and as it exists, is the same, but not so good as was supposed, the principle of *caveat emptor* applies unless the defect is known to the vendor, and cannot with reasonable diligence be discovered by the purchaser: in other words, where the defect is in the quantity of the estate, it is a question of compensation; where it is in the quality, the purchaser must protect himself if he can. In the case in *Hare* the Vice-Chancellor treated the vicinity of a dis-

Judgment.

1855.

James v. Freeland.

derly house as a defect in the quality of the estate, which the purchaser, with reasonable diligence, might have discovered, and compelled the specific performance of the agreement, though with reluctance. If that case is to be distinguished from the present, it is because there the circumstance which formed the ground of the objection affected the value of the estate as it was bought and sold; whereas in the present case the estate as it was bought and sold is liable to no objection whatever, but the purchaser has purchased it for a particular purpose, which it will not answer; at all events, so well as he anticipated.

The simple question which we have to decide is, whether, where no defect exists either in the quantity or quality of the estate, but the purchaser is mistaken as to its fitness for the purpose for which he purchased it, he is to be exonerated from the contract. If he is bound to see that the quality of the estate answers his expectations, is he not at least as much bound to see that the estate will answer the express purpose for which he purchased it? I think the reasoning is *à fortiori*, and therefore that the rule of *caveat emptor* applies, and that Mr. *Freeland's* mistake, or precipitation, or self-delusion, or whatever it was of which he complains in making this purchase, affords no reason why he should be discharged from the contract.

Judgment.

It is then objected that a material fact was not communicated to him, and that this omission is sufficient to invalidate the contract, whether it was wilful or not. The fact referred to is, that actions had been brought and verdicts obtained against *Clarke* for an unlawful use of the water of the stream which flows through the property in question. But how is this fact material? The defendant must have known that he could not use the water of the stream unlawfully without becoming liable to an action, and it was certainly his business to ascertain whether the use of the

1855.

James v. Freeland.

water required by his trade was lawful or not. The vendors did not pretend to judge of the suitableness of the property for the particular business for which Mr. *Freeland* wanted it, and it was perfectly understood, I think, that he was to judge for himself in this respect.

The last objection is, that the vendors have been guilty of such laches in completing the contract as disentitles them to the assistance of this court. Upon this point I may observe that time was not of the essence of the contract, but the purchase was to be completed within a reasonable time, which, however, in this instance, of property sold for the purpose of trade, might be considered shorter than usual. Difficulties arose in the investigation of the title, of which it is only necessary to notice two—namely, the mistake in the description of the property in the trust-deed, and some judgments which had attached at law upon the part of the property omitted to be conveyed. The time appointed for the purchaser to be ready, in case the vendors should then be ready, was the 10th of September. The letter disclosing the mistake in the deed was dated the 11th of September; the mistake was rectified, and a notification of the fact given, by the 5th of December; and the suit instituted to remove the judgments was heard on the 11th of December, exactly three months after the time appointed for the completion of the contract in case the vendors should be then ready. I cannot say that this was not a reasonable time, or that the vendors have been guilty of any laches which should deprive them of the aid of this court in carrying the agreement into execution. It is not shewn that the vendors knew that Mr. *Freeland* required possession by the 1st of January; but if that fact had been communicated to them subsequently to the purchase, I have no doubt that they would not only have brought the cause against *Phipps* to a hearing, but also procured a decision of it in time

Judgment.

1855. to comply with the purchaser's views in regard to the possession. Under these circumstances I think there should be a decree for the plaintiffs, with costs.*

December 11.

FERRASS v. MCDONALD.

Notice—Registration.

Constructive notice is insufficient in any case to postpone a registered conveyance executed *bonâ fide*.

A lessee of the Canada Company, with a right of purchase, assigned his claim to the plaintiff, and afterwards, in fraud of the plaintiff, obtained in his own name an absolute conveyance from the company, and conveyed the land to the defendant, a *bonâ fide* purchaser, without notice, who paid part of the purchase money, and registered the deed to himself: the plaintiff omitted to register the assignment to him. *Held*, that defendant was entitled to hold the land, freed from any claim of the plaintiff.

Statement. This was a motion under the orders of 1853 for a decree declaring the defendant a trustee of a lot of land, of which the plaintiff was then in possession, under the circumstances set forth in affidavits filed, the statements of which clearly appear in the judgment.

Mr. *R. Cooper* for plaintiff.

Mr. *McDonald*, contra.

Trevelyan v. *White* (*a*), *Raphael* v. *Boehm* (*b*), *Bishop of Winchester* v. *Beavor* (*c*), *Leslie* v. *Leslie* (*d*), *Forbes* v. *Dennison* (*e*), *Tunstall* v. *Trappes* (*f*), *Newman* v. *Chapman* (*g*), and *Sugden's* Vendors and Purchasers, vol. iii. p. 492, were referred to.

THE CHANCELLOR.—The plaintiff claims the premises in question in this cause as assignee for value of *Thomas Fox*, and on instrument under the hand and seal of the assignor, which bears date the 15th day of March, Judgment. 1853, has been put in and proved. At the time of this assignment *Fox* was in possession of the property

---

* See Watson v. Marston, 4 DeG. McN. & G., as having a direct bearing on this case.

(*a*) 1 Beav. 588. (*c*) 3 Ves. 314. (*e*) 4 B. P. C. 189.
(*b*) 11 Ves. 104. (*d*) 2 Lloyd & G. 1. (*f*) 3 Sim. 301.
(*g*) 2 Rand. 93.

1855.

Ferrass v. McDonald.

as the lessee of the Canada Company, with power to purchase at any time during his term upon certain conditions specified in the indenture of lease. Subsequent to this assignment, and in pursuance of it, *Fox* applied to be allowed to purchase the property under the covenant in his lease, and shortly afterwards (the precise date does not appear) he obtained a deed in fee simple from the Canada Company. The plaintiff had no knowledge of this transaction until the following month of September, when he was apprised of the fact by the commissioner of the Canada Company in answer to his application to purchase. In November the plaintiff filed his bill in this court, in which he details the gross fraud which had been practised by *Fox*, and prays that the property may be conveyed to him in pursuance of the agreement of March 1853. That cause was set down to be heard on an order to take the bill *pro confesso* against *Fox*, and on the 23rd of January, 1854, the plaintiff obtained a decree in accordance with the prayer of his bill; but before that decree had been pronounced—namely, on the 9th of January, 1854—the defendant purchased the property from *Fox*, without notice of the plaintiff's claim, for the sum of £325, of which sum £200 was paid in cash, and the residue secured by bond; and thereupon the property was conveyed to the defendant in fee simple, and his deed was duly registered on the following day.

Judgment

Now, assuming the facts to be as I have stated them, and the question of notice, as to which I shall speak presently, to be the only point in dispute, I am of opinion that the contract of March 1853 cannot prevail against the subsequent registered conveyance. In *McMaster* v. *Phipps* (*a*), decided the other day, I had occasion to consider attentively the provisions of the recent Registry Act (*b*), and the conclusion at which I then arrived was, that the statute is not confined to regular

(*a*) Ante p. 253.

(*b*) 13 & 14 Vic. ch. 63.

1855. Ferrass v. McDonald.

legal conveyances, but embraces every species of contract by which lands are in any way affected either at law or in equity; and, as the grounds upon which I formed that opinion were then stated at length, it is unnecessary to repeat them in this place. It is true that the point was not expressly decided in *McMaster* v. *Phipps*, and the question is certainly one of some difficulty and of great practical importance; but the opinion which I ventured to express in that case is the best opinion I was able to form upon an attentive consideration of the statute, and I am happy to know that if it be wrong, there is a higher tribunal by which it may be set right without subjecting the parties to unreasonable expense or delay.

Judgment.

Assuming that to be the true construction of the Registry Act, it follows, I think, that the defendant is entitled to succeed. The plaintiff claims under a contract which materially affects this estate,—not a contract for the purchase of the estate, certainly, but a contract which bound *Fox's* equitable title, and entitled the plaintiff to call for a conveyance in fee simple at any moment upon fulfilling its conditions—a contract, therefore, by which the estate was materially affected in equity, which for that reason the plaintiff was bound to register, and which, not having been registered, is declared fraudulent and void against the defendant, who is a purchaser for value without notice under a registered conveyance. But the plaintiff contends that the defendant had notice of his contract at the time he made his purchase, and he rests that proposition on two grounds—first, his own alleged possession at the time of the sale; secondly, upon the doctrine of *lis pendens*. But it is quite clear that constructive notice is not sufficient to postpone a registered conveyance. To use the words of Sir *William Grant* in *Wyatt* v. *Burwell* (*a*), "It is only by actual notice clearly proved

(*a*) 19 Ves. 439. See also Hine v. Dodd, 2 Atk. 272; 2 Sugden V. & P. 1045, 11th ed.

1855.

Ferrass v. McDonald.

that a registered conveyance can be postponed; even a *lis pendens* is not sufficient notice for that." But it is not pretended that the defendant in the present case had actual notice; there is not a tittle of evidence to support the allegation, as it has been distinctly denied by the defendant both in his answer and in a subsequent affidavit.

The question upon the Registry Act was overlooked, so far as I recollect, upon the motion. The argument turned principally upon the doctrine, that notice, while any part of the purchase money remains unpaid, is equivalent to notice before the contract, and precludes a plea of purchase for valuable consideration without notice. That doctrine was very much canvassed by Mr. *McDonald*, but it is quite clear that it has no application to cases falling within the registry law. It may be that the registry law only gives priority to deeds executed upon valuable consideration; that certainly was the effect of the old law; and it will be found, I dare say, that the new law has not made any alteration in that respect; (*a*) but when the deed has been executed upon valuable consideration, the question whether the purchase money had been wholly paid at the time of notice is, as I apprehend, quite immaterial.

Judgment.

ESTEN, V. C.—There is no evidence of actual notice to the defendant, but the contrary. There was *lis pendens* and a qualified possession by *Ferrass* at the time of the defendant's purchase, but no proof of actual knowledge of the facts on the part of the defendant at that time.

The £125 was not paid before this bill was filed; but even supposing this to be purchase money, it seems to be immaterial on the Registry Act. I think the

(*a*) See 13 & 14 Vic. ch. 63, sec. 4.

1854.

Isherwood v. Dixon.

assignment under which the plaintiff claims might have been registered, and therefore that it was void as against the subsequent conveyance to the defendant *McDonald*. The only answer to this defence would be, that *McDonald* had notice of the assignment at the time he purchased; but of this fact no evidence exists. The *lis pendens* is not notice for this purpose; and even supposing the £125 to be purchase money, it makes no difference, as *McDonald's* defence is not that he was a purchaser for valuable consideration without notice, but that the plaintiff's deed is void under the Registry Act. As to this defence, it is not material that the purchase money is not wholly paid, provided that it makes the transaction a purchase for valuable consideration. Whether the family of *Ferrass* have any claim paramount to the assignment, I at present express no opinion.

SPRAGGE, V. C., concurred.

ISHERWOOD v. DIXON.

Usury—Costs.

June 13th, Sept. 24th & December 24.

A security void at the time of its creation on the ground of usury is not rendered valid by the statute 16 Vic. ch. 80, passed at a subsequent date. Where therefore a mortgage had been made upon a usurious agreement, the Court [The Chancellor dissenting] *held*—a judgment creditor of the mortgagor entitled to file a bill to redeem upon paying the amount actually advanced before the expiration of the time appointed for payment.

In answer to a bill for the redemption of a mortgage alleging the existence of usury in the original transaction, the mortgagee set up several defences which were decided against him, the Court, in decreeing redemption, ordered the plaintiff to pay such costs as would have been incurred in a common redemption suit, and the defendant to pay the costs of the issues found against him.

Argument.

The bill in this cause was filed by *Samuel Isherwood*, of Manchester, England, against *Thomas C. Dixon*, *Robert R. Fretwell*, *Samuel Peters* and others, who claimed to be incumbrancers on the estate of *Dixon*, setting forth that in June 1852, *Dixon* being owner of certain property in the town of London, executed a

mortgage thereon in favor of the defendant *Peters*, to secure the payment of £1000 and interest: that this mortgage had been executed without consideration and for the purpose of raising money upon usurious interest, and by means thereof to evade the laws against usury.

That *Fretwell* had paid to *Dixon* thereon the sum of £800 only, and thereupon *Peters*, by direction of *Dixon*, assigned the mortgage to *Fretwell*.

That subsequently *Dixon* executed another mortgage on the same property in favor of the defendants and *Peters*, purporting to be to secure £750, but being in reality only to secure the mortgagees against certain prior endorsations to a small amount for the accomodation of *Dixon*, then outstanding and since due and payable.

Statement.

That afterwards plaintiff recovered judgment in the Court of Queen's Bench against *Dixon* for £507, which judgment had been duly registered in the county of Middlesex on the 25th day of November 1853, at which time *Dixon* owned and still owned the said property, subject to the said judgment and the interests of the mortgagees under the said indentures.

The prayer of the bill was that the first mentioned mortgage might be declared to stand as a security for the amount actually advanced by *Fretwell* thereon, and that the plaintiff might be at liberty to redeem upon the usual terms: And that the rights of the defendants under the other mortgage might be ascertained and the mortgage either set aside, or declared to stand as a security only for the amount *bonâ fide* due thereon, with liberty to the plaintiff to redeem.

Fretwell by his answer denied all knowledge of the transaction between *Dixon* and *Peters*—insisted upon his rights to hold the security for its full amount as

1855.

Isherwood. v. Dixon.

being a *bonâ fide* purchaser for valuable consideration without notice. The other defendants also answered, but nothing turned upon their answers.

The defendants *Peters* and *Dixon* had been examined as witnesses on behalf of the plaintiff: *Peters* in his evidence swore that the mortgage had been created to him to sell again. "I did not sell it; Mr. *Dixon* made the arrangement; do not know what it was sold for; Mr. *Fretwell* asked me if I had such a mortgage." * * * "I did not get the money." *Dixon*, in his testimony, stated that he spoke to *Fretwell* to see if he would let him have money on the mortgage in the pleadings mentioned, who replied he could not deal with *Dixon* "I understood from Mr. *Fretwell* that if I could procure some third person to arrange with him, the money could be had: from what passed between Mr. *Fretwell* and me, I understood that if I made a mortgage to a third party he would buy it; I mentioned to him that I wanted £1000, and left the arrangement to him: to the best of my recollection, Mr. *Fretwell* said he would not lend the money at 6 per cent." * * * * * * * "When I first went to Mr. *Fretwell*, he said to the effect that I ought to know more of business than to come to him. I mean when I went to him for the purpose of getting money."

Statement.

The cause had been argued on a former day, and the Court having desired it to be spoken to again, it now came on for re-argument upon the pleadings and evidence.

Mr. *Mowat*, for the plaintiff.—The charge of usury is clearly made out, and the only question is whether or not the recent statute (16 Vic. ch. 80) affects the rights of the parties to the contract. The English law respecting usury established by the 14 Geo. III., ch. 82, would have been in force in this province without any local enactment; the mortgage held by *Fretwell* is

Argument.

1855.

Isherwood v. Dixon.

therefore void, and the plaintiff has a right at any time to redeem upon payment of what was actually advanced with interest.

The recent statute has only the effect of abolishing all penalties on account of usury, and the rule adopted in constructing acts, that an act being passed repealing a former statute, the law then becomes as if such previous act had never existed, does not apply here; that is, does not render legal that which under the prior statute was illegal.

The *King* v. *Rogers* (*a*), *Jacques* v. *Withy* (*b*), *Hitchcock* v. *Way* (*c*), *Nourse* v. *Goodeve* (*d*), were cited.

Mr. *R. Cooper*, contra.

Sept'ber 24. Judgment.

THE CHANCELLOR.—The only question discussed upon the re-argument of this case was as to the effect of the statute 16 Vic. ch. 80. That statute recites the expediency of abolishing all prohibitions and penalties on the lending of money at any rate of interest whatever, and then enacts that a certain ordinance of the the province of Quebec, (which had regulated the law upon the subject in Lower Canada) and the 6th section of an act passed in the 17th year of the reign of his late majesty King George the III., (the usury law of this province) be and the same are hereby repealed. The learned counsel for the plaintiff contends that all contracts entered into while the statute Geo. III. was in force, and which were illegal and void under its provisions, continue to be illegal and void notwithstanding its repeal; in other words, as it seems to me, that the statute is still in force as to such contracts. The learned counsel for the defendant, on the other hand, argues that the repeal of the statute of Geo. III. has

(*a*) 10 East. 569.
(*b*) 1 H. & B. 65.
(*c*) 6 A. & E. 943.
(*d*) 12 U.C.Q.B. 198.

1855.

Isherwood v. Dixon.

the effect of setting up the contract now in question, which, but for that repeal, would have been illegal and void, because there is no statute now in force upon which the court can pronounce it to be invalid.

The Court of Common Pleas had occasion to consider the effect of a clause repealing a previous statute in *Kay* v. *Goodwin* (*a*), and Chief Justice *Tindal* in the course of his judgment in that case, says, "I take the effect of repealing a statute to be to obliterate it as completely from the records of parliament as if it never passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded, whilst it was an existing law." The same question came before the Court of King's Bench in *Surtees* v. *Ellison* (*b*), and Lord *Tenterden* there says, "It has long been established that when an act of parliament is repealed it must be considered (except as to transactions passed and closed), as if it had never existed. That is the general rule; and we must not destroy that by indulging in conjectures as to the intention of the legislature." And in *Steavenson* v. *Oliver* (*c*), which came before the Court of Exchequer, *Parke B.* says, "there is a difference between temporary statutes and statutes which are repealed; the latter (except so far as they relate to transactions already completed under them) *become as if they had never existed.*" I do not find these cases anywhere questioned; on the contrary, the principle upon which they proceed has been repeatedly affirmed. Regina v. The Inhabitants of *Mawgan*, (*d*), and *Barrow* v. *Arnaud* (*e*), may be mentioned as recent and striking instances of its application.

Judgment.

It is said however, that this construction gave to the repealing clause a retrospective operation; and it is

(*a*) 6 Bing. 576.
(*b*) 9 B. & C. 752.
(*c*) 8 M. & W. 234.
(*d*) 8 A. & E. 496.
(*e*) 8 Q. B. 595.

1855.

Isherwood v. Dixon.

argued that this intention ought never to be imputed to the legislature except upon the clearest and most unambiguous language. Unquestionably the rule which Lord *Coke* has described as a law of parliament—namely, that, "*Nova constitutio futuris formam imponere debet, non præteritis*, is founded upon the plainest principles of natural justice;" and, to adopt the language of Lord *Cranworth* in a recent case, (*a*) "The principle is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment, putting beyond doubt that the legislature meant it to operate retrospectively." But there is no room for the operation of that principle in the case now before us. The legislature has repealed the statute of Geo. III. in language clear and unequivocal; and to hold that that act is still in force as to contracts entered into previous to the repealing statute, upon any speculation, however probable, as to the intention of the legislature, would not be to administer the law, but to make it. As a matter of conjecture I think it highly probable that such a provision would have been made if the subject had been brought under the notice of the legislature; but no such provision has been made; and *Kay* v. *Goodwin*, *Surtees* v. *Ellison* and *Barraw* v. *Arnaud*, are clear authorities that the omission cannot be supplied here. Had there been any such jurisdiction, a different conclusion must have been come to in some, perhaps in all of these cases; but the learned judges by whom they were decided thought, and in this case I humbly venture to think, that courts of justice are bound to carry out what is written, instead of speculating on what may have been intended. And I am of opinion, therefore, that the bill as against *Fretwell* should be dismissed with costs. (*b*)

Judgment.

(*a*) Moon v. Durden, 2 Ex. 22; and see Crooks v. Crooks, 4 Gr. 615.
(*b*) But see Jacques v. Withy, 1 H. B. 65; and Hitchcock v. Way, 6 A. & E. 943; which support the plaintiff's case.

1855.

Isherwood v. Dixon.

ESTEN, V. C.—It is quite clear that the plaintiff must be entitled to redeem on payment of what is actually due, but the usury is important as entitling him to redeem before the time appointed. I think *Fretwell* knew all the facts when he advanced the money and took the assignment, and therefore the usury seems to be established, and the redemption may therefore take place at once.

SPRAGGE, V. C.—The plaintiff is a judgment creditor of the defendant *Dixon*, and has registered his judgment. There are two mortgages prior to the judgment. The first to *Peters*, dated the 14th of June, 1852, assigned by *Peters* to *Fretwell*, is impeached as usurious. In that mortgage the principal money is made payable on the 22nd of June, 1855: the interest in the meantime annually. The second mortgage was made to several persons to indemnify them in respect of endorsements made by them for *Dixon*, and which it is alleged have since become due and payable.

Judgment.

It is contended on behalf of the defendant, that the plaintiff is not in a condition to call upon the second mortgagees to redeem the first, or himself to redeem the first until the first mortgage falls due, and it is also questioned whether the late statute repealing so much of the former act and ordinance as avoids contracts and securities founded upon usurious considerations, and imposes penalties, has not the effect of saving contracts and securities entered into before the act, but not impeached till afterwards.

I think the proper conclusion from the evidence is that the first mortgage was usurious, and that *Fretwell*, the assignee of the mortgage, and not *Peters*, the mortgagee, was the party who advanced the money to the mortgagor; so that independently of the late statute it was void. Then as to the effect of the late statute: The repealed clause, the 6th of the old statute, provided

1855.

Isherwood v. Dixon.

that "all bonds, contracts and assurances whatsoever, whereupon or whereby a greater interest shall be reserved and taken, shall be utterly void;" and the preamble to the third clause of a subsequent statute (7 Wm. IV. ch. 5) runs thus: "And whereas by law all contracts and assurances whatsoever, for payment of money made for an usurious consideration, are utterly void." Upon the 6th clause of the statute, coupled with the above preamble, the Court of Queen's Bench has held that the actual taking of usurious interest is not necessary in order to avoid the security, but that its being reserved is sufficient, as in the statute of Anne, where the words are reserved *or* taken, while in our statutes they are reserved *and* taken. This might be material in this cause, because under the mortgage in question no interest was paid or payable until after the passing of the late statute.

Judgment.

Taking it that the mortgage was void, or would have been so but for the late statute, although no usurious payment was made, the late statute, to have any effect upon it at all, must have made that valid which at the time it passed was void; the instrument was not merely voidable but void, and never had any existence as a valid instrument. The words of our statute, "utterly void," taken from the statute of Anne, received a strong construction in England, to the extent even of setting aside a judgment obtained upon an usurious security, and of holding negotiable paper in the hands of an innocent endorsee for value without notice of the usury, so contaminated by the usury that the holder could not enforce it. There is nothing in the statute to give it any other than a prospective operation, unless it be the repealing of the clauses which avoided securities tainted with usury.

The effect of a simple repeal of the statute has been stated in very broad terms by English judges. The repealed statute, it has been said, must be considered

1855.

Isherwood v. Dixon.

as if it had never existed, as if obliterated as completely from the records of Parliament as if it had never passed; with this exception, however, in the words of one judge, "except as far as they relate to transactions already completed under them;" in the words of another: "except for the purpose of those actions which were commenced, prosecuted and concluded while it was an existing law." The *point decided* has been, that a repealed statute cannot be made the foundation of any proceeding, civil or criminal, even though commenced before its repeal, and it is in such cases that the strong language to which I have referred has been used. That which is put as an exception to a rule does appear to me, with great deference, to be something more, for it establishes that as to every transaction completed, whether by way of suit or otherwise, the statute had existence and force as a law up to the time of its repeal; whatever was done and perfected under it up to the day of its repeal was valid—the judgment of a court in pursuance of the statute would be sustained by the authority of the statute though repealed the next day, and a transaction between individuals would be sustained by the same authority. These considerations seem to me to prove that the simple repeal of a statute does not repeal it *retrospectively*, but that it has force and validity up to the day of its repeal; if it were not so, a judgment founded upon it would be reversible on appeal, a thing never pretended. But it is said that it is valid and of force only for some purposes. It is not valid certainly to sustain any legal proceeding not completed at the time of its repeal, and that appears reasonable, for otherwise the judgment would rest upon a statute which had ceased to exist; as to that therefore, it is as if it had never existed.

Judgment.

It will not do, I think, to push too far, the doctrine that a repealed statute is as if it had never existed, with the exception of acts done and perfected. This repealed statute rendered the contract in question void;

1855.

Isherwood v. Dixon.

but suppose a contract made since the passing of the act, to take ten per cent. interest on money lent, which would not be an invalid contract; and suppose the late act hereafter repealed, the consequence of the doctrine would be to hold such a contract void; but I have no idea that any court would hold it void. And so of any other transaction under the like circumstances; and if this be so, it shews that the rule is by no means an universal one; and it cannot make any difference, as it appears to me, whether the repealed act made that lawful which was before unlawful or prohibited that which was before a lawful act.

In this case, under a statute then in force, the contract in question was void; it never had any valid existence, and never was legally binding upon the parties, because expressly forbidden by the statute, which declared such contracts utterly void. Now if the repeal of that statute has the effect contended for, it must give validity and force to that which previously had no existence; it must bring this piece of paper into legal existence; and the court must shut its eyes to the fact that it was always void, and see only that the statute which made it so is repealed. But does not such a position lead to this consequence, that if the repealed statute is to be considered as having never existed *quoad* this contract, then this contract was *always valid*—a thing manifestly untrue. Judgment.

The case of *Jacques* v. *Withy* is an express authority in favor of the views I take; and it is also supported by the late case of *Hitchcock* v. *Way;* at the same time, the language of many eminent judges is such as to create a doubt, but that language was applied to cases essentially differing from this, and might have been much qualified if applied to such a point as this case presents.

1855.

Isherwood v. Dixon.

December 24.

When judgment was pronounced a question was raised as to the disposition of the costs of the suit; and the court, having taken time to look into the authorities, now directed a decree to be drawn up, giving to the defendants the costs as of a redemption suit, and that *Fretwell* should pay the costs of all the issues raised by his answer and decided against him.

VanWagner v. Terryberry.

Specific performance—Laches.

June 23rd. and Sept. 24th.

A person in possession of lands contracted in the year 1848 with the proprietor for the purchase thereof, and about a year afterwards, without having paid any portion of the purchase money, absconded from the province, leaving some members of his family in possession of the property. In June 1850, the owner having failed to effect any settlement with his vendee, obtained possession in an action of ejectment which he had instituted, and in January 1851, sold the property to another purchaser, who went upon the land and remained in possession until the September of 1853, and laid out large sums in improvements, when the original vendee assigned his agreement to the plaintiff, who thereupon filed a bill for the specific performance of the agreement. The court dismissed the bill with costs.

Statement.

This was a bill for specific performance of a contract of sale of certain lands, the facts of which are stated in the judgment.

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

Mr. Proudfoot for defendants.

Sept. 24.

The judgment of the court was now delivered by

Judgment.

The Chancellor.—This is a suit for the specific performance of a contract for the sale of lot 30 in the 3rd concession of the township of Ancaster, containing one hundred acres. The plaintiff claims as assignee of one *Kramer*, under the following circumstances: In August 1843, *Jacob Terryberry* the defendant, contracted to sell the premises in question to *Kramer* for the sum of £1,125 payable in nine equal annual instalments with interest. *Kramer* had been in possession for

1855.

VanWagner v. Terryberry.

some years previous to the contract under some agreement with *William Terryberry*, the defendant's father; but it is unnecessary to state the circumstances connected with that transaction more particularly, because the rights of the parties to this suit depend upon the contract of August 1848. *Kramer* failed to pay the first instalment,—failed, so far as I can discover, to pay any portion of it; and being pressed by *Terryberry* for payment, he absconded from the province in September 1849, and emigrated to the United States, where he has ever since resided. Previous to his departure, however, a saw-mill which had been erected upon the premises was dismantled, the machinery having been taken out and sold, and an ineffectual attempt was made to remove from the property a frame house which had been built by *Kramer* as an appurtenance to the mill. It is said that this was the act of *Kramer's* sons, not of himself; but I am quite satisfied that it was done with his knowledge and consent. About the same time one *Sanders* was put in possession of the property, nominally as tenant to *Kramer*, but in reality for the purpose of injuring *Terryberry* and obstructing the assertion of his legal rights. *Sanders* was not a *bonâ fide* tenant. He was a man of straw. He had not the means of farming, and in fact did not farm the property, but during his short occupation he committed great waste, with the sanction, if not at the instance, of *Kramer*. In the early part of 1850 *Terryberry*, being anxious to obtain possession of his property, instructed his solicitor, *Mr. Freeman*, to apply to *Kramer* for a release, and in answer to that application *Kramer* addressed a letter to *Terryberry*, under date 4th of February 1850, the last sentence of which is in these words: "*Mr. Terryberry*, I have wrote to my sons how to settle with you, and if not, do the best you can. If you settle with the boys, well; if not, I shall hold on the farm as long as the law will bear me out." Upon the receipt of this letter of defiance from *Kramer*,

Judgment.

1855.

Van Wagner v. Terryberry.

then an absconding debtor, *Terryberry* commenced an action of ejectment, and received possession from the sheriff in June of the same year. In the ensuing January he sold the property to the defendants, the *Shavers*, for £1050, being about £200 less than he would have received from *Kramer* had he fulfilled his contract. The *Shavers* continued in undisturbed possession until the execution of the present assignment, in 1853, under which the plaintiff claims, and laid out large sums in improvements, and up to that time, a period of nearly four years from the letter of February 1850, no communication would seem to have taken place between the parties to this contract.

Judgment.

Such are the circumstances of this case, respecting which I will only repeat now what I said at the hearing, that it does not appear to me to admit of the smallest doubt. A decree for specific performance would be subversive of the foundation on which this jurisdiction rests, and destructive of the principles of equity and good conscience, which this court is specially bound to conserve; and I am of opinion, therefore, that the bill should be dismissed with costs.

Osborne v. The Farmers' and Mechanics' Building Society.

Agent—Abatement—Misdescription.

March 29th. and June 30th.

It is not necessary that the seal of a building society should be affixed to an authority to its agent to sell; the entry in the books of the society is sufficient for that purpose.

A sale having been advertised of property held by a building society in security, in describing it, it was, amongst other things, stated that it rented for £72, and that forty acres of it were a dense forest of pine—in reality it rented for £50 only, and the pinery had no existence at all. The purchaser having discovered this error, filed a bill to compel specific performance of the contract, with an abatement of the price. The society offered to perform the contract without compensation, but this the purchaser declined to accept. The Court, at the hearing, dismissed the bill, but without costs.

Statement.

The bill in this case was filed by *William Osborne* against The *Farmers'* and *Mechanics'* Building Society

1855.

Osborne v. The F. & M. Buildi'g Soc.

and *Joseph D. Ridout* and *William B. Crew*, the President and Secretary thereof, and stated to the effect that a borrower from the society being in default his property was, by resolution of the society, ordered to be sold, and was accordingly advertised. In the particulars and conditions of the sale the property was described as being rented for £72 10*s.* a-year, and being composed in part of forty acres "of a dense forest of valuable pine timber," and at the sale the plaintiff became the purchaser of the whole at £830, when a memorandum to that effect was made and signed by the auctioneers. The plaintiff alleged that after the sale he discovered that the property in fact rented for £50 a-year, and not for £72 10*s.*, as stated in the advertisement, and the dense forest of pine did not exist at all. Under these circumstances, after some correspondence had taken place between the parties with a view to a settlement, the bill was filed to compel a specific performance of the contract, with an abatement of the purchase money, in consequence of the misdescription of the property. This claim was resisted on several grounds; the principal one was, that the defendants being trustees for the persons interested in the purchase money, the Court would not decree any abatement whatever to be made, although they expressed their willingness to convey the property for the sum at which it had been sold, or allow the plaintiff to throw up the bargain altogether. It was also objected that the authority to the secretary to sell the premises in question was not under the seal of the society, and which, the defendants submitted, should have been to empower the agent to enter into a contract binding upon the society.

Statement.

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

Argument.

Mr. *Mowat*, Mr. *E. C. Jones*, and Mr. *Roaf*, for defendants.

1855.

Osborne v. The F. & M. Buildi'g Soc.

Hill v. *Buckley* (*a*), *Stanton* v. *Tattersall* (*b*), *Newly* v. *Paynter* (*c*), *Dyer* v. *Hargrave* (*d*), *Dykes* v. *Blake* (*e*), *Waters* v. *Waters* (*f*), *Dowberry* v. *Stephens* (*g*), *Martin* v. *Cotter* (*h*), *Lowndes* v. *Lane* (*i*), *Brewster* v. *The Canada Company* (*j*), *Turner* v. *Harvey* (*k*), *White* v. *Cuddon* (*l*), *Mortlock* v. *Buller* (*m*), *Garnet* v. *Hill* (*n*), *Carter* v. Dean of *Ely* (*o*), *Hawkes* v. *The Eastern Counties' Railway Co.* (*p*), were cited.

June 30.

ESTEN, V. C.—I think that *Wakefield & Coate* were duly authorised agents of the society, to sell and sign a contract, and that the memorandum endorsed upon the conditions of sale and advertisement, and signed by *Wakefield & Coate*, is a sufficiently signed contract within the Statute of Frauds.

I think the power of sale was to the society in effect, and that the society could exercise it in the absence of both President and Secretary, or either of them. I think the bill should be dismissed without costs.

Judgment.

SPRAGGE, V. C.—I think that the seal of the society was not necessary to confer a valid power upon the officer of the society to carry into effect a sale of property which the society was authorized to sell.

The 3rd section of the Building Societies' Act (*q*) provides that all acts and orders of the directors under the powers delegated to them shall have the like force and effect as the acts and orders of the society at any general meeting thereof could or might have had in pursuance of the act: provided always that the trans-

(*a*) 17 Ves. 394.
(*b*) 21 L. T. 333.
(*c*) 21 L. T. 299.
(*d*) 10 Ves. 505.
(*e*) 4 Bing. N. C. 463.
(*f*) 2 DeG. & S. 609.
(*g*) 3 B. & C. 629.
(*h*) 8 Ir. Eq. R. 147.
(*i*) 2 Cox, 363.
(*j*) Ante, Vol. IV. p. 443.
(*k*) Jacob, 178.
(*l*) 8 Clk. & F. 766.
(*m*) 10 Ves. 292.
(*n*) 5 Stark, 10.
(*o*) 7 Sim. 212.
(*p*) 1 DeG., McN. & G. 737.
(*q*) 9 Vic. ch. 90.

actions of such directors shall be entered in a book belonging to the society. In this case the officer of the society derived his authority to sell from the order of the directors, expressed by entry in their book kept for the purpose of entering the transactions of the society in pursuance of the statute.

It is not indeed expressly proved that the authority to sell in such a case was an authority delegated by the society to the directors under the act; but it was not denied to be so; it was an authority which the entries in their book shew it was the habit of the directors to exercise, and is of a nature which would almost, as a matter of course, be exercised by the directors, and not by the society at large; and it is not to be assumed that the power was exercised without authority.

Judgment.

I think, further, that sufficient was expressed in the order of the directors, as entered in their book of transactions, to warrant the sale which has taken place. There had been a sale by auction which was abortive, and this was followed by an order to re-sell immediately,—importing, as I take it, a re-sale by auction. This order vested authority in the proper officer of the society to do whatever was necessary to carry into effect a sale by auction of the property in question. The proper officer to execute that duty was the secretary, and at that time *Mason* was, by the appointment of the directors, acting secretary of the society. The authority to sell by auction comprehended authority to employ an auctioneer for the purpose.

I think, with my brother *Esten*, that there was a signed contract within the Statute of Frauds. The objection that one of the two mortgagees was absent in England, and did not concur in exercising the power of sale, and that the exercise of the power was therefore by one only of the trustees for sale, is not,

1855.

Osborne v. The F. & M. Buildl'g Soc.

in my opinion, a good objection in a case of this nature. The mortgage was made to the president and secretary under the 12th section of the act, and was made to them as officers of the society; they were the mere channels by which the mortgage security reached the society, and were not the persons intrusted either by the mortgagor or the society with any discretion as to the exercise of the power of sale. From the nature of the power, it would be exercised by those who ordinarily managed the affairs of the society—*i. e.*, the directors of the society.

Upon the question of enforcing specific performance in this case, with compensation to the purchaser, I concur with my brother *Esten* that it ought not to be enforced. With the property so misdescribed as it was, it was necessarily brought to sale by auction at a great disadvantage. I agree with Mr. *Mowat* that the property advertised for sale and the property to be sold were not merely different in degree, but different in kind, nothing less than a different class of property; that persons who might have attended to purchase such a property as it really was would probably be deterred from attending to purchase what it was represented to be; while others who might attend with the view of purchasing a mill property would abstain from bidding upon finding in the auction room that it was no mill property that was to be sold. Then, again, the misdescription as to the *pinery* and the amount of rental was certainly very great; and it is very probable that the property would be worth as much as the plaintiff asks by way of compensation (£250) more than it is worth, if it had really come up to the description; but it by no means follows that it would have brought that amount less if it had been truly described, or, in other words, that it brought that amount more than it otherwise would have done in consequence of the misdescription: on the contrary, a person from the neighborhood, who, it is presumed, was acquainted with the

Judgment.

1855.

Osborne v. The P. & M. Buildi'g Soc.

property, offered at the sale within a trifle of the sum at which it was knocked down to the plaintiff; and it is in evidence that the property, though falling far short of the description in some particulars, is really worth considerably more than the price at which it was purchased by the plaintiff. It seems, then, to be evident that if this sale were enforced with a compensation for deficiencies, not only would the purchaser obtain the property at a very great undervalue, but the mortgagor, who was in the matter of the sale the *cestui qui trust* of the building society, would be very seriously prejudiced by the manner in which it was managed.

If the description of the property, instead of setting forth advantages which the property did not possess, had failed to set forth advantages which it really did possess, such misdescription by those who were trustees for sale would be clearly a breach of trust; and it is not so, I apprehend, where, as in this case, the opposite error is committed, because the almost necessary consequence is in each case the same—that in the result (in the latter case deducting the compensation) a less sum would be obtained for the property than if a correct description of it were given. The doctrine of *Mortlock* v. *Buller* (*a*) appears to me clearly to apply to this case, and has been followed in recent cases in England. In *Goodwyn* v. *Williams* (*b*) the language of both the Lords Justices assumes the doctrine there laid down, without in terms referring to that case, to be the law of the court. In the still more recent case of *Sneezely* v. *Thom* (*c*) Sir *William Page Wood* says: "The principle established by *Mortlock* v. *Buller* and *Lainsbury* v. *Jones* seems to be this, that the court will not enforce, as against a person selling in a fiduciary character, a contract which any party interested in the trust is entitled to complain of."

Judgment.

(*a*) 10 Ves. (*b*) 4 D. M. & G. 104.
(*c*) 1 Jur., N. S., 125.

1855.

Osborne v. The F. & M. Building Soc.

Upon the evidence in this case I can scarcely doubt that if a correct advertisement had been issued, and the property afterwards sold by a correct description, it would have brought a much larger sum than the sum which the plaintiff would have to pay for it if reduced by compensation; I think probably as large a sum, or very nearly so, as he bid for it at auction. I think, therefore, that the management, or rather mismanagement, of the sale amounted to a breach of trust, and that the *cestui qui trust* has great reason to complain of it; and that it would be contrary to the principle established in *Mortlock* v. *Buller*, and the other cases referred to, to enforce it, as the plaintiff desires to enforce it, with compensation.

Judgment.

BUCHANAN v. KERBY.

Mortgage—Application of payments.

June 22 and Nov. 12.

The debtor of a mercantile firm being desirous of extending his transactions with his creditors, executed to them a mortgage to secure the sum of £2000: Subsequent transactions between the parties to a large amount took place, and during one year alone the sums charged to the debtor, including the sum due on the mortgage, amounted to £30,000; and after four years' dealing between the parties, from the time of executing the mortgage, an account was delivered to the debtor, showing a balance of £1641 against him. Upon a bill filed to foreclose the mortgage for this amount, the court held that the transactions which had taken place discharged the mortgage debt.

The ruling in Re *Brown*, reported ante volume 2, page 590, affirmed.

Statement.

This was a bill filed by *Peter Buchanan*, *Robert William Harris*, *John Young*, *James Law* and *Robert Leckie*, against *Andrew Todd Kerby*, *William Kerby* and *Margaret* his wife, and *James Kerby*, praying for the foreclosure of the defendants' interest in certain premises mortgaged by *Andrew Todd Kerby* to secure the sum of £2000.

Dr. *Connor*, *Q. C.*, Mr. *Brough*, and Mr. *Galt*, for plaintiffs.

Mr. *Vankoughnet*, *Q. C.*, Mr. *Mowat*, and Mr. *Turner*, for defendants, other than *Andrew Todd Kerby*; as against him the bill had been taken *pro confesso*. 1855. Buchanan v. Kerby.

The facts of the case, the arguments of counsel, and cases relied on, appear in the judgment of the court, which was now delivered by

Nov. 12. THE CHANCELLOR—On the 12th of August, 1846, *Andrew Todd Kerby* conveyed the premises in question in this cause to the plaintiffs, by way of mortgage, to secure £2000, payable on the 12th of July, 1851. The bill sets out by stating a previous arrangement, which had been entered into in December, 1845, under which the plaintiffs had agreed to make advances to *Kerby*, to the extent of £7500, upon having a security to that amount, which did not, however, affect the premises in question in this cause. According to that arrangement, the terms of which are stated in the mortgage deed, the plaintiffs were empowered to call in their debt at any moment, and *Kerby* was bound to pay any balance due from him upon the determination of the credit, within nine months thereafter. That mortgage, therefore, was in terms, a mortgage to secure a floating balance. Having stated the transaction of December, 1845, in that way, the bill proceeds to the mortgage of August, 1846, which it decribes in these words, "and your orators further shew that subsequently a settlement of accounts was had by or on behalf of the said above named firms, and the said *Andrew Todd Kerby*, and the balance found on such settlement to be due to the said firms, on the footing of the above mentioned mortgage, was the sum of £2000, to secure which balance with interest thereon, the said *Andrew Todd Kerby* by an indenture of bargain and sale, bearing date the 12th day of August, 1846, and made between him, the said *Andrew Todd Kerby*, of the one part, and your complainant, the said *Robert William* Judgment.

1855.

Buchanan v. Kerby.

Harris, of the other part, mortgaged in fee to the said *Robert W. Harris*, divers parcels, &c., and that the time by the said indenture limited for the payment of the said sum of £2000 and interest, has long since elapsed." It is quite clear, therefore, upon the statement of the bill, as well as from the deed, that the mortgage of August, 1846, the one in question in this cause, was not like the former, a mortgage to secure the floating balance of *Kerby's* account, but was intended to secure a specific debt of £2000, then due to the plaintiffs. *Andrew Todd Kerby* claimed the premises in question, under a conveyance from the present defendants, *William Kerby* and *Margaret* his wife, executed on the 16th of May, 1843. That conveyance was absolute in form, but *William Kerby* and his wife allege that it was executed, first, to secure sums advanced, and to be advanced to them by *Andrew Todd Kerby*, and then in trust for the separate use of *Margaret Kerby*, to whom the property originally belonged; and in the month of September, 1848, a suit was instituted by *Kerby* and wife against *Andrew Todd Kerby*, upon that ground, which prayed, amongst other things, that the deed of May, 1843, should be set aside for fraud. A decree was made in that cause, on the 13th of May, 1851, by consent, by which the deed of May, 1843, was declared to be a mortgage; the usual accounts were directed, and *Andrew Todd Kerby* was ordered to reconvey to *Margaret Kerby* or such person as she should appoint, upon payment of any balance found due to him. The Master reported that *Andrew Todd Kerby* had been overpaid by receipt of rents and profits, and the premises were subsequently conveyed to *James Kerby*, in trust for *Margaret Kerby*, in accordance with the provisions of the decree.

Judgment.

The title of the present defendants is, therefore, unquestioned; but they resist a decree for foreclosure on two grounds; they say, first, that the mortgage of

August, 1846, has been paid in full already; but, whether paid or not, they say, secondly, that the plaintiffs, when they took that security, had notice actual or constructive, of the nature of *Andrew Todd Kerby's* title, and have, therefore, no right to a decree.

The argument in support of the first objection is not that *Andrew Todd Kerby's* debt has been fully discharged. It is clear, on the contrary, that it has not been. But it is alleged that the subsequent payments were much more that sufficient to pay off the mortgage debt, and as no appropriation of the payments were made either by *Kerby* or the plaintiffs, the contention is, that the law, upon the principle applicable to indefinite payments, appropriated the same to the payment of that particular debt; and, if that principle be applicable, there can be no doubt that this mortgage has been already satisfied.

Judgment.

Now the facts upon which that argument rests are as follow:—On the 31st of March, 1848, two accounts current between *Andrew Todd Kerby* and the plaintiffs were prepared by the plaintiffs and delivered to *Kerby*. The first purported to be an account of the transactions of 1846, and a balance was brought down against *Andrew Todd Kerby* on foot of that account of £3855 13s. 5d. The second, purported to be an account of the transactions of 1847, and the balance against *Kerby* on the foot of that account was £716 3s. 8d. The transactions between the 12th August, 1846, and the period of which I am speaking were very large. The debit side of *Kerby's* account during that period amounted to more than £30,000, and the payments must have been very large; but for the purpose of the present argument I do not find it necessary to go behind the account of the 31st of March, 1848. The next account current was delivered on the 31st of December, 1848. The

1855.

Buchanan v. Kerby.

debits on that account amounted to £6431 12s. 11d.; the first two items of which were the balances of the two accounts delivered in the previous March, and the balance carried down against *Kerby* on foot of that account was £3854 8s. 1d. That balance was carried into and forms the first item on the debit side of the next account, delivered in December, 1849, which amounted to £7300 6s. 8d., with a balance against *Kerby* of £3000 2s. 10d. That balance formed the first or only item on the debit side of the next account, and it is the last to which I shall have occasion to refer, which was delivered on the 27th of August, 1850. The balance of this account was £1641 0s. 6d., which, with interest, constitutes the plaintiffs' present demand.

Judgment.

Having had occasion to consider the law upon this subject carefully on a recent occasion (*a*), I shall not go over the authorities in detail now, but shall content myself with observing that I am unable to distinguish the present case from the one to which I have referred. And if the present case is to be decided upon the principles laid down by *Sir William Grant* in Clayton's case (*b*), and sanctioned by numerous subsequent decisions, of which *Bodenham* v. *Purchase* (*c*), *Pemberton* v. *Oakes* (*d*), *Simson* v. *Ingham* (*e*), The Bank of *Scotland* v. *Christie* (*f*), and recently *Pennell* v. *Deffell* (*g*), may be cited as examples, then it is quite clear, I think, that the mortgage under which the plaintiffs claim has been fully satisfied. The balance due on foot of the account delivered in December, 1848, was £3854 8s. 1d. That balance, which constituted the whole debt then due to the plaintiffs, and which, therefore, embraced of necessity the amount, if any, due on foot of the mortgage, was the first item in the subsequent account; but, between

(*a*) In re Brown, 2 Grant Rep. 590.
(*b*) 3 Mer. 572.
(*c*) 2 B. & Al. 39.
(*d*) 4 Rus. 154.
(*e*) 2 B. & C. 65.
(*f*) 8 C. & F. 214.
(*g*) 18 Jur. 273.

1855.

Buchanan v. Kerby.

the 31st of December, 1848, and the 27th of August, 1850, *Kerby* had paid upwards of £8000; that is, had paid much more than enough to discharge the old balance. That is the inevitable conclusion, indeed, from the account of 1849, taken by itself; for the credits in that year alone were more than sufficient to pay the old balance, which constituted the first item on the debit side of that account; that is, were more than sufficient to pay off the mortgage debt, which was necessarily embraced in that account. It is said, however, that upon the testimony of *Mathews*, the plaintiffs were at liberty to apply the payments in discharge of the new advances, and, in that way, to keep alive the mortgage debt. No doubt the plaintiffs might have taken that course, quite irrespective of the custom spoken of in the evidence of *Mathews*. It was open to them to have separated the mortgage debt from their general account, and in that way to have kept the security on foot. But that course was not adopted. The mortgage debt was amalgamated with the general account, and formed, of necessity, a part of the general balance; and as there was not any special appropriation of these payments, either by *Kerby* or the plaintiffs, the form in which the accounts were kept was in the eye of the law an appropriation of the payments to the liquidation of the debits in their order; that is, was an appropriation of the payments, in this particular case, in discharge of the old balance, which was the first item on the debit side, and as the old balance obviously included the mortgage debt, it follows that the mortgage debt no longer exists.

Judgment.

Our opinion being in favor of the defendants on the first ground, it becomes unnecessary to consider the second; but it may be proper to observe that, as at present advised, we think that objection entitled to great weight (*a*).

(*a*) Worthington v. Morgan, 16 Sim. 547; Finch v. Shaw, 19 Beav. 511.

1855.

MAIR v. BACON.

Partnership—Sale by one partner of his interest.

One of several partners, engaged in the purchase of wheat and flour, sold one half of his interest to a third party, to which the other partner, who had supplied all the funds used in the transactions of the firm, assented, and a loss having occurred upon a re-sale, he filed a bill against the original co-partner, and his vendee for an account and payment by them of one half of the loss sustained on such resale.

Held, that the vendee was not, by what had taken place, constituted a partner of the plaintiff, and the court dismissed the bill as against him with costs: but directed an account as against the other defendant with costs to the hearing.

Statement.

The bill in this cause was filed by *Thomas Mair* against *John Bacon* and *Ormond Jones*, praying an account of certain alleged partnership dealings, and that the defendants might be ordered to pay each one-fourth of the loss which had accrued in transacting the partnership business.

Mr. *Mowat*, for plaintiff.

Mr. *Vankoughnet*, *Q. C.*, and Mr. *Strong* for defendant *Jones*.

Argument.

Mr. *Brough*, for defendant *Bacon*.

Maure v. *Harrison* (*a*), *Wright* v. *Morley* (*b*), *Jeffries* v. *Smith* (*c*), *Hesketh* v. *Blanchard* (*d*), *Smith* v. *Watson* (*e*), *Saville* v. *Robertson* (*f*), *Stoker* v. *Brockelbank* (*g*), *Coope* v. *Eyre* (*h*), *Pott* v. *Eyton* (*i*), were referred to.

THE CHANCELLOR—This is a bill for an account of partnership transactions.

Judgment.

The plaintiff's allegation is that in the month of May, 1847, he entered into partnership with the

(*a*) 1 Eq. Ca. Ab. 93.
(*b*) 11 Ves. 12.
(*c*) 3 Russ. 158.
(*d*) 4 East 144.
(*e*) 2. B & C. 401.
(*f*) 4 T. R. 720.
(*g*) 3 McN. & G. 350.
(*h*) 1 H. Bl. 37.
(*i*) 3 C. B. 32.

1855.

Mair v. Bacon.

defendant *Bacon*, in the purchase of wheat and flour, upon these terms: the plaintiff to supply all the funds, the defendant *Bacon* to make all the purchases the profit and loss to be divided equally between those parties; that the defendant *Jones* acquired one-half of *Bacon's* interest shortly after, and became a partner in the concern to that extent; that the partnership transactions were limited to the purchase of one hundred barrels of flour, and about 7,000 bushels of wheat; which were resold at a great loss, one half of which he seeks to recover from the defendants, in equal proportions.

Bacon's defence is two-fold. In the first place, he denies the agreement set up by the bill. He asserts that he was a mere agent in the purchase of the wheat, entitled to one half of the profits, but not subject to any part of the loss. He contends, in the second place, that the wheat purchased from *Denant* (about 4500 bushels) was not purchased by him, or under the agreement, but by *Leavitt*, on his own account, and that it forms, consequently, no part of the partnership transactions.

Judgment.

The defence fails wholly, in my opinion, on both grounds. First, as to the original agreement. *Leavitt* proves that very clearly. I agree in the observation that his evidence must be read with caution; but he is confirmed by *Denant*, and I see no reason to doubt his veracity. But the other evidence places this beyond doubt. In the first place we have before us an account settled between *Leavitt* and *Bacon*, which includes a sum of £1000 expended by *Bacon* in the purchase of a portion of this wheat and flour, and at the foot of that account there is a memorandum in the handwriting of *Bacon* himself, in these words: "The profits or loss on the purchase of £996 6s. 9d. to be divided between the said *Mair* and *Bacon*, each one-half." Nothing can be clearer

1855.

Mair v. Bacon.

than that admission; unexplained, it wholly displaces the defence.

Then it is admitted that *Bacon* brought an action against *Jones* to recover one-fourth of the original cost of seven thousand bushels of wheat and one hundred barrels of flour, the same now in question. Now, that fact cannot be reconciled with the present defence. It forms, in my opinion, a conclusive answer to the defendant's case. *Bacon* cannot be heard to allege here that facts within his own knowledge, upon which he rested his right to recover, in that action, in proof of which he adduced evidence, were utterly false. He deliberately affirmed the plaintiff's case in that judicial proceeding, and cannot be heard to question its truth now. It is said, indeed, that the defendant was induced to sign the memorandum, and bring the action, of which I have spoken, by fraud and misrepresentation. But there is not the slightest

Judgment.

evidence of that beyond the assertion in the answer, which cannot be considered, I think, as entitled to much weight.

The other ground of defence is still less tenable. When the defendant sold half his interest to *Jones* he signed a receipt in these words:—

"Brockville, 26th June, 1847.

"Received from *Ormond Jones* the sum of £20 Halifax currency, as a consideration for half of my interest in the purchase of wheat and flour now on hand, bought on joint account with *John G. Leavitt*, *supposed to be about seven thousand bushels* of wheat and one hundred barrels of flour.

"JOHN BACON."

Now, if *Denant's* wheat had not been purchased on joint account, there would not have been 7000 bushels on hand, but only 2500; the assertion in the answer is therefore in direct opposition to the express language of this receipt, signed by *Bacon* himself,—to the contract he had entered into with *Jones*,—and to the action subsequently brought, in which he claimed from

1855.

Mair v. Bacon

Jones one-fourth of the cost of 7000 bushels of wheat, as wheat bought on joint account. As against *Bacon*, therefore, I think the plaintiff clearly entitled to a decree.

Jones's defence rests on a different ground. He denies the alleged partnership. Admitting himself to have purchased one-half of *Bacon's* interest, he denies that he thereby became, or intended to become, a partner with the plaintiff, with whom, he alleges, that he had not any communication whatever from the beginning to the end of the transaction; and he insists that the bill must therefore be dismissed as against him, with costs.

The plaintiff's answer to this defence is that it fails both in law and fact. He alleges that the contract between the defendants was communicated to him, that he acquiesced in the sale, and that *Jones* became thereby a general partner. Assuming *Mair* to have acquiesced in the sale to *Jones*, that did not constitute *Jones* a partner. To effect that there must have been a mutual intention. But there is no pretence for asserting that *Jones* either claimed or desired to be a partner with the plaintiff. He never interfered in any way with the business; and he had no communication, whatever, with *Mair* or *Leavitt*.

Judgment.

It is quite clear, however, that the plaintiff never did, in fact, deal with *Jones* as a partner. Looking into the correspondence between *Mair* and *Leavitt*, we discover a very early appreciation of the importance of implicating *Jones* as a partner, and a firm determination not to permit him to escape from that position if possible, and yet in a letter from *Leavitt* to *Jones*, dated the 9th of August, 1847, which appears to have been the first communication between the parties, the writer says, "As the price of wheat and flour in Montreal is so low in comparison with the

1855.

Mair v. Bacon.

price in England, I have concluded to ship the wheat and flour bought by Mr. *John Bacon* on joint account with me on account of the owners; *as I understand you have bought a share of it from Mr. Bacon,*" &c. It it quite clear, I think, that at the date of the above letter, nothing had occurred between *Jones* and *Mair* to constitute *Jones* a partner; and it is not likely, I apprehend, looking to the state of the market, that anything occurred at a later period.

But the account made out and delivered by the plaintiff himself, in September, 1848, is conclusive. That is not an account between the plaintiff, *Bacon* and *Jones*, as it certainly would have been, assuming the truth of the case made by the bill. It is headed in this way: "Dr.—*Bacon* and *Mair*, joint account, in account with *Thomas Mair*." "Statement of purchase of wheat and flour, and sale of same on joint account of *John Bacon* and *Thomas Mair*." Now, at the time that account was made out the partnership property had been all sold. It had been ascertained that the result of the transaction was a heavy loss; and had there been even slight ground for treating *Jones* as a partner, liable as such to one-fourth of that loss, I have no doubt that the account of which I am speaking would have assumed a very different form.

Judgment.

It is said, next, that the assignment of *Bacon's* interest was an assignment of a chose in action; that the court recognizes the assignment of choses in action; that *Jones*, as such assignee, might have filed a bill against *Mair* for his share of the profits, had the transaction been profitable, and that *Mair* must be entitled, *pari ratione*, to file a bill against *Jones*, to compel him to bear his proportion of the loss.

It is true, indeed, that this court recognizes the assignee of a chose in action, and in many cases permits

him to proceed in his own name to enforce his rights; and it is also true, that a partner in a trading concern may assign his interest therein; but it is equally true that this court has always refused to permit such an assignee to exercise any of the rights of a partner. He is not considered as having any demand against the partnership; neither has the partnership any demand against him: the doctrine contended for would destroy a fundamental rule in the law of partnership. This has been long the settled law of the Court. In *Exparte Barrow* (*a*) Lord *Eldon* says, "I take it to be long since clearly established that a man may become a partner with A, when A & B are partners, and yet not be a member of the partnership which existed between A & B. In the case of Sir *Charles Raymond*, a banker in this city, a Mr. *Fletcher* agreed with Sir *Charles Raymond* that he should be interested so far as to receive a share of his profits of the business, *and which share he had a right to draw out from the funds of Raymond & Co.* But it was held that he was no partner in that partnership, *had no demand against* it, had no account in it, and that he must be satisfied with a share of the profits arising and going to Sir *Charles Raymond*.

1855.

Mair v. Bacon.

Judgment.

Brown v. *De Tastet* (*b*) is a clear authority to the same point. There one *Mangin*, being advanced in years, agreed to relinquish his business to the defendant *De Tastet* in the year 1800. *De Tastet*, about the same time, admitted *De Paiva* and *Grellet* into partnership with him, each to have a fourth share. In the course of the year, 1802, *Mangin* became desirous of again entering into the business, and *De Tastet* at his request, agreed to let him have one-half of his (*De Tastet's*) moiety of the partnership for his life. In July, 1803, *Mangin* died intestate, leaving one daughter, who, with her husband, were the plaintiffs in the suit. At the time of *Mangin's* death a con-

(*a*) Rou. 255. (*b*) Jacob, 284.

1855.

Mair v. Bacon.

siderable portion of his property was embarked in the house as his share of the capital, *of which De Tastet and his partners possessed themselves, and continued to employ it together with their own property in the trade.* The plaintiffs, who had taken out administration to *Mangin*, filed their bill in July, 1809, against *De Tastet*, praying an account of *Mangin's* property in the partnership, and of the profit or interest made with it since his death. *De Tastet*, by his answer, submitted that *De Paiva* and *Grellet* were necessary parties, and the bill was amended accordingly. But at the hearing the bill was dismissed against *De Paiva* (*Grellet* was out of the jurisdiction) with costs. The decree of the Master of the Rolls was brought before Lord *Eldon* upon this, amongst other grounds of appeal, that *De Paiva* and *Grellet* were necessary parties, but Lord *Eldon* said: "I should here remark, before proceeding further, that upon reading the bill and answer of *De Tastet*, I am satisfied with so much of the decree as considers him to be solely liable not only for his own transactions, but for those of *De Paiva* and *Grellet*."

Judgment.

This rule is laid down very clearly in the text books also. In *Collyer* on Partnerships (*a*) it is said, "and clearly when there is a sub-partnership, the sub-partner ought not to be made a party to a suit for taking the account of the general partnership."

We are of opinion therefore that the plaintiff is entitled to a decree against *Bacon*, with costs to the hearing, but that the bill as against *Jones* must be dismissed with costs.

ESTEN, V. C.—It is quite clear that *Bacon* was to be liable for *Jones*, and that *Jones* stood in his place *quoad* one-half, but there is no evidence of any express agreement to become partners between *Mair*, *Bacon* and *Jones*—that is, so far as *Jones* was concerned.

(*a*) Page 333, 3rd Am. Ed.

1855.

Mair v. Bacon.

It appears from the case of *Brown* v. *De Tastet*, reported in *Jacob*, that it was quite competent for *Jones* to contract with *Bacon* to stand in his place as to profits and losses, to the extent of one-half, without becoming the partner of *Mair*, and that in this case *Mair* could demand no account as against *Jones*. I think the circumstances all shew that *Jones* did not agree, and did not intend to become the partner of *Mair*, and therefore I think the bill as against *Jones* should be dismissed with costs, but the whole account should be decreed as against *Bacon*.

Judgment.

SPRAGGE, V. C., concurred.

DUNOVAN v. LEE.

Registered judgment—Lien.

A creditor obtained judgment previously to the statute 13 & 14 Vic. ch. 63, which, after the passing of that act, he registered. Subsequently to this the debtor assigned to a third party his equitable right, as purchaser, to certain lands, upon which a small balance of the purchase money remained due. *Held*, that the judgment so registered attached, and that the plaintiff was entitled to payment of his claim out of the proceeds of such lands, which, upon a bill by the judgment creditor, were ordered to be sold.

Mar. 21 and Nov. 13, 1855.

The bill was filed by *Joseph Dunovan* against *John Lee* and *John Harrison*, and under the circumstances set forth in the judgment prayed that the lands in question in the cause might be sold, and the judgment of plaintiff paid; or that he might be declared the legal owner thereof, and the deed to *Lee* of the same property might be delivered up to be cancelled.

Statement.

Mr. *McDonald*, for plaintiff.

Mr. *Turner*, for defendant *Lee*.

Mr. *Crickmore*, for defendant *Harrison*.

Argument.

In addition to the cases mentioned in the judgment, *Whitworth* v. *Gaugin* (*a*) was referred to.

(*a*) 1 Phil. 728.

1855.

Donovan v. Lee.

THE CHANCELLOR.—The plaintiff is a judgment creditor of the defendant *Harrison*, and the suit is instituted for the purpose of having that debt paid by a sale of the premises in question in the cause.

In the year 1839 the defendant *Harrison* contracted with one *Street* for the purchase of certain lands, including the lands in question, for the sum of £75, payable in nine equal annual instalments. In Michaelmas term 1847 the plaintiff recovered judgment against *Harrison* in the Court of Queen's Bench for £150. On the 5th of December, 1850, that judgment was registered in the county of Halton, where the land lies, and on the same day a writ of *Fieri Facias* against the lands of *Harrison* was placed in the hands of the sheriff of that county.

By letter dated the 4th of October, 1851, *Harrison* required the vendor to convey the premises in question to the defendant *Lee;* and on the 6th of that month *Lee* paid the vendor the balance then due upon the contract (£5 10*s.* 6*d.*), and took a conveyance to himself in fee; and on the 29th of October in the same year *Harrison* assigned all his interest in the property by deed-poll to the defendant *Lee*.

Judgment.

On the 25th of February, 1852, the sheriff of the county of Halton sold all *Harrison's* interest in the premises, under the plaintiff's writ, for the sum of £100. The plaintiff became the purchaser at that sale, and a conveyance was duly executed by the sheriff on the 25th of the following month.

The case made by the bill is two-fold. The plaintiff alleges, in the first place, that the dealings between *Lee* and *Harrison* were colorable merely—a fraudulent contrivance to defeat his judgment; that *Lee* was really a trustee for *Harrison*; that the sheriff's deed was, consequently, a valid conveyance; and that

1855.

Donovan v. Lee.

the deed from *Street* to *Lee* formed a cloud upon his title, and ought therefore to be cancelled by the decree of this court. The plaintiff insists, next, that his judgment was a lien upon *Harrison's* equitable interest in this estate; that *Lee* purchased with note of his judgment, which still forms, consequently, a charge upon the land.

Upon the first branch of the case the only material witness is *Harrison* himself. His evidence is extremely unsatisfactory. The case, upon his own shewing, is one of great suspicion; but we are relieved from expressing any decided opinion upon the point, because we think the plaintiff entitled to relief on the other ground.

Harrison's interest in this property could not have been sold by the sheriff under the statute of Charles II. That was not reserved in trust for *Harrison* within that act (*a*), neither is it made saleable under the recent statutes (*b*). These statutes were passed with an entirely different object, and the proviso to the fifth section of the earlier statute would seem to exclude cases like the present from its operation. The sheriff's deed was therefore a nullity.

Judgment

The statute 13 & 14 Vic. ch. 63, was cited by the learned counsel for the plaintiff. That statute does certainly extend the rights of judgment creditors in several important particulars; but it is confined to judgments entered up after the 1st of January, 1851, and has no application therefore to the present case.

Two questions, then, arise: first, did the plaintiff's judgment form a lien, irrespective of the recent statutes, upon *Harrison's* equitable interest? Secondly, had *Lee* notice of the judgment before he made his purchase?

(*a*) Doe v. Greenhill, 4 B. & Al. 684.
(*b*) 12 Vic. ch. 71, secs. 5, 13, 14 & 15 Vic. ch. 7, secs. 5, 9.

1855.

Dunovan v. Lee.

Upon the first point, it is clear that the plaintiff's judgment did form a lien upon *Harrison's* equitable interest. The proposition advanced by the learned counsel for the defendant *Lee* was very much pressed upon the attention of Lord *St. Leonard* in *Baldwin* v. *Belcher* (*a*); but that learned judge said, "No such proposition can be laid down by a judge in a court of equity; for though the purchaser has neither a legal nor an equitable right, as against the seller, until he pays the purchase money, yet for all purposes of disposition the equitable estate which he obtained under the contract for sale is subject to his control. There is no doubt as to that point; it is a landmark of the court, and ought not to have been questioned."

Judgment.

Upon the other point also the plaintiff is clearly entitled to succeed. I am inclined to think that the evidence establishes actual notice; but it is unnecessary to determine that, because under the recent statute registration is notice. It is said that the 13 & 14 Vic. ch. 73 only applies to judgments entered up after January 1851. But such a limitation of the 8th section would be quite unwarranted. It provides, "that the registry of any deed, conveyance, will, or judgment, under the first recited act (9 Vic. ch. 34), or this act, affecting any lands or tenements, shall in equity constitute notice of such deed, conveyance, will, or judgment, to all persons claiming any interest in such lands or tenements subsequent to such registry." Now I quite agree that no construction which would give to the act an *ex post facto* operation ought to be adopted, unless such an intention has been unequivocally expressed (*b*); and upon that principle it will be found, I presume, that rights acquired before this act passed are not affected by the clause in question. But here the plaintiff's judgment was registered four months after the statute had received the royal assent, and

(*a*) 1 J. & L. 18; and see 1 Sug. V. & P., 194, 11 ed.; Dyer v. Pulteney, Barnard Rep. Ch. 160.

(*b*) Moon v. Darden, 2 Ex. Rep. 22.

1855.

Dunovan v. Lee.

the defendant's deed was a year later. There can be no doubt, therefore, that the case comes within the operation of the statute, which clearly entitles the plaintiff to a decree.

As to the costs, the evidence does certainly fall short of establishing the case of fraud made by the bill, and the general rule of the court would disentitle the plaintiff to costs; but the costs of the suit have not been materially increased, and the case is one of great suspicion, and under such circumstances the decree should be with costs. (*a*)

Judgment

ESTEN, V. C.—There is no question that the judgment when registered attached upon these lands and bound them against all the world, except that a court of equity would not enforce it against a purchaser for valuable consideration without notice having the legal estate; so that the judgment creditor issuing his *Fi. Fa.* against goods and getting it returned, and then issuing his *Fi. Fa.* against lands, could proceed in this court for an equitable execution in aid of the writ. This would be the case if the estate continued equitable. The acquisition of the legal estate would only enable the purchaser to plead a purchase for value without notice. If he be debarred from this defence, he must submit to the judgment in respect of which he would be a trustee for the debtor, and the execution would still be in equity. I do not think this would be a trust within the Statute of Frauds, so that a sale could be effected at law; but even in this case the bill would be proper to impound the deed as part of the chain of title, and forming a cloud upon it in the hands of an adverse claimant.

The defendant *Lee* insists sufficiently that he was a purchaser for value without notice. It is clear that unless *Lee* can sustain this defence the plaintiff is

(*a*) Marshall v. Sladden, 7 Hare 428; Bower v. Cooper, 2 Hare 410.

1855. Dunovan v. Lee.

entitled to one of three modes of relief—1st, either an equitable execution, if the writ were unavailing either under the Statute of Frauds or the provincial statute; or, if the writ were valid under the Statute of Frauds, then to have the deed impounded; or, if the writ were valid by virtue of any late statute subjecting this equitable interest to legal process, then the same relief, together with a conveyance of the legal estate. To every one of these modes of relief the bill is sufficiently adapted. The only question, then, seems to be, whether *Lee* had notice before he got his deed and paid his money. I think myself that it is very clear, under 13 & 14 Vic. ch. 63, that *Lee* had notice of the judgment when he purchased, and this defence therefore fails him; but a sale seems proper, as the plaintiff states that he "bid in" the property.

Judgment.

SPRAGGE, V. C.—On the 5th of December, 1850, execution upon the judgment obtained by the plaintiff against *Harrison* was placed in the hands of the sheriff of the county of Wentworth against the lands of *Harrison*, and on the same day the judgment was registered in the county of Halton (in which county the lands in question lie), under the provincial statutes 9 Vic. ch. 34 and sec. 1 of 13 & 14 Vic. ch. 63. The effect of this registration was to bind the lands of *Harrison* in the county of Halton in the same manner as the docquetting of a judgment in England would have bound land before the practice of docquetting judgments had been discontinued in England.

At the date of this registration *Harrison* was the equitable owner of the land in question: he had contracted to purchase the same from the late *Samuel Street*, and had paid the purchase money, with the exception of £7 10*s*.

In October 1851 *Harrison* agreed to sell the land in question to defendant *Lee*, who paid the balance of the

purchase money to the representative of *Samuel Street*, and on the 6th of that month *Street's* devisee executed a conveyance of the land to *Lee*. *Lee*, in his account, says that the purchase money between himself and *Harrison* was £287 10*s*., of which he paid to *Harrison* £73 15*s*. soon after obtaining the deed, and £25 about three weeks thereafter; and in October 1852, as I understand, gave his notes for the balance, the last of which was payable four years after date; but all of which he says he has since paid, although they had not then fallen due.

The plaintiff purchased the lands under the execution at his own suit, but properly abandons any claim under that purchase, and asks that the lands be sold through the intervention of the court to satisfy his judgment, because the estate of *Harrison*, being equitable only, cannot be reached by process of law. There can be no doubt, I think, that in England lands could be extendible under what is called an equitable elegit, where the estate is equitable, in cases where, if the legal estate was in the judgment debtor, the lands would be subject to an elegit issued from a court of law. *Davidson* v. *Foley* (*a*), *Plasket* v. *Dillon* (*b*), and *Tunstall* v. *Trappes* (*c*), establish this point; and the same doctrine has been applied to chattels affected with a trust, as to which, if of such a nature as to be amenable to legal process, the judgment creditor may obtain an equitable *Fieri Facias*.

Judgment.

If, then, the lands had remained the equitable property of *Harrison*, it would seem that the plaintiff would be entitled in this suit to have them sold and applied to pay his debt. Then how does the purchase by *Lee* vary his right? *Lee* claims to be a purchaser for valuable consideration without notice. But upon this point the eighth section of 13 & 14 Vic. ch. 34 appears to be conclusive. That clause makes regis-

(*a*) 3 B. C. C. 598. (*b*) 1 Hogan, 324. (*c*) 2 Sim. 286.

1855.

Donovan v. Lee.

tration itself notice. Here the registration was in December 1850; the conveyance under which *Lee* claims is October 1852. When he paid his purchase money, or rather the notes given for the balance, does not appear. He says that he had no notice of the judgment at the time of paying any part of the purchase money; but in the brief handed to me the date of paying these notes is left blank. The date of giving the notes is the 29th of October *last*, but the date of the answer is not given. And, while alluding to these defects in this brief, I may refer to the common practice of omitting in briefs the dates of pleadings and of the taking of depositions. The absence of these dates often leave facts uncertain and obscure.

Judgment.

I think that in default of payment of the sum due upon the judgment, the lands in question should be sold to satisfy it. It is not suggested that there are any other lands to satisfy the debt.

Wallis v. Burton.

Wife's lands—Immediate reference.

Where a mortgage was created by husband and wife upon lands of the wife, and the mortgagee, together with the husband, joined in a conveyance of all their interest to a purchaser, the court refused an immediate reference under the orders of 1853, and directed the cause to be brought to a hearing in the regular way.

Quære—Whether a deed by a husband alone of his wife's lands will operate as an effectual transfer of the husband's marital rights therein.

Statement.

This was a suit for foreclosure brought by *James Wallis* against *Anne Jane Burton* and *Francis Henry Burton*, and a motion was now made for an immediate reference to take the account.

Argument.

Mr. *Read* for plaintiff.

Mr. *Hector* for defendants.

1855.

Wallis v. Burton.

The facts of the case appear in the judgment of the court, which was now delivered by

THE CHANCELLOR.—Certain premises, of which *Francis Burton* and *Anne*, his wife, were seized in fee simple in her right, were duly conveyed on the 26th of February, 1847, to one *Noad* in fee, by way of mortgage, to secure a floating balance.

On the 24th of December, 1850, an indenture was executed between *Noad* of the first part, *Francis Burton* of the second part, and *Wallis* of the third part, by which *Noad* and *Burton* respectively professed to convey all their interest in the mortgaged premises to *Wallis*, the plaintiff in the present suit. This deed states the consideration to be 5*s*. paid to *Burton*, and £1130 paid to *Noad*. *Wallis* then filed his bill of foreclosure against *Burton* and wife, and now moves for an immediate reference to the Master to take the accounts.

Judgment.

Mr. *Hector* contends, on behalf of the defendants, that the rule does not apply to a case of this sort, and that the cause must consequently be brought to a hearing in the regular way.

The difficulty arises upon the deed of December 1850. In *Gillespie* v. *Grover* (*a*) my brother *Esten* alludes to a case in the Court of Queen's Bench in which it is said to have been decided that when husband and wife are seized of lands in right of the wife, a conveyance by the husband alone is wholly inoperative. That case was not cited on the argument of this motion; and not having any reference to it, I have not had the means of informing myself of the grounds of the decision. (*b*) In a case depending upon the 43 George III. ch. 5 there would not be, I apprehend, much room for

(*a*) 3 Grant, 568.

(*b*) See Doe Dibble v. TenEyck, 7 U. C. Q. B. R. 600; Doe McDonald v. Twigg, 5 U. C. Q. B. R. 167.

1855.

Wallis v. Burton.

doubt. The language of that statute is very explicit. It provides "that nothing in such deed contained shall have any force or effect to bar such married woman, or her said husband, or her heirs, during the continuance of the coverture, or after the dissolution thereof, or shall be held to have any force or effect whatever," unless acknowledged in the way provided by the act. (*a*) If that statute had been applicable to the present case we would have found ourselves compelled, I think, to adopt the conclusion said to have been arrived at by the Court of Queen's Bench. But this statute has been repealed, and the language of the subsequent acts is materially different. (*b*) I do not mean to express an opinion that the recent statutes admit of any different construction; but there certainly is room to argue from the change of phraseology that the legislature intended to introduce a rule more consonant with the law of England than that which had been established by the statute of George III.

Judgment.

If the execution of this deed by *Francis Burton* is to be regarded as altogether nugatory, then the defendants must be entitled to a reconveyance of the whole estate upon payment of the sum of £1130, which is something very different, I apprehend, from the relief to which the plaintiff conceives himself to be entitled. But assuming that the execution of this deed by *Francis Burton* cannot be regarded as altogether nugatory, the next question is as to the extent to which it is to operate and its effect upon the plaintiff's right to institute the present suit. Mr. *Preston* is of opinion that a conveyance by the husband under such circumstances passes the whole estate of his wife or her heirs, subject only to the right of entry of the wife or her heirs. (*c*) The authorities cited by Mr. *Preston* do not establish his proposition, (*d*) and the law upon the subject would seem still unsettled. But whatever may

(*a*) And see 59 Geo. III. ch. 3.
(*b*) 1 Wm. IV. ch. 2, and 14 & 15 Vic. ch. 115.
(*c*) 1 Preston on Abs. 334.
(*d*) Ashton v. Milne, 6 Sim. 374.

1855.

Wallis v. Burton.

be the statute law in England, it would seem difficult to reconcile the rule laid down by Mr. *Preston* with the express provisions of our provincial statute; and where the parties are dealing, as in the present case, with an equity, it may be doubted perhaps whether the deed of the husband would be held, even in England, to pass more than the husband might legally transfer—namely, the interest vested in him in virtue of his marital right and as tenant by the curtesy. (*a*)

If the deed is to be regarded as having the operation attributed to such deeds by Mr. *Preston*, it is difficult to understand how the plaintiff can sustain a bill to foreclose against *Burton* and wife, because upon that hypothesis the whole estate, legal and equitable, would be in the plaintiff, subject only to the entry of the wife or her heirs after the death of the husband. But, assuming the deed to be an effectual transfer of *Burton's* marital rights, and of them only, then the question will be whether the plaintiff, being both mortgagee and tenant *pur autre vie*, or quasi tenant *pur autre vie*, can sustain the present suit. The former rule was, that the tenant for life under such circumstances must pay one-third of the principal. That rule, it is said, has been long since exploded; but the relative rights of those interested in the equity of redemption would not seem to have been as yet actually defined. (*b*) Mr. *Coventry*, in a note to *Powell* on Mortgages, page 312, states the new rule to be, "that the tenant for life shall contribute beyond the interest in proportion to the benefit he derives from the liquidation of the mortgage debt and the consequent cessation of annual payments of interest during his life, and a reference will be directed to the Master to inquire what proportion of the capital he ought to pay." The rule suggested by Mr. *Coventry* appears to me to be right on principle and consistent with the settled practice in

Judgment.

(*a*) Ravald v. Russell, Young 20.
(*b*) White v. White, 9 Ves. 554; Allan v. Backhouse, 2 V. & B. 70.

1855.

Walls v. Burton.

relation to renewal fines; but, on the other hand, one finds it constantly stated as the settled rule now in relation to mortgages, that the tenant for life is only bound to keep down the interest (*b*); and I am inclined to think that it will be found to be so.

Assuming, then, that the tenant for life is only bound to keep down the interest, the consequence of that rule remains to be considered. How can one who has a life interest in an equity of redemption make that right effectual, either against the mortgagor or the remainder-man, except by redemption? If he refuse to redeem, may not the remainder-man obtain possession of the estate either by ejectment, if he have the legal estate, or by bill of foreclosure? And when the tenant for life has redeemed either in the progress of a suit or by acquiring the mortgage title, what right can he have to foreclose the remainder-man during the existence of the life estate? It cannot be said, speaking strictly, that the equity of redemption is divided in this case into a life interest and a remainder, neither do I mean to assert that there is a precise analogy between such a case and the present; but, assuming such an analogy, the difficulties to which I have adverted would remain to be considered, and we are all of opinion that the order of the court is not strictly applicable to a case so circumstanced. It is obvious, however, that the legal questions may be decided as conveniently upon motion as at the hearing, but that must be by consent; and in that event the case must be argued with reference to the principles and authorities to which I have alluded, which were not at all discussed upon the hearing of the motion.

Judgment.

ESTEN, V. C.—I think the bill should be dismissed with costs, without prejudice to a new bill, should the wife or her heir, after the husband's death, enter upon the estate; but in case it should be decreed that the

(*b*) Coote on Mortgages, 527, 3d ed.

conveyance as regards *Burton* was wholly inoperative, then there seems no objection to a summary reference. 1855. Wallis v. Burton.

SPRAGGE, V. C., also thought motion for immediate reference should be refused.

Subsequently the case was brought on to be heard upon bill and answer, when

Mr. *Read* appeared for plaintiff.
Mr. *Wilson*, *Q. C.*, and Mr. *Hector*, for defendants.

The authorities mainly relied upon are already stated.

The CHANCELLOR expressed briefly the same judgment as before, distinguishing this from the cases decided in the Queen's Bench, and said that under the circumstances the bill should be dismissed with costs. Judgment.

ESTEN, V. C.—It seems that a conveyance by the husband alone is unaffected by the acts, and has the same effect that it always had, and passes, in my judgment, the inheritance of the wife's lands to the alienee, subject to be defeated by her or her heirs; although, if the husband and wife execute a deed of her lands, intended as an absolute alienation of the whole estate in the lands, and she be not examined apart from him, as required by law, the deed is wholly void, and does not pass even his estate. The result seems to be, that the inheritance of the equity of redemption passed defeasibly to the plaintiff in this case, and that consequently during the lifetime of the husband there can be no right to foreclose.

During the coverture the husband is the owner of the equity of redemption, and must be considered as

1855.

Wallis v. Burton.

paying the interest to himself, which therefore does not accumulate as a charge upon the land, and upon the same principle he is not accountable for the rents. The bill, I apprehend, must be dismissed with costs, without prejudice to any bill that the plaintiff may be advised to file after the death of *Burton*.

Judgment.

SPRAGGE, V. C.—Real property of the wife is mortgaged to *Noad & Co.* to secure a floating balance, the debt of the husband; afterwards, when the debt had amounted to upwards of £4,000, it was agreed between the husband and *Noad & Co.* that the mortgaged premises should be sold in, or towards, satisfaction of the debt. The portion in question in this cause was purchased by *Wallis* for £1,300, the sale being intended to be in fee, and that the wife should join in the conveyance to the purchaser; this she refuses to do, and thereupon the husband conveys his estate to *Wallis*, the purchaser, and he files this bill to foreclose her of her equity of redemption. Upon the purchase he was let into possession, and has since received the rents and profits. These he claims to have received as purchaser of the husband's estate, and that he is not bound to account for them.

It has been decided in the Queen's Bench that a conveyance purporting to convey the entire estate of husband and wife passes nothing, not even the estate of the husband, unless all the formalities of the statute are complied with. This is following the strict words of the statute, and applies to a conveyance which upon the face of it conveys the wife's estate. Whether it so applies to a conveyance purporting to convey the husband's estate only, is another question. If it does, nothing passed to the plaintiff, and he has no *locus standi* in this court; if it does not, then, does it convey a life estate, or an estate of inheritance? If a life estate only, then this is a bill to foreclose filed by tenant for life against a reversioner, and that rever-

sioner a married woman, and the husband not made a party. If an estate of inheritance is conveyed, then he is purchaser of the equity of redemption and is the party to redeem, or would be so if the mortgage was in a third hand and not be the party to foreclose. In any view, it appears that the bill to foreclose cannot be sustained.

1855.

Wallis v. Burton.

Blake v. Beaty
and
Beaty v. Blake.

Equity of redemption—Purchase of.

The purchaser of an equity of redemption subject to a charge which is his own proper debt, or which he is under any contract, express or implied, to discharge, cannot keep such charge alive as against a mesne incumbrance, which, by the terms of the contract of purchase, express or implied, the purchaser was also bound to discharge.

These were suits brought by incumbrancers to obtain a sale and payment of their claims, and having been consolidated, a decree was made referring the matters in question to the Master, who made his report, and the same was appealed from on the grounds set forth in the judgment.

Statement.

Mr. *A. Crooks* for the appellants.

Mr. *Turner* for *Beaty*, contra.

Argument.

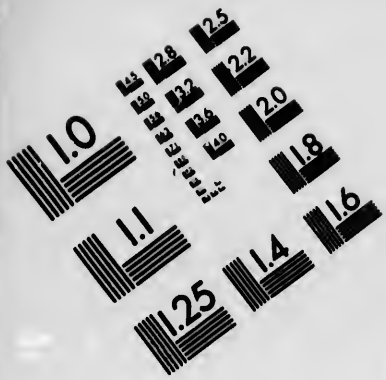
Mocatta v. *Murgatroyd* (*a*), *Burrell* v. Earl of *Egremont* (*b*), *Pitt* v. *Pitt* (*c*), were referred to amongst other cases.

The judgment of the court was now delivered by

Esten, V. C.—This was an appeal from the Master's report allowing to Mr. *Beaty* three sums of £200, £300, and £200, with interest, and some monies paid for

Judgment.

(*a*) 1 P. W. 394. (*b*) 7 Beav. 205. (*c*) T. & R. 180.



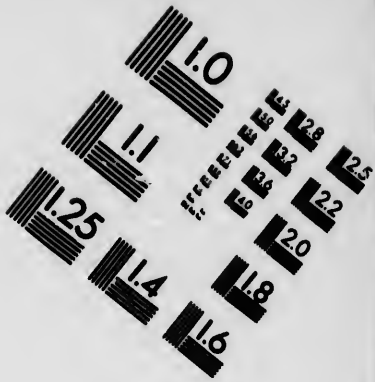
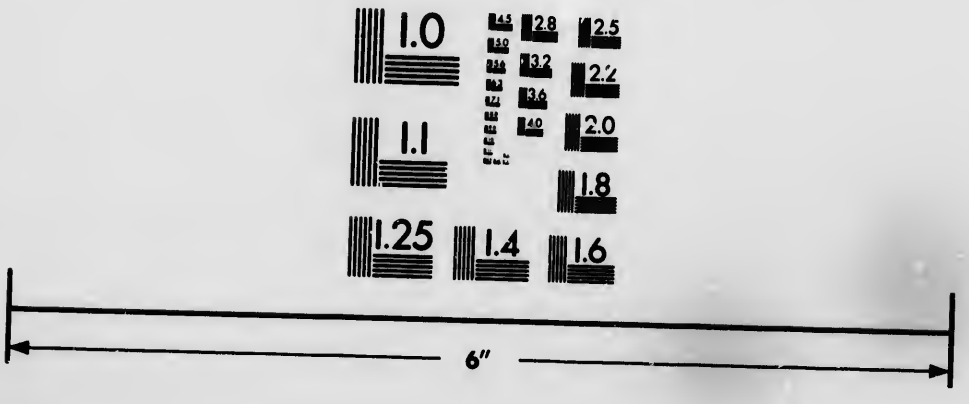


IMAGE EVALUATION TEST TARGET (MT-3)



Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

1855.

Beaty v. Blake, &c.

insurance. The allowance of the sums of £300 and the latter sum of £200, with interest, is affirmed, and requires no particular remark. The amount paid for insurance is disallowed, as the mortgage deed contained no provision for that purpose; and although it appears that one of the policies was delivered by the Messrs. *McGlashan*, the owners of the equity of redemption, to Mr. *Beaty*, with the intent that he should keep it on foot, which may justify the allowance of the monies paid for that purpose against those parties, this circumstance cannot operate against Mr. *Blake*, whose title accrued a long time prior to its occurrence.

The principal question argued on the appeal related to the sum of £200. This was the amount of a note, being one instalment of the purchase money of part of the lands in question sold by *McDonald* to *Connell* for £700, which was divided into three instalments or notes of £200, £300, and £200, and was secured by a mort-

Judgment.

gage of the same lands. *Connell* having paid the first note for £200, sold and conveyed these and other lands to one *Jackson* for £3,000, payable in six instalments of £500 each, secured by promissory notes and a mortgage of all the lands; and *Jackson* was to pay the remainder of the purchase money due on the first sale, consisting of the two notes for £300 and £200, which remained unpaid. *Jackson* sold and conveyed the property to the Messrs. *McGlashan*, and these parties having retired the unpaid note for £200, delivered it to Mr. *Beaty* as a trustee for themselves, with the view of keeping it on foot as a subsisting charge on the estate, and afterwards transferred it with other effects to Mr. *Shaw* as a trustee for their British creditors, from whom Mr. *Beaty* purchased it for valuable consideration.

Mr. *Beaty* contends, and the Master thought, that this instalment of £200 had been effectually maintained as a charge upon the estate prior to the different

instalments of the second mortgage for £3,000; and this, in fact, is the question which we have to determine upon this appeal. Several cases were cited upon the subject, and we have consulted some which were not mentioned at the bar. From these authorities we think the rule to be deduced is, that where the charge which has been satisfied is the proper debt of the party paying it, either by force of the original contract by which it was created, or in consequence of the purchase of the estate subject to it, and the stipulations accompanying such purchase, or any express or implied contract, making it his duty, as between him and the person from whom he has purchased, to discharge it, he cannot keep it alive as a primary charge against any mesne incumbrances which also it was imposed upon him by the terms, express or implied, of his contract of purchase to discharge; but if by the terms of his contract he was not bound to discharge the incumbrance in question, or, although he was bound to discharge that, if he was not bound to discharge any mesne incumbrances affecting the same estate, it would be competent to him to maintain the incumbrance he has discharged as a subsisting charge, in the former case, for his reimbursement, and as standing in the place of the incumbrancer; in the latter case, for his protection.

Judgment.

A purchaser of an equity of redemption may also perhaps stipulate with his vendor, while he enters into an engagement to indemnify him against all the incumbrances affecting the estate, that he shall be at liberty to keep any incumbrance he may discharge on foot as against the subsequent incumbrances so as to make his bargain as beneficial as possible.

In all these cases the principle seems to apply of *modus et conventio vincunt legem*, and the incumbrancers are simply not permitted to be damnified by the arrangement made between the contracting parties,

1855. Blake v. Beaty, &c.

which would be unjust; while at the same time no necessity exists for placing them in a better condition than that in which they would otherwise stand. They retain all the remedies they ever had, but acquire no new ones.

Now in the present case, although there is conflicting evidence on the subject, we have arrived at the conclusion, that, as between *Jackson* and the *McGlashans*, the latter, upon their purchase, became bound to discharge all the incumbrances affecting the estate, and to indemnify *Jackson* against them, without any stipulation for liberty to maintain any incumbrances that might be discharged as against any subsequent incumbrance; the *McGlashans*, therefore, having become bound to discharge all the incumbrances in their order, could not maintain the instalment of £200 when they paid it as a prior charge against Mr. *Blake*.

Judgment.

A man cannot hold his own creditor at arm's length by means of an incumbrance which, as between him and such creditor, he was bound to discharge, except, perhaps, under some very special stipulation to that effect, which does not exist in this case. The Messrs. *McGlashan*, however, had a perfect right to keep the instalment of £200 alive as against their own estate; and they having manifested an intention to that effect, and having transferred the note representing that instalment to Mr. *Shaw* as a trustee for creditors, and Mr. *Beaty* having purchased it from that individual for valuable consideration, which has been applied for the benefit of the Messrs. *McGlashan*, Mr. *Beaty* is entitled to this amount as a subsisting charge against the estate of the Messrs. *McGlashan*, who cannot redeem the lands in question without paying this as well as the other charges affecting them.

1855.

CLARKE v. LITTLE.

Mortgage—Laches—Secondary evidence.

Where a security was effected by an absolute conveyance, and a bond conditioned to reconvey on payment of the debt, but instead of doing so the mortgagee sold and conveyed the premises to other persons, whom the plaintiff alleged, however, had notice of the true nature of the title, but the only notice having been shewn to be a mere casual conversation which took place in the bar-room of a tavern upwards of fifteen years before the filing of a bill by the mortgagor to redeem,—the Court refused redemption, and dismissed the bill with costs.

Where, to let in secondary evidence of the contents of a bond, the attorney of the obligor was called as a witness, and upon being shewn letters written by himself, in which a deed and bond were referred to, and the contents of the bond stated, he swore that he had no recollection whatever of the existence of these instruments, although he had no doubt, from reading the letters, that such a bond had existed,—the Court refused to receive such letters as evidence of an admission by the obligor's agent of the existence of the bond, they not being part of the *res gestæ*.

The bill in this case was filed by *Joseph Clarke* against *William Little* and *John Newlove*, and *Eusebia Elliott* and *Joshua G. Beard*, the executrix and executor of *Christopher Elliott*, and stated that on the 20th of August, 1835, the plaintiff conveyed lot No. 10 in the 11th concession of Walsingham to his brother *Samuel Clarke* to secure the payment of £30 4*s.* 8*d.*, with interest, in one year from the date, which amount plaintiff alleged had been paid; that *Samuel Clarke*, on the 27th of March, 1840, conveyed the north half of the lot to *Little*, and on the 5th day of January, 1842, conveyed the remaining portion to *Christopher Elliott*, since deceased; that *Little*, in or about the month of June 1851, had conveyed to *Newlove* his share of the property, but that *Newlove* had not paid his purchase money; and that *Little*, *Elliott*, and *Newlove* had notice at the time of the conveyances to them respectively of the right of plaintiff to redeem. The prayer of the bill was for an account of what, if anything, remained due, and redemption upon payment thereof. Statement

All the defendants answered the bill, relying principally on the want of notice of any defect in the title of *Samuel Clarke*, and delay since filing the bill.

1855.

Clarke v. Little

The cause was put at issue, and evidence taken before the court. *Henry Latham*, attorney-at-law, being called as a witness, swore that he had no recollection of having transacted any business between *Joseph* and *Samuel Clarke*. Several letters written by himself to *Joseph* and one *Palmer* having been placed in his hands, he stated they were written by him as agent for *Samuel Clarke*. One of these letters referred to the fact of an absolute deed having been given by *Joseph* to *Samuel*, but that no difficulty could arise in consequence thereof, as he (*Latham*) held a bond from *Samuel* to reconvey. After reading the letters he still swore that he had not any recollection of the business referred to, or of *Joseph Clarke:* he further swore, "*I am satisfied that I had such a bond, and that it was given up; but I infer this entirely from the contents of the letter, and have no knowledge or recollection of the fact itself.*"

Statement.

The other evidence sufficiently appears in the judgment.

Mr. *Roaf* for plaintiff.

Mr. *Hagarty*, *Q. C.*, for defendants *Elliott* and *Beard*.

Argument.

Mr. *McDonald* for defendant *Newlove*.

Mr. *Crickmore* for defendant *Little*.

Williams v. *Owen* (*a*), *Smith* v. *Hare* (*b*), *Wyatt* v. *Barwell* (*c*), *Jolland* v. *Stainbridge* (*d*), *Barnhart* v. *Greenshields*, before the Privy Council (*e*), *Smith* v. *Clay* (*f*), *Blair* v. *Ormond* (*g*), were, amongst other cases, referred to.

(*a*) 5 Jur. 114.
(*b*) 1 Ph. 396.
(*c*) 19 Ves. 435.
(*d*) 2 Ves. 478.
(*e*) Ante 99.
(*f*) 3 B. C. C. 639, in the note.
(*g*) 1 DeG. & S. 428.

1855.

Clarke v. Little.

THE CHANCELLOR.—This is a bill to redeem. The property in question in the cause was conveyed by the plaintiff to his brother *Samuel Clarke* in fee on the 20th of August, 1835. A receipt for the consideration (£30) is endorsed upon the deed, and that sum is proved to have been the full value of the property at the time of the transaction. *Samuel Clarke* subsequently conveyed this property in fee simple to the defendants *Little* and *Elliott*—the north half to *Little* on the 27th of May, 1840, and the south half to *Elliott* on the 5th of January, 1842. *Little* conveyed his half to the defendant *Newlove* on the 12th of June, 1851. The case made by the bill is, that the transaction of August 1835 was in reality a mortgage; that *Elliott* and *Little* had notice of the plaintiff's title before they took their conveyances; and that as to *Newlove*, notice is immaterial, as he has not yet paid his purchase money.

Judgment.

The evidence as to the nature of the original transaction between the plaintiff and *Samuel Clarke* is extremely unsatisfactory. The letters of *Latham* are not receivable as the admissions of *Samuel Clarke's* agent; they were not part of the *res gestæ;* they were a mere statement by *Latham* to a third person many months after the transaction had been concluded, and cannot bind the principal. (*a*) The letters were properly placed in the witness's hand to refresh his memory; but they had not that effect: to the close of his examination he declared that he had no recollection of the facts there stated. I am inclined to think *Latham's* evidence insufficient to prove either the existence of the alleged bond or its contents; but, in my opinion, that question does not arise, because I am quite clear that a sufficient foundation for the receipt of secondary evidence has not been laid.

But it is unnecessary to consider these points in

(*a*) Faerlie v. Hastings, 10 Ves. 122.

1855.

Clarke v. Little.

detail; for if the evidence be insufficient to establish notice, as in my opinion it is, the plaintiff must fail, whatever may have been the nature of the original transaction. Two witnesses were called to prove notice. *James Clarke*, a son of the plaintiff, says, in his first examination, that he gave *Little* notice in *Ingram's* presence that *Samuel Clarke* was a mere mortgagee. But *Ingram*, on being called, gives this account of what passed: "I heard no talk of any mortgage at the conversation, except that I heard something of a note. I understood that *Samuel Clarke* was to borrow money from *Gooderham* for *Joseph*, and he got the deed from *Joseph* to shew *Gooderham*, to satisfy him that *Joseph's* endorsement would be good. This is all I heard on the subject, and that I always understood." And *James Clarke*, on being recalled, says: "I have heard *Ingram's* evidence, and have always understood the matter in the way he represented it." *Ingram*, therefore, does not support, but rather negatives the alleged notice. According to his evidence, the information given to *Little* was calculated to mislead, and not to inform. It was not notice that *Samuel Clarke* was a mere mortgagee, but that *Joseph* had never executed any deed whatever. That cannot affect *Little*, who purchased two years later, under a deed executed by the plaintiff and duly registered.

Judgment.

But it is unnecessary to decide the case on the insufficiency of the notice; for upon the evidence the fact of notice is, at the least, doubtful. The conversation which is relied on as notice occurred casually in the bar-room of a tavern more than fifteen years before the filing of the bill in the present suit. Relying upon evidence of that unsatisfactory notice, the plaintiff should have filed his bill promptly; instead of which he waits until the property has been sold and resold, until the present defendants, who are purchasers for value, have expended large sums in improvements, and until *Samuel Clarke*, the alleged mortgagee, has

disappeared. And no explanation of this extraordinary delay is attempted; on the contrary, *James Clarke* swears that his father was then, and has been since, in good circumstances. 1855. Clarke v. Little

But there is another circumstance in the case which not only weakens the evidence of notice, but tends strongly to prove that the plaintiff's right to redeem, if he ever had any, must have been abandoned. A receipt has been put in and proved, signed by *Samuel Clarke*, and dated the 11th of April, 1842, in these words: "I have been fully settled with for my demands in Mr. *George Duggan's* hands for collection against *Joseph Clarke*." *James Clarke*, a son of the plaintiff, and his witness, swears very positively that the settlement spoken of in that receipt was a settlement with reference to the land in question in the cause; but as to the nature of the settlement he gives no information. Now when that receipt was signed the land had been sold by *Samuel Clarke*. *Joseph Clarke* was aware of that fact, or, at all events, had good reason to suspect that it was so. He had given notice, he says, to *Little* and *Elliott*. Had the settlement then consisted in the payment of the mortgage debt, as the plaintiff now alleges, would he not have insisted on a reconveyance of his land? would he not have ascertained something as to the claims of *Little* and *Elliott?* would not the bond have been preserved, for it was his only evidence of title? would not the receipt have been, at least, explicit, stating the amount paid and the account on which the payment was made? would not a bill have been filed without delay? But the reverse of all this takes place. No reconveyance is executed; *Elliott* and *Little* are left in undisturbed possession for eleven years; the bond is not accounted for; and the receipt, so far from containing an explicit statement that the mortgage debt had been paid, imports, I think, the reverse. The evidence leads my mind to a conclusion directly opposite to that for which the plaintiff con- Judgment.

1855.

Clarke v. Little.

tends. I cannot reconcile his statement with his conduct. I doubt that he had in April 1842 any right to redeem; but if he had any such right, the evidence shews, I think, that it was then abandoned.

The plaintiff's case fails, therefore, throughout. He comes here for equitable relief against purchasers for valuable consideration after great delay, of which no explanation is attempted; his evidence is of the most unsatisfactory nature—loose conversations which occurred more than fifteen years before the filing of his bill; and the facts tend strongly to prove an abandonment of his rights, if he ever had any. A decree upon such evidence would be dangerous to the security of property, and contrary to the principles upon which this Court proceeds; and I am of opinion, therefore, that the bill should be dismissed with costs.

Judgment

ESTEN, V. C.—It seems to me that the mortgage is proved in this case, except that further inquiry should be made for the bond; for which, if the plaintiff could succeed on other points, an opportunity should be given. I think also notice is proved to *Elliott*, and *Newlove* has not paid his purchase money. As to *Little*, perhaps the evidence is too slight to make it safe to disturb *Newlove's* title; but it is unnecessary to express an opinion on this point.

I think the evidence shews that there was a settlement by which the land was given up by *Joseph Clarke* in 1842, and therefore that the bill should be dismissed with costs.

SPRAGGE, V. C.—Assuming it to be proved that the transaction between the plaintiff and his brother *Samuel Clarke* was originally a mortgage, and that both *Little* and *Elliott* had notice respectively, before they purchased the plaintiff's title, the plaintiff has still to overcome the difficulties presented by the settlement of 1842.

1855.

Clarke v. Little.

James Clarke, a son of the plaintiff, is called by him to prove this settlement. He says it was after the winter of 1841. He says that there had been a previous agreement to settle, when *Samuel Clarke* agreed to take a waggon in satisfaction of what was due to him upon the land; but that another settlement was afterwards substituted for it. This may or may not have been the settlement of the 11th of April, 1842; but whether it was so or not, there was, as he says, a settlement after the winter of 1841 in respect to the land. The plaintiff desires to make it appear that at this settlement he paid his brother *Samuel* what was due to him upon the land; but the circumstances rather point the other way, and lead to the conclusion that he relinquished his right to redeem the land. If there was any settlement at all, it must have been one way or the other. It can scarcely be doubted, I think, that the plaintiff knew at that time of the sale of one-half the property to *Little*, which had taken place some three or four years before, and of the sale of the other half to *Elliott;* for when he notified *Elliott* of his title, the answer was that he (*Elliott*) would risk it. Now it does appear to me to be incredible that he should pay off a mortgage under such circumstances to the person who had sold the mortgage property, and that he should have done so without taking a reconveyance of the property, or even what is called a quit-claim deed—a mode of conveyance familiar to the minds of people who desire to avoid any assurance of title;—indeed, not even is a receipt given, or an acknowledgment of any kind to shew the mortgage money satisfied.

Judgment.

As to the receipt of the 11th of April, 1842, it shews that *Samuel Clarke* had placed certain demands against the plaintiff in the hands of Mr. *Duggan* for collection, and that the plaintiff settled them. I infer that these demands were not in respect of any monies due upon the security of the lands in question; for *Samuel Clarke*, after selling the land, could not, and it would be absurd in him to call upon the plaintiff to pay any

1855.

Clarke v. Little.

alleged mortgage money; and if the demands were in respect of such alleged mortgage money, it would have been easy for the plaintiff to shew it. The plaintiff puts in the receipt as connected with the alleged mortgage monies on the land in question. If connected at all with the lands in question, it shews this, I think, that in settling with *Samuel Clarke* for other demands the land in question was taken into consideration: and that could only be by making an allowance to *Joseph* in regard to it, he relinquishing any claim that he might have to redeem. I say, that it could only be this; because if the alleged mortgage monies had been then satisfied by the plaintiff, the receipt would not have been confined to the demands in Mr. *Duggan's* hands, which demands, as it appears to me, did not include any claim for mortgage money. Further: if the arrangement was in fact of the nature I take it to have been, the bond of *Samuel* to reconvey would be given up to him; otherwise it would be retained by the plaintiff; but the plaintiff does not produce it, and there is no evidence of its loss.

Judgment.

It is about eleven years after this settlement that the bill is filed. If his account of it be true, he had paid off the mortgage money, and was entitled to immediate possession of the land; yet he took no steps to obtain possession, nor did he even notify the purchasers of his right. In the meantime *Samuel Clarke* leaves for parts unknown to his own family, and large and valuable improvements are made upon the premises; the plaintiff is represented by his son as all the while in good circumstances, and no reason whatever is given for the long delay that has occurred. This looks very suspicious. It confirms me in the belief that in the dealings between the plaintiff and his brother, after the sale by the latter of the premises in question, the plaintiff abandoned his claim to redeem the land. I think the plaintiff's bill should be dismissed, and with costs.

CLARKE V. LITTLE. 1855.

Mortgage—Laches—Secondary evidence

Where a security was effected by an absolute conveyance, and a bond conditioned to reconvey on payment of the debt, but instead of doing so the mortgagee sold and conveyed the premises to other persons, whom the plaintiff alleged, however, had notice of the true nature of the title, but the only notice having been shewn to be a mere casual conversation which took place in the bar-room of a tavern upwards of fifteen years before the filing of a bill by the mortgagor to redeem,—the Court refused redemption, and dismissed the bill with costs.

Where, to let in secondary evidence of the contents of a bond, the attorney of the obligor was called as a witness, and upon being shewn letters written by himself, in which a deed and bond were referred to, and the contents of the bond stated, he swore that he had no recollection whatever of the existence of these instruments, although he had no doubt, from reading the letters, that such a bond had existed,—the Court refused to receive such letters as evidence of an admission by the obligor's agent of the existence of the bond, they not being part of the *res gestæ*.

The bill in this case was filed by *Joseph Clarke* against *William Little* and *John Newlove*, and *Eusebia Elliott* and *Joshua G. Beard*, the executrix and executor of *Christopher Elliott*, and stated that on the 20th of August, 1835, the plaintiff conveyed lot No. 10 in the 11th concession of Walsingham to his brother *Samuel Clarke* to secure the payment of £30 4*s.* 8*d.*, with interest, in one year from the date, which amount plaintiff alleged had been paid; that *Samuel Clarke*, on the 27th of March, 1840, conveyed the north half of the lot to *Little*, and on the 5th day of January, 1842, conveyed the remaining portion to *Christopher Elliott*, since deceased; that *Little*, in or about the month of June 1851, had conveyed to *Newlove* his share of the property, but that *Newlove* had not paid his purchase money; and that *Little*, *Elliott*, and *Newlove* had notice at the time of the conveyances to them respectively of the right of plaintiff to redeem. The prayer of the bill was for an account of what, if anything, remained due, and redemption upon payment thereof. Statement

All the defendants answered the bill, relying principally on the want of notice of any defect in the title of *Samuel Clarke*, and delay since filing the bill.

1855.

Clarke v. Little.

The cause was put at issue, and evidence taken before the court. *Henry Latham*, attorney-at-law, being called as a witness, swore that he had no recollection of having transacted any business between *Joseph* and *Samuel Clarke*. Several letters written by himself to *Joseph* and one *Palmer* having been placed in his hands, he stated they were written by him as agent for *Samuel Clarke*. One of these letters referred to the fact of an absolute deed having been given by *Joseph* to *Samuel*, but that no difficulty could arise in consequence thereof, as he (*Latham*) held a bond from *Samuel* to reconvey. After reading the letters he still swore that he had not any recollection of the business referred to, or of *Joseph Clarke:* he further swore, "*I am satisfied that I had such a bond, and that it was given up; but I infer this entirely from the contents of the letter, and have no knowledge or recollection of the fact itself.*"

Statement.

The other evidence sufficiently appears in the judgment.

Mr. *Roaf* for plaintiff.

Mr. *Hagarty*, *Q. C.*, for defendants *Elliott* and *Beard*.

Argument.

Mr. *McDonald* for defendant *Newlove*.

Mr. *Crickmore* for defendant *Little*.

Williams v. *Owen* (*a*), *Smith* v. *Hare* (*b*), *Wyatt* v. *Barwell* (*c*), *Jolland* v. *Stainbridge* (*d*), *Barnhart* v. *Greenshields*, before the Privy Council (*e*), *Smith* v. *Clay* (*f*), *Blair* v. *Ormond* (*g*), were, amongst other cases, referred to.

(*a*) 5 Jur. 114.
(*b*) 1 Ph. 396.
(*c*) 19 Ves. 435.
(*d*) 3 Ves. 478.
(*e*) Ante 99.
(*f*) 3 B. C. C. 639, in the note.
(*g*) 1 DeG. & S. 428.

1855.

Clarke v. Little.

THE CHANCELLOR.—This is a bill to redeem. The property in question in the cause was conveyed by the plaintiff to his brother *Samuel Clarke* in fee on the 20th of August, 1835. A receipt for the consideration (£30) is endorsed upon the deed, and that sum is proved to have been the full value of the property at the time of the transaction. *Samuel Clarke* subsequently conveyed this property in fee simple to the defendants *Little* and *Elliott*—the north half to *Little* on the 27th of May, 1840, and the south half to *Elliott* on the 5th of January, 1842. *Little* conveyed his half to the defendant *Newlove* on the 12th of June, 1851. The case made by the bill is, that the transaction of August 1835 was in reality a mortgage; that *Elliott* and *Little* had notice of the plaintiff's title before they took their conveyances; and that as to *Newlove*, notice is immaterial, as he has not yet paid his purchase money.

Judgment.

The evidence as to the nature of the original transaction between the plaintiff and *Samuel Clarke* is extremely unsatisfactory. The letters of *Latham* are not receivable as the admissions of *Samuel Clarke's* agent; they were not part of the *res gestæ;* they were a mere statement by *Latham* to a third person many months after the transaction had been concluded, and cannot bind the principal. (*a*) The letters were properly placed in the witness's hand to refresh his memory; but they had not that effect: to the close of his examination he declared that he had no recollection of the facts there stated. I am inclined to think *Latham's* evidence insufficient to prove either the existence of the alleged bond or its contents; but, in my opinion, that question does not arise, because I am quite clear that a sufficient foundation for the receipt of secondary evidence has not been laid.

But it is unnecessary to consider these points in

(*a*) Faerlie v. Hastings, 10 Ves. 122.

1855.

Clarke v. Little.

detail; for if the evidence be insufficient to establish notice, as in my opinion it is, the plaintiff must fail, whatever may have been the nature of the original transaction. Two witnesses were called to prove notice. *James Clarke*, a son of the plaintiff, says, in his first examination, that he gave *Little* notice in *Ingram's* presence that *Samuel Clarke* was a mere mortgagee. But *Ingram*, on being called, gives this account of what passed: "I heard no talk of any mortgage at the conversation, except that I heard something of a note. I understood that *Samuel Clarke* was to borrow money from *Gooderham* for *Joseph*, and he got the deed from *Joseph* to shew *Gooderham*, to satisfy him that *Joseph's* endorsement would be good. This is all I heard on the subject, and that I always understood." And *James Clarke*, on being recalled, says: "I have heard *Ingram's* evidence, and have always understood the matter in the way he represented it." *Ingram*, therefore, does not support, but rather negatives the alleged notice. According to his evidence, the information given to *Little* was calculated to mislead, and not to inform. It was not notice that *Samuel Clarke* was a mere mortgagee, but that *Joseph* had never executed any deed whatever. That cannot affect *Little*, who purchased two years later, under a deed executed by the plaintiff and duly registered.

Judgment.

But it is unnecessary to decide the case on the insufficiency of the notice; for upon the evidence the fact of notice is, at the least, doubtful. The conversation which is relied on as notice occurred casually in the bar-room of a tavern more than fifteen years before the filing of the bill in the present suit. Relying upon evidence of that unsatisfactory notice, the plaintiff should have filed his bill promptly; instead of which he waits until the property has been sold and resold, until the present defendants, who are purchasers for value, have expended large sums in improvements, and until *Samuel Clarke*, the alleged mortgagee, has

disappeared. And no explanation of this extraordinary delay is attempted; on the contrary, *James Clarke* swears that his father was then, and has been since, in good circumstances. 1855. Clarke v. Little.

But there is another circumstance in the case which not only weakens the evidence of notice, but tends strongly to prove that the plaintiff's right to redeem, if he ever had any, must have been abandoned. A receipt has been put in and proved, signed by *Samuel Clarke*, and dated the 11th of April, 1842, in these words: "I have been fully settled with for my demands in Mr. *George Duggan's* hands for collection against *Joseph Clarke*." *James Clarke*, a son of the plaintiff, and his witness, swears very positively that the settlement spoken of in that receipt was a settlement with reference to the land in question in the cause; but as to the nature of the settlement he gives no information. Now when that receipt was signed the land had been sold by *Samuel Clarke*. *Joseph Clarke* was aware of that fact, or, at all events, had good reason to suspect that it was so. He had given notice, he says, to *Little* and *Elliott*. Had the settlement then consisted in the payment of the mortgage debt, as the plaintiff now alleges, would he not have insisted on a reconveyance of his land? would he not have ascertained something as to the claims of *Little* and *Elliott?* would not the bond have been preserved, for it was his only evidence of title? would not the receipt have been, at least, explicit, stating the amount paid and the account on which the payment was made? would not a bill have been filed without delay? But the reverse of all this takes place. No reconveyance is executed; *Elliott* and *Little* are left in undisturbed possession for eleven years; the bond is not accounted for; and the receipt, so far from containing an explicit statement that the mortgage debt had been paid, imports, I think, the reverse. The evidence leads my mind to a conclusion directly opposite to that for which the plaintiff con- Judgment.

1855.

Clarke v. Little.

tends. I cannot reconcile his statement with his conduct. I doubt that he had in April 1842 any right to redeem; but if he had any such right, the evidence shews, I think, that it was then abandoned.

The plaintiff's case fails, therefore, throughout. He comes here for equitable relief against purchasers for valuable consideration after great delay, of which no explanation is attempted; his evidence is of the most unsatisfactory nature—loose conversations which occurred more than fifteen years before the filing of his bill; and the facts tend strongly to prove an abandonment of his rights, if he ever had any. A decree upon such evidence would be dangerous to the security of property, and contrary to the principles upon which this Court proceeds; and I am of opinion, therefore, that the bill should be dismissed with costs.

Judgment.

ESTEN, V. C.—It seems to me that the mortgage is proved in this case, except that further inquiry should be made for the bond; for which, if the plaintiff could succeed on other points, an opportunity should be given. I think also notice is proved to *Elliott*, and *Newlove* has not paid his purchase money. As to *Little*, perhaps the evidence is too slight to make it safe to disturb *Newlove's* title; but it is unnecessary to express an opinion on this point.

I think the evidence shews that there was a settlement by which the land was given up by *Joseph Clarke* in 1842, and therefore that the bill should be dismissed with costs.

SPRAGGE, V. C.—Assuming it to be proved that the transaction between the plaintiff and his brother *Samuel Clarke* was originally a mortgage, and that both *Little* and *Elliott* had notice respectively, before they purchased the plaintiff's title, the plaintiff has still to overcome the difficulties presented by the settlement of 1842.

1855.

Clarke v. Little.

James Clarke, a son of the plaintiff, is called by him to prove this settlement. He says it was after the winter of 1841. He says that there had been a previous agreement to settle, when *Samuel Clarke* agreed to take a waggon in satisfaction of what was due to him upon the land; but that another settlement was afterwards substituted for it. This may or may not have been the settlement of the 11th of April, 1842; but whether it was so or not, there was, as he says, a settlement after the winter of 1841 in respect to the land. The plaintiff desires to make it appear that at this settlement he paid his brother *Samuel* what was due to him upon the land; but the circumstances rather point the other way, and lead to the conclusion that he relinquished his right to redeem the land. If there was any settlement at all, it must have been one way or the other. It can scarcely be doubted, I think, that the plaintiff knew at that time of the sale of one-half the property to *Little*, which had taken place some three or four years before, and of the sale of the other half to *Elliott;* for when he notified *Elliott* of his title, the answer was that he (*Elliott*) would risk it. Now it does appear to me to be incredible that he should pay off a mortgage under such circumstances to the person who had sold the mortgage property, and that he should have done so without taking a reconveyance of the property, or even what is called a quit-claim deed—a mode of conveyance familiar to the minds of people who desire to avoid any assurance of title;—indeed, not even is a receipt given, or an acknowledgment of any kind to shew the mortgage money satisfied.

Judgment.

As to the receipt of the 11th of April, 1842, it shews that *Samuel Clarke* had placed certain demands against the plaintiff in the hands of Mr. *Duggan* for collection, and that the plaintiff settled them. I infer that these demands were not in respect of any monies due upon the security of the lands in question; for *Samuel Clarke*, after selling the land, could not, and it would be absurd in him to call upon the plaintiff to pay any

1855.

Clarke v. Little.

alleged mortgage money; and if the demands were in respect of such alleged mortgage money, it would have been easy for the plaintiff to shew it. The plaintiff puts in the receipt as connected with the alleged mortgage monies on the land in question. If connected at all with the lands in question, it shews this, I think, that in settling with *Samuel Clarke* for other demands the land in question was taken into consideration; and that could only be by making an allowance to *Joseph* in regard to it, he relinquishing any claim that he might have to redeem. I say, that it could only be this; because if the alleged mortgage monies had been then satisfied by the plaintiff, the receipt would not have been confined to the demands in Mr. *Duggan's* hands, which demands, as it appears to me, did not include any claim for mortgage money. Further: if the arrangement was in fact of the nature I take it to have been, the bond of *Samuel* to reconvey would be given up to him; otherwise it would be retained by the plaintiff; but the plaintiff does not produce it, and there is no evidence of its loss.

Judgment.

It is about eleven years after this settlement that the bill is filed. If his account of it be true, he had paid off the mortgage money, and was entitled to immediate possession of the land; yet he took no steps to obtain possession, nor did he even notify the purchasers of his right. In the meantime *Samuel Clarke* leaves for parts unknown to his own family, and large and valuable improvements are made upon the premises; the plaintiff is represented by his son as all the while in good circumstances, and no reason whatever is given for the long delay that has occurred. This looks very suspicious. It confirms me in the belief that in the dealings between the plaintiff and his brother, after the sale by the latter of the premises in question, the plaintiff abandoned his claim to redeem the land. I think the plaintiff's bill should be dismissed, and with costs.

ARNOLD v. WHITE. 1856.

Lessee—Injunction.

A lessor demised property for a term of years, with a stipulation that the lessee would not carry on any business that would affect the insurance: the lessee made an under lease, omitting any such stipulation, and the under lessee commenced the business of rectifying highwines. Upon a bill filed by the lessor against the lessees, the Court restrained the parties from continuing to rectify highwines, or carry on any other business that would interfere in any way with the insurance.

This was a bill by *John Arnold* against *Charles K. White* and *William Thomson*, setting forth that on the 25th of June, 1855, by a memorandum of that date, the plaintiff leased to defendant *Thomson* a certain store of the plaintiff, situate in the City of Toronto, "at the yearly rent of £175, payable quarterly—the said *William Thomson* to pay the taxes—*to do nothing to interfere with insurance.*"

That *Thomson* thereupon entered into possession, and occupied the premises until January, 1856, when he underlet them to defendant *White* for three years, for the purpose, as *White* represented, of carrying on the grocery and liquor business therein, which business, the bill alleged, did not embrace the business of rectifying highwines; that *White* thereupon went into possession, and commenced carrying on the business of rectifying highwines, the effect of which was to invalidate the policy of insurance effected on the premises, and the agent of the insurance company had notified plaintiff to that effect; and that applications had been made to *White* to discontinue such business, but he refused to comply therewith. Statement.

The prayer was for an injunction restraining defendant *White*, his servants, &c., from carrying on the business of rectifying highwines, or any other trade or business that might interfere with the policy or materially affect the same.

Affidavits were filed, verifying all the statements

1856. of the bill, and a motion for an injunction was now made in the terms of the prayer of the bill, by

Arnold v. White.

Mr. *McDonald* for the plaintiff, citing *Holcomb* v. *Nixon* (*a*),* *Tulk* v. *Moxhay* (*b*), *Hewitt* v. *Loosemoore* (*c*).

Mr. *McMichael* for defendant *White*, contra. The bill itself states, that the building can be insured with this business going on in it, although not at the same rate as at present; the question, therefore, is only one of greater or less premium, not of insurance or no insurance; but—

Argument.

Per Curiam.—The premises were rented to *Thomson*, with the express stipulation contained in the memorandum creating his term, the contents of which *White* must be taken to have notice of, as part of his lessor's title; and having such notice, he cannot be heard to say that he has the power of doing that which would invalidate the policy, or cause any extraordinary risk to the premises: for although the property may be insured, one can readily understand that an owner of a house would prefer having the premises retained in specie, to being paid the amount covered by the insurance. Under all the circumstances, we think this a clear case for granting the relief prayed.

(*a*) Ante 278. (*b*) 2 Phil. 774. (*c*) 3 M. and K. 283.

* Note.—When the case of Holcomb v. Nixon was reported, the judgment pronounced by Mr. Vice-Chancellor Esten was not in the hands of the Reporter; and as the appeal from that decision, brought by the defendants, was abandoned at the last sitting of that Court, and the case is one of great practical importance, it is thought advisable to give the judgment in the present number. See *post* 373.

HOLCOMB v. NIXON. 1856.

ESTEN, V. C.—After the best consideration I can give this important case, I think the plaintiffs are entitled to the injunction they ask, although that opinion is much less strong than it would have been, had it not differed, in some degree, from that formed by the other members of the court.

I think the covenant must be restrained to the limits of the plaintiffs' business, and that so restrained, it is not unreasonable, and is therefore good in law. Then, with regard to the injunction—I think the first branch of the covenant, not to have any interest in any vessels trading below Ogdensburg—if it ended there—would not have prevented *Brown* from parting with any vessels he had or might have for the purpose, although he would himself be precluded from so using them. Upon the second branch of the covenant, however, I think that *Brown* would be restrained from disposing of the vessels to any one for the purpose of trading below Ogdensburg, and that any person would be restrained from purchasing them for that purpose, and if they had purchased them, they would be restrained from applying them to that purpose. In short, any person dealing for the vessels, with notice of the covenant, must be held to engage not to apply them to that purpose. It is not sufficient at the time not to intend to use them—they must intend not to use them. The thing prohibited must enter into their contemplation, and must be excluded. Judgment.

Besides, I would not hear a party actually using the vessels in that way, say that he did not intend it when he purchased. The covenant is one which ought to be specifically executed, and is therefore to be enforced against anybody with notice. The object of the parties was manifestly to exclude not only the personal competition of *Brown*, but the competition of the boats; and such a covenant, requiring, as it does, to be specifically executed to do justice, should be enforced, generally, so far as the frame of it will permit. I think, that as *Brown* could not dispose of the boats for this purpose, so no one claiming under him with notice can do so. I think the injunction should go to restrain the use of the boats in question between Ogdensburg and Quebec.

1856.

MOFFATT v. THE BANK OF UPPER CANADA.

Mortgage—Amount claimed.

The solicitor of mortgagees gave to the mortgagor a memorandum of the amount due, and, relying upon this, a third party purchased the equity of redemption: upon a bill to redeem, the court held the mortgagees not bound by the amount given in the memorandum; the evidence shewing that the solicitor was not aware that the mortgagor had made the enquiry on behalf of the purchasers of the equity of redemption.

This was a suit for redemption, brought by *Lewis Moffatt* and *Alexander Murray* of Toronto, merchants, against *The Bank of Upper Canada*, and the bill filed set forth, that in June, 1852, one *Benjamin Switzer*, being largely indebted to plaintiffs, and insolvent, proposed to assign all his property to them, upon being released from all their claims against him. Part of *Switzer's* property consisted of certain village lots in Streetsville, on one of which *The Bank* held a mortgage, dated 12th September, 1843, purporting to secure £351 10s.; but before completing this arrangement, the plaintiffs enquired of defendants what amount was due on their mortgage, and, in answer, were informed by *Clarke Gamble*, their solicitor and agent, that the whole amount claimed by them was £135, and that thereupon they completed their settlement with *Switzer*.

Statement.

That in September, 1853, the plaintiffs having sold and conveyed this lot, offered to pay defendants the sum of £135, and interest thereon; but the defendants refused to receive this amount, alleging that their claim amounted to a much larger sum; and this was the first intimation the plaintiffs had, that the defendants claimed more than stated by *Gamble*, which the plaintiffs contended bound the defendants.

The prayer of the bill was for redemption on the foot of the memorandum furnished by Mr. *Gamble*, and that defendants should pay costs of suit.

The defendants answered, denying that they were

concluded by the memorandum given by their solicitor to *Switzer*, the same having been furnished for *Switzer's* information solely, and upon an assertion, that *Switzer* had paid a sum of £100, for which he had a receipt at his house, and would be produced. 1856. Moffatt v. Bank U. C.

The cause having been put at issue, evidence was taken before the court, when Mr. *Gamble* was examined on behalf of the defendants; he stated that neither of the plaintiffs ever applied to him with respect to the demand of the Bank against *Switzer*, until after the present difficulty arose; that the memorandum was given to *Switzer* himself, who did not mention that he wanted it for any particular purpose, and at the time, he (*Gamble*) was ignorant of any intention whatever to arrange through the plaintiffs. Statement

Dr. *Connor*, Q. C., and Mr. *Brough*, for plaintiffs.

Mr. *Crickmore* for the defendants. Argument.

Scott v. *Scott* (*a*), *Evans* v. *Bicknell* (*b*), Exp. *Carr* (*c*), *Ibbotson* v. *Rhodes* (*d*). *Clapham* v. *Shillito* (*e*), were referred to.

The judgment of the court was now delivered by

THE CHANCELLOR.—The only question in this case is, as to the terms upon which redemption should be decreed. It is admitted that the plaintiffs purchased the estate subject to this mortgage; but, then, it is alleged that, at the time of the purchase, the defendants represented *Switzer's* debt to amount to £135 only, and that the plaintiffs purchased on the faith of that representation, and they now claim to redeem, not on payment of the amount really due on foot of the mortgage, but on payment of that specific sum. Judgment.

(*a*) 1 Cox. 366 (*b*) 6 Ves. 173. (*c*) 3 V. and B. 111. (*d*) 2 Ver. 554. (*e*) 7 Bear. 146.

1856.

Moffatt v. Bank U. C.

In proof of this allegation, a document has been put in evidence, which is in these words—

"B. U. C. v. SWITZER. } "The balance due in this matter, amounts, with interest and costs, to £135, upon payment of which, satisfaction will be entered.

"C. GAMBLE,
"*Sol. B. U. C.*"

Now, had this paper been furnished by the defendants, with a knowledge of the plaintiffs' intention to purchase the estate, and in reply to an enquiry, on their behalf, as to the amount due upon the mortgage, it is quite clear, I apprehend, that the statement would have been conclusive; the defendants would not have been allowed to question the accuracy of a representation, on the faith of which the plaintiffs had been induced to purchase.

Judgment.

But, admitting the law to be so, the defendants argue that it is wholly inapplicable to the present case, first, because no communication whatever took place between these parties, and, secondly, because the document upon which the plaintiffs insist was not a representation made to them, or to any person on their behalf, but was a memorandum furnished to the mortgager himself, for his own information, and without any reference whatever to the plaintiffs' purchase, and therefore inconclusive in the present suit.

The plaintiffs argue, on the other hand, that this case comes within the rule I have stated, on one of two grounds. They contend, first, that the mortgagor, when he enquired the amount due upon the mortgage, acted as their agent, and that the defendants furnished the statement in question with a full knowledge of that fact, and with a view to the plaintiffs' purchase. But there is nothing in the evidence to sustain that. The only witness upon the point is the solicitor by

1856.

Moffatt v. Bank U. C.

whom the statement was prepared, and he swears that it was made out as a mere memorandum for the information of the mortgagor, and without any reference whatever to the plaintiffs' purchase, of which he was at the time wholly ignorant. It is said, indeed, that the statement of the witness is unworthy of credit, and it must be admitted that, in some important particulars, his recollection of the transaction is imperfect. But it is unnecessary to enter into any minute criticism of his evidence, because, though it could be shown to be devoid of all weight, that could not relieve the plaintiffs from the burthen of establishing the proposition which they offered, and are bound to prove, but of which there is not, so far as I can discover, a tittle of proof.

It is argued, first, that this memorandum given to the mortgagor was a representation to all the world that so much, and so much only, was due upon this mortgage, and that the defendants are estopped thereby, as against the plaintiffs, who purchased on the faith of that representation. But that proposition is directly contrary to what I understand to be the settled law upon the subject. The statement contained in the mortgage deed, as to the amount advanced upon the security, is certainly a representation to all the world as strong, at the least, as the memorandum in the present case; and yet we know that when a mortgage is assigned without the concurrence of the mortgagor, the assignee takes subject to the accounts between the parties. *Lunn.* v. *St. John* (*a*) and *Matthews* v. *Wallwgn*, (*b*), are clear authorities for that. And the purchase of an equity of redemption stands in precisely the same position. Indeed, *Matthews* v. *Wallwyn* is very analogous to the present case.

Judgment.

(*a*) Cited 4 Ves. 127. (*b*) 4 Ves. 118.

1856.

BABY v. CAVANAGH.

Setting aside conveyance—Misrepresentation—Parties.

April 5. A person resident in England having the title to certain lands in Canada, but who had never been in the province, was, by a person resident near the land, urged to make him a lease of those lands, representing, in the course of his correspondence with the proprietor, that the lands were unoccupied, save by some squatters, who had built some huts or hovels for the purpose of, and were, committing depredations upon the lands, by stripping them of the most valuable timber, of which they were nearly denuded; that the lands were liable to forfeiture for nonpayment of taxes, and that the title of the persons so trespassing would shortly become absolute by lapse of time. In consequence of these representations, the owner was induced to execute a lease of the lands for twenty-one years, which he transmitted to the lessee in Canada, who, upon the receipt of the instrument, went to the persons in possession, and induced them to execute to him deeds of quit-claim of their interests respectively, taking from him a bond to reconvey in case it should appear afterwards that he was not entitled to the possession. It was shewn that the persons in possession were not of the character represented, but in reality substantial farmers, with valuable clearances and buildings. Upon a discovery of the misrepresentations made by the lessee, the lessor, and the occupants who had executsd quit-claims, filed a bill to set aside the transactions, and the court held them entitled to the relief prayed for, and that they were not improperly joined as plaintiffs.

Statement.

The bill in this case was filed by *Daniel Baby*, *Robert Hervey*, *Benjamin Wilson*, *George Wilson*, *Ephraim Haight*, *Merritt Palmer*, and *John Minard*, against *Denis Cavanagh*, setting forth that the plaintiff *Baby*, who had never been in Canada and was then resident in England, owned certain lands in Yarmouth, in Upper Canada, where the defendant resided; that in March 1851, the defendant commenced a correspondence with *Baby*, which was continued with him and his solicitor in England until he obtained a lease of the property in question from the plaintiff; that throughout this correspondence the defendant urged *Baby* to give the lease, and falsely and fraudulently represented that the lands were unoccupied, except by squatters, and were unimproved; that the squatters were destroying the timber; that taxes were unpaid, and the lands in danger of being sold for payment of the taxes; and that it would be advisable to grant the lease, in order to prevent waste, and to prevent the title of the squatters becoming absolute by reason of continued posses-

sion; and that believing and relying fully upon the statements of the defendant, the plaintiff *Baby* was induced to execute a lease of six hundred acres in his favor for twenty-one years.

The bill alleged that so far from the statements of the defendant being true, the facts were, that for many years, and up to the parties being dispossessed, as stated by the plaintiffs, the plaintiffs, other than *Baby*, were in possession of the lands, farming and improving the same, and living thereon as farmers, and had made large clearances and improvements thereon, with the express leave and license of the agents of the plaintiff *Baby*, and as intending purchasers or lessees, and under promises and assurances on the part of such agents, partly verbal and partly in writing, that in the event of any sale or lease of the lands, they should respectively have the preëmptive and first right to purchase or lease the parts they were so in possession of respectively; and that during all the time of the correspondence with *Baby*, the defendant was well aware of all the circumstances attending their possession, and fraudulently concealed the same. The bill further alleged, that upon the defendant obtaining the lease in the manner stated, he immediately called upon the plaintiffs, other than *Baby*, and demanded possession, and threatened proceedings to turn them out of possession; and that in order to save expense and trouble, they agreed to execute and did execute deeds of quit-claim to the defendant of the lots they were respectively in possession of; but they insisted upon the defendant giving them a bond, conditioned to reconvey to them if it should appear upon inquiry that he was not entitled to the lands in the manner he represented, which was accordingly given to them.

Judgment.

The bill prayed that the lease and deeds of quit-claim obtained from the plaintiffs might be declared fraudulent, and ordered to be delivered up to be cancelled, and the

1856.

Baby v. Cavanagh.

defendant compelled to restore possession to the parties, and for further relief.

The defendant answered the bill, denying all the charges of fraud.

Several of the defendant's letters were set out in the pleadings. In one of them he offered to pay rent for each two hundred acre lot at the rate of seven dollars a year for the first seven years, fourteen for the second, and twenty-one for the third; remarking, "that will be better than to let it lie as it has the past seven years: it will be improving, and the occupant will have to pay the tax." The lease executed reserved rent at the rate of £4, £4 5*s*., and £5, for these respective periods, and bound the defendant to make certain improvements of a very expensive character. It appeared in evidence that the plaintiff *Baby* had appointed his brother agent for his property in this country, but no attention had ever been paid to the property by the agent, whose death happened during the time of the correspondence between the defendant and the plaintiff *Baby*.

Statement.

Evidence was taken in the cause, the tendency of which was to corroborate the statements of the bill, as sufficiently appears in the judgment.

Mr. *R. Cooper* for the plaintiffs.

Mr. *McDonald* for the defendant.

Kelly v. *Solari* (*a*), *Calverley* v. *Williams* (*b*), *Turner* v. *Harvey* (*c*), *Small* v. *Attwood* (*d*), *Arthurton* v. *Dalley* (*e*), *Story's* Eq. Jur., vol. i. secs. 9, 141-7-8-9, 207; *Sugden's* Vendors and Purchasers, vol. iii. p. 387, were cited.

(*a*) 9 M. & W. 54.
(*b*) 1 Ves. Jun. 210.
(*c*) Jacob, 169.
(*d*) Young's Rep. 407-61.
(*e*) Ante vol. 2, p. 1.

The judgment of the court was delivered by

1856.

Baby v. Cavanagh.

ESTEN, V. C. — This suit was instituted for the purpose of avoiding a lease granted by the plaintiff *Baby* to the defendant, on the ground of fraud and misrepresentation. *Albertson*, the only witness to the annual value except the defendant's relations, strongly corroborates the plaintiffs' evidence on the point, shewing the annual value to be more than ten shillings per acre. Although his evidence is not altogether intelligible, it certainly appears that the lands were in a considerable state of improvement when the defendant applied to the plaintiff on the subject of the lease, and possessed a considerable annual value. Did the defendant's letters convey any intimation of this to Colonel *Baby?* The representations to him that divers persons adjoining and within three miles had for seven years been plundering the best timber on the property, and had erected huts or hovels for that purpose, and were in that way occupying it, and might acquire eventually a title thereby, and that legal process would be necessary to dispossess them, and that they are called "squatters,"—these statements, I think, involved a gross misrepresentation. They conveyed no idea that these individuals had cleared a very large portion of the property, and were cultivating it in a proper manner as farmers; had erected dwelling-houses and barns, at a very considerable expense; and had, many of them, paid large sums for the acquisition of the interest, such as it was. These facts were very material, and were, I think, designedly suppressed by the defendant, who does not pretend that he was ignorant of them.

Judgment.

Misrepresentation consists in the suppression of what is true, as well as in the statement of what is false; and although the parties to contracts must protect their own interests, and gain for themselves the information necessary for that purpose, yet if one party will take upon himself to make a representation to the other, he

1856.

Baby v. Cavanagh.

must adhere to truth in that representation. This duty the defendant did not perform. He made a representation to the plaintiff to induce him to grant the lease in question, and in so doing suppressed a material fact, the suppression of which rendered his statement untrue in substance, although perhaps true in the letter. It was under the impression created by this statement that the lease was executed in London, and transmitted to the defendant in Canada, who executed it in the presence of Mr. *James Baby*.

Judgment.

It is true that subsequent correspondence took place between the parties, in which the lease was recognized as a subsisting transaction; but it no where appears that the plaintiff, Colonel *Baby*, did or said anything which could be deemed a recognition of the lease with a full knowledge of all the circumstances under which it was granted: on the contrary, he appears to have repudiated it as soon as those circumstances became fully known; and nothing is more clear than that perfect knowledge of all material facts is essential to any confirmation of an avoidable transaction. I may also remark that this defence is nowhere insisted on by the defendant in his answer, except by an allegation of the most general nature. Colonel *Baby* appears to have referred the defendant to his brother *Francis Baby*, who appears to have been his agent in Canada at that time for the property in question; and if we are to believe the defendant, Mr. *Francis Baby* approved of his proposal, and promised him a lease; but it not only does not appear that he was aware of the real circumstances of the case, but, I think, we must assume the contrary, he having been furnished by Colonel *Baby* with a copy of the defendant's letter, and yet making no remark on the misrepresentation of the facts of the case, which he naturally would have done had he been aware of them. I think, too, that the defendant was aware of, or strongly suspected this ignorance on the part of Mr. *Francis Baby*, and calculated upon it, and

was thereby led to practice the deceit which he did upon Colonel *Baby*. He says in his letter of the 23rd of November, 1851, that Mr. *Francis Baby* lived one hundred and fifty miles from the place, and in two other letters he mentions that he had told him he had not seen the property for fifteen or seventeen years. I am led to think that the defendant was tolerably well aware of this fact before he made the application to Colonel *Baby*. In fine, I think this lease was obtained by fraud, and cannot stand. 1856. Baby v. Cavanagh.

Nor do I think that the quit-claim deeds given by the other plaintiffs should stand any more than the lease. They were given on the supposition that the lease was a genuine and valid instrument, and in fact to relieve the title created by the lease of an incumbrance. I think they should be set aside, and I see no objection to all the plaintiffs joining in one suit for all these purposes. I think the defendant should pay the costs of the suit. The plaintiff *Baby* should refund the rent, and the defendant should account for the profits of the estate. A fair allowance should be made the defendant for all that he has done in pursuance of the provisions of the lease. Judgment.

Attorney General v. Garbutt.

Grant from the Crown—Mistake.

March 14 & May 12.

In the year 1797 an order in Council was made in favor of M. P., as daughter of S. De F. a U. E. loyalist, under which a lot of land was located, and a description therefor was regularly made out in her name; but in the year 1801 a patent for the lot so described issued to one M. F., the sister of the husband of the locatee; but during her life she never claimed any interest under such patent: no authority was shown for the change of the name in the grant from "M. P." to "M. F." The Court, upon an information filed at the suit of the Attorney General, decreed the patent to be cancelled, as having been issued by mistake. [Esten, V. C., dissenting.]

The facts of this case are stated in the report, ante p. 181. After the decision there reported, the plain-

1856.
Atty.-Gen. v. Garbutt.

tiff adduced further evidence, principally officers and those who had been officers in the land granting department: the nature of their evidence is set forth in the judgment.

Mr. *Wilson*, Q. C., and Mr. *Brough*, for plaintiff.

Hindmarsh on Patents, p. 39, 42, 398 and 498; *Shower's* Parliamentary Cases, 212; 10 *Coke* 113, b.; *Freeman* 178, were referred to.

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

Argument.

Although lapse of time is not of itself a bar to relief, still after such a length of time much stronger evidence ought to be adduced in order to obtain the intervention of the court, than if the transaction had been recent: in that respect the same rule exists where the crown is concerned, as between subject and subject.

The smallness of value of the property in question, half a century ago, constitutes of itself a strong reason why the court should not interfere in the manner now sought.—*Beaumount* v. *Bramley* (*a*).

May 12th.

Judgment.

THE CHANCELLOR.—The object of this information is to have it declared that a certain patent, made in the year 1801, by which lot No. 11, in the 4th concession of the township of Haldimand, was granted to "Mary Fairfield," is void, on the ground of mistake.

On the 30th of August, in the year 1797, *Mary Pruyne*, then the wife of *Walter Pruyne*, applied for and obtained an order in Council, for a grant of 200 acres of land, as the daughter of *Simon De Forest*, a U. E. loyalist. In pursuance of this order in Coun-

(*a*) 1 T. & R. 41.

1856.

Atty.-Gen. v. Garbutt.

a U. E. loyalist. In pursuance of this order in Council the property in question in this cause—that is, lot No. 11, in the 4th concession of Haldimand, was assigned to her. Her name was written upon it by Mr. *Smith*, the then Surveyor General, in the original map of the County of Haldimand. It was "described" in the usual way to "*Mary Pruyne;*" and that description which has been proved, is the only description for the lot in question which ever issued from the office of the Surveyor General.

On the 27th of May, 1798, another *Mary Pruyne*, a sister-in-law of the former, obtained an order in Council for a grant of 200 acres of land as the daughter of *Harman Pruyne*, a U. E. loyalist; and in pursuance of that order, lot No. 30 in the 3d concession of the township of Cramahe was shortly afterwards described to her in her maiden name, "*Mary Pruyne.*"

Judgment.

On the 30th of June, 1801, letters patent were issued, by which the Haldimand lot was granted to "*Mary Fairfield, of Ernestown;*" and on the 17th of May, 1802, the Cramahe lot was, by like letters patent, granted to "*Mary Pruyne,*" described as of the township of Cramahe. But before either patent had issued—namely, on the 10th of March, 1799—*Mary Pruyne*, daughter of *Harman Pruyne*, had intermarried with *Stephen Fairfield*, who then was, and throughout his life continued to be, an inhabitant of the township of Ernestown.

Now the allegation on the part of the Crown, is, that these patents should have been in accordance with the descriptions, but that by mistake in some office connected with the Government, the Haldimand lot was granted to "*Mary Fairfield*" instead of to "*Mary Pruyne,*" and the Cramahe lot was granted to "*Mary Pruyne*" instead of "*Mary Fairfield;*" and had these parties been the only claimants, there would

1856. Atty.-Gen. v. Garbutt.

be no doubt whatever, I suppose, as to the right of the Attorney General to the decree which is asked; because, "*Mary Fairfield*," having already received a patent in her maiden name, "*Mary Pruyne*," to the only lot to which she had any claim—namely, the lot in Cramahe—admits now, as she seems to have always admitted, that she has no right whatever to the Haldimand lot, the one in question in this cause.

But *William Garbutt*, another of the defendants to this suit, denies the existence of the mistake suggested by the Crown. He contends that it was not the intention of the Crown to grant this lot to either "*Mary Pruyne*," but to an entirely different person, namely, to *Mary Fairfield*, wife of *Archibald Fairfield*, whose maiden name had been *Mary Holden*, through whom he claims. Now that contention gives rise to a new and entirely different question—a question of identity. Who was the person designated in the patent as "*Mary Fairfield, of Ernestown*?" Was it *Mary*, wife of *Stephen*, or *Mary*, wife of *Archibald*? That question might have been tried in the action of ejectment; and had I been present when this cause was originally heard, that is the course, I think, which I would have been inclined to suggest. But as an inquiry was directed, and as there has been considerable delay and expense in prosecuting that enquiry, I think it is our duty to dispose of the case upon the materials before us, if the evidence be sufficient to bring our minds to a satisfactory conclusion.

Judgment

In determining, then, whether the person designated in the patent as "*Mary Fairfield, of Ernestown*," was *Mary*, the wife of *Archibald*, it is extremely material to consider the course pursued by the Executive Government of that day, in relation to grants of land. The first step towards obtaining a grant of land, at the time these patents issued, was to procure an order, authorizing the grant, from the Executive Council

1856.

Atty.-Gen. v. Garbutt.

of the Province. The practice is thus described by Mr. *Boulton*, who was for a long time connected with the Provincial Government, first as Solicitor, and then as Attorney General. "The course of obtaining land was to present a petition to the Council, upon which an order was made; that order was carried to the Attorney General's office for a fiat, which fiat was taken to the Surveyor General's office for a description, this was taken to the Secretary's office, by whom the patent was made out." And the practice is described in the same way by Mr. *Spragge*, who has been in the Surveyor General's department, I believe, for a period of 27 years, or nearly so. Now there is no trace whatever of any application to the Executive Council on behalf of *Mary Holden*, either as *Mary Holden* or as *Mary Fairfield*; and no order in Council ever issued in her favor. That is satisfactorily established by the evidence of Mr. *Lee*, the clerk of the Executive Council.

Judgment.

The next step was to obtain a description from the Surveyor General's office, without which no patent could have been issued. Upon this point Mr. *Spragge* says, "I know of no instance in which a patent has issued without such a description;" and again, upon cross-examination, "I have not ever known a patent issued without a description." Now this lot was never described to *Mary Fairfield*. It was described, as I have already shown, to *Mary Pruyne*; and that description is the only one which ever emanated from the Surveyor General's office.

Then according to the settled course of practice, a description once issued would have been altered,—could only have been altered properly, under the authority of an order either of the Executive Council, or of the Heir and Devisee Commission, except in the case of *marriage*, when, as it would seem, a patent to the locatee in her acquired name would have

1886.
Att'y. Gen. v. Garbutt.

been regular. Mr. *Spragge*, says: "I think that patents were sometimes issued to assignees without any application to the Heir and Devisee Commission, and I believe that assignees have had their rights recognized by order in Council, upon which patents have issued to them, but I know of no case in which a description once issued has been altered in favor of another grantee without an order in Council, or under the Heir and Devisee Commission." Mr. *Boulton* says: "A description having issued to one person, a patent could not have issued to another in my time." Sir *John B. Robinson*, who was Attorney General from 1812 to 1829, says: "A patent could not issue to *Mary Fairfield*, after a description to *Mary Pruyne*, unless upon an order in Council in favor of *Mary Fairfield*, or land-board certificate, or upon the assumption that they were the same persons. It is possible that the name would be changed after the description issued, upon an assurance by some person of credit that it was the same person, without more; but in such a case I would expect to find a memorandum of the change, such as the words 'formerly *Mary Pruyne*,' or something to that effect. * * * I think it altogether unlikely that the Attorney General would substitute the name of *Mary Fairfield* upon being convinced that she was in truth the assignee of *Mary Pruyne*. I should say that any Attorney General of the day would know that such substitution would be wrong."

Judgment.

The force of the argument arising upon the evidence cannot, I think, be denied. There is not a vestige of anything to connect *Mary*, wife of *Archibald Fairfield*, with this grant; on the contrary, the evidence goes far to negative her claim, unless we are to adopt the unreasonable and highly improbable hypothesis, that the patent in this case issued out of the ordinary course, and contrary to the established regulations. Had the evidence gone a step further—had it been established as a matter of fact that the patent was delivered to

1856.

Atty.-Gen. v. Garbutt.

Mary, wife of *Stephen Fairfield*, or to some person on her behalf, that would have been conclusive, in my opinion, against the case made by the *Garbutts*. Unfortunately it has been impossible, from the great lapse of time and other causes, to ascertain this fact by direct proof; but the evidence laid before us leads fairly to the conclusion that the patent deed was delivered to the *Stephen Fairfields*; and it establishes clearly that the *Pruyne* family asserted their right to this lot, and exercised acts of ownership from a very early period, and the assignee of the heir-at-law of *Mary Pruyne* continued in the undisturbed possession of it from the year 1834 to 1854; while the claim of this *Archibald Fairfield* is comparatively recent, and has been suffered to remain long dormant.

Judgment.

In the first place, it is clear from the evidence of *Fisk*, that *Archibald Fairfield* and his family left the township of Ernestown in the year 1796; and I gather from the evidence, although the point has been left certainly in some obscurity, that they never after resided there. *Bell* shows that he had resided in Ernestown from 1800, and that *Archibald Fairfield* had not resided there during that period; and his testimony is corroborated by other witnesses.

In the first place, it is quite clear that the patent did not come into possession of the *Archibald Fairfields* until the year 1824. The statement in the answer of the *Garbutts* is this: "That three or four years after the defendant's marriage, and in or about 1824, the patent for the said lot was handed to this defendant *William Garbutt* by *Benjamin Fairfield*, brother of *Archibald Fairfield*, and a resident of Upper Canada, who handed the same to the defendant as the patent of lands in Upper Canada in which defendant's wife was interested jointly with her two sisters as daughters and co-heiresses of said *Mary Fairfield*."

Harman Fairfield, son of *Stephen* and *Mary Fair-*

1856.

Atty-Gen. v. Garbutt.

field, who was examined as a witness, makes this statement: "I have heard my mother say that there was a patent for 200 acres in the County of Haldimand, presented to her by her brother-in-law. I do not know whether it was for the same lot mentioned in the pleadings. She never claimed the lot. She had received a patent for 200 acres; I think No. 3 in the 2d concession of Cramahe, in the name of *Mary Pruyne*, which she thought was for herself. Afterwards *William Fairfield* presented her with a patent for 200 acres of land in Haldimand. Her father-in-law told her that as she was only entitled to one lot, she must return the patent that William gave her to the Government. She said that the patent was sent back or returned, and she lost sight of it. I never saw the patent. *Simon Pruyne*, after my father's death, told me that my mother held the patent for his mother's land, and asked me to look for it."

Judgment.

It is said that this is mere hear-say evidence, and therefore inadmissible. Now, as mere narrative of conversation had with *Mary Fairfield* and *Simon Pruyne*, it is so. But in another aspect it is admissible and extremely material upon two points which seem to me to be of vital importance. It is admissible to show that *Mary Fairfield* was, or thought that she was, in a position to assert some claim to the Haldimand lot, in consequence of some mistake in the patent; and that she repudiated any such right. It is also admissible to show that *Simon Pruyne* claimed the lot on behalf of his mother; that he alleged the patent to be in possession of the *Stephen Fairfields*, and asked *Harman Fairfield* to make search for it. But it is difficult to explain how such a statement came to be made by the one, or such a request by the other, except upon the hypothesis that the patent came originally into the hands of the *Stephen Fairfields*; and in my opinion the fair inference from the whole is, that this patent was delivered to *Mary*, wife of *Stephen Fairfield*, or

to some one on her behalf, and continued in her possession until in some way, unexplained by the evidence, it got back into the hands of *Benjamin Fairfield*, by whom it was delivered to *William Garbutt*, somewhere about the year 1824. 1856. Atty.-Gen. v. Garbutt.

Then it is quite clear that the *Pruyne* family claimed the lot from an early period. A report was made in favor of *Mary Pruyne's* claim in 1820, by Mr. *Cameron*, then the Provincial Secretary, in pursuance of which this lot would have been granted to her but for the discovery that a patent had issued already in the name of *Mary Fairfield.*

Again: I see no reason to doubt the statement that the defendant *Garbutt* did admit, in the year 1828, that money which he had sent to pay the taxes upon the lot had been returned, because the taxes had been already paid by *Simon Pruyne.* Had this material fact, said to have been admitted, been untrue, the defendant might have shewn it; he might have shewn that the taxes had been paid by himself, or by some person unconnected with the *Pruyne* family, but no evidence of that sort is given; and *Harman Fairfield* has not been impeached, and is, so far as I can judge, trustworthy witness. Judgment.

Then it is not to be doubted that *Simon Pruyne* claimed the lot before the Heir and Devisee Commission, as the heir-at-law of *Mary Pruyne*, and that his claim was only abandoned because a patent had been already issued.

Lastly: It is established that *Simon Pruyne* sold the lot to *Sisson Wait* about the 1834, and that *Sisson Wait* remained in undisturbed possession until the year 1854, having made in the interim large improvements.

In answer to that clear and conclusive chain of testimony against the claim advanced by the *Garbutts*,

1856.

Atty.-Gen. v Garbutt.

it was argued that the crown cannot have intended to grant this land to either of the *Pruynes*, because *Mary Fairfield* is not described as a U. E., as she would have been had the supposed intention existed. That observation is, no doubt, entitled to some weight; but its force is weakened, if not obviated, by the fact sworn to by Mr. *Kent*, that this grant was entered at the time in a book kept in the Provincial Registrar's Office devoted to U. E. grants.

It was said in the next place that the practice of not varying from the description, however general, was not universal; and it was suggested that *Mary Fairfield* may have been the assignee of *Mary Pruyne*, and that the patent may have issued in the name of the assignee instead of being in the name of the locatee. The practice may not have been universal, but it has been so nearly so, as to render the defendant's hypothesis in the highest degree improbable. Not more than two or three exceptions have been shewn within the half century; and, so far from shaking the rule, they establish it. But there is nothing in the evidence to countenance the supposed assignment from *Mary Pruyne* to *Mary Fairfield*. Had any such assignment existed, it would, no doubt, have been stated in the answer; but the answer so far from stating this case, appears to me to negative it. The allegation is: "that the patent issued to and in the name of *Mary Fairfield* therein described, and who was the wife of *Archibald Fairfield*, and not the same person as *Mary Pruyne*, in the said information mentioned." Now that passage certainly does not import that *Mary Fairfield* claimed under *Mary Pruyne*. It imports, I think, quite the reverse; it is an assertion that the patent issued to *Mary Fairfield* in her own right. But the conduct of the parties negatives this supposed assignment, which is equally inconsistent with the claim constantly put forward by the *Pruyne* family, and with the non-claim of the defendants, the *Garbutts*, for a period of more than thirty years.

Judgment.

1856.

Atty.-Gen. v. Garbutt.

My conclusion upon the whole case is, that the person described in the patent as "*Mary Fairfield*, of Ernestown," was not *Mary*, wife of *Archibald*, but *Mary*, wife of *Stephen Fairfield*; and it is quite clear, I think, that her name was introduced by mistake instead of *Mary Pruyne*, to whom the land had been described; and I am therefore of opinion that the patent should be set aside.

ESTEN, V. C.—I am so unfortunate as to differ from the other members of the court in this case.

I have not seen the exhibits upon this occasion, but do not apprehend that to be material, as I examined them with attention when the cause was formerly before us. The evidence which we then had, we did not consider sufficient, and the hearing was adjourned to enable the Crown to adduce further evidence. It was indeed of the most meagre and trivial description. I have been unable upon a second perusal to discover any facts proved by it at all material, except that both *Mary Fairfields* might properly have been described as of Ernestown; that improvements have been made by *Wait*; and that *Mary*, wife of *Stephen*, did not claim the lot in question. What she is stated to have said with respect to the presentment of the patent in question to to her by Mr. *Fairfield*, is, I am satisfied, not evidence.

Judgment.

The additional evidence supplied merely shews that certain forms have always been observed in the government offices in issuing patents, and that supposing all the documents which ever existed with respect to this patent to be in existence and to have been produced, it was irregularly issued to *Mary*, the wife of *Archibald Fairfield*. But, in the first place, it is by no means clear that we have all the documents which ever existed with respect to this patent; and in the next, even if we have, we are not called upon to set aside this patent on the ground of irregularity, but on the ground of

1856.

Atty.-Gen. v. Garbutt.

mistake; and, as to the irregularity being conclusive evidence of the mistake, I deem that position wholly untenable. It is assumed by the counsel for the Crown that because the description was to *Mary Pruyne* and the patent to *Mary Fairfield*, and because a patent could not regularly issue to a different person from the one named in the description, except in case of marriage, without some authority, and no such authority is produced, therefore the patent was issued in mistake. I hold this position to be utterly untenable. I think that, consistently with all the evidence we have before us, the patent in question might have issued, regularly or irregularly, to *Mary*, the wife of *Archibald*, being intended for her. The only evidence as to the possession of the patent is to be found in the information, and from the statement contained in the information, coupled with the admitted fact of the patent being now in the possession of the defendant, I think, we must intend that it was always in the possession of the rightful owner—namely, *Mary*, the wife of *Archibald*. It was confessedly never in possession of *Mary De Forest*, or of any one claiming under her. *Mary De Forest* appears upon her second marriage in 1820, and not before, to have made some application respecting the lot; but upon being informed that a patent had issued, to have prosecuted it no further. Mr. *Mercer* tells us that he preferred a claim before the Heir and Devisee Commission to the lot on behalf of *Simon E. Pruyne*, in 1830, but that upon its being ascertained that a patent had issued it was abandoned. In 1834, however, after *Simon E. Pruyne* had departed the country, he disposes of a claim which he had abandoned himself to one *Wait*, who it is said paid him £150 for it. Upon this it is sufficient to remark that it is not proved.

Judgment.

With regard to the possession, of course, it is not matter of surprise that a wild lot should not have been in the actual possession of the rightful owner for many years after the patent issued, nor that a stranger

1856.

Atty.-Gen. v. Garbutt.

should have intruded and made improvements upon it. It appears, however, that the defendant paid taxes upon the property although the money was returned to him, and that the family dealt with the property; defendant having purchased the shares of the other children, and having executed a lease of the property, and finally commenced an action for its recovery. I think that if I were on a jury I should render a verdict in his favor upon this evidence, and the Attorney General is evidently of the same opinion, for he prays an injunction. The jurisdiction to rectify mistakes in deeds is very cautiously exercised: the instances of it are extremely rare; it is said never to have been done where the answer denied the mistake, which it does here. I hold it never will be done where the instrument can possibly be correct as it is. Can it be said here that it was impossible that the patent should have been intended for *Mary*, wife of *Archibald Fairfield?*

Judgment.

The case seems to me to rest almost entirely on the fact, that there was a description to one person and a patent to another. The Attorney General wishes us to assume that this could not be without mistake. But what is the mistake? To be material, it must be that the patent issued to the person named in it, on the supposition that she was the person named in the description, for if the patent was really meant for the person claiming it, without an order in Council, or other warrant, and a new description, the irregularity would not be sufficient to vitiate it. But the information negatives the impossibility of a patent intentionally issuing to a different person from the one named in the description; for it asserts that it was done in this case.—The patent is stated to have been issued not merely in the name of, but to *Mary*, wife of *Stephen Fairfield*, meaning of course that it was intended for her. The argument, therefore, is suicidal. It is added, certainly that this was done by mistake, but what the mistake

1856.

Atty.-Gen. v. Garbutt.

was is not mentioned. It is not said that the patent was granted to *Mary*, wife of *Stephen Fairfield*, supposing her to be the person who was *Mary De Forest*. It may be that the mistake merely was that the patent issued without an order in Council or other warrant, and without a further description. In every case where a written instrument has been vacated on ground of mistake, it has been clearly shewn what the mistake was, and how it happened. Here it is not stated what the mistake was, much less is it shewn how it happened; and in my judgment it is not proved to have happened at all. Would not any reasonable man say, that, consistently with the evidence we have before us, it might appear, if the truth could be certainly discovered, either that there was or that there was not mistake in this case. Is it possible to set aside a patent under such circumstances? This case appears to me certainly the weakest of the kind that was ever brought before a court of justice; and yet it invokes a jurisdiction which is exercised only in cases where the proof is of the strongest description. The rule must be somewhat relaxed in the case of the Crown, where the patent is prepared *ex parte* through the instrumentality of subordinate officers; but in this case the proof seems to me not to exceed the strength of a probable conjecture. I think the information should be dismissed; and had it been a bill by *Wait*, or had he been named as relator, I should have given the defendant his costs. I think it much better that the Crown should be at the trouble and expense of granting another lot to those claiming under *Mary De Forest*, if it think fit, than that the solemn patent of the Crown should be annulled upon such grounds as exist in the present case.

Judgment.

SPRAGGE, V. C.—Since this cause was before my brother *Esten* and myself, inquiries have been made and evidence has been taken upon points suggested in the judgments which we then gave. This evidence

has cleared up much that then appeared obscure and uncertain. 1865.

Atty.-Gen. v. Garbutt.

I take the strict question to be, whether the patent for the land in question, lot 11 in the 4th concession of Haldimand, was intended for *Mary* wife of *Archibald Fairfield*, or for either *Mary* wife of *Stephen Fairfield*, or *Mary* wife of *Matthew Pruyne*; for, if *intended* for the wife of *Archibald Fairfield*, it cannot be disturbed on the ground that either of the other two was the one *entitled* to it. I think the evidence establishes, that *Mary*, daughter of *De Forest*, a U. E., and wife of *Matthew Pruyne*, located the land in question in pursuance of an order in Council in her favor made in 1797, and that the same was described to her; that *Mary*, sister of the same *Matthew Pruyne*, and a daughter of a U. E., located the lot in Cramahe referred to in the pleadings and evidence, in pursuance of an order in Council in her favor, made in 1798, and that the same was described to her: that she married *Stephen Fairfield* in 1799. The patent for the lot in question issued in 1801, in the name of *Mary Fairfield*, of Ernestown. The patent for the Cramahe lot, in 1802, in the name of *Mary Pruyne*. Judgment.

At the end of the year 1798 matters stood thus: there were two *Mary Pru*[illegible], each a daughter of a U. E.; the one the wife, the other a sister of *Matthew Pruyne;* each had obtained an order in Council in her favor for 200 acres of land, and each had probably located her land in pursuance of it, and the land was described to her. The description would be carried either to the Secretary's or the Attorney General's office, in order that the patent might issue in due course.

Before either of the patents issued there was only one *Mary Pruyne*,—at least, only one of the two whose names are connected with these lots—one of

1856. Atty Gen. v Garbutt.

them having become *Mary Fairfield*, and the first patent issued is in that name, and is for the lot described not to *Mary Fairfield* who had been *Mary Pruyne*, but for the lot described to *Mary Pruyne* who had been *Mary De Forest*. This patent bears date the 30th of June, 1801, and was sent to the late *Thomas Markland* sometime in the following year, and was afterwards in the possession of *Mary Fairfield*, who had been *Mary Pruyne*: when it reached her does not appear; but I think, from the evidence, it was after the patent for the land which she had really located. The patent for that land issued in 1802 in the name of *Mary Pruyne*, of Ernestown. This was three years after the marriage of *Mary Pruyne* to *Stephen Fairfield*: the patent was taken to her and she received it and treated the land as her own. The patent would have been quite correct but for her marriage. She took it as issued in ignorance of her change of name; and so when the patent to *Mary Fairfield* for other land—the land in question—reached her, she disclaimed it, upon the evident assumption that she had already received her grant.

Judgment.

Now, if instead of disclaiming she had insisted upon retaining it, and that against the claim of her brother's wife, to whom it had been described, how would the case have stood—that is, putting out of view for the present, the existence of such a person as *Mary* wife of *Archibald Fairfield?* On the part of the claimant it would have been suggested that confusion had arisen in some branch of the land-granting department, from the circumstance of there being two *Mary Pruynes*, both also being locatees of land; that some officer in the department had been informed that one of the two had become *Mary Fairfield*, and had been misinformed or had mistaken which of the two locatees this was, and so had transposed them, whereby *Mary Pruyne's* land was granted in the name of *Mary Fairfield*, and *Mary Fairfield's* in that of *Mary Pruyne*: and, I

think, the conclusion would be almost irresistible that such a mistake had occurred. 1856.

Atty.-Gen. v. Garbutt.

Then how far does the circumstance of there being another *Mary Fairfield*, the wife of *Archibald*, alter the case? The patent found its way into her possession, and she sufficiently answers the description of the grantee, but that is all. Suppose the land had been described to *Mary Fairfield*, wife of *Stephen*, and the patent issued to *Mary Fairfield*, of Ernestown, a description applying to each of the two *Mary Fairfields*, there could surely be no difficulty in concluding that the one to whom the land was described was the one intended in the patent, in fact the grantee; it would not be that the patent was issued in mistake, but that it had got into the wrong hands, that the one *Mary Fairfield* had obtained the patent belonging to the other *Mary Fairfield*. If then, as between the two *Mary Fairfields*, the one formerly *Mary Pruyne* was clearly the one intended; and if as between her and *Mary Pruyne* formerly *De Forest* the latter was the one intended, I see no difficulty in coming to the conclusion that the latter must be entitled as against *Mary*, the wife of *Archibald*. Judgment.

The position of the latter is that she is grantee, and has nothing at all to do with the other *Mary Fairfield* or with *Mary Pruyne*. If the mistake as between the two latter could not be made out, this position would probably be unassailable; for she could hardly be put to show why the patent was granted to her, and it would be presumed that it was intended for her. It is suggested that she may have been the assignee of *Mary Pruyne*. All that can be said is that this is possible; but nothing appears in favor of that hypothesis, and much against it. A change of name when land was described to a female appears to have been not improbable; that is, a description in a maiden name and a grant in a married name, and that

1856.

Atty.-Gen. v. Garbutt.

without any record of the reason of the change appearing. But a change of person could hardly have been made; it could not have been made without a serious breach of duty by some officer connected with the land-granting department. Different officers connected or formerly connected with the issuing of patents have spoken to this point. Sir *John B. Robinson* says: "Supposing a description issued to *Mary Pruyne* and a patent to *Mary Fairfield*, my first impression would be that they were the same person and had married." Again, "a patent could not issue to *Mary Fairfield* after a description to *Mary Pruyne*, unless upon an order in Council in favor of *Mary Fairfield*, or a Land-Board certificate, or upon the assumption that they were the same person;" and he adds, "it is possible that the name would be changed after the description issued, upon an assurance by some person of credit that it was the same person, without more; but in such a case I should expect to find a memorandum of the change, such as the words 'formerly *Mary Pruyne*, or something to that effect." If such a change were made it was more probably in the Attorney General's department than in any other, and the papers of that department do not appear to have been preserved. Sir *John Robinson* says further: "I think it altogether unlikely that the Attorney General would substitute the name of *Mary Fairfield* after being convinced that she was in truth the assignee of *Mary Pruyne*. I should say that any Attorney General of the day would deem that such substitution would be wrong."

Judgment.

The suggestion that *Mary*, wife of *Archibald Fairfield*, may have been the assignee of *Mary Pruyne*, is not only unsupported by any evidence shewing even its probability, but is negatived as far as the nature of the suggestion would permit.

The patent being issued to *Mary Fairfield* without

1856.

Atty.-Gen. v. Garbutt.

the addition of the words U. E., the *Mary Fairfield*, wife of *Archibald*, not being a U. E., while the other *Mary Fairfield* and *Mary Pruyne* were both U. E's., struck me as material for the defendant upon the former argument. But at the subsequent examination a book was produced from the Secretary's office and proved, this being the book in which the issuing of patents to U. E's. is entered, and in this book the patent now in question is entered. I think this a circumstance entitled to great weight not seriously affected by the fact that two entries appear in the same book, not strictly to U. E's., but one to the husband of a U. E., and another to a gentleman having a recognized special military claim.

Another circumstance of great weight is, that no patent for any other land has been issued to *Mary Pruyne*, formerly *DeForest*. This would seem to imply that her claim for land was satisfied by the patents issued, at least by one of them.

Judgment.

I confess that all these circumstances are to me very convincing; and, were it not for the different view of my brother *Esten*, would entirely remove the doubts which the evidence upon the former hearing left upon my mind. I believe that on one point I was in error —viz: in supposing that the description "of Ernestown" would apply more properly to *Mary* wife of *Archibald*, than to *Mary*, wife of *Stephen Fairfield*. I cannot say now, upon all the evidence before the Court, that there is anything to lead me to think that the patent could have been intended for the wife of *Archibald Fairfield*, or to lead me to doubt that it was intended for the person to whom the land had been described.

1856.

ATTORNEY GENERAL v. GODERICH.

Municipal corporations—Trust estate.

March 12 & May 12.

Land was conveyed to the Town Council of Goderich for the purpose of a market place, and the Council considering that the quantity of land was greater than required for that purpose, agreed to grant a portion of it to the Municipal Council of the Counties of Huron and Bruce for the site of a court-house. Upon an information filed to restrain the proceedings of the councils—*Held*, that a corporate body acting as a trustee is as amenable to the jurisdiction of equity as an individual; that any alienation of the land was a breach of trust, and the land should be reconveyed; and if no conveyance had been actually executed, its execution should be restrained.

Statement.

The information in this cause was filed on the 20th of February 1855, on the relation of *John Galt*, *Daniel Lizars*, *Christopher Crabb*, and *William G. Smith*, against the Town Council of *Goderich* and the Municipal Council of the United Counties of *Huron* and *Bruce*, setting forth that in 1828 *The Canada Company*, being owners of the land, laid out the town of *Goderich*; in laying out which the Company set apart a plot of ground near the centre of the projected town, as and for a market-place for the use of the future inhabitants of said town; and thereupon was left and continued until recently, an open and unoccupied space known as the market-square.

That in April 1854 one *Robert Gibbons*, the mayor of *Godcrich*, at the request of the Council of the town, and under a resolution passed by that body, applied to and obtained from the *The Canada Company* a conveyance of the said plot of ground to the defendants, the Town Council, to hold as and for a market-place for the use of the inhabitants of said town; prior to which the defendants the Municipal Council of the Counties of *Huron* and *Bruce*, had resolved to erect a court-house for the use of the counties, and had appointed a committee to manage all matters connected with that object.

That on or about the 2nd day of May following, the Town Council passed a resolution to grant to the Council of the Counties so much of said market-square as might

be necessary for the erection of a court-house, with the necessary approaches; and such sum, not to exceed £250, as might be necessary to make the requisite alterations in the plans for the court-house adopted by the said Counties Council. 1856. Att'y.-Gen. v. Goderich.

That on the 9th of May, the Counties Council adopted a resolution, previously passed by the said building committee, to the purport and effect that the court-house should be erected in the centre of the said market square, on certain terms and conditions, and that the Counties Council had proceeded to build the said court-house, the effect of which would be to obstruct the free use of the said market-square by the inhabitants of the town, and in fact render it unfit for the purposes of a market-place, and that the relators had notified the defendants not to proceed with the building, which had already proceeded to a great extent.

The prayer was for an injunction to restrain the erection of the building, and for other relief. Statement.

The defendants answered, alleging that the *Canada Company* by its agent had stated in writing to the Town Council that they might use the land for any public purpose they desired; that the quantity conveyed to the Town Council was much greater than would ever be required for the purpose of a market-place, and that the inhabitants other than the relators were almost unanimous in favor of the building being used as a court-house; they insisted also that the delay in filing the information was, under the circumstances, a sufficient bar to the relief thereby prayed.

Evidence was taken before the court, shewing that the whole market-place contained about eight acres—that the present market-house was sufficient for the present use of the inhabitants; that the court-house occupied about an eighth part of the remainder, and

1856.

Atty.-Gen. v. Goderich.

that several public meetings of the inhabitants had been held, at which the erection of the building now complained of was approved of.

Mr. *Brough* for the plaintiff, contended that the conveyance of the land was a gross breach of trust. A question may be raised whether a public body stands on the same footing as a private individual when acting as trustee, but the authorities were clear to shew that there is not the slightest difference in the law applicable on that point.

Green v. *Rutherford* (*a*), *Attorney General* v. *The Foundling Hospital* (*b*), *Attorney General* v. *Sheffield Gas Company* (*c*).

Mr. *Mowat*, *Q.C.*, and Mr. *Roaf*, for the Counties Council.

Mr. *Crickmore* for the Town Council.

Statement.

No case is made for the relief prayed; not the slightest moral fraud imputable to the parties. It is shewn that one forty-eighth part of the property has been given for a court-house, and that more still remains than will ever be required for a market-place; there is therefore no ground for the interference of the court on the ground of nuisance.

When more money has been given for a particular purpose than is required to carry out the object intended, the court will invest the surplus, and there is no good reason why the same practice should not also apply to lands. Here, the building has been erected, and it is shewn that the inhabitants generally think it desirable to apply part of the land to the purpose of a court-house, and if it be wrong so to apply it permanently, there is no difficulty however in saying it may be so applied temporarily.

(*a*) 1 Ves. Senr. 468. (*b*) 2 Ves. Junr. 46. (*c*) 17 Jur. 677.

1856.

Atty.-Gen. v. Goderich.

Hill on Trustees, 128–45; *Attorney General* v. The Mayor of *Bristol* (*a*).

THE CHANCELLOR.—When the town of *Goderich* was laid out by the *Canada Company*, in the year 1828, a plot in the centre of the village, containing about eight acres, was set apart as a market-place; and on the 26th of April 1854 this parcel of land was conveyed to the Municipal Council of the Town of *Goderich*, to hold to them and their successors, "as and for a public market-place for the use of the inhabitants of the said town of *Goderich* for ever."

The Municipal Council of the United Counties of *Huron* and *Bruce* being about to erect a court-house in the town of *Goderich*, which is the county town, certain negotiations took place as to the site, which resulted in the adoption by the Counties Council of the following resolution, viz:

Judgment.

"That the court-house be erected on the centre of the market-square, in compliance with the wishes of the inhabitants of the town, and on the terms and conditions named in the resolution of the Town Council, namely—that they give the Counties Council a deed of the land required, and form approaches thereto, and pay for the required alterations in the buildings a sum not exceeding £250; and further, that the Town Council shall guarantee that no building be erected within sixty-six feet of the walls of the building."

This resolution was laid before the Town Council on the 9th of May 1854, when it was adopted by a majority of the members of that body then present, four having voted in its favor and two against it.

It was stated in argument that a deed had been executed in accordance with the above arrangement, but that fact has not been proved. It is clear, however, that the Counties Council proceeded with the

(*a*) 2 J. & W. 294.

1856.

Atty.-Gen. v. Goderich.

erection of the court house shortly after the resolution in question had been adopted; and it is admitted that a letter was addressed to them on the 14th of the next month, remonstrating against the proceedings as illegal and informing them distinctly that in case they persisted an application would be made to this court for relief.

The bill in the present suit was filed on the 20th of February 1855, and when the cause was brought to a hearing, the court-house which the plaintiff seeks to have removed had been nearly, if not altogether, completed.

Judgment.

Apart from the question of laches, I cannot say that I have any doubt as to the plaintiff's right to relief. Had the defendants covenanted not to use this land otherwise than as a market-place, it is quite clear, I apprehend, that this court would have interfered to prevent the erection upon it of a court-house or any structure of that sort (*a*); and the right of the public to that sort of protection is, I think, equally clear, when the land has been granted in the way it has been here, expressly as a market-place for the use of the inhabitants of the town of *Goderich*. We acted upon that principle in the Municipality of the of the Town of *Guelph* v. *The Canada Company* (*b*), and the cases in the American courts are clear and numerous.

It is said, however, that delay is an answer to the application, and there are some cases before Lord *Eldon* which would seem, certainly, to warrant the objection (*c*). When the application is upon motion I can understand the principle upon which delay has been often considered an answer; but when relief of this sort is asked upon the hearing, I cannot see how

(*a*) Tulk v. Moxhay, 2 Phil. 744; Coles v. Sims, 1 Kay 56; S. C. in Appeal, 5 D. McN. & G. 1.
(*b*) 4 Grant, 632.
(*c*) Roper v. Williams, 1 T. & R. 18; Birmingham Canal Co. v. Lloyd, 18 Ves. 514.

1856.

Atty.-Gen. v. Goderich.

delay can be an answer, unless it has been such as to warrant the conclusion that the right has been waived. That distinction is sound in principle, and warranted by the authorities (*a*); and, applied to the present case, I am of opinion that the circumstances are not such as to warrant the conclusion that there has been a waiver of the public right. It is true that the bill in this case was not filed so soon as it might have been, but there was an early and distinct notice that the course about to be pursued by the defendants was considered illegal, and would be resisted; and as that notice is not shewn to have been ever abandoned, I am of opinion that the circumstances of the present case would not justify us in declaring that the right of the public has been forfeited or waived, but lead properly to the conclusion that the defendants proceeded with the erection of this building, and incurred the expense which unfortunately they have incurred in their own wrong, and that there must be therefore a decree for the plaintiff with costs.

Judgment.

ESTEN, V. C.—I think an enquiry should be directed as to the fact of a conveyance, and if a conveyance has taken place, that the property should be reconveyed—if not, that a conveyance should be restrained. As to the injunction, I do not think the court is called upon to grant one, either on the ground of nuisance or breach of trust. As to the ground of nuisance, I suppose the erection of a building in the centre of a market-square is a nuisance; but here all the evidence shews that the erection and use of these buildings do not at present interfere with the purpose to which the property was dedicated—nay, are attended with benefit to the town. In such a case, the court, I think, may well refer the public to its legal remedy. Apart from this, much delay seems to have occurred. It is true one of the defendant's witnesses proves that the

(*a*) Earl of Marlborough v. Bown, 7 Beav. 131; Attorney General v. The Sheffield Gas Co., 7 Railw. Ca. 671; Coles v. Sims, 5 D. McN. & G. 8.

1856.

Atty.-Gen. v. Goderich.

municipality received notice, in June, of the objection to the erection of the buildings. When the buildings proceeded, however, no further step was taken, and the counties were suffered to finish the buildings, or nearly so, before the bill was filed. I very much doubt whether a notice, even if satisfactory in its terms, would be sufficient to induce the court to grant an injunction compelling the demolition and removal of buildings which were completed in view of the objecting parties, without any further step being taken by them to prevent it or to put the other parties on their guard.

It is, however, argued that this proceeding is a breach of trust and ought to be restrained. I agree that a corporate body as a trustee is as amenable to the jurisdiction of this court as any other trustee; and upon this principle, I think a conveyance of the property ought to be enjoined, or if one has taken place, that a reconveyance should be ordered.

Judgment.

But this being done, the buildings remain or become the property of the Town Council in trust for the public, and they can exclude the counties and demolish and remove the buildings when they please.

In the meanwhile, when confessedly they do not interfere with the present use of the ground as a market place, and may be applied to their present use at a real or nominal rent with advantage to the inhabitants, is the municipality guilty of a breach of trust, supposing them to be prepared to dispossess the counties and remove the buildings if necessary, and to devote the ground to the use for which it was intended when occasion requires? I do not think they are. Then the only evil to be apprehended is that a title may be gained by non-claim. But that may be prevented by the municipality or by any number, however small, of the inhabitants; or by the Crown, and I cannot sup-

1856.

Atty.-Gen. v. Goderich.

pose that this duty will be neglected by all the different parties concerned in its performance, merely because the present municipality, supported by the concurrence of a large majority of the inhabitants—previously to this expression of opinion on the part of the court—have manifested an intention to convey the piece of ground on which the buildings are erected to the counties *in perpetuam*. I think the municipality should insist on something being done by the way of acknowledgment of title. I think the injunction should be refused; and that each party should bear his own costs.

Judgment.

SPRAGGE, V. C.—The conveyance from the *Canada Company* to the Town Council of *Goderich*, was made in or after April 1834; the precise time is not stated, nor is the date given of the agreement between the two municipal bodies for the erection of a court-house on a portion of the market-place. The building was commenced in May 1854, and according to the terms of the contract was to have been finished in that year. In February 1855, it was in the course of being roofed, the roofing having been commenced in the fall of 1854. The bill was filed on the 20th of February 1855; the cause was brought to a hearing on the 12th of March last. The prayer of the bill is for an injunction to restrain the erection of a court-house or other building on the market-place in *Goderich*, and to restrain the defendants from continuing to obstruct or occupy the market-place or any part thereof with the court-house theretofore commenced to be erected thereon, or to obstruct or occupy the same with other buildings not necessary or proper for the purpose of a market-place.

The bill states that the town of *Goderich* was laid out in 1828, and that the market-place was laid out at the same time; and that until shortly before the filing of the bill it continued an open unoccupied space known as and called the market-square. The conveyance from the *Canada Company* is to the Town Council of the Town of *Goderich*, "to have and to hold the

1856.

Atty.-Gen. v. Goderich.

same to them and their successors for ever, as and for a market-place for the use of the inhabitants of the said town."

This was the trust, and I can have no doubt that the permitting the erection of a court-house upon the trust property was a breach of that trust.

The erection of this building is objected to on two grounds; that it is a breach of trust, and that it is a nuisance. It is stated in evidence that a piece of ground embracing that upon which the building has been erected has been conveyed by the Town Council of *Goderich* to the Municipality of the United Counties of *Huron* and *Bruce*. This is not stated in the information, nor is it regularly proved; but if the fact be so, it certainly cannot be held by those to whom it has been conveyed in plain breach of the trust upon which it was held, and I take it to be clear that it must be reconveyed.

Judgment.

Suppose it not conveyed, or suppose it reconveyed: either way, we shall find upon certain land belonging to the town of *Goderich* a certain building, which building, of course, as well as the land, must be the property of the town of *Goderich*. It was built, and improperly built, for a purpose foreign to that for which the land could properly be used; but the building is there, and what is sought by the information is, in plain words, that it should be pulled down. The court should go as far as is necessary for the restitution of the trust, and so that the town of *Goderich* suffer no disadvantage from the breach of trust; and if the building is an obstruction to the use of the market-square for the purposes for which it was granted, it should not be suffered to remain; but this is not shewn. One witness, Mr. *McDonald*, thinks that it would make an excellent market-house; another, Mr. *Gibbons*, differs with him, and thinks it would require great alterations; none suggest that the building is an absolute incumbrance, worse than useless; and all agree that the space of

1856.

Atty.-Gen. v. Goderich.

ground remaining is much more than sufficient for all the purposes of a market place; and besides the town of *Goderich* has the remedy in its own hands. If it is an incumbrance, worse than useless, interfering with the use for which the land was granted, or should it at any future time become so, they can order its removal. It appears to me that the court can set right the breach of trust without directing the removal of the building. The removal of the building is not necessary for that purpose; and I think the court should stop at that which is necessary, when going further would involve the destruction of a costly building, it may be to the great detriment of the town.

What this court would have done if this information had been filed promptly, and an injunction had been asked for when the building was being commenced, is quite a different thing. It is most unfortunate that this was not done; it would have saved both the municipalities from a very false position.

Judgment.

What I have said applies in a great measure to the objection to this building on the score of nuisance. Assuming it to be a nuisance, the ordinary remedy in such case is by indictment; when the extraordinay interposition of this court is asked, the party applying for it should shew as a reason for coming that the ordinary remedy is insufficient to meet the justice of the case. He shews no such ground here. He cannot say that it is a case of urgency, whatever it might have been in May 1854. His delay since that time closes his mouth upon that point. The nuisance, taking it to be one, produces trivial injury, if any, and there has been great delay. The cases of the *Attorney General* v. *Johnson* (*a*), and the *Attorney General* v. *The Sheffield Gas Co.* (*b*) are authorities to shew that in such cases the court will not interfere.

I think the relief should be granted without costs.

(*a*) 2 Wils. 87. (*b*) 17 Jur. 677.

aff. on appeal 6 Gr. v. 200

1856.

THE ATTORNEY-GENERAL v. GRASETT.

Endowment of Rectories in Upper Canada.

Sept. 18, 19 & 20, 1855, and May 12, 1856.

Under the statute 31 George III. ch. 31, and the Royal Commission, Sir John Colborne, the Lieutenant Governor of Upper Canada, had authority to create and endow Rectories, without any further instructions.

The public events that occurred in the Province of Upper Canada between the years 1826 and 1836, were not sufficient to warrant the presumption that such authority had been revoked or suspended.

Under the 31st George III. ch. 31, a patent establishing and endowing a Rectory or Parsonage, is not void for want of a grantee being named in it; nor for not defining the limits of the parish within which the Rectory was to be, it being established in and for a certain Township.

The information in this case was filed against the Reverend *Henry J. Grasett*, The Hon. and Right Reverend *John Strachan*, D.D., Bishop of the Diocese of Toronto, and The *Church Society* of the Diocese, setting forth:

Statement.

"That after the passing of the act, passed by the Parliament of Great Britain, in the thirty-first year of the reign of his late Majesty, King George III., intituled 'An act to repeal certain parts of an act passed in the fourteenth year of His Majesty's reign, intituled an act for making more effectual provision for the government of the province of Quebec, in North America, and to make further provision for the government of the said province,' divers lands of the Crown within the said province of Upper Canada, were, from time to time, in accordance with the provisions of the said statute, allotted and appropriated for the support and maintenance of a Protestant clergy, within the said province of Upper Canada.'

"That on the 15th day of January, 1836, letters patent, in respect of divers of such lands, being the lands described in such letters patent, were issued by Sir *John Colborne*, then lieutenant-governor of Upper Canada, which letters patent were and are in the words and figures following, namely: '*J. Colborne*, province of Upper Canada; 'William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, King Defender of the Faith: Whereas his late Majesty, King George III., by letters patent, under the great seal of the Kingdom of Great Britain, bearing date

the twenty-eighth day of June, in the thirty-third year of his said late Majesty's reign, did erect, form, ordain, make and constitute the provinces of Lower Canada and Upper Canada, and their dependencies, to be a bishop's see, according to the establishment of the Church of England, to be called from thenceforth the Bishopric of Quebec.' 1856. Att'y.-Gen. v. Grasett.

"'And whereas by a certain act or statute of the Parliament of Great Britain, passed in the thirty-first year of the reign of the said late Majesty, intituled 'An Act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign intituled, 'An act for making more effectual provision for the government of the province of Quebec, in North America, and to make further provision for the government of the said province,' sundry provisions were made respecting the allotment and appropriation of land for the support and maintenance of a Protestant clergy within the said provinces respectively; And it was among other things especially enacted that it might and should be lawful for his Majesty, his heirs and successors, to authorize the governor, lieutenant-governor, or person administering the government of each of the said provinces respectively, with the advice and consent of his Majesty's Executive Council, within the same, from time to time, to constitute and erect in every township or parish, which then was or thereafter might be formed, constituted or erected, within such province, one or more parsonage or rectory, or parsonages or rectories, according to the establishment of the Church of England: And whereas, we having due regard to the spiritual welfare of all our loving subjects, resident within the township of York, within the Home District, and being desirous of making a permanent provision for their instruction according to the doctrine and discipline of the Church of England, and also for the support of a Protestant clergyman, duly ordained according to the rites of the said church, have, pursuant to the provisions of the said recited act, and by and with the consent and advice of our Executive Council of our said province of Upper Canada, determined to erect and constitute, and by these presents, and by and with the advice and consent aforesaid, do erect and constitute, a parsonage or rectory at the City of Toronto, within the said township, according to the establishment of the Church of England, to be here- Statement.

1856.

Att'y.-Gen. v. Grasett.

after known, styled and designated as the first parsonage or rectory within the said township of York, otherwise known as the parsonage or rectory of St. James; and by virtue of the same authority and by and with the advice and consent of our Executive Council, we do hereby command that there shall be from henceforth and forever set apart out of the lands which we now hold in our said province, by virtue of our royal prerogative, certain parcel or parcels of land situated in the said township, composed of lots numbers six, nine and twenty-two in the second concession, and lot number seventeen in the third concession, from the bay in the township of York, containing by admeasurment eight hundred acres, as a glebe and endowment, to be held appurtenant with the said parsonage or rectory, we intending and willing, by virtue of our royal prerogative, forthwith to present an incumbent or minister of the said Established Church of England, to the said parsonage so truly erected and constituted as aforesaid, with its appurtenances, saving, nevertheless, to ourselves the right of thereafter erecting and constituting one or more parsonages or rectories, within the said township. Given under the great seal of our province of Upper Canada. Witness our trusty and well-beloved Sir *John Colborne*, K.C.B., Lieutenant-governor of our said province and major-general commanding our forces therein, this 16th day of January, in the year of our Lord 1836, in the sixth year of our reign. J.C.'"

Statement.

"That forty-three similar letters patent were at the same time issued, purporting or supposed in like manner to constitute forty-three other Rectories, and to endow the same, with other of the lands so allotted and appropriated as aforesaid.

"That the said patent hereinbefore set forth, as well as all the said other patents, were issued without any authority or instruction to the said Sir *John Colborne* from his then Majesty, King William IV., under his signet and sign manual, or by order in Privy Council, or through any of the Principal Secretaries of State, or otherwise howsoever, to constitute, erect or endow Rectories, or the said supposed Rectory of St. James, or any of the said other supposed Rectories; nor was there any sufficient authority, in any manner de-

rived or communicated, for the said Sir *John Colborne* to constitute, erect and endow such or any rectories or rectory. 1856. Att'y.-Gen. v. Grasett.

"That the power of the Crown to constitute, erect or endow parsonages and rectories in Upper Canada aforesaid, had never, before the said fifteenth day of January 1836, been exercised, and never has been exercised since, and was not exercised on the said fifteenth day of January, 1836, save and unless by the letters patent aforesaid.

"That the issuing of the said letters patent, and the erection and endowment of the said supposed rectories, at the time aforesaid, were all against the mind and intention in that behalf of his said Majesty, and of his Government, and that the intention of the said Sir *John Colborne*, or of the Executive Council of Upper Canada aforesaid, to erect or endow the said supposed Rectory of St. James, or any other rectories or rectory, was not known to or suspected by his Majesty or his Government until after the issuing of the said letters patent respectively, and no communication of such intention of His Excellency was previously made to His Majesty or his Government, though His Excellency in Council had the matter in contemplation for several months previously. Statement.

"That the authority of each and every governor, lieutenant-governor or person administering the government of Upper Canada from time to time, was always conferred by royal commission addressed to each at the time of his appointment, which commission always had been, and was in the same form to every governor, lieutenant-governor or administrator of the said government of Upper Canada; and, amongst other things, purported to authorize his Excellency, with the advice of the Executive Council in the said Province, to erect parsonages or rectories in terms of the 28th section of the said Imperial statute; and the commission to the said Sir *John Colborne*, which was from his late Majesty King William IV., declared such authority to be subject nevertheless to such instructions touching the premises as should or might be given him by his Majesty under his signet or sign manual, or by his Majesty's order in Privy Council, or through one of his Majesty's principal secretaries of state.

1856.

Att'y.-Gen. v. Grasett.

"That the inhabitants of the said province have always been much divided in religious faith, and that while many of them have always been members or adherents of the Church of England in the said Province, yet that that portion of the inhabitants not composed of such members or adherents or of persons otherwise connected with the said Church, but distributed amongst and connected with other Christian denominations, have always formed a large majority of the inhabitants of the said province, and of every township and other locality of or in the same.

"That for this reason, and other reasons, a strong feeling has always existed in the said province against the establishment or endowment therein of rectories, and against any exclusive privileges being given to the Church of England in the said province, and generally against the operations and provisions of the statute hereinbefore mentioned in regard to the lands thereby directed to be appropriated as aforesaid. That the feeling aforesaid was frequently, and particularly in and after the year 1825, and up to the time of the issuing of the said patents, as well as ever since manifested and expressed by the said inhabitants, and by their representatives in the House of Assembly.

Statement.

"That in consequence of this state of things, Lord *Ripon*, being one of his Majesty's principal secretaries of state, on the 21st of November, 1831, addressed to the lieutenant-governor above named, by his Majesty's command and authority, two despatches which referred to and accompanied two other documents, by which despatches and accompanying papers it was declared in effect to be his Majesty's desire that an end should be put to any further appropriation of lands under the said statute; that the lands already appropriated and reserved should be abandoned, as a provision for the purpose in the said statute mentioned, and should be re-vested in the Crown free from any trust therefor; and it was further thereby intimated that no intention then existed to erect or endow parsonages; and his Majesty invited the legislature of the said province to consider how the powers given to such legislature by the said statute to vary or repeal that part of its provisions which relates to the subject of the said land could be called into existence most advantageously for

the spiritual and temporal interests of his Majesty's faithful subjects in the said province.

"That agreeably to this invitation, which was duly communicated to the said legislature by his Excellency, the legislature took into consideration the matters to which their attention was so invited, and the same was the subject of much consideration and discussion thereupon until after the said patents were issued; but that until after such period no measure was agreed to, chiefly in consequence of a difference of opinion on the subject between the House of Assembly and the Legislative Council of the said province.

"That meanwhile his Majesty's intentions and wishes, as expressed or intended in the said papers as aforesaid, remained unchanged, and continued to be what they are hereinbefore stated to have been, and that divers despatches to his Excellency, written by his Majesty's authority as aforesaid during such period, shewed this to be the case. That no intimation was given by his Excellency or his council to the said legislature of the intention to erect or endow any rectory, nor was such intention known to the said legislature until some time after the patents had been actually issued. That the same were issued by his Excellency in council under mistake and misapprehension of a despatch transmitted to his Excellency by Lord *Ripon*, on the 5th day of April, 1832, in which despatch his lordship had observed as follows:—'I quite concur with you in thinking that the greatest benefit to the Church of England would be derived from applying a portion at least of the funds under the control of the executive government in the building of rectories and churches, and I would add in preparing, as far as may be, for profitable occupation, that moderate portion of land which you propose to assign in each township or parish for increasing the future comfort, if not the complete maintenance, of the rector.' Statement.

"That his lordship did not intend by these expressions, or by the said despatch, to sanction or give instructions, for, in fact, he did not thereby sanction or give instructions for, and he was not authorized by his Majesty or his Majesty's government to sanction

1856.

Att'y.-Gen. v. Grasett.

or give instructions for the erection or endowment of rectories; but the Executive Council aforesaid, mistaking the meaning of the said expressions in the said despatch, made an order in council on the same day as the said patents were issued in the terms following, that is to say:—'May it please your Excellency, pursuant to the views of Lord *Goderich*, shewn by his despatch of the 5th of April, 1832, in which he concurs with your Excellency, and expresses his desire that a moderate portion of land should be assigned in each township or parish for insuring the future comfort, if not the complete maintenance, of the rectors, the council caused the necessary steps to be taken for the purpose of setting apart lots in each township throughout the province. Much delay has been caused by their anxiety to avoid interfering with persons who might have acknowledged claims to any of the reserves to be selected either for lease or purchase. A difficulty in completing what his lordship most appropriately calls this salutary work was also caused by the Crown officers not concurring in the form to be used in the instrument by which the endowment is to be confirmed, which left the council to decide as to the mode to be adopted for that purpose. These obstacles have now been surmounted; and it is respectfully recommended that no time be lost in authorizing the *Attorney-General* to prepare the necessary instruments to secure to the incumbents named in the annexed schedules, and their successors, the lots of land therein enumerated, as having been respectively set apart for glebes. All which is respectfully submitted.

Statement.

(Signed) 'PETER ROBINSON, P.C.'

"That his Excellency, having, under the like mistake aforesaid, approved of the said order in Council, the said patents were prepared, signed, and passed the great seal of the said province on the same day, being three days before he surrendered the government of the said province to his successor. That the defendants pretend that though the despatch last referred to may contain no authority to erect and endow the said rectories, yet that through a former secretary of state his late Majesty King George III. had authorized one former Governor General to erect, and his Majesty King George IV. had authorized another predecessor of the said Sir *John Colborne* to erect and endow rectories in every township of the said province; but your

informant charges that such authority, independently of the circumstances hereinbefore set forth, would not and did not extend to the said Sir *John Colborne*, who received his commission from King William IV., and that the circumstances hereinbefore set forth amounted to and were a revocation of any such authority. That the patent hereinbefore set forth is also void on the face of it, and does not contain sufficient or proper words to constitute or erect rectories or a rectory, or to vest the lands in the said patent mentioned in any rector or other person or corporation."

1856.

Att'y.-Gen. v. Grasett.

That the defendant *Grasett* was presented by his Excellency to the said supposed Rectory of St. James, and was still the incumbent thereof, and in possession of the said lands.

That the defendant *Strachan* was the bishop of the diocese of Toronto, in which the said supposed rectory lies. That the defendants *The Church Society* of the diocese of Toronto had the right of presentation to the said supposed rectory until the validity of the erection is judicially decided; and that the said defendants claim to be so interested in the object of this suit as to be the proper defendants to the bill.

Statement.

That the suit was brought to try the question of the validity of the said patents in pursuance of a resolution of the Legislative Assembly of the Province of Canada directing the same. And the prayer was that on the grounds set forth, or on some other or one of them, the said letters patent might be declared void, and might be ordered to be set aside or delivered up to be cancelled, and the defendants decreed to deliver up possession of the lands described in the patent, and might be a-moved therefrom.

The defendants answered the information, stating, "That, to the best of their respective knowledge, information and belief, on the said 15th day of January, in the year of our Lord 1836, his Excellency Sir *John Colborne*, in the said information named, by the virtue of an act passed by the Parliament of Great Britain, which is in the said information mentioned, and of the royal commission under which at the time aforesaid he administered the government of the said province of Upper Canada, as lieutenant governor thereof, and by

1856.

Att'y.-Gen. v. Grasett.

virtue of divers despatches and instructions, theretofore addressed to him or to some or one of his predecessors in the government of the said province, by one or more of the principal secretaries of state for Great Britain, was legally, fully, and duly authorized and empowered to constitute, erect and endow the said parsonage or rectory of St. James, and to issue the letters patent which are in the said information set forth; and denied that the said letters patent were issued under mistake and mis-apprehension on the part of his Excellency in Council, as in the said information is in that behalf alleged; and that subsequently to the issuing of the said letters patent, the right honourable *Lord Glenelg*, while he was principal secretary of state for the Colonies of Great Britain, and having a full knowledge of the fact that the said letters patent had issued, and of the circumstances under which they had been issued, recognized and avowed on behalf of her Majesty, and of the Executive Government of Great Britain, the inviolability of the rights acquired, as well under the said letters patent, which are in question in this cause, as under the several other patents which are in the said information mentioned or referred to."

Statement.

And the defendants submitted, "that after such recognition and avowal the validity of the said patents or any of them, could not be impeached or questioned by or on behalf of her Majesty, and also that throughout a period of many years prior to the issuing of the said patents the Executive Government of the said province of Upper Canada, with the knowledge and approbation of the Executive Government of Great Britain or of the principal secretary of state for the colonies for the time being, had frequently contemplated, and had from time to time endeavoured, so far as the circumstances of the said colony would admit of, to give effect to the provisions of the said act of the Parliament of Great Britain referred to, so far as the said provisions relate to the creation and endowment of parishes and rectories, and to the support and maintenance of a Protestant clergy within the said province."

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

Argument

Mr. Cameron, Q.C., *Mr. Hagarty, Q.C.*, *Mr. Vankoughnet, Q.C.*, and *Mr. Brough*, for the defendants.

1856.

Atty.-Gen. v. Grasett.

The following are some of the principal cases cited by counsel :—*Grant's Case* (*a*), *Cameron* v. *Kyte* (*b*), The *Queen* v. *Eastern Archipelago* (*c*), *Rudd* v. *Morton* (*d*), The *King* v. *Morris* (*e*), The *King* v. *Pasmore* (*f*), *Jenison* v. *Dyson* (*g*), *Doe Crisp* v. *Barber* (*h*), *Fleming* v. *Scott* (*i*), *Long* v. *Storie* (*j*), *Exp. Blackmore* (*k*), *Cooper* v. *Dodd* (*l*), *Taylor* v. *Parry* (*m*), and 2 *Rolle's* Abridgment, 197.

The arguments of the counsel are stated sufficiently in the judgment of the court.

May 12

THE CHANCELLOR.—This information has been filed by Her Majesty's *Attorney-General* for Upper Canada, at the instance of the Legislative Assembly of the Province, for the purpose of testing the validity of certain letters patent, bearing date the 15th January, 1836, which purport to constitute a rectory within the township of York, to be known as the Rectory of St. James, and to set apart 800 acres of the Clergy Reserve lands as an endowment for the said rectory, to be held and enjoyed forever thereafter as appurtenant thereto.

Judgment.

These letters patent are impeached by the information upon three grounds. It is said, in the first place, that they ought to be avoided on the ground of mistake, or, secondly, that they are void in point of law —first, because there is not any grantee; secondly, because the limits of the proposed parish are not defined.

Upon the argument the case was rested principally upon the ground of mistake. It was said that Sir *John Colborne* never had authority from the Crown either to constitute or endow rectories in Upper Canada;

(*a*) 7 Moore, 141. (*b*) 3 Knapp, P. C. 332. (*c*) 1 Ell. & Bl. 310.
(*d*) 2 Salk, 501. (*e*) 4 T. R. 550. (*f*) 3 T. R. 249.
(*g*) 9 M. & W., 566. (*h*) 2 Tem. R., 749. (*i*) 2 East, 467.
(*j*) 3 DeG. & S.308. (*k*) 1 B. & Ad., 122. (*l*) 14 Jur., 724.
(*m*) 1 M. & G. 604.

1856.

Atty.-Gen. v. Grasett.

or, secondly, that his authority—if ever he had any—had been revoked, either expressly, or by implication.

That Sir *John Colborne* had authority at one time to constitute and endow rectories in Upper Canada is, in my judgment, too clear for argument. The language of Lord *Gosford's* commission (*a*), which was also Sir *John Colborne's* commission (*b*), is this: "And we do by these presents authorize and empower you, the said *Archibald*, Earl of Gosford, with the advice of the Executive Councils appointed by us for the affairs of our said Provinces of Upper Canada and Lower Canada respectively, from time to time, to form, constitute, and erect townships or parishes within our said Provinces; and also to constitute and erect within any township or parish which now is or hereafter may be formed, constituted, or erected within our said Provinces, one or more parsonage or rectory, or parsonages or rectories, according to the establishment of the Church of England, and from time to time, by an instrument under the seal of our said Provinces respectively, to endow every such parsonage or rectory with so much of the said lands* . . . . . as you, with the advice of our said Executive Council of such Provinces, shall judge to be expedient under the existing circumstances of such township or parish."

Judgment

Now that is in my opinion a clear and express authority to erect and endow parsonages in the province. I really cannot understand how a doubt can exist upon that point.

But it is said that the passage I have quoted is followed by these words: "subject, nevertheless, to such instructions touching the premises as shall or may be given you by us under our signet and sign manual, or by our order in our Privy Council, or through one of our principal secretaries of state;" and it is argued

(*a*) See page 76 of printed case. (*b*) Page 74.

* The words omitted are immaterial to our present purpose.

1856.

Atty.-Gen. v. Grasett.

that the effect of this clause was to suspend the operation of the power until the receipt of further instructions, and, as no further instructions were received, it it is contended that the power remained always in abeyance.

I cannot accede to that argument: the reasoning is inconclusive, and the assumed facts inadmissible. The power of erecting and endowing parsonages is subjected, no doubt, by the clause in question, as all the other powers in the commission are, to the further instructions of his Majesty under his sign manual, or through one of his principal secretaries of state; but that reservation was not intended, and, in my opinion, had not the effect of suspending the operation of the power in the meantime.

It is said, however, that there are instructions in relation to every other power conferred by the commission except this, and it is argued that the exception of this power warrants the conclusion that its immediate exercise was not in the contemplation of the Crown. But the absence of express instructions in relation to this particular power is in exact accordance with the Constitutional Act. The only power vested in the Crown by that statute in relation to this matter is the power to authorize the Governor to act; but the right to determine the mode in which that power, when conferred, should be exercised is vested by the Constitutional Act itself in the Governor in Council. The instructions are silent, therefore, as to the mode of exercising this power, because everything in relation to that matter, everything in relation to the number and locality of the rectories, and the extent of the endowment—that is, everything about which instructions could have been given—had been wisely left to the discretion of the Governor in Council.

Judgment.

But it is incorrect to say that the instructions are silent upon the subject. They do not contain special

1856.

Atty.-Gen. v. Grasett.

directions, it is true, because special directions would have been, as I have shewn, improper; but they contain much in relation to the subject, which plainly presupposes the exercise of the power in question. The 44th and following instructions run thus (*a*):—

"44. It is our will and pleasure to reserve to you, . . . and to all others to whom it may belong, *the patronage and right of presentation to benefices;* but it is our will and pleasure that the person so presented shall be intituled by the bishop or his commissary duly authorized by him. 45. You are to take especial care that God Almighty be devoutly and duly served throughout your government, that the Lord's day be duly kept, and the services and prayers appointed by and according to the Book of Common Prayer be publicly and solemnly performed throughout the year. 46. You are to take care that the churches which are or may be hereafter erected in our said Province of Upper Canada

Judgment.

be well and orderly kept. 47. You shall recommend to the Legislative Council and General Assembly of the Province of Upper Canada to settle the limits of parishes in such manner as shall be deemed most convenient. 48. You are to use your best endeavors that each minister be constituted one of the vestry in his respective parish, and no vestry be held without him, except in case of sickness, or that after notice given of a vestry he omit to come. 52. You are not to present any Protestant minister to any ecclesiastical benefice within our said Province by virtue of the said act, passed in the 31st year of the reign of his late Majesty King George III., *and of our Commission to you,* without a proper certificate from the Bishop of Quebec or his commissary, of his being conformable to the doctrine and discipline of the Church of England. 53. And you are to take especial care that the table of marriages established by the canons of the Church

(*a*) See page 209.

of England be hung up in all places of public worship, according to the rites of the Church of England."

1856.

Atty.-Gen. v. Grasett.

The passages I have just cited plainly presuppose, as I think, the immediate exercise of the power of erecting and endowing rectories; and, coupled with the consideration to which I have already alluded, they present a complete answer to the argument attempted to be drawn from the absence of instructions. I am of opinion, therefore, that Sir *John Colborne* had ample authority, and that in this respect, at least, the patent which we are now asked to set aside is perfectly valid and binding.

It was argued, however, that the power conferred upon Sir *John Colborne* by the royal commission was revoked by certain despatches written by the Secretary of State for the Colonies on the 21st of November, 1831, which are said to evince a clear intention on the part of his Majesty's government of abandoning the clergy reserves, and with them all intention of preserving an Established Church in this Province. But, so far from discovering any such intention in these despatches, I find it clearly stated that his Majesty's government had no intention whatever of abandoning the Established Church in this Province; but, on the contrary, meant carefully to preserve the power of erecting and endowing rectories, by which alone it could have been founded. In the first of these despatches, having expressed the willingness of his Majesty's government to abandon the clergy reserves, Lord *Goderich* proceeds thus (*a*): "Such are the considerations by which his Majesty's government have been influenced in coming to the conclusion *that the retention of the clergy reserves in their present state is inexpedient.* It is scarcely necessary to protest against this conclusion being construed into an acquiescence in the opinion expressed in a petition upon the subject,

Judgment.

(*a*) See page 38.

1856.

Atty.-Gen. v. Grasett.

signed by a considerable number of the inhabitants of the Province—'that any kind of church establishment, circumstanced as Upper Canada is, is essentially anti-Christian and baneful to every interest of humanity." I am convinced that this is a sentiment which the great majority of those by whom the petition was signed would not seriously mean to adopt, and that in their eagerness to get rid of a practical grievance they have incautiously sanctioned speculative opinions, which I have no doubt that upon mature reflection they would disavow. Believing this to be the case, I decline to enter into any argument for the purpose of refuting an assertion the justice of which I so entirely deny. It is sufficient to repeat that his Majesty's government have advised the abandonment of the reserves for the simple reason that, after an experience of forty years, they have been found not to answer the expectations entertained at the time the system was established, but have entailed a heavy burden upon the Province without producing any corresponding advantage."

Statement.

But the accompanying despatch, in which the measures to be adopted for the purpose of carrying out the views of his Majesty's Government are stated in detail, seems to me to place this point beyond doubt (*a*). "First, then," observes Lord Goderich, "it should be enacted that so much of the British statute of 1791 as relates to the appropriation of clergy reserves should be repealed. But as it is unnecessary, and would be highly inconvenient to repeal so much of that act as relates to the erection and endowment of parsonages, it will be fit, in order to obviate the possibility of mistake, that the precise words upon which alone the repeal is to operate should be quoted in the repealing act."

Again: in the message from his Majesty to the Legislative Assembly of the Province, transmitted by

(*a*) Page 41.

the Secretary of State for the Colonies, it is said: "It has therefore been with peculiar satisfaction that in the result of his enquiries into this subject, his Majesty has found that the change sought for by so large a portion of the inhabitants of the province may be carried into effect, without sacrificing the just claims of the Established Churches of England and Scotland. His Majesty has solid grounds for entertaining the hope that before the arrival of that period it may be found practicable to afford the clergy of those churches such a reasonable and moderate provision as may be necessary for enabling them properly to discharge their sacred functions."

1856.
Att'y.-Gen. v. Grasett.

Lastly: the draft of an act to be submitted to the Provincial Legislature was transmitted to the Lieutenant-Governor with these despatches by the Colonial Secretary, in which all those portions of the Imperial statute to the repeal of which his Majesty's government was prepared to assent, are recited; but that portion which empowered his Majesty to constitute and endow rectories is not recited: it had been advisedly excluded, as I have already shewn, and would have remained intact although the repealing statute had gone into operation.

Judgment.

I am unable to discover in these despatches and papers any intention of abandoning the power of constituting and endowing rectories: on the contrary, I find a very clearly expressed determination to preserve it.

But upon the question of intention, the despatch of the 5th of April 1832 is extremely important. In that document Lord *Goderich*, the Colonial Secretary, says: (*a*) "I have considered with great attention the observations contained in your private letter of the 16th of February, and the propositions which result from them; and I am happy to find that your practical views,

(*a*) See page 55-6.

1856.

Atty.-Gen. v. Grasett.

grounded upon personal knowledge and experience, are so coincident with those which, upon a mere speculative view, I had been led to entertain. I quite concur with you in thinking that the greatest benefit to the Church of England would be derived from applying a portion at least of the funds under the controul of the Executive Government in the building of rectories and churches, *and I would add in preparing as far as may be for profitable occupation that moderate portion of land which you propose to assign in each township or parish for increasing the future comfort, if not the complete maintenance, of the rectors.* With this view, it appears to me that it would be most desirable to make a beginning in the salutary work by assigning to it a portion at least of the £4000 to which I have before alluded as being no longer required (during the present year at all events) for the payment of Church salaries."

Judgment.

It is said that this despatch was written with a different intent, and did not authorize the erection or endowment of rectories. That may be so; but it is perfectly clear, from the document, that Lord *Seaton's* intention to proceed to the erection and endowment of rectories had been communicated to his Majesty's Government, and had met with their cordial approval. The Colonial Secretary must have been of opinion that the Lieutenant-Governor had authority under his commission, and that the authority so given had not been revoked.

It must be remembered, moreover, that the commission under which Sir *John Colborne* acted, bears date in 1835, several years after the date of the despatch by which the power thereby conferred is supposed to have been revoked, and at a time when the attempts of the Provincial Parliament to legislate upon the subject had repeatedly failed.

It was said, however, that this power had been in abeyance from the year 1791, and it was argued that

Sir *John Colborne* could not legally exercise a power which had lain dormant for a period of nearly fifty years, without special instructions. 1856. Atty.-Gen. v. Grasett.

But the assertion that this power had been suffered to lie dormant for half a century is not warranted by the evidence. For a considerable period the province remained almost a wilderness, and the clergy reserves were wholly unproductive. While that state of things lasted there was little room for effective action; still the power was exercised as occasion offered; and there is quite enough to shew that it was treated throughout, not only by the Crown and the Executive Government of the province, but by the Provincial Legislature, as an existing power capable of being called at any moment into active exercise. In the year 1793 the provinces of Upper and Lower Canada were erected into a bishop's see (*a*). In the year 1815 the executive government of this province made regulations for the erection and repair of parsonages, which were approved of by her Majesty's governmen (*b*). In the year 1818 the rectory of Montreal was constituted by letters patent under the great seal of the province. (*c*) In the year 1824 Lord *Bathurst* directed Sir *Peregrine Maitland*, then Lieutenant Governor, to proceed with the erection and endowment of rectories in Upper Canada; and on the 5th of April, 1832, the despatch to which I have already referred was transmitted to Sir *John Colborne*, under which it is said, and I believe truly, that his Excellency continued to act up to the close of his administration. Then in the year 1823 an act was passed by the Povincial Legislature, which received the Royal assent on the 20th of February, 1823, which recites—"that doubts had been suggested that the tithe of the produce of land might still be legally demanded by the incumbent, duly instituted, or rector of any parish, Judgment.

(*a*) See page 14. (*b*) See page 18. (*c*) See page 19.

1856. (which doubts it was important to the well-being of the Colony to remove :)" goes on to enact "that no tithes shall be claimed, demanded, or received by any ecclesiastical parson, rector, or vicar of the protestant church within the province (*a*)." Lastly, on the 15th of January, 1834, the Legislative Assembly of Upper Canada voted an address to His Excellency the Lieutenant Governor, (*b*) requesting him to lay before the house, with as little delay as practicable, a full and detailed account of the receipt and expenditure of all monies arising from the sale or leasing of the clergy reserves in the province, and of glebes, rectories and parsonages * * * *and also a statement shewing how much of the reserves has been set apart for glebes, &c., and the quantity so set apart in each year.*"

Atty.-Gen. v. Grasett.

Judgment.

I am quite satisfied, therefore, that the power conferred upon the Governor of the Province had not fallen into desuetude, but had been acted on from time to time as circumstances permitted, and was treated by all the authorities, imperial and provincial, as a valid and subsisting power, capable of being called into exercise at any moment.

But it is said that this patent is void in law for want of a grantee; the consequence of which is, it was argued, that the endowment never vested in the incumbent, but remains in the Crown at this moment, as if no such patent had ever existed.

I have no doubt whatever on this point. The course pursued by the Executive Government was in exact accordance with the Constitutional Act, which empowers the Crown, first, to constitute the rectory; then, to endow it; and lastly, to present the incumbent; and then it goes on to provide "that every person so presented to such parsonage or rectory shall hold and enjoy the same, and all rights, profits and

(*a*) And see 33 Geo. III. ch. 2, sec. 7. (*b*) See page 152.

emoluments thereunto belonging, or granted, as fully and amply as the incumbent of a parsonage or rectory in England." I have no doubt, therefore, that when the present defendant was appointed to the Rectory of St. James, his title to the endowment was perfect and complete, as perfect as if the grant had been to him and his successors.

1856.

Atty.-Gen. v. Grasett.

It is said, in the last place, that this patent is void, because the limits of the parish of St. James have not been defined. I have had some doubt upon that point, but have come to the conclusion that this objection ought not to prevail. "Township" and "parish" are treated as synonimous, not only in the Constitutional Act itself, but in numerous statutes of the Provincial Parliament (*a*); and, assuming it to have been necessary to define the limits of this parish, which I do not admit, the effect of the patent was, in my opinion, to constitute a parish co-extensive with the township of York, a course which seems to me to have been in accordance with the statute 31 Geo. III. ch. 31, sec. 38.

Judgment.

We have had the advantage of perusing the opinions given by Her Majesty's advisers in relation to these patents, which were brought to the notice of the court by consent. With the latter opinion we quite agree, and a perusal of the case to which it is an answer has released us from all embarrassment as to the former.

In the case first submitted to the law officers of the Crown, I find this passage—"On the 21st of November, 1831—that is, six months before the date of the despatch to which reference is made by the Executive Council—Lord *Ripon* addressed to Sir *John Colborne* a despatch in which the Provincial Legislature was invited to exercise this power, and *he expressly recommended that the repeal should embrace all the clauses*

(*a*) See Prov. Statutes 33 Geo. III. ch. 2, secs. 1 to 7; 46 Geo. III. ch. 5; 5 Wm. IV. ch. 8.

1856.

Att'y.-Gen. v. Grasett.

in question, amongst which are included those which relate to the erection and endowment of rectories. The despatch of the 5th of April, 1832, was marked confidential, and it would seem impossible that Lord *Ripon* could have designed by such a communication to convey to the Lieutenant Governor the royal sanction for neutralizing to a considerable extent the effect of that repeal which, five months before, his Lordship had recommended in a public despatch." It is difficult to understand how such a statement as that came to be made, for I have already shewn that his Majesty's Government had firmly resolved not to relinquish the power of erecting and endowing rectories; and, so far from having consented to the repeal of the clause of the Constitutional Act which confers that power upon the Crown, a statute had been prepared under the direction of the Colonial Secretary for the express purpose of preventing any consequence of that sort; but, however that misapprehension may have arisen, it is clear that the answer to a case containing so material a misstatement of a most important fact cannot weaken the authority of the subsequent opinion formed upon more accurate information, nor deprive it of that weight to which, coming from men so eminent for learning and ability, it is so justly entitled.

Judgment.

Upon the whole case, therefore, my opinion is in favour of the defendants. This patent is not void in law, and the grounds on which we are asked to set it aside wholly fail. The power conferred upon Sir *John Colborne* by the royal commission was ample; and there is nothing in the evidence to warrant the conclusion that it had become inoperative, either by revocation or disuse. If it be true that this grant is objectionable on grounds of public policy, and offensive to the feelings of a portion of the people of this province,—if it does involve in reality a principle so important that the private rights of the defendant and

his successors, who derive title to the endowment under these letters patent from the Crown, and the more general rights of all the members of the Church of England in this township, for whose benefit this grant was made, must be sacrificed for its vindication; that is matter proper for the consideration of the Legislature, with which, as a court of justice, we have no concern. A decree declaring these letters patent void on the grounds urged in argument could not be sustained upon the evidence laid before us, and would be therefore unjust; but its injustice in the particular case would be its least evil, for such a decree, under such circumstances, could not fail, in my humble opinion, to shake the foundation on which the rights of property rest, in a way and to an extent highly dangerous to the best interests of this community.

1856.
Att'y.-Gen. v. Grasett.

ESTEN, V. C.—This information is filed in order to set aside letters patent, dated 15th of January 1836, whereby the Rectory of St. James, within the Township of York, was established and endowed. The information objects to the patent on various grounds: 1st—That the Lieutenant-Governor had no authority to issue it, no such authority being conferred by his commission alone without further instructions, and no further instructions having been given. 2nd—That if he had ever had such authority, the political events which occurred in the then Province of Upper Canada between the years 1826 and 1836 were sufficient to raise a presumption that it had been revoked or suspended. 3rd—That, supposing this to be otherwise, yet the patent in question is void for not defining with sufficient certainty the boundaries of the parish. 4th—That it is void for want of a grantee. And 5th—That it was issued under such circumstances of mistake as are sufficient to make it void. Upon all these points I have formed a very clear opinion against the information, and in favour of the defendants. With regard to the first point, I think the commission

Judgment.

1856.

Att'y.-Gen. v. Grasett.

conferred sufficient authority to erect and endow parsonages without any further instructions. The natural import of the words is, that power is thereby given for that purpose, but that if the government should think fit at any future time to give instructions on the point, they were to be observed; and although this reservation was strictly unnecessary, yet the same may be said of many other parts of the commission where powers are conferred subject to instructions therewith or thereafter to be given. It is most likely, if it had been desired to restrain the exercise of the power until instructions should be received, that express words would have been employed to that effect; for upon this hypothesis the language of the commission is, to say the least of it, equivocal, and calculated to mislead the Lieutenant-Governor on a point of much importance; and the 52nd instruction to Lord *Dalhousie* seems to contemplate the immediate exercise of the power, as it refers to the presentment of incumbents to rectories or parsonages to be created by virtue of it; and if its immediate exercise had not been contemplated, this instruction would most likely have been withheld, in order to be forwarded together with the others, which would have been required when it should be desired to call the power into exercise. It is the merest conjecture, that because the Crown had given instructions as to most other points, many of them of comparatively little importance, and had not given any present instructions as to this point, therefore the power in question was to remain dormant until it should be called into activity by further instructions. There are no instructions as to the use of the seal or the pardon of offenders, although these are powers which might and would be called into immediate exercise; and although there is an instruction as to the presentment of incumbents to rectories and parsonages, yet the commission contains no reference to it. Nothing therefore would be more unsafe than to found any conclusion of importance contrary

Judgment.

1856.

Att'y.-Gen. v. Grasett.

to the natural import of the words, upon the omission or the form of a reference to the instructions in the commission. I understand the commission to mean that, with regard to the creation of rectories and parsonages, the Lieutenant-Governor was to proceed, with the advice of his Executive Council; that the Crown had then no particular instructions to give with respect to it, although it might have some instructions to give on the subject at some future time; but that with regard to the presentment of incumbents to benefices, it was desired that none should be presented until their conformity to the doctrine and discipline of the Church of England should be evidenced by the certificate of the bishop or his commissary.

If this view is correct, then the Lieutenant-Governor had, without any other instructions than he had already received, authority on the 15th January 1836 to erect parsonages and rectories, unless that authority had in the mean time been revoked or suspended.

Judgment

It will be observed that I lay out of view altogether the instruction or despatch dated 26th of July 1825, addressed by Lord *Bathurst* to Sir *Peregrine Maitland*, upon which so much stress was laid in the argument. I do this because I cannot see at present that it continued in force after the appointment of Sir *John Colborne*, who was referred by his commission for his guidance in the administration of the government entirely to the instructions given to Lord *Dalhousie* and those which he might thereafter receive himself.

The question then is, whether, under the circumstances of the case, the authority which I apprehend to have been conferred by the commission to establish and endow rectories, must be deemed to have been revoked or suspended before the 15th January 1836. Assuming all the facts which are detailed in the docu-

1856.
Att'y.-Gen. v. Grasett.

ments produced in the case to be proved, it is quite clear that in the year 1826, and from that time to the year 1836, there had arisen and diffused itself amongst a large part of the population a strong feeling of objection to, and disapprobation respecting, the appropriation made by the 31st Geo. III. of the Clergy Reserves to the support of a Protestant clergy, partly as being detrimental to the temporal interests of the province, and partly as being contrary to their religious principles. This feeling was very decidedly manifested by the House of Assembly, and a large majority of the members were strongly influenced by it.

During all this time however, the other branch of the Legislature entertained views totally different, and not only did not concur in the proceedings of the House of Assembly, but strenuously resisted them, and by their opposition rendered them unavailing. The House of Assembly adopted various resolutions expressive of the sentiments I have mentioned, and passed several acts for the purpose of carrying them into effect. The resolutions, however, were met by counter resolutions of the Legislative Council, and the acts were totally altered, and in effect rejected by that body. Lord *Goderich*, concurring in the opinion that the provision made for the support of a Protestant clergy was detrimental to the temporal interests of the province, but, adhering to the principle of establishment and endowment, had proposed the surrender of the reserves, and had forwarded the draft of an act of Parliament to be introduced into the Provincial Legislature for the accomplishment of that object; which act, while it repealed all the clauses of the act 31st Geo. III. relating to the appropriation of the reserves, preserved all those relating to the erection and endowment of rectories and parsonages. It is remarkable that Lord *Glenelg*, no doubt through oversight, wholly misstated this matter in the case submitted by him to the law officers of the Crown in 1832, in

Judgment.

1856.

Att'y.-Gen. v Grasett.

which he mentions that the proposed repeal embraced not only the clauses relating to the appropriation of the reserves, but also the clauses relating to the creation and endowment of rectories. The act proposed by Lord *Goderich*, although at first entertained, was finally rejected by the House of Assembly. In 1836 the two houses continued as much at variance as ever on this point; it was impossible to foresee how or when the question would be settled; and it might become necessary, and was the subject of deliberation, to invoke the intervention of the Imperial Parliament for its adjustment.

Judgment.

Lord *Goderich*, after learning the receipt of his draft act of Parliament, and that it had been entertained, and would probably be adopted by the House of Assembly, in a despatch dated 5th April 1832, sanctioned the creation and endowment of rectories to a limited extent.

Between this period and the year 1836 Sir *John Colborne* was in constant communication with the colonial office, which was kept informed of all that was passing in the province. It would appear that although no rectories or parsonages were created until 1836, the object had not been neglected or overlooked. Mr. Secretary *Rowan* in 1835 submitted a case to the law officers of the Crown for their opinion as to the form of the instrument proper for that purpose; and in this case reference is made to another, which had been previously (it does not appear how long previously) submitted to a preceding Attorney-General. It is probable, therefore, as asserted in the report of the Archdeacon of York, that progress was made, though perhaps slowly and gradually, towards carrying the recommendation of Lord *Goderich* contained in his despatch of the 5th April 1832 into effect, from the time that despatch was received. It is argued on behalf of the *Attorney-General*, that it appears to have been so inexpedient

1856.

Atty.-Gen. v. Grasett.

to exercise the power of creating and endowing rectories in the then state of popular feeling in the province, that it must be presumed that that power had been revoked or suspended before the date of the patent in question. I cannot accede to this argument. It would, in my judgment, be most dangerous to the rights of property, and most unjust, to overthrow the solemn patent of the Crown on any speculation formed at the present time as to the views entertained at a distant period by the Home Government with regard to what was then passing in the province. We have before us, I suppose, all that is material to this question of the intercourse that took place between the Provincial Government and the Colonial Office during the interval between the years 1826 and 1836, and for some time afterwards. Confessedly, no express revocation or suspension of the authority to create and endow rectories was transmitted by the Colonial Secretary to the Lieutenant-Governor during this interval, or until the 31st of August 1836, when this authority was expressly suspended, but in terms that seem to indicate that it had not been previously revoked or suspended. When Lord *Glenelg* objected to the patents creating and endowing the rectories in 1832, it was on the ground, not that the authority to create and endow them had been revoked or suspended, but that there had been no instructions calling it into exercise. It may be contended indeed, that the terms of the despatch, dated 31st August 1836, by which this authority was suspended, evince that the mind of the Crown had not contemplated the establishment and endowment of rectories on the 15th of January previous. However this may be, I am quite sure that any change of sentiment that may have occurred on the part of the Crown should not invalidate this patent, issued under an authority which had not been revoked or suspended; and that any ignorance of such change, if any had really occurred, on the part of the Lieutenant-Governor, affords no ground of error or mistake sufficient to warrant the

Judgment.

1856.

Atty.-Gen. v. Grasett.

cancellation of this patent, and the consequent annihilation of the rights created by it. The Crown can avoid its grants issued under circumstances of mistake either as to law or fact, but here is no mistake either of law or fact; but a mere oversight and omission on the part of the Secretary of State to notify a change in the intention of the Crown to the Lieutenant-Governor, who of course, until such change of intention was made known, continued to act on the instructions he had already received.

No case, so far as I know, has carried the doctrine of avoiding grants by the Crown for mistake the length that a grant made under an authority legally conferred, remaining unrevoked and legally exercised, can be invalidated on the ground that the views of the Crown on the subject matter of the grant had undergone a change, which, if the intention to make the grant had been known, would have probably occasioned its prohibition.

Judgment.

These observations dispose of the 1st, 2nd, and 5th points of objection to the patent in question.

I think that authority to establish and endow the Rectory of Saint James was legally conferred, remained unrevoked and unsuspended, and was legally exercised at the time of such establishment and endowment, and that no possible or probable change of sentiment on the part of the Crown, not made known or acted upon, can affect the validity of the patent, by which such establishment was effected

The information, however, objects further, that the patent was void for not defining the bounds of the parish. This objection is, I think, untenable. The act authorises the erection of one or more rectories in each parish or township. The establishment of one rectory in one township, which is the case in this

1856.

Atty.-Gen. v. Crasett.

instance, can be attended with no difficulty. The duties of the rector would extend to the whole township, every inhabitant of which would have all the rights of parishioners in respect of his church. The act, however, evidently contemplated the creation of several rectories, if expedient, in one township or parish. Whether it intended that, upon the erection of more than one rectory in one parish, it should be subdivided so as to define the space within which each rector was to officiate, or intended that the several churches should serve for the whole township or parish, every inhabitant having all the rights of a parishioner as to each church, (an arrangement which would be attended with no difficulty, as the endowment of each church was fixed), it is unnecessary to determine. The Lieutenant-Governor, in creating this rectory, reserved the power of creating more, if it should be deemed expedient, in the same township, and we must presume that if this power should ever be exercised, it will be exercised duly and according to law.

Judgment.

The last objection made to this patent is, that no grantee was named in it. This point I have already determined, so far as I am concerned, in the case of *Martin* v. *Kennedy*, (*a*) in which the same objection was raised. I there considered that the process contemplated by the act was first the erection, then the endowment of the rectory; and, when it should have been erected and endowed, the appointment of an incumbent, who, upon his induction, would become invested with all the temporalities of the living, in the same manner as any rector or parson appointed at the present day in England. To this opinion I adhere. The express provision of the act dispenses with the rule of the common law, and obviates all difficulty arising from the want of a grantee, which otherwise might, in accordance with that rule, render the patent void.

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

1856.

Atty.-Gen. v. Orasett.

I see no reason to doubt that the Rectory of Saint James, created by the patent, was validly created, and validly endowed, being the only rectory or parsonage established within the township of York. I think it embraces within its limits the whole township, and is indeed exactly commensurate with it.

The whole ground of the information fails, and I think therefore that it should be dismissed.

SPRAGGE, V. C.—This cause was argued on the 18th, 19th and 20th days of September last, with great ability, by counsel on both sides.

The patent impeached in this suit differs from an ordinary patent granting land by the Crown to a subject, in this, that in an ordinary case, error or mistake must be shewn in order to invalidate the grant, while in this case it is thrown upon those who claim under the patent to shew that it was granted under proper authority, in pursuance of the 31st of the late King George III.

Judgment.

The statute in terms enables the Crown to authorise the Governor or Lieutenant-Governor, with the advice of the Executive Council, from time to time to erect parsonages or rectories, and to endow the same from the Clergy Reserve lands.

The fact of endowment by the Lieutenant-Governor with the advice of the Executive Council is not disputed, but it is alleged by the information that the erection and endowment of the rectories "was all against the mind and intention in that behalf of his said Majesty, and of his Government."

The statute enabled the Crown to authorize the Lieutenant-Governor to do a certain act; and the simple and only questions for the decision of this court

1856.

Atty.-Gen. v. Grasett.

are, whether at the time the act was done the Lieutenant-Governor had the authority of the Crown for the doing of the act, and whether the act was validly done. These are the points which the information presents for the adjudication of the court, and these only. No fraud is charged, but the case made negatives the idea of fraud, being in substance this, that the Lieutenant-Governor and the Executive Council, misapprehending the meaning of a despatch from the Colonial Secretary, conceived that they had authority, while in truth they had not.

First, as to the authority. From the passing of the act downwards, it remained for the Crown to confer or withhold that authority; for express authority to the colonial Governor was requisite under the statute. The royal commission conveys the authority in clear and distinct terms, and was of itself, without more, sufficient authority for the act, unless its reference to future instruction, made future instructions necessary in addition; the royal commission conveying an inchoate authority, to be perfected by instructions which might be thereafter sent.

Judgment.

The commission follows the language of the statute, and purports to confer the authority which the statute enabled the Crown to confer; and if it stopped there, the authority would clearly be conferred; but the words conferring this authority are followed by these, "subject, nevertheless, to such instructions touching the premises as shall or may be given you by us, under our signet and sign manual, or by an order in our Privy Council, or through one of our principal secretaries of state;" and the ground taken by the information is, that it required subsequent instructions to complete the authority, and that Sir *John Colborne* had them not.

This is, in my view, a cardinal point in the case; for I incline to think that Sir *John Colborne* had not

1856.

Atty.-Gen. v. Grasett.

instructions for the erection and endowment of rectories. The despatch of Lord *Goderich*, of the 5th of April, 1832, called by Lord *Glenely* a *confidential* despatch, did not in terms convey instructions for such erection and endowment, but was rather an intimation of the personal approval of Lord *Goderich* of steps which Sir *John Colborne* had in a private communication informed him he proposed to take, with a view to constituting gradually a certain number of rectories or parsonages in every township, and endowing them. This appears to have been the nature of the communications between the parties, from Lord *Goderich's* despatch, and from the notice of Sir *John Colborne's* letter contained in it, and also in the case submitted by Mr. Secretary *Rowan* to the Crown Law Officers in 1835. It may be that both Lord *Goderich* and Sir *John Colborne* assumed that the latter already possessed the requisite authority for the doing of the acts which he contemplated. The language of both seems to imply it; and the postscript by Lord *Goderich*, desiring that no actual step should be taken as to the distribution of the £4000 (the immediate subject of this despatch) until he should have had an opportunity of considering such suggestions in regard to it as Sir *John Colborne* might offer, but expressing no such desire as to the proposed rectories, would favor the same inference. But it would not be safe to conclude that such was their view. We have no copy of Sir *John Colborne's* communication; which appears not to be on the files of the Colonial Office. It appears to have contained suggestions in regard to the proposed rectories, and *may* have asked for authority to erect and endow them, though what we know of it does not imply this, but perhaps the contrary. However this may be, Lord *Goderich's* despatch did not convey authority, even though it may have assumed authority as already conferred. I should think, too, though upon such a point I can speak but doubtfully, that instructions intended to complete authority imperfectly conveyed by the

Judgment.

1856.

Atty.-Gen. v. Grassett.

Royal Commission would not only be conveyed in clear and distinct terms, but also in a formal public despatch, not in one that falls within the class designated by Lord *Glenelg* as confidential. The instructions to Sir *Peregrine Maitland* certainly were conveyed in the most formal manner.

I think, further, that the instructions to Sir *Peregrine Maitland* were not continued to Sir *John Colborne*. The commission to the latter officer is thus expressed: "We do hereby authorize and require you to exercise and perform all and singular the powers and directions contained in our commission to our Captain-General and Governor-in-Chief, according to such instructions as he hath already received from us, and such further orders and instructions as he or you shall hereafter receive from us;" thus referring to instructions previously sent to the Governor-in-Chief, but not to those previously sent to the Lieutenant-Governor, the new Lieutenant-Governor's own predecessor. This looks like a mistake in the wording of the commission; for if he was to be governed by any previous instructions, they would naturally be such instructions as were sent to the Governor of the same, not of another colony; and so we find commissions to Governors-in-Chief refer to previous instructions to their predecessors. It may be, indeed, that the *general* instructions sent to the Governor-in-Chief are those referred to; and these appear to have been sent to Governors-in-Chief only, and are conveyed to Lieutenant-Governors by reference only. The words of reference, however, contained in the commission are large enough to include both, and, I should judge, were intended to include both; otherwise instructions of general policy would have to be repeated upon each new appointment, or confined to the individuals to whom they were addressed. But whichever were intended by this reference, in the commission to Sir *John Colborne*, the instructions addressed to Sir *Peregrine Maitland* are not included, and con-

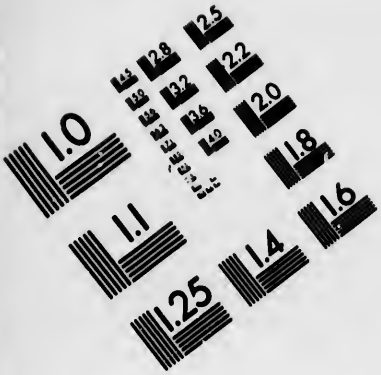
Judgment.

sequently are not, as I think, instructions which could authorize Sir *John Colborne* to do anything. The authority must rest upon the same principles as in an ordinary case between individuals, where the authority must be traced from the principal to the agent, and only the authority expressed to be conveyed is conve

If this view be correct, we must look for the authority to Sir *John Colborne* in the Royal Commission to himself, and in the documents incorporated with it by reference—namely, the Royal Commission to the Governor-in-Chief, the general instructions to the Governor-in-Chief, and any particular instructions upon the subject to the same functionary: of the last there are none before the court; the two former are before us.

Judgment.

The Royal Commission refers to a number of different matters pertaining to the government of the colony, conferring as to each "full power and authority," and adding as to some, and not as to all, "subject to instructions." The matters made subject to instructions are, the issuing of writs of summons and elections, and the calling together of the Legislative Council and Assemblies of the two provinces; the fixing the times and places of holding sessions of the Legislature of the two provinces, and the proroguing and dissolving the same, and the erecting of townships or parishes, and the erection and endowment of rectories (these last to be done with the advice of the Executive Council), and the giving or withholding the royal assent to bills. An argument is attempted to be drawn from the use of the word "may," in the clause regarding instructions as to rectories—"subject to such instructions touching the premises as shall or may be given"—and the inference suggested is, that it was thereby meant that instructions *might* be thereafter given, not that they *would* be, and that instructions were a pre-requisite to the act. But we find the same word used in the clause



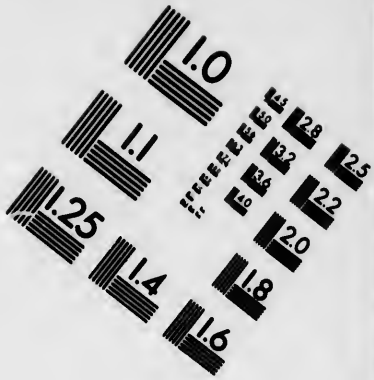
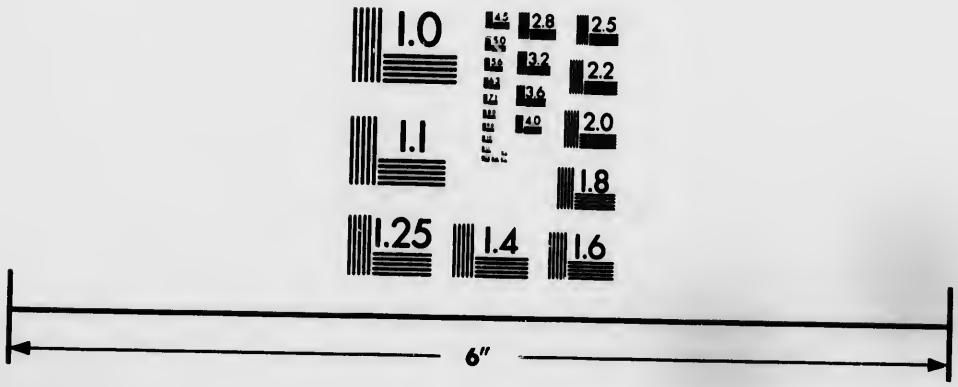
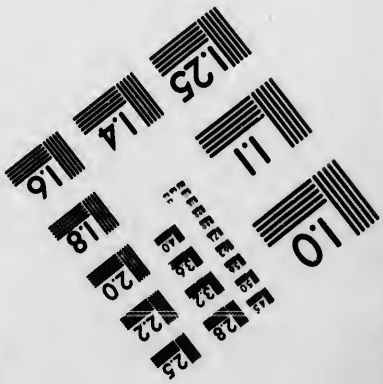


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

1856.

Att'y.-Gen. v. Grasett.

relating to the fixing the times and places of holding sessions of the Legislature, and the proroguing and dissolving the same, while in the other clauses the word "shall" is used. To entitle the argument to any weight it must go to this extent, that the power was to be in abeyance until instructions which might or might not be given, should be given. Apply this to the clause I have cited as to the fixing the times and places of holding sessions of the Legislature, and proroguing and dissolving of the same, — could it be intended that such a power was to be in abeyance until instructions which might never be given should be given? If so, this absurdity would follow, that the Governor might never have the power to prorogue the Legislature, which, under the Constitutional Act, he was bound to call together once in every year.

Judgment.

There are one or two other points in which the words "subject to instructions," as used in the commission, may be open to verbal criticism; but as I think the words used in each connexion were intended to have substantially the same meaning, it would be unprofitable to comment upon them.

Then, as to the proper meaning of the words used: Do they mean that power is given, but not to be exercised until instructions are given to call it into exercise; or that power is given, with nothing to restrain its present exercise, but that its exercise may at any future time be controlled by any instructions that may be given? Suppose the words used in a power of attorney, given by a gentleman in a private station, appointing an agent to go and reside upon and manage an extensive estate in a distant country; suppose the instrument to specify some of the matters which were to be the subjects of management on the estate; take, for instance, leasing or selling land, building houses, or bridges, or mills, or a school-house, or a church or chapel, and providing for the maintenance of teachers and of a

clergyman; giving not only general powers to manage the estate, but express and distinct powers in relation to the matters I have enumerated. Suppose, then, the words to be added, "subject nevertheless to such instructions touching the premises as shall or may be given you by me in writing." Could it be said that the person constituting such agent did anything more by the use of those words than reserve to himself the right, at any future time, to control (without revoking the power, and by a less formal instrument than the power of attorney) the exercise by his agent of the powers previously conferred. I confess I think that in such an instrument such would be the natural import of the words; and I think that it is in such a sense that the words "subject to" are ordinarily used and interpreted, unless there be something in the context to lead to a different interpretation. 1856. Att'y.-Gen v. Grasett.

Discharging from the memory for a moment that these words are used in connexion with the endowment of rectories, and supposing them used in such a private document as I have suggested, there is little difficulty, I think, in the mind assenting at once, that the true meaning of the words used and the intention manifested in the instrument are, that power to do the acts enumerated was given by the instrument; that power to do them was not postponed until instructions which might or might not be sent should come, but that the power was subject to be controlled by instructions, in the event of any instructions being sent. I see no reason for not giving the same construction to the same words when used in the royal commission. I have considered this point at some length, because both in the information filed and at the bar the words *subject to instructions* are insisted upon as shewing that without instructions the power to act was incomplete. Judgment.

Following the clause in the commission authorising

1856.

Att'y.-Gen. v. Grasett.

the erection and endowment of rectories, is one, authorizing the Governor to *present* to the same, and to every church, chapel or other ecclesiastical benefice, according to the establishment of the Church of England within either of the Provinces. This clause does not in terms refer to any instructions; but in the general instructions accompanying the commission there is one, the 52nd, applying to this subject, which is in these terms: "You are not to present any Protestant minister to any ecclesiastical benefice within our said province by virtue of the said act, passed in the 31st year of the reign of his late majesty, King George the III., and of our commission to you, without a proper certificate from the Bishop of Quebec or his commissary of his being conformable to the doctrine and discipline of the Church of England." Now the only presentations under the statute referred to, in this instruction, are presentations to parsonages or rectories, and to the parsonages or rectories the endowment of which is authorized by the next pre[illegible]g section of the statute. If we construe the Roy[illegible]ommission as meaning that no rectories were to be created without further instructions, we have instructions *sent with the commission* as to the presentation to rectories, which were not, without further instructions, to be brought into existence; instructions, in fact, as to the mode of doing an act, the doing of which was as yet unauthorized. On the other hand, if we construe the commission as authorizing the doing of the act, instructions as to the mode of doing it accompanying the commision are intelligible and natural enough. Upon any other construction, we have the anomaly, of an act being contemplated and directed, without there being anything to be acted upon.

Judgment.

This instruction seems certainly applicable to Upper Canada, for the instruction next preceding (the 51st) is in terms applied to Upper Canada, and to that only, and the one in question has the words, "benefice within *our said* province."

1856.

Att'y.-Gen. v Grasett.

The instructions of which the above form a part bear date the 13th of April 1820. The information in this suit states that "the power of the Crown to constitute, erect or endow parsonages and rectories in Upper Canada, had never before the (said) 25th day of January 1836 been exercised;" consequently the instructions to present must have been intended to apply to rectories then yet to be created in Upper Canada, and I cannot but think that it manifests very clearly the intention of the Crown that instructions were not to be waited for.

There is nothing to be *inferred* from the absence of instructions as to rectories, because, unlike the other matters made subject to instructions by the terms of the commission, explanatory directions were not considered necessary; thus the despatch to Sir *Peregrine Maitland* on the subject is simply a formal direction to proceed, without any instruction as to the mode or time of proceeding, whereas the instructions as to the other matters were particular, and in some cases minute. Judgment.

There are other clauses in the general instructions which tend to throw light upon this point—for instance, the 45th, which, among other things, enjoins the Governor to take especial care "that the services and prayers appointed by and according to the Book of Common Prayer be publicly and solemnly performed throughout the year:" also the 46th, which says, "you are to take care that the churches which are or may be hereafter erected in our said Province of Upper Canada be well and orderly kept."

Looking at the whole of the commission and the whole of the general instructions together, I can come to no other conclusion than that no specific instructions were necessary in order to the valid erection and endowment of rectories.

I am strengthened in this opinion by the circum-

1856.

Att'y.-Gen. v. Grasett.

stance of the erection of the Rectory of Montreal in 1818. It is not suggested that that was done upon any special instruction. Lord *Dalhousie* was appointed Governor-in-Chief in 1820; we have the terms of his commission and of the general instructions by which it was accompanied. The clause in the commission in relation to the erection and endowment of rectories applied to both Upper and Lower Canada. As early as the year 1801, as I gather from the report of Mr. *Sewell*, the Attorney-General of Lower Canada, the erection of rectories was contemplated. What was actually done is not shewn in evidence; but in 1818 the Rectory of Montreal was erected, and two years afterwards Lord *Dalhousie* is authorized generally to erect and endow rectories: no check is interposed to his continuing to do what his predecessor had so recently done. I think this is material, for if it had been intended that the example set at Montreal was one not to be followed in Lower Canada, or in Upper Canada, I think we should find some indication of such intention, either in the commission, or in the general, or in special instructions.

Judgment.

The information filed takes this further objection beyond that of the mere absence of authority, that the issuing of the letters patent, and the erection and endowment of the rectories, were all against the mind and intention in that behalf of his Majesty the King, and of his government. In the first place, I would observe that we look for the mind and intention of the Crown in the official communications from the Colonial office, and find in them no expression of such mind and intention until after the erection of these rectories and their having excited notice as well in England, as Lord *Glenelg* says, as in Upper Canada. I by no means mean to say that the mind and intention of the Crown may not be clearly manifested in despatches from the colonial office, without any express declaration of mind against the endow-

ment of rectories, for the language employed may be so clear and unequivocal against all ecclesiastical endowment, and against the appropriation of any portion of the reserves to ecclesiastical purposes, as to leave no room for doubt upon the mind of the colonial governor that in the erection and endowment of rectories he would violate the spirit of his instructions and run counter to the known views and intentions of the British Government. I find no such clear and unequivocal language in any of the despatches (with one exception perhaps, which I will presently notice.) They do however manifest a disposition to yield to the wishes of the Assembly in regard to the reserves, from which it might not unfairly be inferred, taking those despatches by themselves, that the mind of the writers would be against any such endowment.

The wishes of the Assembly in this respect had been from time to time expressed from 1825 until after the endowment of the rectories; and although pointed at the reserves generally, they yet manifested clearly enough a strong hostility to ecclesiastical endowments of any kind; and the Assembly in some of their addresses referred to them in express terms. Taking then these addresses and despatches together, such an inference as I have referred to would not be unwarrantable But nothing can shew more clearly how unsafe such inference would be than the two despatches of Lord *Goderich*, of November 1831: one of these despatches is the one to which I have referred as perhaps an exception to the absence of clear and unequivocal language against the appropriation of the reserves to ecclesiastical purposes, and is relied upon in the information as shewing the mind of the Crown to be against such appropriation; and its language is certainly strong. After stating the concurrence of the writer with the Assembly, that the reserves formed a great obstacle to the improvement and settlement of the Province, without

Judgment

1856.

Att'y.-Gen. v. Grasett.

being productive of any corresponding advantages to make up for the inconvenience; after stating that he cannot entertain a doubt that an end should immediately be put to the system of reserving a seventh of the land for the support of a Protestant clergy, and stating the additional ground that it was to be condemned as a provision for the ministers of religion, since it must have a direct tendency to render odious to the inhabitants those to whom their good will and affection are so peculiarly needful; he proceeds, "such are the considerations by which his Majesty's government have been influenced in coming to the conclusion that the retention of the clergy reserves in their present state is inexpedient;" and after designating them as a "practical grievance," he refers to the mode to be adopted for the purpose of causing these reserves to "revert into the general mass of the Crown estate, when they will be managed by the same officers, and according to the same rules," and he refers to a separate despatch as containing the details of a measure to be adopted for that purpose. Now, when we recollect that rectories could only be endowed out of reserves, and when we see a despatch so plainly evincing an intention that the reserves should cease to exist, it might perhaps be thought safe to assume that the mind and intention of the writer was against the appropriation of those reserves, or any part of them, to the endowment of rectories. But this would be a most erroneous conclusion, for the separate despatch of the same date contains this passage: "First, then, it should be enacted that so much of the British statute of 1791 as relates to the appropriation of clergy reserves should be repealed. But, as it is unnecessary and would be highly inconvenient to repeal so much of that act as relates to the erection and endowment of parsonages, it will be fit, in order to obviate the possibility of mistake, that the precise words upon which alone the repeal is to operate should be quoted in the repealing act."

Judgment.

1856.

Att'y.-Gen. v. Grasett.

Had Lord *Goderich* been only expressing generally the views of his government in relation to the reserves, and not suggesting the details of a particular measure, he would have expressed himself in the terms of the first quoted despatch only; and it would be contended that the necessary inference was, that the mind and intention of his government were against the endowment of rectories. In Lord *Goderich's* own mind this would be, not a necessary inference, but a possible mistake.

It does appear to me that it would be most unsafe to infer the mind and intention of the Crown in regard to the endowment of rectories from any general expression of the views of the colonial minister upon the subject of the reserves. The inference might be, as in the instance of Lord *Goderich*, wholly erroneous, and would form at the best a most unsafe ground for judicial decision.

Judgment.

I have not omitted to notice the despatches of Lord *Glenely*, and particularly the passage in his despatch of the 31st of August, 1836, in which, after referring to the endowment of the rectories, he says, "I need not, I am sure, point out to you that pending the settlement of the clergy reserve question, it is indispensable that no further allotment of church lands should take place without the express sanction of his Majesty's government."

This may afford room for the inference that he was against the endowment at the time it was made; but when he wrote, the matter had, as he said, attracted the notice of the public both in England and in Canada; and it is difficult to say that a man's mind was against an act before it was done, merely because he wished it not to be repeated after he had seen unpleasant consequences result from it.

I grant, however, that the despatch and the instruc-

1856.

Att'y.-Gen. v. Grasett.

tions from the Colonial Minister to Sir *Francis Head*, of the 5th of December, 1835, furnish a probable inference that he would not have approved of the establishment of the rectories, if the question had been submitted to him; but it is not a necessary inference, and does not amount to that moral certainty upon which alone it would, I conceive, be safe to act. The inference certainly is *not more* probable than that arising from the first quoted despatch of Lord *Goderich*, of November, 1831, and might be equally a mistaken inference.

It is observable too that Lord *Glenelg* himself, neither in the case submitted by him to the law officers of the Crown in England, in which he rather argues against the validity of the endowment; nor in his despatch of the 6th of July, 1837, in which he states his grounds for considering the endowment illegal, states as a fact that the endowment was against the mind and intention of the British government. It may be, however, that the personal views of the colonial minister were not considered by him material, and that in his opinion the mind of the Crown could only be indicated by the definite terms of a despatch.

Judgment.

The remaining questions raised in this case, I propose to notice briefly. It is objected that the patent is void, because there is no grantee named in it with words of succession; that to make it valid, the parson should have been first presented and inducted and the patent should then have granted the lands to him and his successors. I think the statute under which the endowment is made disposes of this question. The 38th section authorises the Governor, with advice of the Executive Council, to erect parsonages the or rectories; then from time to time, to endow the same out of the clergy reserves; and the 39th section then authorises the Governor to present to every such par-

1856.

Atty.-Gen. v. Grasett.

sonage or rectory an incumbent or minister of the Church of England, and to supply vacancies from time to time. As I read the statute, the rectory was intended to be complete as to erection and endowment, before any incumbent was presented: the mode of erection and endowment are prescribed by the statute; and the Governor is then authorized to present to *such* parsonage or rectory. If this be correct, it is a good grant under the statute.

With regard to the objection that until the erection of parishes there could be no valid erection of a parsonage or rectory, because there would be no defined limits within which the incumbent would be bound to execute his duties; the section of the statute which provides for the presentation of incumbents enacts, that they shall hold and enjoy, in the same manner and on the same terms and conditions, and liable to the performance of the same duties, as the incumbent of a parsonage or rectory in England;" and certainly it would be difficult for a person to enforce against an incumbent the performance of those duties, unless prepared to shew that he resided within certain limits relative to the parsonage or rectory, which entitled him to require at the hands of the incumbent the performance of those duties.

Judgment.

The words "township" or "parish," are used in the imperial act together, and apparently synonimously; just as the words "parsonage" or "rectory" are used together in the same act. There is nothing to shew that it was contemplated that parishes should, then or thereafter, form subdivisions of townships, or that a parish, any more than a township, should form an ecclesiastical subdivision.

The idea that when a parsonage or rectory should be formed, a parish, as distinguished from a township, should form the territorial limits of the rights and

1856.

Atty-Gen. v. Grassett.

duties of the incumbent (which is the point here contended for) is negatived by the statute: for it provides for the erection of one, *or more than one* parsonage or rectory within each township or *parish*. In the event then of the erection of two or more rectories in one parish, each rectory could not have its own parish; yet that case—a rectory without its own parish—is a thing contemplated by the statute. How then can it be said that a parish to each rectory is a thing *essential* to the valid erection of the rectory? It is made a non-essential by the statute.

It may have appeared to the framers of the act inexpedient that separate parishes or territorial limits of any kind should be assigned to each rectory in a township or parish, other than the limits of the township or parish itself, in view of the changes which the increase of the population would from time to time render necessary. As far as such a state of things would be inconvenient, it would be an inconvenience incident to a new and growing country, and might well have been left to future local regulation, when the proper time should arrive.

Judgment.

I think there are, and must be, certain limits within which the rights and duties of the incumbents of rectories were, under the statute, to be discharged. If the statute had provided for the erection of one rectory in each township or parish, it could not be doubted, I think, that those limits would be the limits of the township or parish: are insuperable difficulties created because there may be more than one? I think not. Suppose one created first, with duties co-extensive with the limits of a township and corresponding rights on the part of the inhabitants, and suppose a second rectory afterwards created; I see nothing to prevent the duties of the incumbent being also of the same extent, and the rights of the inhabitants corresponding therewith. Such a state of things may appear anomalous,

as compared with things in England, and yet little or no practical difficulty might arise from it, any more than from a somewhat analogous state of things in the larger towns of the Province. But even though serious difficulties should arise, and though questions difficult of solution should be the consequence of such a state of things, it would only prove that the machinery provided by the act was not fitted to work harmoniously; it would not prove that it was not intended to go into operation at all.

1856.

Atty.-Gen v. Grasett

The plan may or may not be ill conceived; but it is capable of being practically worked, and that without difficulty, unless in the event of there being more than one rectory in a township or parish; and in that event it is still capable of being worked, though perhaps not without difficulty. I do not think the objection amounts to anything, unless it can be shewn that something remained to be done which was *essential* to a rectory with an incumbent having certain rights and duties; that an indispensable constituent part was wanting. This, in my judgment, is not shewn, and I think the objection fails.

Judgment.

Upon the whole, my opinion is that the patent impeached by this information is legal, and the rectory validly constituted and endowed.

1856.

March 17th

FLETCHER v. BOSWORTH.

Guardian ad litem—Setting aside proceedings.

A suit had been instituted by a creditor for the administration of the estate of a party deceased, and the agent of the solicitor for the plaintiff was appointed guardian *ad litem* to the infant defendants: after a sale of the lands under the decree, at which the plaintiff, by leave of the court, had bid off a portion of the lands, a motion was made to change the name of the purchaser. The court, upon looking into the papers, refused the application; directed that a new guardian should be appointed, who, unless the parties consented thereto, was to take measures to set the proceedings aside.

The facts appear in the judgment.

Mr. *Price* for the application.

The judgment of the court was delivered by—

Judgment.

THE CHANCELLOR.—This was an application to my brother *Esten* at Chambers, that *Thomas Newton Bosworth* might be substituted for the plaintiff as the purchaser of certain real estate sold under the decree in the cause, and that he might be relieved from the necessity of paying his purchase money into court. Something which transpired upon that application induced my brother *Esten* to direct that the matter should be mentioned in court; and having perused the papers intrusted to us as well as the proceedings in the cause, we are quite satisfied that the order cannot be made.

This is, in form, a suit for the administration of the estate, real and personal, of *Newton Bosworth*. It originated in this way—*Newton Bosworth* died in July, 1848, intestate as to his real estate, leaving *Catherine*, his widow, and two sons, *Alfred Bosworth* and *Thomas Newton Bosworth*, his successors. *Newton Bosworth* made a will, it would seem, but as it was not duly attested, his real estate descended to *Alfred*, who was his heir-at-law. *Alfred Bosworth* died in the following

month, having first duly made and published his will, whereby he devised all his real estate, which consisted altogether I think of these descended lands, to his wife for life, remainder to his children in fee as tenants in common. Some fifteen years previous to *Newton Bosworth's* death *Fletcher*, the present plaintiff, advanced on his behalf a sum of between five and six hundred pounds, which, if that ever was intended, seems not to have been repaid, and this suit was instituted in consequence by *Fletcher*, as a simple contract creditor of the intestate, for an administration of his real and personal estate, but as the personal estate was insignificant, the practical object was the sale of the realty.

1856. Fletcher v. Bosworth.

Now, assuming that there was a subsisting debt, and that this suit was instituted in good faith to obtain payment of it, and that the infant defendants were properly protected; assuming these things, I say, the suit was one of the most ordinary kind, and of course, quite unobjectionable. But, unfortunately, we do not feel it safe to assume any one of these positions. Three letters were produced upon the present motion, for the purpose of satisfying the court that *Thomas Newton Bosworth* ought to be substituted for the plaintiff as purchaser, which had a most important bearing upon the points to which I have referred. The first in point of date shews very clearly that these proceedings were not instituted by *Fletcher* of his own accord, or for his own behoof, but at the instance of *Catherine Bosworth* and *Thomas Newton Bosworth*, and for their benefit; and all of them tend to shake our confidence in the *bona fides* of the parties. In that dated the 31st of May, 1849, I find this passage: "Now to enable you all to act at once, I enclose you my power of attorney, under notarial and city seals, upon which you will act at once, claiming payment immediately of my debt. This places you in a position to act. And you have my authority to use that power

Judgment.

1856.
Fletcher v. Bosworth.

coercively, so as to justify those who have power under your brother's will, or take power by administration to his effects, if he died intestate. You can sue for the recovery of my debt. You can involve your father's estate in litigation, by every means that the Canadian law permits. And your sister, the guardian of her children, will be justified by the coercion you thus threaten, and have power to use to enforce my claim, to make arrangements to prevent the ruin of her family. The power of attorney authorizes you to make such arrangement, and I shall approve and ratify whatever is done for the benefit of the whole; the comfort of your mother, and the securing to you the possession of what you have so long and meritoriously laboured to maintain." The third is from *Mr. Gilmour*, a mutual friend, to *Thomas Newton Bosworth*, in which I find this extract from a letter of *Fletcher's* to him: "Thomas (that is, *Thomas Newton Bosworth*) informs me that the lawyer says the power of attorney is unavailing against the freehold. That is true; but it makes *Thomas* creditor to the extent of £800, and enables him at common law to proceed against the administrator for a claim on the personal estate, and to absorb it all. The power of attorney was sent *in terrorem* that *Thomas* might be in a position to enforce, that the widow might have the plea of coercion to justify her in making a compromise. It is not my desire to set the members of the family at variance. A threatening letter from *Thomas*, under my power, to the widow, would suffice as her justification to adopt what I advised him to demand, and her to agree to."

Judgment.

Now I will not say that these extracts warrant the conclusion that no debt whatever was due to *Fletcher*, or that, if any debt ever existed, it had been long barred by the statute; neither will I take upon me to designate the whole proceeding as an attempt to rob the infant children of *Alfred Bosworth* of their rights, under the form of law; but, looking at what was done by Lord

1856.

Fletcher v. Bosworth

Cottenham in *Flower v. Martin*, (*a*) and by Vice-Chancellor *Knight Bruce* in *Melland v. Gray*, (*b*) and considering that the bill was not filed until seventeen years after the debt is supposed to have arisen, I think I may safely say that the case is one which ought not to have been allowed to pass undefended. But, looking through the proceedings, it is clear that no defence was attempted. So far as I can judge, no attempt whatever was made to protect the infant defendants.

The bill was filed on the 21st May, 1851. It is signed by Mr. *Turner*, and endorsed "*Turner* for *Price*," but the name *Turner* has been erased.

On the 22nd of August 1851, Mr. *Turner*, who had in the interim appeared for the infants, was on that ground appointed their guardian *ad litem*.

On the 12th of September, 1851 Mr. *Price* moved for a reference to the Master, and the decree drawn up upon that application is said to have been by consent. How that was allowed I cannot explain; but I cannot discover that any evidence was adduced, and certainly no opposition was made.

Judgment.

In the Master's office the proceedings were attended by Mr. *Turner* alone, who acted as the agent of Mr. *Price*, the plaintiff's solicitor, and as the guardian *ad litem* of the infant defendants.

The debt was proved by the declaration of *Fletcher*, under what I cannot but consider as a most extraordinary act of the Imperial Legislature (*c*), and by an affidavit of *Catherine Bosworth*, who was in truth, though not in form, the plaintiff in the suit. No opposition was offered, and the Master reported the whole amount claimed with seventeen years' interest.

(*a*) 2 M. & C. 459.
(*b*) 2 Y. & C.C.C. 199, and in Courtenay v. Williams, 3 Hare 539.
(*c*) 5 & 6 Wm. IV. ch. 62, sec. 15.

1856.

Fletcher v. Bosworth.

Then a motion was made that the plaintiff should be allowed to bid, giving the conduct of the sale to *Catherine Bosworth*. I need hardly say that *Catherine Bosworth* is not the person to whom the court would have entrusted the conduct of the sale if the facts had been disclosed. But no opposition was made. In fact the motion was made by Mr. *Turner* on behalf of Mr. *Price;* and the result was as might have been expected. The sale of the farm in the township of Dumfries was ordered to take place in the city of Toronto; and that upon the affidavit of *Thomas Newton Bosworth*, who had so material an interest in preventing a fair sale.

At the auction, Mr. *Turner*, who, as the solicitor of *Catherine Bosworth*, had the conduct of the sale, acted as the agent of Mr. *Price* to purchase the Dumfries property for the plaintiff, nominally, but in reality for *Thomas Newton Bosworth*. For that lot there were but two bids. Mr. *Capreol* offered £100, Mr. *Turner* £110. And at that price the plaintiff, or rather *Thomas Newton Bosworth*, was declared the purchaser of the farm of 100 acres in the township of Dumfries, for which £300 had been paid in the year 1846.

Judgment.

I shall not allow myself to make a single observation upon the proceedings at present beyond this, that unexplained they cannot be allowed to stand. The case may—will, I hope—be found to admit of some explanation which we have not been able to discover; but unexplained they cannot stand; and if the plaintiff will not consent to have the proceedings set aside, we direct an application to be made for that purpose on behalf of the infant defendants, and we appoint Mr. *Strong* their guardian *ad litem* for that purpose.

1856.

March 17th.

COOK v. FLOOD.

Chattel mortgage.

The mortgagee of chattels, like a mortgagee of real estate, is entitled to a foreclosure in default of payment of the amount secured thereby.

Where a party held a mortgage on chattel property and also mortgages on real estate, the court refused to make a decree for sale of the chattels and of foreclosure as to the realty.

This cause had been heard on a previous day upon an order to take the bill *pro confesso*.

Mr. *Barrett*, for the plaintiff, referred to *Dyson* v. *Morris* (*a*).

The judgment of the court was now delivered by

THE CHANCELLOR.—The plaintiff claims under three distinct mortgages, two of which affect real estate, the third, personal chattels merely. The bill has been ordered to be taken *pro confesso* against the mortgagor, who does not appear; and the relief which the plaintiff asks is that the chattels may be sold, and that the defendant may be foreclosed as to the real estate upon non-payment of the balance remaining due after crediting the amount realized from the sale of the chattels. But no such relief is prayed by the bill; and when a bill of foreclosure praying the ordinary relief has been heard upon an order to take the bill *pro confesso*, we ought not, in my opinion, to permit a decree so special in its nature to be drawn up in the absence of the defendant. Judgment.

But, apart from the particular considerations to which I have just adverted, I very much doubt whether such a decree as is asked would be proper under any circumstances. *Dyson* v. *Morris* was cited as in point, and that case does, certainly, countenance the plaintiff's position to some extent. But the Vice-Chancellor proceeded there upon the notion that a sale was the only—or if not the only, at least the proper—relief

(*a*) 1 Hare 422.

1856.
Cook v. Flood.

upon a bill filed by a mortgagee of personal chattels. But in *Slade Rigg*, (*a*) determined by the same learned judge, it was decided that a mortgagee of personal chattels is, like any other mortgagee, entitled to a decree of foreclosure. And the same point was decided very clearly by Vice-Chancellor *Turner*, after argument, in *Wayne* v. *Hanham* (*b*). Now if a mortgagee of personal chattels be entitled, like any other mortgagee, to an ordinary decree of foreclosure, it is difficult to perceive how such a decree as is asked here can be sustained on principle, unless it can be shewn that a mortgagee of real estate is entitled to have a decree of sale as to one portion of the mortgaged estate, and of foreclosure as to the remainder. But such a decree would be, I apprehend, quite unprecedented, and calculated to lead to very inconvenient results.

CHRISTIE v SAUNDERS.

March 17.

Will—Construction of.

A testator devised all his property to his widow for life—remainder to his two daughters and niece, with a power of apportionment: by a codicil to the will the testator revoked that part of his will giving these parties the power of disposing of their portions, and declared that they should "not have the power of willing the same saving and excepting they shall be married and have a child or children; and further, should any or either of the aforesaid parties depart this life previous to their obtaining their various legacies, then, and in such case the share or shares of the party or parties so departing this life shall go and devolve to the child or children of W. A. C. that shall be then alive at such decease." *Held*, that the daughters and niece took no interest until the death of the tenant for life; but that they had a power of appointment in the meantime in the event of their marrying and having children.

Case spoken to upon the construction of the will of the testatator by—

Mr. *Cooper*, for the plaintiffs;

Mr. *McDonald*, for defendants *Saxon* and wife;

(*a*) 3 Hare 85. (*b*) 9 Hare 62.

1856.

Christie v. Saunders.

Mr. *Barrett* for defendant *Clements*;

Mr. *Morphy* for defendants *Jenkins* and wife.

Rancliffe v. Parkyns, (*a*), *Welby v. Welby* (*b*), were referred to, amongst other cases.

The judgment of the court was delivered by—

Judgment.

ESTEN, V. C.—I have looked at the cases cited by Mr. *McDonald*, but they do not appear to me to govern this case. They establish the rule that when property is given to children or others, payable at twenty-one, or marriage, but not in the lifetime of persons having life-interests in the fund or life annuities payable out of it, and there is a gift over in case they shall die respectively before their shares become payable, the words "to become payable," are to be construed as referring to the periods of attaining twenty-one, or marriage, when, so far as the child is concerned, the share is payable, its payment being postponed when the tenants for life and annuitants happen then to be alive, only for the protection of their interests. In these cases there are two periods to which the terms of the gift over may be referred—namely, one, the time of actual payment; the other, the time of the child attaining twenty-one or marrying; and reason strongly dictates that they should be applied to the latter, when the child is competent to receive payment. The object in all these cases is to give the child an absolute interest at twenty-one or marriage. In the case now under our consideration there is no allusion to the time of attaining twenty-one, or marrying. If the property had indeed been given to Mrs. *Christie* during her life, and after her death to the daughters and niece, payable or enjoyable at twenty-one or marriage, with a gift over in case they should die before attaining their respective legacies, probably the construction estab-

(*a*) 6 Dow. 149. (*b*) 2 V. & B. 191.

1856.

Christie v. Saunders.

lished by the cases that were cited would have been adopted; but such is not the case: the property is simply given to Mrs. *Christie* for life, with remainder to the daughters and niece equally, with a gift over in case they should die before obtaining their respective legacies. There is but one period to which the terms of the gift over can be referred—namely, the death of the tenant for life, upon which event they were to obtain: that is, to enter into the possession or enjoyment of the property given to them; unless, as was argued by the learned counsel for Mr. and Mrs. *Saxon*, they can be referred to the death of the testator. But I think such a construction wholly untenable. Had the testator been providing for the death of the daughters and niece in his lifetime, he would have used different language; and I am convinced he was providing for an event that was to happen after his death. The result is, that the daughters and niece respectively take estates for life to their separate use, with a power of appointment in case they marry and have children, with remainder in default of and until appointment to them respectively in fee; but in case they die in the lifetime of the tenant for life, then (still in default of appointment) to the other children of Mr. *Clements*. This disposition is not an unreasonable one. The testator means that if his daughters and niece ever enter into possession of the property given to them they should keep it; but if they die before they got possession of it, the ulterior objects of his bounty become entitled to it. Meanwhile, if they marry and have children, they have power to provide for them so as to override the gift over, even if they die in the lifetime of the tenant for life. It is true that they and their husbands may alienate their reversion although they have not children, but such alienation would be subject to the gift over; while any appointment to or in favour of children, or it seems others, in case they had children, would override the ulterior gift.

Judgment.

1856.

CASEY v. JORDAN.

Dec. 18 1855, and Mar. 17 1856.

Grantees of the Crown—Registry Act.

The registry acts do not apply to instruments executed previously to the grant from the Crown. Where, therefore, the locatee of land executed a bond to convey, and after the issuing of the patent sold and conveyed the property to a third party, who again sold and executed a conveyance to a purchaser for value; but before either had paid his purchase money the holder of the bond, having registered the same, filed and served a bill for specific performance—*Held*, that neither vendee was in a position to plead a purchase for value without notice, and that the plaintiff was entitled to a specific performance with costs.

This was a bill by *Sarah Casey* against *James Jordan*, *John Ward* and *Thomas Gilbert*, setting forth that on the 12th of March, 1846, *Thomas Callinan* being entitled as locatee of the Crown to the south half of lot No. 11, in the 2nd concession of Mosa, sold the same to one *George Elliott*, who paid him therefor, and received from *Callinan* a bond to convey the same; that on the 6th of July, 1846, the patent from the Crown was taken out by *Elliott*, and remained in his possession till his death, and since then in that of the plaintiff, his sole heiress at law.

Statement.

The bill further alleged that *Callinan* after executing the bond left the province, and never returned thereto, or executed a deed of the property to *Elliott* or the plaintiff according to the condition of said bond, which had been duly registered on the 11th of November, 1853, in the county were the land lies; that in the said month of November the defendant *Ward*, though he knew or had notice of the claim of the plaintiff, prevailed upon *Callinan* to sell him his interest in the said property; and afterwards, representing himself to be the agent of *Callinan*, sold the property to the defendant *Jordan*, and in pursuance of a power of attorney in that behalf from *Callinan* executed a deed of the property to *Jordan*, for the sum of £150; £50 being paid down, remainder secured by mortgage on the premises to *Ward*.

1856. Casey v. Jordan.

The bill charged that *Jordan* at the time of the agreement with *Ward*, had notice of the plaintiff's claim upon the property, and that the registry of the bond was alone sufficient notice from the time of such registry, and that *Jordan* had subsequently sold to the defendant *Gilbert*, who had also notice of the plaintiff's claim.

The bill prayed a specific performance of the contract, and for other relief, should it appear, as was alleged by the defendants, that *Elliott* had only a lien upon the land for money due him.

The defendants answered—*Gilbert* and *Jordan* denying notice; *Ward* alleging that he had been informed *Elliott* held the land in security merely, for about £20.

The evidence shewed that the bond had not been registered until after the deed to *Jordan* had been registered.

Argument. *Mr. Mowat* for plaintiff.

Mr. R. Cooper for defendants.

March 17th. Judgment. THE CHANCELLOR.—This is a bill for the specific performance of a contract for the sale of 100 acres of land in the township of Mosa, entered into in the year 1846. *Thomas Callinan*, being entitled to the premises in question at that period, as locatee of the Crown, became bound to *George Elliott*, through whom the plaintiff claims, in the penal sum of two hundred pounds, with a condition for the conveyance of the property in question to *Elliott* within six months from the date of the bond, or so soon thereafter as the patent should be issued. Letters patent were issued in the course of that year in favour of *Callinan*, but he left the province without having conveyed the property to *Elliott* in pursuance of this contract. On the 8th

of November, 1853, *Callinan* conveyed the premises in question to the defendant *Jordan;* and on the 25th of the same month *Jordan* conveyed them to the defendant *Gilbert*, and both deeds were registered about the time of their execution. 1856. Casey v. Jordan.

The plaintiff's right to relief is resisted on two grounds—first, because the plaintiff's unregistered contract is fraudulent and void, under the registry laws, as to the defendants, who claim under deeds duly registered without any actual notice of the plaintiff's equitable title: secondly, because the court will not take any steps against these defendants, who have acquired the legal estate, and are purchasers for value without notice.

Having considered the case since the argument, we retain the opinion which we then expressed, that the defence fails on both grounds. The case is not affected by the registry laws, because none of them apply to instruments executed previous to the grant from the crown. That is so, clearly, as to the earlier statutes, and if the proper construction of the recent act (*a*) can be said to be doubtful in that respect, it is unnecessary to express an opinion on the point, for the statute is limited in its operation to instruments executed after the 1st day of January, 1851, and can have no effect, therefore, upon the contract under which the plaintiff claims, which was entered into in 1846. That the second ground of defence fails also, is equally plain, because it is clear upon the evidence that the bill in this cause had been filed and served upon all the defendants before any one of them had paid his purchase money. There must be a decree, therefore, for the plaintiff with costs. Judgment.

ESTEN, V. C.—It seems that the bond must be considered to have been given for valuable consideration

(*a*) 13 & 14 Vic. ch. 61, sec. 3.

1856.

Casey v. Jordan.

and I am of opinion that it is not void by force of the Registry Act, and the defendants are none of them in a position to plead a purchase for value without notice, not having paid their purchase money.

SPRAGGE, V. C.—Concurs.

Per Curiam—Decree for plaintiff, with costs.

aff. on appeal 7 Gr. 270

ARKELL v. WILSON.

Mortgage—Irregularity—Nullity.

Dec. 14 1855. and May 17, 1856.

In a foreclosure suit, the defendant, after having been arrested for contempt in not answering, employed the agent of the solicitor for the plaintiff to defend the suit; and after several proceedings by consent a decree was made, directing the money to be paid on the 25th day of May, 1841. Three days before the time appointed for payment the plaintiff died; and the solicitor, acting in the cause, subsequently obtained an order appointing a new day for payment, and afterwards the final order for foreclosure by consent, without having revived the suit and without taking any notice of the death of the plaintiff. The representative of the plaintiff afterwards conveyed to the trustee for the creditors of his ancestor, and he sold to a third party, who again sold to the solicitor of the plaintiff, through whose agent all the proceedings had been taken, but who was himself ignorant of the defects existing therein. The defendant in the cause having died, his widow and devisee, about twelve years afterwards, filed a bill to redeem, setting forth the above facts.

Held, [per Blake Chancellor,] that the proceedings after the death of the plaintiff were nullities: that the solicitor must be taken to have had notice thereof, and that the right to redeem had never been foreclosed.

But Held [per Spragge, V. C.,] that the proceedings were merely irregular: that the solicitor was a purchaser for value without notice, and was not bound by the facts within the knowledge of his agent, and that under the circumstances the right to redeem had been extinguished.

Esten, V. C., having been counsel in the original cause, gave no judgment.

The bill in this cause was filed on the 14th of October, 1854, (and after answer put in, was amended in October, 1855,) by *Mary Arkell* against *John Wilson* and *Elthan Paul*, the statements of which clearly appear in the judgment, and prayed an account of rents and profits, and redemption on payment of what should be found due.

The defendants answered; and the cause having

been put at issue, evidence was taken. The plaintiff was examined on behalf of the defendants; and the defendant *Paul* had been examined by the plaintiff. The nature of the evidence, as also the points relied on by counsel and the authorities cited, appear sufficiently in the judgment of the court.

1856.
Arkell v. Wilson.

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

Mr. *Mowat* for defendants.

In addition to the cases mentioned in the judgment, *Furnival* v. *Bogle* (*a*), *Boddy* v. *Kent* (*b*), *Nash* v. *Hayes* (*c*), *Gregson* v. *Oswald* (*d*), *Thompson* v. *Judge* (*e*), *Jolland* v. *Stainbridge* (*f*) were referred to.

May 12. Judgment.

THE CHANCELLOR.—This suit is brought for the redemption of a farm in the township of Southwold, containing four hundred acres and upwards, under the following circumstances. *Henry Arkell*, the plaintiff's testator, was the owner in fee of the premises in question in the year 1834, and by an indenture dated the 26th of November in that year, he conveyed them to one *Lucius Bigelow*, through whom the defendants claim in fee, to secure the sum of £850, payable within two years from the date of the mortgage. *Lucius Bigelow*, the mortgagee, filed his bill of foreclosure in this court, and in that suit Mr. *Wilson*, one of the present defendants, was the plaintiff's solicitor, but the proceedings were conducted throughout by Mr. *Maddock*, who was at that time Mr. *Wilson's* town agent. *Arkell* failed to enter his appearance; and a writ of attachment was in consequence issued against him on the 27th of June, under which he was arrested for his contempt by the sheriff of the County of Middlesex. The steps subsequently taken to enforce this process do not appear; but on the 27th of August

(*a*) 4 Russ. 142. (*b*) 1 Mer. 361. (*c*) 2 Hogan 286.
(*d*) 1 Cox 348. (*e*) 2 Dru. 414. (*f*) 3 Ves. 478.

1856.
Arkell v. Wilson.

Arkell, being still in custody, as I believe, retained Mr. *Maddock* as his solicitor in the foreclosure suit.

The ulterior proceedings were neither in accordance with the practice of the court, nor conducted with due attention to the interests of the defendant. Under various petitions presented on behalf of the plaintiff by Mr. *Maddock*, and by him assented to on behalf of the defendant, the cause was brought to a hearing as a short cause upon bill and answer, on the 7th of November, 1839, when the usual decree of foreclosure was pronounced.

On the 26th of December a further petition was presented on behalf of the plaintiff, praying that the decree might be amended, by inserting therein a direction to the master to tax to the plaintiff his costs of an ejectment brought to obtain possession of the mortgage property; and although no case was made for such a direction upon the pleadings, that petition was assented to by Mr. *Maddock* on behalf of the defendant, and the decree was altered accordingly. But whilst Mr. *Maddock* felt himself at liberty to consent to this alteration of the decree in favor of the plaintiff, he seems not to have felt that it was his duty to the defendant to have insisted at the same time upon an account of the rents and profits, which would have been obviously proper; and in consequence of that omission the defendant was charged in account with the costs incurred by the plaintiff, but was not credited with the rents and profits received by him.

Judgment.

The mortgage money was made payable at the office of Mr. *Maddock* on the 25th of May, 1841, but previous to that time—namely, on the 22nd of May, the plaintiff died, and the suit became thereby abated. But no objection is taken on that ground; on the contrary, a petition was presented on the 20th of November, in the name of *Lucius Bigelow*, who had been

many months dead, praying that the time for payment of the mortgage money should be enlarged till the 1st day of January, 1842, which, by consent, was ordered accordingly.

It is said, however, that Mr. *Maddock* remained ignorant of the plaintiff's death until the proceedings in the suit had been finally closed. I am sorry to be obliged to say, that the evidence before us does not appear to me to afford any just grounds for that conclusion. Amongst the papers laid before us is the draft of a power of attorney from the plaintiff to Mr. *Maddock*, authorizing him to receive this mortgage money, which, from the statements contained in it must have been prepared long after the plaintiff's death. Now it must be assumed, I think, that Mr. *Maddock* took some steps to have this document executed, because without it he could not obtain the final order of foreclosure; and, assuming him to have taken such steps, what ground has been laid to lead us to doubt that he ascertained the truth. A year elapsed between the time fixed for payment of the mortgage money and the date of the final order. Is it to be believed that, during that long interval Mr. *Maddock* did not make some attempt to put himself in a position to move for that order? and, assuming him to have made that attempt, it must be intended, in the absence of any evidence to the contrary, that the death of his client was well known to him on the 30th of December, 1842, if not long before; and yet he consented on that day that a final order of foreclosure should be drawn up against his client the defendant, upon a petition presented in the name of the plaintiff, who had been nearly two years dead. That order was obviously improper on several grounds: First—Neither the plaintiff, who had been then long dead, nor any person having any semblance of authority from him, had attended at the time appointed for payment of the mortgage money, and therefore the necessary founda-

Judgment.

1856.

Arkell v. Wilson.

tion for such an order was wholly wanting. Secondly —Although the plaintiff had been then alive and had attended, no such order would have been made against the defendant without a further reference to the master and a new day; because the plaintiff had been then in possession more than three years, and a new account had therefore become necessary (*a*). Lastly—Viewed as an application in an abated suit, it was a fraud upon the court as well as upon his own client.

That the proceedings were irregular, and in other respects highly objectionable, is not denied; but it is said that according to the practice of the court a solicitor may be concerned for all parties, and it is argued that the defendant was conclusively bound by the final order of foreclosure drawn up with the consent of Mr. *Maddock*, his duly authorized solicitor. It must be admitted that the rule which prevails in courts of law by which attornies are precluded from acting for both sides, even by consent of parties, (*b*) has not been adopted in this court; but I must add that the adoption of a different rule in courts of equity has been productive, in my opinion, of much mischief. Experience has convinced me of the wisdom of Lord *Eldon's* opinion, (*c*) "that a general rule that neither a solicitor by himself or his partner, nor a clerk in court, should be employed on both sides, would be extremely beneficial;" and I believe that such a rule ought to be at once adopted. But the practice, as at present understood, does not warrant the proposition that a solicitor may be engaged on both sides when, as in the present case, the parties are hostile and their interests adverse. The contrary is clear; and I entertain no doubt whatever that if this had been a question between the parties to that suit, the proceedings must have been set aside.

Judgment.

It is said, however, that *Lavicount*, *Paul* and

(*a*) Buchanan v. Greenway, 12 Beav. 355.
(*b*) Anon. 7 Mod. 47, Simon Mason's case, 1 Free. 74.
(*c*) Dyott v. Anderton, 3 V. & B 178.

1856.

Arkell v. Wilson.

Wilson were successively purchasers for value without notice; and it is argued that they are in the same position as purchasers under a sale by the authority of the court, and cannot be affected by any irregularity in the conduct of the same; and *Bowen* v. *Evans* (*a*) and *Davenport* v. *Stafford* (*b*) were cited as authorities for that proposition, to which may be added *Calvert* v. *Godfrey* (*c*) at the Rolls. Assuming the final order of foreclosure to be irregular merely, the causes which were cited go far to establish the proposition for which the defendants contend, if they can be regarded as purchasers under a sale directed by a decree of the court. But I am not prepared to admit that the defendants stand in that position. None of the cases to which we were referred establish that; and certainly the principles of public policy upon which sales under decrees have been established, notwithstanding irregularities (*d*), have no application to a case like the present, where the sale has not been directed by the court and the decree constitutes a mere link in the vendor's title.

Judgment.

It is unnecessary, however, to determine that point; for I am of opinion that the plaintiff's equity of redemption was never foreclosed, inasmuch as the final order drawn up in the abated suit was a mere nullity. That point was determined by Vice-Chancellor *Wigram* in *Lee* v. *Lee*, (*e*) upon reasons which appear to me satisfactory; and *Bowen* v. *Evans*, which was much relied on, cannot be regarded, I think, as an opposing authority; on the contrary, the guarded manner in which Lord *St. Leonards* expressed himself in that case appears to me to confirm the position taken by the Vice-Chancellor in *Lee* v. *Lee*. It is said at page 247: "As to the abatement, when a purchase has been made under a decree, and everything arranged except

(*a*) 1 J. & L. 178.
(*b*) 8 Beav., 503.
(*c*) 6 Beav., 97.
(*d*) Bennett v. Hamill, 2 S and L, 566.
(*e*) 1 Hare, 617.

1856.

Arkell v. Wilson.

the execution of the conveyance, which is delayed by accident or negligence until the abatement; when the court, acting in the abated cause with the parties before it really interested, authorizes the deed to be executed and the purchase to be completed, I should be sorry to hold that the abatement is to operate to suspend the title of the purchaser." And in a case recently determined (*a*) the Master of the Rolls assumes that an order of this sort obtained after the death of the plaintiff would be a mere nullity. "It is contended," he says, "on behalf of the plaintiff, that this is to be treated exactly in the same way as if *Davis* had not died; in which case the decree of foreclosure made against him after his death would, in point of fact, have been a mere nugatory proceeding and of no value."

Judgment.

But it is said that these defendants purchased successively under the belief that the final order of foreclosure was a valid and binding order; and it is argued that the defendants are therefore entitled to the protection of the court as purchasers for value without notice, whether that order is to be regarded as irregular merely or as wholly void. I would be disposed to accede to that argument if I were satisfied that the defendants were purchasers without notice, actual or constructive, of the invalidity of the order. But I have been unable, on several grounds, to bring myself to that conclusion. A purchaser, to adopt the language of Lord *Hardwicke* in *Martin* v. *Joliffe*, (*b*) "is bound to take notice of everything necessary to make out his title." In *Jackson* v. *Bown* (*c*) Sir *John Leach* applied that rule, and assigned the reason for it in these words: "It must be intended upon these pleadings that the title of the plaintiff's mother to the estate in question depended wholly upon the settlement; and

(*a*) Wood v. Turo, 19 Beav., 554. (*b*) Amb. 311.
(*c*) 2 S & S, 472, and see Worthington v Morgan, 16 Sim. 547.

1856.

Arkell v. Wilson.

the defendant's father, like every other purchaser, was bound to use due diligence in the investigation of the title before he accepted the conveyance of the estate. With due diligence he must have discovered the root of the title, and that his intended wife had only a life estate; and although he may in fact have been ignorant of the settlement, according to the averment of the plea, yet in equity he must be bound with all the knowledge which it was reasonable he should acquire: and the plea is therefore disproved by the implied notice. If it was otherwise, a mere disseisor would have a marketable title." This rule is laid down by Sir *Edward Sugden* in this way: (*a*) "In all cases where a purchaser cannot make out a title but by a deed which leads him to another fact, whether by description of the parties, recital or otherwise, he will be deemed conversant thereof; for it was *crassa negligentia* that he sought not after it; and, for the same reason, if a purchaser has notice of a deed he is bound by all its contents." *Bisco* v. Earl of *Banbury* (*b*) is a remarkable instance of the application of that rule. In that case the purchaser had notice of *a specific mortgage*, but the deed creating this mortgage referred to other incumbrances, and the question was whether the purchaser was to be affected with notice of the incumbrances which the deed creating the mortgage disclosed. Upon that the Lord Chancellor says: "The purchaser could not be ignorant of the mortgage, and ought to have seen that, and that would have led him to the other deeds in which, pursued from one to another, the whole case must have been discovered to him." And *Coppin* v. *Fernyhough* (*c*) may be referred to on the same subject.

Judgment.

Now the defendants in the present case claim under *Lawrence Bigelow*, who makes title as heir-at-law of *Lucius Bigelow*, the mortgagee. They were entitled

(*a*) 2 Sug. V. and P., 1056, 11 Ed. (*b*) Ca. in Ch., 287.
(*d*) 2 B. C. C., 291.

1856.

Arkell v. Wilson.

therefore to require proof of the death of *Lucius Bigelow* intestate. In England the ordinary evidence would have been, I believe, a certificate of burial, and here a purchaser is entitled to an affidavit at least; and being entitled to call for proof it must be intended, I think, at least in the absence of evidence to the contrary, that they received all the information which they were entitled to require. It must be intended, therefore, that they were informed of the date of *Lucius Bigelow's* death, a fact which does not seem to have been involved in any doubt or uncertainty; and knowing the date of *Lucius Bigelow's* death, they must be held to have known that the order of foreclosure pronounced two years after that event was void and ineffectual to bar the mortgagor's equity of redemption. (*a*)

Judgment.

But it is not necessary to rest the plaintiff's case upon that ground alone, the evidence to which I am about to refer appears to me to relieve the case from all difficulty, establishing, as I think it does, either actual notice or such circumstances as ought to have put the parties upon further enquiry.

Before adverting to the evidence, I may observe that the defendants cannot shelter themselves under the conveyance to *Lavicount*. He claims under a mere quit-claim deed in consideration of five shillings, and cannot be regarded, therefore, as a purchaser for value. But though that were otherwise, many of the objections to *Paul's* purchase will be found to apply with equal force to the earlier transaction.

As to *Paul's* purchase I would observe, in the first place, that it was made at a great under-value. It is established, I think, upon his own statement, that the price paid was not more than one-sixth of the then

(*a*) Ferrars v. Cherry, 2 Ver. 384; Hamilton v. Boyse, 2 S. & L. 315; Hansard v. Hardy, 18 Ves. 455.

value of the property. Then it is clearly made out, I think, that *Arkell* claimed a right to redeem at the time of *Paul's* purchase, and that *Paul* was well aware of that fact. This does not rest upon the direct testimony of *William Arkell*, the admission in *Paul's* examination quite satisfies my mind upon that point. He says: "*Arkell* called on me at my house a second time, but I think that was after I saw *Gates*, and, as I think, in the fall of 1852. He then said he was going to try and get the property back, but upon what ground he did not state; and I made no enquiry and knew nothing of it." And again he says: "There had been a great deal of talk about the *Arkells* bringing a suit, and I did not want to go through with it. I think it likely I made this remark to Mr. *Hughes* before I sold to him. The neighbours were always saying that *Arkell* would commence a suit, and that they thought he could make out a claim; and I think I remarked that to *Hughes* and *Wilson*, but *Wilson* always said that the title was perfectly good. I did not know at that time what claim *Arkell* had."

Judgment.

There is some discrepancy as to the time when *Arkell* advanced this claim. *Paul* says that it was in the fall of 1852, subsequent to the execution of the first deed from *Lavicount* to himself. Upon that he is contradicted, and there are circumstances which incline me to think Mr. *Arkell's* statement to be correct. But the point is really immaterial; for it is admitted that the last instalment of *Paul's* purchase money was not payable until April 1854, and the notice was clearly long prior to that. For the rest, it is clear, I apprehend, that the claim advanced by *Arkell* was a right to redeem. The suit spoken of can have been no other than a suit to redeem, and the parties, in my opinion, must have so understood it.

But the deed of the 19th of May, 1853, under which the defendants claim, has a very material bearing upon

1848. this case, whether we view it as one of actual or constructive notice. Not only is that deed, as I before observed, a mere quit-claim, without consideration and without covenants, but it contains, moreover, a clause of the most unusual kind, in these words: "But it is to be hereby expressly understood that nothing herein contained is to be read or construed as containing any express or implied covenant for title, or otherwise than as conveying the interest in the said lands which may be vested in the said *Lawrence G. Bigelow*, as heir-at-law, as aforesaid." Now there is room to argue that the clause which I have extracted from that deed was in itself express notice of the infirmity of *Lawrence Bigelow's* title. I am disposed to think it was. But however that may be, I have no doubt that it was quite sufficient, coupled with the other circumstances to which I have adverted, and considered in connection with the claim to redeem openly advanced by *Arkell*, to have put the parties upon further inquiry; and having failed to make that inquiry, they are chargeable, I think, with what has been termed wilful blindness. (*a*) I am of opinion, therefore, upon this part of the case, that notice, either actual or constructive, or perhaps both, has been clearly established against *Paul*.

Arkell v. Wilson.

Judgment.

But the most important witness on the point is *Murdoch McKenzie*, as to whose evidence there is no room for doubt. He swears that *William Arkell* knew, in February, 1854, that the final order of foreclosure had been obtained after *Bigelow's* death; that the witness came to Toronto about that time with *William Arkell* to take advice upon the subject; that Mr. *Vankoughnet* was consulted, and gave a written opinion that the final order of foreclosure obtained after *Bigelow's* death was ineffectual, and that *Arkell's* devisee had therefore a right to redeem; that the witness saw *Paul* a few days after the receipt of Mr.

(*a*) Kennedy v. Green, 3 M. & K. 699.

1856.

Arkell v. Wilson.

Vankoughnet's opinion, and informed him—to use the language of the witness—"that they had been at Toronto, and had taken the opinion of what they thought the most eminent men, who advised them that the equity of redemption was still in the family;" and that *Paul* on that occasion requested the witness to inquire what arrangement the family would make; but that he subsequently sold to *Wilson* without any further communication as to the proposed settlement. Now it does seem to me, I must confess, impossible to maintain that *Paul* was a purchaser for value without notice, in the face of that evidence.

With respect to the principal defendant, Mr. *Wilson*, the case is somewhat different. He paid a full consideration, and acted, I have no doubt, in the belief that *Paul's* title was perfectly good. But the evidence against him is in some respects strengthened. He was the agent of *Lucius Bigelow* in the foreclosure suit, and was aware, as he states in his answer, of the impropriety of Mr. *Maddock's* conduct, which he very properly resented by declining to employ Mr. *Maddock* any longer as his agent. That circumstance occurred, certainly, many years before the sale; but, keeping in mind that Mr. *Wilson* was purchasing under the decree in that very suit, it must not, I think, be overlooked. Then Mr. *Wilson* acted as *Paul's* professional adviser throughout the whole of his negotiations for the purchase of this property. *Paul* says, "Mr. *John Wilson* was my attorney in carrying out the contract. I acted throughout on his advice." The deeds of the 19th of May, 1853, were proven through his instrumentality; Mr. *Hughes*, his partner, was the subscribing witness; and the proper conclusion from the evidence appears to me to be, that Mr. *Wilson* had as full notice of the claims advanced by *Arkell* as *Paul* himself had. Lastly, the circumstances upon which *Paul* must be fixed, as I have already determined, with constructive notice, apply with much more force to Mr. *Wilson;*

Judgment.

1856.
Arkell v. Wilson.

because, as a professional man, he was much more capable of appreciating their effect. I am of opinion, therefore, that the defence fails as to Mr. *Wilson* also, and that the plaintiff is therefore entitled to our decree.

I have the misfortune to differ with my brother *Spragge* in this case; and, differing from him, I cannot but distrust my own judgment. Striving to free myself from all bias, I may have been betrayed into the very error I wished to avoid. I have not been able, however, after the most attentive consideration of the case, to bring my mind to the same conclusion. But it is my consolation to know that the cause must be disposed of by a higher tribunal, where any error into which I may have fallen will be corrected.

Judgment.

SPRAGGE, V.C.—The point upon which I find myself unable to agree with his lordship the Chancellor is, that the defendant is affected with notice that the suit of *Bigelow* v. *Arkell* had abated before the final order of foreclosure was made. The defendant is a purchaser for value, and according to the evidence of *Paul* had paid the whole of his purchase money before the date at which he was informed of the above circumstance.

It is sought to affect the defendant with actual as well as with constructive notice. I had occasion, upon the appeal of the case of *Barnhart* v. *Patterson*, to consider the law in relation to actual notice, and there referred to the authorities, which appeared to me to establish, that a party is not affected with notice merely because a cautious prudent person would, under the circumstances which were brought to his knowledge, have enquired further, and thereby gained further information, such further information being the notice with which he is sought to be charged; but that his negligence must be of so gross a character that a court of equity must treat it as evidence of fraud, and visit it with the consequences of fraud.

1856.

Arkell v. Wilson.

The foreclosure suit of *Bigelow* v. *Arkell* was instituted in 1839; the final order for foreclosure was not obtained until December, 1842. The plaintiff died in May 1841, as was stated by his uncle, Mr. *Goodhue*, but who, as he says, did not ascertain the date of his death until after the commencement of this suit. It does not appear that after the foreclosure *Arkell* made any claim, or asserted any right to redeem until the summer of 1851, with the exception of general expressions to that effect among his family and neighbours.

In the summer of 1851, more than eight years after the final foreclosure, an enquiry was made through *Arkell*, eldest son of the mortgagor, as to who held the property, in order that his father might redeem; he told the defendant that his father claimed a right to redeem if he could find out whom to redeem; but he gave no reasons for his father's claim to have a right to redeem, only that he had been turned out wrongfully. The wrongful turning out, as I gather from the evidence, was upon a recovery in ejectment, before the final foreclosure, and this being made to the defendant, the ground of *Arkell's* assertion of a right to redeem would naturally be treated as an unsubstantial visionary idea, and disregarded accordingly. *Arkell* the son does not appear to have informed the defendant that he wished to enquire as to any particular fact, though I understand from the evidence of Mr. *Goodhue* that he wished to ascertain from him the date of the death of *Bigelow*, the mortgagee; *Arkell* the son was referred to Mr. *Goodhue* by Mr. *Wilson*, as the person most likely to afford him information; and Mr. *Goodhue*, unable to give him the information he sought, referred him to *Lawrence Bigelow* of New Hampshire. I cannot see from the evidence any desire either on the part of Mr. *Wilson* or Mr. *Goodhue* to withhold information from the *Arkells*, but would seem to have directed enquiry to the quarter from which it was most likely to be obtained. It does not appear that Mr.

Judgment.

1856.

Arkell v. Wilson.

Goodhue communicated to Mr. *Wilson* the nature of the enquiries made by the younger *Arkell*.

It was in the autumn of the same year, 1851, that *Paul* was in treaty with the assignees of the estate of *Bigelow* for the purchase of this and other lands; which purchase he completed in the following year. He consulted with Mr. *Wilson* as to the purchase, by whom he was advised that the title was good. I think it is pretty evident that Mr. *Wilson* looked upon the claim of *Arkell* as idle and baseless, resting only in the distempered fancy of a crazy intemperate man. *Arkell* himself seems to have been unable to state any ground for his claim, for he never did so to his son, although, as he says, he asked him to do so as much as fifty times. Indeed, the only reason given—namely, that he was wrongfully turned out of possession—would confirm a professional man in the belief that the claim rested upon no solid ground. This assertion of right, therefore, did not, as I conceive, affect any one, either *Paul* or *Wilson*, with notice.

Judgment.

But the defendant was *Bigelow's* solicitor in the foreclosure suit; and his own client died before the final order was obtained; and the question is, whether he must have known of his death before final foreclosure, or whether it is a fair conclusion from the evidence that he did know of it. The peculiar circumstances attending the management of the suit I need not repeat. I do not find anything to lead to the conclusion that the defendant did become aware of his client's death, and obtained the final order with that knowledge; but I do find from the evidence of Mr. *Goodhue*, uncle of the plaintiff in that suit, that it was he that instructed Mr. *Wilson* in that suit, and became responsible for the costs, and, as he believes, paid them; and that, as far as he knows, the defendant had no communication with his client. The impropriety (or apparent impropriety under the circumstances) of the agent

1856.

Arkell v. Wilson.

in Toronto acting for the defendant as well as the plaintiff, was a matter in which Mr. *Wilson* had no concern, and about which he had expressed his strong dissatisfaction. The final order appearing to be by the consent of the defendant, was in an unusual shape, but was Mr. *Wilson* to assume that it was unauthorized? He was himself unacquainted with Chancery practice, and saw that the court had acted upon the consent, by granting its order upon it. Is it reasonable to say that the inference in Mr. *Wilson's* mind should have been that his client was dead? I confess I think not.

I have somewhat transposed the order of events. The final order of foreclosure was obtained in December 1842. The farm remained in the hands of those claiming under *Bigelow;* and a period of eight years elapsed without any claim being made by the mortgagor in respect of anything being wrong in the proceedings against him; then came the enquiries by the son in 1851 and 1852, and there the matter rested until 1854, upwards of eleven years after the final order for foreclosure; and then, for the first time, is any search made by the *Arkells* into the regularity of the proceedings, and for the first time any objection to them put into a tangible shape. I infer from the evidence that the persistance of the mortgagor in the assertion of his right to redeem created more uneasiness in the mind of *Paul* than of the defendant *Wilson*, and this is natural, because the latter could see more clearly than the former the baselessness of the ground alleged; and if *Paul* had any knowledge or suspicion as to the date of *Bigelow's* death, which he did not communicate to *Wilson* (which, however, does not appear), it would be an additional reason with him for desiring to part with his property.

Judgment.

Be this as it may, it appears that in the spring of 1854 *Arkell* the son ascertained the fact of the death

1856.

Arkell v. Wilson.

of *Bigelow* before the date of the final order for foreclosure, and took counsel's advice upon the subject, by whom he was advised that the equity of redemption was not barred—this was communicated to *Paul*, and *Wilson* was informed by *Paul*, as he *Paul* thinks, that counsel advised that the equity of redemption was not foreclosed, not however of the ground (the abatement of the foreclosure suit) upon which counsel so advised. The notice to *Wilson* consists in this, that *Paul thinks* he told him. I cannot but think it very unlikely. *Paul* confesses that he was anxious to get rid of the property to avoid a threatened litigation, and *thinks* he gave information to an intending purchaser—information which would in all probability induce him not to purchase. I think it extremely loose evidence upon which to fix Mr. *Wilson*, a purchaser for value, with notice.

These last occurrences, and the proceedings in the foreclosure suit, may afford more or less grounds for suspecting that *Wilson* had such reason to surmise that *Arkell* might not be really foreclosed of his equity of redemption, that if he had exercised caution and great prudence he would have enquired further; but, as I think, do not afford sufficient ground for saying that it was gross negligence in him not to enquire further. The enquiries made by *Arkell*, theson, in 1851, would, in my judgment, tend rather to convince Mr. *Wilson* that there was nothing wrong. With regard to the proceedings in the foreclosure suit, we must consider that a practitioner in the town of London, from his imperfect knowledge of the practice of this court, would necessarily confide in his agent in Toronto for the regularity of the proceedings; and that an actual inspection of the papers, if such took place, which would be very unlikely, would fail to inform him that all the proceedings had not been regularly conducted, even when they had not been so.

Judgment.

But, even assuming that it was gross negligence in

1856.

Arkell v. Wilson.

Mr. *Wilson* not to have inquired further, and that further enquiry would have led him to the information that *Bigelow* had died before final foreclosure; it is another question whether such negligence committed by him as a solicitor can affect him as a purchaser on his own behalf, in respect of a purchase not growing out of the same transaction, but made from one claiming only intermediately from the heir of the mortgagee, and made some twelve years afterwards. I think there is great room for doubt, whether, as a subsequent purchaser, he would be so affected; but in the view that I take of the case it is not necessary to decide that he would not.

With regard to the constructive notice with which it is sought to affect Mr. *Wilson*, of the death of *Bigelow* before final foreclosusre, I understand it to be placed upon this ground, that in investigating his chain of title, the death of *Bigelow* and the date of it would form a link in the chain, as the title is traced through *Bigelow's* heir-at-law and afterwards through the final order in the foreclosure suit, and that by comparing the date of that death with the date of the final order, it would be found that the death occurred before the final order, and it would thus appear that that link in the chain of title, the foreclosure order, was defective.

Judgment.

The first question upon this point, I think, is whether a purchaser for value is presumed to have investigated his title by means of a regular formal abstract of title, and is affected with notice of all that must appear upon such an abstract of title. I am not clear that this is to be presumed against him, especially as conveyancing is practised in this country. If, indeed, the grantor claims under a conveyance, or a conveyance is placed in his hands which shews the title to be defective, or if it recites another conveyance which shews the title defective; or again, if he is the assignee of

1856.

Arkell v. Wilson.

a lease which appears to be a renewal, and in the lease of which it is a renewal, or in any preceding lease of which subsequent leases were renewals, a defect appears, he is affected with notice of that defect, and there are some cases which seem to go further; but I have seen none that extends the doctrine of presumptive notice so far as it would be necessary to carry it in this case. But, assuming the legal presumption to be, that Mr. *Wilson* possessed an abstract of title shewing the date of the order of foreclosure and the fact of the death of *Bigelow;* what is the date in relation to *Bigelow's* death that would be necessary to constitute his title? He has a conveyance from his heir-at-law. He would require to be satisfied that the grantor of that conveyance was *Bigelow's* heir-at-law, and of course that *Bigelow* was, *at that time*, dead: the exact date of his death would be immaterial; and might be, and often is in this country, very difficult of ascertainment. This very instance is an

Judgment.

example of this; since this suit has been instituted it has been ascertained that *Bigelow* died in May 1841. Before the suit was commenced it was only known certainly, even to his uncle, his agent in London, to have occurred before October 1843. If made to appear that it occurred any time before the date of the deed from his heir-at-law, that would be the material fact upon which the purchaser would go. He certainly would not assume that it occurred before final foreclosure; he would have a right to presume *prima facie* that the proceedings of the court were correct.

If, in England, it would be presumed that an abstract of title was laid before the purchaser, and that in it the exact date of the death of an ancestor would appear, it would be because it is the universal practice of conveyancers to observe all such forms; but no such presumption can arise here, because no such universal, or even general practice prevails, but is even now of only gradual introduction; but even were it otherwise,

1856.

Arkell v. Wilson.

I believe the presumption would be rebutted, for *Bigelow* died at a distant part of the province, if in the province at all, without, it would seem, wife or child, and the fact of his death was first learned by his uncle, on a visit to New Hampshire, long afterwards, and its date not till thirteen years afterwards.

The tendency of the late English decisions has been to restrict the doctrine of constructive notice; the circumstances of this country, and the comparatively loose manner in which the transfer of property has been, and still is, effected, forbid, I should say, its being applied here in any other than the most cautious spirit, and with a due regard to all the considerations which a different state of circumstances render just and necessary.

Judgment.

I have omitted to notice one point which the counsel for the plaintiff considered of some weight. I allude to the form of the conveyances from *Lawrence Bigelow*, the heir of *Lucius Bigelow*, to *Lavicount*, the assignee of the creditors of *Lucius:* there were three conveyances, the first of the assets of *Lucius* to which *Lawrence* might be entitled: the other two of real estate; the first conveying generally all lands in certain townships of which *Lucius* died seized, without describing them by number of lots or otherwise; in the other of the two, the lands were described in a manner which enabled the grantee to register the deed. The conveyance expressly provides against *Lawrence* being liable for defects of title. I can see nothing suspicious in there being the two deeds of the real estate, nor anything suspicious in the provision to which I have adverted in the second deed; for, unless he received a valuable consideration for the estate descended, which does not appear to be the case, it was reasonable that he should take care not to be liable for defects in title. He was probably satisfied

1856.

Arkell v. Wilson.

that the debts of his deceased brother would absorb the property, and desired rather to facilitate than obstruct their being applied to that purpose.

I am certainly far from convinced, taking the circumstances separately, or looking at them altogether, that Mr. *Wilson* had notice of the defect which forms the ground of this suit: I cannot say that I have a belief that he had. But even a strong suspicion will not suffice.

It has been assumed by the plaintiff's counsel that *Arkell* the mortgagor suffered a great wrong. Great wrong may have been done by the solicitor whom he employed in the suit; but if he could succeed in this it would be the mere result of the accident of the death of *Bigelow*, for it is not pretended that he was ever prepared to pay the mortgage money in pursuance of the Master's report, and the proper consequence of default in payment is foreclosure. Strictly, in order to foreclosure, there must be an attendance to receive at the time and place appointed, as well as default in attendance then and there to pay; the defaulter has but little to complain of in a moral point of view, for an attendance by the mortgagee to receive, would have been an attendance in vain. He would, of course, be entitled to the benefit of the objection except against a purchaser for value without notice; but the benefit is, after all, rather a technical than a meritorious one.

Judgment.

Upon the point, therefore, to which I have directed my remarks, I am compelled, though with great distrust of my own judgment, to differ from his lordship the Chancellor.

In the view which I have taken of this case, I have not found it necessary to remark upon the great delay that has taken place, except incidentally, in reference to notice; but I do not mean to say that it is unimpor-

tant in other views, for it has disabled the defendant from obtaining the evidence or even the explanations of Mr. *Maddock*, by the absence from the province and subsequent death of that gentleman. 1856. Arkell v. Wilson.

BURR v. GRAHAM.

Mill site—Riparian proprietor.

The owner of a mill dammed back the water of a river so as to overflow land of the person owning the lot next above him, who filed a bill for an injunction to restrain such overflowing, on the ground, amongst others, that it prevented him building a mill on his land: it being doubtful on the evidence whether or not the party complaining had a mill site upon his property, an enquiry was directed on that point

The bill in this case was filed by *Rowland Burr* and *William Tyrrell* against *William Graham* and *William Barrons* for an injunction to restrain the defendants from damming back the water upon the property of the plaintiff *Burr* and leased by him to the other plaintiff. The circumstances out of which this case arose appear sufficiently in the report of the case of *Graham* v. *Burr*, ante vol. iv. p. 1. Statement.

Mr. *Barrett* for the plaintiffs.

Mr. *McDonald* for defendant *Barrons*.

Mr. *Cooper* for defendant *Graham*. Argument.

The judgment of the court was delivered by

SPRAGGE, V. C.—It is not denied that the defendants' dam has the effect of backing the water upon lot 33, the property of the plaintiff *Burr*. The defendants claim a right to do so to the extent of raising the water at the division line between lots 32 and 33 to the height of one foot above the ordinary level, on the ground of a license from the last owner of lot 33, *John* Judgment.

1856.

Burr v. Graham.

Cunningham, upon the faith of which the defendant *Graham* says he incurred large expenses in the building of his mill; and also on the ground of acquiescence by *Cunningham*, under whose observation, it is said, these expenses were incurred, and who actually assisted by his son and his oxen, in constructing the dam by which the water has been raised. If the license or acquiescence were sufficiently established so as to be binding upon *Cunnigham* and those claiming under him, it would become a material question whether the stipulated height was exceeded; but I think that neither express license nor acquiescence is proved. The license being, as it was, verbal only, and therefore not available as a defence at law, and being at the best ambiguous anduncertain in its terms, could hardly have been relied upon by *Graham* as warranting him in the expenditure of money upon the faith of it. And it appears by the evidence of *Swinerton*, the millwright, under whose advice *Graham's* mill was placed

Judgment.

and constructed where it stands, that it was placed where it is without any reference to any supposed license from the owner of lot 33, and would have been placed in the same position if permission to back water on lot 33 had been absolutely refused. The permission granted by *Cunningham* upon *Graham's* formal application for leave to raise water to the height of a foot on the division line, appears to have consisted in his answer to *Graham's* application to the effect, that "a foot was neither here nor there," adding, as he says, and his wife confirms him, "if it would not hurt him;" and even this half assent to *Graham's* application was revoked by *Cunnigham* within a few days afterwards. He appears to have been understood by some witnesses to have spoken of his assent to *Graham's* application as more unqualified than as represented by himself; but if he did so in a casual conversation, it should not bind him, and there is nothing to shew that that conversation did not occur in the interval between his answer to *Graham's* application and his refusal to

allow him to back water upon his land. His son with his oxen assisting in completing the dam, though with his knowledge, amounts to nothing, unless the necessary and patent consequence of the act would be to back water upon lot 33. The dam was what is called a brush dam, and the water found its way through the brush after the top log was placed on the dam, and at that time the water was not backed upon lot 33. I think that the defendant has failed in establishing that *Cunningham* either licensed the backing of water upon his lot, or sanctioned it by his acquiescence.

The fact of the water being backed upon lot 33, and to a height greatly exceeding the point contended for is shewn, I think, very clearly—I think to the height of 3 feet 4 inches, and probably still more. Some witnesses, indeed, speak of the water not being raised to so great a height; but the discrepancy may be accounted for by the lowering of the dam or the removal of one or more bracket boards at the period of their inspection.

Judgment.

In regard to the water power on lot 33 being such as to constitute what is called a water privilege, and the position of the plaintiff who has not availed himself of it if it exist; it is in evidence that, taking the water power to be sufficient, the proper site for the building is so saturated with water, if not actually overflowed, that a mill cannot be placed there until the water is drawn down; and there is some evidence—as much, I think, as could reasonably be expected—of the intention of the plaintiff to use his mill privilege when relieved from the back water caused by the defendants' dam.

Upon the point whether there is a mill privilege upon lot 33, the evidence appears to be defective. The natural fall of water across the lot is stated by Mr. *Dennis* to be 4 feet 8 inches, and less than that according to the evidence of Mr. *Thomas Ellis*, who

1856.

Burr v. Graham.

seemed to be a competent judge of such matters, would be sufficient; but whether a sufficient fall of water is the only necessary condition, or whether it must be combined with a suitable configuration of the river banks, or whether the land is in fact suitable, is not shewn; we only know what is the fall of the water: no witness says that there is a mill privilege on the lot, though from what witnesses do say it probably is so. I think that there should be an enquiry upon that point, or that the cause should be brought on again upon further evidence in relation to it.

Judgment.

I express no opinion as to whether the injuiry to the plaintiffs' property is not of such a nature as ought to be restrained by injunction, apart from the question of there being a mill privilege upon it. The case made by the bill is for an injury to the water power.

RIGNEY v. VANZANDT.

Accommodation acceptor—Execution creditor.

The holder of certain accommodation drafts, after having obtained judgment and execution against the payee thereof, was paid the amount of them by the accommodation acceptor, and thereupon expressed his intention of directing the sheriff to credit that sum on the execution in his hands, the amount of which he had made by sale under execution of the goods of the payee, for whose accommodation the bills had been negotiated. The acceptor hearing of this, gave the sheriff notice of his claim, and filed a bill to compel the payment of the amount which he had advanced. *Held*, that as surety the acceptor had a right to receive the amount of his claim out of the proceeds of the execution, to the exclusion of the subsequent execution creditors.

Statement.

By the pleadings and evidence in this cause, it appeared that the agent of the plaintiff resident in Canada had drawn certain bills amounting to £802 10*s.* upon the plaintiff in favor of the defendant *Fuller*, for his accommodation and without any consideration therefor; that during the currency thereof *Fuller* endorsed the bills to the defendant *Vanzandt*; and about the same time had executed a confession of

judgment in favor of *Vanzandt* for £2659 7*s.* 6*d.*, in which sum was included the amount of bills which had been drawn on the plaintiff; that execution was issued thereon and goods seized to an amount greatly exceeding the sum due on such execution; that *Vanzandt* after these had been taken, applied to the plaintiff and obtained payment of the drafts so drawn upon him at their maturity; that upon ascertaining what had been done, plaintiff applied to *Vanzandt* for re-payment of the amount paid to him, or that plaintiff might be subrogated to his rights under the execution in the hands of the sheriff to the extent of the £802 10*s.*, which he refused to comply with, but expressed an intention of waiving all claim in respect thereof under the execution, and of directing the sheriff to credit that amount upon the execution in his hands at the suit of *Vanzandt*, the effect of which the bill alleged would be to make that sum payable to the defendants *Crandall* and *Bradley*, who had an execution in the hands of the sheriff to an amount exceeding all that would remain of the moneys made by the sheriff after payment of what remained due to *Vanzandt* on his writ, in which case the amount would be wholly lost to the plaintiff, as *Fuller* had become insolvent.

1856.

Rigney v. Vanzandt.

Statement.

The prayer of the bill was for an account of what was due to plaintiff; that *Vanzandt* might be declared a trustee for plaintiff of the amount so paid by plaintiff; an injunction to restrain the Sheriff—also a defendant—from paying, and *Vanzandt* from receiving the said sum of £802 10*s.*

Mr. *A. Crooks* for plaintiff.

Mr. *Vankoughnet, Q. C.*, for defendants *Crandall & Bradley.*

Argument.

Mr. *S. M. Jarvis* for defendants *Vanzandt* and the Sheriff.

1856.

Rigney v. Vanzandt.

ESTEN, V. C.—It may be conceded that an accommodation acceptor is not a surety *quoad* the creditor, with notice to him of the fact at the time of contracting the obligation. In fact, this rule, it is apprehended, is not confined to accommodation acceptors; but it is intended only to enable the creditor to recover his debt with the greater facility, and when he is not longer a creditor: that is to say, when the debt is paid, the reason does not apply. That an accommodation acceptor is a surety as between him and the drawer cannot be doubted.

It is, no doubt, also true that the execution creditor has great power over his writ, and that the rights of the next execution creditor are jealously guarded; but the power of the execution creditor ceases the moment he has been paid, and he becomes a trustee for another person; and to enforce the rights of the *cestuis que trust* can be no infringement of the rights of the execution creditor next in order. The learned counsel for the defendants *Crandall & Co.*, contended that the rights of his clients attached the moment the amount due on the first execution was paid or reduced.

Judgment.

I differ in this respect from the learned counsel. I think the rights and interests of the surety in regard to the execution were paramount to those of the execution creditor next in order.

SPRAGGE, V. C.—I do not think that this is a case which can admit of any serious doubt.

Notwithstanding the form in which the bills were drawn, the actual relative position of the parties after they were discounted was that *Vanzandt* was the creditor, *Fuller* the principal debtor, and *Rigney* the surety; and when *Vanzandt* obtained a judgment against *Fuller* for the debt, he obtained an additional security, to the benefit of which, unless there be some-

thing special in this case to prevent it, the surety becomes entitled, upon payment to the creditor of the debt for the payment of which he was surety. 1856. Rigney v. Vanzandt.

The general rule is, that a surety upon payment to the creditor of the debt of the principal, is entitled to the benefit of all securities which the creditor has, and can render available against the principal debtor; and the doctrine was, as Lord *Brougham* says, (*a*) luminously expounded in the argument of Sir *Samuel Romilly* in *Craythorne* v. *Swinborne*, (*b*) where he said, 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 these sureties transferred to him though there was no stipulation for that; and to avail himself of all those securities against the debtor." This doctrine applies to all securities obtained by the creditor, as well to those subsequently acquired and not parted with by the creditor, as to those in existence at the inception of the suretyship, with the exception of such securities as are extinguished, as was the case in *Coppin* v. *Middleton*, (*a*) by the fact of the payment of the debt by the surety. Judgment.

It is objected in this case that *Vanzandt* was ignorant of the fact of *Rigney* being surety for *Fuller*, for upon the face of the bills he was the party primarily liable. There is nothing to shew that *Vanzandt* knew that *Rigney* was an accommodation acceptor, and it must be taken, I think, that he was ignorant of the fact; but I do not see how it can affect the right of *Rigney* to have the benefit of the security of the judgment, for it is not a security that *Vanzandt* has parted

(*a*) Hodgson v. Shaw, 3 W. & K. 191. (*b*) 14 Ves. 160.
(*c*) T. & R. 224.

1856.

Rigney v. Vanzandt.

with; nor can he be prejudiced by the surety having the benefit of it. The equity of the surety arises, as counsel for *Vanzandt* put it, from the implied contract of the debtor to indemnify him; the debtor and surety being cognizant, of course, of the fact of suretyship, I cannot see how the contract to indemnify can be qualified by the circumstance of the creditor being ignorant of it. It is true that something is sought from the creditor, but if that something is founded on the equity adverted to, and the creditor is not prejudiced by granting it, it appears to me that the existence of a circumstance not affecting that equity, cannot affect the ordinary right of the surety.

Judgment.

In the case of an agent dealing with a third party without disclosing his principal, the principal has his remedy against the third party just as if his name had been disclosed, unless such remedy would place the third party in a worse position than if the fact of an agency had been disclosed. Being *in fact* principal, there is no reason why the rights incident to that character should be lost to him, because not known as principal to the third party, unless the want of that knowledge prejudiced the third party; and this doctrine, clear in the case of principal and agent, is, as it appears to me, equally applicable to the case of principal and surety, and those dealing with them.

Generally, certainly in the case of principal and surety, the creditor is aware of the suretyship: from the nature of the dealing it can very rarely be otherwise; but where it is otherwise, I can see no reason for abridging the rights of the surety unless where it is necessary to do so for the protection of an innocent party; and I came to this conclusion before finding any authority upon the point. But in *ex parte Hippins* and *Harrison* (*a*) before Sir *John Leach* and before Lord *Eldon* on appeal, there was the same circumstance,

(*a*) 2 Gl. and Jam., 93.

1856.

~~Dolson~~ Rigney
v.
~~Mollidge~~ Vanzandt

of ignorance on the part of the creditor of the fact of suretyship, the debt arising, as in this case, upon bills accepted for the accommodation of the drawer and discounted by the creditors, the bankers of the drawer, who (the bankers) afterwards became bankrupt. At the time of the bankruptcy *Harrison*, the drawer of the bills, had a cash balance to his credit to the amount of £1500, and desired to set against it the amount of the bills, £1338 7*s*. 9*d*., and to claim for the difference, on the ground that if an action had been brought against him, he would have had the benefit of a set off; that he ought to have the same benefit of the action brought against *Hippins*, the accommodation acceptor, who was a mere surety for him; that a proceeding against a surety is in effect a proceeding against the principal, who must indemnify the surety, and that *Hippins* would have obtained this equitable adjustment by bill in equity. Against this it was objected that the court had no jurisdiction to give the relief sought upon petition—that there was no authority for the exercise of such a jurisdiction as it respected *Hippins*, who was primarily liable on the bills; that it was dangerous to vary the legal liabilities of parties on negotiable instruments by the introduction of equities attaching upon third persons; and that there was no right of set off at the time of the bankruptcy. Sir *John Leach* held that on the bills in question *Harrison* the drawer, was in effect the principal debtor, and *Hippins*, the surety; and as *Harrison* would have a right of set off if the action were brought against him, the assignees were not to be permitted to proceed against *Hippins* for the purpose of defeating that right, but must deliver up the bills to *Harrison* in reduction of the cash balance, leaving him at liberty to prove for the difference. Lord *Eldon*, on the appeal, had some doubts as to the propriety of *Hippins* joining in the petition with *Harrison*; "but the point is," he said, "whether *Hippins* the acceptor had not a right to call upon *Harrison* to present a petition. If *Harrison* alone had presented the petition there could have been no objection to the jurisdiction."

Judgment

1856.

Rigney v. Vanzandt.

In disposing of the case, Lord *Eldon* placed it upon the ground, that *Harrison* being liable to the bankers upon the bills, and on the other hand having a cash demand against them, he had a right to say, that as between the bankers and himself, the drawer of the bills, the account must be so settled that he may have the benefit of the cash credit. He intimates no difference of opinion with Sir *John Leach*, while sustaining his order upon a simpler ground; and while referring to a previous case of *ex parte Burton* before himself, he would appear to hold the same view. *Ex parte Burton* (*a*) was in its circumstances similar to *ex parte Hippins* and *Harrison*, with this important exception, however, that the acceptance was not for the accommodation of the drawer. Lord *Eldon* dismissed the petition with the question, "what right have the acceptors *Franco* and *Corea* here?" And on referring to it in *ex parte Hippins* and *Harrison* he said, "it did not appear to him in *ex parte Burton* that the acceptor was an acceptor for accommodation; and that if he was an acceptor for accommodation that case had been decided with less consideration than was due to the importance of it: this from so cautious a judge as Lord *Eldon*, was a pretty clear indication that his leaning was in favour of the view taken by Sir *John Leach*.

Judgment.

The case which I have cited appears to me to establish the principle that the ignorance of the creditor of the fact of suretyship does not *per se* affect the rights of the surety even as against the creditor, and it is a stronger case to that point than the one in judgment; for in that case the creditor's estate was disabled from recovering a considerable sum of money to which it would otherwise have been entitled, while here the creditor is in no way affected by the assertion of the rights of the surety.

(*a*) 1 Rose, 320.

1856.

DALTON v. MCNIDER.

Pretended Bank of Upper Canada—Award.

A debtor of the late pretended Bank of Upper Canada, at Kingston, having called upon the bank commissioners to arbitrate under the provisions of the statute 10 Geo. IV. ch. 7,—an award was made finding a sum of £900 due, and directing the debtor to pay and the commissioners to receive that amount in quarterly payments in notes and other securities of the bank. *Held*, that the debtor had a right to pay in notes of the bank for which no certificates had ever been issued pursuant to the act of Parliament.

Although the general principle is that an award may be good in part and bad in part; still where arbitrators found a sum of money due to a creditor, and directed the debtor to pay, and the creditor to receive such amount in a certain specified manner, the creditor was not allowed to adopt the award in so far as it found the sum due, and reject that portion of it directing the mode of payment.

Statement.

The bill in this cause was filed by *Sophia Dalton*, administratrix with the will annexed of *Thomas Dalton* deceased, against *Thomas McNider*, setting forth that, in 1819, certain parties had set on foot and established an association under the style of the president, directors and company of the Bank of Upper Canada, at Kingston, where they carried on business until the company stopped payment; that the said *Thos. Dalton* was indebted to the bank upon a bond and mortgage, dated 10th of December, 1822, securing the payment of £3,600, by instalments of £125, with interest every three months, with an express stipulation that the obligor should be at liberty to pay the amount in bills of the bank.

The bill set forth the passing of the act 10 Geo. IV. ch. 7, entitled "An act to make more effectual provision for settling the affairs of the late pretended Bank of Upper Canada," upon the petition to the legislature of sundry of the debtors of the bank complaining of grevious injuries sustained by them; and that defendant was the only commissioner under the act for settling the affairs of the bank: that *Dalton* in his lifetime claimed an equitable deduction and set-off for and on account of instalments of stock

1856.

Dalton v. McNider.

advanced by him to the bank, and requested that the said debt should be left to arbitration, which was done accordingly as prescribed by the act of parliament; and a deed was executed whereby *Dalton* and the then commissioners bound themselves respectively to abide by the award of the arbitrators named by them; that in pursuance of such submission, two of the arbitrators made an award whereby they found a balance due by *Dalton* to the bank of £900, which, after reciting that he had been ready and willing to pay to the commissioners in bills of the said pretended bank, but which they refused to accept, they ordered *Dalton* to pay that sum to the bank commissioners by quarterly instalments, "to be paid by him and received by them in bills or notes of the said pretended bank, or bank certificates of the former or present commissioners, or any order or orders for bank stock, to the amount of stock paid into the said bank by the drawer or drawers of such order or orders, or any order or orders from any other creditor or creditors of the said bank, to the amount due from the said bank to such bank creditor or creditors," and directed the usual re-leases and acquittances by the bank to *Dalton*.

Statement.

The bill then alleged *Dalton's* readiness to pay in the mode directed, and the refusal of the commissioners to receive payment in that manner, who insisted upon being paid in current money of Upper Canada; and in 1839, commenced an action at law to recover the said sum of £900, and obtained a writ of execution against *Dalton* in his lifetime; and since his death the sheriff had seized the goods of *Dalton* in the hands of the plaintiff as his administratrix. The prayer was that the award might be specifically performed, and that an injunction might issue to restrain proceedings under the execution.

The defence was, that the notes and securities offered by *Dalton* in payment of the sum awarded

had not been brought in pursuant to the acts of parliament, and were therefore valueless. 1856.

Dalton v. McNider.

Mr. *Turner* for plaintiff.

Mr. *Mowat* for defendant.

THE CHANCELLOR.—The transactions out of which this suit has grown are of a very early date.

Prior to the year 1822, *Thomas Dalton*, the plaintiff's testator, was indebted to the pretended Bank of Upper Canada in a large amount, and on the 10th of December in that year he executed a bond and mortgage to secure the debt. That institution was found shortly afterwards, as I gather, to be in an insolvent condition, for on the 19th of March in the following year an act of Parliament was passed (*a*) vesting the property of the bank in certain commissioners, who were authorized to wind up its affairs. The general provisions of this statute, and of several others subsequently passed for its amendment, (*b*) appear to have failed to effectuate the object which the Legislature had in view; for the 10 Geo. IV. ch. 7, after reciting, in effect, that previous legislation had been productive of injustice, and that it was expedient to provide other means for a final, amicable, and equitable settlement of the affairs of the institution, proceeds to substitute new arrangements for those previously in existence, and amongst other things renders arbitration compulsory upon the commissioners, at the instance of any debtor. Almost immediately after this act was passed *Thomas Dalton* availed himself of this provision, and by mutual bonds executed on the 22nd of April in the same year, the questions between him and the board of commissioners were duly submitted to arbitrators appointed under the act. An award was made on the

Judgment.

(*a*) 4 Geo. IV. ch. 22. (*b*) 4 Geo. IV. 2d Ses. ch. 21; 9 Geo. IV. ch. 11.

1856.

Dalton v. McNider.

9th May, 1829. It finds *Dalton's* debt to be £900; directs that sum to be paid in quarterly instalments of £31 5*s.* each; and authorizes *Dalton* to pay in "bills or notes of the said Kingston Bank, or bank certificates of the former or present commissioners, or any order or orders for bank stock to the amount of stock paid into the said bank by the drawer or drawers of such order or orders, or any order or orders from any other creditor or creditors of the said bank to the amount due from the said bank to such bank creditor or creditors." The manner in which these parties dealt with each other subsequent to the award is left in some obscurity, as I shall presently show, upon the evidence; but in the year 1839 the commissioners brought an action of debt upon the award, and in each count of the declaration upon which judgment is entered the breach is stated in the terms of the award already quoted. To these counts the defendant demurred. The judgment on demurrer was in favor of the plaintiffs, and was duly entered up on the 29th of June 1840. On the 6th of November in the same year the plaintiff filed her bill in this court, praying to have the award specifically performed, and for an injunction. The motion was heard on the 12th, when an injunction was ordered, which has continued in force ever since, a period of nearly fourteen years.

Judgment.

The jurisdiction is admitted. (*a*) But it is said that the award is manifestly unjust in authorizing the payment of the debt in "stock certificates," and that the court ought therefore to refuse specific performance.

I am by no means prepared to accede to that proposition. We have no knowledge of the case except from the papers, and there is nothing in them to justify such a conclusion. The act of Parliament under which the reference took place recites that

(*a*) See Wood v. Griffith, 1 Swan, 43; Hawksworth v. Brammall, 5 M. & C. 251.

1856.

Dalton v. McNider.

many of the debtors to this institution had complained of grievous injustice. The Legislature sanctions their complaints, and provides arbitration as a remedy. The bond of submission embodies the recital in the statute, and, among other claims advanced by *Dalton*, they state this was one, to pay in "stock certificates," which was therefore a matter in difference, expressly referred to the arbitrators; beyond this fact we know nothing. It is impossible, upon such data, to affirm the proposition contended for by the defendant.

But the objection fails on another ground. The defendant is precluded from questioning the validity of the award. The judgment which he now asks to be allowed to enforce is a judgment recovered on foot of this award. The commissioners having deliberately adopted it, the question which he now seeks to raise is no longer open to him.

Judgment.

But it is argued that an award may be good in part and bad in part, and it is said that this award is good so far as it finds a debt of nine hundred pounds, but bad for the residue.

No doubt an award may be good in part and bad in part when the parts are separable; but here they are plainly inseparable. The award directs a sum to be paid, at a particular time, and in a particular manner. Here are three things certainly, but they constitute one award. Take away two of them and the award is no longer the award of the arbitrators, but something essentially different.

It is said, however, that the plaintiff has been guilty of great laches, and that the court, on that ground, ought to refuse relief.

The answer to that is, that all the delay has been caused by the commissioners themselves. This ques-

1856.

Dalton v. McNider.

tion turns upon the admissibility of certain entries from a book, in the handwriting of a former clerk of the commissioners, purporting to be the record of their proceedings. The book itself has been lost, and the plaintiff has been allowed, consequently, to adduce secondary evidence; but the witness swears that the extracts furnished embrace everything at all connected with the subject of the present suit.

It is sufficiently established, I think, that this book is the record of the proceedings of the commissioners. It purports to be so. It is produced from amongst the papers of their clerk, and is in his handwriting. It was so produced under an order of this court, in a suit instituted against the present defendant for the administration, I believe of the trusts imposed on him by the statute under which he was appointed. And its authority was never questioned, so far as I can learn, in that suit. Under these circumstances it must be taken,

Judgment.

I think, that this book was the record of the proceedings of the commissioners kept by their clerk, and I have no doubt that it is admissible evidence against them. (*a*)

In this book, under date the 31st July, 1829, the following entry occurs: "Mr. *Thompson* moves that the award of the arbitrators in the case of the Bank Commissioners and *Thomas Dalton*, except so much thereof as relates to the receiving of stock certificates in payment, and the granting a release before the payments are made, be complied with. Yeas—*Hugh C. Thompson*. Nays—*Henry Smith* and *John Strange*. The clerk was ordered to communicate to Mr. *Dalton* that a majority of the Kingston Bank Commissioners have determined not to comply with the award of the arbitrators in his case."

Nothing can be more explicit than this declaration, and it was followed by a letter of the same date to

(*a*) Rex v. Mothersell, 1 Str. 92.

Mr. *Dalton* from the clerk, which is equally clear and peremptory. He says:—

"SIR—I am directed to say that a majority of the Kingston Bank Commissioners have decided that the award of the arbitrators in your case cannot be complied with on their part."

"To THOMAS DALTON. J. VINCENT, Clerk."

Besides these documents, which are clear and sufficient in themselves, there are other papers, which prove that the antagonism on the subject of the award continued at least till the year 1834, (*a*) and taken together they prove the plaintiff's proposition, that the delay resulted necessarily from the defendant's conduct. Now if the delay resulted from the defendant's conduct, it follows necessarily that it cannot constitute a defence to the present suit. (*b*)

Judgment.

It is said, however, that there are other entries in the book which prove a new arrangement between the Commissioners and *Dalton*, by which this part of the award was abandoned. I am not certain that any such conclusion is fairly deducible from the entries referred to. Whatever may be the import of the entries, taken by themselves, such a conclusion is hardly to be reconciled with other parts of the evidence; but it is unnecessary to discuss the question, because I am of opinion that these entries are not admissible in favor of the defendant. The entries, which are the statements of the commissioners, are of course evidence against them, but they cannot be evidence in their favor on a question like the present, for that would be in effect to allow them to make evidence for themselves. This has been decided repeatedly with respect to entries in the books of corporate bodies, (*c*) and the present is in my opinion an analogous case.

(*a*) See Dalton's letter demanding a settlement and the report to the Governor for the year 1834.

(*b*) Morse v. Merest, 6 Madd. 26; Pope v. Lord Duncannon, 9 Sim. 177; Dimsdale v. Robertson, 2 J & L. 58.

(*c*) Marriage v. Lawrence, 3 B. & Al. 142; Hill v. Manchester Water Works Co., 5 B. Ad. 866.

1856.

Dalton v. McNider.

Upon these grounds, I am of opinion that the plaintiff is entitled to a decree with costs.

SPRAGGE, V. C.*—The bond securing the debt which was referred to arbitration expressly provided that payment might be made in notes of the bank; and the submission to arbitration recites *inter alia* that clause of the statute under which it was made, which provides that the commissioners should have authority to accept of bills or notes of the bank or certificates given for the same in satisfaction of debts to the bank.

The statute made it compulsory upon the commissioners to refer to arbitration; but it is contended that they could only refer the fact of debt or no debt, and the amount. The statute says: "it shall be incumbent upon the commissioners to refer such debt or demand to arbitration;" that clause and the previous clauses of the statute having merely spoken of debts due by mortgage, bond, note or otherwise.

Judgment.

The submission in terms refers all claims and demands of the Bank against *Dalton*, and claims referred to in the submission of *Dalton* against the bank, and all other claims and demands in law and equity on his part against the bank.

Taking this in connection with the debt being made payable in notes of the bank, and the recital of the authority conferred by the statute upon the commissioners to accept payment in notes of the bank, I should say that the mode of payment was intended to be referred as well as the amount of debt; and I am not prepared to say that the words of the statute, "refer such debts or demands to arbitration," would exclude the mode of payment from the jurisdiction of arbitrators. The commissioners could have agreed

* ESTEN, V. C., was concerned in the case while at the bar.

1856.

Dalton v. McNider.

with *Dalton* beforehand that whatever amount should be awarded might be paid in notes of the bank; and if an award be, what it is called, an agreement between parties, the terms of which are ascertained by a third person, must not the legislature have intended that the commissioners should refer to arbitration those questions upon which the statute authorized them to agree with parties, unless expressly excluded by the language of the statute?

But however this may be, and taking the award in question to have been such that the commissioners were at liberty either to accept or reject it, they did accept it as to the amount of the debt, and with a qualification as to the mode of payment. They rightly objected to that part of the award which allowed *Dalton* to pay in stock scrip; and *Dalton* appears to have acquiesced in the objection: this appears from entries in their books, referred to in the answer, made in the years 1829 and '30. The commissioners further adopted the award with the same qualification, by the form of their action at law against *Dalton* in 1839, for they sued upon the award and laid for breach the non-delivery of notes of the bank in pursuance of it.

Judgment.

It is said that after the award an arrangement was entered into between the commissioners and Mr. *Dalton* independently of the award. Supposing that to be proved, it appears to me that the pleadings in the action amount to an abandonment of that arrangement and a reverting back to the award. It is objected to this suit that the plaintiff, if entitled to succeed at all, her testator had a good defence to the action at law. I do not agree to this; for there may be offers and refusals which in this court will excuse a party from a strictly legal tender; and besides a successful defence at law could not have given *Dalton* all that his administratrix seeks, and is entitled to in this court.

1856.

FOSTER v. MCKINNON.

Administrator—Trustee.

Jan. 21 and May 12. The administrator of an estate purchased from government in his own name and with his own funds, land in which the intestate as occupant had a preëmptive right, at the same price as had been agreed to sell to the intestate; but being administrator, the government did not require him to pay in the value of improvements made by the intestate: *Held*, that he was a trustee for the heir-at-law of the intestate, and under the circumstances could not purchase for his own benefit.

Mr. *Mowat* for plaintiff.

Mr. *Martin* for defendant.

Lee v. *Flood* (*a*), *Nesbitt* v. *Tredennick* (*b*), *Lee* v. *Vernon* (*c*), *Randall* v. *Russell* (*d*), *Fosbrooke* v. *Balguy* (*e*).

May 12th. THE CHANCELLOR.—The property in question in this cause is a lot in the town of Caledonia, and contains about half an acre. The legal fee simple is in the defendant; but the contention is, that upon the

Judgment. circumstances, the court ought to declare him to be a trustee for the plaintiff.

The site on which the town of Caledonia now stands belonged, when the village was laid out, to the Six Nation Indians: it was vested in the Crown, in trust for them; and when the plan of laying out a village and selling the lands was adopted, the Crown determined to concede to all occupants a right of preëmption. The practice was to permit the occupant to purchase it if he desired it; but if the occupant declined to purchase, his improvements were valued, and the purchaser, in addition to the price of the land, was required to pay the assessed value of the improvements, and this latter amount was paid by the Crown to the previous occupant.

Prior to the period in question, one *Turner* appears

(*a*) 17 Jur. 544. (*b*) 1 B. & B. 29. (*c*) 5 Br. P. C. 10.
(*d*) 3 Mer. 190. (*e*) 1 M. & K. 226.

1856.

Foster v. McKinnon.

to have been in possession of a considerable part of the town plot, and the Crown, for the purpose of carrying out the proposed plan, bought up his right; and a ratable distribution having been made, £1 5*s.* was charged upon the lot in question in this cause as a proportional part of the amount paid to *Turner* for his improvements.

In the year 1845, *John Foster*, the father of the present plaintiff, was the occupant of this particular lot. It does not distinctly appear how or when he obtained possession. It is said, and I believe truly, that he claimed under *Turner*, but the fact is not material. It is clear that upon the survey made by government in the year 1845, for the purpose of ascertaining the names of the occupants and the value of their improvements, *John Foster* was returned as the occupant, and his improvements were valued by Mr. *Kirkpatrick*, the Crown surveyor, at eighty pounds.

Judgment.

On the 6th of October, in the year 1845, *John Foster* applied to purchase this lot in question, and obtained from Mr. *Thorburn*, the officer of the Indian department, on whom the duty of selling these lands devolved, an order to pay one-third of the purchase money into the Gore Bank, to the credit of the Receiver General of the province, on account of the Six Nation Indians; that being the usual way in which such sales were carried out. This order continued in force until the 30th of December, and was more than once renewed; but before the money had been paid—namely, on the 6th of July, 1846—*John Foster* died, intestate.

On the 7th of Janury, 1847, letters of administration to the estate of *John Foster* were granted to the defendant *McKinnon*, and on the 12th of July following he purchased the property in question; but this was done, as he alleges, with his own money and on his own account. The price paid by *McKinnon* was £35,

1856.

Foster v. McKinnon.

that being the price at which *Foster* had agreed to purchase; but, being administrator, he was not required to pay the £80, at which *Foster's* improvements had been valued by the government surveyor.

Shortly after *McKinnon's* purchase he caused the house which had been built by *Foster* upon the property to be sold, as a portion of *Foster's* estate, and for the benefit of his creditors; and upon that sale *McKinnon* became the purchaser at £56, the greater portion of which sum he retained as payment of his own debt, and the rest was distributed, as he alleges, amongst the other creditors.

The plaintiff insists that this purchase was, under the circumstances, a purchase on his behalf, and that the defendant ought to be declared to be a trustee for him; and, in my opinion, he is entitled to that relief.

Judgment.

Viewed as administrator alone, and apart from the considerations to which I am about to advert, I very much doubt whether the defendant could have been permitted to retain this purchase. Being administrator, he owed a duty to those interested in the estate, and especially to the present plaintiff, which ought to have precluded any attempt to manage the estate for his own benefit; but to permit him to purchase the property on his own behalf, and thereby to destroy the right of preëmption, the most valuable part of the estate, would be to permit him to sacrifice his duty to his interest, or at least to bring them into conflict in a way which this court ought not to sanction (*a*).

It is unnecessary, however, to determine this case upon that ground alone; because, in my opinion, the proper conclusion upon the evidence before us is that the defendant made this purchase as the personal

(*a*) Exparte Lacey, 6 Ves. 625; Exparte James, 8 Ves. 337; James v. Dean, 11 Ves. 383.

representative of *John Foster*, and in virtue of the right of preëmption to which he was entitled. Mr. *Thorburn's* evidence upon this point is not so clear as might have been expected; and he does state, it must be admitted, that he sold to *McKinnon* as a stranger, considering *Foster's* right determined. That is no doubt a correct statement of Mr. *Thorburn's* present recollection of the matters which induced him to make this sale, but is quite inconsistent with the other part of his narrative. Mr. *Thorburn* admits that a sale under such circumstances to a stranger was directly contrary to the settled practice of the office; and yet it is admitted that the sale was made without any notice whatever to the party beneficially entitled. Assuming the sale to *McKinnon* to have been a sale to him as personal representative of the intestate, and for the benefit of the estate, the course adopted was perfectly right. Assuming the sale to *McKinnon* to have been a sale to a stranger, and adversely to the estate, it was clearly wrong. Again, had there been a sale to *McKinnon* as a stranger, and not as the personal representative of *Foster*, the £80 at which *Foster's* improvements were valued must have been paid to the government for the benefit of those entitled to the estate; but *McKinnon* neither paid this sum to *Thorburn*, nor did he account for it in any way whatever. The facts go far to convince me that this sale was made to *McKinnon* as the personal representative of *Foster*, and not as a stranger; and that conclusion is in accordance with the written memorandum of Mr. *Thorburn* himself, in which, as I understand Mr. *Chesley's* evidence, the sale is described as a sale to *McKinnon* in virtue of his representative character. If the evidence falls short of that, it is at all events quite sufficient to warrant us in declaring that a trustee who purchases under such circumstances cannot be permitted to hold for his own benefit.

1856.

Foster v. McKinnon.

Judgment.

Again, this was clearly a purchase, to a very large

1856.

Foster v. McKinnon.

extent, with money belonging to the estate of the intestate. Assuming this to have been a sale to a stranger, the price was not the sum paid by *McKinnon* —namely, thirty-five pounds,—but that sum, with the £80, at which *Foster's* improvements had been valued. Now this sum, which was more than two-thirds of the whole purchase money, was not paid by *McKinnon*. It was allowed to remain in *McKinnon's* hands, as the personal representative of the intestate: in other words, the purchase was made to a large extent with the money of the estate; and in that view *Fosbooke* v. *Balguy* (*a*) is precisely in point.

Shortly after the defendant had made the purchase he put up the house for sale as a part of the estate, and for the benefit of the creditors, and at that sale he became himself the purchaser. Now a trustee cannot sell to himself. Such a sale was set aside in *Watson* v. *Toone* (*b*) after twenty years, and the delay in *Hall* v. *Hallett* (*c*) was nearly as great.

Judgment.

Upon some or all of these grounds I am of opinion that the plaintiff is entitled to the relief he asks, with costs.

ESTEN, V. C.—There seems to be no doubt that the defendant was a trustee, as it was or might have been his duty to complete the purchase, and he placed himself in a position incompatible with that duty.

SPRAGGE, V. C.—The principle that a person undertaking an office involving duties to others, must, in the execution of those duties, act for their benefit, not for his own, is perfectly well established; and I think that this case falls within that principle.

The defendant is administrator of the estate of *Foster*, who stood in a position which gave him certain claims

(*a*) 1 M. & K. 226. (*b*) 6 Mad. 153. (*c*) 1 Cox. 134.

1856.

Foster v. McKinnon.

in regard to the land in question; and though they may not be of such a nature as to be enforceable at law, still they were recognized by the Crown agent for the Indian lands, and were of a marketable value, being the constant subjects of bargain and sale: the agent dealing with persons in *Foster's* position in a manner more favorable than with strangers.

I look upon *Foster's* position as substantially that of a person who had contracted for the purchase of real estate; and he dying before the contract was performed, his personal estate was applicable to the payment of whatever might be due for purchase money.

His executor or administrator, on going to the vendor in his representative capacity, and paying purchase money, pays it, there can be no doubt, I think, for the benefit of the estate; and if he has not funds of the estate in his hands, he must be taken to be making advances for the benefit of the estate; he cannot be heard to say that he purchased for himself.

Judgment.

In this case, I think from Mr. *Thorburn's* evidence that he dealt with the defendant as administrator of *Foster's* estate, and in a manner different from that in which he would have dealt with him if a stranger. On completing the purchase therefore he had the benefit of *Foster's* position, and had that benefit as his personal representative, and now claims it for himself. To permit this would be in plain contravention of the rules of this court.

The cases cited by Mr. *Martin* do not shew that this is not a case falling within the principle. The most recent case, that reported in the 17th Jurist, is a strong case in favor of the plaintiff; for, although the renewal lease was not in that case held to be part of the assets of the father, it was because it was shewn to be a gift to his son by way of advancement; and in that case it did not appear that there was any *right* to renewal, but that the position of the lessee gave him

1856.

Foster v. McKinnon.

a right of claim, which it was the custom to recognize. I look upon that case as a recognition of this principle, which indeed can hardly be disputed at this day, and of its applicability to such a case as the present.

I think the plaintiff clearly entitled to a decree.

McIlroy v. Hawke.

Solicitor and client—Mortgage.

June 19, 1855 and March 17, '56

A person in indigent circumstances being entitled to a grant of land from the Crown, had consulted a solicitor with a view of obtaining the patent. In the course of their business transactions the solicitor wrote, "I think I can manage for you so effectually that I can get your deed from Government probably through some assistance on my part." The client having executed an assignment, as he alleged, by way of security to the solicitor, and the patent for the land having been issued, the solicitor set up the transaction as an absolute purchase; in consequence of which the wife of the plaintiff, acting as his agent, took steps to assert her husband's claim, and procured the assistance of her brother in ferreting out the nature of the title held by the solicitor: after repeated applications the solicitor agreed to reconvey upon being paid the sum of £170, asserted by him to be due. This amount the brother advanced, and took a conveyance of the property, said to be worth £800, in his own name, and then alleged he had purchased for his own benefit. The court [Esten, V. C., *dissentiente,*] declared the deed to the solicitor a mortgage only; that his assignee had in fact acted as agent of the plaintiff, and could not purchase for his own benefit: and directed an enquiry as to certain points left in doubt by the evidence before the Court, and an examination of the solicitor's books: unless the purchaser would consent to reconvey upon receiving back the amonnt paid by him to the solicitor.

Statement.

The object of this suit was, to have an absolute conveyance executed by the plaintiff to the defendant *Hawke*, declared to have been given as a security merely, and to be allowed to redeem on payment of what should be found due, if the court should think the deed not void, on the ground of fraud.

The facts sufficiently appear in the judgment.

Argument.

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

Mr. *McDonald* and Mr. *Strong* for defendant *Moran*.

Mr. *Barrett* for defendant *Hawke*.

1856.

McIlroy v. Hawke.

THE CHANCELLOR.—I have had considerable difficulty in arriving at a satisfactory solution of this case, owing partly to the insufficiency of the evidence, and partly to the imperfect state of the record.

The plaintiff seeks to redeem the premises in question, which consist of 100 acres of land in the township of Adjala. The case made by the bill is, that the plaintiff, being entitled to a free grant of this land, conveyed his right to the defendant *Hawke*, for the purpose of enabling *Hawke*, as his agent, to obtain the patent, and upon an agreement that *Hawke* should hold the land as a security for his charge in procuring the patent, and for all his other demands of whatever kind against the plaintiff. That *Hawke* subsequently claimed to be absolute owner, and fraudulently sold the property to his co-defendant, *Moran*, who took with full notice of the plaintiff's equitable title.

Judgment.

Hawke's answer states that the plaintiff was indebted to him in the summer of the year 1849, to the extent of about twenty-five or thirty pounds, upon a promissory note; that he commenced an action at law for the amount; that the plaintiff, thereupon, offered to sell him the property in question, for £100, deducting thereout the amount of the promissory note and the amount of the patent fees; that the conveyance of October, 1849, was executed in pursuance of that agreement, and was never intended to operate otherwise than as an absolute conveyance; that subsequently he, *Hawke*, agreed to convey to the defendant *Moran*, for the benefit of the plaintiff's family, upon receiving the amount which he had himself paid for the land with interest, a course which he represents himself to have adopted from motives of compassion to the plaintiff's family, and not in consequence of any agreement into which he had entered.

Moran claims as a purchaser for value without notice.

1856.

McIlroy v. Hawke.

Now in determining whether the deed of October, 1849, is to be regarded as an absolute deed, or as a mortgage, as between the plaintiff and *Hawke*, it is, obviously, extremely material to consider, in the first instance, the relative position of the parties at that time. The plaintiff was in indigent circumstances and in an humble station. Thus far seems plain enough. *Hawke* was a solicitor of this court, and the evidence goes far to establish that he acted as the professional adviser of the plaintiff at the period in question. The deed of October, 1849, was certainly prepared in his office; but the letter of July, 1849, to which I shall advert, and the evidence of *Stanton*, tend to shew that his professional services were not confined to the preparation of that deed, but that he was then the general professional adviser of the plaintiff, or at least, acted as such in relation to several other matters. Had that sort of case been alleged and proved, it would have been difficult, if not impos-

Judgment.

sible, to sustain the present defence. But although the bill does not seek relief on that ground, still upon the question whether the transaction of October, 1849, was a mortgage or a sale, the facts to which I have just referred are both admissible and very material, in connection with the other evidence to which I am about to advert.

Now, to lay aside for a moment the admissions of *Hawke*—evidence which must be received, I admit, with caution, on a question of this sort—it cannot be denied, I think, that the facts which have been proved beyond doubt go far to displace the answer and to establish that the deed of October, 1849, does not disclose the real transaction between the parties. I will advert, first, to the letter from the defendant to the plaintiff, under date the 13th of July, 1849, to which I have already referred, which runs thus:—

"Sir,—Not having heard from you for some time, I am under the necessity of writing to you to come in and see me at once. I think I can manage for you

so effectually that I can get your deed from government probably through some assistance on my part. Come in, therefore, and consult with me at once. A small note of yours in my possession of £1 2*s.* 6*d.*, I hope you have not forgotten is overdue. Hoping an early attendance to this letter. I remain, &c."

Now the importance of that letter—the extent to which it sustains the bill and negatives the answer, is, I think, apparent. But an attempt was made to elude the force of this evidence by urging that in the interval between the 13th of July and the 19th of October, the position of the parties may have been wholly changed; a new debt may have been incurred, and the intention to obtain the patent, as the agent of the plaintiff, may have been changed into a purchase of his interest. No doubt all that is possible; but under the circumstances, the onus of establishing such a change would have lain, I apprehend, upon the defendant. But here the evidence, instead of establishing, goes far to negative any inference of that sort.

Judgment.

In the next place, it is to be gathered from the evidence, I think, that the plaintiff continued in possession for several years after the execution of the deed of 1849. This point has been left, certainly, in some obscurity. It might and should have been made clear; and an enquiry may be proper. But the fair inference upon the evidence as it stands appears to me to be, that the plaintiff's occupation continued for some years.

Then it is clear upon the evidence of two disinterested witnesses that *Hawke* refused to sell to *Langley;* and that, not because of any unwillingness to sell the property, for he seems to have been very anxious to effect a sale, but upon the ground of some right in the plaintiff, to which he was willing, or felt himself bound to give effect.

Lastly, it is admitted that *Hawke* did eventually

1856.

McIlroy v. Hawke.

convey the property to the defendant *Moran*, in consideration of £170, that being the amount which *Hawke* alleged that he had himself paid for it on his purchase from the plaintiff. It is said that this was done from motives of compassion; but I cannot accept of that as a credible explanation of the facts of this case. A property worth £800 is conveyed to a mere stranger—a stranger in whom the defendant does not appear to have any peculiar interest—for a fifth part of its value, at a time when *Langley* was pressing to purchase it at a much larger price; but that hypothesis, improbable as it is, does not meet all the difficulties of the case. It leaves the fact of *Hawke's* refusal to sell to *Langley*, before any application had been made on behalf of *Moran* or his sister, quite unexplained. Assuming the transaction of October, 1849, to have been a sale, and the facts can only be explained upon an hypothesis so strange as to be almost incredible; assuming the evidence of *Langley* and *Keenan* to be true, (and having had the benefit of hearing the examination of these witnesses, I think them entitled to all credit); assuming *Hawke* to have admitted what these witnesses swear that he did admit, and all the difficulties of the case are at once resolved.

Judgment.

Upon the whole, looking at the relative position of the parties to this transaction; considering the manner in which the property was subsequently dealt with; remembering the conduct and admissions of *Hawke* when pressed to sell; and keeping in view the fact that *Hawke* did eventually submit in effect to be redeemed—considering the case in all these aspects, there is enough, I think, upon the evidence as it stands, to warrant the conclusion that the deed of October, 1849, was intended as a security merely.

I am conscious that this may be regarded as a strong decision when considered with an exclusive reference to English authorities and English habits; and I am fully alive to the importance of preserving the

rule, that upon such questions, parol evidence should be received with the utmost caution. But looking, on the one hand, at the extent to which securities of this sort are in use in this province, and the manner in which they are prepared; and, on the other hand, at the certainty with which truth is elicited by the system of examining witnesses in open court, and recollecting how numerous have been the frauds perpetrated under the pernicious system of substituting absolute deeds for proper mortgages, (a system at one time almost universal, and which prevails still to a great extent), and how frequently such frauds have been brought to light in this court, I feel that I would but ill discharge my duty did I fail to scrutinize every case of this sort with jealous care; and having considered the case in that spirit, but with the utmost attention, I am brought to the conclusion that this deed ought not to be allowed to stand.

1856.

McIlroy v. Hawke.

Judgment.

But had my opinion as to the original transaction been different, I would have felt the greatest difficulty in persuading myself that *Moran* ought to be permitted to retain this property. In the view which I am about to take of it, the case is one of the simplest kind. The plaintiff left this country, as it would seem, some time during the year 1852, leaving behind him his wife and an only child. During his absence his wife, as I gather from the evidence, continued in the receipt of the rents and profits of this property until the year 1854, when the rent being in arrear, she brought an action, in the name of her husband of course, to recover the gale then due. This action failed in consequence of some interference on *Hawke's* part, the nature of which has not been clearly explained. But, whatever may have been its nature, it had the effect of stimulating Mrs. *McIlroy* to exertion. She seems to have been confident that her husband had not sold the property, and she came to this city repeatedly for the purpose of ferreting out the nature of *Hawke's* claim,

1856.

McIlroy v. Hawke.

and of rescuing the property, if possible, from his grasp. Her efforts not being successful, she applied to the defendant *Moran*, her brother, to assist her in the matter, and they came to the city together, for that purpose, and employed Mr. *McDonell* as their agent, to ascertain and assert the plaintiff's right in relation to the land. The information which they then possessed was, or was thought to be, insufficient, and in consequence *Moran* returned to the township of Adjala for the purpose of obtaining copies of the papers which had been filed in the office of the District Court, upon the trial to which I have already adverted; and Mrs. *McIlroy* proceeded to Barrie for the purpose of searching the registry, and of procuring copies of such memorials affecting the property as might have been registered, and they again returned to Toronto, together with such information as they were able to obtain, which they communicated to their agent Mr. *McDonell*. The enquiry instituted by Mr. *McDonell* appears to have been of the most superficial kind. His whole investigation, indeed, would seem to have consisted in asking Mr. *Hawke* whether he had an indisputable title, and Mr. *Hawke* answered him in the affirmative; he seems to have thought that everything had been done which his duty required of him. It would seem, however, that Mr. *McDonell* had several interviews with Mr. *Hawke* on the subject, and the result of these interviews was that *Hawke* offered to reconvey the land upon being paid the amount which he had advanced, or said he had advanced, to the plaintiff. In other words, *Hawke* submitted to be redeemed. Mr. *McDonell* communicated this in a letter to Mrs. *McIlroy*, the plaintiff's wife, in these words:—

Judgment.

"TORONTO, April 11th, 1854.

"Mrs. CATHERINE McILROY.—I have succeeded in coming to an arrangement with Mr. *Hawke* respecting the lot 18. Your husband had received from him monies at different times; your brother, I think, told me that he was willing to give £300: but I have

so arranged that *Hawke* will take something about £170; so if you and he wish, come down here as early as possible with the amount of money, you shall return with the title deeds. If you can't raise the money and come down, I fear that *Hawke* will find some other purchaser. 1856. McIlroy v. Hawke.

"ALLAN MACDONELL."

In consequence of that letter Mrs. *McIlroy* and *Moran* came again to the City of Toronto. But upon their arrival here the plaintiff's rights are wholly disregarded, and by some arrangement between the parties, this property, then worth £800, was conveyed to *Moran* for £170, upon a parol agreement on his part to make out of it a provision of some sort for the plaintiff's wife. Now that was in my opinion a gross fraud upon the plaintiff. There can be no doubt whatever that Mrs. *McIlroy* acted throughout this matter as the agent of her husband, and it is equally clear that the other parties engaged in the business at her instance were in the like capacity. Then having undertaken to ascertain and assert the plaintiff's right, and having proved his claims until they had been acknowledged by *Hawke*—acknowledged to this extent, that *Hawke* consented to be redeemed—they were all affected, in my opinion, with the disabilities which attach to the character of agent, and were incapacitated from purchasing the property for their own benefit. (*a*) Could Mr. *McDonell* have purchased the property under the circumstances for his own benefit? It is perfectly clear, I apprehend, that he could not. It is equally clear, I think, that the plaintiff's wife could not have done so; and the same principle appears to me to apply with quite as much force to the present defendant. Judgment.

But the improper state of the record makes it very difficult to dispose of the case satisfactorily. Upon

(*a*) Lees v. Nuttal, 1 R. & M. 53; Lawler v. Mansfield, 1 D. & W. 624; Carter v. Palmer, 8 C. & F. 657; Rackhan v. Siddall, 16 Sim. 305; S. C. 1 McN. & G. 607.

1856.

McIlroy v. Hawke.

the facts proved, my brother *Spragge* suggests, and I concur in his opinion, that a further enquiry should be directed upon two points which have been left in some obscurity. We think that Mr. *Hawke's* books should be produced, and that the plaintiff should be at liberty to adduce further evidence as to the possession of the property, and the receipt of the rents and profits from October 1849, when the deed to *Hawke* was executed, until the action for rent, in 1854. My individual opinion is in favor of a more extended enquiry, suggested by the answer of *Hawke* and the examination of *Moran*; but my brother *Spragge* thinks that the enquiry should be confined to the points already indicated.

Judgment.

ESTEN, V. C.—I think this bill should be dismissed with costs. I think a mortgage not established; that anything like agency is negatived, and that supposing such a trust as appears can be enforced, it is of so indefinite a nature that this court cannot carry it into effect.

SPRAGGE, V. C., concurred in the views expressed by his lordship the Chancellor.

JACKSON v. JESSUP.

Specific performance—Railway Company.

Jan. 9 & 17, and May 12.

The owner of lands over which the Grand Trunk Railway would pass, offered to convey a portion thereof for a station house upon certain conditions, which offer was rejected. Afterwards an agreement was made with the solicitor of the contractors, which was reduced into writing and signed by the owner, agreeing to convey a quantity of land not to exceed ten acres, upon condition that the station should be placed upon it. The owner afterwards refused to convey unless the contractors would secure to him three crossings over the railway track, and brought an action of ejectment to turn the parties out of possession of the land so agreed to be conveyed: upon a bill filed for that purpose, the court decreed a specific performance of the agreement to convey and an injunction to stay the ejectment, notwithstanding that the defendant swore that the condition upon which he agreed to convey was that the crossings should be secured to him.

This was a bill by *William Jackson*, Sir *Samuel*

1856.

Jackson v. Jessup.

Morton Peto, Baronet, *Thomas Brassey* and *Edward Ladd Betts*, against *Hamilton Dibble Jessup*, setting forth that the plaintiffs were contractors for the construction of the Grand Trunk Railway of Canada, and as such, were bound to procure in the different towns through which the railroad passes land for a station; that by an agreement dated the 19th of October, 1853, the defendant, in consideration that plaintiffs would place the station for the town of Prescott, through which the railway passes, on the land of defendant, he, the defendant, agreed to convey to plaintiffs a sufficient quantity of land not to exceed ten acres, for the purposes of such station; that the plaintiffs had filed the railway plans, upon doing which they were entitled to receive a conveyance in fee; and that the lands set out for the purposes of the railway station did not exceed ten acres, which defendant had allowed plaintiffs to take possession of, and they had entered into contracts for the erection of buildings on the land, and would suffer great loss if they did not obtain a deed.

Statement.

The bill further alleged that the defendant refused to complete the agreement by executing a conveyance, and had brought an action of ejectment to turn the plaintiffs out of possession.

The prayer was for a specific performance of the agreement and an injunction to restrain the action of ejectment.

The defendant answered the bill at considerable length; the chief points however were, that he admitted the execution of the agreement, and that his objection to complete the contract arose from the plaintiffs having refused to produce certain roads leading to the station, the centre one of which if produced would pass through the station house erected

1856. Jackson v. Jessup. by the plaintiffs on the land, and which the answer alleged the plaintiffs through their agents had agreed to produce.

Witnesses were examined before the court—one of them, Mr. *Bell*, with whom the agreement had been made, swore that no stipulation as to the roads or crossings was ever made on the occasion of signing the agreement; and that had the defendant insisted upon any such condition being introduced into the document, he would have broken off all negociations with him; and that he had previously told defendant that a proposition made by him on a former occasion to that effect would not be entertained.

The other points in the evidence appear sufficiently in the judgment.

Mr. *Galt* for plaintiffs.

Argument.

Mr. *Brough* for defendant.

Waring v. *Manchester, &c. Railway* (*a*), *Pickering* v. *Ely* (*b*), *Ellard* v. *Landaff* (*c*) *Kimberly* v. *Jennings* (*d*), *Baldwin* v. *The Society for Diffusing Useful Knowledge* (*e*), were referred to.

ESTEN, V. C.—I think there should be a specific performance, apart from the question as to the power of the court to compel a performance of the consideration. It may be conceded that, had it been understood between the parties or even by the defendant alone, when he entered into the agreement that the crossings were to be reserved as mentioned in his previous proposal which was rejected by the plaintiffs, it would be improper for the court to interfere, as such a course would involve a surprise upon the defen-

(*a*) 7 Hare, 482. (*b*) 2 Y. & C. C. C. 294. (*c*) 1 B. & B. 241.
(*d*) 6 Sim. 340. (*e*) 9 Sim. 393.

dant; but we are far from being satisfied that either was the case. Indeed, not only the express evidence, but all the facts proved are consistent with the supposition that the defendant had abandoned the stipulation respecting crossings, and meant to trust to the liberality of the plaintiffs as to what crossings there should be, and where they should be placed. It is almost incredible that the agreement should not have contained some stipulation on the subject had it been so intended. Mr. *Bell*, on the contrary, says, that there was a perfect silence on the subject, although the interview at which the agreement was made lasted from half an hour to an hour, and there was evidently much conversation.

1856.

Jackson v. Jessup.

The correspondence too which followed, by no means evinces a precise agreement or understanding upon the point. Then with regard to the question of the court being able to execute the whole agreement: the general rule certainly is, that the court will not specifically perform an agreement on one side without securing to the other party the actual equivalent for which he stipulated; but it is equally clear that, where an agreement can be specifically executed on one side and not on the other, and the party who has to perform that part which the court cannot specifically execute has either actually performed it, or on applying to the court for its aid offers to perform it, and it can be presently performed, the court will compel the specific execution of that part which it can specifically execute; and there is some doubt whether the doctrine and practice of the court does not go still further, and whether, where the party seeking its aid has done all that he was bound to do up to the time of the application, he is not entitled to the assistance of the court in compelling the specific performance of that for which he has stipulated, although something remains to be done by him; and should he refuse to do

Judgment.

1856.

Jackson v. Jessup.

it, the court could not compel its specific execution. (*a*) The present case, however, seems to steer clear of these difficulties, although the consideration mentioned in the agreement is the placing the Prescott station on the land in question; yet it is manifest that the defendant did not mean to stipulate that that should actually be done before he conveyed the land. It is expressly provided by the agreement that so soon as the plaintiffs declared their election to accept the offer of the defendant, and should set out the ground, the deed was to be executed; and it appears to me that, if the plaintiffs accept the defendant's offer, set out the ground, and apply for the deed with the *bona fide* intention of establishing the station upon the spot, the defendant has the consideration for which he stipulated, and is bound to execute the deed. What his future rights may be it is unnecessary to define, nor can the agreement with any justice be characterised as a hard one. It is quite certain that the defendant himself thought at one time far otherwise, and was extremely solicitous to bring it about. I think there should be a decree for specific performance with costs: but the plaintiffs, having by their counsel in court offered to assure to the defendant the two side crossings as if the streets were produced—let provision be made for the purpose in the decree.

Judgment.

SPRAGGE, V. C.—It seems to me impossible to hold that the stipulations introduced by Dr. *Jessup* into his proposal of the 8th of August, 1853, are incorporated into the agreement of the 29th of October following. The agreement entered into is in no respect a modification of the agreement proposed, but wholly independent of it, and quite different in respect of the quantity of land to be taken, and of the terms upon which it was to be taken, and was made after the proposal of August had been declined.

(*a*) See Waring v. Manchester, Sheffield, &c. Railway Company, 7 Hare, 482.

Nor can I see that Dr. *Jessup* was at all taken by surprise; or, that he had any reason to suppose that the continuation of the three streets through the railway ground was to be conceded to him. His former proposal in that respect was not even mentioned when the agreement was entered into; and the agent of the plaintiffs, Mr. *Bell*, with whom the agreement was made, says in his evidence that if it had been made a stipulation he would immediately have broken off the negociation. The proposal of August does not appear, indeed, to have been at all referred to on that occasion.

The interview which resulted in the agreement of October was sought not by Mr. *Bell*, but by Dr. *Jessup*. The written proposal of August was evidently carefully considered, and stipulations for his own benefit introduced into it; the visit of Mr. *Bell* with a view to an agreement was procured by him; it did not come upon him unexpectedly, so as to render it possible that in this matter he overlooked a provision which he considers, and considered then, as he says, so essential to his interests. He says in his answer that he did not read the agreement before executing it (in this Mr. *Bell* disagrees with him), and that it was not read to him except once by Mr. *Bell*; but he does not say that he believed that it contained any provision as to streets crossing over the railway ground: nor does he say that in consequence of hurry or forgetfulness, or from any other cause, such provision was omitted; or that he would have made it a stipulation if it had occurred to his mind.

Judgment.

It is plain from the evidence that Dr. *Jessup* was very anxious to get the railway station upon his property; that he was aware that his was not the only land available for that purpose, but that an offer of land made by Sir *Charles Stuart might* be accepted by the company: that while anxious to make as good terms as possible for himself, he was at the same time

1856.

Jackson v. Jessup.

fearful of losing the opportunity of getting the station upon his property: his letters to Mr. *Bell*, and to Mr. *Shanley* and Mr. *Ross*, officers of the company, are evidence of this. The evidence certainly shews much more anxiety on his part than on that of the plaintiffs, or any agent of theirs, that his land should be the land selected for the station. Mr. *Bell*, I should say, manifested the reverse of a desire that Dr. *Jessup's* land should be selected.

I can hardly suppose that Dr. *Jessup* advisedly abstained from insisting upon the three crossings upon the occasion of the agreement being entered into, intending in his own mind to insist upon them afterwards, but apprehending that if he insisted upon them then they would be refused, because such conduct would not be consistent with fair dealing; but the evidence does lead me to think that if he thought of them at all, he resolved to trust in, and hoped to find, liberality and an accommodating spirit in the plaintiffs (and I am far from saying that he has not so found them), or else to trust to his rights under the railway acts.

Judgment.

It is to be regretted that so much delay occurred in furnishing Dr. *Jessup* with a copy of the agreement, but I do not find that his position was thereby prejudiced. I have no reason to think that he was not aware substantially of its contents, or that he would have acted differently in any respect if he had had a copy in his possession. I do not find from the evidence that he claimed the other crossings as a right before December 1854. No doubt in the summer of that year he so shaped his course as to get them if he could. With that view he directed Mr. *West* the surveyor to produce the three streets northward, so as to cross the land in question.

What passed between Mr. *West* and Mr. *Ellis*, the plaintiffs' engineer at Prescott, is related somewhat

differently by the two. Both agree that Dr. *Jessup's* plan of laying out the land south of the station was to be furnished to Mr. *Ellis;* he says, for the purpose of his seeing how far he could accommodate Dr. *Jessup* in the way of crossings; Mr. *West* says, in order that the exact position of the streets produced might be marked upon the plans in the company's office. Mr. *West* seems to have understood Mr. *Ellis* as conceding to Dr. *Jessup* the right to have the streets produced across the station ground; this is quite at variance with the purpose for which Mr. *Ellis* says the plan was to be furnished, and his account certainly is a reasonable and probable one, whether he had at that time seen the agreement or not; more than that would be almost absurd, for it would be engaging blindfold to allow whatever streets might be upon Dr. *Jessup's* plans, which might be three or four, or even more, and this by an officer who had no power to do so.

1856.

Jackson v. Jessup.

The stake planted in the line which would have been the centre of St. Lawrence street produced, and what was marked upon it, no doubt tended to lead Dr. *Jessup* to the conclusion that he was to be allowed to continue that street through the station ground, but Mr. *Ellis* denies that it was placed there with any such view; and as to the marks upon it, he says they were not put upon it with his authority.

Judgment.

The correspondence between Dr. *Jessup* and Mr. *Ellis* is material; that on the part of Dr. *Jessup* does not strike me as being the language of a man who felt that he was entitled under any agreement, to the three crossings; and when he came to insist upon them he still for a time based his claim upon what had passed between himself and Mr. *Ellis*, and upon what had been done upon the ground, so at least I understand his language, until we come to his letter of the 7th of February, 1855, when he speaks of there having been a distinct understanding that the three crossings

1856.

Jackson v. Jessup.

should be granted, and declares that they were the basis of his agreement with the company; this appears to be a formal letter and to embrace the several grounds of complaint which Dr. *Jessup* conceived he had against the plaintiffs, and in this he states for the first time that he was entitled to the three crossings by reason of anything that had occurred before his interview with Mr. *Ellis*. There is a short note from Mr. *Ellis* to Dr. *Jessup*, dated 13th of December, 1854, which shows his idea of his position and that of Dr. *Jessup*, and sustains fully his account of the character in which Mr. *West's* survey was asked for and received. It runs thus: "Dear Sir—If you can conveniently call in here between half-past two and half-past three this afternoon I should feel much obliged, as I wish to lay before you our intentions with regard to your property. I need not detain you many minutes; if you would bring the plan of your property as laid out it might be of service. An answer per bearer will oblige." It would be strange for Mr. *Ellis* to express himself in such terms, "our intentions," and to say that a plan of your property as laid out *might be of service*, if he had understood, or had been led by Dr. *Jessup* to think that he, Dr. *Jessup*, understood that there was any stipulation binding upon the plaintiffs or the company in regard to the crossings. Dr. *Jessup's* answer to this note was in few words: "I have just received note of this date, and will call at half-past two this afternoon, as requested."

Judgment.

It was not necessary, in the absence of any evidence as to such a stipulation, to shew, by correspondence between the parties or otherwise, that none such existed; but I think the correspondence does negative the idea of any such stipulation, or any such understanding as is contended for by Dr. *Jessup*. The matter really in dispute has been, and is, whether what has been termed the centre crossing should be allowed or not—*i. e.*, whether St. Lawrence Street, or

1856.

Jackson v. Jessup.

Centre Street as it is sometimes called, should be produced through the railway station. The counsel for the plaintiffs have submitted in court that the other two streets should be produced; and in refusing the centre one, I see no desire to act vexatiously towards Dr. *Jessup*. I think Dr. *Jessup* has wholly failed to make out his claim in regard to the centre crossing.

As to Mr. *Brough's* position, that the court could not compel specific performance upon this agreement, against the plaintiffs; I am not satisfied that the defendant would be without remedy. After a conveyance to the plaintiffs of this land taken by them, and conveyed to them expressly for the railway station for Prescott, the court would, I apprehend, restrain the plaintiffs from erecting the railway station for Prescott anywhere else than upon this land. Again: If the plaintiffs changed their intention as to having a station at Prescott at all, then the consideration for the conveyance would wholly fail; and it may be, though it is unnecessary to say it, that the defendant would be entitled to a reconveyance. It is objected further, that the agreement was binding upon one party only, as it was not obligatory upon the plaintiffs to place the station on the lands which were the subject of the agreement, but it was provided that in case it was not placed there the agreement should be void; it was therefore to a certain extent binding upon one party only; but so is, generally, the covenant for renewals in leases; the option is not always, perhaps not generally, mutual, and yet they are specifically performed.

Judgment.

It is doubted whether the defendant is entitled to any crossing under the statute, and if not entitled under the statute, whether he is entitled to any crossing at all. I think he is entitled under the statute, although the mode of ascertaining the value of the land before provided by the statute was not in this instance resorted

1856.

Jackson v. Jessup.

to; for the statute contemplates an agreement as to the value between the company and individual owners of property, and failing that, a mode of ascertaining the value is provided, and then provides generally as to crossings. I think therefore that, whether the value is ascertained by agreement or in the mode prescribed when there is no agreement, the individual owner is equally entitled to a crossing under the statute.

All these are indeed imaginary difficulties. The station *is built*, and not one crossing merely, but the producing of two streets across the station ground, is conceded. The case of *Baring* v. *The Manchester Railway Company* seems to establish that where a party coming for specific performance has thus far performed his part of the agreement, and is ready and willing, and in a position to complete it, he is *rectus in curia*, and it is no answer to say that the court could not enforce the specific performance of the plaintiff's part of the agreement.

Judgment.

In coming to this decision Sir *James Wigram* takes it as established by the preceding case of *McIntosh* v. *The Great Western Railway Company*, that where the party coming for specific performance has actually performed his part of the agreement; the want of mutual remedy cannot be alleged. In this case the plaintiffs had probably placed themselves in a position to demand the conveyance asked for by this bill as soon as they had, in the terms of the agreement, set out the ground; but they have done much more, they have done all that formed the consideration for the conveyance; they have in effect paid the agreed price of the land; and it is now objected that they should not have a conveyance of the land, because, if they had not paid the consideration, that consideration was of such a nature that the court could not enforce it. It is difficult to imagine a more theoretical and technical ob-

jection. Where indeed the whole matter lies in *fieri*, there is some reason against enforcing specific performance against one when you cannot enforce it in his favor against the other contracting party; in such cases there is no mutuality of remedy: but here the objecting party wants no remedy, for he already has all that he contracted for. The court therefore can no longer say we cannot execute the whole contract, and therefore we will not execute one side of it; but nothing further remaining to be done in favor of the objecting party, and that which is to be done on his part being of a nature that the court can execute, the objection resolves itself into a hypothesis, that if a contingency had happened which has not happened, and which can never happen, the non-performance of the plaintiff's side of the agreement which has in fact been performed, then the former existence of that bygone contingency is a subsisting good and sound reason why he should not be decreed to perform his part of the agreement. If the court were to give effect to such an objection, it would, in my mind, be permitting the mere shadow of a technical rule to defeat a plain equitable right.

1856.

Jackson v. Jessup.

Judgment.

The cases I have referred to, and the elaborate decision of Lord *St. Leonards* in *Lumley* v. *Wagner*, shew a disposition not to allow this very useful branch of the jurisdiction to be defeated by merely technical objections, and seems to me fully to establish that in such a case as this there is nothing in this objection. I cannot doubt that any of the learned judges who decided those cases would have overruled the objection raised here.

1856.

GEARY v. THE GORE BANK.

Principal and Surety.

May, 24th. A surety paying the debt of his principal after arrangements had been made between the creditor and the principal debtor which would have had the effect of discharging the surety, is not entitled to recover back the money so paid.

The bill in this case was filed by *John Geary* and *William Niles* against *The Gore Bank*, *The Bank of Upper Canada* and others, alleged to be creditors of *William Jones Geary*, in several sums amounting in all to about £1570, the plaintiff *Niles* being surety for about £770 of that amount.

It appeared that for the purpose of securing these debts *John Geary* executed a mortgage upon certain lands and mill property, and with *William Geary* executed a confession of judgment; taking from the attorneys of the creditors an undertaking to issue execution, but not to sell unless compelled to do so by reason of other executions coming in; that default having been made in payment of some of the instalments, *John Geary* was applied to by the mortgagees to execute, and that he did execute a release of his equity of redemption, and they entered into possession of the property and sold it to one *Bull*, who paid £150 down, securing the balance (£772) by mortgage on the premises: but before any further payment was made the mill was burnt down.

Statement.

After the mortgage and confession of judgment had been executed, *Niles* paid the debts for which he was surety; the bill alleging that he had done so in ignorance of what had occurred between *Geary* and the creditors, but the evidence tended to show that he was always aware of it.

This, with the statement set forth in the judgment, it is believed, will be sufficient to render the facts of the case intelligible.

Mr. *Turner* and Mr. *R. Cooper* for plaintiffs.

Mr. *Mowat* for the *Gore Bank*.

Mr. *Crickmore* for the *Bank of Upper Canada*.

Exparte *Glendenning* (*a*), *Law* v. *The East India Company* (*b*), *Boultbee* v. *Stubbs* (*c*), *Rees* v. *Berrington* (*d*).

THE CHANCELLOR.—In the view which we take of this case it is unnecessary to state the facts particularly, or to go through the evidence, which is conflicting and unsatisfactory. The substance of the case is this—The plaintiffs were indebted to the defendants the *Gore Bank* and the *Bank of Upper Canada*, as sureties for *William Jones Geary*, a bankrupt. *Niles* paid these sums, and the allegation is that he paid them after he had been discharged from all liability, and in ignorance of that fact. The bill is for an account, and prays that the sums advanced by *Niles* may be repaid. Judgment.

I am inclined to accede to the plaintiffs' proposition that *Niles* might have resisted these demands with success. The agreement of May, 1846, had the effect, *primâ facie*, of discharging the surety; and I am by no means satisfied upon the evidence that the right to proceed against *Niles* was reserved by the creditors. But the answer to that is conclusive—namely, that no such case is made by the bill. The bill does not allege that *Niles* was discharged by the agreement of May, 1846; on the contrary, his subsequent liability is assumed throughout, and that ground of relief is consequently excluded.

It is argued, next, that the release of the equity of

(*a*) Buck. 517. (*b*) 4 Ves. 824. (*c*) 18 Ves. 20.
(*d*) 2 Ves. 540; S. C. 2 W. & Tud. 707.

1856.

Geary v. Gore Bank.

redemption, and the subsequent sale to *Bull* on credit, were equivalent to payment; that *Niles* ceased thenceforth to be debtor to the defendants, and that the monies paid by him ought therefore to be repaid. That argument would be of great weight with me if this were a proceeding to resist payment of these demands. But that is not the state of the case. The object of the present suit is to compel the defendants to refund monies paid by *Niles* voluntarily and with a full knowledge of all the facts; but there is no principle for that. It was competent to *Niles*, of course, to waive the defence of which he now seeks to avail himself; and as the evidence leaves no room to doubt that he made the payments voluntarily and with a full knowledge of all the facts, he must be taken to have waived it, and can have no right to the relief which is here asked. (*a*)

Judgment.

Now the repayment of the sums advanced by *Niles* was the substantial object of this suit. The plaintiffs do not ask to have the rights of the co-sureties, as between themselves, adjusted; they do not seek to stand in the place of the defendants, the *Bank of Upper Canada* and the *Gore Bank*, against the trust property, nor yet to have the property sold; they ask the account only as subservient to the main object, the recovery of these payments; and as they have no right to that, or even to an account as against these particular defendants, the bill ought perhaps, in strictness, to be dismissed; but as *Niles* is entitled to an assignment of the securities held by the banks, and to rank upon the estate for the amount of his payments, although that relief is not asked, and as it is for the interest of all the creditors that an account should be taken and a sale of the trust property directed, we think that a decree of that sort may be drawn up, but the *Gore Bank* and the *Bank of Upper Canada* must be paid their costs.

(*a*) Wareing v. Wason, 15 Beav. 151.

ESTEN, V. C.—I think it is quite clear upon the evidence—the whole of it—that the intention and agreement was, that the release of the equity of redemption should discharge only the *Gearys* or *William Jones Geary;* but *Niles* should remain liable for any deficiency on the sale of the property. 1856. Geary v. Gore Bank.

The plaintiffs should pay all the costs of the suit, and are entitled to no relief against the defendants or any of them, but may claim to have the necessary acquittances and discharges, and satisfaction entered on the roll and a sale—*Niles* to stand in the place of the banks: transactions with them not to be unravelled; property to be sold and creditors to be paid ratably; the necessary accounts for this purpose to be taken: defendants having the legal estate to join for the purposes of a sale. Judgment.

Niles seems entitled to his remedy as surety against *John* and *William Geary;* but no such relief is asked, or, it is apprehended, required; nor, perhaps, would it be proper; in fact the bill might properly be dismissed with costs, with liberty to file another for the proper relief.

SPRAGGE, V. C., concurs.

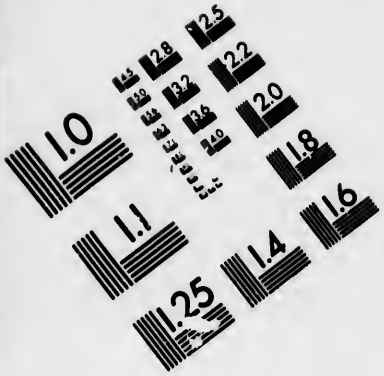
GOODWIN v. WILLIAMS.

Voluntary settlement—Judgment creditor.

A person against whom several executions for small amounts were in the sheriff's hands, and whose chattel property when sold by the sheriff was not sufficient to pay those executions, made a settlement of the only real estate he had in trust for his wife and children. *Held*, that the settlement was fraudulent and void under the statute 13 Elizabeth, chap. 5. May 12th.

A judgment creditor is not a purchaser within the meaning of the statute 27 Elizabeth, chap. 4.

This was a foreclosure suit. A decree had been obtained, but was subsequently set aside for irregularity, and on the suit proceeding, it was discovered



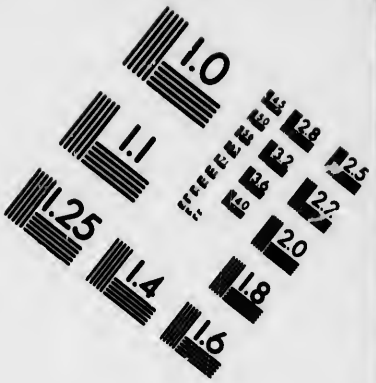
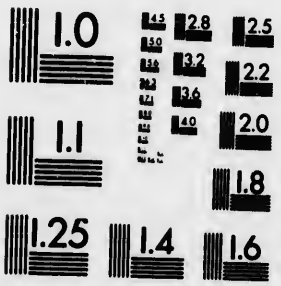
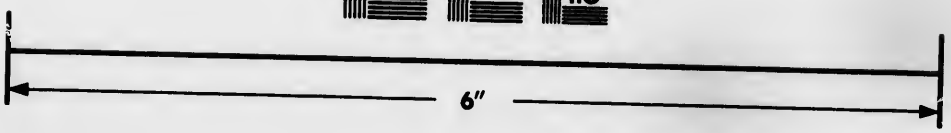


IMAGE EVALUATION
TEST TARGET (MT-3)





Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

1856. Goodwin v. Williams.

that the defendants were in reality trustees for the wife and children of *Richard Williams*. The deed creating the trusts being impeached as fraudulent, evidence was taken on the point, when the facts elicited were such as appear in the judgment of the court.

Mr. *Hector* for the plaintiff.

Mr. *Mowat*, Q. C., for the defendants *Williams*.

Mr. *Strong* for the defendants *Smith* & *Widdowson*.

The judgment of the court was delivered by

THE CHANCELLOR.—The only question argued on further directions was as to the validity of a voluntary settlement of the equity of redemption of the premises in question in this cause, executed by the defendant *Richard Williams* on the 13th of February, 1849.

Judgment.

It was argued, in the first place, that this settlement is void as against the judgment creditors of *Richard Williams*, under the 27th Eliz., ch. 4; judgment creditors being purchasers within the meaning of that act. I stated upon the argument that the proposition contended for appeared to me to be quite untenable, and subversive in many respects of what had been long considered as settled law. The learned counsel for the plaintiff, however, relied with some confidence upon a case of *Stone* v. *Van Heythuysen*, recently determined by Vice Chancellor *Wood*, and which I find reported in the 11th volume of *Hare* (*a*) as well as in the 18th volume of the *Jurist*, (*b*), to which we were referred as the only existing report. The point before us was not decided in *Stone* v. *Van Heythuysen;* but it must be admitted that the precise proposition for which the plaintiff contended is affirmed

(*a*) page. 126. (*b*) p. 344.

1856.

Goodwin v. Williams.

by the Vice Chancellor distinctly in the course of his judgment, and he reasons from it as settled law, to the conclusion at which he arrived in that case. We are relieved, however, from the hesitation which we must otherwise have felt in dissenting even from the doctrine of so learned a judge, by a recent decision; a report of which has been received since the argument of this cause. The case to which I allude is *Beavan* v. Lord *Oxford*, (*a*) which came before the Court of Appeal, including the present Lord Chancellor. That case overrules the old authorities upon which Vice Chancellor *Wood* proceeded, and decides expressly that a judgment creditor is not a purchaser within the 27th Elizabeth, ch. 4.

It was argued, in the next place, that the trust deed was at all events void under the statute 13th Eliz., ch. 5; and upon this branch of the case the evidence was a good deal canvassed on both sides, for the purpose of determining whether *Richard Williams* was solvent or insolvent at the time he executed the settlement in question. The cases upon this point are obscure and somewhat conflicting. Lord *Alvanley* decided in *Lush* v. *Wilkinson* (*b*), that nothing less than insolvency would suffice; and that notion appears to have prevailed more or less for a considerable period (*c*). Sir *Thomas Plumer*, on the contrary, appears to have determined in *Richardson* v. *Smallwood* (*d*), that absolute insolvency was not necessary; and that, so far as it goes, is no doubt correct. In *Scarf* v. *Soulby* (*e*), Sir *Launcelot Shadwell* decided that the indebtedness of the settlor at the time of the settlement was alone sufficient to bring the case within the provisions of the statute; and the learned judge cited several cases before Lord *Hardwicke*, which do appear, at first sight, to support his position; but upon

Judgment.

(*a*) 2 Jur. N. S. 121.
(*b*) 5 Ves. 384.
(*c*) See Shears v. Rogers, 3 B. & Ad. 362.
(*d*) Jac. 552.
(*e*) 16 Sim. 481.

1856.

Goodwin v. Williams.

appeal that decision was reversed by Lord *Cottenham* (*a*), who referred to *Townsend* v. *Westacott* (*b*), before Lord *Langdale*, as furnishing the true rule applicable to such cases. Recent authorities are in conformity with Lord *Cottenham's* judgment in *Scarf* v. *Soulby*, which may be safely regarded, perhaps, as having settled the law upon the subject. In *French* v. *French* (*c*), decided the other day, the present Lord Chancellor says: "That statute says not a word about voluntary settlement, but merely begins by reciting 'that persons with intent to delay, or defeat, or defraud their creditors, have made alienations or gifts of their property,' &c., and then enacts that such alienations or gifts are fraudulent and void against the creditors." Now the first question is, what is to be held to be an indication that a person making a settlement which is to be voluntary is thereby intending to defeat or delay creditors? If the settlement is made by a person who, if he had not made the settlement, would have had property upon which his creditors might immediately fasten, and pay themselves, but which, by the settlement being made, is withdrawn; that, *primâ facie*, is an act which must delay them. If a man having £10,000 worth of chattels in his shop, make a settlement of £1000 of it, and at the time owes but £1000, that can hardly be said to be an intention of delaying or defeating his creditors, because he leaves in the same state as before amply sufficient to pay them; but if he has £10,000, owes £10,000, and settles £5,000, he does not leave sufficient to pay his debts; and that is not altered by the circumstance that he may have reversionary interests, nor by the circumstance that he may have other properties in the East Indies; nor is it affected by the circumstance that he may have debts owing to him, which, if he can, he may recover, or which he may not recover at all. If the immediate effect is to with-

Judgment.

(*a*) 1 McN. & G. 364. (*b*) 2 Beav. 340, & 4 Beav. 58.
(*c*) 2 Jur. N. S. 169.

draw assets that are immediately available, so that they are placed beyond the reach of the creditors, this is clearly a delaying within the meaning of the statute."

1856.
Goodwin v. Williams.

Now that passage appears to me to furnish a very clear statement of the rule to be deduced from modern authorities; and applying the principle there laid down to the case before us, I have no doubt that this settlement is fraudulent and void under the 13th Eliz. ch. 5. That *Richard Williams* was in a state of great embarrassment at the time he executed this instrument, cannot be doubted. During the month of November, 1848, and subsequently, several executions for small amounts were in the sheriff's hands. At the time the deed was executed he possessed no other property except his household furniture. That was sold within a few days after the execution of the settlement, for a sum not sufficient to pay his creditors. *Smith* and *Widdowson*, who are defendants in the present suit, were judgment creditors then, and have not yet been paid. A *Fi. Fa.* for a small amount was placed in the sheriff's hands in the early part of March, at the suit of the Gas Company, which was returned *nulla bona*. And, finally, the settlor was arrested about the same time, at the suit of Mr. *Dennison*, for a debt of £15; and after having lain for several weeks in jail, he at length procured his discharge by assigning the rent of the settled property to Mr. *Dennison*. I have no doubt whatever that a voluntary settlement executed under such circumstances, is fraudulent and void within the statute of Elizabeth.

Judgment.

1856.

LYON v. RADENHURST.

Trustee appointed by Court—Power of.

June 30th. A testator by a codicil to his will directed that the trustees named in his will, or the survivor of them, or the heirs, executors, or administrators of such survivor, should, during the minority of his children, have power to appoint some person whom they might think fit and competent to take charge of and conduct and carry on his business in the manner it had been carried on during his life-time, and to pay the person so appointed a salary. The surviving trustee having died intestate, leaving his widow, who took out letters of administration to his estate, but declined acting as a trustee under the will, and his eldest son being an infant, and therefore incapable of acting as such trustee—the persons interested under the will of the testator filed a bill for the appointment of a new trustee. *Held*, that under the circumstances the parties were entitled to have a new trustee appointed; but that the powers given by the codicil were personal to the trustees named in the will, or the survivor, or the heirs, &c., of the survivor, and could not be exercised, by any trustee appointed by the court.

Mr. Morphy for plaintiff.

Mr. Barrett for defendants.

THE CHANCELLOR.—This suit is instituted by the devisees of *George Lyon* for the purpose of having
Judgment. new trustees appointed in the room of *William Horace Radenhurst*, the heir-at-law of the surviving trustee, who is a minor.

The testator had been engaged in various branches of manufacture, and the object of the plaintiffs is to have the business in which he had been so engaged continued under a provision in the codicil to his will, which is in these words: "Now I do by this writing, which I hereby declare to be a codicil to my said will to be taken as part thereof, will and direct that my *said trustees, or the survivor of them, their or his heirs, executors, or administrators*, in case a favorable opportunity may not offer to sell the said personal property, or to demise, lease, set, or otherwise rent my said real estate during the said period from my decease until my youngest child attain its majority, do and shall appoint some person whom they may think fit and competent to take charge of, and to conduct and

1856.

Lyon v. Radenhurst.

carry on my said business in the manner that it has heretofore been carried on, for such time or times, during the said period, as my said executors, or the survivor of them, their heirs, executors, or administrators, shall deem most fit for the benefit and profit of my said estate; and that such person do keep and render proper accounts of the business to my said executors, or the survivor of them, their or his heirs, executors, or administrators, and that my said executors do pay such person a reasonable and fixed salary for his said services, such salary to be chargeable upon and payable out of the proceeds of my said estate."

The relief prayed by this bill is not resisted by the defendants. Indeed, the propriety of appointing new trustees under the circumstances, cannot, I think, be doubted; and the only question is as to the power of such trustees to carry on the testator's business under the provision contained in the codicil to which I have just referred. Now the power with which the testator has invested his trustees in this case does appear to me to indicate the greatest personal confidence; and it is clearly settled, I apprehend, that such powers are confined to the persons indicated by the devisor, and cannot be exercised by trustees appointed by this court.

Judgment.

Cooke v. *Crawford* (*a*) has been the subject of much observation (*b*); and if the reasoning of Lord *Langdale* in *Titley* v. *Wolstenholme* (*c*), and of Sir *John Romilly*, in *Macdonald* v. *Walker* (*d*), ought to prevail, there is certainly room to contend that the trust in the present case does not indicate personal confidence, and ought to be exercised by any person to whom the character of trustee may happen to belong. I am not prepared to admit that *Cooke* v. *Crawford* was wrongly decided. I incline to think it consistent with the previous authorities. But whatever may be the ultimate fate of

(*a*) 13 Sim. 91.
(*b*) 2 Jar on Wills [716].
(*c*) 7 Beav. 425.
(*d*) 14 Beav. 556.

1856.

Lyon v. Radenhurst.

Cooke v. *Crawford*, the present case appears to me to be governed by decisions of the highest authority. In *Cole* v. *Wade* (*a*) the power was given to the trustees, and the heirs, executors, and administrators of the survivor of them. The power in *Doyley* v. *The Attorney-General* (*b*) was given in words precisely similar. In *Fordyce* v. *Bridges* (*c*) the discretion was reserved to the three trustees, their executors, administrators and assigns. In *Newman* v. *Warner* (*d*), it was to the trustees and the survivor of them, and the executors and administrators of such survivor; but in all these cases it was held that the powers had become extinct, and could not be exercised by trustees appointed by the court. These authorities shew that when the devise is of a nature to indicate personal confidence, the reservation of the power to the heirs, executors, and administrators of the surviving trutsee, does not affect the discretionary character of the trust; and this governs the present case, because they determine that powers of that sort, however "incongruous and inconsequential" such a form of devise may be, can only be exercised by the persons designated by the testator, and not by the trustees appointed by this court.

Judgment.

My brother *Spragge* referred to a case of *Byam* v. *Byam* (*a*), recently decided at the Rolls; to which I may add *Brassey* v. *Chalmers* (*f*), which came before the same learned judge. But these cases do not appear to me to conflict, in principle, with the previous authorities. In both, the power was given to certain persons by name, who were also appointed executors or trustees; and the learned judge professed to proceed, in each, upon the principle that the power had been attached by the donor to the office, and not to the person; upon the principle, in other words, that there was sufficient, upon the whole instrument, to exclude the inference of personal confidence, derived from the

(*a*) 16 Ves. 27.
(*b*) 4 Vin. 485.
(*c*) 2 Phil. 497.
(*d*) 1 Sim. N. S. 457.
(*e*) 19 Beav. 58.
(*f*) 16 Beav, 223.

nature of the trust. These cases, therefore, do not impeach, but rather establish the principle of the previous decisions; and the question whether they were rightly decided upon the circumstances is immaterial to our present purpose. 1856. Lyon v. Radenhurst.

My opinion therefore is, that the plaintiffs are entitled to have new trustees appointed in the room of the heir of the surviving executor, who is an infant, and incapable therefore of performing the trusts of the testator's will (*a*); but for the reasons already stated, I think that the power given by the codicil is discretionary, and cannot be exercised by the trustees to be appointed under the decree.

SPRAGGE, V. C.—I think the conclusion to be drawn from all the cases is, that when the trust created is discretionary in its character, and from the terms in which it is conferred appears to be of a personal nature, the discretion vested in the persons designated in the instrument creating the trust cannot be exercised by a trustee appointed by the court. Judgment.

The trust has been held to be personal, even when it is made to devolve upon those in whom it would be difficult to conceive that any trust was reposed—for instance, the heir of a survivor of several trustees, or an administrator; and it has been argued that it must have been intended that such persons were intended to execute the trusts only because they should happen to fill the office, and not because any confidence was placed in them, or could in the nature of things be placed in them; and therefore, that any person filling the office by the appointment of the court should exercise the same discretionary power that they could exercise. But it has been held that such persons, heirs or administrators, upon whom accident might throw the

(*a*) Hill on Trustees, 184.

1856.

Lyon v. Redenhurst.

execution of the trust, may exercise the discretion, because they are *designated* in the instrument to exercise it, while trustees appointed by the court are not so designated. It has not been held that the creator of the trust has manifested an intention that the discretion conferred should be exercised by any others than those designated, unless when the words "trustees for the time being," or some equivalent expression, has been used.

The late case of *Byam* v. *Byam*, before Sir *John Romilly*, may be an exception; but it was not a contested case; and in the settlement creating the trust in that case no words devolving the trust upon the representatives of the trustees named were used. Sir *John Romilly* held the trust annexed to the office and exercisable by a trustee appointed by the court. If he could have held the same in the case of an instrument devolving the trust upon the representatives of the trustees, it would seem to be in opposition to the weight of authority.

Judgment.

At the same time I cannot but think that the intentions of testators and those creating discretionary trusts would be best carried out if the discretion were exercisable by trustees appointed by the court; and that their intentions must be at times necessarily defeated, because a trustee appointed by the court has not such power in the present state of the law.

Decree.

Declare—That the powers vested in the trustees appointed by the said will, and under and by virtue of the said codicil, in so far as the same directs that the said trustees, or the survivor of them, their or his heirs, executors, or administrators, in case a favorable opportunity might not offer, to sell the personal property of the said testator, or to demise, lease, set, let, or otherwise rent the said real estate, might, during the period from his decease until his youngest child should attain its majority, appoint some person whom they might think fit and competent to take charge of and conduct and carry on his said business in the manner it had been theretofore carried on, for such time or times during such period as his executors or the survivors of them, their heirs, executors, or administrators should deem best for the benefit and profit of his said estate, and that such person should keep and render proper accounts of the said business to the said

executors, or the survivor of them, their or his heirs, executors or administrators, and that his said executors should pay such person a permanent and fixed salary for his said services, such salary to be chargeable upon and payable out of the proceeds of his said estate; were personal to the trustees in the said will named, and the survivor of them, and the heirs, executors, and administrators of such survivor, and cannot be exercised by any trustee to be appointed by this Court: And the said defendant *E. R.*, the administratrix of *T. M. R.*, who was the surviving trustee of those appointed under the will of the said *G. L.*, by her counsel declining to act as a trustee under the said will, and praying to be relieved from the future execution of the trusts thereof, and the said *W. H. R.*, the eldest son of the said *T. M. R.* being an infant under the age of twenty-one years, and therefore incapable of discharging the trusts of the said will: this Court doth further declare, that the said plaintiffs are entitled to have a new trustee appointed in the place and stead of the said defendants *E. R.* and *W. H. R.*, and doth order and decree the same accordingly; and it appearing to this Court that *R. L.* of, &c., is a fit and proper person to be appointed such trustee, this Court doth order that the said *R. L.* be, and he is hereby, appointed trustee of the said last will and testament of the said *G. L.*, in the pleadings named, in the place and stead of the said *W. H. R.* and *E. R.*: and upon the said *W. H. R.* and *E. R.* conveying the trust, estate and premises vested in them by the said will and codicil thereto, so as to vest the same in the said *R. L.*, upon the trusts in the said will and codicil mentioned, such conveyance to be settled by a judge of this Court, and the said defendant *E. R.* passing her accounts and the accounts of the said *T. M. R.*, in respect of the said trust estate: It is ordered that the said defendants be discharged from the trusts of the said will. And it is ordered that the said defendants do deliver up to the said *R. L.* all deeds and writings in their or either of their custody or power relating to the said trust estate. And it is ordered that the said plaintiffs and defendants be paid their costs of this suit as between solicitor and client out of the said trust estate, and the said *R. L.* is to be at liberty to raise and retain the same out of the personal estate, or the rents and profits of the real estate of the said *G. L.*, deceased, which may come to the hands of the said *R. L.* as such trustee as aforesaid.

1856.

Lyon v. Radenhurst.

Decree.

McMaster v. Campton.

Practice—Rehearing.

Upon the argument of a petition for rehearing, the party applying cannot ask the decree to be varied in any particular not objected to by the petition; and upon a second petition of rehearing he is confined to such parts of the decree as were objected to by the former petition.

This was an application by the defendant to present a second petition of rehearing, the circumstances of which appear in the judgment of the court.

Statement.

Mr. *Strong* and Mr. *Turner* for the defendant.

Mr. *Mowat*, Q. C., contra.

1856.

McMaster v. Campton.

THE CHANCELLOR—This was a foreclosure suit. The bill was filed on the 29th March, 1851; on the 9th of the following May a decree was pronounced upon motion, of which notice had been served on the defendant personally. In the Master's office the usual warrants were served upon the defendant personally. The report was made on the 5th of June, 1851, and the final order for foreclosure was obtained on the 16th of December, in the same year.

On the 30th of August, 1853, a petition of rehearing was presented, which complained that the decree was erroneous in declaring that the mortgagor's wife, who had been made a defendant, should be foreclosed, on default, whereas the bill should have been dismissed as against her with costs, inasmuch as she had never executed the mortgage deed. The petition also complained that certain proceedings in the Master's office, subsequent to the decree, to which I need not more particularly advert, were irregular.

Judgment.

Upon that petition the cause was set down in the usual way, and on the rehearing the court was of opinion that the decree ought to be varied by directing the bill to be dismissed as against Mrs. *Campton*, the mortgagor's wife; but the other objections were overruled: first, because obviously such questions were not open to discussion on the rehearing (*a*). Secondly, because as irregularities, we thought they had been waived; and it was therefore ordered that the decree in all other respects should stand.

A second petition of rehearing has been presented, which, in addition to the points taken by the former petition, complains that the decree is erroneous in this, that it directs the estate to be conveyed, upon payment, to the mortgagor and his wife; whereas, it should have directed a reconveyance to the mortgagor alone.

(*a*) 3 Danl. C. P., 1 Ed. 110-111; Bowyer v. Bright, 13 Price, 319.

1856.

McMaster v. Campton.

This error was pointed out by the court upon the rehearing, but as no alteration of the decree in that respect had been asked, my brother *Spragge* and myself were of opinion that the point was not open to the appellant, (*a*) and that, if competent, it was not incumbent upon us to direct the decree to be varied in a particular as to which no objection had been made.

To that opinion I still adhere. It is clear, I think, that the appellant was not in a position, upon the rehearing, to ask that this decree should be varied in any particular not objected to by the petition; and it is equally clear, I apprehend, that the appellant is confined, upon a second petition of rehearing, to such parts of the decree as were objected to on the former petition; (*b*) and I am therefore of opinion that no case has been shewn for rehearing, (*c*) and that the petition should be dismissed with costs.

Judgment.

ESTEN, V. C.—It appears to me that no new ground is presented by this petition. What is suggested necessarily follows upon the dismissal of the bill as to the wife, and was therefore implied in the object of the former petition. I must suppose that the court intended, after dismissing the bill as to the wife, to proceed to direct that upon payment by the husband the property should be reconveyed to him, and that it was omitted by oversight. The decree as it stands is doubtless self-contradictory and inconsistent on the face of it, and I cannot suppose that the court so intended. The substantial question argued on the former rehearing was, whether the husband should have a new day, and this the majority of the court decided against him; and I must suppose that the requisite alteration would have been made in the decree without affording

(*a*) 2 Smith C. P. (2 Ed.) page 31; 3 Danl. C. P. (1 Ed.) page 127; Rawlins v. Powell, 1 P. W. 299; 2 Eq. Cas. Ab. 391.
(*b*) 3 Danl. C. P. (3 Ed.) p 104; 2 Smith. C. P. (2 Ed.) 26; Norbury v. Meade, 3 Bligh. 261.
(*c*) 3 Danl. C. P. (1 Ed.) 113.

1856.

McMaster v. Campton.

him a fresh opportunity of redeeming the property, which would have been effected simply by allowing the time to remain the same, but by introducing the necessary alterations in other respects. I thought, and still think, that the court ought not to do this, but I must suppose that the majority were of a different opinion. I look upon this proceeding rather as a rehearing of the order made on the rehearing than of the original decree. I think that order was drawn erroneously: that it did not provide enough; but I consider the point decided on the former petition. I have no reason to doubt that a bill of review could have been maintained under the former practice in this case. There was error, I apprehend, apparent on the face of the decree. Whether upon such a bill the requisite alteration would have been made without giving a new day, is the question. I think not, and therefore I think a new day should have been appointed in the present instance.

Judgment.

SPRAGGE, V. C.—I still think that the order made on the rehearing of this case was the proper order; that part of the decree was complained of which directed the wife of the mortgagor to be foreclosed in the event of the mortgage not being redeemed. In truth she had not executed the mortgage, and she was aggrieved by such a decree, but she was the only party aggrieved, and the court, as I conceive, did all that was necessary or proper in setting the decree right upon that point; this was done by directing the bill to stand dismissed as against her. There were other minor objections which were overruled. Another portion of the decree appears open to objection—namely, that part which directed that in the event of redemption the mortgaged premises should be reconveyed to the husband and wife, instead of the husband only. This part of the decree, however, was not objected to in the former petition of rehearing, but was noticed in the judgment delivered by the Chancellor, and it is now complained of in the second petition of rehearing.

1856.

McMaster v. Campton.

The defendant now contends that the point was open to him on the first petition, although that part of the decree was not objected to; and that the point having been noticed by the court, the court ought to have given effect to it; and in support of this position a passage is cited from *Daniel's* Practice, which states that it is not necessary that a petition for a rehearing should state the reasons why the party presenting it is dissatisfied with the original decree or order, but that it usually states in a general manner that he is aggrieved by it, or by part of it; and prays that the cause, &c., may be reheard, and either that the decree may be reversed or that it may be altered in such points as are objected to. This passage does not bear out the position contended for, which is, that a party objecting to a portion of a decree, other portions of the decree not objected to in the petition may be objected to on the hearing of the petition—in other words, that he may petition against a part of a decree, and upon the hearing of the petition object to the whole of it. Not complaining of part of a decree is quite a different thing from not stating *reasons* for objecting to the parts that are complained of; the latter is unnecessary, the former is a bar to impeaching it when the petition is heard, and is so stated by the same writer, who at page 1631 quotes Lord *Redesdale* as his authority. In the case of *Rawlins* v. *Powell*, (*a*) that learned judge said that "upon the plaintiff petitioning to rehear, the cause was open as to the whole and every part of it with respect to the defendant; while in relation to the plaintiff it was only open as to those parts complained of in the petition:" the passage in *Daniel* is to the same effect, the words appellant and defendant being used instead of plaintiff and defendant. The defendant in this case, therefore, was not entitled upon his former petition to object to the decree upon that ground, and that ground for a second rehearing fails.

Judgment.

(*a*) 1 P. W. 299.

1856.

McMaster v. Campton.

A second rehearing is admittedly a matter of discretion, and only granted, as I understand it, where it would be conducive to the ends of justice. So little has the defendant been aggrieved by the error upon which he now seeks to impeach the decree, that although he had in his first petition evidently scrutinized the decree, and the proceedings upon it, with a view to what is commonly called picking holes in them, he did not discover that it was, in that respect, in an unobjectionable shape until it was pointed out by the court; and he now, some four years after the decree, after default in payment, and after final order for foreclosure obtained in December 1851, asks that proceedings may be opened on account of this defect. I think it would not be a sound exercise of discretion to accede to this.

Judgment.

If, indeed, it would at all benefit the defendant to have the decree set right upon this point—for instance, in case the foreclosure should be opened by the mortgagor suing for the mortgage money—I see no particular objection to its being done, without, however, opening the foreclosure, which I think would be very unjust to the mortgagee: that, however, is evidently not what the defendant seeks, and would almost certainly be varying the decree in a manner barren of all useful results to him. I am not prepared to say that even this should be granted.

HOWITT v. GZOWSKI. 1856.

Chattel mortgage.

Where parties employed an agent to quarry and get out a quantity of stone for the purposes of certain works then in progress, and for the purpose of carrying out the agreement made advances in money; and by the terms of the contract entered into between them it was stipulated: "*That upon all materials upon which the parties of the second part shall have made any advances, the said parties of the second part shall have and retain a first lien and preference for all monies advanced upon the same, or under this contract, and the same shall become from the time of their preliminary construction the absolute property of the parties of the second part, subject to the right of the parties of the second part to reject the same should the same be rejected as hereinbefore mentioned: nor shall the same, unless afterwards rejected, be removed by the said party of the first part, or appropriated to any other use than that of the said works; but it is distinctly understood that all such materials, as well as all tools, instruments and other things, shall be in the charge and at the risk of the party of the first part.*" *Held*, That as against a subsequent *bona fide* purchaser such contract was fraudulent and void for want of registration.

Statement.

This was a suit to restrain the defendants, who were contractors for constructing a portion of the Grand Trunk Railway in Canada, from quarrying stone upon land of the plaintiff. It appeared that the plaintiff had entered into a contract with one *Rowlands* whereby *Rowlands* was to have the right of quarrying stone upon the property. *Rowlands* having agreed with the defendants to get them out a quantity of stone for their road, entered into a written contract on the subject, whereby a lien was given to them for all advances made to *Rowlands* under the contract, the terms of which are clearly set forth in the judgment.

On a former occasion an injunction had been moved for and granted, but it appearing that the defendants intended not to quarry any more upon the premises, the injunction was not acted on,—the defendants undertaking to keep an account of what portion of the stone already quarried might be used by them: their right to retain possession, under their contract, of the stone so quarried being the point to be discussed.

Mr. *Crooks* for plaintiff.

Mr. *Mowat* for defendants.

1856.

Howitt v. Gzowski.

The arguments of counsel sufficiently appear in the judgment of the court, which was now delivered by

THE CHANCELLOR.—So far as the bill seeks to restrain further quarrying, the plaintiff rests his case upon this: that this contract with *Rowlands* was a mere license, revocable at any moment, and in fact revoked with the consent of both parties.

We are of opinion that the plaintiff's case fails entirely, in that respect, on both points. We think it clear, as a matter of law, that the contract between the plaintiff and *Rowlands* was a valid and binding contract, which the plaintiff had no right to rescind. And we think it is equally clear, as a matter of fact, that neither the plaintiff nor *Rowlands* had any intention whatever of rescinding it. An attempt was made to infer such an intention from some loose expressions contained in the memorandum of the 23rd of Sept., 1854; but looking at the whole of that memorandum, and at the bill of sale by which it was carried into effect, and considering the steps which *Rowlands* was taking to carry on the work under the superintendence of *Gzowski*, we think it perfectly clear that no such intention existed.

Judgment.

With respect to the stone which had been quarried by *Rowlands* on the 23rd of September, 1854, the plaintiff relies upon a bill of sale of that date, duly registered pursuant to the statute. The defendants contend, on the other hand, that they were entitled to retain the quarried stone under a clause in their written contract with *Rowlands;* and they argue that the case is excepted from the operation of the registry law, because they were in possession of the property in question under that clause previous to the execution of the bill of sale under which the plaintiff claims.

The clause under which the defendants claim is in these words: "And it is further agreed, that upon

all materials upon which the parties of the second part shall have made any advances, the said parties of the second part shall have and retain a first lien and preference for all monies advanced upon the same, or under this contract, and the same shall become from the time of their preliminary construction the absolute property of the parties of the second part, subject, however, to the right of the parties of the second part to reject the same, should the same be afterwards rejected as hereinbefore mentioned. Nor shall the same, unless afterwards rejected, be removed by the said party of the first part, or appropriated to any other use than that of the said works; but it is distinctly understood that all such materials, as well as all tools, instruments, and other things, shall be in the charge and at the risk of the party of the first part."

1856.

Howitt v. Gzowski.

Now that clause, if it had any effect, must have operated either as a mortgage or *quasi* mortgage, or as a bill of sale, and in either view it comes within the provisions of the registry laws, unless the possession be sufficient to except the case from their operation. But we think it clear that the possession here is not sufficient to except the case from the operation of the statutes. First, because there was not in fact any change of possession such as the statutes contemplate. The defendants never did take possession at all as owners under this clause. They took possession rather as the agents of *Rowlands*, and for the purpose of carrying out the contract on his behalf. Secondly, because the contract, whether it is to be regarded as a sale or a mortgage, was not accompanied by an immediate delivery, which the statute expressly requires. The language of the Legislature is very clear upon this point. The late act (*a*) recites that, "Whereas the law now in force in Upper Canada requiring mortgages of personal property to be filed, requires amendment so as to require that every sale of goods and chattels *which*

Judgment.

(*a*) 13 & 14 Vic., ch. 62.

1856. Howitt v. Gzowski. *shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession* of the things sold, shall be in writing," &c., and then it goes on to state: "That every sale of goods and chattels *which shall not be accompanied by an immediate delivery, and followed by an actual change of possession*, shall be in writing," &c. Now the contract in the present case, whether it is to be regarded as a sale or mortgage, was not accompanied by an immediate change of possession. Possession, if taken at all within the meaning of the acts, was not taken until long after the sale. The contract, therefore, ought to have been registered; and not having been so, it is fraudulent and void as against the plaintiff's bill of sale, which was duly registered. To that extent, therefore, we think that the plaintiff is entitled to relief.

JOHNSON v. THE CANADA COMPANY.

Parol agreement, payment of purchase money not a part performance of.

October 9th. Payment of the whole amount of purchase money, in pursuance of a parol contract for sale, will not operate as part performance to take the case out of the Statute of Frauds, any more than payment of a portion of the price.

Statement. This was a bill for specific performance of a parol agreement for the sale of lands, setting forth that plaintiff had paid the full price agreed upon, with a view of shewing a part performance of the contract, in order to take the case out of the statute.

To this a demurrer for want of equity was put in.

Mr. *Brough* in support of demurrer.

Mr. *Turner* contra.

The judgment of the court was now delivered by

SPRAGGE, V. C.—In the earlier cases arising upon bills by vendors of real estate for specific performance,

1856.

Johnson v. Canada Co.

it was held that the payment of any portion of the purchase money was a part performance to take the case out of the statute; afterwards the payment of a *substantial* part was held to be necessary. It has been subsequently held that the payment of a part, even though a substantial part, is not sufficient; and it is admitted on the argument of this demurrer that such is now the law. The doctrine has become more and more strict on this point; and generally there is, as Mr. *Batten* observes (*a*) in his treatise on specific performance, a growing reluctance to carry parol agreements into execution, on the ground of part performance, where the terms do not distinctly appear. In this case the bill alleges that the whole purchase money has been paid; and it is contended that such payment is a part performance.

In *Ex-parte Hooper*, (*b*) Mr. *Fonblanque* and Mr. *Montague* for the petitioners, said, in argument, that payment of the whole purchase money is considered as part performance; although payment of a part only has not that effect, being regarded merely as earnest, according to Lord *Redesdale*, in *Clinan* v. *Cooke:* and Lord *Eldon*, in disposing of the matter, merely uses these words: "Without saying whether in the case of a parol contract for the sale of an estate payment of the whole price would be a part performance, that would support the contract, &c."

Judgment.

Lord *Redesdale* did not, in *Clinan* v. *Cooke*, regard part payment merely as earnest, but said that a payment of fifty guineas would no more take the case out of the statute than the payment of one guinea (referring to *Seagood* v. *Meade*, (*c*) where a guinea had been paid by way of earnest), "for it is paid in both cases as part payment, and no distinction can be drawn." One of the reasons given by Lord *Redesdale* in the above case why payment of purchase money

(*a*) p. 95. (*b*) 19 Ves. 480. (*c*) P. Ch. 560.

1856.

Johnson v. Canada Co.

should not be deemed part performance is, that the Statute of Frauds providing that in respect to goods part payment shall operate as part performance, the courts have considered this as excluding agreements for lands, because it is to be inferred that when the Legislature said it should bind in the case of goods, and was silent as to the case of lands, they meant that it should not bind in the case of lands.

The other reason given by Lord *Redesdale* is as applicable to the case of full payment of purchase money as of part payment only. He says: "I take it that nothing is to be considered as a part performance which does not put the party in a situation that is a fraud upon him unless the agreement is performed;" after instancing the case of a party being let into possession upon the parol agreement; which possession would make him liable as a wrong-doer and accountable for the rents and profits, unless such letting into possession were taken as part performance, he proceeds: "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 that nature. Payment of money is not part performance, for it may be re-paid; and then the parties will be just as they were before, especially if re-paid 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."

Judgment.

In the more recent case of *Dale* v. *Hamilton* (*a*) Sir *James Wigram* treats the point as settled, and puts the reason upon the same ground as was applied by Lord *Eldon* in *ex-parte Hooper* to cases of an alleged mortgage: after putting the case of delivery of possession of land as a common example of part performance, Sir *James Wigram* (*b*) says: "But an

(*a*) 5 Hare, 369. (*b*) p. 381, Rec.

act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance, taking the case out of the Statute of Frauds; as, for example, the payment of a sum of money alleged to be purchase money." So in another passage: "It is without doubt a gross moral fraud for a vendor who has got his purchase money to withhold the conveyance; but payment of purchase money will not take a case out of the statute."

1856.
Johnson v. Canada Co.

The distinction which the plaintiff's counsel attempts to draw between payment of part and payment of the whole of the purchase money, does not appear to me to be sustainable upon authority or upon reason. In addition to the payment of purchase money, the plaintiff alleges that "he has made improvements on the said premises," without alleging any delivery of possession and making improvements consequent thereupon, or that the improvements were made in pursuance of the contract, or as a purchase, or even that in point of time they were made after the contract.

Judgment.

I think clearly that nothing is shewn here to take the case out of the statute.

I think the demurrer must be allowed.

1856.

MARCON v. ALLING.

Will—Construction of—Vested estate.

May 12th. A testator by his will made a devise in the following terms—"I give, devise, and bequeath unto my grandson *G. K. W.* upon his attaining the full age of twenty-one years, and to his heirs forever, all and singular, &c.; [naming certain lands] and my executors are hereby required to make whatever use or benefit they can or may for the advantage of my said grandson during his minority, and pay to him upon his reaching the age of twenty-one years whatever the said lots may have produced of clear profit during the said term of his minority from the day of the death of my said wife Susannah." *G. K. W.* survived the testator, but died during his minority. *Held*, that he took a vested interest descendable to his heirs.

Statement. This was a bill by *Frederick Marcon* and his wife to have the rights of parties under the will of *Robert Alling* declared.

Mr. *Hurd* for the plaintiffs.

Mr. *Brough* for the defendants *Wilson* and wife.

Mr. *Read* for the other defendants.

THE CHANCELLOR.—Two questions arise upon the will of Dr. *Alling*, the testator in the pleadings mentioned—first, as to the nature of *George Knyvett Wilson's* interest: secondly, as to the effect of the direction to convert the leaseholds into freehold.

Judgment. The testator having devised all his estate real and personal to the trustees named in his will, and having provided, among other things not material to the present question, for the maintenance and education of his grandson *George Knyvett Wilson* during minority, proceeds in these words—"I do give, devise, and bequeath unto my said grandson *George Knyvett Wilson*, upon his attaining the full age of twenty-one years, and to his heirs forever, all and singular, &c. And my executors are hereby required to make whatever use and benefit they can or may for the advantage of my said grandson during his minority, and pay

to him upon his reaching the age of twenty-one years, whatever the said lots may have produced of clear profit during the said term of his minority, from the day of the death of my said wife Susannah."

1856.

Marcon v. Alling.

George Knyvett Wilson survived the testator, but died before he attained the age of twenty-one; and the question is whether he took a vested interest descendable to his heirs, or a contingent interest expectant upon his attaining the prescribed age.

Looking at the whole will, the effect is, I think, that the rents and profits of this estate were to be paid to the testator's widow during the minority of the grandson, if she so long lived, but in the event of her death before the grandson attained the age of twenty-one, the rents and profits were to be accumulated for his benefit; and assuming that to be the true construction, it is clear, I apprehend, that the case comes within the rule laid down in *Boraston's* case, and the other authorities of that class.

Judgment.

In *Boraston's* case (*a*) the testator devised the monies in question to *Thomas Aumerie* and his wife for eight years, and after the said term to remain to his executors until *Hugh Boraston* should attain his age of twenty-one years, "the mesne profits to be employed by my executors towards the performance of this my last will; *and when the said Hugh shall attain the age of twenty-one years, then I will that he shall enjoy.*" The devisee died at the age of nine years, and the court said that the case at bar was no other, in effect, but that a man devises his lands to his executors for the payment of his debts until his son shall have come to his full age of twenty-one years, remainder to his son in fee," for although these are adverbs of time "when," &c., and "then, &c., yet they do not amount to make anything precede the settling of the remainder, no more than in the common case."

(*a*) 3 Rep. 19, a.

1856.

Marcon v. Alling.

In Doe dem. *Wheedon* v. *Lea* (*a*), the testator devised the premises in question to certain persons, their heirs and assigns, to hold to them and their heirs until *Michael Lea* should attain the age of twenty-four years, on condition that they should, out of the rents and profits, during all that time keep the buildings in repair. He subsequently devised the same premises to the said *Michael Lea*, his heirs and assigns, forever, *upon and as soon as he should attain the age of twenty-four years*, and directed his trustees to surrender the premises accordingly. *Michael Lea* died before he attained twenty-four, but the court held it to be clear beyond all doubt that he took a vested interest descendable to his heirs.

In *Mansfield* v. *Dugard* (*b*), the devise was to the testator's wife till his son should attain the age of twenty-one years, *and when his son should attain the age of twenty-one years, then to his son and to his heirs.*

Judgment.

The son died at the age of nineteen, and it was held that the wife's estate determined at his decease, and that the remainder vested in the son upon the testator's death, and did not expect the contingency of his attaining twenty-one years.

In Doe dem. *Haywood* v. *Whitby* (*c*), the premises in question were devised to certain trustees and their heirs, to lay out the rents and profits for the maintenance of the testator's nephews during their minority; *and when, and as they should attain the ages of twenty-four years, to remain to them and their heirs;* and it was held that the nephews took an immediate fee.

In Doe dem. Keegan v. *Ewart* (*d*), the testator devised his estate to certain parties upon trust to receive the rents and issues, &c., and apply them to the son of the testator's wife during her life and widow-

(*a*) 3 T. R. 41. (*b*) 1 Eq. Ca., Ab. 195. (*c*) 1 Bur. 228.
(*d*) 7 A. & E., 636.

hood, and from and after her decease or marrying again, which should first happen "upon trust, to apply the same, rents, &c., towards the maintenance and support of my said daughter *Isabella*, until she shall attain the age of twenty-five years; *and* from and after her attaining that age, then upon trust as to my real estate, for my said daughter *Isabella*, her heirs and assigns, for ever; and I give and devise the same accordingly; but in case it should happen that my said daughter *Isabella* depart this life without leaving issue lawfully begotten," then over. And it was held that *Isabella* took a vested estate tail on the death of the testator, her mother having died in his lifetime. 1856. Marcon v. Alling.

These cases shew that when land is devised to trustees until *A.* attains a given age, and "when," or "if" he shall attain the age, or "upon" his attaining that age, to *A.* in fee, *A.* takes a vested interest, and consequently, upon his death before attaining the prescribed age, the land will descend to the heir-at-law; and it is quite clear, I think, that the present case falls within that rule. Judgment.

It was argued, however, that *Festing* v. *Allen* (*a*) is a clear authority for the opposite construction. But *Festing* v. *Allen* belongs to an extremely different class of cases. There the devise was to trustees to the use of the testator's granddaughter for life, "and from and after her decease to the use of all and every the child or children of her the said *Martha Hannah Johnson* (the granddaughter), *who shall attain the age of twenty-one years.*" In that case, therefore, the age formed part of the description of the devisee, and upon that ground the court held that the granddaughter took an estate for life with remainders to such of her children as should attain the age of twenty-one. But this decision proceeds altogether upon the grounds to

(*a*) 12 M. & W. 279; and see as to this case Doe Dills v. Hopkinson, 5 Q. B. 224.

1856.

Marcon v. Alling.

which I refer, and is not in conflict with *Boraston's* case. The distinction between the cases is stated very clearly by Sir *Launcelot Shadwell* in *Newman* v. *Newman* (*a*), decided some years previous to *Festing* v. *Allen*, where his honor observes, "In *Boraston's* case, and in the other class of cases, there was, in the first place, a gift to the party intended to take; and then following the words "at, if, or when," that party shall attain a particular age; and it was held that these words were used merely for the purpose of pointing out the time at which the devisee was to take in possession. But in the case now before me there is no gift except to such of the testator's grandchildren as shall sustain the character of attaining the age of twenty-four. The attainment of that age is part of the constitution of the original taker." And in *Bull* v. *Pritchard* (*b*), Sir *James Wigram* proceeds upon the same distinction.

Judgment.

Festing v. *Allen*, therefore, does not touch the present case; and upon the authority of *Boraston's* case and others to which I have referred, I am of opinion that *George Knyvett Wilson's* interest was vested, and upon his death under twenty-one descended to his heir-at-law.

Upon the second question, which turns entirely upon the 11th paragraph of the will, I have no doubt that the price of converting the leaseholds into freehold is made a charge upon the whole estate of the testator.

ESTEN, V. C., concurred.

SPRAGGE, V. C.—I agree with the other members of the court as to the proper construction of this will; that the devise vested, and that the enjoyment only was postponed. I think, too, that other portions of the will besides the one which contains this devise, throw light upon the intention of the testator, and tend to shew that he did not mean the land in question to

(*a*) 10 Sim. 57. (*b*) 5 Hare 571.

1856.

Marcon v. Alling.

fall into his general estate. In disposing of his estate generally for the benefit of his wife during life and widowhood, and of his two daughters and their issue, he makes two exceptions, at least as to the daughters and their issue; one, upon which the question in this cause arises, in favor of the son of one of his daughters *George Knyvett Wilson*, who appears to have been an especial object of his bounty; the other, in favor of the other daughter and her husband and their issue. It is true that he selects one from the family of one daughter and makes no selection from the family of the other; but still these two exceptions from his general estate look as if he desired to deal in a manner equally with the two families so far as having a favorite in the one and not in the other, he could do so. The devise to the *Marcon* family was not in such terms that it could lapse; and there is nothing in the terms of the devise to the members of the *Wilson* family to indicate any intention that it should lapse in any event, and if it were to lapse it would destroy that equality which would otherwise exist; for in the event of a lapse the land devised to this member of the *Wilson* family would not be retained in that family, but would be inherited equally by the two families; and thus, taking these two devises as two shares, the *Wilson* family would have but half a share, while the *Marcon* family would have a share and a half. Of course this might be an unforeseen and yet a necessary consequence of the terms of the will; but, looking at the whole will, it looks to me as if the devise to the *Marcons* was made because of the devise to young *Wilson*, and that the intention was to benefit the family of each daughter, though as to one of the families, primarily an individual member of it.

Judgment.

Independently, however, of this consideration, I think the words used manifest an intention that the grandson *Wilson* should have the estate devised to him absolutely; the trustees to whom this was imme-

1856.

Marcon v. Alling.

diately devised being in the nature of guardians, to take care of it and invest the proceeds of it for his benefit until he should arrive at the age fixed by the testator for his coming into the enjoyment of it himself.

McDonald v. Jarvis.

Specific performance—Evidence.

After entering into a contract for the purchase of land, the vendee discovered a deficiency in the quantity sold, and insisted upon an abatement of price in respect thereof. After a good deal of discussion and negociation in respect of title as well as the deficiency of land, the purchaser proposed to waive the contract upon condition of the vendee paying the costs incurred by the purchase, and interest on the amount of purchase money from the time of the contract, which was acceded to by the vendor. After some weeks, a bill of charges was furnished to the vendor's solicitor, but he, objecting to some of the items of charge, tendered the amount less three items (amounting in all to about £4 or £5). A few days afterwards he offered to pay the full amount of the costs, but this was also refused, and a bill was filed praying for the specific performance of the contract.

Held, that what had taken place between the solicitors was no abandonment of the contract, and that the plaintiff was entitled to have the contract specifically performed.

A vendor having, in consequence of disputes arising between him and his vendee, sold the same property to another purchaser, but who had notice of the original contract, in a suit by the first, against the vendor and the second vendee, for the specific performance of the contract, the vendor was offered as a witness on behalf of the other defendant. *Held*, that he was not a competent witness under the circumstances, although he had parted with all interest in the property.

Statement.

This was a bill by *Donald McDonald* against *William Botsford Jarvis* (the Sheriff) and *Frederick William Jarvis* (Deputy Sheriff of the Counties of York and Peel), praying a specific performance of a contract entered into between the plaintiff and the defendant *William Botsford Jarvis*, for the sale by *Jarvis* of a lot of land and a dwelling house in the city of Toronto; the agreement stating the contents of the lot to be one acre: in reality it contained only three-fourths of an acre or thereabouts.

The evidence shewed that plaintiff resided close to, if not adjoining, the premises bargained for, which were embraced within fences.

The plaintiff alleged that on investigating the title, it was discovered that some judgments were standing against the vendor, and that the quantity of land was deficient by about twenty-six feet frontage of the quantity sold, and objections having been taken to the title, negociations in relation thereto were carried on between the parties and their solicitors. After much discussion certain propositions for settlement were made by the purchaser: 1st—that the vendor should clear the title so that no objection could be taken to it; or, 2nd—give the title as it was with a compensation for the deficiency in the quantity of land; or, 3rd—pay interest upon the purchase money from the time of the contract, and the costs incurred by plaintiff's solicitor in searching into title; upon doing any one of which the matter would be settled. The vendor having acceded to the last proposition, a bill was afterwards sent to him of the items of charge, consisting in part of about £11 for interest, £5 for fee on advising on title, and sundry small charges, making in all a sum of about £19. The vendor's solicitor objected to this bill as excessive, and offered £15 in full; this the purchaser's solicitor refused to accept, and told the other that he would not enter into the particulars of the bill, nor discuss the matter further. A few days afterwards the full amount of the bill was tendered of purchaser's solicitor, but this was also rejected. In the interval the vendor treating the agreement between him and plaintiff as at an end, sold and conveyed the property to the other defendant.

Statement.

The bill was shortly afterwards filed, and evidence was given at considerable length, the chief points of which are those above set forth.

The cause came on to be heard on the pleadings and evidence.

Mr. Mowat for plaintiff—The contract is distinctly shewn, and any rescision of it must be established by

1856.

McDonald v. Jarvis.

as clear evidence as the contract is proved by; here the evidence for that purpose is wholly insufficient—*Robinson* v. *Page* (*a*), *Carolan* v. *Brabazon* (*b*), *Price* v. *Dyer* (*c*), *King* v. *Wilson* (*d*)—There was in reality no agreement to rescind the contract; the parties in fact did not understand each other.

Mr. *Vankoughnet*, *Q. C.*, and Mr. *Strong*, for defendants, contended parties had waived the right on each side to enforce specific performance; that four pounds being in reality the thing in dispute, the court would not make use of this jurisdiction, which is intended to be used generally where damages will not compensate the party. Now in this case, where the parties themselves have stated their damage at the small amount shewn, no ground exists for calling for the interposition of the court.

Argument.

The court can make the compensation agreed upon, and the case is clearly one in which no other decree should be made in favor of the plaintiff—*Ogbourne* v. *Pitcairn* (*e*), *Bell* v. *Howard* (*f*).

The vendor had been examined as a witness by his co-defendant, and his evidence was offered on behalf of *F. W. Jarvis*. This the counsel for the plaintiff objected to the reception of, as the evidence given had a direct bearing in favor of the witness himself.—*Wood* v. *Rowcliffe* (*g*), *Monday* v. *Guyer* (*h*), *Carrington* v. *Pell* (*i*), were referred to, as shewing evidence was admissible.

At the conclusion of the argument,

THE CHANCELLOR intimated briefly that in his opinion what had occurred did not amount to an abandonment of the contract; and although the amount in

(*a*) 3 Russ. 49.
(*b*) 3 J. & La. 201.
(*c*) 17 Ves. 756.
(*d*) 6 Beav. 128.
(*e*) 2 Ves. Sen. 376.
(*f*) 9 Mod. 302.
(*g*) 6 Hare 183.
(*h*) 1 De G. & S. 182.
(*i*) 3 De G. & S. 512.

dispute was but trifling, the question now was, who was to be made sustain the costs of this litigation? clearly not the party who had never been in any default. 1856. McDonald v. Jarvis.

The case having stood over,

THE CHANCELLOR still adhered to the views expressed at the argument, and thought the plaintiff was entitled to a decree with costs.

ESTEN, V. C.—I think there should be a decree for the plaintiff with costs. I have come to this conclusion, without reading the sheriff's evidence, which appears to me to be inadmissible. I should put the same construction upon the English and provincial act—namely, that interest in a co-defendant does not disqualify him as a witness, but that he must not give evidence which will entitle himself to a decree. The provincial act contains no provision relative to co-defendants in equity, and perhaps may be thought not to apply to courts of equity at all; but certainly the intention of that act seems to be to exclude only the evidence of persons having the direct interest of parties in effect. The English act enables a defendant in equity to examine a co-defendant, notwithstanding he is interested, and there stops; but in construction it has been deemed not to let in evidence which supports the interest of the party giving it, and entitles him to a decree. This was the decision in the cases of *Monday* v. *Guyer* and *Carrington* v. *Pell*, cited by Mr. *Strong*. In both these cases the defendants were so completely identified in interest that there could not be a decree for or against one without there being the same decree for or against the other. In *Wood* v. *Rowcliffe*, it was different,—there *Rowcliffe* and *Buchanan* stood in the relation of first and second incumbrancers. There could be a decree in favor of *Rowcliffe* without there being one Judgment.

1856.

McDonald v. Jarvis.

in favor of *Buchanan*, and therefore there was no reason why *Rowcliffe* should not read *Buchanan's* evidence, and this was probably the reason why the Vice-Chancellor, in *Carrington* v. *Pell*, said that *Wood* v. *Rowcliffe* did not seem at variance with *Monday* v. *Guyer*. Now in the present case it is impossible that there can be a decree for *F. W. Jarvis* without there being also a decree for the sheriff. And although this circumstance may not exclude the evidence because his interest does not seem substantial, yet, as *F. W. Jarvis* had notice, and therefore if the bill be dismissed it must be from want of merits on the part of the plaintiff; as that he did not come into equity with clean hands, or that the contract had been rescinded, it is impossible that he could have his costs from the sheriff, and in all probability the sheriff would receive them from the plaintiff, and this as the direct result of his own evidence, which would therefore entitle him to a decree exempting him from, or entitling him to, costs. I therefore think the sheriff's evidence inadmissible. Upon the merits, I think the plaintiff purchased *bonâ fide*, and has been eager to complete his contract; that he has been guilty of no laches, and has never relinquished his rights or acquiesced in the second purchase; that the contract was never rescinded or abandoned; and that the plaintiff has been guilty of no bad faith.

Judgment.

SPRAGGE, V. C.—The plaintiff files his bill as vendee of the land in question. The contract for purchase between plaintiff and the defendant *William Botsford Jarvis* is not disputed. It is shewn in evidence that he was always a willing purchaser, prompt and willing to complete the purchase; and, apart from the question of compensation for the alleged deficiency of twenty-six feet frontage, no difficulty was occasioned by him. It lies upon the defendant to shew that he either abandoned the contract or has by his conduct disentitled himself to insist upon its specific performance.

1856.

McDonald v. Jarvis.

Two questions were raised by the purchaser, one of title, the other that of compensation. And, not to enter into the discussions of the parties, in which much time was consumed, they resulted in the three propositions, which have been referred to, and upon the third of which, and the acting of the parties upon it, the whole question appears to me to turn.

This third proposition was simply an offer to abandon the contract upon certain conditions in case the vendor should prefer it, rather than accept either of the other propositions. The conditions annexed to the offer do not seem unreasonable; though, had they been so, I do not see that that could have made any difference, as the purchaser need not have made the offer at all, and when he did make it, might make it upon such conditions as he thought fit. That offer was accepted, and as I think upon the evidence without any abandonment or annulling of the contract until its conditions should have been complied with. Some days after the vendor had signified his acceptance of the proposition the purchaser's solicitor delivered a bill or memorandum of his charges, which were to be paid by the vendor, and also of the interest on the purchase money also to be paid by the vendor. Up to that time the purchaser had not placed it in the power of the vendor to comply with the conditions of his offer, and so the latter was at that time chargeable with no delay. The whole amount of this bill was between £19 and £20; of this something over £11 was charged for interest on the purchase money, £5 for the solicitor's charge in investigating the title, which included a number of searches, attendances and interviews with the vendor, and the balance was for disbursements at public offices for searches. This bill was objected to as excessive, in regard to the amount charged for interest, and also in regard to the solicitor's charge. The purchaser's solicitor refused to discuss the particulars of the bill, but treated the

Judgment.

1856.

McDonald v. Jarvis.

payment of the amount charged as a condition of the offer, and told the vendor's solicitor that the proposition was before him, and that he must either accept or reject it; so at least the purchaser's solicitor swears though the solicitor for the vendee denies that he was told so. The vendor's solicitor, before leaving, offered £15 in payment of the bill; which was at once refused.

It should be mentioned that the purchaser's solicitor, in submitting the three alternative propositions to the vendor, declined to put them in writing, lest it might affect his client's rights under the contract, and at the same time remarked to the vendor that if he would fulfil them in a day or two, he had no doubt that his client would not depart from them.

Judgment.

After the discussion upon the amount of the bill, nothing appears to have been done for some time, when the purchaser, with a view to ending the question, instructed his solicitor that he should insist upon his contract unless one of the three propositions were accepted and immediately performed; and therefore on the same day the solicitor drew up a memorandum of the amount claimed for interest and costs, and wrote under it a notice to the effect, that if the same were not paid before night the proposition was withdrawn. This was done, the solicitor swears, in compliance with the purchaser's request. The time however was named by the solicitor. This document was carried by the solicitor himself to the office of the vendor's solicitor, and not finding him there, he delivered it to the vendor himself, whom he met near the office; this was between 10 and 11 o'clock in the morning. The solicitor opened the paper, shewed it to the vendor, and directed his attention to the notice and told him that he could do nothing else; that his client insisted on his doing it. No part of the money was paid or tendered upon that day, and it is clear

1856.

McDonald v. Jarvis.

that no attempt was made on the part of the vendor to do so. Some short time afterwards the vendor's solicitor called on the solicitor of the purchaser, and again attempted to reduce the amount of the bill; but the time which had been limited for payment having expired he did not consider the matter open for discussion, and referred to his client, who then expressed himself willing to take the title, and the quantity of land as they were, and decided not to give up his purchase. When this was communicated to the opposite solicitor, he said that the land had been already sold to another person, his own brother; he says indeed, that he had previously mentioned that the vendor had found another purchaser. I have endeavoured, by comparing the evidence of the two solicitors, to discover at what intervals the various communications between them took place, and how much time was consumed in endeavoring to reduce the purchaser's charges by four or five pounds. I should say some considerable time, during all which time the contract remained unrescinded, if the proposition was made, as I see no reason to doubt, in the shape deposed to by the purchaser's solicitor.

Judgment

The third proposition appears to have been in substance this: I will forego my purchase upon your paying interest on the purchase money, and my solicitor's charges, and this is to be done promptly, and until it is done the contract of purchase is to remain in full force. Now, if the purchaser and his solicitor had beforehand made up the amount of interest and charges, and either of them had named that amount as the sum to be paid, he would have had a clear right to do so. On the other hand, if the attorney had taken advantage of the shape of the proposition, to claim for his charges an amount palpably outrageous, it is probable that the vendor might not have been bound to pay it, viewing it as a departure from the spirit and meaning of the proposition of the purchaser

1856.

McDonald v. Jarvis.

himself; but even then, he should have communicated with the purchaser. Here the amount of the bill, without any deduction, was insisted upon from the first. No reference was made to the purchaser himself; and a considerabe time, I should say, elapsed.

From the terms in which the proposition was made, the vendor must, I conceive, have understood that the purchaser reserved to himself the right of withdrawing it; but that he would not do so if accepted, and the condition performed promptly. The time named by the solicitor was short, but no objection was made on that ground, and I incline to think that he might have withdrawn his propositson without giving any further time. It is not like the case of a party *rescinding* a contract: here was a party willing to perform it, but difficulties having arisen, willing to forego it, and offering to do so upon certain conditions, and while these conditions are still not complied with the purchaser sells to another.

Judgment.

The sale to the second purchaser appears to have been made under misapprehension of the rights of the first. The vendor, with the title still in question, tenders to the purchaser a deed conveying a less quantity of land than is described in the contract; and upon the purchaser declining such conveyance, the vendor and his legal adviser treat the contract as at an end, and a sale is made to a third person. This, at least, is the ground taken by the vendor's solicitor, and is obviously untenable: besides the question of title, it was not for the vendor to assume that the purchaser was entitled neither to the quantity of land contracted for, nor to compensation for the deficiency.

MORRISON v. NEVINS.

1856.

Welch mortgage—Costs.

A party in possession of land under an agreement in the nature of a Welch mortgage having refused to give any statement of rents received, or information as to the amount due, a bill was filed by the mortgagor for an account. Notwithstanding that on taking the account between the parties a balance was found to be still due to the defendant, the court ordered him to pay the costs of the suit.

June 21.

This was a bill by *Alexander Morrison* against *Robert Nevins*, praying, that under the circumstances set forth in the judgment an account might be taken, before the master, of the rents and profits received, or which, but for his default, might have been received by the defendant; and for further relief.

Mr. Morphy, for plaintiff, cited *O'Lone* v. *O'Lone* (*a*), *LeTarge* v. *D'Tuyll* (*b*), *Harvey* v. *Tebbutt* (*c*), *Russell* v. *Austwick* (*d*).

Mr. R. Cooper, for defendant.—The sole question raised in this case is, whether a mortgagor in a Welch mortgage can file a bill for an account without offering to redeem.

Judgment.

The judgment of the court was delivered by

SPRAGGE, V. C.—The facts, so far as they are material to the points in question, are shortly these: Some time before the month of May 1845 the plaintiff and one *George Ritchey* became jointly interested in the purchase of a piece of ground in the village of St. Catharines, upon which they proceeded with the erection of a building, to be divided into several tenements for the purpose of letting the same. The building had been commenced at the time of their purchase. The plaintiff became indebted to several persons in the course, as he says, of the completion of the building; and the defendant, his brother in-law, paid a portion of the said debt, and assumed the payment of the residue, and in the meantime the plaintiff, who

(*a*) Ante vol. 2, p. 125.
(*b*) Ante vol 1, p. 227.
(*c*) 1 J. W. 203.
(*d*) 1 Sim. 52.

1856.

Morrison v. Nevins

had received the rents of the premises before May 1845, became indebted to *Ritchey* in a sum which the bill states was afterwards stated and settled at £70. In May 1845 the defendant obtained possession of the premises; whether properly or not, was rendered immaterial by an arrangement made between the above three parties in December of the same year. This arrangement was reduced into writing, but the document was subsequently lost, and its contents are proved by the evidence of the plaintiff, who was called as a witness for the defendant. The substance of the agreement, according to the evidence, was, that defendant was to receive the rents of the property and apply the same in reimbursing himself what he had advanced, and what he might advance, including two instalments of the purchase money of the property then remaining unpaid (two having been previously paid, one by the plaintiff and one by the defendant), *Ritchey* was also to be paid out of the rents. Upon the whole amount secured being paid, the plaintiff was to have the property. The plaintiff says further, that it was understood at the date of the agreement that the defendant was to remain in possession of the property; and that he was to keep a book in which were to be entered all the rents received, which book was to be open to him at all times. The original contract of purchase was in the form of a bond to one *Grey*, the purchaser, who assigned to one *Fanny Morrison*, a sister of the plaintiff, and to whom it was assigned as a security for monies advanced: by her it was assigned to *David Thompson* as a like security; and contemporaneously with the agreement above referred to, it was assigned by *Thompson* to the defendant. By an instrument of the same date executed by the defend ant, he acknowledged *Ritchey* "to have an equal interest with himself in the property assigned, and held himself bound to account to *Ritchey*, his heirs or assigns accordingly;" these are the words of the instrument.

Judgment.

1856.

Morrison v. Nevins.

In January, 1848, *Ritchey* assigned all his interest to the defendant; and in February of the same year the original vendors conveyed the property in fee to the defendant.

The evidence given in the Master's office has been directed to two points; the state of the account, and applications at various intervals by the plaintiff to the defendant for an account of his advances, disbursements and receipts, and for an inspection of the books in which such account was kept; and by the consent of the parties the whole of the evidence is placed before the court with a view to the question of costs. The right of the plaintiff to an account is not denied: the decree referring the account to the Master was by consent. The master finds that on the 19th of June 1852, the date of his report, there was a balance due by the plaintiff to the defendant of £210 16s. 8d. less any rents that he might have received subsequently to the previous 16th of November.

Judgment.

The applications for a statement of the account, and for an inspection of the books, are proved by several witnesses: about the autumn of the year 1847, 1849, and 1850, by *Thomas Baily*. On each of these occasions the defendant refused to accede to the applications, and on the last told the plaintiff that he had nothing to settle with him; on a previous occasion he told the plaintiff that if he would pay him £400 he would give up the property. *James Cameron* proves an application by the plaintiff to come to a settlement in 1847, and *Thomas Morrison* proves a similar application in 1848; and further, that on the second occasion, the plaintiff applied for leave to inspect the books, which also the defendant refused, stating that he had been ordered not to shew him the books, "as it would give the plaintiff a chance to go to law with him." This, the witness says, occurred twice, the second time in the autumn of 1850. *James*

1856.

Morrison v. Nevins.

Morrison, a brother of the plaintiff proves a conversation between himself and the defendant, in which he submitted to the defendant a reference to arbitration, of the misunderstanding which had arisen between him and the plaintiff; the defendant, he says, replied to the effect that he had got the deed, and paid almost as much for the property as it was worth, that he did not consider that the plaintiff had any interest in it; that he was out of possession, and that he would keep him out. The witness places this conversation at about the year 1846 or 1847; but as the defendant alluded to his having the deed, which he did not obtain until February 1848, it probably occurred somewhat later. There is further evidence of applications to the defendant sometimes for a statement of account, sometimes for an inspection of the books, and sometimes for an arbitration; confirmatory of that to which I have referred. And there is also evidence of the defendant's treating the property as his own, and offering it for sale.

Judgment.

The plaintiff in his evidence says that the refusal by the defendant to allow him to inspect the books has been the great cause of the difficulty between himself and the defendant, as he could not tell how they stood.

The bill was filed on the 20th of April 1851, and the solicitor for the plaintiff, in the month of March preceding, after receiving instructions from the plaintiff, made a written application to the defendant for a statement of account, to which no answer was returned, and the bill was filed.

To prove the defendant's willingness to account, and to allow to the plaintiff an inspection of the books, a daughter of the defendant, 19 years of age, at the time of the examination, is called as a witness on his behalf. She says that in 1847 the plaintiff was offered a sight of the books at her father's house, and that her father was about to fetch them, when the plaintiff said, "You need not bring the books now, for

I will not look at them." It appears that there had been a dispute between them on that occasion. She also proves the carrying of a memorandum to the plaintiff's house for the purpose of shewing to his wife, and which came from her father, though she denied it at the time. It was in her own handwriting; its correctness was denied by the plaintiff. The paper is obviously incorrect in one item; the charge against the plaintiff of £130 paid to *Ritchey*, which is composed in part of rents in arrear, which ought to be credited to the plaintiff instead of charged against him. This paper contains no account of rents received by the defendant, nor any item of credit in plaintiff's favor. From the date of the last item, it must have been shewn to the plaintiff (it was not left with him) after January 1848. The witness states that she is not aware of the delivery of any other account to the plaintiff; or of any other occasion than the one of which she has spoken, on which he had an opportunity of inspecting the books. She confirms the evidence of other witnesses as to the defendant's refusal to arbitrate, and speaks of another application by the plaintiff to defendant to leave the differences between them to arbitration. This was probably about the time of the bill being filed. It was refused; the witness says she does not know for what reason.

1856.

Morrison v. Nevins.

Judgment.

The agreement between the parties of December, 1845, was in the nature of a Welch mortgage, and the plaintiff contends that the defendant was bound to account for the rents and profits which came to his hands; and under the agreement, to allow to the defendant inspection of the books by which the state of the account between them would appear: that repeated applications for both purposes are proved, and that the defendant's refusals, which are also proved, justified the institution of this suit, and that the costs of it should be borne by the defendant: he also contends that he is not bound to redeem by paying to the defendant the sum found due by the Master's report;

1856.

Morrison v. Nevins.

but that the defendant is bound to continue in receipt of the rents and profits of the premises in question until he is thereby satisfied the amount due to him, unless the plaintiff shall himself think fit to redeem.

The defendant contends that the plaintiff filed his bill upon the assumption that the defendant had been already paid in full, when the contrary is the case; and that the plaintiff is bound to pay the costs of the suit, as he could only excuse himself by tendering the amount due, as in ordinary cases of mortgage; and further, that the plaintiff, having filed his bill, must be decreed to pay the amount found due with costs, within a limited period of time, as in other cases of mortgage.

Judgment.

We think that under the agreement under which the defendant entered into possession he was bound to keep an account, and to afford to the plaintiff at all reasonable times an opportunity of seeing how the account stood. Whether he kept any account at all does not appear; but if he did, it must have been a very inaccurate one, for the account made up and exhibited in 1848 by his daughter was palpably erroneous; and indeed contained no account of that of which it was his peculiar duty to render an account—that is, of the rents and profits, for which under the agreement he was accountable to the plaintiff. Further, it appears that he denied the plaintiff's right to an account, that the numerous applications for an account proved in the evidence failed to elicit one; and that latterly he treated the property as his own, and offered it for sale. In *Yates* v. *Hambly* (*a*), in which there had been an agreement substantially similar to the one proved in this case, Lord *Hardwicke* compared the position of the party who had been in receipt of the rents and profits to that of a tenant by *elegit;* and said,

(*a*) 2 Atk. 362.

1856.

Morrison v. Nevins.

"The plaintiff has certainly a right to come into this court for an account of the profits received: as in *elegit* the conusor has a right to come here to see if the conusee upon the extended value has received a satisfaction for his whole debt, and if there is a surplus to have it paid over to him." The case of *Godfrey* v. *Watson* (*a*), before the same learned judge, was the case of a *conusor* of a judgment filing his bill against a tenant by *elegit*, who had extended his lands, for an account of the full annual value. At common law, up to the 1 & 2 Victoria ch. 110, the conusor could bring the tenant by *elegit* to account only by writ *ad computandum*, and he then only accounted according to the value fixed by the sheriff, which was much below the real value. It would be very strange, and we have seen nothing to support the idea, that the party entitled in equity to an account of the actual value from the tenant by *elegit* would only obtain it upon the terms of paying whatever balance might be due; indeed such a consequence could not follow; for what would be the alternatives?—there could be but one in the English courts, a foreclosure, or rather a forfeiture of the land extended; and there could be no reason nor analogy for such a course.

Judgment

There is still more reason for holding a party entitled to an account without such a consequence, in a case like this under a special agreement, which is in the nature of a Welch mortgage, than in the case of an *elegit*, because in the latter the whole money is due and payable, whereas in this case it is by the agreement only payable as rents and profits come to hand to pay it; and to decree a payment otherwise would be to depart from the agreement of the parties: and where, as in this case, the party had refused to account, it would give him a benefit as the result of his own wrong.

A party of course files his bill for an account at the

(*a*) 3 Atk. 517.

1856.

Morrison v. Nevills.

peril of costs; and certainly he must place the accounting party clearly in the wrong, or he will be decreed to pay him his costs. In this case he has done so; and we think that not only should we refuse the defendant his costs, but that he should pay the costs of the plaintiff, on the ground that the plaintiff was justified by the defendant's wrongful withholding of the account which it was his duty to render, in instituting this suit to compel it.

It will be convenient to provide, in regard to the defendant's accounting for rents received subsequently to the account taken, that it may be done in this suit without filing a new bill: the decree on further directions will therefore provide, that the bill be retained with liberty to the parties to apply.

KENRICK v. DEMPSEY.

Right of purchase.

Nov. 20th. The owner of real estate conveyed the same absolutely, receiving back a bond declaring the conveyance to be in trust to receive the rents &c., and account therefor to the grantor; and in the bond was reserved a right to the obligor and his heirs to purchase the property. Upon a bill filed to set aside this agreement as infringing the rule against perpetuities, and for an account of the rents and profits received—*Held*, that if even the agreement were within the rule it was good for the life of the grantee; and an account of rents was directed, reserving the question of costs until after report, the bill not alleging any applications for an account.

Statement.

The bill in this case was filed by *John Kenrick* against *Richard Dempsey*, setting forth that in February 1848 the plaintiff was owner in fee of certain land and premises in the city of Toronto; that the defendant was the nephew of plaintiff, and was known by him from his infancy; that plaintiff placing confidence in defendant and his business habits, and being desirous therefore of having such property managed by defendant, the plaintiff conveyed the same absolutely to him taking from defendant a bond conditioned that defendant, his heirs, &c., would, from time to

time, and at all times, as often as thereunto requested by plaintiff, his executors, &c. well and truly pay and account for rents, &c. "Or if the said *Richard Dempsey*, his heirs, executors, administrators or assigns, do and shall, whenever he or they think fit, pay or cause to be paid, unto the said *Kenrick*, his heirs, executors, or assigns, the fair price or value of the said premises," obligation to be void, or else &c. 1856. Kenrick v. Dempsey.

The bill further alleged that defendant had not paid or accounted for the rents; that plaintiff had not sold to the defendant, nor defendant purchased the said premises, or paid therefor or any part thereof.

The prayer was for an account of the rents and profits of the premises come to the hands of the defendant, and monies properly expended by him in respect of the premi es, and for reconveyance.

The bill had been taken *pro confesso;* and the cause coming on to be heard, counsel for the defendant appeared and waived all objections to the order *pro confesso* under sec. 2 of order xiv. of 1853. Statement.

Mr. Brough for plaintiff.

Mr. Strong, for defendant, cited *Gaskarth* v. Lord *Lowther* (*a*), *Mylnes* v. *Gery* (*b*), *Boyce* v. *Hanning* (*c*), *Wood* v. *White* (*d*), *Keppell* v. *Bailey* (*e*), *Cadell* v. *Palmer* (*f*).

ESTEN, V. C.—I think the power good for the life of *Dempsey* and twenty-one years afterwards; and the property ought not to be re-conveyed in the meantime.

SPRAGGE, V. C.—The plaintiff, by his bill asks two things—an account, and that the defendant be decreed

(*a*) 12 Ves. 107.
(*b*) 14 Ves. 400.
(*c*) 2 Cr. & Jer. 334.
(*d*) 4 M. & Cr. 482.
(*e*) 2 M. & K. 517.
(*f*) 7 Bligh N. S. 202.

1856.

Kenrick v. Dempsey,

to reconvey to him the property which he the plaintiff placed in his charge by the deed of conveyance and agreement (the latter by defendant's bond), executed in February 1848.

The plaintiff's right to an account is not disputed, and it will be necessary to refer it to the Master to take it. The right to a reconveyance is denied. The plaintiff places his right to this part of the relief prayed by his bill upon the ground that the agreement gives a perpetual right of purchase to the defendant and his heirs, and that it infringes the rule against perpetuities, and is therefore void.

Supposing this agreement to be within the rule, what is the consequence? Is it not good so far as it does not offend against the rule, and so to be read as if the right to purchase were limited to the life of the defendant? Apart from the exceptional cases, which have no application here, the rule is so. *Biddle* v. *Perkins* (*a*), *Powis* v. *Capron* (*b*), *Wood* v. *White* (*c*), are instances of the rule. In this last case there had been a sale made to a person which was objected to as falling within the rule against perpetuities. Lord *Cottenham* inclined to think that the case did not fall within the rule; but if it were otherwise, he remarked, the sale in question was within the permitted period, and he thought there could not be much doubt of its validity until the expiration of that period.

Judgment.

The plaintiff does not suggest any other ground upon which he is entitled to a conveyance. He does not allege fraud or mistake, or that he was taken by surprise, or that he was under any misapprehension, or that he is entitled to be relieved against his agreement on the ground that it was an improvident bargain; he simply states the agreement, and prays for a reconveyance. He comes to annul his own agreement

(*a*) 4 Sim. 135. (*b*) *Ib.* 138 N. (*c*) 4 M. & C. 482.

without laying any grounds for annulling it, and rests his case in argument solely upon the ground of its infringing the rule against perpetuities. If it is objectionable on other grounds, they have not been taken.

As to the costs, it may be proper to reserve them till after the account is taken. The bill alleges certainly that the defendant has not accounted. It is filed nearly six years after the agreement was entered into, and is taken *pro confesso*; but according to the agreement, he was to pay to the plaintiff from time to time what he should receive on account of the premises as often as he should be thereunto requested, and should also render an account of what he should receive and expend; and no application for account and payment of money is alleged in the bill.

KERBY v. KERBY.

Mortgagee—Trustee.

A bill was filed against a trustee for an account and re-conveyance. At the hearing a decree was drawn up by consent, treating the defendant in all respects as a mortgagee. *Held*, upon appeal from the Master's report, that from the time of the decree the rights of the parties respectively must be determined by the rules ordinarily applicable to cases of mortgage.

A mortgagee in possession of a grist mill and other property, erected a carding and fulling mill upon the premises: the expense of this was disallowed to him, as being an improvement that a mortgagee could not make without consent.

Statement.

This was an appeal and cross-appeal from the Master's report.

Mr. *Mowat* for plaintiff.

Mr. *Turner* for defendant.

The judgment of the Court was delivered by

ESTEN, V. C.—The original bill in this case presents a case of fraud, not wholly abandoned, although

1856.

Kerby v. Kerby.

considerably softened, in the amended bill. The answer, when the bill was amended, had admitted the trust. No evidence was adduced at the hearing of the cause. The decree was made by consent, and treats the defendant in all respects as a mortgagee. In this light he is, we think, to be regarded from the time of the decree by the deliberate choice of the parties, and their respective rights are to be determined by the rules ordinarily applicable to cases of mortgage.

The Master's settlement with respect to the year 1842, we have not thought it right to disturb. From the expiration of the year 1842 until the commmencement of the lease to *John Kerby*, and from the expiration of his tenancy to the commencement of the lease to the next friend of the plaintiff, our determination is, that a rent of £150 per annum should be allowed, and that the whole charge for repairs should be disallowed excepting the sum of £147 8s. 11d., expended for that purpose in the year 1842. We arrive at this result upon the evidence regarding the rent, the offer made by *Steele* in 1849, the rent paid by *John Kerby*, and the estimates formed by the witnesses of the work done by the mill. We are convinced by this evidence that a tenant could have defrayed all the ordinary expenses of the mill, expended from year to year the amount which the defendant appears actually to have expended in repairs, realized a profit, and paid a rent of £150 per annum without difficulty. We allow the amount of *Gartshore's* bill; and during the time of *John Kerby's* tenancy, we think that the defendant should be charged with the rent which he actually received—namely, £165. We think that the Master was perfectly right in disallowing the salaries to the defendant's clerks. The defendant charged with rent as a tenant, and reaping all the profits of the mill, must, of course, pay the wages of his own servants. With respect to the charge for insurance we were referred to a letter from Mrs. *Kerby* to the defendant, which we

Judgment.

1856.

Kerby v. Kerby.

have not seen. If this letter contained an authority, or sanction to the insurance in question, we think it ought to be allowed to the extent of charging the interest or estate of *Wm. Kerby* in the mortgaged land. It is true that a mortgagee cannot insure the mortgage property against loss by fire, and charge the expense attending it upon the security without the sanction of the mortgagor. We think also that no evidence exists of a settlement of this property to the separate use of Mrs. *Kerby*, so as to make her in respect of it *feme* sole and capable of consenting to such a proceeding; but it appears to us that she was intrusted by her husband with the management of the property, and was his agent in fact for that purpose, and capable of consenting in that capacity, and so as to charge his interest with the insurance in question. We think the rent of the miller's house should be disallowed, it being properly an appendage of the mill. The sum expended in adding the wings to the building is allowed, but at the same time the rent of the mill is raised proportionably from the time of the completion of that improvement except during the tenancy of *John Kerby*. With respect to the farmer's store and the cultivated land, we think that a rent of £28 15s. should be allowed for the land, and £20 for the farmer's store during the tenancy of *Wm. K. Kerby* under verbal lease from his uncle, it not appearing what the rent was that he paid. From the time of his holding under the written lease granted him by the defendant, £50, the rent mentioned in that lease, is to be allowed in respect of the land and the farmer's store. The rent payable by *Abraham Kerby* is not to be allowed, unless it has been actually paid to the defendant. It must be ascertained what disposition was made of the farmer's store from the expiration of *Wm. K. Kerby's* tenancy until and after it was under lease to John *Kerby*. We think a rent of £20 should be charged in respect of it during such time as it has been in the occupation of the defendant. No rent is to be charged

Judgment.

1856.

Kerby v. Kerby.

in respect of the cultivated land after the expiration of *Abraham Kerby's* lease. The exception with respect to the removal of the bank, and the settlement of the mill, we think should prevail, and the sums charged by the Master in this respect disallowed. The £25 charged in respect of the settlement of the mill seems to be a mere fine which it appears to us that the Master has no power to impose, and the charge of £37 10s. for the removal of the bank is not overrated by the facts. As to the charges of £2 5s. and £12 8s. 10½d., the report is confirmed. The defendant is entitled to interest on the sum of £214, the amonnt of *Gartshore's* account, and £147 8s. 11d., the sum expended in 1842 for repairs from the respective times that these amounts were disbursed by the defendant, but that rests ought to be made at the end of each year, and the rent payable by the defendant set against these sums until they are discharged. We think that interest was properly charged by the Master on the sums advanced for the benefit of the plaintiff and her family from the end of the year, such advances having been made for the most part in goods.

Judgment.

The report is right in disallowing the carding and fulling mill. It is not an improvement that a mortgagee under the circumstances could make without consent, and no consent is proved; but, on the contrary, dissent on the part of Mrs. *Kerby*.

The rent of the distillery should be allowed, and the report confirmed in this instance.

The deposit on both appeals should be paid to the plaintiff.

POLLOCK V. PERRY.

1856.

Stated account.

March 17th.

A debtor having executed a mortgage in favor of his creditors, reciting that he was indebted in a sum named, and a suit to foreclose this mortgage having been subsequently instituted, a reference to the Master was directed to take an account of what was due; in taking which the Master required the production of the accounts on the foot of which the mortgage debt was created, and the usual four-day order had been issued for non-production. *Held*, on a motion to set this order aside, that the parties were *primâ facie* bound by the amount stated in the mortgage as being the true debt, and that the Master, in the absence of evidence to impeach the statement in the mortgage, could not go behind it.

This was a motion to set aside a four-day order issued on the certificate of the Master that the plaintiffs had not produced certain accounts in his office, under the circumstances set forth in the judgment. Statement.

Mr. *Turner* for the plaintiff.

Mr. *Mowat Q. C.*, contra.

The judgment of the court was delivered by

THE CHANCELLOR.—This is a motion to discharge the usual four-day order for non-production of certain accounts in the Master's office, and to take the Master's certificate off the file under the following circumstances. For a long time prior to the year 1846, the plaintiffs had had large dealings in the way of their trade, with *Peter Perry*, through whom the defendants claim; and towards the close of that year, *Perry's* indebtedness being then confessedly large, he executed a mortgage to secure a sum of £6,000 payable in six years. The sum specified in that security was not the full amount then due from *Perry*. His balance at that time must have been several thousand pounds greater. This mortgage therefore, was not predicated upon a final settlement of accounts, but was intended as a security for so much of the floating balance. Subsequent to the mortgage of November 1846 the dealings between the parties continued, and accounts were Judgment.

1856.

Pollock v. Perry.

from time to time delivered until the 23rd of June 1848, when a settlement took place, upon which *Perry* admitted himself to be indebted to the plaintiffs in the sum of £3135 12s. 2d., exclusive of the amount covered by the previous security, and he agreed to execute a further mortgage to secure that sum, payable by instalments. The mortgage executed in pursuance of this arrangement recites that "whereas the said party of the first part is indebted to the said parties of the third part in the sum of £5000 with interest thereon, being the balance of the sum mentioned in a certain indenture of mortgage made and executed by the said party of the first part to the said parties of the third part, bearing date the 16th day of November 1846. And whereas the said party of the first part is further indebted to the said parties of the third part in the additional sum of £2881 14s. 2d. with interest thereon from the 1st day of January A.D. 1847, to the 14th day of June A.D. 1848, amounting to the sum of £253 18s. And, whereas the said party of the first part is now unable to pay such parts of the said sum of £2881 14s. 2d. as are now due and payable or on the 1st day of July next shall become due and payable. And whereas the said parties of the third part have agreed to re-assign certain debts made over to them by the said party of the first part for securing payment to them by the said party of the first part of the sum of £3458 1s., of which the said sum of £2881 14s. 2d. is now the balance remaining unpaid; in consideration whereof the said party of the first part hath agreed to convey to the said parties of the third part the lands and tenements hereinafter mentioned, as a security in substitution for the said debts so to be re-assigned as aforesaid, for which said sum of £2881 14s. 2d. the said parties of the third part now hold the promissory notes of the said party of the first part, &c. Now this indenture witnesseth that the said party of the first part, for and in consideration of the sum of £3135 12s. 2d. &c. &c.

Judgment.

1856.

Pollock v. Perry.

Now the decree in this case directs an account to be taken of the sum due to the plaintiff upon these securities. But the Master, instead of proceeding to take the account on the foot of the mortgages, called upon the plaintiffs to produce an account of the dealings between the parties prior to either security—called, that is, for the production of accounts which had been finally closed and settled by the deed of June 1848. Now that course was in my opinion clearly erroneous. I do not mean, of course, to assert that the defendants were absolutely concluded either by the settlement of June 1848 or by the explicit statement of that settlement contained in the mortgage deed. But the evidence was ample, unquestionably, to prove that the account had been stated, and the mortgage executed, to secure an ascertained and admitted balance. Had the plaintiffs relied upon their mortgage deed alone, that would have constituted, in the first instance, a sufficient case, which could not have been displaced except upon proper proof. But here the evidence to which I have referred, and the manner in which these securities were dealt with for years, constituted together not only a sufficient, but a strong case which appears nevertheless to have been wholly disregarded; for, in the absence of any evidence whatever to impeach these transactions, the Master ordered the production of the previous accounts, which had been long treated by all parties as settled and closed.

Judgment.

Something was said, indeed, as to a letter of Mr. *Gilmour*, in which he is said to have stated that the second mortgage had been paid and cancelled. But that has no bearing upon the question now before us. That letter, unless it originated in mistake, may furnish important evidence in the account which the Master has been directed to take on the foot of the mortgage securities; but upon the question whether the amount had been stated, and that is the question now before us, it has obviously no bearing.

1856.

THOMPSON v. WILKES.

Equity of redemption.

May 12th. Irrespective of the form of the contract between the parties the the rule is clear, that the purchaser of an equity of redemption is bound as between himself and his assignor to pay off the incumbrances.

The owner of shares in a steamboat, on which a portion of the price was secured by the bond of the holder, sold the same, subject to this bond, and the shares were afterwards transferred in trust for the benefit of the original owner of the vessel, who still held the bond for securing the payment of the stock; notwithstanding which proceedings were taken by him to enforce payment of the bond. Upon a bill filed for that purpose, the court restrained further proceedings thereon; and ordered the bond to be delivered up to be cancelled, with costs.

Statement. This was a bill by *Daniel Thompson* against *Frederick Thomas Wilkes;* and, under the circumstances set forth in the judgment, prayed that the bond of the plaintiff might be delivered up to be cancelled, and for an injunction restraining the defendant from proceeding upon the said bond at law, and for other relief.

Mr. *Crickmore* for plaintiff.

Mr. *Read* for defendant.

Wareing v. *Ward* (*a*), *Tweedle* v. *Tweedle* (*b*), were referred to and commented on by counsel.

The judgment of the court was delivered by

Judgment. THE CHANCELLOR.—On the 10th of July, 1851, the defendant, who was then the owner of the steamboat "Experiment," sold ten-sixty-fourth parts of that vessel to the plaintiff for £250, and took a mortgage upon the shares to secure the purchase money. The plaintiff gave a bond at the same time, which refers to the mortgage, and is conditioned for payment of the amount thereby secured. On the first day of May in the following year the plaintiff sold his interest in these ten shares, subject to the outstanding mortgage, on which £70 had been then paid, to one *Hatfield*, for £30, and the shares were transferred accordingly;

(*a*) 7 Ves. 337. (*b*) 2 B. C. C. 101.

1856.

Thompson v. Wilkes.

and *Hatfield* subsequently, (the precise date does not appear) assigned all his interest therein to *John Wilkes*, in trust for the defendant. Notwithstanding that assignment, the defendant has commenced, and is now prosecuting, an action against the plaintiff on his bond; and the object of this suit is to have that action restrained, and the bond delivered up to be cancelled.

The plaintiff's right to that relief, *primâ facie*, cannot be doubted, for it is clear that the purchaser of an equity of redemption is bound, as between himself and his assignor, to pay off the incumbrances, and that quite irrespective of the frame of the contract between the parties. The learned counsel for the defendant treated this as a technical rule, depending upon the doctrine of merger, and confined in its operation to mortgage transactions; and he seemed to think that the assignment of the equity of redemption to *John Wilkes*, as trustee for the defendant, had the effect of preventing the merger, and of thereby obviating the operation of the rule in this particular case. But, in truth, the doctrine is not confined to mortgage transactions, which are but particular instances of the application of the general rule, that the purchaser of an estate, subject to incumbrances, is bound to indemnify the vendor against them, even though no covenant to that effect has been entered into; and it does not proceed upon any technicality whatever, but upon clear principles of reason and justice. The doctrine of the court is laid down very clearly by Sir *Edward Sugden* in *Jones* v. *Kearney*, reported in the first volume of *Drury & Warren* p. 155: "Now what was the situation, he asks, in which *Kearney*, the defendant, stood? He became the assignee of the premises under the deed of the 24th of September, 1834. He was in the ordinary position of a purchaser buying an estate *cum onere*. The premises were subject to a burden: the purchaser did not enter into any particular obligation to discharge that burden, or to indemnify the

Judgment.

1856.

Thompson v. Wilkes.

seller against the incumbrances affecting the property sold; it was not necessary that he should do so. This court fastens on every such purchaser a liability to indemnify the seller against the incumbrances affecting the property sold. If I create an incumbrance on my estate, and sell, and no engagement be entered into with respect to the incumbrance, but I convey the estate subject to it, the purchaser is bound in equity to indemnify me against such incumbrance. It was my object in so selling to charge him and indemnify myself. This is a proposition which is perfectly clear, requiring no authority to support it. But in *Waring* v. *Ward*, Lord *Eldon*, speaking of the purchaser of an equity of redemption, states the principle: "If he enters into no obligation with the party from whom he purchases, neither by bond nor covenant of indemnity to save him harmless from the mortgage, yet the court, if he received possession and has the profits, would, independent of contract, raise upon his con-

Judgment.

science an obligation to indemnify the vendor against the personal obligation to pay the money due upon the the vendor's transaction of mortgage: for, being the owner of the estate, he must be supposed to contract to intend to indemnify the vendor against the mortgage. I take it therefore to be perfectly clear, that any purchaser standing in the position in which *Kearney* stood, is bound to indemnify his vendor."

I have cited the passage at length, because it is an authenticated statement of the law upon the subject, as I understand it; and upon the principles there laid down the plaintiff's right to relief is, I think, clear. There cannot be any doubt that *Hatfield*, when he purchased the equity of redemption, became bound to pay off the mortgage debt, and to indemnify *Thompson* against his liability on the collateral bond. That duty, as I have already shown, is implied by law from the nature of such a transaction, and does not require any stipulation; but upon the evidence there

1856.

Thompson v. Wilkes.

is no room to doubt that such was the intention of the parties in the present case. A question is made, indeed, whether the defendant agreed to discharge the plaintiff from further liability upon his assigning the equity of redemption to *Hatfield*. An agreement to that effect is asserted on one side and denied on the other; and that is in reality the only question of fact upon which any controversy can be said to exist. But, under the circumstances of the present case, that fact is quite immaterial. The really material question is, did the plaintiff sell subject to the mortgage?—by whom did the parties intend that the mortgage should be paid? And the agreement between *Hatfield* and the defendant is decisive on that point. After certain provisions immaterial to the present question, the agreement proceeds in these words: that *Hatfield* is to be entitled "to the dividends on ten shares or sixty-fourth parts of said steamer, a quit-claim to which he has purchased from *David Thompson*, the late captain—these last per centages and profits or dividends to be endorsed on mortgage for £180 registered in custom house at Dunnville on the said ten shares. Or, in the event of anything occurring whereby the ten shares cannot be made over to said *Hatfield*, by his paying said mortgage in manner aforesaid, or in the event of said *Hatfield* choosing to do so, he is at liberty to take $10 per month over and above the $40 per month above named. It is further understood that any profit that may arise out of last year's business as accruing to *David Thompson*, after paying all expenses, &c., shall be held to belong to said *Hatfield* and endorsed on mortgage aforesaid, if *Hatfield* elect to assume it. In addition to the above, it is agreed between the parties that should said *Hatfield* elect to take $50 per month in lieu of all per centage and profits, he shall receive the amount he paid for the ten shares, say $170 and interest."

Judgment.

It is said that the intention of the person who

1856.

Thompson v. Wilkes.

framed this agreement was to exclude the inference that the defendant had any intention of discharging the plaintiff from his personal liability. Judging from the nature of the transaction and the language of the agreement, I would have arrived at a very different conclusion. This agreement seems to me to furnish strong confirmation of the truth of the plaintiff's statement. But that question is, as I have said, immaterial. What we want to arrive at is the agreement between the plaintiff and *Hatfield*, not between the plaintiff and defendant; and upon that point it is quite clear that *Hatfield* purchased the equity of redemption subject to the mortgage, and was the person, as between himself and the plaintiff, by whom it was to be paid off.

Judgment.

The position of *Hatfield*, then, and the liabilities of *Hatfield* being such as I have described, he sold his interest to the defendant for £30, and assigned the ten shares to *John Wilkes* as his trustee. That instrument has not been put in evidence, because neither party, I suppose, considered its precise terms material; and it must be assumed, I think, that it does not contain any covenant for *Hatfield's* indemnity. But, assuming that to be so, the liability of the defendant would be still quite clear, because I have already shewn that the right to indemnity does not depend upon express contract, but is implied by law from the nature of the transaction. But beyond the duty implied by law, it is clear, I think, from the nature of the transaction, that the intention was to relieve *Hatfield* from all responsibilty; and from the statement in the answer, I gather that there was an express contract to that effect. The duty of the defendant, then, as the purchaser of this equity of redemption, was to pay the mortgage debt, and indemnify his vendor; and on both grounds he ought to be restrained from bringing this action. For being bound to pay, and also entitled to receive payment, the necessary effect of the transaction was to extinguish the debt,

and therefore the action should be restrained; and, secondly, being bound to indemnify *Hatfield*, he cannot be allowed to proceed with an action which would have the effect of rendering *Hatfield* liable for the amount of the mortgage debt. 1856.

VanNorman v. Beaupre.

Specific performance—Dower.

Although at law the right of dower is, during the life of the vendor, a nominal incumbrance only, the purchaser has a right in equity to compel its removal or to have specific performance of the contract with an abatement in the amount of the purchase money in respect of such incumbrance.

Argument.

Mr. McMichael for plaintiff.

Mr. Crooks for defendant.

The judgment of the court was delivered by

Judgment.

The Chancellor.—This is a bill for the specific performance of a contract for the sale of certain real estate. The defendant resists a decree for specific performance on the ground that his wife refuses to release her dower; and as a conveyance without a release of dower has been refused, and the court will not compel such a release, it follows, as he contends, either that the contract must be rescinded, or that the bill must be dismissed, leaving the plaintiff to his legal remedy on the contract. The plaintiff insists, on the other hand, that he is entitled to a conveyance with compensation for the outstanding title of dower; and his right to that relief is the point to be determined.

There cannot be a doubt that the proposition for which the plaintiff contends is in accordance with the general rule of the court. That has been stated by Lord *Eldon* repeatedly. In *Wood* v. *Griffith* (*a*), he says: "No one will dispute this proposition, that if a man offers to sell an estate in fee simple, and it

(*a*) 1 Swan. 54, (1818.)

1856.

VanNorman v. Beaupre.

appears that he is unable to make a title to the fee simple, he cannot refuse to make a title to all that he has. The purchaser may insist on having his estate such as it is. The vendor cannot say that he will give nothing, because he is unable to give all that he has contracted to give. If a person possessed of a term of one hundred years contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey the term, and the court will arrange the equities between the parties." And in *Mortlock* v. *Buller* (*a*), a much earlier case, the same learned judge observes: "I also agree, if a man having partial interests in an estate choses to enter into a contract, representing it, and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under these circumstances is bound by the assertion in his contract; and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the court will not hear the objection, by the vendor, that the purchaser cannot have the whole." And the general rule is stated by Sir Edward *Sugden* in these words: "Generally speaking, where the seller has not the whole interest which he sold, the purchaser may elect to take the interest which the seller has, with a compensation." (*b*)

Judgment.

But, admitting the general rule to be so, it is argued, that the present is an exceptional case: First, because the defendant did not contract to procure a release of dower: Secondly, because this title of dower is not an incumbrance: or, Thirdly, because, if an incumbrance at all, it is a merely nominal incumbrance, during the contingency, and may be wholly disregarded; for the incumbrance being nominal, the amount of compensa-

(*a*) 10 Ves. 314, (1804.) (*b*) 1 Sug. V. & P. 341 S. 12 11th Ed.

1856.

VanNorman v. Beaupre.

tion must be, it is said, nominal also. *Dack* v. *Currie* (*a*) recently determined by the Court of Queen's Bench in this province, and several cases there referred to, particularly *Bass* v. *Bower* (*b*), were cited in support of this argument; but it is quite clear to me that the proposition for which the defendant contends cannot be supported upon any of the grounds on which it was rested. The argument assumes that the plaintiff's right to require a release of this outstanding title of dower depends upon the special stipulations of his contract. But that is an obvious error. It is quite clear that the right of a vendee of real estate to call for a good title is not the result of express stipulation; it arises by operation of law, irrespective of the provisions of the contract, and belongs to every vendee, unless it has been either limited by express contract, or waived by conduct which implies contract. It is equally clear that the vendor is bound to procure a release of his wife's title of dower which has attached upon the estate. It is unnecessary to consider whether her right is, in the strict technical term, an incumbrance affecting the vendor's title, (although it is difficult to understand how it can be viewed in any other light) (*c*), because that is a mere verbal criticism which does not affect the question before us. If there be no other name by which it can be designated, it is at least a title of dower, and that is a right which attaches upon and binds the land; it could not have been barred in England previous to the recent statute, (*d*) except by fine or recovery; the vendor, as the law now stands in this province, cannot displace it by his own act; and, in virtue of it, his wife, if she survive him, will become entitled to a third part of the estate for life. Now we need not stop to enquire whether that sort of title can be termed with propriety an incumbrance, because, whatever may be its proper designation, it is obviously a something by which the value

Judgment.

(*a*) 12 U. C. Q. B. 334.
(*b*) E. T. 5 Vic.
(*c*) Mole v. Smith, Jac. 495.
(*d*) 3 & 4 Wm. IV. ch. 105.

1856.

VanNorman v. Beaupre.

of the estate is materially affected, and which the vendor is therefore bound to remove. It is quite impossible to doubt that the law was so in England, previous to the recent statute; indeed it was the universal practice, I believe, to require a fine from the vendor and his wife, under such circumstances, even when there was an outstanding term which would operate as a bar (*a*). And it is perfectly plain, I think, that as the law now stands in this province, a vendor is bound to procure a release of his wife's dower.

Judgment.

It is said, however, that this right is but a nominal incumbrance at present, because during their joint lives it cannot be known whether the wife's title of dower will ever ripen into an actual estate, and it is argued that until that has been ascertained it cannot be predicated of the title of dower that it is more than a nominal incumbrance, because, being a contingent interest, the death of the wife, at any moment, may prevent it from ripening into an actual estate—that is, may prevent it from becoming ever an actual or substantial incumbrance. But that reasoning is obviously fallacious. It is quite true that until this contingency happens it cannot be known whether the wife's life estate will ever vest; but to argue that the title of dower is therefore but a nominal incumbrance in the interim, is to confound the estate with the enjoyment of it; two things which are obviously and entirely distinct. Contingent estates are liable, as their name imports, to be defeated; the period of enjoyment may never arrive; but to argue that they are merely nominal, and have no actual value until the contingency happens, is to misapprehend altogether the true nature of such interests. It is quite clear that there is in all cases a possibility, and in some a high degree of probability that the wife may outlive her husband, and that she may become entitled to a life

(*a*) 2 Sug. V. & P. p. 1, 11th Ed.

estate; and this chance that she may out-live her husband, and may become entitled to a life estate, is a substantial interest, capable of valuation, and has a material effect upon the value of the estate before the contingency happens, and quite irrespective of it; an effect more or less material according to the circumstances of each case. The value of the interest does not depend upon the event: therefore, as has been supposed, it has a present value, whatever the event may be, and constitutes a substantial incumbrance, which the vendor is clearly bound to remove.

1856.

Van Norman v. Beaupre

It is unnecessary to consider the cases at law to which we were referred, because the question in all of them arose upon one or other of the ordinary covenants for title, and turned upon the language of the covenant, and possibly upon technical reasoning quite inapplicable to the case before us. It must be admitted, however, that the reasoning upon which these judgments proceed does appear, to some extent at least, inconsistent with the views which I have just expressed; but, so far as it may be so, I can only say that the conclusion at which we have arrived is in accordance with the authorities in this court, and appear to me to be well founded in reason.

Judgment.

I am of opinion, therefore, that the plaintiff is entitled to a decree for specific performance, with an abatement, unless it can be shewn that there is some peculiarity in this case which ought to induce the court in its discretion to withhold that relief. But the only peculiarity that has been suggested consists in the difficulty of computing the value of this contingent interest. Now, considering the rapidity with which real estate changes hands in this Province, and considering that from the simplicity of our conveyances almost every estate is subject to dower, keeping these considerations in view, I would have hesitated much before yielding to the objection, though the difficulties

1856.

Van Norman v. Beaupre.

had been much greater, and the authorities less distinct, because the effect of such a decree would be to place the right to specific performance in almost every case in the power of the vendor. But I have shewn already that this sort of interest admits of a sufficiently accurate valuation upon known principles, (*a*) and the rule of the court has been applied in cases much more questionable than the present (*b*).

In *Thomas* v. *Dering* (*c*) the estate which Sir *Edward Dering* had contracted to sell was vested in trustees to the use of Sir *Edward* for life without impeachment of waste, with remainder to the trustees to preserve contingent remainders; and remainder to trustees for a term to secure a portion for Sir *Edward*'s mother; remainder to the first and other sons of the marriage successively in tail male, with an ultimate limitation to Sir *Edward* in fee. In that case Lord *Langdale* refused to decree specific performance with an abatement, upon grounds which are summed up at the conclusion of his judgment in these words: "Here the vendor has a life estate without impeachment of waste, with remainder to his sons in tail male; and having regard to the settlement, and the protection intended to be afforded to the objects of it—conceiving that the consequence of a partial execution of this contract might be prejudical to those objects—seeing the difficulty of ascertaining upon satisfactory grounds the just amount of the abatement from the purchase money—and considering, also, that nothing has been done under the contract, so that the purchaser, though suffering the disappointment of making himself owner of an estate he desires to possess, has sustained no damage for which compensation may not be given by a jury—it appears to me that in this case I ought not to decree a conveyance of the vendor's life estate and

Judgment.

(*a*) 1 Rope, Hus. & W. P. 549.
(*b*) Milligan v. Cooke, 16 Ves. 1; Hanbury v. Litchfield, 2 M. K. 692.
(*c*) 1 Keene 729, and Graham v. Oliver, 3 Beav. 124.

ultimate reversion to the purchaser." Now, although that case presented peculiar difficulties, the soundness of the decision has been questioned by Sir *Edward Sugden* upon grounds which seem to be entitled to great weight; (*a*) and the reasonings upon which the Master of the Rolls refused relief has no application in the present case. 1856. VanNorman v. Beaupre.

I am of opinion, therefore, that the plaintiff is entitled to a decree for specific performance, with compensation.

WHITNEY v. HICKLING.

Injunction—Trade marks.

A party professed to sell the secret of a preparation called "Jones' Patent Flour," and became bound not to disclose the secret to any other person in Canada nor make use of it himself except at the instance and for the benefit of his vendees; notwithstanding, he afterwards commenced selling a similar article done up in bags bearing a general resemblance to those of his vendees, although differing in some minute particulars, and led parties purchasing it to believe that it was the same article. The court granted an injunction to restrain him from selling the same preparation, or any other preparation done up in such a manner as to lead the public to suppose that it was the same article, and from representing it to be such, although it was sworn by the vendor that the preparations were not the same. Nov. 20th.

The bill in this case was filed by *Frederick Augustus Whitney* and *John W. G. Whitney* against *Charles Hickling* and *Charles Frederick Hickling*, setting forth that plaintiffs were extensive dealers in grain and flour, and that the defendants, while working in the employment of plaintiffs, sold to plaintiffs the secret of preparing what in England was known as "Jones' patent flour," and by an instrument under their hands bound themselves not to sell the same to any person in Canada or make use of it themselves except for the benefit and at the instance of the plaintiffs; that the plaintiffs, after much exertion and expense on their part, had succeeded in obtaining a considerable demand for, and sale of, the preparation. That the Statement.

(*a*) 1 Sug. V. & P. 351, 11 Ed.

1856.

Whitney v Hickling

defendants had left the employment of the plaintiffs and had commenced preparing and selling for themselves, and on their own account, flour which they styled "*Extra prepared flour, manufactured only by C. Hickling,*" and advertised the same as the only genuine article of the kind manufactured in the province, but which the plaintiffs were informed and believed was exactly the same as the preparation sold by the the defendants to the plaintiffs, and that the defendants had stated it to be so to several persons, customers of the plaintiffs, thereby injuring their business.

The bill prayed an injunction to restrain the defendants from manufacturing and preparing flour according to the secret sold by them to the plaintiffs, or substantially according to the same, in violation of the agreement of the defendants, and from imitating the wrappers, mode of packing, and printed directions used by the plaintiffs; for an account of the profits realized by the defendants, and for further relief.

Statement.

The evidence shewed clearly that the defendants had been vending an article called "Extra Prepared Flour," done up in yellow paper bags bearing a strong resemblance to those used by the plaintiffs in packing their patent prepared flour, and in accounts furnished by the defendant *Charles Hickling*, the article was charged for as "p. prepared flour." It appeared that the other defendant was acting merely as the servant or agent of his father *Charles Hickling*.

Mr. *Connor, Q. C.*, for the plaintiffs, now moved for an injunction in the terms of the prayer of the bill, as against the defendant *Charles Hickling*.

Mr. *Strong* contra.

The judgment of the court was delivered by

SPRAGGE, V. C.—I think the plaintiffs entitled to

1856.

Whitney v. Hickling.

an injunction against the defendant, in the first place, upon the contract between them. The defendant does not deny that it would be a breach of his agreement to vend here the same preparation, the secret of preparing which he sold to the plaintiffs, and he denies also that he has represented the article sold by him to be the same article. It is difficult to establish the fact of the article sold by him being the same, because he has a right to keep the secret of its composition and made of preparation, unless, indeed, it can be established by chemical analysis, as has been established by the defendant's own declaration.

Looking at all the evidence, I am induced to believe that the defendant did declare the article sold by him to be the same as that prepared by the plaintiffs, only as he said, of superior quality; still I am not satisfied that it is the same; because, looking at his conduct, and his affidavit, I cannot but think him quite capable of selling it as the same, though in fact different, to those who had been customers for and liked the article prepared at the plaintiffs. At the same time I am not satisfied that it is not the same, or the same with some insignificant change in the ingredients or the mode of preparation. That he gave those who desired the same article to understand that his was the same; that he used language which led them to believe that they were purchasing the same preparation, and used such language in order to induce that belief, I cannot say that I have any doubt.

Judgment

But, apart from his contract, the parcels used by the defendant for containing his preparation bear such a general resemblance to those used by the plaintiffs as to bring him fairly within the rule against the imitation of trade marks. In the Pictorial Almanac case before Lord *Cottenham* (*a*), and the Omnibus case, (*b*), and the case (*c*), in which a solution of copaiba was the

(*a*) Spottiswoode v. Clark, 2 Phi. 154.
(*b*) Keith v. Morgan, 2 Keen. 213.
(*c*) Franks v. Weaver, 10 Beav. 297.

1856.

Whitney v. Hickling.

article sold, before Lord *Langdale*, the former confirmed by Lord *Cottenham* upon appeal. The resemblance was certainly not closer than in this case. In the two latter cases injunctions were granted, and in the former the plaintiff was sent to law in the first place; but it is pretty evident that if Lord *Cottenham* had had to decide the question of legal right himself, he would at once have enjoined the defendant.

In each of these cases, when the defendant's article and the plaintiff's came to be *compared*, there were palpable differences between them; but seeing the defendant's in the absence of the plaintiff's, a cursory observer, retaining no very accurate recollection of plaintiff's article, would be apt to mistake the one for the other, and to purchase or use the defendant's article under the supposition that it was the plaintiff's; and such, I think, would be the case here. I allude more particularly to the paper bags containing the preparation; the color and general appearance of the label are so like those of the plaintiff's as to mislead any ordinary observer. The resemblance, I think, could scarcely have been accidental. It looks as if prepared by some one who had one of *Whitney's* paper bags before him, and whose object was to imitate it in its general appearance, so as to deceive the eye into the belief that they were the same, and yet to make as many points of critical difference as possible. I willquote here the language of Lord *Langdale* in *Franks* v. *Weaver*: "If he imagines that because the similarity is not so great but that people may possibly find out a difference, or because the label does not contain the name of *George Franks*, or because the preparation is sold in bottles of a different size and form, that therefore he does not come within the scope of these decisions, he is under a great misconception."

Judgment.

If the defendant's preparation is really a different thing from that the secret of which he sold to the

plaintiffs, there is nothing to prevent his preparing and selling it; but then he must not represent it to be the same, either by language or by hand bills, or by using such labels or other marks as to lead purchasers to believe so. I think he has offended in all these points, and ought to be restrained. 1856. Northey v. Moore.

NORTHEY v. MOORE.

Practice.

A defendant having by his answer set up several matters of defence, which, through oversight, he had omitted to give evidence of; the court at the hearing directed the cause to stand over, with liberty to both parties to give evidence upon those points. May 12th.

Mr. *Morphy* for plaintiff.

Mr. *Crickmore* for defendants.

The judgment of court was delivered by

SPRAGGE, V. C.—This cause has been brought to a hearing in a very unsatisfactory way. What the real merits of the defence may be it is impossible to say, for all the material facts relied upon in the answer are left unproved; and the defendant's counsel at the hearing relied upon the answer as if it were itself proof of the matters of defence alleged in it.

The articles of partnership drawn by Mr. *Freeman*, and assented to as it is alleged by the plaintiff; the so-called account stated and agreed upon between the parties at the dissolution of the partnership; and the agreement alleged to have been thereupon come to between the plaintiff and the defendant, to the effect that *Edward* and *John Francis Moore* should hold and retain the partnership property, and relieve the plaintiff from the payment of the partnership debts: upon all these points, circumstantially alleged in the answer, the cause is barren of proof, while a great quantity of evidence has been taken upon the point Judgment.

1856. Northey v. Moore.

whether the plaintiff acted judiciously and economically in the management of that branch of the partnership business which was entrusted to his superintendence.

I agree in thinking that the plaintiff's claim to have either wages as a workman, or a share in the profits of the partnership at his option, is not satisfactorily made out. It rests solely upon the account given by the witness, of what passed at a conversation about eight years before he gave his evidence, between the plaintiff and two of the defendants, *Edward* and *John Francis Moore*: the evidence is not of that definite and satisfactory character that can be considered such as to be safely relied upon. Even as the witness puts it, it was rather a personal assurance on the part of two of the partners, leading the plaintiff to expect that he would receive as much as wages at any rate, than a deliberate article of contract between partners. It could not bind the partnership, of course, as one of the partners, the defendant *Henry John Moore*, was no party to it; and if the plaintiff had such election, his claim to have the accounts taken, and then to say whether he will take wages or a share of the profits, and that after waiting four years since the dissolution of the partnership, appears to me to be inadmissible.

Judgment.

It may also be open to another objection, which, however, was not taken at the hearing—viz., that the agreement not having been in writing, was void under the Statute of Frauds, not being to be performed within a year.

I think the plaintiff not entitled to the option he claims; but the defendants have shewn nothing to bar his right to an account of the partnership dealings up to the dissolution. If, in truth, such an arrangement was entered into as they set up in their answer, it is much to be regretted that they as business men managed

their affairs so loosely as to have no written memorandum of it, nor, so far as is shewn, evidence of any kind that such arrangement was made. With respect to the subsequent account, the long delay that has occurred, the subsequent dealings between the plaintiff and *Edward* and *John Francis Moore*, and the apparent acquiescence by the plaintiff in the business at Seneca falling into the hands of the defendants and being conducted by them, are circumstances against such a claim; but no such objections are made by the answer, but the alleged, though unproved agreement to which I have adverted is set up, and the plaintiff's acquiescence in that agreement is relied upon.

By that agreement, indeed, the *Moores* were to hold the premises, and conduct the business thenceforward as their own. They did so hold the premises and conduct the business, and the plaintiff appears to have acquiesced in their doing so, and it should have been stated in that way. The agreement, if proved, needed no subsequent acquiescence; it was binding without it. The acquiescence should have been alleged to have been in what was done, whether by agreement or not. Strictly, perhaps, the defendants having failed to prove the agreement alleged, and having alleged acquiescence only in the agreement, it is not open to them to prove acquiescence in what was done by them; and it may be, that under the pleadings, as they stand, the plaintiff has not deemed it necessary to offer evidence in respect to the apparent acquiescence and delay; which nevertheless, he may have it in his power to give. Parties have not, however, in this court, been held very strictly upon this point to their pleadings—*Haggart* v. *Allan* (*a*), and *Hook* v. *McQueen* (*b*), are instances of this. I think the defendants, and the plaintiff also, should be allowed to give evidence upon this point.

Judgment.

(*a*) Ante, Vol. 2, p. 407. (*b*) Ib. 490.

1856.

SMITH v. FRALICK.

Indorser—Principal and surety—Bill holder.

May 12th. The accommodation indorser of several bills of exchange and promissory notes obtained from the maker and acceptor thereof a conveyance of certain freehold premises, by way of indemnity against such indorsations. Certain of these bills were subsequently indorsed by another, and were discounted; and such subsequent indorser, on the bills maturing, was obliged to retire them. On a bill by the second indorser claiming to have the benefit of the trust deed by having the estate administered, and the amount so paid by him to retire the notes refunded—*Held*, that he was not entitled to such relief: and, *quære*, whether, under the circumstances, he had a right to claim such relief subject to the grantee in the deed being relieved from all liabilities incurred on the faith of it.

Statement. The bill in this case was filed by *Albert L. Smith* against *Samuel B. Fralick*, *William Lingham*, *Job Lingham* and *James Browne*, and under the circumstances stated in the judgment, prayed that the plaintiff might be declared entitled to have the trusts of the deed referred to in the judgment carried into execution, and to be repaid certain monies alleged to have been expended by him in retiring notes of *Lingham*; and that he might also be declared to have a lien on the estate for those monies.

Argument. *Mr. Strong* for plaintiff.

Mr. Hector for defendants.

Judgment. THE CHANCELLOR.—The original bill in this cause was filed on the 12th day of July, 1855. It stated that the defendant *Fralick*, having become liable on various bills of exchange and promissory notes which he had indorsed for the accommodation of the defendants the *Linghams*, and being requested to continue his indorsements for their accommodation, it was agreed between them that the instrument to which I am about to refer should be executed for his indemnity; and that thereupon, by an indenture of the 22nd of November 1854, certain premises were conveyed by the *Linghams* to *Fralick* in fee simple, upon trust nevertheless for securing any sum not exceeding £10,000, in which the

1856.

Smith v. Fralick.

Linghams or either of them should be at any time indebted to *Fralick*; and for securing payment of any sum for which *Fralick* was or should become liable on account of the *Linghams*, or either of them, by reason of his having become, or becoming security for them as indorser of any bill or note, or by any other means whatever; and that *Fralick* was thereby empowered to sell the trust estate upon default, for the purpose of realizing any sum due to him from the *Linghams*, or for which he should be liable for them as indorser. The bill then went on to state, that on the 9th of January 1855 the *Linghams* made their promissory note, whereby they promised to pay *Fralick* or his order £361 5s. 0d. on the 9th of April then next; that the note was indorsed by *Fralick* for their accommodation and as their surety, and that the same having been subsequently indorsed by the plaintiff was discounted at the Commercial Bank, who were the holders when it became due; that on the 10th of March, 1855, the *Linghams* made their further promissory note, whereby they promised to pay *Fralick* or his order the sum of £118 15s. 0d. on the 10th of June then next; that this note also was indorsed by *Fralick* for their accommodation, and having been subsequently indorsed by one *S. B. Smith* was discounted with the Commercial Bank, who were the holders when it fell due; that when the note which had been indorsed by the plaintiff fell due he had been obliged to pay the same, and was then the holder thereof, and had been also obliged to pay large sums as costs incurred in actions brought against the defendants and himself to recover the amounts of such notes; that when the note indorsed by *S. B. Smith* fell due it was protested for non-payment, and that thereupon he was obliged to take it up and became the holder thereof; and that after *S. B. Smith* had taken up the last mentioned note he indorsed it for a valuable consideration to the plaintiff, who became thereby, and was the holder thereof. The bill then submitted that the plaintiff

Judgment.

1856.

Smith v. Fralick.

was entitled under these circumstances to have the trusts of the indenture of the 22nd of November 1854, carried into execution for his benefit, and to have a sufficient sum raised by sale of the trust estate to reimburse the sums so paid by the plaintiff and *S. B. Smith*, or to have it declared that he was entitled to a lien upon the trust estate for such sums, and the prayer for relief was in accordance with that view of the law.

The bill was subsequently amended by making *James Browne* a party, and the amended bill states, by way of supplement, that a portion of the trust property had been conveyed by *Fralick* to *Browne*, on the 18th of August 1855, in consideration of his releasing a certain judgment, described in the bill as a judgment against the *Linghams;* and the amended bill prays that the conveyance just referred to may be set aside as fraudulent and void, and that *Brown* may be ordered to reconvey.

Judgment.

The facts in relation to this part of the case appear to be, that on the 9th of January 1850, the *Linghams* made their promissory note whereby they promised to pay *Fralick* or his order £644 17s. 0d. on the 12th of April then next; that this note was endorsed by both *Fralick* and *Browne* for the accommodation of the *Linghams*; that *Browne* was obliged to pay the amount of this note when it fell due; that he subsequently recovered judgment thereon against *Fralick* and the *Linghams*, and that the conveyance in question was made in consideration of the release of that judgment, and in pursuance of the power of sale in the indenture of November 1854.

This bill, therefore, proceeds upon the notion that the plaintiff by virtue of his position as a bill holder, and without reference to any other circumstances, is entitled to the benefit of the indenture of the 22nd of November, 1854; and on the argument the case was

rested principally upon the dictum of Sir *Wm. Grant* in *Wright* v. *Morley* (*a*), "*that as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety*, the surety has just as good an equity to the benefit of all the securities the principal gives to the creditor."

It must be admitted that *Maure* v. *Harrison* (*b*) supports the dictum of Sir *Wm. Grant* to its full extent; but the authority of that case has been questioned by Lord *Eldon*, and the applicability of the doctrine to a case circumstanced like the present has been repeatedly denied.

Before adverting to the authorities which stand opposed to the doctrine attempted to be deduced from *Wright* v. *Morley*, I may observe that nothing which fell from Sir *Wm. Grant* in that case can be considered as an authority in favour of the plaintiff here; for when the precise question arose shortly afterwards in *Hassall* v. *Smithers* (*c*), there was an obvious hesitation to apply the doctrine to a case circumstanced like the present. The argument against the equity of the bill holder in that case was, that if the fund could be considered subject to a trust in the hands of the intestate (the surety), great inconvenience and difficulty would arise. It was asked, suppose the bills on account of which the fund was remitted to be dispersed in fifty hands, and due at different times, for whom would the trust be, which could only arise upon relieving the surety from his acceptances to the extent of the fund. The Master of the Rolls did not rest his decree upon the supposed equity of the bill holder, but upon the equity of the depositor, who was clearly entitled to, and asked that relief; and having stated that as his ground, His Honor makes this observation: "*and that avoids the question upon the strength of their own claim to insist upon the application.*"

Judgment.

(*a*) 11 Ves. 22. (*b*) 1 Eq. Ca. Ab. 93.
(*c*) 12 Ves. 119

1856.

Smith v. Fralick.

We find from the report in *Glynn & Jameson*, where the argument of counsel is fully stated, that *Maure* v. *Harrison* and *Wright* v. *Morley* were much pressed upon Lord *Eldon* in *ex parte Waring* (*a*); but his lordship's observation upon *Maure* v. *Harrison*, which is in exact accordance with Sir *William Grant's* dictum in *Wright* v. *Morley*, was: "I have never heard this case relied upon as a governing case at this day"; and having kept *Exparte Waring* under consideration for a period of nine months, his language in delivering judgment was this (*b*): "The relief sought by the petition has been referred to this principle. These short bills and this mortgage having been deposited with *Brickwood & Co.*, as a security against their acceptances, the holders of the acceptances, it is said, have an equity to have the short bills and mortgage applied specifically in discharge of their acceptances, on the alleged general ground, that when a transaction of this kind takes place, those persons whose debts

Judgment.

are thus situated have in equity a right to the benefit of a contract between the parties indemnifying and the party indemnified, though no party themselves to the contract; that is to say, that those who have contracted out of their deposits, or their pledges, to pay certain debts, are liable to the demands in equity of those whose debts are so to be paid, and there is a case in equity that goes that length (*c*). It is enough to say that doctrine is inapplicable to the present case. Supposing bankruptcy not to have happened, and looking at this merely as the case of persons dealing with their bankers and making a deposit of this sort, I see nothing which would entitle the creditors to say that they have an equity attaching on these effects; or, in other words, that it raises a lien of this nature, that the moment that the pledge is put into the hands of the banker he becomes a surety for those whose acceptances are deposited with him;

(*a*) 19 Ves. 345 S. C.; 2 Rose. 182, S. C.; 2 Glynn v. Jameson, 404.
(*b*) 2 Ro. 184. (*c*) Maure v. Harrison.

if so, the consequence would be, that the banker and the person whose depository he is, could come to no new arrangement without the consent of the creditors. If this petition, therefore, can be supported, it must be on other grounds."

It has been doubted whether Lord *Eldon's* decision in *Ex parte Waring* does not go too far in favor of the bill holder; (*a*) but so far as it determined that the bill holder had not any direct equity against the surety, but only an indirect equity growing out of the bankruptcy or insolvency of the principal and surety, the case has never been questioned, so far as I have been able to discover. On the contrary, the authority of that case has been uniformly admitted whenever the question has arisen. In *Ex parte Parr* (*b*) Sir *John Leach* proceeded entirely upon the principle enunciated in *Exparte Waring*. In *Exparte Hobhouse* (*c*), and several other cases there cited, Lord *Eldon's* doctrine in *Exparte Waring* is stated as clear law. It was assumed as undisputed by Vice Chancellor *Wigram* in *Laycock* v. *Johnson* (*d*) and by Vice Chancellor *Stuart* in *Powles* v. *Hargreaves*; (*e*) and when the latter case came before the Court of Appeal, Lord *Cranworth*, in delivering judgment, said: "The question (in *Exparte Waring*) seems to have been argued very fully and at great length, and Lord *Eldon* held that there was such a right; not, he said, 'in the nature of a direct demand,' by virtue of any distinct and independent equity existing in the bill holders to claim a lien on that which had been deposited by the principal debtor with the surety; if that were so, they would have had a right at all times upon the bills so deposited, and to have said nobody shall deal with these bills except as we choose to permit, *a proposition utterly untenable.*"

Judgment.

But it is unnecessary to decide the abstract question,

(*a*) 2 Mont & Ayr. 282; 2 Glyn & Jame 417. (*b*) Buck. 191.
(*c*) 2 Mont & Ayr. 269. (*d*) 6 Hare 199.
(*e*) 17 Jurist 614.

1856.

Smith v. Fralick.

because I am quite clear that the plaintiff is not entitled to any relief upon the present record. If the plaintiff can claim under the deed of November, 1854, which for the reasons already stated I very much doubt, he can only claim subject to *Fralick's* right to be paid whatever may be due to him on foot of the security, and to be relieved from all liabilities incurred on the foot of it. But this is a bill to have the plaintiff's debt raised out of the trust estate without any regard whatever to *Fralick's* rights, which would be obviously unjust. Again: if there be any equity, it is an equity to have the trust estate distributed ratably amongst all the bill holders. But this is a suit to have the trust estate applied in payment of a single bill holder, to the exclusion of all the rest. Such a decree would be repugnant to the very principle upon which relief is asked.

Judgment.

I may add that upon the evidence before us, that the sale to *Browne* appears to me to be authorized by the deed of November, 1854, and to be a perfectly valid transaction.

ESTEN, V. C.—I have looked at several of the cases cited, but not all. They appear to negative the equity upon which the bill proceeds, and there is no distinction, I think, between bill holders, and other creditors.

Sir William *Grant's* dictum in *Wright* v. *Morley* does not seem to have been followed. Under these circumstances, and as the other members of the court think that the plaintiff should be at liberty to apply to amend his bill, I do not think it expedient that judgment should be delayed, as they are of opinion that even if the plaintiff has any equity, he cannot enforce it on this bill.

SPRAGGE, V. C.—I agree that it is quite impossible that the plaintiff can succeed upon the present frame of his suit. Whether he has any equity against the defendants at all is, I think, very questionable.

1856.

Smith v. Fralick

Where a creditor, a bill holder, or other creditor, has been allowed to avail himself of securities held by a surety, it has only been where the estate both of the security and the debtor were to be administered in bankruptcy, or in the Court of Equity, and where, in adjusting the equities between those estates, it becomes necessary that the creditor should have the benefit of securities held by the surety.

My impression is, that there is no branch of equity that would give a creditor a right to the securities held by a surety for his protection against the liability incurred by him for the debtor. It is not well perhaps to say more, as the plaintiff may be advised to amend his bill, and bring the point formally before the court for its decision.

OSBORNE v. OSBORNE.

Voluntary bond—Specific performance.

March 17th

The locatee of lands of the Crown executed a bond in favor of one of his sons, for the conveyance of fifty acres of his land, for the purpose of procuring his marriage with a particular person, which, however, never took place, and the son afterwards married another woman, having, in the meantime, been allowed to retain possession of the bond. The father subsequently conveyed to another son for value, but who had notice of the existence of the bond; and he applied for and obtained the crown patent for the land, and having refused to recognize the right of his brother under the bond, a bill was filed to compel the specific performance of the agreement contained therein.

Held, that as against a purchaser for value the bond was voluntary and could not be enforced; but the defendant having by his answer denied all knowledge of the existence of the bond, the court dismissed the bill without costs, and without prejudice to filing another, if, under the circumstances, he should be so advised.

The bill in this cause was filed by *Robert Osborne* against *William Osborne* and the *Trust and Loan Company* of Upper Canada, who held an incumbrance upon the premises in question in the cause,—praying to have a conveyance in accordance with the condition of a bond given by *George Osborne*, the father of *Robert* and *William Osborne*.

1856.

Osborne v. Osborne.

The obligor in the bond was examined as a witness, and stated: "I remember giving a bond to the plaintiff, it was given on account of his intended marriage with Miss *McQuaid*. * * * * * Miss *McQuaid* married another person, and my son *Robert* married a Miss *Thorndyke*. I said to Mr. *Redmond* [who was married to a daughter of the witness] when the match with Miss *McQuaid* was broken off, that I would not stand to the bond I had given to *Robert*. *Robert* never asked a deed of me in pursuance of that bond. He never mentioned the bond until he heard that *William* had got the land. * * * If he had been going to marry his present wife I don't think I should have given the bond: she had nothing—her father had nothing to give her."

This extract from the evidence, together with the facts set forth in the judgment, will, it is believed, be sufficient to convey a clear understanding of the facts of the case.

Mr. *Brough* for plaintiff.

Argument.

Mr. *Morphy* for defendant *Osborne*.

Doe *Otley* v. *Manning* (*a*); *Thornton* v. *Jenyns* (*b*); *Willan* v. *Willan* (*c*); *Stent* v. *Bailis* (*d*); *Brown* v. *Carter* (*e*); *O'Gorman* v. *Comyn* (*f*); *Sterry* v. *Arden* (*g*), were referred to.

Judgment.

Esten, V. C.—I think in this case the bond is to be deemed voluntary, and that the defendant must be regarded as a purchaser for valuable consideration; which makes the case stronger in his favor, although the bond being voluntary would of itself be a sufficient objection to the suit. The bill in this view should be

(*a*) 9 East, 59. (*b*) 1 Scott's N. R. 52. (*c*) 16 Ves. 72.
(*d*) 2 P. W. 217. (*e*) 5 Ves. 862. (*f*) 2 Sch. & Le. 137.
(*g*) 1 John. C. R. 62 & 261.

dismissed with costs. It may indeed be contended that the father having permitted the plaintiff to retain the bond until the time of his marriage to his present wife, such marriage formed a valuable consideration for the bond, as it must be presumed that it took place on the strength of it. This, however, is by no means clear; and at all events, the plaintiff cannot insist on this case upon the present record, but would be obliged to amend for the purpose; and as in this case he would ordinarily have to pay the costs to the hearing, the better course would seem at first sight to be to dismiss the present bill with costs, but without prejudice to his filing another if he should be so advised. I think, however, it is proved that the defendant had notice of the bond when he purchased; and as he has positively denied notice by his answer, I think it right to deny him his costs; and therefore there may be, at the option of the plaintiff, either a decree dismissing the bill without costs, and without prejudice to his filing another if he should be so advised, or an order that the cause stand over, with liberty to the plaintiff to amend his bill if he shall be so advised, each party paying his own costs.

1856.

Osborne v. Osborne.

Judgment.

SPRAGGE V. C.—The bond which is the foundation of this suit bears date the 24th of March 1828; it was executed by the father of the plaintiff and of the defendant *William Osborne*, and is conditioned for the conveyance three years after its date by the father to the plaintiff, of the northerly fifty acres of lot 18 in the 2nd concession of Cavan. The father at the time was locatee of the Crown of the east half of the lot, one hundred acres. The bill does not state any purchase by the plaintiff from his father, or that consideration of any kind passed; but places his title to a conveyance from *William*, not only upon the bond from his father, as I understand the bill, but also upon this: that when the father assigned to *William* his interest in the one hundred acres, he did so in the full

1856.

Osborne v. Osborne.

expectation and confidence that *William* would convey the northerly fifty acres to *Robert* according to the condition of the bond. He alleges further that *William* received this transfer and assignment with full knowledge of the bond, and of *Robert's* right to have the fifty acres conveyed to him, and that he then admitted, and has admitted since, that *Robert* had such right. I read the bill as placing the plaintiffs right to a conveyance principally, if not wholly, upon the latter ground, that of a positive trust in *William* to recognize the bond and convey the fifty acres in accordance with it; for although the bill speaks of *Robert's* right to a conveyance under the bond, it must be taken, I conceive, as using the word "right" *sub modo*, and not in the sense of alleging a right of suit in this court, unless it is stated in such terms as to set forth such right, whereas the case which the plaintiff states as to the bond is that of his being a volunteer.

Judgment.

I think upon the evidence, though *William* denies it in his answer, that he did know of the existence of the bond before he took the assignment from his father; but there is no evidence that he took the assignment with any trust, express or understood, for the conveyance of the fifty acres to *Robert;* and I should say from the evidence, that the fact is otherwise.

The plaintiff has, however, endeavoured to sustain his case upon another ground; that he stood in the position of a purchaser for value, and he has given evidence upon this point, and argued upon it, without objection on the part of the defendants. The plaintiff alleges past services as one ground, and his own marriage, which his father, he says, was desirous to promote, as another. As to the past services, it is at least doubtful whether he was of age when the bond was given: according to the evidence of *George Osborne*, his brother, he was only about nineteen

1856.

Osborne v. Osborne.

at that time, and the expression of *Redmond* "that he was able to do a man's work before 1837," implies that he was not then a man in age, although he might be so in strength. Besides, there is no evidence to shew that his past services were even a motive on the part of his father for agreeing to make the conveyance.

As to the intended marriage, there is more in the evidence upon this ground than the other; for it does appear that intended marriage by *Robert* was the reason and consideration for the execution of the bond by the father. But the question is, whether it was with a view to his marriage generally, or with a view to a particular marriage then in contemplation which did not take place, and in view of that particular marriage only. Upon the evidence, I think it was the latter. The evidence of the father, and of *Redmond*, his son-in-law, who drew the bond, confines it to the latter and gives a special reason for such provision being made, in case he married that particular person—viz., that she had some other means of her own, and her brothers objected to the match unless *Robert* had some real property of his own; and the circumstances of the bond being attested by two persons of the same name as the intended wife, one of them, her brother, looks in the same way.

Judgment.

It appears as a fact that *Robert* did not marry till some considerable time, some years, I think, afterwards; and further, that he did not claim the land when he did marry, or do any act which shewed that he had any idea that his marriage was in any way connected with his claim to the land. If he had married the young woman, upon his engagement with whom the bond was given, it can hardly be doubted that he could have claimed the land: his not doing so when he married another looks as if his own understanding of the transaction was, that it was not

1856. upon his marriage with any person whatever, but upon his marriage with one person in particular that he was to have the land.

Osborne v. Osborne.

Still, any clear subsequent recognition of the bond by the father would tend to shew that he did not consider the bond invalid upon the failure of the particular match for the furthering of which he had given it. The only recognition proved is that spoken of by *McCannis* as having been made after he and the father had made a bargain for the lot. The father said he wished *McCannis* would see *Robert*, as he was to get part of the money; that he did see *Robert*, who spoke of his claim under the bond. It does not appear that this bond was named between *McCannis* and the father; and the father in his evidence denies that when he was selling, he *McCannis* said anything about the bond or any claim of *Robert's*, and that he did not think *Robert* had any claim. I am not inclined to discard the evidence of *McCannis*, or to consider it of less weight than that of the father; and it is not easy to see why the father should refer him to *Robert*, and tell him that *Robert* was to get part of the purchase money, unless it was in virtue of this bond. Still, this might occur from the mere fact of *Robert's* having such a bond in his hands, and from his father, not feeling safe in selling without first making terms with him. It amounts to no acknowledgment that the bond was given for any consideration, marriage or otherwise.

Judgment.

The defendant *William Osborne* is, I think, a purchaser for valuable consideration; he paid certain dues to the government upon the land, and entered into a covenant with his father for the support of himself and his wife, and the survivor of them, and the payment of an annual sum during their joint lives, and of a smaller sum annually during the life of the survivor.

It is not necessary, however, I apprehend, for *William* to shew himself a purchaser for value if *Robert* was a mere volunteer, as upon the evidence I think he is. 1856. Osborne v. Osborne.

IRVING v. MCLACHLAN.

Religious Societies—Demurrer.

Under the statute 12 Victoria, ch. 91, the trustees of lands held in trust for the benefit of the religious bodies therein mentioned, with the consent of the governing body, can alone exercise the powers given by the act. Where therefore a contract for the sale of lands so held in trust was entered into in compliance with a resolution of the congregation, by a member of a committee appointed for the purpose of disposing of such lands, and a bill was filed by the purchaser to enforce its specific performance, a demurrer for want of equity was allowed. March 17th.

This was a bill by *Æmilius Irving* and *Adam Warnock* against *William McLachlan*, *Stephen Moffatt*, *David Scrimger*, *John B. Keachie*, *William McKenzie*, *Thomas White*, *John Fergusson*, *David Potter*, *James Wyllie*, *James Sharp*, *Alexander Adair*, *David Phee*, *Alexander Young*, and *William Dickson*, praying for the specific performance of an agreement for the purchase of lands: the nature and particulars of which are fully stated in the judgment of the court.

Mr. *Mowat*, *Q. C.*, in support of the demurrer. Argument.

Mr. *A. Crooks*, contra. *Martin* v. *Pycroft* (*a*), *Robinson* v. *Page* (*b*), *Blackwood* v. *Borrowes* (*c*), *Sugden's* Vendors and Purchasers, 11 Ed. p. 134.

THE CHANCELLOR.—This is a suit to enforce the specific performance of a contract for the sale of a tract of land held in trust for a certain religious congregation in the town of Guelph, known as "the congregation of the Rev. Mr. *Strang's* church," or the "Associate Presbyterian Church." The plaintiffs are Judgment.

(*a*) 16 Jur. 1125. (*b*) 3 Russ. 114. (*c*) 4 D. & W. 441.

1856.

Irving v. McLachlan.

the purchasers under that contract. The defendants are the present trustees of the congregation, the chairman and secretary of a meeting at which the sale is said to have been authorised, and several members of the congregation.

The bill states, that the defendant *David Potter* contracted for the purchase of the property in question in the year 1849, on behalf of this congregation, as a site for a church or meeting house, and a manse for their minister: that the temporal affairs of the congregation are managed exclusively by itself at general meetings thereof, and that trustees are accustomed to be appointed thereat from amongst the members for the execution of the instructions of the said congregation, and to hold in trust therefor the property and effects thereof: that six persons, named in the bill and defendants in this suit are the present trustees; that at a general meeting of the congregation held in January then last past, a resolution was passed ordering the sale of the property in question at a sum of not less than £30 per acre, and that the persons named therein, who are defendants in the present suit, were appointed a committee to carry out that resolution. The bill then sets out *in extenso* the contract on which the plaintiffs rely. That instrument purports to be made between the trustees of Mr. *Strang's* church and the plaintiffs, but the contract was in fact made by *Keachie*, one of the committee appointed by the congregation, and is signed by him alone. The bill then alleges that the contract as made by *Keachie* was approved by the other members of the committee,—by one unreservedly, and by the others with some qualification; and it prays specific performance.

Judgment.

This is, therefore, a bill to enforce the specific performance of a contract for the sale of lands held in trust for this congregation under the provisions of

the statute 12 Vic. ch. 91. But, as such, it is quite clear, I think, that it cannot be sustained. The second section of the statute in question provides that, "Whereas under the said acts divers religious societies or congregations have, by their trustees, acquired lands which from circumstances have become inappropriate to the purposes for which they were acquired, and it would be for the advantage of such societies or congregations that the trustees should be enabled to dispose of any such lands, and acquire others better adapted for their purposes. Be it therefore enacted, that it shall and may be lawful for the trustees for the time being, of each of the religious societies or congregations to which the said acts are applicable, and the said trustees of each respective society or congregation, are, as such trustees, hereby authorized, from time to time, upon the express consent of the conference, synod, or body, having the direction of the temporal affairs of such societies or congregations respectively first had, therefore, by deed, under the hand and seal of office (which seal each body of trustees is hereby empowered to have and make, and from time to time to alter), to lease, mortgage, sell and convey, or exchange such of the lands and tenements held or to be held by any of the said respective trustees, in such portions and in such manner, as from time to time may be deemed by the trustees thereof necessary and useful for the purposes connected with the particular trust."

1856.

Irving v. McLachlan.

Judgment.

Now it is quite clear that the legislature did not mean to invest either congregations or synods with the power of selling lands held in trust in the manner pointed out by the act. The assent of the congregation, synod, or other governing body, is made essential, indeed, to the valid exercise of the statutory power, but it is quite obvious that the power is vested in the trustees and in them alone. But here the trustees have neither entered into nor sanctioned any contract

1856. Irving v. McLachlan. whatever; and as the power which the congregation has assumed to exercise is quite unauthorised by the statute, we are of opinion that the demurrer must be allowed.

PEGGE v. METCALFE.

Equity of redemption—Judgment creditor.

April 30, and October 27. Where land, subject to a mortgage, is sold by the sheriff under the statute 12 Victoria, chapter 73, the purchaser acquires only the title of the mortgagor at the time the writ was delivered to the sheriff, not such as he had at the time of registering the judgment.

A judgment creditor, purchasing an equity of redemption at sheriff's sale, cannot set up his registered judgment against a mortgage upon the premises made before the delivery of the writ to the sheriff.

And *quære*, whether a stranger purchasing the premises would not be bound to pay off judgment as well as mortgage debts, as forming together a portion of the price of the land purchased.

The amended bill in this cause was filed by *Caroline Pegge*, *Samuel Goodenough Lynn*, and *William Wallis*, the executrix and executors of *William Pegge*, against *Francis H. Metcalfe*, *Thomas Wilcoxon* and *Thomas Eck*, the executors of *Samuel Pegge*, praying a declaration of the priority of the incumbrances of the parties respectively; a sale of the incumbered estate, and payment of the claims of the several incumbrancers according to their priorities.

Mr. *Turner* and Mr. *Hallinan* for plaintiffs.

Mr. *Brough*, for defendants.

The judgment of the court was delivered by

October 27. SPRAGGE, V. C.—This bill is filed in respect of incumbrances created upon the estate of *Elisha Morton*. They stand thus in order of time—First, a mortgage by *Elisha Morton* to *William Pegge*, 14th of February, 1846. Next, judgments recovered by defendant *Metcalfe* against *Elisha Morton*, 20th of February, 1847, and registered

the same day. Next, mortgage by *Elisha Morton* to *Silas Morton*, 10th of May, 1847, registered 7th of June, 1847. Next, registration of the first mortgage of *Elisha Morton* to *William Pegge*, 8th of July, 1847. So that the position of the parties is, as between the two mortgages, that the second has obtained the priority over the first by prior registration; as between the first mortgage and the judgments that the mortgage has the priority. This under the authority of *Beavan* v. Lord *Oxford* (*a*), while as between the judgments and the second mortgage the judgments are prior in date of recovery and registration. 1856. Pegge v. Metcalfe.

The mortgaged premises were sold under the Provincial statute 12 Victoria, chapter 73, by virtue of writs placed in the sheriff's hands on the 6th of July, 1847, upon a judgment recovered by one *McGregor* against *Elisha Morton*; and the above judgment creditor *Metcalfe* became the purchaser at the sum of £50; and the interest of *Elisha Morton*, that is, his equity of redemption was conveyed to him by the sheriff's deed. Judgment

The bill as amended, is by the personal representatives of the assignee of the second mortgage against *Metcalfe*, and the personal representatives of the first mortgagee, and prays that the priorities of the several incumbrances may be declared and the land sold for their satisfaction, claiming priority for the two mortgages.

Independently of the statute it would seem that the first mortgagee having lost his priority over the second by the prior registration of the second mortgage, and the judgments having priority over the second mortgage, the first mortgage would be postponed to both, and the order of the incumbrances would be,

(*a*) 2 Jur. N. S. 121.

1856.

Pegge v. Metcalfe.

first, the judgments; secondly the second mortgage; and thirdly the first mortgage: and the question arises upon the effect of the purchase by the judgment creditor of the equity of redemption of *Elisha Morton.*

The effect given by the statute to the taking in execution, sale and conveyance under it, is to transfer and vest in the purchaser, all the legal and equitable estate, as the statute expresses it, right, title, interest and property, and the equity of redemption of such mortgagor in the lands taken in execution, sold and conveyed "*at the time of placing such writ in the hands of the sheriff* or other officer to whom the same is directed as well as at the time of such sale;" and to vest in the purchaser the same rights, benefits and powers as the mortgagor could or would have had if the sale had not taken place.

Judgment.

The third section enacts that any mortgagee of the lands sold may purchase at the sale; but in that case he is to give a release of the mortgage debt to the mortgagor; and in case any other person shall become the purchaser, and the mortgagee shall enforce the debt against the mortgagor, the mortgagor may recover payment over from the purchaser, and the land shall remain charged with the amount in favour of the mortgagor.

If the statute had given to the sale and conveyance of the equity of redemption, the effect of vesting in the purchaser the estate and interest of the mortgagor *at the date of the registering of the judgment* instead of at the date of the placing of the writ in the sheriff's hands, it would perhaps have been more consonant with the statutes which make a registered judgment a charge upon land. As it is, it admits mortgages made between these two periods, and what is sold is the mortgagor's estate or equity to redeem all mortgages subsisting at the latter period; and the amount due

upon all these mortgages would necessarily be taken into account by any one bidding at the sale of such equity of redemption; that amount being part of his price for the land. The second mortgage having been made before the delivery of the writ to the sheriff, and the mortgagor's estate at that date subject to it, the estate acquired by *Metcalfe* by the purchase at sheriff's sale, was the mortgagor's equity to redeem that as well as prior incumbrances, and if the assignee of that second mortgage had enforced payment of it against the judgment debtor, the mortgagor, he might under the third section have recovered it over against *Metcalfe*. It is clear therefore that *Metcalfe* is the person to pay that mortgage, and that it remains a charge upon the land after the sale.

1856.

Pegge v. Metcalfe.

Then does the circumstance of the purchaser being also a prior judgment creditor, make any difference, or enable him to claim his judgment as a prior charge upon the land? If *Metcalfe* puts himself in the position of a prior incumbrancer notwithstanding his purchase, then the holder of the second mortgage is entitled to redeem him, and having done so, being himself only an incumbrancer is entitled to be redeemed by the owner of the equity of redemption, which is *Metcalfe* himself; so that *Metcalfe* would be redeemed in his character of prior incumbrancer, to redeem again as owner of the equity of redemption: to receive money in one character which he would be bound to pay back to the same party in another. If a stranger had become the purchaser there could be no doubt, I apprehend, that this second mortgage would continue a charge, and it would be strange if its so continuing could depend upon whether the purchase was by a stranger or another incumbrancer; the thing purchased being the same, by whichever the purchase was made.

Judgment;

It is not necessary to determine whether in the case of a purchase by a stranger he would be bound

1856.

Pegge v. Metcalfe.

to pay off the judgment debts. If bound to do so the judgment debts as well as the mortgage debts must be taken to be part of the price of the land, and so a stranger purchasing would not without paying both, pay the whole price of the land; and *pari ratione*, an incumbrancer purchasing and setting up his incumbrance against subsequent incumbrancers would, by so doing, claim from another a portion of the price which he was himself to pay for the land.

If on the other hand the mortgage debts only, and not the judgment debts, are under the statute to be paid by the purchaser, that is as between himself and the mortgagor, still in a case where the judgment creditor is himself the purchaser he cannot claim an incumbrance in virtue of his registered judgment, as he would then be claiming an incumbrance upon his own land.

Judgment.

In either view it would seem to follow that a judgment creditor purchasing an equity of redemption at sheriff's sale, cannot set up his registered judgment against a mortgage upon the premises purchased, made before the delivery of the writ to the sheriff.

The decree will be for a sale of the mortgaged premises, the proceeds to be applied in satisfaction of the incumbrances, in the order of their priority.

1856

November 3.

McKIDD v. BROWN.

Will—Specific bequest.

A testator, by his will, after making sundry devises and bequests proceeded, "And I further leave to my son *George* all my plate and plated goods, books and pictures, together with all accounts, papers *and personal effects that may be in my possession at the time of my death*, always excepting household furniture, beds, bedding and linen, and these I leave to my daughters (naming them), to be divided share and share alike; * * * and I further leave, give and bequeath all my horses, cattle, cows, sheep and farming implements to my two daughters," being those already named.—*Held* that the bequests to the son and daughters were specific, and that the residue, if any, was not disposed of.

Mr. *Roaf* for plaintiffs.

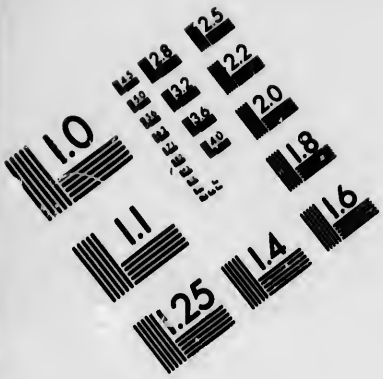
Mr. *Brough* for defendant.

The judgment of the court was delivered by

SPRAGGE, V. C.—The appeal by the parties, plaintiffs and defendant, from the Master's report has been already disposed of, with the exception of two points of objection made by the plaintiffs. Judgment.

The plaintiff, *Julia McKidd*, is a legatee under the will of her father, the late *George Brown*; the defendant is also a legatee and executor. The Master finds the debts of the testator to have amounted to £326 2*s.* 4*d.*, and he charges the plaintiffs with £79 7*s.* 4*d.* as the proportion thereof which should be borne by them: which is correct, if the real and personal property of the testator is specifically devised and bequeathed; incorrect if there is a residuary legatee.

The plaintiffs contend that the defendant, *Brown*, is the residuary legatee. After a specific devise of real estate and a specific bequest of certain moneys due upon a bond executed to the testator in England by a person then and still resident in the city of London, the will proceeds as follows: "And I further leave to my son *George* all my plate and plated goods,



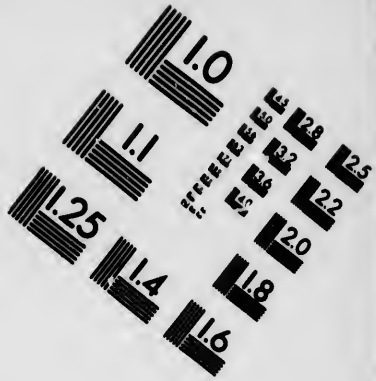
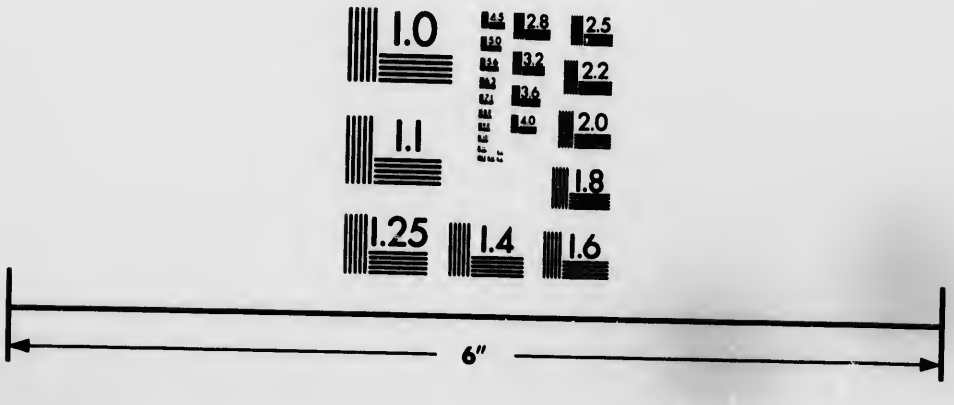
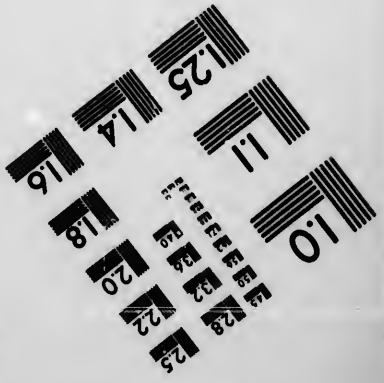


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

1856.

McKidd v. Brown.

books and pictures, together with all accounts, papers and personal effects that may be in my possession at the time of my death, always excepting household furniture, beds, bedding and linen, and these I leave to my daughters, *Julia Brown* and *Isabella Scott*, to be divided share and share alike between the said *Julia Brown* and *Isabella Scott*; and I further leave, give and bequeath all my horses, cattle, cows, sheep and farming implements to my two daughters, *Julia Brown* and *Isabella Scott*, to be divided between them share and share alike." It is upon this part of the will that the plaintiffs contend that the defendant is a residuary legatee.

Judgment.

We think that he is not: the bequest to the defendant concluding with the words, "and personal effects that may be in my possession at the time of my death," looks at first like a gift of the residue of his estate; but the first bequest to his daughters shews the restricted sense in which these words are used in the will; for it is evident that he does not treat his horses, cattle and farming implements as personal effects in his possession. By the use of these terms he seems to mean what might be actually in his house, and these he divides between his son and two daughters: to his daughters the household furniture, beds, bedding and linen; to his son the plate, books, pictures, accounts (by which I understand books and evidences of accounts due to him), papers and other personal effects. If he had meant any more than this he would naturally have added his cattle, farming implements, &c., to the articles which he excepted from the personal effects bequeathed to his daughters: his not doing so but placing these upon a different footing, seems to shew that by the words "personal effects in my possession" he could have meant only household effects, papers and accounts; and that he thus apportioned one part of his personal estate to his son, another to his daughters: a specific bequest to each.

The other ground of objection taken by the plaintiff is, that the Master ought to have charged the defendant in favor of the plaintiffs with the proportion of the moneys due upon the bond; inasmuch as he has been guilty of default in not getting in the bond debt: that it was against his duty as executor to loan the moneys of the estate out upon personal security, and that he ought to have clothed himself with the necessary powers to enforce payment of the bond by proving the will in England. For the defendant it is contended that an executor is not bound to go out of the jurisdiction to assume a representative character abroad.

1856.

McKidd v. Brown

We have looked into the authorities cited upon this point, but do not think it necessary to express any opinion; as we think that there is not enough shewn upon the report to charge the executor with the plaintiff's share of the bond debt, even if the bond debtor were in this country. It does not appear that the money is yet due; or if due, whether the obligee was solvent, or is or not now solvent; whether it is now recoverable, or has become lost through the defendant's delay to get it in. On further directions it may be proper to direct an inquiry, or to order that the money be got in.

Judgment.

1856.

JOSEPH v. HEATON.

Judgment creditor—Principal and surety.

April 30, and October 27.

H. obtained from his debtor an assignment of his books of account, notes, bills and other evidences of debt by way of security against the consequence of his becoming a party to notes for the accommodation of the debtor; and also a conveyance of real estate from the father of the debtor for the same purpose. Having been compelled to pay a large sum of money by reason of his being a party to such notes, *H.* recovered judgment against the debtor and sued out execution thereon, which was the first placed in the hands of the sheriff against the debtor, and the effects of the debtor were afterwards sold under this and other executions subsequently placed in the hands of the sheriff; upon which sale sufficient was realized to satisfy the execution of *H.* and leave a balance in the hands of the sheriff, and *H.'s* claim was accordingly paid, and the books of account and other securities held by him were delivered up to the debtor after notice from a later judgment creditor not to part with them; and the father's land was re-conveyed to him. The execution creditor who gave the notice, claimed in consequence priority over intermediate execution creditors, and also a right to compel *H.* to make good the amount of his claim in consequence of having parted with the securities.

Held, that a subsequent execution creditor had not any equity to compel the first creditor to recover payment of his claim out of the property held by him in security, so as to leave the goods of the debtor to satisfy the subsequent executions, nor had he any right to call upon *H.* to assign the lands conveyed to him by the debtor's father; that *H.* was not rendered personally liable in the first instance to the subsequent execution creditors, but, that he had no right to deliver up the securities held by him, to the debtor, on being paid the amount of his execution, and was, therefore, liable for any loss thereby occasioned.

Statement.

The bill in this case was filed by *Henry Abraham*, *Joseph* and *Charles Brown* against *John Heaton*, *William H. Morgan*, *Amos G. Batson* and *William Cady Van Brocklin*, setting forth at length the facts as stated in the judgment; and also a letter from Messrs. *Wood* and *Long*, the attorneys at law of *Heaton*, in the common law proceedings which gave rise to this suit. The evidence in the cause bore out the statement of the facts as set forth in this letter, which was to the following effect:

Brantford, 23*rd May*, 1855.

DEAR SIR,—Two letters from you to *Heaton*, *de Morgan*, *Brown* and *Joseph* affair are before us. In this matter we have acted for Mr. *Heaton* from the first, and are therefore in a position to give you all the information you require * * *. The history of *Heaton's*

connection with *Morgan* is as follows: for some time past *Heaton* has been endorsing notes for the accommodation of *Morgan*, until in the month of March last, such endorsements amounted to the sum of £3,500. *Heaton* became alarmed and requested security; *Morgan* gave him a confession for the amount of the endorsations, with the agreement that *Heaton* should be at liberty at any time to take out a *Fi. Fa.* for the amount of the paper on which he was endorser, and out of *Morgan's* goods make the amount, and with the money so made to take up such paper. But, it was at the same time stated that *Morgan* might give a cognovit to some other party, or some one might recover judgment against him, and while the *Fi. Fa.* in *Heaton's* case was unissued anticipate his security; and, therefore, as collateral to the confession, *Morgan* made to *Heaton* an assignment of his book debts, and the father of *Morgan* assigned for like purpose a town lot, with the agreement that when, and if any of the money should be made out of *Morgan's* goods (if necessary to be made at all), *Heaton* should reassign the debts, &c., to *Morgan* and the town lot to the father; or such part therof as should remain after the making up of any deficiency that might be found from the sale of the goods. *Heaton* found it necessary, to protect himself, to put the *Fi. Fa.* in the sheriff's hands, while at the same time he retained the collateral securities till the *Fi. Fa.* was satisfied. In order that as much might be realized from the assets of *Morgan* as possible, *Heaton* consented to take paper running over a period of fifteen months, if the same should be satisfactory. A sale took place some two or three weeks ago, and Mr. *Bacon* became the purchaser; he failed to give satisfactory notes and the sale took place again last Monday; out of the proceeds of which *Heaton* has been satisfied his *Fi. Fa.* and claim against *Morgan*, immediately upon which *Morgan* demanded a reassignment to him of the debts and the town lot. *Heaton*, of course, had no course left him but to comply; and on consulting us we advised him that he had nothing to do with *Joseph*, *Brown* or *Topping* in the matter: that if he had been paid his *Fi. Fa.* he was bound by his agreement with *Morgan* on taking the assignment, the terms of which we have mentioned, to reassign the collateral securities. He has accordingly done so. *Morgan*, we believe, is about assigning them to *Topping* and *Brown*. If, therefore, you wish to institute any

1856.

Joseph v. Heaton.

Statement.

1856.
Joseph v. Heaton,

proceedings in this matter you have the parties concerned before you. We need not tell you how the *Fi. Fa's.* stand; this you understand.

The bill prayed, amongst other things, an account of the amounts due the several parties; a declaration of their rights and priorities, and that under the circumstances it might be declared that plaintiffs had obtained priority over the judgment creditors other than *Heaton;* and that *Heaton* might be ordered to make good the demand of plaintiffs.

Mr. *A. Crooks*, for plaintiffs.

Mr. *Morphy*, for defendants.

The judgment of the court was delivered by

Judgment.

SPRAGGE, V. C.—The defendant *Heaton* was the first of several judgment creditors of the defendant *Morgan*, all of whom had executions in the sheriff's hands on the 21st of May last; their priorities were as follows:

1 Heaton for	£3,002	15	11
2 Vanbrockiin, a defendant, for	1,208	0	0
3 Batson, a defendant, for	202	8	0
4 Joseph and Brown, the plaintiffs, for	730	0	0
5 Topping, for	3,500	0	0

The defendant *Heaton*, at the same date, held an assignment from *Morgan*, dated the 22nd of March, 1855, of his books of account, debts, dues and demands, notes, bills and other evidences of debts then existing, or thereafter to be created, by way of security for his becoming a party to promissory notes and bills for the accommodation of *Morgan;* and the father of *Morgan*, at the same time, conveyed certain real property to *Heaton* upon the same security; *Heaton* afterwards had to pay a large sum in consequence of his being a party to such notes for *Morgan*, and thereupon recovered the judgment above referred to. He states in his affidavit (which it was consented to receive as evidence) that the assignment was made to him to secure the identical debt

for which his judgment was obtained. Before the 21st of May the following letter was received by *Heaton* from the plaintiff's solicitor: 1856. Joseph v. Heaton.

Wellington-street, Toronto, May 19, 1855.

John Heaton, Esq., Brantford.

DEAR SIR,—On behalf of Messrs. *Joseph* and *Brown*, of this city, I beg to notify you, that inasmuch as you hold, as well an assignment of book debts, accounts, notes, &c., as a writ of execution against goods for the security of the indebtedness of Mr. *William Morgan* of Brantford to you, and that by your resorting to the proceeds of the sale by the sheriff of *Morgan's* goods for the payment of that indebtedness you would prejudice the rights of Messrs. *Joseph & Brown*, who have only such proceeds to resort to as subsequent execution creditors. Messrs. *Joseph & Brown* claim to have the book debts, accounts, notes, &c., so assigned to you, and the proceeds of the sheriff's sale marshalled for their benefit and indemnification; and on their behalf I have to give you formal notification of such rights, and that they will hold you responsible for any thing that you may do to interfere with or prejudice such rights. Judgment

I have, &c.

(Signed) ADAM CROOKS.

At the same time a similar letter was addressed to the sheriff.

On the 21st of May the goods of *Morgan* were sold under the executions, and a sufficiency was realized to satisfy *Heaton's* debt in full, and *Vanbrockin's* debt the extent of £508.

After the sale *Topping* and his attorneys demanded of *Heaton* the delivery of the books and securities; *Heaton* objected, having received Mr. *Crooks'* letter of 19th of May, 1855, and consulted with *Wood; Wood* referred to *Cameron & Rubridge*, and then learned, if he did not know before, of the assignment of the 7th of April, and with this knowledge advised *Heaton* that he had nothing to do with any one, and must reassign to *Morgan*. *Heaton* executed no assignment, but said,

1856. Joseph v. Heaton.

"Here are the books; Mr. *Wood* advises me that I ought to deliver them up to *Morgan;* now whoever is entitled to them may have them."

Morgan, Topping and *Vanbrocklin* were present, as well as *Heaton* and *Wood.* The date of this does not appear exactly, but was probably on the 23rd. It may have been on the 22nd.

Joseph & Brown, by their letter of the 18th of April, seem to have repudiated taking under the assignment of the 7th of April; and their rights in this suit do not appear to be affected, either beneficially or prejudicially, by that assignment.

The principle then upon which the plaintiffs come into this court is, that they and *Heaton*, being creditors of the same person, and *Heaton* having two funds to resort to—his assignment and his prior judgment—while the plaintiffs had but the one, *Heaton* should have realized his debt out of the fund to which the plaintiffs could not resort; or in the event of his realizing it out of the fund common to both, the plaintiffs became entitled to the other fund and to the securities held by *Heaton* in respect of it, upon the same principle as the doctrine of marshalling assets is founded: That a creditor who has two funds cannot by his election to realize his debt out of a fund common to him, and another creditor who has but that one fund to resort to, disappoint the other creditor of his remedy.

Judgment.

I understand the rule to be that the creditor having two funds cannot be prevented from resorting to either as he may see fit, but that upon his resorting to the fund common to both and thereby satifying his debt, the creditor having but the one fund becomes entitled to resort to the other fund *pro tanto*, and to the benefit of any securities held by the other creditor in respect of it. The principle is fully established in *Aldrich* v.

Cooper (*a*) and other cases, and I believe was not denied in this case, and therefore we think that *Heaton* was not correctly advised when he was told that his proper course was to reassign to the debtor the securities which he had held. 1856. Joseph v. Heaton.

As to the notification by plaintiffs to *Heaton* of their equitable rights giving them priority over prior judgment creditors: they were equities affecting the conscience of *Heaton* as to any judgment creditor of which he had notice; and so, express notice by one of them could not postpone the equities of others, of which others *Heaton* had notice. But suppose he had not notice of the intervening judgment, why should this notice by plaintiffs give them priority. If at all it must be because they exercised greater diligence; but there could be no lack of diligence on the part of those sought to be postponed, unless they had notice of the existence of the assignment to *Heaton* at or before the time of the notice being given by plaintiffs; and there is no evidence that they had such notice. Judgment

The cases cited by Mr. *Crooks* do not seem to apply to such a case as the present: they were exceptions to the general rule, *qui prior est in tempore potior est in jure*, because the prior party postponed had, by gross negligence, left the party preferred to advance his money in ignorance of his prior charge. The first case which established this principle was *Dearle* v. *Hull* (*b*), followed immediately by *Loveridge* v. *Cooper* (*c*), both before Sir *Thomas Plumer*, and affirmed on appeal by Lord *Eldon*. These cases were followed by *Foster* v. *Blackstone* (*d*), before Sir *John Leach*, and In re *Atkinson's* Trust, before Lord *St. Leonards* (*e*). In each of these cases there was an estate outstanding in trustees, and in each of them the party preferred had advanced his money to the *cestui que* trust in ignorance of the prior charge

(*a*) 8 Ves. 382. (*b*) 3 Rus. 1. (*c*) Ib. 30.
(*d*) 1 M. & K. 297. (*e*) 16 Jur. 1003.

1856.

Joseph v. Heston.

created in favour of the party postponed. It is stated by Sir *Edward Sugden*, in his treatise on the law of vendors and purchasers, that upon the purchase of a chose in action, or of any equitable right, it is the invariable practice of the profession to require notice of the sale to be given to the trustees; and he states further, that a purchaser of any equitable rights, of which immediate possession cannot be obtained, should, previous to completing his contract, inquire of the trustees in whom the property is vested whether it is liable to any incumbrance; and he adds, that if the trustee make a false representation, equity would compel him to make good the loss sustained by the purchaser in consequence of his fraudulent statement.

It is clear then that the English rule is, that the purchaser of such an equitable right, omitting to give notice to the trustee, omits that which it is the invariable practice of the profession to do, and is consequently guilty of gross negligence, and that to the prejudice of a subsequent purchaser of the same equitable right, because it enables the *cestui que trust* to commit a fraud upon him by inducing him to believe that there is no prior charge affecting the property, a belief which the usual diligence on his part, and probably no amount of diligence, would enable him to correct. While if notice had been given to the trustee the subsequent purchaser would be safe whether the trustee disclosed the fact to him or not.

Judgment.

In the absence of notice it is assumed that the subsequent purchaser advanced his money upon the faith that no prior charge of which he had not notice did in fact exist. This prior purchase may have been of the whole right of the *cestui que* trust or of a charge upon it only. In either case it appears a plain equity that it should be postponed to the right of the subsequent but diligent purchaser, whose money may be placed in jeopardy or wholly lost through the negligent omission of the prior purchaser.

1856.

Joseph v. Heaton.

But, when the principle is applied to a case like the present, it wholly fails. In the first place no negligence is shewn, for an omission to give notice is not negligence unless the party omitting knew of that of which he omitted to give notice. In the second place, there was no advance of money by the party claiming this priority, upon the faith of the non-existence of the incumbrance sought to be postponed. And thirdly, there was no loss or danger of loss in consequence of the existence of the prior incumbrance, but the position of all parties remained the same. It was prudent and diligent certainly in any party interested in the second fund to notify the person who held it, in order to prevent his parting with it, but to give him a priority on that ground would be to prefer him to those before him, to reverse the rule *qui prior est in tempore potior est in jure* merely as a *reward* for the quickness and diligence which he had used, without any loss or change of position resulting from the omission of those prior to him, and without any negligence on their part being shewn.

Judgment.

There is another ground which would appear to prevent the application of the principle in this case. Messrs. *Rubridge* and *Cameron* were solicitors for all the judgment creditors except *Heaton*, and the plaintiffs would therefore have notice of the prior incumbrances, in which case, even if an advance be made, the principle does not apply.

Two other cases were cited by Mr. *Crooks*, they rest upon the same principle as the others to which I have referred. In one of them *Rice* v. *Rice* (*a*), the bill was filed to enforce a lien for unpaid purchase money; a conveyance had been made with the usual receipt endorsed, and the title deeds were delivered to the purchaser, who, upon the following day, created an equitable mortgage by deposit of the title deeds. It was held that the vendors had enabled the purchaser to

(*a*). 2 Dr. & W. 73.

1856.

Joseph v. Heaton.

deal with the estate as absolute owner. In the words of Sir *Richard Kindersley* "they had in effect by this act assured the mortgagee that as far as they, the vendors, were concerned the mortgagor had an absolute indefeasible title both at law and in equity."

In the other case cited by Mr. *Crooke*, *Stocks* v. *Dobson* (*a*), a judgment creditor assigned his judgment; the assignee omitted to give notice to the judgment debtor, and he in ignorance of the assignment satisfied the debt to the judgment creditor. The assignee by his negligence enabled the judgment creditor to represent himself as entitled to receive the amount of the judgment debtor, and so to commit the fraud of receiving a debt which he had assigned to another. In this case there was a debt paid; in the other case cited, advances were made, in ignorance of rights of which the possessors of those rights ought to have given notice. I think that both these cases are distinguishable from the case before us upon the same grounds as the case of *Dearle* v. *Hall*, and the other cases of that class to which I have adverted.

Judgment.

As to the father's land, we think that *Heaton* did not do wrong in reassigning it—*quoad*, that land, *Morgan*, the father, was a surety for the son's debt—the land was pledged to secure a judgment debt prior to the plaintiffs'. If the land had been sold to pay the debt the surety would have been entitled to stand in the place of the creditor, whose debt was thereby satisfied, *pro tanto*, and to avail himself of the securities then held by the creditor against the principal debtor, and so would have been entitled to the benefit *pro tanto* of *Heaton's* prior judgment against *Morgan*, junior, a judgment prior to the plaintiffs'; or again, if the surety had paid *Heaton* a sum of money by way of redeeming the land pledged not exceeding its value, he would, it seems, be entitled to stand in the same position. The

(*a*) 5 De G. & S. 760.

1856.

Joseph v. Heaton.

debt for the payment of which the land was pledged by way of suretyship being satisfied otherwise, by what process of reasoning can it be shewn that the position of the surety is made worse than if he had paid the debt or part of it; or it had been satisfied in whole or in part by a sale of the land. Such a position would be in violation of the rules of equity, which protect and indemnify a surety wherever it would not be inequitable to the creditor to do so; and would postpone him when the debt was paid *aliunde*, when, if paid by himself he would stand prior; and would, moreover, make him liable for debts for which he pledged neither himself nor his property, and would disappoint him of his acknowledged equity to stand in the place of the creditor. A further reason is, that one of the rights of the surety is to put the creditor in motion against the debtor; so *Morgan*, senior, might have compelled *Heaton* to enforce his judgment in order to relieve him the surety; but if the plaintiffs' position upon this point be correct, enforcing the judgment would not relieve the surety, but leave him still liable.

Judgment.

If this doctrine were correct, it would follow, that in the case of a prior judgment creditor having a security for his debt, a subsequent judgment creditor would have an equity to compel him to sue the surety, and so leave the debtor to him, and it would involve this absurdity that the surety upon being sued and paying would stand in the creditor's place against the debtor, and so be still prior to the subsequent judgment creditor.

1856.

FICK v. MCMICHAEL.

Deed impeached after 50 years.

June 10th. 1856, and January 19, 1857.

A person against whom an action of ejectment was brought, filed a bill to restrain the action, alleging as a ground that the deed, under which the plaintiff in the ejectment claimed, was a forgery. The deed was dated about fifty years before the bill was filed, and all the persons who had witnessed the deed, four in number, were dead before the validity of the deed was impeached in any way.

The court, under the circumstances, refused the relief prayed, and dismissed the bill with costs.

Statement.

The bill in this case was filed by *Mackentyre Fick* against *William McMichael*, *Cornelius Dedrick*, *Lucus Dedrick*, and *William Anderson*, and under the circumstances set forth in the judgment, prayed specific performance of the agreement of sale set forth in the bill, and an injunction to restrain the defendants from felling timber or committing waste upon the premises in question.

Mr. *R. Cooper* for plaintiff.

Mr. *McMichael* for defendants.

The judgment of the court was delivered by

SPRAGGE, V. C.—The plaintiff claims as purchaser of 53 acres, part of lot 13, in the front concession of Walsingham, from *William McMichael*, eldest son and heir-at-law of *Edward McMichael*, under a contract of purchase of the 10th of January, 1839. The lot, of which the above is a part, consists in all of 380 acres, and the defendants claim different portions of it through one *John McKay*, and in support of their claim they produce a conveyance of the whole lot from the late *Edward McMichael* to *McKay*, dated the 22nd of June, 1803; and a conveyance of the same premises also to *McKay* from the above *William McMichael*, dated the 12th of September, 1806. The former conveyance is impeached, on the ground that at its date *Edward McMichael* was dead, having died on the twentieth day

1857.

Fick v. McMichael.

of the same month; in fact, that the deed is a forgery; and it is alleged as a suspicious circumstance, that the deed purports to be executed with the mark of the grantor, whereas *Edward McMichal* was a good penman. The deed is attested by no less than four witnesses. The deed from *William McMichael* to *McKay* is impeached on the ground that it was obtained from the grantor, without consideration, while in a state of intoxication brought about by *McKay*.

As to the first conveyance and the fact whether *Edward McMichael* was dead or living at its date, the only evidence in support of the plaintiff's allegation is that of *William Backhouse*, who says that *Edward McMichael* received a severe injury on the third of the month, from the effects of which he died, as *William Backhouse* thinks, between the 15th and 20th, but "he would not be certain," his words are "I should think not later than the 20th, but would not be positive." In another place, "I have nothing but my memory to assist me in these dates;" again, "I would not swear positively to the day of his death, but am pretty confident it was after the 15th, but as near as I can recollect it was between the 15th and 20th." We are asked, upon the evidence of a man who states himself to be seventy-seven years old, and who speaks from his unassisted recollection after an interval of more than 50 years, to pronounce that a man did not survive an injury which caused his death, nineteen days, because the witness thinks he did not survive it more than seventeen days, and whose memory ranges with extreme uncertainty over five days, between the 15th and 20th. The witness was not present when *Edward McMichael* died, but saw him on the previous evening, and on the morning, as he supposes, and as seems probable, of the day of his death, and he states that on that morning the wife of *Edward McMichael*, after some coversation with her husband, requested him, the witness, to go for *Alexander Hutchinson*, the witness's father, or *Captain*

Judgment.

1857.

Fick v. McMichael.

Hutchinson, to do some writing, and he says that his father left home to go; and after narrating the account given to him of what passed by his father and *Alexander Hutchinson* he says "if a deed was executed by him (*Edward McMichael*) it must have been on that day."

We think the evidence that he did not survive to the 22nd very slight indeed. There is no reason to suppose the deed a forgery—certainly no evidence upon which to pronounce it so. Every one of the four witnesses is spoken of in the evidence as highly respectable, and incapable of any base or fraudulent act; the unusual number may be accounted for from the circumstance of the conveyance being executed by the mark, instead of the ordinary signature of the grantor, occasioned by extreme weakness, to afford proof, and to silence cavil in the event of the deed being questioned upon that ground. I doubt if a forgery was ever attempted otherwise than by counterfeiting the *ordinary* signature of the party whose name is forged, and it would be extraordinary indeed, in a case of forgery, to date the deed after (as this is alleged to be) the death of the party, it being just as easy to put in an earlier date. Further, as negativing the idea of a forgery, is the circumstance that *Edward McMichael*, feeling probably that his end was approaching, himself, and so far as appears, spontaneously expressed his intention of making the conveyance to *McKay;* and the further circumstance, that *McKay* does not appear to have been present, or to have taken any part in procuring the execution of the deed.

Judgment.

Possession seems to have followed the conveyance, and the land was thenceforth called the *McKay* lot.

The second deed may probably have been desired by *McKay*, for the same reason that I have supposed induced the unusual mode of attesting the execution of the first: viz., the unusual mode of signature, which would remain

1857.

Fick v. McMichael.

after the death of those capable of explaining it. This second deed was drawn by Mr. *Walsh*, the then register of the county, and was executed in his presence, and witnessed by *John Thomas* and *Peter Desjardins*: both the witnesses and Mr. *Walsh* are spoken of in the evidence as very respectable. The witnesses upon whose evidence it is impeached are *William McMichael* himself, and *John Williams;* according to their evidence *William McMichael* was in such a state of utter intoxication as to be unable to know whether he signed a paper as a party or a witness. But, in the first place, their evidence is discredited upon the oath of several witnesses, who swore that they would not believe them upon oath, and their evidence is discrepant in several particulars; and against their position is the signature of *William McMichael* itself, written in a clear firm hand, though not in the hand of a person in the habit of writing much. It is written to the receipt as well as opposite to the seal; and, as indicating a consciousness that he was executing as a party, not as a witness, part of the signature is carried over the seal. But a still stronger fact is, that the memorial to this same deed appears to have been also signed by *William McMichael*, and three days after the deed. This might, of course, have been executed by *McKay*, and if *William McMichael's* signature had been obtained by such means as is now pretended, *McKay* would hardly have run the gratuitous risk of asking for his signature a second time. Indeed, the second signature, after an interval of three days, does of itself appear to me to negative the grounds upon which the deed is impeached.

Judgment.

It is pretended that *William McMichael* did not become aware that he had executed this second deed until 1837, thirty-one years afterwards. In that year at any rate *William McMichael* and *Job Williams* went to the registery office, and there saw the present register, Mr. *Francis Walsh*, and they represent that gentleman as having told them in effect that the deed

1857.

Fick v. McMichael.

had been obtained by fraudulent practices, and as having recommended *William McMichael* to take possesion of the land. All this is emphatically denied by Mr. *Walsh*, and is indeed most improbable. It would be impeaching the character not only of the witnesses to the deed, but of his own father in relation to a matter of which he had no personal cognizance, or any reason that we can see for believing it to be other than fair and honest.

William McMichael seems to have obtained possession stealthily of a small house on the southern part of the land, and to have himself put a small house on the land, and to have held possession of some land, it does not appear clearly how much, for several years. But the north 200 acres remained in the undisturbed possession of *McKay* and of *Anderson*, who claimed through him, and a large portion of the south part of the land also. His proceedings in this respect were not those of a man openly claiming title to this lot, but rather as if striving to keep alive a claim which he might afterwards assert.

Judgment.

If *William McMichael* honestly believed in the goodness of his own title, it is unaccountable that he did not assert it earlier, and put those in possession to the proof of theirs. Take his own position; up to 1837 there was, as he believed, nothing against his own title but a forged deed, dated after his father's death; yet, he never put them to the proof of their title, and after 1837 he does not impeach what he represents as the newly discovered deed fraudulently obtained from himself; nor is it impeached at all until after the death of those best qualified to speak to the circumstances under which it was executed. According to his own evidence and that of *Williams*, his own mother was actively instrumental in procuring its execution. She is dead as well as Mr. *Walsh* and the witnesses. The witnesses to the first deed are all dead, so that these matters are not brought in question until a period when time and death have made

proof difficult. It is not too much to say that this argues a consciousness on the part of *William McMichael* that he could not succeed until death had removed those who had personal knowledge of the transactions which he desired to impeach. 1857. Fick v. McMichael.

If the first deed be satisfactorily established there is of course an end of the plaintiff's case; but if the defendants had to rest upon the second deed only, questions might arise out of its being a voluntary conveyance. But we think the deed of the 22nd of September, 1803, established, and do not hesitate to express our full conviction that it was duly executed by *Edward McMichael*, and was a valid conveyance of the land it purported to convey, to *McKay*. The plaintiff's bill must be dismissed with costs.

HATCH v. FICK.

Sale of hemlock bark.

The owner of real estate sold all the hemlock bark thereon. *Held*, that the purchaser had, under such sale, a right to fell the trees. November 17 and December 15.

The bill in this cause alleged that on the 18th day of March, 1854, the defendant *Brown*, the owner of 50 acres of land, entered into a written agreement with the plaintiff, for the sale to the plaintiff of all the hemlock bark thereon, together with a certain number of the hemlock trees, "*with the privilege and right to enter in and upon any part or the whole of the said quarter lot at his pleasure, with teams, carriages, and workmen, to peal, cut, and haul away the said bark and trees, for and during the full term of four years, from the day of the date hereof, and no longer.*" That on the 22nd day of April, 1856, *Brown* sold and conveyed the said 50 acres to the defendant *Frederick B. Fick*, reserving all hemlock bark upon the same; and that *Fick*, prior to, and at the time of the sale and conveyance to him, had notice, and well knew of the agreement betwen the plaintiff and *Brown*. Statement.

1856.

Hatch v. Fick.

That *Fick* had taken possession of a large quantity of hemlock bark, which had been prepared on the premises, and had also commenced an action of trespass against plaintiff and his workmen for cutting the bark and trees.

The bill prayed a specific performance of the agreement; an injunction to restrain *Fick* from preventing plaintiff from removing the trees and bark; to stay the action at law, and for other relief.

Affidavits were filed on behalf of the plaintiff, clearly establishing the allegations of the bill; and a motion was now made for a decree in the terms of the prayer of the bill.

Argument.

Mr. *Roaf* for the plaintiff.

Mr. *Read*, contra; admitted that under the facts, as appearing in the evidence, the plaintiff was entitled to the hemlock bark; but contended that the agreement did not give the plaintiff any right to fell the trees for the purpose of obtaining the bark; and asked for time to produce evidence to shew that the bark could be obtained without felling the trees. The cause stood over accordingly, but no evidence having been adduced.

Judgment was now delivered by

Judgment.

SPRAGGE, V. C.—The cause has stood over to afford an opportunity for evidence to be given to shew that the hemlock bark, which appears to be the main part of the subject of this contract, can be detached from the tree without felling the tree itself; and upon the evidence already before the court, the onus to shew this was upon the defendant. This has not been shewn, and upon the evidence it appears, what indeed was almost self-evident, that the tree must be felled to obtain the bark. Under the contract, therefore, with the defendant *Brown*, the

plaintiff was, and is, entitled to fell the hemlock trees mentioned in the contract, during the period therein provided. 1856. Hatch v. Fick.

Upon the question, whether or not the plaintiff has unnecessarily come to this court to restrain the proceedings at law by defendant *Fick*, we think that the contract itself would have been a good defence at law, if the suit had been by the owner of the land, the party to the contract, *Brown;* but that it is not so to an action by *Fick*. The contract is for the sale of that which has been held to be an interest in land, and capable of registration, but it was not registered. *Fick* is a purchaser of the land for a valuable consideration, and the conveyance to him is registered. But having actual notice, as it is proved he had of the contract with the plaintiff, an equity is created on behalf of the plaintiff which entitles him to come to this court; inasmuch as in this court only, and not at law, that equity will avail him against *Fick's* registered conveyance. Judgment.

The decree must be for an injunction and decree as prayed by the bill, with costs against the defendant *Fick*.

VANKOUGHNET v. MILLS.

Principal and surety—Indorser.

The holder of a promissory note sued the maker and indorser, and after execution placed in the sheriff's hands against both, the plaintiff, upon the application of the maker, entered into an arrangement by which he extended the time for payment of the amount, without the consent of the indorser. February 23.

Held, that this discharged the indorser from all liability.

The bill in this case was filed by the Honourable *Phillip M. Vankoughnet* against the Honourable *Samuel Mills*. From the pleadings and evidence it appeared that the plaintiff had become an accommodation indorser of a promissory note for one *Jarvis*, which was

1857.

Vankough't v. Mills.

negociated by him with the defendant; that default having been made in payment of the note defendant sued *Jarvis* and the plaintiff at law, and recovered judgment, upon which he issued execution against both, and placed the same in the hands of the sheriff: that after the writ had been in the hands of the sheriff for some time, the maker saw the plaintiff in that suit, and by paying something on account of the interest and costs obtained from him some further time for payment of the balance of the execution; and the attorneys in the action wrote to the sheriff to that effect, with a direction to stay proceedings on the execution in his office. Afterwards, the maker of the note having in the meantime become insolvent, instructions were given by the attorneys to levy the amount out of the goods of the indorser, and the sheriff, having notified him of his intention to proceed to a sale of his goods, the present suit was instituted for the purpose of obtaining an injunction to restrain further proceedings on the writ.

Statement.

A motion was now made for a decree in the terms of the prayer of the bill, pursuant to the orders of 1853.

Mr. *Strong* for the plaintiff, referred to *English* v. *Darley* (*a*), *Mayhew* v. *Crickitt* (*b*), *Smith* v. *Knox* (*c*).

Mr. *Connor*, Q. C., contra, cited *Exparte Wilson* (*d*), *Owen* v. *Homan* (*e*).

The judgment of the court was delivered by

February 23.

ESTEN, V. C.—In this case a promissory note was given by Mr. *Jarvis* to defendant *Mills*, indorsed by the plaintiff. The plaintiff was an accommodation indorser, but it does not appear that this was known to the defendant; what was patent to him, however, on the face of the note was, that as between themselves, *Jarvis* was

(*a*) 2 B. & P. 61.
(*b*) 2 Swans. 185.
(*c*) 3 Esp. 46.
(*d*) 11 Ves. 410.
(*e*) 3 McN. & G. 378.

primarily and plaintiff secondarily liable; in other words, that the relation of principal and surety existed between them, he should not therefore have given time, as he did, to the maker, without the consent of the indorser of the note. He says he thought that time was asked and given on account of both, but if he chose to take the fact for granted without inquiring, he must abide the consequences. It is well settled that time given to the maker of a note discharges the indorser. The learned counsel for the defendant attempted to distingush this from cases in England, on the ground that one judgment was obtained against both maker and indorser, but we do not think this should vary the principle. The plaintiff had a right at any time to bring the money into court and put the judgment in force against *Jarvis*. This he was prevented from doing by the time given. There should be a decree for plaintiff with costs.

1857.

Vankough't v. Mills.

MELLISH v. GREEN.

——— v. BROWN.

——— v. COSSEY.

Principal and surety.

The holder of a promissory note sued and recovered judgment thereon against the makers and endorsers, which was duly registered so as to create a lien on the real estate of the makers; subsequently the judgment creditor accepted from the makers of the note a composition of fifty per cent, and discharged their lands from further liability, expressly retaining the right to go against their personal assets, and the plaintiff in the action proceeded to execution against the goods of the endorser. *Held*, that what had taken place operated as a discharge of the endorser from further liability; and a perpetual injunction was granted restraining further proceedings in such action against the endorsers.

Decemb'r 22, 1856, and Jan. 19, 1857.

These were three several suits brought by *William Mellish*, *Joseph Morrell*, *John Russell*, and *Joseph Whitehead*, against *William Green*, *Major Brown*, and *William Cossey*; the *Buffalo*, *Brantford* and *Goderich* Railway Company being also made defendants in each cause, and the bills stated that the Railway Company hav-

1857.

Mellish et al. v. Brown et al.

ing become largely indebted to the plaintiffs for work done by them as contractors on the road, gave the plaintiffs their promissory notes for the liquidation of a portion of such indebtedness, which subsequently came to the hands of *Green*, *Brown*, and *Cossey*, who sued and recovered judgment against the plaintiffs and the Railway Company for the amount of the notes held by them respectively, which were registered in the several counties through which the railway ran, so as to form a lien on the railway land and real estate of the Company: that subsequently, for the purpose of carrying out a proposed transfer of the railway and real estate of the said Company, it was agreed that the Company should, within thirty days, pay ten shillings in the pound, and obtain a discharge of their lands from further liability in respect of the judgments which had been so obtained against them and the plaintiffs, which the Company accordingly paid, and obtained such release; which, by the terms of the agreement for such composition, it was expressly stipulated should not be construed to be a discharge of all indebtedness to the judgment creditors, but the residue should be and constitute judgment debts against the Company and be paid by them so far as their assets would extend.

Statement.

The bill further alleged that the judgment creditors had issued execution and levied thereunder upon the goods of one of the plaintiffs, and prayed a declaration that the plaintiffs were released from all liability in respect of said judgment and entitled to have satisfaction entered thereon; and an injuncion to stay proceedings on the execution.

The bill had been taken *pro confesso* for want of answer, and the causes came on to be heard together.

Argument.

Mr. *Morphy* for the plaintiffs. The defendants did not appear.

The judgment of the court was delivered by. 1857.

Mellish et al. v. Brown et al.

ESTEN, V. C.—We think the injunction should be made perpetual in these cases, and that the plaintiffs should have their costs of suit. The case of *Mayhew* v. *Crickitt* (*a*), shews that a creditor may remain passive but cannot forego any advantage he has gained to the prejudice of the surety. He is a trustee of it, in fact, for him. In the present case the creditors had obtained and registered judgment, which therefore formed a charge upon the real estate of the debtor. They thought fit, without the consent of the surety, to release this real estate which formed a sufficient and almost the only fund for the payment of their debts from a moiety of such debts, the other moiety being paid at the time. It would be highly unjust that they should throw the remaining moiety on the surety, who, we think, therefore, is very clearly discharged. We have no doubt that the relation of principal and surety exists in these cases, and that all the law affecting that relation applies to them with full force.

FORBES v. CONNOLLY.

Specific performance—Option to purchase.

September, 1856, and April 27, 1857.

A lessee under a lease containing a clause giving him the right to purchase upon certain terms, neglected to pay the rent and perform the conditions specified, and his landlord wrote stating that the lease under which he held was void, and offering the tenant other terms: twenty months after such letter the lessee filed a bill to enforce the contract contained in the lease; or failing that, then a conveyance on the terms set forth in the letter, which the tenant alleged he had accepted, but the evidence wholly failed to establish that fact: the court dismissed the bill with costs.

Where, by the terms of a covenant to sell the option to purchase is entirely with the covenantee upon certain specified terms, the contract rests upon a wholly different footing from an ordinary contract for sale and purchase of land; and the party entitled to the option must shew that he has performed all the terms, upon the performance of which alone he is entitled to exercise that option.

This bill was filed on the 27th of March, 1856, by

(*a*) Sw. 2 185.

1857. *Robert Gourlay Forbes*, against *John Hamilton Connolly*, praying, under the circumstances appearing in the judgment, a specific performance of a covenant to convey contained in a lease from the mother of the defendant to the plaintiff, or if not entitled to that relief then that the defendant might be ordered to convey the property in question to him upon the terms set forth in the letter addressed by the defendant to the plaintiff on the 7th day of July, 1854.

Forbes v. Connolly.

Mr. *Turner* and Mr. *Blevins* for plaintiff.

Mr. *Read* for defendant — *Curre* v. *Bowyer* (*a*), *Pyke* v. *Northumberland* (*b*), *Eaton* v. *Lyon* (*c*), *Dunlop* v. *Higgins* (*d*), *Duncan* v. *Tophan* (*e*), *Friar* v. *Grey* (*f*), were referred to.

The judgment of the court was now delivered by

April 27. SPRAGGE, V. C.—The plaintiff was lessee of the premises in question, fifty acres in the township of Dereham, under a lease granted by the late *Eliza Plummer Conolly* to him, and dated the 1st of November, 1844, for the term of ten years, at a rental of £2 5*s*. a year, payable annually. The lease contained the following covenant on the part of the lessor granting to the lessee the privilege of purchasing the leased land if he should desire so to do:—

"And the said party of the first part doth hereby promise, covenant, and agree to and with the said party of the second part and his assigns aforesaid, that if the said party of the second part or his assigns, shall be desirous of purchasing the fee simple of the said above demised premises, that then in such case the said party of the first part, his heirs or assigns, upon the said party of the second part, or his said assigns, having well and truly

(*a*) 3 Beav. 3. (*b*) 1 Beav. 152. (*c*) 3 Ves. 690.
(*d*) 1 H. d. Ca. 381. (*e*) 8 C. B. 225. (*f*) 15 Jurist 814.

paid unto the said party of the first part, her heirs or assigns, within the term above granted to the said party of the second part, the full and just sum of thirty-seven pounds ten shillings of lawful money of Canada, and having performed and paid all the rents and covenants on his and their part to be performed, as hereinbefore set forth, shall make and execute, or cause to be made and executed, unto the said party of the second part, or his said assigns, in fee simple, such good and sufficient deed of bargain and sale as by the said party of the second part shall be reasonably required."

1857

Forbes v. Connolly.

It will be observed that by the terms of the covenant, there was no contract to purchase, but that it was entirely at the option of the purchaser whether he should exercise the privilege to purchase or not; and that it was exercisable only upon his paying the sum of £37 10*s.* within the term, and in case of the lessee having paid and performed all the rents and covenants on his part.

Judgment

The receipts for rent put in shew it not to have been paid at the times it was made payable; the last is dated 20th June, 1851, and is for ten pounds on account of rent. No rent is shewn to have been paid or tendered after that date, but in or about the month of June, 1854, as appears by the evidence of *John Burn*, whose name appears to the receipts for rent put in, the plaintiff called upon him and said he could make a good payment, *Burn* said he was not authorised to receive it, but would write to Mr. *Connolly*, the defendant, which he did; no answer was given, unless it be a letter from the defendant, dated 7th July, 1854, which is as follows:

"In reply to your letter on the subject of granting a small portion of lot No. 14 in 11th concession, Dereham, for the purpose of a church, I beg to say that I shall have no objections to any disposition which you may make of the property after you have settled with me. The lease I consider now to be wholly void; but I

1857.

Forbes v. Connolly.

purpose giving you five years more to pay in, charging you at the rate of six dollars per acre. I will either give you a new lease to this effect, or I will give you a deed and take a mortgage for the payment. Let me know which you prefer."

This was a plain denial of the plaintiff's right to purchase under the purchase clause in the lease; accompanied by an offer to sell for £75, payable in five years—the time had not then expired—the answer insists upon the breach of the covenant to pay rent as having disentitled the plaintiff to the exercise of his option to purchase.

Judgment.

The bill is filed to enforce a specific performance of the contract to convey, and failing that, then for a conveyance upon the terms offered in the above letter, which terms the plaintiff alleges were accepted by him. In evidence of such acceptance he proves by one *Connor* that he wrote a letter in the name of the plaintiff and addressed it to the defendant, in answer, as he thinks, to the defendant's letter containing the offer, and accepting it. The defendant went to England according to the same witness, in the fall of 1854, and the letter of acceptance was not writen until after his return. An acceptance after so long a delay, we incline to think, would not be binding upon the party making the offer; but a fatal objection is, that it does not appear that the letter was posted, only that it was given to the plaintiff, that he might post it, which he was of course at liberty to do or not as he pleased, and amounts to no more than if the plaintiff had himself written such a letter, and so far as appears, kept it himself. The defendant in his answer denies its receipt. *Connor's* belief or opinion that defendant's letter of 4th of September, 1855, is an answer to the one written by him, is entitled to no weight. It does not refer to it, and contains a proposition altogether different in terms; and which proposition was not accepted.

The question then is reduced to this, whether the plain-

1857.

Forbes v. Connolly.

tiff is entitled to compel a conveyance under the purchase covenant in his lease—and first, as to the non-payment of the agreed purchase money—the date of the death of the lessor, Mrs. *Connolly*, is not shewn, but in July, 1854, the defendant acted as owner, whether as heir-at-law or devisee of the lessor, does not appear, but it is to be presumed that Mrs. *Connolly* was then dead; and the first question is, whether there was any hand to receive the purchase money. It seems to have been assumed by both parties that the plaintiff had declared his option to purchase; upon which the purchase money would belong to the personal estate of Mrs. *Connolly*, and it is not shewn that the estate had then any personal representative. If there was no hand to receive the purchase money there could be no default in not paying it. We express no opinion as to whether the defendant's repudiation of plaintiff's right to purchase for £37 10*s.* and offering to sell at £75, would have excused the plaintiff from a tender of the £37 10*s.* if there had been any person duly authorised to receive it.

Judgment.

The defendants right to resist a conveyance must rest then upon the plaintiff's default in the payment of rent: and we think upon a covenant of this nature when the covenantor cannot enforce a sale, but it is entirely in the option of the covanantee whether he will purchase or not, and where he is at liberty to exercise his option only upon the performance of certain specified terms, the contract rests upon a wholly different footing from an ordinary contract for the sale and purchase of land, and that a party entitled to purchase or not at his option must shew that he has performed all the terms, upon the performance of which alone he is entitled to exercise that option.

This distinction is fully recognised by the English authorities, and is applicable to this case—the plaintiff had a privilege and was not bound to purchase, but he

1857.
Forbes v. Connolly.

did not observe the terms upon which alone he could exercise his privilege, and the law is that in such case his privilege is gone.

It may not be generally known that in contracts of this nature so much strictness is required, they may probably be often regarded as mere contracts of purchase. In the great majority of cases, the privilege is exercised because manifestly to the advantage of the party having it to avail himself of it: but it is not always so, and cases may frequeutly arise where the not being bound to purchase, or to renew a lease, or the like, may be of great advantage—at all events the law is, that such agreements are not upon the same footing as ordinary contracts of purchase.

The plaintiff was probably misinformed as to his rights in this particular, and believing himself entitled to purchase notwithstanding his default, at the price named in his lease, he was unwilling to pay the large sum demanded of him, though less than the value of the land. It is of course now at the option of the owner of the land whether he will still permit him to purchase upon the terms he has offered. This bill, at any rate, must be dismissed with costs.

Heard on further direction, 6 Gr. 385

WATSON v. MUNRO.

Mortgage—Laches.

Sept. 30, 1856 and May 4, 1857.

A creditor brought an action against his debtor to recover his demand, which was stayed by an arrangement made in October, 1840; the debtor assigned to the creditor the house and premises occupied by the debtor, when in addition to the amount of the debt, a sum in cash was paid him, and for two years he continued to receive the rent of the premises, when the creditor obtained possession by an action of ejectment. In December, 1855, the debtor filed his bill setting up that the transaction was a mortgage, alleging that his poverty had, in the meantime, prevented him from enforcing his claim; the court, though inclining to dismiss the bill, directed an issue as to the question of mortgage or no mortgage.

The present suit was brought by *Richard Watson*,

against *George Munro*, claiming a right to redeem the property in question in the cause under the circumstances stated in the judgment. 1857.

Watson v. Munro.

Mr. *Mowet*, Q. C., and Mr. *Strong* for the plaintiff.

Mr. *Morphy* for defendant.

The judgment of the court was now delivered by May 4.

SPRAGGE, V. C.—The property in question is a piece of land in the city of Toronto, having a frontage of 50 feet on Yonge Street, and a depth of 120 feet. This land was purchased by the plaintiff in July, 1839, of Mr. *McGill* through his agent Mr. *McCutchon*; the price was £150, half a year's interest was paid in advance; but no part of the principal. The plaintiff put up a frame two-story dwelling house on the premises, 22 feet by 30, which was first occupied in February, 1840, one Mr. *Smith* then renting it of the plaintiff at £25 a year. Judgment.

The transaction out of which this suit has arisen occurred in October, 1840. The defendant had brought an action against the plaintiff to recover a debt of £35 17*s.* 11*d.*, and that action was stayed by an arrangement made at the above date, the plaintiff assigning to the defendant his interest in the above property, by an assignment absolute in its terms.

Upon this assignment being made the defendant paid to the plaintiff the sum of £25, this was over and above the debt. The plaintiff insists that this assignment was intended to be by way of security only: the defendant says, the plaintiff being unable to pay the debt for which he was suing him, agreed to assign to him his interest in the premises in question in satisfaction of the debt and in consideration of the further sum of £25. The plaintiff relies upon the value of the premises greatly exceeding the alleged consideration; upon certain alleged admissions by the defendant to *Smith* the tenant of the

1857.

Watson v. Munro.

premises, and upon the continued receipt by himself of the rent of the premises for a considerable period after the assignment; there was also a payment made by the plaintiff to the defendant in 1841, of £8, or £8 10*s.*, which the plaintiff says was a payment on account of the debt; while the defendant says it was upon an arrangement that the plaintiff should for a time continue to receive the rent.

The bill is filed for the redemption of the premises; and alleges that the defendant has received rents and profits more than sufficient to satisfy the debt and the £25 and interest. Upon this bill the value of the premises can only be material as a piece of evidence, as tending to shew the great improbability of premises of large value being sold, or transferred absolutely, under the circumstances. The evidence of value is very conflicting; the land itself had probably increased a little, though but a little in value during the fifteen months that intervened between the purchase by the plaintiff and his transfer to the defendant; this would appear to be the case from sales made in 1840 and 1842. The improvements made by the plaintiff are variously estimated: at £250, by a brother of the plaintiff's; at £239, upon a recent survey of the premises, at the date of erection and independently of the improvements made by the defendant. The house is valued at £100 only, by a person who himself put up houses somewhat similar the following year; other improvements, a well, and the fencing are not valued separately. The house was built on posts, a stone cellar was put under it about ten years ago by the defendant. At that time the sills were decayed, and the mason who built the cellar deposes that he and the carpenter employed upon that occasion, agreed in the remark that the house was not worth what they were doing to it. In the opinion of Mr. *Bell*, who has freehold property on the same street, the premises in question were not worth more than £215 in 1840: he was not aware, however, of what was the frontage of the lot. £215 was about the price

Judgment.

given by the defendant, at that price, taking the land as of the value of the sum given for it, the improvements would be taken at about £65. 1857. Watson v. Munro.

Taking all the evidence together, the debt to the defendant, and the £25 additional, would appear to be considerably less than the value of the plaintiff's interest in the land in question—probably less than half—taking the price paid by the defendant at the above amounts, and the balance of purchase money due in all, say £215, and the whole value at £300, which was probably not more than the value, the difference between the two sums is considerable; but we consider that it would be most unsafe ground from which to infer that a transfer absolute in its terms must therefore have been intended, and was in fact agreed, to be only by way of security. It may, however, be a circumstance to be taken with others, in determining the question.

Judgment.

The evidence of admissions deposed to by Mr. *Smith*, we take to be of very small value. *Munro* may have been speaking of his having insisted on the payment of a long standing debt, and of the premises having been conveyed to him in satisfaction of it, in consequence of his pressing for payment just as well, as far as appears from *Smith's* evidence, as of this old debt being still unpaid; this, supposing *Smith* accurate in his recollection, but he tells us that his memory is bad. To act upon such evidence would be giving effect to that which was particularly intended to be guarded against by the Statute of Frauds.

Before adverting to the continued receipt of rent by *Watson*, it will be well to consider what appears against the plaintiff's case. First, the absolute conveyance and its peculiar form, which goes some length to negative the retention of any interest in the person making it; next, if the land were taken as a security, it would almost certainly have been for the debt only: it

1857.

Watson v. Munro.

would be almost unaccountable that *Munro* while suing for his debt should make a further advance of about two-thirds the amount of his debt, and undertake to pay also the interest in arrear on the purchase money, and instal ments becoming due from time to time. It is quite unlike the advances made in the course of business between merchants and factors, and dealers in lumber or produce when security is given, for advances needed to be made in the ordinary course of their dealings. Here we must suppose a transaction entirely out of the ordinary course of dealing and of a nature most unlikely to occur.

The improvements made by *Munro* under the eye of *Watson*, for he has lived ever since in the immediate neighbourhood, and his long undisputed possession are material; for although they form no objection to redemption when the right to redeem is clear, they are circumstances to shew that such right did not exist, because not claimed by the party now claiming it.

Judgment.

In addition to all this is the evidence of Mr. *Bell*, the attorney of *Munro* in the action at law to recover the debt against *Watson*. He says that he understood from each of the parties separately that the debt was settled by the conveyance of the land, and as he thought the payment of a sum of money besides; and that he heard nothing from either party as to the land being taken as a security.

There remains to be considered, the circumstance of the continued receipt by *Watson* of the rent of the premises. The bill states this at eight months, and that *Munro* then induced the tenant to attorn to him. The tenant states it at about two years, and other evidence confirms this. The account given by the defendant in his answer, is that it was part of their agreement that *Watson* should retain possession for a certain period; that *Munro* went to England, and *Watson* in his absence

still kept possession; and that *Munro* returning to this province in May or June, 1842, took proceedings in ejectment and evicted *Watson*. 1857. Watson v. Munro.

This would not be a very strange arrangement if *Watson* were in the actual occupation of the premises, but that he should be allowed to receive the rents for such a period, is a circumstance of considerable weight, because it would be natural and usual in the case of an assignment by way of security, but not so in the case of a purchase.

This circumstance has created the only real difficulty in our minds in disposing of this case, and certainly it is not satisfactorily explained. For myself I do not think it is incapable of explanation or inconsistent with the assignment being absolute. I judge from the evidence of *Smith*, the tenant, that he did not see *Munro* at the premises, or indeed at all, until about two years after the assignment, and it is not impossible or even very improbable that *Munro*, a wholesale merchant, may not have been aware, up to that time, that the premises were occupied by a tenant of *Watson*, not by *Watson* himself, and the form of the action of ejectment against *Watson* himself as the tenant in possession favours this supposition. This circumstance may admit of this or some other explanation, which in the course of fifteen or sixteen years may be not only incapable of proof, but have been forgotten. The plaintiff accounts for his long delay by the state of his circumstances, which he proves to have been poor, but when that delay leaves circumstances in obscurity which a timely assertion of claim might have enabled the defendant to clear up, the excuse of delay in the plaintiff ought not to be allowed to operate to the prejudice of the defendant; his acts should not receive an unfavourable construction, but as I think as favourable a construction as they are reasonably capable of, and I cannot but think that this single circumstance, Judgment.

1857.

Watson v. Munro.

weighty though it is, ought not to turn the scale, which, but for it, would preponderate greatly in favour of the defendant.

The inclination of my own opinion, therefore, is to dismiss the bill, but as my brother *Esten* prefers that an issue should be directed, I will concur in the adoption of that course.

AN INDEX

TO THE

PRINCIPAL MATTERS.

that an award may be good in part and bad in part; still where arbitrators found a sum of money due to a creditor, and directed the debtor to pay, and the creditor to receive such amount in a certain specified manner, the creditor was not allowed to adopt the award in so far as it found the sum due and reject that portion of it directing the mode of payment.

Dalton v. M'Nider, 501.

CHATTEL MORTGAGE.

1. The mortgagee of chattels, like a mortgagee of real estate, is entitled to a foreclosure in default of payment of the amount secured thereby.

Cook v. Flood, 463.

2. Where a party held a mortgage on chattel property and also mortgages on real estate, the court refused to make a decree for sale of the chattels and of foreclosure as to the realty. *Ib.*

3. Where parties employed an agent to quarry and get out a quantity of stone for the purposes of certain works then in progress, and for the purpose of carrying out the agreement made advances in money; and by the terms of the contract entered into between them it was stipulated: "*That upon all materials upon which the parties of the second part shall have made any advances, the said parties of the second part shall have and retain a first lien and preference for all moneys advanced upon the same, or under this contract, and the same shall become from the time of their preliminary construction the absolute property of the parties of the second part, subject to the right of the parties of the second part to reject the same should the same be rejected as hereinbefore mentioned: nor shall the same, unless afterwards rejected, be removed by the said party of the first part, or appropriated to any other use than that of the said works; but it is distinctly understood that all such materials, as well as all tools, instruments and other things, shall be in the charge and at the risk of the party of the first part.*" *Held*, That as against a subsequent *bonâ fide* purchaser such contract was fraudulent and void for want of registration.

Howitt v. Gzowski, 555.

CONVEYANCE.

(SETTING ASIDE.)

1. A person resident in England having the title to certain lands in Canada, but who had never been in the province, was, by a person resident near the land, urged to make him a lease of those lands, representing, in the course of his correspondence with the proprietor, that the lands were unoccupied, save by some squatters, who had built some huts or hovels for the purpose of, and were, committing depredations upon the lands, by stripping them of the most valuable timber, of which they were nearly denuded; that the lands were liable to forfeiture for nonpayment of taxes, and that the title of the persons so trespassing would shortly become absolute by lapse of time. In consequence of these representations, the owner was induced to execute a lease of the lands for twenty-one years, which he transmitted to the lessee in Canada, who, upon the receipt of the instrument, went to the persons in possession, and induced them to execute to him deeds of quit-claim of their interest respectively, taking from him a bond to reconvey in case it should appear afterwards that he was not entitled to the possession. It was shewn that the persons in possession were not of the character represented, but in reality substantial farmers, with valuable clearances and buildings. Upon a discovery of the misrepresentations made by the lessee, the lessor, and the occupants who had executed quit-claims, filed a bill to

set aside the transactions, and the court held them entitled to the relief prayed for, and that they were not improperly joined as plaintiffs.

Baby v. Cavanagh, 378.

(IMPEACHED AFTER FIFTY YEARS.)

A person against whom an action of ejectment was brought, filed a bill to restrain the action, alleging as a ground that the deed, under which the plaintiff in the ejectment claimed, was a forgery. The deed was dated about fifty years before the bill was filed, and all the persons who had witnessed the deed, four in number, were dead before the validity of the deed was impeached in any way. The court, under the circumstances, refused the relief prayed, and dismissed the bill with costs.

Fick v. McMichael, 646.

COSTS.

1. Where defendants had set up in their answer several grounds of defence on which much evidence was gone into, and the court, without going into these defences, dismissed the plaintiffs' bill on a ground not argued at the bar, and which might have been taken by demurrer to the bill, it was —*Held* (*Esten*, V. C., *dissentiente*), that the defendants were notwithstanding, upon the authorities, entitled to the whole costs of their defence.

Simpson v. Grant, 267.

2. In answer to a bill for the redemption of a mortgage alleging the existence of usury in the original transaction, the mortgagee set up several defences which were decided against him, the court, in decreeing redemption, ordered the plaintiff to pay such costs as would have been incurred in a common redemption suit, and the defendant to pay the costs of the issues found against him.

Isherwood v. Dixon, 314.

3. A party in possession of land under an agreement in the nature of a Welch mortgage having refused to give any statement of rents received, or information as to the amount due, a bill was filed by the mortgagor for an account. Notwithstanding that on taking the account between the parties a balance was found to be still due to the defendant, the court ordered him to pay the costs of the suit.

Morrison v. Nevins, 577.

CROWN.

1. This Court has no jurisdiction to set aside a grant of land made by the Crown upon a deliberate view of all the circumstances of a case, and in the absense of fraud or mistake.

Simpson v. Grant, 267.

2. This Court cannot enforce against the Crown specific performance of an order in Council. *Ib.*

3. An order in council was made after the passing of the statute 7 Wm. IV., ch. 118, and before 4 & 5 Vic., ch. 100, appropriating land to certain religious purposes. *Held*, that under the 27th section of the latter statute the Governor in council had power to revoke such appropriation. *Ib.*

4. The 3rd section of the latter statute, giving authority to the Governor in council to adjudge upon claims to free grants of land under any order in council then in force, applies to located lands on which improvements have been made as well as other lands. *Ib.*

DISTRIBUTION.

A testator placed his two sons in possession of certain portions of his real estate, intending to convey or devise the same to them, but during his lifetime retained the full control of the property; notwithstanding this, the sons made valuable improvements upon their respective portions. Upon a bill filed after the decease of the

father for a distribution of the estate, the court refused to make to the sons any allowance in respect of such improvements.

Foster v. Emerson, 135.

DIVISION COURT.

See "Injunction," 2, 3.

DOWER.

1. A sale of land for taxes, under the wild lands assessment act, destroys the right of the widow of the owner to dower.

Tomlinson v. Hill, 231.

2. Although at law the right of dower during the life of the vendor, is a nominal incumbrance only, the purchaser has a right in equity to compel its removal or to have specific performance of the contract with an abatement in the amount of the purchase money in respect of such incumbrance.

VanNorman v. Beaupre, 599.

ELECTION.

(TO PROCEED AT LAW OR IN EQUITY.)

See "Practice," 2.

EQUITY OF REDEMPTION.

(PURCHASE OF.)

1. The purchaser of an equity of redemption subject to a charge which is his own proper debt, or which he is under any contract, express or implied, to discharge, cannot keep such charge alive as against a mesne incumbrance, which, by the terms of the contract of purchase, express or implied, the purchaser was also bound to discharge.

Blake v. Beaty, 359.

2. Irrespective of the form of the contract between the parties, the rule is clear that the purchaser of an equity of redemption is bound as between himself and his assignor to pay off the incumbrances.

Thompson v. Wilkes, 594.

3. Where land subject to a mortgage is sold by the sheriff under statute 12 Vic., ch. 73, the purchaser acquires only the title of the mortgagor at the time the writ was delivered to the sheriff, not such as he had at the time of registering the judgment.

Pegge v. Metcalfe, 628.

4. A judgment creditor purchasing an equity of redemption at sheriff's sale, cannot set up his registered judgment against a mortgage upon the premises made before the delivery of the writ to the sheriff.—*Ib.*

5. And *quære*, whether a stranger purchasing the premises would not be bound to pay off judgment as well as mortgage debts, as forming together a portion of the price of the land purchased.—*Ib.*

EVIDENCE.

1. A vendor having, in consequence of disputes arising between him and his vendee, sold the same property to another purchaser, but who had notice of the original contract,—in a suit by the first against the vendor and the second vendee for the specific performance of the contract, the vendor was offered as a witness on behalf of the other defendant. *Held*, that he was not a competent witness under the circumstances, although he had parted with all interest in the property.

McDonald v. Jarvis, 568.

FORGERY.

See "Partnership," 1.

FRAUDS.

(STATUTE OF.)

Where a sheriff had sold property under an execution at common law, but before any deed was executed by him, a settlement was effected by the debtor with the execution creditor, who thereupon desired the sheriff to refrain from completing the sale, and

the sheriff accordingly refused to convey the property to the purchaser at sheriff's sale, who thereupon filed a bill against the sheriff to compel him specifically to perform the alleged contract, but it appeared that no memorandum evidencing the sale had been made or signed by the sheriff—*Held*, that the contract must be in writing, under the Statute of Frauds.

Witham v. Smith, 203.

GRANT FROM THE CROWN.

1. Although the Crown will be permitted to shew mistake in law or fact, in respect of its grant, when it would not be open for an individual to do so, still the evidence must not be such as to make out a *primâ facie* case only.

Attorney-General v. Garbutt, 181.

2. The plaintiff having purchased at sheriff's sale all the interest of a bargainee of the Crown to certain lands, placed the defendant in possession; afterwards the Crown Lands Department advertised these lands, amongst others, for sale at a stipulated price. The rule of the department in all such cases was, that the occupant of any such lands was entitled to a right of pre-emption; and the defendant, concealing the nature of his holding, applied for and became the purchaser of those lands, and obtained a patent therefor, after notice to the government of the claim of the plaintiff. Upon a bill filed for that purpose, the court declared the defendant a trustee of the lands, and ordered him to pay the costs of the suit.

Dougall v. Lang, 292.

3. Boulton v. Jeffrey (reported in 2 U. C. Jurist, p. 74) remarked upon. *Ib.*

4. In the year 1797 an order in Council was made in favour of M. P., as daughter of S. De F., a U. E. Loyalist, under which a lot of land was located, and a description thereof was regularly made out in her name; but in the year 1801 a patent for the lot so described issued to one M. F., the sister of the husband of the locatee, but during her life she never claimed any interest under such patent. No authority was shown for the change of the name in the grant from "M. P." to "M. F." The court, upon an information filed at the suit of the Attorney-General, decreed the patent to be cancelled. (*Esten*, V. C., dissenting.)

Attorney-General v. Garbutt, 383.

5. The registry acts do not apply to instruments executed previously to the grant from the Crown: where, therefore, the locatee of land executed a bond to convey, and after the issuing of the patent sold and conveyed the property to a third party, who again sold and executed a conveyance to a purchaser for value, but before either had paid his purchase money, the holder of the bond having registered the same, filed and served a bill for specific performance—*Held*, that neither vendee was in a position to plead a purchase for value without notice, and that the plaintiff was entitled to a specific performance with costs.

Casey v. Jordan, 467.

IMPROVEMENTS.

See "Distribution."

INDORSER.

See "Principal and Surety," 3,4,5,6.

INJUNCTION.

1. The solicitor of a mortgagee, in a suit of foreclosure after a decree of absolute foreclosure, purchased the mortgagor's interest in the premises; the decree so pronounced was subsequently set aside, and a decree *nisi* directed to be drawn up, directing, *inter alia*, a sale of the mortgaged premises, and that all judgment creditors should be served with the decree

and made parties to the suit. Notwithstanding this, however, the solicitor, who was also a judgment creditor of the mortgagee, proceeded upon his judgment, and was about to sell the mortgage premises under execution. The court, upon a motion made in the cause, restrained the solicitor from proceeding with his execution, and ordered him to pay the costs of the application.

Goodwin v. Williams, 178.

2. The plaintiff had subscribed a sum of money to aid in the erection of the parish church in the city of Toronto, with a view of raising such a sum as would enable the churchwardens to erect the church on the old site, so as to avoid leasing off portions of the land about the church, used as a burying-ground. Subsequently, at a meeting of the vestry, the plan of building was changed, by reason of which, in making the excavations for the foundation of the church, the graves of several members of the plaintiff's family were disturbed; thereupon the plaintiff addressed to the vestry clerk a letter annulling his subscription, and refused to pay it. A suit having been instituted in the Division Court for the recovery of this subscription, a motion was made in this court for an injunction to stay such action. The court, under the circumstances, refused the application, with costs.

3. *Quære*, whether this court will in any case grant an injunction to restrain an action in the Division Court.

Heward v. Harris, 226.

4. The owner of several steamers, who was carrying on business as a forwarder, sold one of them to another forwarding firm, and upon the sale covenanted that he would not directly or indirectly have any interest in any vessel navigating the St. Lawrence below Ogdensburgh at any time thereafter; and also that he would not dispose of two other steamers then owned by him to any person or persons for the purpose of navigating the St. Lawrence below Ogdensburgh. Afterwards the proprietor transferred his business as forwarder, and sold the two other steamers to persons having full knowledge of this covenant, who, notwithstanding, commenced running the vessels on the St. Lawrence below Ogdensburgh. Upon a bill filed for that purpose, the court held the owners bound by the covenant entered into by the original proprietor, and granted an injunction restraining them from navigating the river below Ogdensburgh with those vessels.

Holcomb v. Nixon, 273, 373.

5. A lessor demised property for a term of years, with a stipulation that the lessee would not carry on any business that would affect the insurance. The lessee made an underlease, omitting any such stipulation, and the under-lessee commenced the business of rectifying high-wines.—Upon a bill filed by the lessor against the lessees, the Court restrained the parties from continuing to rectify high-wines, or carry on any other business that would interfere in any way with the insurance.

Arnold v. White, 371.

5. The owner of a mill dammed back the water of a river so as to overflow land of the person owning the lot next above him, who filed a bill for an injunction to restrain such overflowing, on the ground, amongst others, that it prevented him building a mill on his land. It being doubtful on the evidence whether or not the party complaining had a mill-site upon his property, an inquiry was directed on that point.

Burr v. Graham, 491.

6. The owner of shares in a steamboat, on which a portion of the price was secured by the bond of the holder, sold the same subject to this bond, and the shares were afterwards transferred in trust for the benefit of the original owner of the vessel, who still held the bond for securing the payment of the stock; notwithstanding which, proceedings were taken by him to enforce payment of the bond. Upon a bill filed for that purpose, the court restrained further proceedings thereon, and ordered the bond to be delivered up to be cancelled, with costs.

Thompson v. Wilkes, 594.

7. A party professed to sell the secret of a preparation called "Jones' Patent Flour," and became bound not to disclose the secret to any other person in Canada, nor make use of it himself, except at the instance and for the benefit of his vendee; notwithstanding, he afterwards commenced selling a similar article, done up in bags, bearing a general resemblance to those of his vendees, although differing in some minute particulars, and led parties purchasing it to believe that it was the same article. The court granted an injunction to restrain him from selling the same preparation, or any other preparation done up in such a manner as to lead the public to suppose that it was the same article, and from representing it to be such, although it was sworn by the vendor that the preparations were not the same.

Whitney v. Hickling, 605.

IRREGULARITY.

See "Mortgage," 7.

JUDGMENT CREDITOR.

A judgment creditor is not a purchaser within the meaning of the statute 27 Eliz., ch. 4.

Goodwin v. Williams, 539.

See also "Equity of Redemption," 4, 5.

LACHES.

See "Specific Performance," 6. "Mortgage," 5, 10.

LIEN.

A deed of trust was executed by a debtor, and by a mistake in setting out the metes and bounds, a portion of the property intended to be conveyed was omitted; subsequently to which a creditor obtained and registered a judgment against the debtor: *Held*, that the assignees in trust were entitled to have the mistake rectified, and that the lien of the judgment creditor did not attach upon the land.

McMaster v. Phipps, 253.

A creditor obtained judgment previously to the statute 13 & 14 Vic., ch. 63, which, after the passing of that act, he registered. Subsequently to this the debtor assigned to a third party his equitable right, as purchaser, to certain lands, upon which a small balance of the purchase money remained due. *Held*, that the judgment so registered attached, and that the plaintiff was entitled to payment of his claim out of the proceeds of such lands, which, upon a bill by the judgment creditor, were ordered to be sold.

Dunovan v. Lee, 345.

LIMITATIONS.

(STATUTE OF.)

A father, being desirous of assisting his sons, put them in possession of portions of his real estate, and frequently expressed his intention and determination to convey such portions to the sons; during the continuance of such possession, however, the father was frequently on the premises assisting with his advice and directing the actions of his sons in improving the property, and conveyed an acre to one of the sons, and subsequently sold a valuable portion of the premises occupied by the same son: by his

will, the father devised his lands to be divided between all his children. *Held*, that the sons had not under the circumstances acquired a title under the Statute of Limitations 4 Wm. IV., ch. 1.

Foster v. Emmerson, 135.

LOTTERY.

See "Trust Deed."

MARRIED WOMEN.

(ANSWER OF)

See "Practice," 1.

MILL SITE.

See "Injunction," 5.

MISDESCRIPTION.

See "Abatement."

MISREPRESENTATION.

See "Conveyance."

MISTAKE.

See "Grant from the Crown," 1, 4. "Practice," 3.

MORTGAGE—MORTGAGOR—MORTGAGEE.

1. The decree of the Court of Chancery in the cause of Holmes v. Matthews (Ante vol. 3, p. 379), reversed, and the plaintiff's bill dismissed with costs.

Matthews v. Holmes, 1.

2. The solicitor of a mortgagee in a suit of foreclosure, after a decree of absolute foreclosure, purchased the mortgagor's interest in the premises; the decree so pronounced was subsequently set aside, and a decree *nisi* directed to be drawn up directing, *inter alia*, a sale of the mortgage premises, and that all judgment creditors should be served with the decree and made parties to the suit: notwithstanding this, however, the solicitor, who was also a judgment creditor of the mortgagee, proceeded upon his judgment and was about to sell the mortgage premises under execution: the court, upon a motion made in the cause, restrained the solicitor from proceeding with his execution, and ordered him to pay the costs of the application.

Goodwin v. Williams, 178.

3. Where, after a mortgage debt had been reduced to a sum of about one pound fourteen shillings, the mortgagee, who had taken an absolute deed, distrained for forty pounds, claiming that amount to be due: the court, upon a bill filed by the mortgagor to redeem, refused the mortgagee his costs.

Long v. Glenn, 208.

4. The debtor of a mercantile firm being desirous of extending his transactions with his creditors, executed to them a mortgage to secure the sum of £2,000. Subsequent transactions between the parties to a large amount took place, and during one year alone, the sums charged to the debtor, including the sum due on the mortgage, amounted to £30,000; and after four years' dealing between the parties, from the time of executing the mortgage, an account was delivered to the debtor, shewing a balance of £1641 against him. Upon a bill filed to foreclose the mortgage for this amount, the court held that the transactions which had taken place discharged the mortgage debt.

Buchanan v. Kerby, 332.

5. Where a security was effected by an absolute conveyance, and a bond conditioned to reconvey on payment of the debt, but instead of doing so the mortgagee sold and conveyed the premises to other persons whom the plaintiff alleged, however, had notice of the true nature of the title, but the only notice having been shewn to be a mere casual conversation which took place in the bar-room of

a tavern upwards of fifteen years before the filing of a bill by the mortgagor to redeem—the court refused redemption, and dismissed the bill with costs.

Clarke v. Little, 363.

6. The solicitor of mortgagees gave to the mortgagor a memorandum of the amount due, and, relying upon this, a third party purchased the equity of redemption: upon a bill to redeem, the court held the mortgagees not bound by the amount given in the memorandum; the evidence shewing that the solicitor was not aware that the mortgagor had made the enquiry on behalf of the purchasers of the equity of redemption.

Moffatt v. Bank of U. C., 374.

7. In a foreclosure suit, the defendant, after having been arrested for contempt in not answering, employed the agent of the solicitor for the plaintiff to defend the suit; and after several proceedings by consent a decree was made, directing the money to be paid on the 25th day of May, 1841. Three days before the time appointed for payment the plaintiff died; and the solicitor, acting in the cause, subsequently obtained an order appointing a new day for payment, and afterwards the final order for foreclosure by consent, without having revived the suit, and without taking any notice of the death of the plaintiff. The representative of the plaintiff afterwards conveyed to the trustee for the creditors of his ancestor, and he sold to a third party, who again sold to the solicitor of the plaintiff, through whose agent all the proceedings had been taken, but who was himself ignorant of the defects existing therein. The defendant in the cause having died, his widow and devisee, about twelve years afterwards, filed a bill to redeem, setting forth the above facts. *Held*, [per *Blake*, Chancellor,] that the proceedings after the death of the plaintiff were nullities: that the solicitor must be taken to have had notice thereof, and that the right to redeem had never been foreclosed. *But Held* [per *Spragge*, V. C.,] that the proceedings were merely irregular; that the solicitor was a purchaser for value without notice, and was not bound by the facts within the knowledge of his agent, and that under the circumstances the right to redeem had been extinguished. *Esten*, V. C., having been counsel in the original cause, gave no judgment.

Arkell v. Wilson, 470.

8. A party in possession of land under an agreement in the nature of a Welch mortgage have refused to give any statement of rents received or information as to the amount due on the agreement, a bill was filed by the mortgagor for an account. Notwithstanding that on taking the account between the parties a balance was found to be still due to the defendant, the court ordered him to pay the costs of the suit.

Morrison v. Nevins, 577.

9. A mortgagee in possession of a grist mill and other property, erected a carding and fulling mill upon the premises: the expense of this was disallowed to him, as being an improvement that a mortgagee could not make without consent.

Kerby v. Kerby, 587.

10. A creditor brought an action against his debtor to recover his demand, which was stayed by an arrangement made in October, 1840; the debtor assigned to the creditor the house and premises occupied by the debtor, when in addition to the amount of the debt, a sum in cash was paid him, and for two years he continued to receive the rent of the premises, when the creditor obtained possession by an action of ejectment. In December, 1855, the debtor filed his bill

setting up that the transaction was a mortgage, alleging that his poverty had, in the meantime, prevented him from enforcing his claim; the court, though inclining to dismiss the bill, directed an issue as to the question of mortgage or no mortgage.

Watson v. Munro, 662.

MUNICIPAL CORPORATIONS.

Land was conveyed to the Town Council of Goderich for the purpose of a market place, and the Council considering that the quantity of land was greater than required for that purpose, agreed to grant a portion of it to the Municipal Council of the Counties of Huron and Bruce for the site of a court-house. Upon an information filed to restrain the proceedings of the councils—*Held*, that a corporate body acting as a trustee is as amendable to the jurisdiction of equity as an individual; that any alienation of the land was a breach of trust, and the land should be reconveyed; and if no conveyance had been actually executed, its execution should be restrained.

Attorney General v. Goderich, 402.

NOTICE.

1. Constructive notice is insufficient in any case to postpone a registered conveyance executed *bonâ fide*.

Ferrass v. McDonald, 310.

2. A lessee of the Canada Company, with a right of purchase, assigned his claim to the plaintiff, and afterwards, in fraud of the plaintiff, obtained, in his own name, an absolute conveyance from the company, and conveyed the land to the defendant, a *bonâ fide* purchaser, without notice, who paid part of the purchase money, and registered the deed to himself. The plaintiff omitted to register the assignment to him. *Held*, that defendant was entitled to hold the land, freed from any claim of the plaintiff. *Ib.*

NULLITY.

See "Mortgage," 7.

PAROL EVIDENCE.

The circumstances under which parol evidence should be admitted to give to an absolute deed the operation of a mortgage between the parties considered and discussed.

Matthews v. Holmes, 1.

See also "Specific Performance," 1.

PARTIES.

Semble—That this court would entertain a bill for the purpose of compelling a sheriff to convey property sold under an execution; but to such a bill the execution debtor whose property has been sold must be made a party.

Witham v. Smith, 203.

See also "Conveyance."

PARTNERSHIP.

One of two partners carried on the business of bill broker on his own account, and in that capacity received from the plaintiff several sums of money, by checks and proceeds of drafts on the plaintiff, as the price of certain promissory notes, and the money was by the broker paid into and used with the partnership funds. It was afterwards discovered that these notes had been all forged by the broker, who absconded, and the remaining partner executed a deed of assignment of all the joint effects to trustees for the benefit of all their creditors. Upon a bill filed for that purpose the court held that the plaintiff had a right to be paid his claim out of the partnership assets. [*Spragge*, V. C., *dissentiente.*]

Wallace v. James, 163.

2. One of several partners, engaged in the purchase of wheat and flour, sold one half of his interest to a third party, to which the other partner, who had supplied all the funds used

in the transactions of the firm, assented, and a loss having occurred upon a re-sale, he filed a bill against the original co-partner, and his vendee for an account and payment by them of one half of the loss sustained on such resale. *Held*, that the vendee was not, by what had taken place, constituted a partner of the plaintiff, and the court dismissed the bill as against him with costs: but directed an account as against the other defendant with costs to the hearing.

Mair v. Bacon, 338.

PAYMENTS.

(APPLICATION OF.)

The debtor of a mercantile firm being desirous of extending his transactions with his creditors, executed to them a mortgage to secure the sum of £2000: Subsequent transactions between the parties to a large amount took place, and during one year alone the sums charged to the debtor, including the sum due on the mortgage, amounted to £30,000; and after four years' dealing between the parties, from the time of executing the mortgage, an account was delivered to the debtor, showing a balance of £1641 against him. Upon a bill filed to foreclose the mortgage for this amount, the court held that the transactions which had taken place discharged the mortgage debt.

Buchanan v. Kirby, 332.

The ruling in Re Brown reported ante vol. 2, page 590, affirmed. *Ib.*

PRACTICE.

1. A married woman had been served with an office copy bill as well as her husband, but no joint answer was put in, and an order was obtained and served upon her directing her to answer separately and apart from her husband; no answer having been put in after the expiration of a month from the service of that order, a motion was made for an order *pro confesso* against her. The court refused to make the order, and directed a second office copy of the bill, together with an order to be served upon her directing her to answer separately from her husband within a time limited after service of that order.

Miller v. Gordon, 145.

2. A defendant having allowed the plaintiff to proceed with his suit in this court as well as at law for the same object, afterwards applied for an order on the plaintiff to elect in which court he would proceed; the court granted the order, but directed the defendant to pay so much of the costs at law as had been incurred after defendant became aware that the relief sought in both suits was the same.

Ausman v. Montgomery, 175.

3. Where a cause was brought on to be heard at the suit of The *Attorney General* for the repeal of a grant of land alleged to have been issued in mistake, and the evidence adduced did not sufficiently establish the mistake, the court directed the cause to stand over for the purpose of adducing further evidence.

Attorney General v. Garbutt, 181.

4. Where a plaintiff in a redemption suit moves for a summary reference, and seeks to deprive the mortgagee of his costs, a case should be made for that relief upon the pleadings, and the question of costs should be included in the reference to the Master.

Long v. Glenn, 208.

5. Where a case has been referred to arbitration and an award made, such award must in all cases be made an order of the Court, before any other order in the cause can be made.

Wadsworth v. McDougall, 290.

6. Where a mortgage was created by husband and wife upon lands of

the wife, and the mortgagee, together with the husband, joined in a conveyance of all their interest to a purchaser, the court refused an immediate reference under the orders of 1853, and directed the cause to be brought to a hearing in the regular way.

Wallis v. Burton, 352.

7. Upon the argument of a petition for rehearing, the party applying cannot ask the decree to be varied in any particular not objected to by the petition; and upon a second petition of rehearing he is confined to such parts of the decree as were objected to by the former petition.

McMaster v. Campton, 549.

8. A defendant having by his answer set up several matters of defence, which, through oversight, he had omitted to give evidence of; the court at the hearing directed the cause to stand over, with liberty to both parties to give evidence upon those points.

Northey v. Moore, 609.

PRINCIPAL AND SURETY.

1. The treasurer of the united counties of Kent, Essex and Lambton, having become defaulter, actions were commenced against him and his sureties respectively; afterwards, in consequence of a proposition from the treasurer, the Warden, with the consent of the council, settled with the treasurer, and took his confession of judgment for £1,000, and a confession from one of his sureties for a like amount, being together equal to the amount of the defalcation then ascertained, and released the actions against them; the treasurer's second surety did not take any part in this arrangement. Afterwards a further defalcation was discovered, and thereupon the councils, proceeded against the second surety of the treasurer, and obtained judgment against him for £1,000. Upon a bill to restrain that action the court granted a perpetual injunction for that purpose, although the warden and the attorney of the councils in the action at law swore that their rights as against the second surety were intended to have been reserved.

Baby v. The Municipal Council of Kent, 232.

2. A surety paying the debt of his principal after arrangements had been made between the creditor and the principal debtor which would have had the effect of discharging the surety, is not entitled to recover back the money so paid.

Geary v. The Gore Bank, 536.

3. The accommodation indorser of several bills of exchange and promissory notes obtained from the maker and acceptor thereof a conveyance of certain freehold premises, by way of indemnity against such indorsations. Certain of these bills were subsequently indorsed by another, and were discounted; and such subsequent indorser, on the bills maturing, was obliged to retire them. On a bill by the second indorser claiming to have the benefit of the trust deed by having the estate administered, and the amount so paid by him to retire the notes refunded—*Held*, that he was not entitled to such relief: and, *quære*, whether, under the circumstances, he had a right to claim such relief subject to the grantee in the deed being relieved from all liabilities incurred on the faith of it.

Smith v. Fralick, 612.

4. *H.* obtained from his debtor an assignment of his books of account, notes, bills and other evidences of debt by way of security against the consequence of his becoming a party to notes for the accommodation of the debtor; and also a conveyance of real estate from the father of the debtor for the same purpose. Having been compelled to pay a large sum of money by reason of his being a party to such

notes, *H.* recovered judgment against the debtor and sued out execution thereon, which was the first placed in the hands of the sheriff against the debtor, and the effects of the debtor were afterwards sold under this and other executions subsequently placed in the hands of the sheriff; upon which sale sufficient was realized to satisfy the execution of *H.* and leave a balance in the hands of the sheriff, and *H.*'s claim was accordingly paid, and the books of account and other securities held by him were delivered up to the debtor after notice from a later judgment creditor not to part with them; and the father's land was re-conveyed to him. The execution creditor who gave the notice, claimed in consequence priority over intermediate execution creditors, and also a right to compel *H.* to make good the amount of his claim in consequence of having parted with the securities. *Held*, that a subsequent execution creditor had not any equity to compel the first creditor to recover payment of his claim out of the property held by him in security, so as to leave the goods of the debtor to satisfy the subsequent executions, nor had he any right to call upon *H.* to assign the lands conveyed to him by the debtor's father; that *H.* was not rendered personally liable in the first instance to the subsequent execution creditors, but, that he had no right to deliver up the securities held by him, to the debtor, on being paid the amount of his execution, and was, therefore, liable for any loss thereby occasioned.

Joseph v. Heaton, 636.

5. The holder of a promissory note sued the maker and indorser, and after execution placed in the sheriff's hands against both, the plaintiff, upon the application of the maker, entered into an arrangement by which he extended the time for payment of the amount, without the consent of the indorser. *Held*, that this discharged the indorser from all liability.

Vankoughnet v. Mills, 653.

6. The holder of a promissory note sued and recovered judgment thereon against the makers and endorsers, which was duly registered so as to create a lien on the real estate of the maker; subsequently the judgment creditor accepted from the makers of the note a composition of fifty per cent. and discharged their lands from further liability, expressly retaining the right to go against their personal assets, and the plaintiff in the action proceeded to execution against the goods of the endorser. *Held*, that what had taken place operated as a discharge of the endorser from further liability; and a perpetual injunction was granted restraining further proceedings in such action against the endorsers.

Mellish v. Brown, 655.

PROCEEDINGS.

(SETTING ASIDE.)

A suit had been instituted by a creditor for the administration of the estate of a party deceased, and the agent of the solicitor for the plaintiff was appointed guardian *ad litem* to the infant defendants: after a sale of the lands under the decree, at which the plaintiff, by leave of the court, had bid off a portion of the lands, a motion was made to change the name of the purchaser. The court, upon looking into the papers, refused the application; directed that a new guardian should be appointed, who, unless the parties consented thereto, was to take measures to set the proceedings aside.

Fletcher v. Bosworth, 448.

PURCHASE MONEY.

Payment of the whole amount of purchase money in pursuance of a parol contract for sale, will not operate

as part performance to take the case out of the Statute of Frauds, any more than payment of a portion of the price.

Johnson v. The Canada Co., 585.

RECTORIES.

1. Under the statute 31 George III., ch. 31, and the Royal Commission, Sir John Colborne, the Lieutenant Governor of Upper Canada, had authority to create and endow Rectories, without any further instructions.

Attorney General v. Grassett, 412.

2. The public events that occured in the Province of Upper Canada between the years 1826 and 1836, were not sufficient to warrant the presumption that such authority had been revoked or suspended. *Ib.*

3. Under the 31st George III., ch. 31, a patent establishing and endowing a Rectory or Parsonage, is not void for want of a grantee being named in it: nor for not defining the limits of the parish within which the Rectory was to be, it being established in and for a certain Township. *Ib.*

[Affirmed on Appeal. See post vol. vi.]

REGISTRATION.

See "Notice." "Crown, grant from the" 5.

REGISTRY ACT.

The recent registry act 13 & 14 Vic. ch. 63, has not made any change in the rights of equitable incumbrancers.

McMaster v. Phipps, 253.

RE-HEARING.

See "Practice," 7.

RELIGIOUS BODIES.

Under the statute 12 Victoria, ch. 91, the trustees of lands held in trust for the benefit of the religious bodies therein mentioned, with the consent of the governing body, can alone exercise the powers given by the act. Where therefore a contract for the sale of lands so held in trust was entered into in compliance with a resolution of the congregation, by a member of a committee appointed for the purpose of disposing of such lands, and a bill was filed by the purchaser to enforce its specific performance, a demurrer for want of equity was allowed.

Irving v. McLachlan, 625.

RIGHT OF PURCHASE.

The owner of real estate conveyed the same absolutely, receiving back a bond declaring the conveyance to be in trust to receive the rents, &c., and account therefor to the grantor; and in the bond was reserved a right to the obligor and his heirs to purchase the property. Upon a bill filed to set aside this agreement as infringing the rule against perpetuities, and for an account of the rents and profits received—*Held*, that if even the agreement were within the rule it was good for the life of the granteee; and an account of rents was directed, reserving the question of costs until after report, the bill not alleging any applications for an account.

Kendrick v. Dempsey, 584.

See also "Specific performance," 11, 12.

SALE.

(SETTING ASIDE.)

A building society having a mortgage containing a power of sale on default, advertised for sale the mortgage property, and at the auction it was stated by the auctioneer that the price to be paid for the premises was to be over and above the amount of certain other mortgage debts against a portion of the same estate. At the auction, one of the directors, who was also solicitor to the society, bid off the property in his own name, though it afterwards appeared that he

had acted only as agent for a third party; after the sale the purchaser bought up the interest of the other mortgagees, who had already commenced proceedings to foreclose, carried on the foreclosure suit and obtained a final decree of foreclosure, no notice being taken of the fact of the money having been paid to the mortgagees; before this order was obtained, however, the mortgagor claiming to have the surplus of the purchase money over and above the amount of the mortgage under which the property was sold, filed a bill for that purpose, when the agent of the purchaser swore that he had not intended to bid the sum he did in addition to the amount of the mortgage paid off. The court set aside the sale, and gave the mortgagor leave to redeem: The Chancellor dissenting, who thought the sale already made should be carried out and the surplus of the purchase money paid to the mortgagor.

Montgomery v. Ford, 210.

SECONDARY EVIDENCE.

Where, to let in secondary evidence of the contents of a bond, the attorney of the obligor was called as a witness, and upon being shewn letters written by himself in which a deed and bond were referred to, and the contents of the bond stated, he swore that he had no recollection whatever of the existence of these instruments, although he had no doubt, from reading the letters, that such a bond had existed; the court refused to receive such letters as evidence of an admission by the obligor's agent of the existence of the bond, they not being part of the *res gestæ*.

Clarke v. Little, 363.

SHERIFF,

(SALES BY.)

See "Statute of Frauds." "Parties."

SOLICITOR AND CLIENT.

A person in indigent circumstances being entitled to a grant of land from the Crown, had consulted a solicitor with a view of obtaining the patent. In the course of their business transactions the solicitor wrote, "I think I can manage for you so effectually that I can get your deed from Government probably through some assistance on my part." The client having executed an assignment, as he alleged, by way of security to the solictor, and the patent for the land having been issued, the solicitor set up the transaction as an absolute purchase, in consequence of which the wife of the plaintiff, acting as his agent, took steps to assert her husband's claim, and procured the assistance of her brother in ferreting out the nature of the title held by the solicitor: after repeated applications the solicitor agreed to reconvey upon being paid the sum of £170, asserted by him to be due. This amount the brother advanced, and took a conveyance of the property, said to be worth £800, in his own name, and then alleged he had purchased for his own benefit. The court [*Esten*, V. C., *dissentiente*,] declared the deed to the solicitor a mortgage only; that his assignee had in fact acted as agent of the plaintiff, and could not purchase for his own benefit: and directed an enquiry as to certain points left in doubt by the evidence before the court, and an examination of the solicitor's books; unless the purchaser would consent to reconvey upon receiving back the amount paid by him to the solicitor.

McIlroy v. Hawke, 516.

SPECIFIC BEQUEST.

See "Will," 4.

SPECIFIC PERFORMANCE.

A vendor executed an agreement to convey certain premises and re-

ceive back a mortgage for part of the price payable by instalments, but omitted to say that the mortgage should be made payable with interest: in a suit brought to enforce specific performance of the agreement and to compel the vendor to accept a mortgage without interest, parol evidence was admitted to shew that the real understanding of the parties was that interest should be made payable by the mortgage.

Gould v. Hamilton, 192.

2. Where a suit was brought to compel the acceptance of a mortgage, for part of the purchase money, without interest, and the defendant in his answer thereto swore, "I have always said that I was ready and willing and have offered to complete the sale of the said property to the plaintiff, provided interest on the unpaid purchase money was included in the mortgage;" and also, "I submit and insist that unless the plaintiff will consent to pay interest on the unpaid purchase money aforesaid, he is not entitled to any relief in this court." The court treated these statements as submitting to a decree for specific performance, with interest reserved by the mortgage, and made a decree accordingly.

Ib.

3. The parties to an agreement differed as to its proper construction on one point, which the plaintiff at first refused to give up, and the defendant in consequence treated the agreement as at an end: the court thought there was some ground for the claim set up by the plaintiff though he had subsequently abandoned it, and, under the circumstances, decreed a specific performance of the agreement; but without costs. [The Chancellor dissenting.]

Gray v. Springer, 242.

4. This Court cannot enforce against the crown specific performance of an order in council.

Simpson v. Grant, 267.

5. The defendant agreed for the purchase of a factory situate near a small stream, intending to carry on in the building his occupation of soap and candle manufacturer. After the contract had been entered into the defendant discovered that he would not have a right to throw the refuse of his factory into the stream, and without the privilege of so using this stream the property would be useless for the purpose he had intended to apply it to, and of which the vendees were aware at the time of entering into the contract; *Held*, notwithstanding, that the vendee was bound to complete the contract, although the vendors had not pointed out this fact at the time of the sale.

James v. Freeland, 302.

6. A person in possession of lands contracted in the year 1848 with the proprietor for the purchase thereof, and about a year afterwards, without having paid any portion of the purchase money, absconded from the province, leaving some members of his family in possession of the property. In June, 1850, the owner having failed to effect any settlement with his vendee, obtained possession in an action of ejectment which he had instituted, and in January, 1851, sold the property to another purchaser, who went upon the land and remained in possession until the September of 1853, and laid out large sums in improvements, when the original vendee assigned his agreement to the plaintiff, who thereupon filed a bill for the specific performance of the agreement. The court dismissed the bill with costs.

Van Wagner, v. Terryberry, 324.

7. The owner of lands over which the Grand Trunk Railway would pass, offered to convey a portion thereof for a station house upon certain conditions, which offer was rejected. Afterwards an agreement was made

with the solicitor of the contractors, which was reduced into writing and signed by the owner, agreeing to convey a quantity of land not to exceed ten acres, upon condition that the station should be placed upon it. The owner afterwards refused to convey unless the contractors would secure to him three crossings over the railway track, and brought an action of ejectment to turn the parties out of possession of the land so agreed to be conveyed: upon a bill filed for that purpose, the court decreed a specific performance of the agreement to convey and an injunction to stay the ejectment, notwithstanding that the defendant swore that the condition upon which he agreed to convey was that the crossings should be secured to him.

Jackson v. Jessup, 524.

8. After entering into a contract for the purchase of land, the vendee discovered a deficiency in the quantity sold, and insisted upon an abatement of price in respect thereof. After a good deal of discussion and negotiation in respect of title as well as the deficiency of land, the purchaser proposed to waive the contract upon condition of the vendee paying the costs incurred by the purchase, and interest on the amount of purchase money from the time of the contract, which was acceded to by the vendor. After some weeks, a bill of charges was furnished to the vendor's solicitor, but he, objecting to some of the items of charge, tendered the amount less three items (amounting in all to about £4 or £5). A few days afterwards he offered to pay the full amount of the costs, but this was also refused, and a bill was filed praying for the specific performance of the contract. *Held*, that what had taken place between the solicitors was no abandonment of the contract, and that the plaintiff was entitled to have the contract specifically performed.

McDonald v. Jarvis, 368.

9. Although at law the right to dower is, during the life of the vendor, a nominal incumbrance only, the purchaser has a right in Equity to compel its removal, or to have specific performance of the contract with an abatement in the amount of the purchase money in respect of such incumbrance.

Van Norman v. Beamer, 599.

10. The locatee of lands of the Crown executed a bond in favour of one of his sons, for the conveyance of fifty acres of his land, for the purpose of procuring his marriage with a particular person, which, however, never took place, and the son afterwards married another woman, having, in the meantime, been allowed to retain possession of the bond. The father subsequently conveyed to another son for value, but who had notice of the existence of the bond; and he applied for and obtained the crown patent for the land, and having refused to recognise the right of his brother under the bond, a bill was filed to compel the specific performance of the agreement contained therein. *Held*, that as against a purchaser for value the bond was voluntary and could not be enforced; but the defendant having by his answer denied all knowlege of the existence of the bond, the court dismissed the bill without costs, and without prejudice to filing another, if, under the circumstances, the plaintiff should be so advised.

Osborne v. Osborne, 619.

11. A lessee under a lease containing a clause giving him the right to purchase upon certain terms, neglected to pay the rent and perform the conditions specified, and his landlord wrote stating that the lease under which he held was void, and offering the tenant other terms: twenty months

after such letter the lessee filed a bill to enforce the contract contained in the lease; or failing that, then a conveyance on the terms set forth in the letter, which the tenant alleged he had accepted, but the evidence wholly failed to establish that fact: the court dismissed the bill with costs.

Forbes v. Connolly, 657.

12. Where, by the terms of a covenant to sell, the option to purchase is entirely with the covenantee upon certain specified terms, the contract rests upon a wholly different footing from an ordinary contract for sale and purchase of land; and the party entitled to the option must shew that he has preformed all the terms, upon the performance of which alone he is entitled to exercise that option. *Ib.*

STATED ACCOUNT.

A debtor having executed a mortgage in favour of his creditors, reciting that he was indebted in a sum named, and a suit to foreclose this mortgage having been subsequently instituted, a reference to the Master was directed to take an account of what was due; in taking which the Master required the production of the accounts on the foot of which the mortgage debt was created, and the usual four-day order had been issued for non-production. *Held*, on a motion to set this order aside, that the parties were *primâ facie* bound by the amount stated in the mortgage as being the true debt, and that the Master, in the absence of evidence to impeach the statement in the mortgage, could not go behind it.

Pollock v. Perry, 591.

TRADE MARKS.

See "Injunction," 7.

TREES.

The owner of real estate sold all the hemlock bark thereon. *Held*, that the purchaser had under such sale, a right to fell the trees.

Hatch v. Fick, 651.

TRUST DEED.

(VOID IN PART.)

1. A debtor conveyed his real estate to trustees for the benefit of his creditors, to be disposed of by the trustees—first, by a lottery, and failing that plan of disposition, then in trust to sell as the trustees should deem most advantageous. *Held*, that although the deed was void as to the trust for a lottery, it was valid as to the other trusts therein declared.

Goodeve v. Manners, 114.

2. A conveyance of property for the benefit of creditors may create a valid and irrevocable trust, although none of the creditors are either parties or privy to the deed; and when in its inception it is not so, subsequent dealings or communications between the debtor or his trustees and the creditors may render the trusts irrevocable.—*Ib.*

TRUSTEE.

1. A testator, by a codicil to his will, directed that the trustees named in his will, or the survivor of them, or the heirs, executors, or administrators of such survivor, should, during the minority of his children, have power to appoint some person whom they might think fit and competent to take charge of and conduct and carry on his business in the manner it had been carried on during his lifetime, and to pay the person so appointed a salary. The surviving trustee having died intestate, leaving his widow, who took out letters of administration to his estate, but declined acting as a trustee under the will; and his eldest son being an infant, and therefore incapable of acting as such trustee, the persons interested under the will of the testator filed a bill for the ap-

pointment of a new trustee. *Held*, that under the circumstances the parties were entitled to have a new trustee appointed; but that the powers given by the codicil were personal to the trustees named in the will, or the survivor, or the heirs, &c., of the survivor, and could not be exercised by any trustee appointed by the court.

Lyon v. Radenhurst, 544.

2. A bill was filed against a trustee for an account and re-conveyance. At the hearing a decree was drawn up by consent, treating the defendant in all respects as a mortgagee. *Held*, upon appeal from the Master's report, that from the time of the decree the rights of the parties respectively must be determined by the rules ordinarily applicable to cases of mortgage.

Kerby v. Kerby, 587.

See also "Grant from the Crown," 2 —"Municipal Corporations"—"Administrator."

UPPER CANADA.

(PRETENDED BANK OF.)

A debtor of the late pretended Bank of Upper Canada at Kingston having called upon the bank commissioners to arbitrate under the provisions of the statute 10 Geo. IV., ch. 7, an award was made finding a sum of £900 due, and directing the debtor to pay and the commissioners to receive that amount in quarterly payments in notes and other securities of the bank. *Held*, that the debtor had a right to pay in notes of the bank for which no certificates had ever been issued pursuant to the act of Parliament.

Dalton v. McNider, 501.

USURY.

A security void at the time of its creation on the ground of usury is not rendered valid by the statute 16 Vic., ch. 80, passed at a subsequent date. Where, therefore, a mortgage had been made upon a usurious agreement, the court [the Chancellor dissenting] *Held* a judgment creditor of the mortgagor entitled to file a bill to redeem upon paying the amount actually advanced before the expiration of the time appointed for payment.

Isherwood v. Dixon, 314.

VESSEL.

(SALE OF.)

See "Injunction," 3, 6.

VOLUNTARY SETTLEMENT.

A person against whom several executions for small amounts were in the sheriff's hands, and whose chattel property, when sold by the sheriff, was not sufficient to pay those executions, made a settlement of the only real estate he had in trust for his wife and children. *Held*, that the settlement was fraudulent and void, under the statute 13 Eliz., ch. 5.

Goodwin v. Williams, 539.

See also "Specific Performance," 10.

WIFE

(LANDS OF.)

Quære—Whether a deed by a husband alone of his wife's lands will operate as an effectual transfer of the husband's marital rights therein.

Wallis v. Burton, 352.

WILD LAND ASSESSMENT.

A sale of land for taxes, under the Wild Lands Assessment Act, destroys the right of the widow of the owner to dower.

Townlinson v. Hill, 231.

WILL

(CONSTRUCTION OF.)

1. A testator by his will, amongst other things, directed as follows:—"Sixthly. I will and order that the portion of my real estate and premises severally bequeathed to my two sons, and also the portion bequeathed to my

four daughters, shall be severally and separately valued; and if either one shall be found to have a greater proportion or share thereof than the other, he or they shall pay back to the other in such manner such amount as will make each one of them equal sharer of my real estate." On a bill filed for a declaration of the rights of all parties under the will, *Held*, that each child was entitled to an equal share of the estate devised.

Foster v. Emmerson, 135.

2. A testator devised all his property to his widow for life, remainder to his two daughters and niece, with a power of appointment. By a codicil to the will the testator revoked that part of his will giving these parties the power of disposing of their portions, and declared that they should "not have the power of willing the same, saving and excepting they shall be married and have a child or children; and, further, should any or either of the aforesaid parties depart this life previous to their obtaining their various legacies, then and in such case the share or shares of the party or parties so departing this life shall go and devolve to the child or children of W. A. C. that shall be then alive at such decease." *Held*, that the daughters and niece took no interest until the death of the tenant for life, but that they had a power of appointment in the meantime in the event of their marrying and having children.

Christie v. Saunders, 464.

3. A testator by his will made a devise in the following terms:—"I give, devise, and bequeath unto my grandson G. K. W., upon his attaining the full age of twenty-one years, and to his heirs for ever, all and singular, &c. (naming certain lands); and my executors are hereby required to make whatever use or benefit they can or may for the advantage of my said grandson during his minority, and pay to him, upon his reaching the age of twenty-one years, whatever the said lots may have produced of clear profit during the said term of his minority from the day of the death of my said wife Susannah." G. K. W. survived the testator, but died during his minority. *Held*, that he took a vested interest, descendable to his heirs.

Marcon v. Alling, 562.

4. A testator by his will, after making sundry devises and bequests, proceeded: "And I further leave to my son George all my plate and plated goods, books, and pictures, together with all accounts, papers, *and personal effects that may be in my possession at the time of my death*, always excepting household furniture, beds, bedding, and linen, and these I leave to my daughters (naming them), to be divided share and share alike: * * * and I further leave, give, and bequeath all my horses, cattle, cows, sheep, and farming implements to my two daughters," being those already named. *Held*, that the bequests to the son and daughters were specific, and that the residue, if any, was not disposed of.

McKidd v. Brown, 634.

ROWSELL & ELLIS, PRINTERS, KING STREET, TORONTO.

nd bequeath unto my
. W., upon his attain-
e of twenty-one years,
for ever, all and singu-
ng certain lands); and
re hereby required to
r use or benefit they
the advantage of my
uring his minority, and
n his reaching the age
years, whatever the
ave produced of clear
e said term of his mi-
day of the death of
usannah." G. K. W.
stator, but died during
Held, that he took a
descendable to his

larcon v. Alling, 562.

r by his will, after
devises and bequests,
nd I further leave to
ll my plate and plated
nd pictures, together
ts, papers, *and per-*
t may be in my pos-
e of my death, always
hold furniture, beds,
en, and these I leave
(naming them), to be
d share alike: * * *
e, give, and bequeath
cattle, cows, sheep,
plements to my two
those alreadynamed.
quests to the son and
pecific, and that the
as not disposed of.
Kidd v. Brown, 634.