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JAMES McDOUGALL.....APPELLANT;

*March 10.

AND

*Dec. 7.

DAVID CAMPBELL.....RESPONDENT.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage, agreement to postpone—Non-registration—Priority.

In 1861, *W. M.*, the owner of real estate, created a mortgage thereon in favor of *J. T.* for $4,000. In 1863 he executed a subsequent mortgage in favor of *J. M.*, the appellant, to secure the payment of $20,000 and interest, which was duly registered on the day of

*PRESENT.—Sir William J. Ritchie, Kt., C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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its execution. In 1866, *W. M.* executed another mortgage to the respondent *C.*, for the sum of $4,000, which was intended to be substituted for the prior mortgage of that amount, and the money obtained thereon was applied towards the payment thereof, and *J. M.* executed an agreement under seal—a deed poll—consenting and agreeing that the proposed mortgage to respondent *C.* should have priority over his. In 1875, *J. M.* assigned his mortgage for $20,000 to the *Quebec* Bank, without notice to the bank of his agreement, to secure acceptances on which he was liable, which assignment was registered, and superseded the agreement, which *C.* had neglected to register.

C. filed his bill against the executors of *W. M.*, and against *J. M.*, and the Bank. The Court of Chancery held that the respondent was not entitled to relief upon the facts as shown, and dismissed the bill. The Court of Appeal affirmed the decree as to all the defendants, except as to *J. M.*, who was ordered to pay off the respondent's (plaintiff's) mortgage, principal and interest, but without costs. *J. M.* thereupon appealed to the Supreme Court of *Canada*.

Held, affirming the judgment of the Court of Appeal, (*Strong*, J., dissenting), that as appellant could not justify the breach of his agreement in favor of *C.*, he was bound both at law and equity to indemnify *C.* for any loss he sustained by reason of such breach.

APPEAL from a judgment of the Court of Appeal for *Ontario* (1) allowing an appeal from a decree of the Court of Chancery (2).

The plaintiff *David Campbell*, being about to advance money to *William McDougall* on property on which the appellant, *James McDougall*, had a prior mortgage, procured a written consent by appellant that the proposed mortgage to him should have priority over his.

The consent was as follows:

"Know all men by these presents, that I, *James McDougall*, of the city of *Montreal*, miller, hereby declare and agree that a certain mortgage now being made by my brother, *William McDougall*, of *Baltimore*, in the county of *Northumberland*, miller, unto and in

(1) 5 Ont. App. R. 503. (2) 26 Grant 280.

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favor of *David Campbell*, of *Cobourg*, Esquire, upon his milling and other property, near *Baltimore*, as described in a mortgage prior to mine made in favor of Dr. *Taylor*, which is registered, for securing to the said *David Campbell* four thousand dollars with interest, shall stand as the first charge upon the property so described, and that my mortgage, which I now hold on the same property, shall be postponed thereto and shall rank thereafter notwithstanding priority of date and registration.

"In witness whereof I have hereunto set my hand and seal, this 7th day of February, A.D. 1866.

"(Signed) *James McDougall.*"

The mortgage to *James McDougall*, referred to in this deed, was dated 24th October, 1863, and registered the same day, and was for $20,000. The mortgage to *Taylor*, was dated 12th July, 1851, and was for $4,000.

The mortgage by *William* to *Campbell*, also for $4,000, was dated 28th January, 1866, and was intended to be substituted for the mortgage to *Taylor*, and the money advanced by *Campbell* was, in fact, applied to the discharge of the mortgage to *Taylor*. In 1875, *James McDougall* assigned his mortgage to the *Quebec Bank* to secure a liability to the bank, which assignment was registered, and superseded the agreement, which had never been registered, and the existence of which *James McDougall* did not mention to the bank. The plaintiff (*Campbell*) filed a bill against the executors of *William McDougall*, the *Quebec Bank* and the present appellant, asking for the sale of the land; payment of any deficiency by the executors, and that appellant might be ordered to make good any loss by reason of the assignment of the mortgage.

The Court of Chancery was of opinion that the respondent was not entitled to relief; the Court of Appeal for *Ontario* held that the bill as against the exe-

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cutors of *William McDougall* and the *Quebec Bank* should be dismissed. "As to *James McDougall*, the plaintiff should have a decree for the payment of the mortgage money and interest, the amount of which to be computed by the registrar, and as between the plaintiff and *James* no costs to either party up to the issuing of the decree now directed."

From this judgment the appellant appealed to the Supreme Court of *Canada*.

Mr. *Maclennan*, Q. C., for appellant :

The ground on which the court seems to rest its judgment, is that the appellant owed the plaintiff the duty of notifying the bank of the paper he had signed, and that having failed in that duty he must make good the loss, although it is admitted that ordinarily no such duty exists. But it is argued, that because the bank gained priority, the security was more beneficial to them, and that this was an advantage to the appellant, and it is therefore only just and reasonable that he should pay off the plaintiff's mortgage. If, however, the appellant owed no duty to the plaintiff to give notice, it is difficult to see how it can make any difference whether the result was or was not advantageous.

As the decree now stands, it is simply an order upon the appellant to pay off the plaintiff's mortgage, principal and interest, because the plaintiff has lost his priority by the prior registration by the bank of their assignment; the appellant does not owe the debt by covenant or otherwise, and the suit is not for either redemption or foreclosure. It must therefore be shown that the appellant, by some wrongful or inequitable act, has caused the loss.

The only act done by the appellant was the assignment of the mortgage to the bank. This was done first on the 17th November, 1875, and afterwards by a more

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formal instrument on the 16th March, 1876; the assignment was not registered till nearly six weeks afterwards on the 24th April, and the appellant had nothing to do with the registration. The injury to the plaintiff did not arise from the assignment—that was perfectly harmless; the injury arose from the bank's registering and the plaintiff's omission to register, and then only by force of the statute which made the plaintiff's instrument void as against the bank; while both were unregistered, the plaintiff's priority was undisturbed.

The appellant cannot be held liable now unless he became liable by the very act of assignment, nor unless the plaintiff could have filed the bill against him the very moment the assignment was made to the bank.

The appellant could not have given notice to the bank, for he had no knowledge. The important thing for the bank to know was, not merely that the agreement had been signed by appellant, but that it had been acted on, and that plaintiff had, if such was the fact, advanced his money on the faith of it. The appellant could not notify the bank of this, for he did not know it. The plaintiff had not notified him, and it is not now proved as a fact in the cause. The evidence fails to show that the plaintiff ever knew of the existence of the document, or relied upon it in any way.

If the not giving such notice as would subject the bank to the agreement referred to has the effect contended for by the plaintiff, one answer to his claim is, that he has not proved, by an examination of those who represented the bank, or otherwise, that the bank had no such notice, and the evidence of the appellant shews the contrary sufficiently for his exoneration.

If the plaintiff would be entitled to relief notwithstanding the absence of fraud, because the appellant, by his own neglect, had been benefited to the

extent of the plaintiff's mortgage, the plaintiff has failed to prove such benefit to have been received by the appellant. Equity does not relieve against the operation of the registry law except on the ground of fraud on the part of those against whom the relief is to be given. The appellant had a right to assign the mortgage, and the bank to register the assignment. If the plaintiff did not choose to register the instrument under which he now claims, and to thus give notice of it to all the world, he cannot claim to be relieved from the consequences of his own ten years' negligence in giving such notice, by now insisting that it was the duty of the appellant to keep the matter in his mind for all that long period for the plaintiff's benefit, and in assigning to assume (without having been informed) that the plaintiff had acted on the paper, but had not registered it, and to have given notice of these facts to the bank before assigning his own mortgage. The appellant got no advantage from the bank not being informed of the plaintiff's mortgage having priority.

The decisions under the statute 27th *Elizabeth* apply in principle, and are to the effect that a voluntary grantee has no remedy or redress either against a subsequent purchaser, or against the grantor or even against the unpaid purchase money, though on the subsequent transaction all parties had notice of the voluntary settlement; and no matter what covenants the voluntary settlement may contain. The principle of these decisions is, that to give active relief on the first instrument which the statute had declared void, would be to impair the effect of the statute; and the same reasoning applies to the Registry Acts; and the existence of valuable consideration makes no difference. *Kerr* on Frauds (1); *Daking* v. *Whymper* (2).

(1) Pp. 169, 170.

(2) 26 Beav. 568.

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Mr. *Boyd*, Q. C., for respondent:

The reasoning of V. C. *Blake*, in his judgment in the Court of Appeal *Ontario* (1), is correct, and the respondent is entitled as against the present appellant to be paid all the costs of the litigation. The litigation was entirely occasioned by the wrongful act of the present appellant.

The instrument executed by the defendant, being a declaration and contract, that his own mortgage, though prior in point of date and registration, and by consequence superior to the plaintiff's, shall be postponed to the plaintiff's, and shall rank thereafter, it follows that the defendant could obtain no benefit from the lands embraced in the plaintiff's mortgage, or in respect of his equity of redemption, except by redeeming that mortgage. The defendant subsequently assigned his mortgage to the *Quebec Bank* for valuable consideration, the full benefit of which he received. By that assignment he covenanted with the bank that he had in himself good right, full power, lawful and absolute authority to assign the mortgage-money and interest to the bank, and also that he had not at any time theretofore made, done, or executed, or knowingly suffered, any act, deed, matter or thing whatsoever, by means whereof the premises, or any part thereof, were or was charged, encumbered or in any way affected in title, estate, or anywise howsoever.

By virtue of the apparent priority of his mortgage referred to in his agreement, and of the absolute and unqualified assignment which he made, he has actually obtained the full benefit of the mortgage, as a first mortgage prior to the plaintiff's, and so profited to the extent of four thousand dollars and interest, which as between himself and the plaintiff was a preferential charge, but which he has succeeded in postponing in

(1) 5 Ont. App. R. 503.

favor of himself and his assignees, to his gain and the plaintiff's loss.

It was inconsistent with his declaration and agreement, and with his duty in the premises, for the defendant to execute such an assignment. He should have transferred only the interest which, as between himself and the plaintiff, he was entitled to, and not the absolute interest which he appeared to have.

The respondent hoped, that notwithstanding the improper form of the assignment, the defendant might have given such notice to the bank of the existence of the plaintiff's rights as would have preserved those rights, and the bill was originally framed on this hypothesis.

The bank, however, by its answer denied notice, and the present appellant by his answer, so far from setting up that he had given any notice which would in anywise affect the position of the bank or the plaintiff, alleged that he received no consideration for the declaration and agreement, declared that when he made the assignment to the bank he had not in his mind that instrument, and if he had, it would probably not have occurred to him to make any mention thereof to the bank, and submitted that the prejudice to the plaintiff was due to his own neglect in not registering the document.

It would be manifestly unjust, in view of the facts hereinbefore stated, and of the evidence, that the appellant should be permitted to profit by his own wrongful act. It appears that he derived personal profit, by reason of the assigment to the *Quebec Bank*, to the amount due on the plaintiff's mortgage, and the respondent submits that the decree of the Court of Appeal is correct except as to the said costs, as to which the said respondent submits the decree should be amended.

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The following authorities were cited by counsel. *Judd* v. *Green* (1); *Re Phœnix Life Assurance Co.* (2); *Redfearn* v. *Ferrier* (3); *Weir* v. *Bell* (4).

Mr. *Maclennan*, Q.C., in reply.

RITCHIE, C. J. :—

It is manifest that the plaintiff was induced to lend his money on the agreement under the hand and seal of defendant *James McDougall*, that the mortgage to be taken as security therefor should stand as a first charge on the property, and have priority over the defendant's mortgage, which should be postponed thereto, and should rank thereafter, notwithstanding priority of date and registration. Had this been a mere representation made by defendant to plaintiff, with a view to induce him to alter his position and advance his money, and plaintiff on the strength of such representation had acted on such representation and changed his position and advanced his money, it is quite clear that, as between these parties, the party so representing and so inducing the actions of the other party would never be allowed to repudiate the representation, and by his own act, in direct opposition thereto, deprive the party to whom it was made of the benefit thereof, and secure such benefit to himself. How much stronger this case where plaintiff's security was a solemn covenant and agreement under seal. The instrument containing this agreement with the plaintiff, the intending mortgagee, that his mortgage should have priority, amounted to a contract with him, that out of the proceeds of the property, his, plaintiff's mortgage, should be first satisfied. If by reason of defendant's assignment of his mortgage to the bank, without notice of this agreement, the agreement cannot have effect,

(1) 33 L. T. N. S. 596.
(2) 2 Johnson Chy. 441.
(3) 1 Dow. P. C., 50.
(4) 3 Ex. Div. 238.

and thereby plaintiff is deprived of such priority or satisfaction, why, as against defendant, who by his act has prevented his agreement from operating as intended, should the plaintiff be remediless? At the outset it is worthy of remark that the mortgage so to have priority was made to secure money loaned to take up the *Taylor* mortgage which had priority over the defendant's mortgage, that in point of fact defendant was giving up nothing, but in effect simply allowing plaintiff's mortgage to take the place of the *Taylor* mortgage. I think defendant had no right, either at law or in equity or good conscience, to do any act which would militate against his undertaking so made and on which plaintiff acted, and, in an equitable view of the case, still less to do an act by which the priority would not only be absolutely destroyed and plaintiff's mortgage cease to be postponed, but whereby he, the defendant, would in fact directly derive the benefit of the destruction of such priority, and that at the expense of the plaintiff who advanced his money on the strength of such undertaking, and thereby relieved the property from the *Taylor* mortgage; in other words, that the law will not permit the defendant to break his covenant and agreement without holding him responsible and liable for the loss his covenantee may sustain by reason of any such breach.

I am of opinion that no question of registration or non-registration arises in this case, as between plaintiff and defendant, but that the legal or equitable rights, or both, of the parties depend purely on matters of representation and agreement, and, pursuing the equitable view, I do not think defendant should be in a better position in relation to the property after his assignment than he was before, and that though, by virtue of the Registration Acts and want of notice of plaintiff's prior equity, the *Quebec Bank* may have obtained a priority,

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such privilege should not enure to the benefit of the defendant and confer upon him a position he had resigned, and by resigning had induced plaintiff to act and advance his money. It is not, in my opinion, unjust or unreasonable to place the defendant, *James McDougall*, exactly in the position he undertook to assume when plaintiff advanced his money, and in which he would have been had he made no assignment; not to do so, would be, in my opinion, to do a gross wrong and injustice to plaintiff. The property, it is very clear from the evidence, is wholly insufficient to pay the mortgage in the bank's hands; it follows that if defendant gets the benefit of the whole proceeds of the property it must be at the expense of the plaintiff to the amount of his mortgage, $4,000. In what particular is defendant wronged in saying to him: "Your agreement was that out of the proceeds of the property plaintiff should first have his $4,000. As between you and him there is no right or equity, that because the bank, by reason of want of notice of plaintiff's priority, has secured by registration of your assignment, to the detriment of the plaintiff, a priority, you should reap the actual benefit thereof; that in the disposition of the proceeds you shall obtain the benefit of a priority you had by solemn deed surrendered and agreed plaintiff should have."

Had defendant retained the mortgage and under it realized the value of the land, he would have been obliged to account to plaintiff, out of the money so realized, for the amount of plaintiff's mortgage; in other words, plaintiff's mortgage must have been first paid. Why then, because he has transferred the mortgage to the bank, to be held by them for his benefit as a collateral security for certain bills of exchange on which he is liable to the bank as acceptor, should he be in any better or different position, whether he

realized directly as mortgagee, or through the bank as his assignee? In either case, it is for his benefit the proceeds of the land are to be realized. Why should he lose his priority in the one case, when he realizes himself, and maintain it in the other, when the bank realizes for him? In both cases the money secured by the mortgage enures alike to his benefit, in the one case directly, in the other indirectly, through the bank; why then should he not stand in the same relative position towards the plaintiff and the property in the one case as the other? I can see no wrong done to the defendant or hardship imposed on him that he did not himself assume; it is but carrying out his own agreement. All plaintiff asks leaves defendant exactly where he was if he had made no assignment. It takes from him no rights; it burthens him with no new liabilities; the bank's rights are respected, but as between the plaintiff and defendant it leaves them just as they were if the bank had no right; it adds nothing to the rights of the one, it takes nothing from the other. I can see no principle of law or equity by which plaintiff can, with any propriety or justice, be allowed to claim by an act of his against the plaintiff the benefit of a priority he has surrendered and agreed that plaintiff should have, and on the strength of which plaintiff advanced his money; or be permitted by any act of his to repudiate his own solemn instrument under seal and his covenant and agreement therein contained; or to allege that plaintiff's mortgage shall not stand as a first charge, and that his mortgage shall not be postponed and shall not rank thereafter, notwithstanding priority of date of registration, when by such instrument he has declared and agreed the contrary shall be the case. The only case the defendant sets up in answer to plaintiff's claim is by way of

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excuse for assigning, rather than any defence against the claim itself, or justification for the breach of his agreement occasioned by his assigning his mortgage. He seems to me rather to seek to relieve himself from any imputation of moral fraud in assigning the mortgage with a view of defeating his undertaking, and the priority of the plaintiff secured thereby, by alleging that he had no such intention, but that he forgot the instrument he had executed, and so made the assignment without reference thereto, though through his whole evidence he gives us very clearly to understand that when he assigned he was under the impression there was on the property a claim to the amount of plaintiff's mortgage prior to his, and therefore he could hardly in a court of equity claim that he had a right to be benefited by his own destruction of such prior claim. Assuming all defendant says, while it may relieve him from all charge of moral wrong or of any intentional desire to get the better of the plaintiff, does it in law or equity relieve him from the duty of standing in the same position he would have been in had he recollected it, and had not made the assignment at all, or had made it subject to plaintiff's right of priority? Why should he, still retaining his interest in the mortgage, and entitled to the benefit of the proceeds recoverable thereunder, and to a re-assignment thereof in the event of his paying the bill of exchange, as collateral security for which he made the assignment, benefit by his forgetfulness at the expense of the plaintiff? Or, in other words, what answer has he set up justifying a breach of his agreement?

In *Burrowes* v. *Lock* (1), the defendant's answer was that he had forgotten the circumstance complained of. Sir *Wm. Grant* held that this was no defence.

(1) 10 Ves. 470; mentioned in *Pike* v. *Viger*, 2 Dr. & W. 226.

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The plaintiff cannot dive into the secret recesses of his [the defendant's] heart: so as to know whether he did or did not recollect the fact; and it is no excuse to say he did not recollect it.

The mortgage was assigned to the bank as a collateral security, and defendant is still therefore the party beneficially interested in the amount secured thereby; and as the bank, if they had had notice, would have been in equity bound by it, so defendant himself must, I think, continue bound by his deed, and can neither claim nor receive any benefit under his mortgage which would militate against or destroy the priority of plaintiff's mortgage secured to him under such deed. In other words, I think defendant at law must be bound by his agreement, and in equity must be treated as the equitable owner of the mortgage, and so hold his interest in it subject to the priority he, by his deed, guaranteed to the plaintiff's security, and so neither at law or in equity be permitted by an act of bad faith, whether intentional or unintentional, as against the plaintiff, to reap the benefit of a priority he agreed plaintiff should have, and on the strength of which he was induced to advance his money.

No equitable doctrine is better established since the days of Lord *Hardwicke* than that enunciated by that learned judge, that the "taking of a legal estate after notice of a prior right makes a person a *malâ fide* purchaser;" in other words, that a purchaser with notice of a right in another is in equity liable to the same extent and in the same manner as the person from whom he purchases, and therefore, notwithstanding the Registry Acts, there can be no doubt that it is well settled that when a purchaser, by deed duly registered, has notice of a prior unregistered conveyance he will be restrained in equity from availing himself of his purchase on the ground that though the Registry Acts provide that unregistered deeds should be void as against subsequent purchasers, the legislature never could have intended

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to sanction such gross wrong and injustice as is implied in accepting a conveyance of an estate with a knowledge that it had previously been sold to another, and for the purpose of depriving him of the benefit of his purchase; and on a like principle it was held in *Kennedy* v. *Day* (1), that if a party conveys to a person who has no notice of a trust and then takes a re-conveyance, he having notice of the trust, it attaches to him.

In *Schutt* v. *Large* (2) it was decided that a conveyance to a *bonâ fide* purchaser by a purchaser with notice cannot cure the defect of the original purchase, although it may put the property beyond its reach, and that it will attach itself to the title upon a subsequent re-conveyance to the guilty party.

If these are governing principles, it appears to me "*a fortiori*" the present defendant cannot, by his own act, get rid of his agreement and the equity he himself created, and secure to himself a pecuniary gain, at a corresponding pecuniary loss to plaintiff, by destroying a priority established by himself, and so have his own mortgage which he had made a second charge substituted and made a first charge in lieu of that of the plaintiff. I am, therefore, of opinion that both at law and in equity plaintiff is entitled to indemnity. If, by the evidence it had appeared that there was any likelihood of the property not being sufficient to pay the first mortgage of $4,000, then the decree of the Court of Appeal might not be right, but it is clear that the property is much more than sufficient to satisfy the $4,000 security, but not sufficient to satisfy the defendant's mortgage. Therefore, as the bank stands in the shoes of the defendant, and as it is for its interest and therefore for the interest of the defendant, that the property should not now be sold, but held in

(1) 1 H. L. 379. (2) 6 Bar. 373.

view of an increased value, there is no reason that I can discover why the plaintiff should not, as against the defendant, realize his prior security, which, but for the transfer to the bank, he might now do as he would in such case be in the position of a first mortgagee and as such entitled to a sale.

It would possibly have simplified matters if the bank would have consented to a sale, but they may have good and substantial reasons for not doing so, particularly as the property is estimated much below in value the amount of the mortgage held by them. And as it very clearly appears there could be no surplus after paying that mortgage I can see no reason why plaintiff should not now have a decree against the defendant for his mortgage and interest. I had great doubts at the hearing as to the form of the decree. On further consideration, I am not prepared to dissent from the decree adjudged by the Court of Appeal. The decree proposed by V. C. *Blake* would commend itself more to my mind if a sale could be ordered, but as this cannot be done, and as from the evidence it is clear that in the ultimate result any decree the court might make with a view of indemnifying the plaintiff would practically resolve itself into that made by the court of Appeal, I am not prepared to say that that decree ought to be altered, much less reversed. I think, therefore, the appeal should be dismissed with costs.

STRONG, J.:—

The facts of this case, so far as they are material to the present appeal, may be stated as follows: On the 24th of October, 1863, the late *William McDougall*, now represented in this cause by the trustees and executors of his will, *David McDougall* and *John Ludgate*, mortgaged the lands in question to the appellant, *James McDougall*, to secure the payment of the sum of

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$20,000 and interest. There were at this date two antecedent mortgages on the property, one to a person named *Carpenter*, and the other to Dr. *Taylor*. On the 25th January, 1866, *William McDougall* executed another mortgage to the respondent, *David Campbell*, the plaintiff in the court below, on a portion of the property comprised in the mortgage to the appellant, to secure payment of £1,000 and interest in three years. The mortgage to the appellant was registered on the day it bears date, and that to the respondent, *Campbell*, on the 15th February, 1866. On the 7th February, 1866, the appellant executed an instrument under seal, or deed poll, in the words following:

> Know all men by these presents, that I, *James McDougall*, of the city of *Montreal*, miller, hereby declare and agree that a certain mortgage now being made by my brother, *William McDougall*, of *Baltimore*, in the county of *Northumberland*, miller, unto and in favour of *David Campbell*, of *Cobourg*, Esquire, upon his milling and other property near *Baltimore*, as described in a mortgage prior to mine in favour of Dr. *Taylor*, which is registered, for securing to the said *David Campbell* $4,000 with interest, shall stand as the first charge upon the property so described, and that my mortgage which I now hold on the same property shall be postponed thereto and shall rank thereafter, notwithstanding priority of date and registration.

This instrument was delivered to the respondent *David Campbell*, and upon the faith of it he advanced *to William McDougall* the £1,000 which the mortgage was given to secure. This deed poll was, however, never registered. No re-conveyance or statutory discharge was ever obtained from *Taylor*, and the legal estate was outstanding either in him or *Carpenter* when the bill was filed. On the 17th November, 1875, appellant, by an informal instrument, transferred his mortgage to the *Quebec Bank* as collateral security for the payment of certain acceptances of his held by the bank, amounting in the aggregate to £20,000, and subsequently on the 17th March, 1876, he executed a formal deed of transfer for the same purpose. This last

mentioned deed was registered on the 24th April, 1876. It is alleged that the property is insufficient to pay off both the plaintiff and the *Quebec Bank*. The respondent *Campbell* filed his bill alleging notice of his mortgage to the *Quebec Bank* at the time they obtained their assignment, insisting that in case the plaintiff should fail to obtain priority over the bank the appellant was bound to indemnify him, and praying that he might be declared entitled to priority in respect of his mortgage over the *Quebec Bank*, and that the property might be sold and the encumbrances paid off in due order of priority. The *Quebec Bank* by its answer denied the notice alleged. At the hearing of the cause before the Chancellor of *Ontario* the plaintiff failed to prove notice to the *Quebec Bank*, and as the plaintiff had not by his bill offered and did not at the hearing submit to redeem the bank, the bill was dismissed with costs, the Chancellor holding that the appellant was not liable to indemnify the respondent against the consequences of his loss of priority caused by his omission to register the instrument of the 7th February, 1866. From this decree the respondent *Campbell* appealed to the Court of Appeal for *Ontario*, and that court affirmed the decree so far as related to the question of priority between the respondent *Campbell* and the *Quebec Bank*, but directed that the appeal should be allowed as against the present appellant, *James McDougall*, and that the decree should be varied by ordering him forthwith to pay off the amount due for principal and interest on the mortgage to the present respondent *Campbell*, together with his costs of the original suit and of the appeal. From that order, the appellant, *James McDougall*, has appealed to this court.

No question of evidence arises before this court, but the case as here presented is purely one of law as to the

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equitable rights of the appellant and the respondent, *David Campbell*, upon the facts already stated. The grounds on which the Court of Appeal seems to have proceeded were, that the loss of priority by the respondent is attributable to the act of the appellant in assigning his mortgage to the bank without notice of the respondent's rights, and at all events that the priority acquired by the bank having made their security more beneficial, this was an indirect advantage to the appellant, and that therefore it was just and reasonable that he should be ordered to pay off *Campbell's* mortgage.

I am unable to see that there is any foundation in law for either of these propositions. The appellant has, so far as I can see, done nothing which makes him liable to the respondent *Campbell*, either *ex contractu* or *ex delicto*. The effect of his transfer of the mortgage of 1863 to the *Quebec Bank* was innocuous as regards the plaintiff. The priority gained by the bank was not through any act of the appellant, for the assignment of the mortgage only operated to pass to the bank such title and right of priority as the appellant himself had. The bank upon the execution of the assignment stood exactly in the position of the appellant,—they acquired no priority or advantage over *Campbell* by reason of the absence of notice to them of the deed of 1866, giving *Campbell* priority over the appellant, and until the registration of their assignment they were as much bound by that deed as the appellant had been. In short, the transfer to the bank, though without notice, had no greater effect on the respondent's rights than it would have had if it had been made expressly subject to the priority which had previously been conceded by the appellant to the respondent. That this is a correct view to take of the effect of the assignment by itself, apart from the subsequent operation of the registry laws, is, I think, clear

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when it is considered that the legal estate was outstanding in *Taylor* or *Carpenter*, whose mortgages preceded the appellant's, and therefore a mere equitable estate passed to the bank under the transfer, so that between the respondent, *Campbell*, and the bank, both being equitable encumbrancers, the precedence of their encumbrances depended on the arrangement which had been effected by the deed of February, 1866, just as it had previously depended as between *Campbell* and the appellant, whose rights, and whose rights only, the bank, as the purchasers of an equitable estate, acquired under the assignment.

The priority which the bank subsequently obtained by registration of their assignment whilst the instrument of February, 1866, remained unregistered in the hands of the respondent, *Campbell*, cannot be imputed to any act or conduct of the appellant, but resulted exclusively from the operation of the Registry Act upon the neglect of the respondent to register a deed which formed an important part of his title as mortgagee. That the deed of February, 1866, granting priority to the respondent was a deed affecting lands, and as such requiring registration under the Con. Stats. of *U. C.*, cap. 80, sec. 17, the statute in force at the date of its execution, as well as under the statute of *Ontario*, 31 *Vic.*, cap. 20, the Registry Act, under which the assignment to the bank was registered, and so liable to become fraudulent and void under either of these acts by the prior registration of a subsequent deed affecting the same lands, is a proposition too plain to be disputed. Neither can it be contended that the deed of February, 1866, was one not susceptible of registration in consequence of the omission to set out the parcels to which it related in the body of the instrument itself, for it is clear that a deed referring to lands described in another deed, as in the present case, could have been

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registered in a memorial properly framed under the first mentioned act, and can now be registered at full length under the later statute.

If, however, this deed had not been a deed requiring registration within the Registry Acts, it would have made no difference as regards the present appellant; the consequence would have been that the bank would have gained no priority, and the respondent, *Campbell*, would have been entitled to be first paid off out of the proceeds of the sale, and would have had no occasion to seek indemnity from the appellant, who in that case would have been equally entitled to relief against the order appealed from as he is in the view which I take.

For these reasons, I am of opinion that the loss which the respondent has sustained of the preference which had been given to his mortgage, and in respect of which I concede he was a purchaser for value, is not to be imputed to any breach of contract, or to any wrongful or inequitable act or omission on the part of the appellant, but entirely to the provisions of an Act of Parliament operating on the respondent's own negligence. That any obligation rested on the appellant to obviate the possible consequences of the respondent's omission to register, would be equivalent to saying that it was incumbent on every grantor to register the deed, a proposition surely not to be sustained, more especially since it would interfere with the right of the grantee to retain his conveyance unregistered if he thinks fit to do so.

Then, if the appellant cannot be said to have broken any covenant or agreement, or to have been guilty of any illegal misrepresentation or concealment, upon what principle can he be said to be liable, merely because he has accidentally acquired an advantage under the provisions of a statute? I concede, of course,

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that if the estate was a sufficient instead of a scanty security, and the derivative mortgage to the *Quebec Bank* did not absorb the whole amount of the original mortgage, as between the appellant and respondent, the latter would be entitled to priority of payment out of the proceeds of a sale. This, however, does not depend on any personal liability of the appellant, but results from the deed of February, 1866, by which the appellant postponed his interest, and which is still binding on the appellant as regards the estate, though as between the respondent and the *Quebec Bank* it has been avoided by the Registry Act.

I can see no ground upon which the appellant can be made responsible to the respondent for the loss which he has sustained by the operation of the registry laws which would not apply with very much greater force to a voluntary settlor who avoids the settlement by a subsequent conveyance to a purchaser for value In that case it has been held that the grantee claiming under the voluntary deed has not only no right against the settlor personally, but cannot even claim a lien on the purchase money. And the reason given for this is, that to hold otherwise would defeat the policy of the law, the statute of 27 *Elizabeth* having enacted that the prior voluntary deed is to be deemed fraudulent and void in favour of the second purchaser.

Then, is not the same reasoning *a fortiori* applicable here? The Registry Acts have avoided unregistered deeds against later registered deeds in order to carry out the policy of the act, which is that all deeds should be registered, and surely it would tend to defeat that policy if a purchaser unwilling to register could obtain indemnity agains the penalty imposed by the statute from one who derived an advantage to be ascribed entirely to the effect of the statute, apart from any act or omission of his own.

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In short, I think the argument, which seems to me a conclusive answer to the second position taken by the Court of Appeal, may be summed up by saying that any benefit which has accrued to the appellant, having been given to him by the law, and by the law alone, no court of justice ought to take from him that which he has so acquired.

Even if I had come to the same conclusion as the Court of Appeal, I should still have thought their order premature. It does not appear to me that the evidence is sufficient to warrant the conclusion that there can be possibly nothing left available for the respondent. I think the proper decree in that point of view would have been to have directed all accounts to be taken and a sale, leaving the ultimate liability of the appellant to be dealt with on further directions.

I am of opinion that the order of the Court of Appeal should be reversed, and the Chancellor's decree restored, with costs to the appellant both here and in the Court of Appeal.

FOURNIER, J., concurred with the Chief Justice.

HENRY, J. :—

From the evidence in this case, it appears that *William McDougall*, a brother of the appellant, was, in 1866, the owner of a mill and other real estate near *Baltimore*, in the county of *Northumberland*, upon which he had executed a mortgage to a Dr. *Taylor* for four thousand dollars, which was duly registered. Subsequent to the making and registry of that mortgage he executed a second one to the appellant (*McDougall*) on the 24th of October, 1863, which was registered on the same day.

In 1866, the mortgagor applied to the respondent for the loan of four thousand dollars to pay off the first mortgage to Dr. *Taylor*, which he agreed to give on a mortgage to himself, provided the appellant would

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undertake to admit that mortgage when executed to hold the same relative position to his mortgage as Dr. *Taylor's* then occupied. To this the appellant agreed, and before the advance of the four thousand dollars by the respondent and the delivery of the mortgage to him executed under his hand and seal, an agreement and covenant to and with the respondent, that the mortgage being made by his brother (*William McDougall*) unto and in favor of the respondent "upon his milling and other property near *Baltimore*, as described in a mortgage prior to 'his,' in favor of Dr. *Taylor*, which is registered, for securing to the said *David Campbell* four thousand dollars, with interest, shall stand as first charge upon the property so described," and that his mortgage, which he then held on the same property, should "be postponed thereto, and rank thereafter, notwithstanding priority of date and registration."

With the respondent's money the mortgage to Dr. *Taylor* was paid off and discharged.

The interest on the respondent's mortgage was paid up to the 25th January, 1877. The bill claims the four thousand dollars and three hundred and eighty-five dollars for interest due at the commencement of the suit.

The appellant, in 1876, assigned his mortgage to the *Quebec Bank*, in consideration of bills of exchange held by the bank for an amount equal to the mortgage he held, and for which bills he was liable, and the assignment was registered a few days afterwards. It is not alleged or shown that the bank had any knowledge of the appellant's agreement and covenant with the respondent. It is shown the mortgaged property is not more than sufficient to satisfy the mortgage assigned to the bank, and if the respondent has no recourse upon the appellant his claim will be probably lost. The money which is the foundation of that claim the

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respondent was induced to advance solely on the faith of the appellant's covenant, and as between the parties we are asked to decide that it is worthless. By its true interpretation it is not only a warranty that the respondent's mortgage shall have priority to the appellant's, but that it should stand as a first charge on the property.

The appellant, in his answer, denies, for reasons given, that he was guilty of any moral fraud when he assigned the mortgage to the bank in not communicating the position he occupied with the respondent in regard to it. He committed no fraud, legal or moral, upon the bank, because he gave them a good conveyance, but he was guilty of a legal fraud upon the respondent by failing to make such communication. The substance and spirit of his covenant required him as far as he dealt with his mortgage to preserve the priority of the respondent's mortgage, and having failed in his duty to the respondent he claims an acquittance from his covenant, by resting the only defence he attempts to make in his answer on the failure of the respondent to register it. The registry of documents effecting interests in lands, besides other objects, is intended to operate as a notice to subsequent parties, and the statute makes no provision by which a failure to register would invalidate instruments between immediate parties to transfers or agreements. A mortgagor could not, as between himself and his first mortgagee, who, by neglecting to register his conveyance, had lost his lien through the means of a second mortgage executed to another, set up that negligence as a defence to his convenant in the first mortgage to repay the amount of it.

McDougall was bound to fulfil his convenant, and it would be no excuse to say that he had forgotten it when making the second conveyance. He testified that he

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was not aware his covenant had been acted upon by the advance of the money by the respondent. He, however, executed it, knowing it was intended to be acted on. He knew, as the covenant shows, that the respondent had agreed to advance the money, and that the mortgage was being prepared, and he was bound at his legal peril to enquire and ascertain that it had not before putting it out of his power to fulfil it. With all deference to the learned Chancellor, I think the case of *Slim* v. *Croucher* (1) is in these particulars quite in point.

The covenant was at least a warranty against the acts of the covenantor himself, and how can he, by his own wrongful act in violation of it, claim exemption from it. He warranted that the respondent's mortgage should have priority over his own, and he does an act which prevented that priority. His answer to the respondent is: I acknowledge the breach of the warranty, but if you had registered the covenant I could not have broken it. Such a defence cannot, in my opinion, be for a moment considered. Suppose that the appellant, when he assigned the mortgage, was unable to pay the damages arising from the breach of his covenant, by that act his conduct would be justly called fraudulent By his covenant he had induced the respondent to advance his money, and by his subsequent act he nullifies the security upon which the money was given. If he did so wilfully it was a moral as well as a legal fraud. He received from the bank the consideration of $20,000, when he was bound to have known his interest in the mortgage, as against the respondent's claim, was but $16,000. He got, therefore, $4,000 of the respondent's money, having got that amount over and above his proper interest in the mortgage.

The respondent, under the pleadings and evidence,

(1) 2 Giff. 37.

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is, in my opinion, entitled to a decree against the appellant for that amount with interest at the rate stated in the respondent's mortgage, from the date of the assignment, less the amount paid up to the 25th January, 1877, with costs.

The bank is entitled to our judgment. As the respondent's action is not to redeem, and the bank had no notice of the lien of the respondent, and paid the full consideration for the mortgage, the respondent, I think, can have no decree in his favor as to the bank. A second mortgagee can tender the amount of a first mortgage and enforce an assigment of the first to him, but I know of no law under which a second mortgagee by legal proceedings can force a first one to sell. The bank then, I think, is entitled to the costs of their defence. It is proved that under a covenant in the respondent's mortgage, the mortgagor was bound to keep $4,000 permanently insured on the mortgaged property. It appears that after his death the executors on one occasion failed to pay the premium which the respondent's agent paid on his own account. I think the respondent should also have a decree against the appellants *David McDougall* and *John Ludgate* the executors of *William McDougall*, for fifty dollars, the amount so paid, with costs

The decree should, I think, provide that on payment of the amount due on the mortgage, with the costs herein, the respondent shall be required to assign his mortgage to the appellant, *McDougall.*

GWYNNE, J.:—

During the argument, and for some time since, I was, I confess, much impressed by the argument of the learned counsel for the appellant.

Some passages in the judgments of some of the learned judges of the Court of Appeal who pronounced

the judgment against which the defendant *McDougall* has appealed, seemed to me to support the impression made upon my mind. The Chief Justice, at p. 514 of Vol. 5 of the Appeal Reports, says:

> Putting the case on the highest grounds for the plaintiff, there was negligence on both sides, and I think that most persons would be inclined to designate that of the plaintiff as more gross and inexcusable than that of *James McDougall*.

Mr. Justice *Patterson*, at p. 513, says:

> Here there is no formal contract by *McDougall* to do anything. When he signed the paper he had done all that he was to do. The mischief to the plaintiff arose from his own neglect to register the instrument, and that neglect has been the occasion of the litigation.

And I confess, as it appeared to me, the occasion also of the damage sustained by the plaintiff, and regarding the case in that light I could not well see how a man who had done all he had contracted with another to do, could be made liable to reimburse that other damages sustained by his neglect to do something which, if done, would have prevented his sustaining the damage of which he complains. But upon a more careful consideration of the terms of the instrument executed under the hand and seal of *James McDougall*, which I agree in thinking, in view of the circumstances under which, and the purpose for which, it was executed, must be treated as the covenant of *James McDougall* to and with the plaintiff, I am of opinion that even if it were correct to say that the covenantor, by signing the paper, "had done all that he was to do," it is not correct to say that all was done that he covenanted should be done, or that he has kept his covenant and for this reason, as it appears to me, the defendant may be made answerable for the damage sustained by the plaintiff. The covenant so made with the plaintiff is "that a certain mortgage now being made by my brother, *Wm. McDougall*, in favor of *David Campbell*" (the plaintiff) "shall stand as first mortgage on the property" (mortgaged) "and that my mortgage, which

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I now hold on the same property, shall be postponed thereto and shall rank thereafter, notwithstanding priority of date and registration."

Now, the only time when the priority here covenanted for could be asserted or given would be upon some proceedings being taken in court to obtain payment of the mortgages, or of either of them, out of the land mortgaged; and the covenant of *James McDougall* is not qualified by any condition that, upon that occasion arising, the mortgage then held by him should still be held by him; the covenant is absolute, that upon a question arising as to priority between the mortgages, whenever arising, the plaintiff's mortgage, although subsequent in date to that held by *James McDougall*, shall have priority over the latter, which shall be postponed to the plaintiff's. The occasion has now first arisen for calling for the fulfilment of that covenant, and *James McDougall*, by his own act of assigning his mortgage without securing to the plaintiff the priority covenanted for, has incapacitated himself from securing to the plaintiff that priority which *McDougall* contracted that he should have, and his assignee is, by *James McDougall's* act, in a position to refuse, and does refuse, to let the plaintiff have the benefit of *James McDougall's* covenant. This covenant is therefore broken, and it is immaterial whether the plaintiff could or could not have registered the covenant, or whether by so doing he could have secured himself. *James McDougall's* covenant is broken, and the damages awarded are the natural consequence of the breach of that covenant. Upon this ground I think the decree can be sustained, and that the appeal must therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *Mowat, Maclennan & Downey.*

Solicitor for respondent: *Sydney Smith.*