1879

*Jan. 21, 22.

*April 15.

WILLIAM JOHNSON TAYLOR.....APPELLANT;

AND

ADAM HENRY WALLBRIDGE.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Principal and Agent—Trustee and cestui que Trust—Laches.

In 1847, the Plaintiff, *W. J. T.*, before leaving *Canada*, conveyed certain lands, in which he had an interest as assignee of a contract to purchase, to his brother, *G. T.*, one of the Defendants.

In April, 1851, *G. T.*, in anticipation of a suit which was afterwards brought by one *C.* against *W. J. T.* in relation to the lands in question, without the knowledge of his brother, re-assigned the property to him, and having paid the balance of the purchase money, a deed of the lot issued at *G. T.'s* request to *W. J. T.*, as such assignee. In October following a power of attorney was sent to, and executed by, *W. J. T.*, who was then in *California*, in favor of *G. T.*, to enable him (*G. T.*) to "*sell* the land in question, and to *sell* or *lease* any other lands he owned in *Canada*."

In 1856, *G. T.* conveyed the property to *W.*, the Respondent, who had acted as solicitor for *W. J. T.*, and had full means of knowing *G. T.'s* position and powers, for an alleged consideration of $1000, and *W.* immediately reconveyed to *G. T.* one-half of the land for an alleged consideration of $200. In 1873, *W. J. T.* returned to *Canada*, and in January, 1874, filed a bill impeaching the transactions between his brother and *W.*, seeking to have them declared trustees for him.

Held,—(Reversing the judgment of the Court of Error and Appeal and affirming the decree of Vice-Chancellor *Proudfoot*, *Strong* J., dissenting,) that *W. J. T.* was the owner of the lands in question, that he had not been debarred by laches or acquiescence from succeeding in the present suit, and that the transactions between *G. T.* and *W.* should be set aside.

APPEAL to the Supreme Court of *Canada* from a judgment of the Court of Appeal for the Province of *Ontario*,

*PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry and Taschereau, J. J.

affirming an order of the Court of Chancery of *Ontario*, dated 2nd February, 1876, in a cause in the said Court of Chancery between *William Johnson Taylor* (Appellant) Plaintiff, and *George Taylor*, *Adam Henry Wallbridge* (Respondent), and *George Simpson*, Defendants.

In this case Plaintiff's bill sets forth: that in 1851 he was seized in fee simple, or well entitled to the north half of lot No. 8, in the 2nd Concession of the Township of *Thurlow*, and being out of *Canada*, he executed a power of attorney to *George Taylor*, dated 11th October, 1851, authorizing him "to sell all" the said land, as also to act as his attorney "in the sale or leasing of any lands of which" he was the owner in the Province of *Canada*, known as *Canada West;* that in the year 1856 one *Joseph Canniff* exhibited his bill of complaint in the Court of Chancery against Plaintiff, which Plaintiff believed alleged that *Canniff* had some estate, &c, in the said lands, and registered under said bill *a lis pendens* against said lands, and *George Taylor*, as such attorney and agent of Plaintiff, defended against said bill by *Lewis Wallbridge* and *Adam Henry Wallbridge*, co-partners and practicing solicitors; that under the said power *George Taylor* pretended to convey by indenture of grant, dated 29th December, 1856, the said land to Defendant *Wallbridge*, for the expressed consideration of $1,000, and said *Wallbridge*, by indenture of even date, conveyed back to *George Taylor* one half of the same, viz: the north seventeen acres and the south thirty-three acres of the said north half of said lot, for the expressed consideration of $200.

That Plaintiff left *Upper Canada* before 1851, and remained out of *Canada* continuously until October, 1873, when, for the first time, he returned to *Canada;* that the said power of attorney was executed by him in *California* and sent to *George Taylor* to enable him to

1879

TAYLOR v. WALLBRIDGE.

act as trustee and agent for Plaintiff in the management and sale of the lands and premises therein mentioned. That the conveyance to Defendant *Wallbridge*, and the conveyance back to *George Taylor*, were "made in pursuance of a colorable and collusive agreement and understanding between the Defendants, to defraud Plaintiff out of said lands and to divide the same between the Defendants, both of whom at the time held a fiduciary position towards the Plaintiff—the one as agent and the other as solicitor." That Defendants had, since the said pretended conveyances, bargained, sold and conveyed some portions of said lands to different parties, all which, so far as the abstract title of the said lot in the Registry Office showed (and Complainant had no knowledge of any other sales or conveyances thereof), Plaintiff was willing, and offered, to confirm the same. That Defendants had received and appropriated to their own use divers large sums of money, the proceeds of such sales, and neglected and refused to account to Plaintiff therefor and to pay same over to him.

That since Plaintiff's return to *Ontario*, *George Taylor*, as Plaintiff was informed and believed, executed, without any consideration whatever, an indenture of grant of part of said lands to *George Simpson* for his natural life, and Plaintiff alleged that the said *George Simpson*, before the execution of the said indenture, was well aware, or had actual notice of Plaintiff's rights and interests in said land; and Plaintiff submitted that said power of attorney did not warrant and empower Defendant, *George Taylor*, to grant, convey, and lease said lands to *Adam Henry Wallbridge* and *George Simpson*, and that the pretended consideration mentioned in the deed to *Adam Henry Wallbridge*, if paid at all, which Plaintiff denied, was grossly inadequate to the value of the said north half of the said lot; and Plaintiff prayed:—

1. That the Defendants might be declared Trustees for him of the said lands, premises and moneys.

2. That an account might be taken of the parcels or portions of the said lands and premises sold or conveyed, or leased, as aforesaid, and of the moneys which they received or ought to have received therefor.

3. That they might be ordered to convey and assure, by proper assurances with all necessary parties, the remaining or unsold portions of the said lands and premises to the Complainant.

4. That the Defendants might be ordered to account to Complainant for the moneys received by them, or either of them, or which should have been received by them, or either of them, for the said parcels or portions of said half lot so sold and conveyed, and for the rents, issues and profits which they received or ought to have received from the said lands and premises, with interest.

The Defendant *George Taylor*, in his answer, after setting forth that his mother purchased the said lands from King's College, and her connection with the said lands, states that she afterwards assigned her interest in said lands to him, in consideration of which he paid her the sum of $50, and that afterwards, in the year 1851, he assigned his interest in the said lands to the Plaintiff, setting forth the circumstances under which he alleges this was done.

He admits receiving the power of attorney.

He admits the suit by *Canniff* against Plaintiff, in whose name the title to said lands then stood, but alleges that he defended it, not as attorney and agent for Plaintiff, but on his own behalf, as the person beneficially entitled to said lands.

He alleges that the conveyances from himself to *Adam Henry Wallbridge*, and from *Adam Henry Wallbridge* to himself, were made immediately after the

1879

TAYLOR v. WALL-BRIDGE.

determination of that suit, in pursuance of an agreement previously entered into between his Solicitor, *Adam Henry Wallbridge*, and himself, the particulars of which he sets out.

He denies collusive agreement with Defendants to defraud Plaintiff of lands; admits that he has sold certain portions of the lands and received the purchase money; that about 15 years ago he did agree to give Defendant *Geo. Simpson*, his and Plaintiff's uncle, a life lease of about 15 acres of land in consideration of a nominal rent, and he then entered into possession, and that he, *George Taylor*, has since executed a life lease to him.

Has always believed that Plaintiff had no title and never had any to said lands, except under the deed from the King's College to him, which, he submits, gave Plaintiff no beneficial interest in lands, but merely made him a trustee of the legal estate for him, *George Taylor*, and he submits that the legal estate was properly conveyed by him, as Plaintiff's attorney, to Defendant *Adam Henry Wallbridge*, but if it should be held that the legal estate did not pass to *Adam Henry Wallbridge* by said conveyance, and the same still remains in Plaintiff, he submits that Plaintiff ought to be declared a trustee of the legal estate for him, and ordered to convey the same to him by a good and sufficient deed. *George Taylor* further submits that he is a purchaser for value, and contends that Plaintiff never paid anything, and would never have had any claim had he, *George Taylor*, not taken the deed from King's College in his name.

He further submits that in any event he is entitled to a lien on said lands for the purchase money so paid by him.

Adam Henry Wallbridge, by his answer, after setting forth the result of inquiries as to the land before the same came to *Jane Taylor*, says:

That said *Jane Taylor*, on 3rd March, 1832, contracted in her own name with the Chancellor, President, and scholars of King's College, for the absolute purchase thereof in her own proper name.

That on the 26th Nov., 1839, *Jane Taylor* assigned the contract of purchase to Defendant, *George Taylor* ; on the 30th October, 1841, *George Taylor* assigned the same to Plaintiff ; on the 9th November, 1847, Plaintiff assigned same to *George Taylor* ; on 12th April, 1851, *George Taylor* assigned same to Plaintiff ; on or about the said month of April, 1841, a deed was issued by King's College in the name of Plaintiff, *William Taylor*.

That he, *Adam Henry Wallbridge*, furnished the money to pay the amount due the college, and the same was transmitted to *Toronto*, in the name of *George Taylor*, with instructions to have the deed made out in Plaintiff's name.

That before the time of the last mentioned transfer to Plaintiff, he had left *Canada* for the purpose of going to *California*, and he remained away from *Canada* until some time during last year.

Submits that Plaintiff could not have known, except by report or letter, that the land had been so transferred in his name, and he paid nothing to the college for the land.

Submits that the land, notwithstanding the title stood in the name of Plaintiff, was, in fact, the property of *George Taylor*, and that Plaintiff never, until within a short time, so far as he knows, or has been informed, set up any title thereto, or in any way claimed the same. on the contrary, Plaintiff, shortly after deed was made to him by the College, transmitted to *George Taylor* the power of attorney to enable Defendant, *George Taylor*, to dispose of the land.

Submits that land was the property of *George Taylor* and not of Plaintiff, but stood in Plaintiff's name, with-

1879

TAYLOR v. WALL-BRIDGE.

out the Plaintiff's knowledge until informed, &c., and that Plaintiff was trustee for *George Taylor*, or of himself, *Adam Henry Wallbridge*, who paid the money.

That he received a deed from *George Taylor*, executed under said power of attorney, for good and valuable consideration paid by him therefor, and he claims to be an innocent purchaser for value, and denies collusion or intention to defraud charged in bill.

That *George Taylor* and he have been in possession of land 20 years and upwards; and he claims the benefit of the statute of limitations. That Plaintiff has acquiesced in his title by lapse of time and otherwise, and he is estopped from denying the title given under the power of attorney.

That the title is a registered title, and the deed under the power of attorney is also registered, and he claims the benefit of the registry laws. That he has sold part of the land to one *John Hyslop* and *M. Thompson*, who are interested in the suit and necessary parties.

Submits, if any secret trust or understanding between Plaintiff and *George Taylor*, he is not chargeable therewith or thereby, as he received his deed under the authority given by Plaintiff and without notice of any trust.

The following exhibits were fyled in the suit:—

EXHIBIT "P."

Letter from *W. J. Taylor* to the Bursar of King's College, 28th November, 1842, as follows:

"*Belleville*, 28th November, 1842.

"SIR,—I have become the purchaser of north half of Lot No. 8, in the 2nd concession of *Thurlow*, from *Jane Taylor*, the original purchaser thereof from King's College. I am now able to pay £25, which I will do if I can secure such terms as will enable me ultimately to own the lot. I wish to know the longest time you can

give me for the payment of the balance, and whether the deed can come out in my name upon producing the assignment from *George Taylor* to me.

"Your obedient servant,

"WILLIAM JOHNSON TAYLOR,

"By his Agent, *L. Wallbridge.*"

"Please address *W. J. Taylor, Belleville.*"

"Are U. E. rights taken in payment? If so, I can pay down."

"W. J. TAYLOR."

Address: "*H. Boys*, Esq., Bursar King's College, *Toronto.*"

Receipt, dated 7th July, 1853, and signed by *G. Taylor* and *A. H. Wallbridge*, for £90 5s. on account of purchase money of half lot 8, which, he alleges, he agreed to sell him for £215, *Wallbridge* to bear half expense of the suit now going on respecting said half lot in Court of Chancery and Queen's Bench, the remaining five hundred dollars to be paid this fall. If suit in Chancery does not terminate successfully, then each party to sustain half the loss, and *Wallbridge* is not then to pay the $500.

EXHIBIT "R."

Receipt to *George Taylor*, as follows:—

"UNIVERSITY OFFICE,
"*Toronto*, April 14, 1851.

"Received from *George Taylor*, the sum of one hundred and forty-three pounds seven shillings and a penny currency, in payment of the following sum due to the University of *Toronto*, on the north half lot 8, second concession of *Thurlow*.

Balance of principal	£60	0	0
do. of interest	68	10	0
Costs	14	16	4
Postage			9
	£143	7	1

"ALAN CAMERON,
"*Bursar, University.*"

1879

TAYLOR v. WALL-BRIDGE.

EXHIBIT "S."

Receipt to *George Taylor*, as follows:

"UNIVERSITY OFFICE,
"*Toronto*, April 24th, 1851.

"Received from *George Taylor*, the sum of two pounds fifteen shillings currency, in payment of the following sum due to the University of *Toronto*, on north half lot eight, second concession of *Thurlow*.

Fee for Deed.....	£	15	0
Assignment of Registry.....	2	0	0
	£2	15	0

"ALAN CAMERON,
"*Bursar, University.*"

EXHIBIT "T."

Letter of receipt to *George Taylor*, as follows:

"UNIVERSITY OFFICE,
"*Toronto*, April 15th, 1851.

"SIR,—I enclose a receipt for your remittance by cheque on Commercial Bank of £143 7s 1d in full of purchase money, &c., of the north half lot No. 8, second concession of *Thurlow*. The deed will be made out and forwarded to *William Johnson Taylor* as soon as possible on receipt of fee of fifteen shillings for the deed, and £2 0 0 for registering four assignments.

"I am, sir, your obedient servant,
"ALAN CAMERON,"
"*Bursar.*"

John Taylor, father of *William* and *John*, was original lessee of land from the Crown. Lease expired in 1826.

John Taylor died, leaving a will by which he nominated his wife, *Jane Taylor*, his executrix, and his son *John* his executor. The will is dated 14th December, 1824.

John Taylor, the son, died, leaving *Jane Taylor*, his mother, surviving him. In March, 1832, *Jane Taylor*

paid the rent then in arrear. On the 3rd March, 1832, she, while executrix, contracted in her own name with the Chancellor, &c., of King's College to whom land had been transferred, for the absolute purchase thereof in her own name. On the 26th November, 1839, *Jane* assigned this contract of purchase to Defendant *George Taylor*. On 30th October, 1841, *George Taylor* assigned same to Plaintiff *William J. Taylor*. On the 9th November, 1847, *William* assigned same to *George Taylor*. On the 12th April, 1851, *George* assigned same to *William*. On the 24th April, 1851, King's College deeded same to *William Taylor*. On 11th October, 1851, *William* sent *George* a power of attorney in these words :

"Know all men by these presents, that I, *William Johnson Taylor*, at present of *Carson's Creek*, County of *Calaveras*, State of *California*, *United States of America*, but formerly a resident of *Kingston*, in that part of Her Britannic Majesty's Dominion, known as *Canada West*, hath made, constituted and appointed, and by these presents, doth make, constitute and appoint *George Taylor*, of *Belleville*, in that part of Her Britannic Majesty's Dominion, known as *Canada West*, my true and lawful Attorney for me, and in my name and behalf to sell all that certain tract or parcel of land, known as lot number eight, second concession of the Township of *Thurlow*, in the *Victoria* District and Province of *Canada*, aforesaid. As also to act as my Attorney in the sale or leasing of any lands of which I am the owner in the said Province of *Canada*, aforesaid. Hereby ratifying and confirming the act or acts of my said Attorney.

"In witness whereof, I have hereunto set my hand and seal at *Carson's Creek*, as aforesaid, this eleventh day of October, one thousand eight hundred any fifty-one.

"Signed and Sealed in presence of.

"(Signed) J. ALDHAM KYLE.

"(Signed) WM. J. TAYLOR."

1879

TAYLOR v. WALLBRIDGE.

On 29th December, 1856, *William*, by his attorney, *George*, in consideration of £250 sells and conveys to *Adam Henry Wallbridge* the land in dispute—north ½ of lot 8. On the 29th December, 1856, *Adam Henry Wallbridge*, in consideration of £50, sells and conveys to *George Taylor* the north 17 acres and the south 33 acres of the north ½ of lot 8.

The following exhibits also were fyled in the suit:—

Answer of *William J. Taylor*, dated 22nd November, 1852, in chancery suit of *Canniff* v. *Taylor*, and sworn to by *George Taylor*.

Affidavit on production, made by *George Taylor* in same suit, dated 30th June, 1853.

Copy of decree in same suit, dated 13th June, 1856.

Deposition taken *vivâ voce* of *George Taylor* in suit of *Canniff* v. *Taylor*, 15th May, 1856, and also depositions of *J. W. D. Moodie* and *T. J. W. Myers* in same suit.

Judgment roll in ejectment in suit of *Doe* v. *Fairman*, on verdict for Plaintiff; *William Taylor* comes into Court; possession prayed for and granted.

The other material facts of the case and the evidence relating to the transfer of the lot in question by the King's College, are hereafter given at length in the judgment of the Chief Justice.

The case came on for examination of witnesses and hearing before Vice-Chancellor *Proudfoot* at *Belleville*, on the 10th day of November, 1874, and the Court gave a decree in favor of the Plaintiff.

The cause then came on before the Court of Chancery by way of re-hearing, and on the 2nd February, 1876, the Court made the following order:

"1. This Court doth order that the said decree be and the same hereby is reversed as against the said Defendant, *Adam Henry Wallbridge*, with costs of such

re-hearing to be paid by the Plaintiff to the said Defendant forthwith after taxation thereof.

2. This Court doth further order that the Plaintiff's bill of complaint be and the same is hereby dismissed out of this Court as against the Defendant *Adam Henry Wallbridge*, with costs to be paid by the said Plaintiff to the said Defendant forthwith after taxation thereof.

3. And this Court doth further order that the deposit in Court of forty dollars, paid in by the Defendant, be forthwith paid out to him.

4. And this Court doth further order that the Plantiff do forthwith repay to the said Defendant *Adam Henry Wallbridge*, any amount which the said Defendant may have paid to him on account of the costs of this suit, or otherwise under the said decree payable by the said Defendant to the Plaintiff.

On appeal to the Court of Appeal for *Ontario*, this order was affirmed with costs.

Mr. *Bethune*, Q. C., and Mr. *George D. Dickson*, for Appellant:—

The beneficial property was in *William Johnson Taylor*; and Vice-Chancellor *Proudfoot*, who saw the Plaintiff, the Defendant *George Taylor*, and the Defendant *Wallbridge*, all of whom were examined before him as witnesses, and the evidence of all of whom is most material, was in a better position to form a judgment upon the facts than the majority of the Court of Appeal in *Ontario*, and the latter Court should not have disturbed the finding of the Court of first instance upon the facts.

The evidence shows that prior to the 28th November, 1842, the Plaintiff had purchased the land from the Defendant, *George Taylor*, and on the 28th November, 1842, applied to King's College to have his purchase recognized, and this was done.

1879

TAYLOR v. WALLBRIDGE.

In 1847 the Plaintiff expected to go to *California*, and to enable the Defendant *George Taylor* to procure the deed from King's College, and to manage the property for Plaintiff, conveyed the property to him. After the execution of the conveyance, a Bill was filed in Chancery against the plaintiff by *Joseph Canniff*, setting up an agreement to sell the land to *Canniff*, and charging that the transfer by the Defendant *George Taylor* to the Plaintiff was in fraud of this agreement, and asking for specific performance of it. The Defendant *George Taylor* answered this Bill in the name of and as the agent of the Plaintiff; and, in the answer, states in substance that he applied for and got the conveyance as *agent* for the Plaintiff, and the transfer to the Plaintiff were *bonâ fide* and for consideration. The Defendant *George Taylor*, who is the Sheriff of the County of *Hastings*, has been ill for a number of years, and his memory has become impaired; but in 1856 was in perfect mental health, and was examined as a witness in the suit of *Canniff* v. *Taylor*. On the occasion of his examination in that suit he swore in the most positive terms that he had no interest in the suit if the Plaintiff was then alive, and that he assigned the land to the Plaintiff—that this was *bonâ fide*, and not to avoid payment of the claims of creditors.

It is alleged by Respondents that the conveyance to *Wallbridge* was executed in pursuance of the bargain contained in the receipt of the 7th July, 1853, signed by *A. H. Wallbridge*. But such a bargain was not within the scope of the agent's power. It was substantially a bargain, as carried out, to divide the property between the Defendant *Wallbridge* and the Defendant *George Taylor;* and the power of attorney set out in Plaintiff's bill was obtained from him under the pretext of being required to enable the Defendant *George Taylor* to manage the Plaintiff's property in *Canada*,

but in reality for the express purpose of enabling the Defendants *Wallbridge* and *Taylor* to divide the Plaintiff's land between them, and carry out the fraudulent scheme they had conceived.

The power of attorney was given by the Plaintiff to the Defendant *George Taylor* in 1851, and it was under this power of attorney that the land was conveyed to Defendant *Wallbridge*, who re-conveyed half of it to the Defendant *George Taylor*. At the time of the suit of *Canniff* v. *Taylor*, the Defendant *Wallbridge* was solicitor for the Plaintiff, and he cannot be a purchaser for value without notice, and to hold that Defendant *Taylor* was the beneficial owner, would be to enable them to profit by their own fraud.

There was no resulting trust here. This was not the case of a purchase by a stranger in the name of a trustee. This was a purchase by an agent in the name of his principal, and he cannot be heard against the principal to say that it was otherwise. In such a case the presumption of a resulting trust does not arise. The payment here was not proved to have been made with the money of *George Taylor*.

If the assignment was made by the Defendant *George Taylor*, intending to vest the property in the Plaintiff, then the purchase would be intended to have been completed for the benefit of the Plaintiff, and there would be no resulting trust. There is in the evidence no intimation made to the College that in any sense the purchase was intended to have been made for the benefit of *George Taylor*.

The Defendants cannot either defend under the statute of limitations, because they took possession in the Plaintiff's name in 1856, under the ejectment which *George Taylor* had obtained against *Canniff*.

No delay can be imputed to the Plaintiff until his return, and he filed his bill promptly thereafter.

1879

TAYLOR v. WALLBRIDGE.

The learned counsel relied upon the following cases and authorities:

Greenwood v. *The Commercial Bank* (1); *Brown* v. *Smart* (2); *Marquis of Clanricarde* v. *Hennesy* (3); *Lewis* v. *Thomas* (4); *Sturges* v. *Morse* (5); *In re Butler's Estate* (6); *Blair* v. *Brownley* (7); *Brown* on Limitations (8); *Cole* v. *Lease* (9); *Dart* on Vendors (10).

Mr. *Fitzgerald*, Q. C., for Respondent :—

It must be admitted that at one time, viz., in 1847, the Appellant conveyed his whole estate and interest in the lands in question to *George Taylor*. The consideration of £150, named in the conveyance of the 29th November, 1847, is to be presumed to have been paid by *George*, and thenceforward *George* was and continued to be the beneficial owner of the property in dispute. There is no evidence that the Appellant provided any part of the purchase money paid to the College, nor was it shown that *George* paid it by way of a loan to him, and the consideration of 5s., named in the transfer from *George* to *William*, dated 12th April, 1851, was only nominal.

Upon reading all documents, it is clear that *George* was the owner, and that when *George*, without *William's* knowledge, got the deed issued in *William's* name, *William* became a bare trustee for *George* by the principle of resulting trust.

There must be evidence to rebut the presumption of law giving rise to the resulting trust; *Lewin* on Trusts (11). The evidence of *George Taylor* in the *Canniff* v. *Taylor* suit, relied on by the Appellant here, does not do so. The

(1) 14 Grant 40.
(2) 1 Grant's Er. & App. 148.
(3) 30 Beav. 175.
(4) 3 Hare 25.
(5) 24 Beav. 541; 3 DeG. & J. 1.
(6) 13 Equity Ir. p. 451.
(7) 5 Hare 542.
(8) 510.
(9) 28 Beav. 562.
(10) Vol. 1, p. 186, Vol. 2, p. 656.
(11) 6th ed., 150.

conveyance to *William* was a contrivance at the time which was honest to defeat *Canniff*, and *George's* statement in that evidence that he had no interest in that suit must be considered in the light of all the surrounding circumstances and the evidence in this case —and is, after all, only "evidence," and does not in any view amount to "estoppel." The meaning that must be attached to it is only that he had put himself in his brother's power as to this land by the conveyance of 12th April, 1851, and taking the University deed in his name, that his brother *William* had control of the property till he got some instrument giving that control back to him (*George*), and that he had done so under legal advice and was speaking of the conveyances according to the advice he had received as to their operation. It must be assumed on the evidence that *George* promptly communicated what he had done to *William* who had no previous knowledge thereof, and asked him for the power of attorney, and that *William* assented. The return of the power of attorney from *California* in October, 1851, having regard to the length of time then required for communicating with a person there, supports this view. Were it otherwise the Appellant could have shown it to be so. *Washburn* v. *Ferris* (1).

George Taylor, being then the beneficial owner of the land, it was only necessary that he should obtain from the Appellant the power of attorney of October, 1851, which he did obtain, to enable him to deal with it for his own use. That power of attorney is sufficient in point of form to support the conveyance to *Wallbridge* of 1856.

In 1856, *George Taylor*, as equitable and beneficial owner, and also as the duly constituted attorney of

(1) 16 Grant 76.

1879

TAYLOR v. WALLBRIDGE.

William, in whom was the legal estate, was then competent to and did give a valid title to the said lands to *Wallbridge*, and *Wallbridge* did thereby acquire a valid title in fee simple to one half of the said lands, viz., 50 acres.

Even if *William* was at the time of the sale and conveyance to *Wallbridge* the owner of the said lands, yet by virtue of the said power of attorney he gave to *George Taylor* full power to sell and convey the said 50 acres to *Wallbridge* in fee simple in the manner in which he did sell and convey the same to said *Wallbridge*, and *William* is now estopped from denying *Wallbridge's* title to the said 50 acres, and if there were any doubt the court would now order a conveyance from *William*, the trustee of the legal estate.

The evidence, moreover, shows that *Wallbridge* was a purchaser *bonâ fide* for value, without notice of any defect in the title of *George*.

As to *Wallbridge* being incapacitated from buying, the rule seems to be that the onus is cast upon the solicitor to prove that he paid full value, and the evidence shows that he did pay full value, for he only bought one half.

In any event the laches and acquiescence of the Appellant disentitle him to any relief as against *Wallbridge*, and by analogy to the rule under 25 *Vic.*, c. 20, the absence of a Plaintiff from the country will not enable him in a Court of Equity to open up the transaction in question after so long a time, viz., 21 years after it took place, and 26 years after the Plaintiff left the country.

The Respondent relies also on the Statutes of Limitations as a complete bar to Plaintiff's claim.

After such a lapse of time the onus is upon the Appellant to establish his case beyond all reasonable doubt, and this he has plainly failed to do, and in con-

sidering a decision on an appeal, as in this case, the Higher Court will not interfere unless they are perfectly satisfied that the decision of the subordinate Court of Appeal is wrong.

Per Lord *Wensleydale*, *Mayor of Beverley* v *The Attorney-General* (1).

Mr. *Bethune*, Q. C., in reply :—

On 27th November, 1856, we have an order of the Court of Queen's Bench granting possession to the Appellant of the land in question, and any possession prior to that date cannot be invoked by Respondents.

The evidence, moreover, does not clearly prove that *George* did not pay the *University* with *William's* money, for we know that *George* had money the moment he exercised his power of selling *William's* lands. It is not a case where the evidence is clear and distinct as in *Washburn* v. *Ferris* (2). As to a resulting trust, see *Perry* on Trusts (3). There is only evidence of £20 consideration paid by *Wallbridge*. It is not a fair consideration, as he admits the property to be worth £215. The evidence in the suit of *Canniff* v. *Taylor* is conclusive, for the issue then was the same as at the present time ; was there any interest in *George* then ?

THE CHIEF JUSTICE, after stating the facts of the case, hereinbefore set out, proceeded as follows :

The Plaintiff relied on his documentary title, and Defendant claimed that the land was *George Taylor's*, held by *William* for him ; and, if not *George's*, then the sale and conveyance by *William*, by his Attorney *George*, vested title in him. *William* denied that *George* had any interest in the land, and contended that the power of attorney did not authorize *George* to sell and

(1) 6 H. L. 332. (2) 16 Grant 76.
(3) Vol. 1, sec. 162, p. 180.

1879

TAYLOR v. WALLBRIDGE.

convey the land, and, if it did, that the sale was not *bonâ fide*, but colorable with a view to defraud him, or, if *bonâ fide*, that *George* could only sell for cash, and not on the terms and in the manner it was sold.

It is not disputed that, however the right to the property came to *Jane Taylor*, the mother, she, on the 3rd March, 1832, contracted with the authorities of King's College for its absolute purchase in her own name, and by virtue of which the deed was subsequently made to *William Taylor*, as assignee, by the college.

On the 29th Nov., 1839, *Jane Taylor* assigned her interest in the land to Defendant, *George Taylor*. The deed by which this was accomplished expresses to be in consideration of £100 paid by *George Taylor*, the receipt of which is acknowledged, and the instrument contains a covenant by *George Taylor*, "that he will pay all the remaining instalments that are due on the said land to the scholars or corporation of King's College (though the deed does not appear to have been executed by *George Taylor*), and *Jane Taylor* thereby requested that the deed for said land should be made out and issued in the name of *George Taylor*, upon his paying the remaining instalments due on said land.

On the 30th Oct., 1841, *George Taylor* assigned by a similar instrument alleging the same consideration of £100, his interest in the said land, and though containing a similar covenant by *William Taylor* as to paying instalments, it was not executed by *William Taylor*.

On the 29th November, 1847, by a similar deed, containing a like covenant on part of *George Taylor*, *William Taylor*, in consideration of £150 to him paid by *George Taylor*, transferred to him the said contract and lands. This deed is executed by both *William Taylor* and *George Taylor*.

On the 12th April, 1851, *George Taylor*, by an instrument under seal, in consideration of five shillings to him

paid by *William Taylor*, re-assigned and set over the said contract, and all benefit and advantage to be derived therefrom; to hold the same and the lands therein mentioned to him and his heirs, and requested that the deed for the same might issue to him. This document was witnessed by *L. Wallbridge* and the Defendant *W. H. Wallbridge*. And on the 24th April, 1851, the Chancellor, trustees and scholars of the University of *Toronto*, duly conveyed the said lands to the Plaintiff *William Taylor*.

This placed the legal title in the said lands, on the 24th April, 1851, in the Plaintiff, and this title remained unchanged until the 29th day of December, 1856, when a deed of that date was made and executed by *W. J. Taylor* by attorney *George Taylor* to *Adam Henry Wallbridge*, and which was registered 3rd January, 1857.

This deed purported to be made by and between *William Johnson Taylor*, of the City of *San Francisco*, in County of *Calaveras*, and State of *California*, but formerly of the Town of *Belleville* and County of *Hastings*, gentleman, of the first part; *Adam Henry Wallbridge*, of the Town of *Belleville* and County of *Hastings*, Esquire, of the second part; and witnesseth that the party of the first part for and in consideration of £250 of lawful money of *Canada*, to him in hand paid by the said party of the second part, had given, granted, bargained, sold, aliened, released, enfeoffed and conveyed all and singular that certain parcel or tract of land and premises, situate, lying and being in the Township of *Thurlow*, in the County of *Hastings*, being composed of the north half of Lot Number Eight, in the Second Concession of the Township of *Thurlow* and County of *Hastings*. To have and to hold in fee simple, with all appurtenances subject to original reservations. *Covenants for seizen, good right and title to convey, quiet possession, freedom from incumbrances and further assurance.*

1879

TAYLOR v. WALLBRIDGE.

On the same 29th Dec., 1856, by a deed dated on that day and registered the said 3rd Jan., 1857, and purported to be made by and between *Adam Henry Wallbridge*, of the Town of *Belleville*, and County of *Hastings*, Esquire, of the first part; and *George Taylor*, of the Township of *Sidney*, and County aforesaid, Esquire, of the second part, it was witnessed that the said party of the first part, for and in consideration of the sum of fifty pounds of lawful money of *Canada*, to him by the said party of the second part in hand well and truly paid, had given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed unto the said *George Taylor*, his heirs and assigns, the north seventeen acres and the south thirty-three acres of the north half of lot number eight, in the second concession of the Township of *Thurlow*. Same covenants as in last deed.

The authority for making the deed of the 29th Dec., 1856, to *Adam Henry Wallbridge* is alleged to be under the power of attorney set out at length in the Plaintiff's bill, dated 11th Oct, 1851, whereby *William J. Taylor* constituted and appointed *George Taylor* his true and lawful attorney for him and in his name and behalf to sell all that certain tract or parcel of land known as lot No. 8, second concession of the Township of *Thurlow*, in the *Victoria* district and Province of *Canada*, as also to act as his attorney in the sale or leasing of any lands of which he was the owner in the said Province of *Canada*.

The legal title from the College being thus shown to have been in *William*, the first question we have to consider and determine is, was *William* under the deed from the College the beneficial as well as the legal owner, or was he only clothed with the legal estate for the benefit of *George*, the real owner? If *William* was a mere trustee, vested with the legal estate for *George*, the bene-

ficial owner, and the transfer of the property was made to Defendant *Wallbridge*, by and at the instance of *George*, under the power of attorney from *William*, it is obvious *William* could have no right to have such disposal of the property interfered with, whatever may have been the consideration for, or agreement or arrangement between *George* and *Wallbridge* under which such transfer was made, and consequently could have no ground for maintaining the present suit.

We must, therefore, enquire, first, who was the beneficial owner under the deed from the College? If *George*, the case ends. If *William*, then was the transfer under the power a good and valid conveyance of *William's* interest to *Wallbridge?* As the documentary title indicates no trust the burthen of establishing that the property was held in trust necessarily rests on the Defendants. At the outset I can safely say that I have never, that I can remember, been called on to consider a case where the evidence was so contradictory and unsatisfactory as in this case—the witnesses not only contradicting one another, but each, more or less, contradicting himself; and it is through this mass of conflicting statements that we have to grope our way to a conclusion.

After giving this case more than ordinary consideration, I am constrained to the conclusion that the weight of evidence establishes, with as much certainty as one could expect to feel in a case where the whole evidence is so unsatisfactory, that the property in question was transferred by *William* to *George* on the eve of a contemplated departure from *Canada* to enable *George*, as his agent, the better to look after his interests and obtain for him the title from the College. It is not disputed that he had left *George* as his agent in charge of all his other large real estate, which *George* says amounted to $20,000, and that, as *William* says, he

1879

TAYLOR v. WALLBRIDGE.

handed his papers to *George* on leaving. On 30th June, 1853, *George* himself swears as to the papers connected with this property, as follows:

William left *Canada* in December, 1850, and then left with me (*George*) the contract for purchase of the deed and the assignment to me.

This was in the controversy when *George* was putting *William* forward as solely interested in the land.

And *William* says:—

I made a transfer of some property to *George* when I thought of going West; I had obtained an assignment at one time of the right my brother had in the land in dispute. I recollect the assignment from myself to *George*, which was made afterwards. I executed this to him as my agent.

This statement of *William's* appears to me to be as strongly confirmed as it very well could be by *George*, who on the 3rd March, '53, swore as follows:—

The assignment from *William Taylor* to me was without consideration, and made to me because he (*William*) was going to *California*.

And again, on the 15th May, '56, after testifying that he could not tell why *Wallbridge* advised him to assign to his brother, says:—

I had no reason, but that I had not paid my brother.

At another time he says:—

I think it was done so that I might be a witness.

I think the weight of evidence likewise establishes that the re-transfer was not for the purpose of vesting the legal title in *William*, with a beneficial or resulting trust in favor of *George*, to enable *George* to appear as a disinterested and competent witness, as suggested by *George*, when, in fact and in truth, he was the reverse, but was made because *William* was the benificial owner. This suggestion of *George*, that the transfer was made to enable him to be a witness is at variance with his answer: for in paragraph 2 he says he cannot now

say why he assigned to Plaintiff; and it is not confirmed by *Wallbridge*, who assigns an entirely different reason. I am unwilling to think, without the clearest evidence, that any respectable solicitor could have advised a transfer for such a purpose, with a view, in contemplation of such evidence being given and the land thereby recovered, that a claim should be subsequently set up of a beneficial interest in witness.

On principles of public policy, I should hesitate long before I should be willing to admit that a party, who claims a resulting trust on the ground that he made a transfer of the property with a view to enable himself to testify in relation to it as a disinterested and competent witness in a suit pending, or in contemplation, in which the title to such property was in issue, and in such suit put himself forward as such disinterested witness, and was accepted on testifying that he had no interest in the property, could be allowed to set up what, if his contention is correct and successful, can, I think, be looked on in no other light than a fraud on the Court. I am, by no means, as at present advised, prepared to say that a party who has so put himself forward as having no interest in the property ought to be permitted to invoke the aid of the Court so deceived, or any other Court, to assist him in obtaining the fruits of his deception, by declaring that he then was and still is the beneficial owner, and that the owner put forward by him as the absolute owner had no beneficial interest in the property whatever, but that the title merely stood in his name as trustee. To give judicial sanction by giving efficacy to such a proceeding seems to me repugnant to the due and proper administration of justice. Weak and impotent, indeed, it appears to me, would be the law if a man could deal thus treacherously with its tribunals, and then constrain the same tribunals to give him the benefit and

1879

TAYLOR v. WALLBRIDGE.

advantage of such treachery; but it is unnecessary to discuss this question further, as I cannot think that, if both *Wallbridge* and *George* knew that this suit, if gained, would inure to the sole individual benefit of *George*, the transfer could have been advised by *Wallbridge*, or made by *George*, under the idea that he should, as he certainly did do, appear in Court, offer himself as a disinterested and competent witness, and qualify himself as such by swearing on the *voir dire* that he had no interest in the property. Nor am I able to bring myself to the conclusion that the transfer was made for the reason assigned by *Wallbridge*. He says the assignment was made to *William* at his suggestion in view of litigation. On this all important point in his case we would naturally expect as part of his case a very clear and circumstantial account of this transaction, and satisfactory reasons assigned for advising a client to place his property in the name of a person of whose very existence at the time there was no certainty. But in his direct examination we find no particulars whatever given, and it is only on his cross-examination we find the reasons brought out.

It is well to bear in mind that the assignment from *George* to *William* was on the 12th April, '51, and the deed from the College to *William* on the 24th April, '51, and that Mr. *Wallbridge* says the litigation took place after deed was obtained from the College, the first steps of which were taken by him, for he says:—

> I first commenced an action against *Fairman* at the suit of the Plaintiff.

And then, on his cross-examination, he gives his reasons for advising the transfer. He says:—

> I think the bargain (that is the bargain between himself and *George Taylor*) was made with *George Taylor* about a month or six weeks before the deed issued from the College; no litigation was going on; I supposed it could be got without litigation at that time.

I did not find out that we could not get the property without litigation until the month of May. Up to this time I thought we could get it without litigation.

And he then says:

It was in view of litigation with *Canniff* that I advised the transfer to he made to the Plaintiff. Although I supposed there would be no litigation, I had the transfer made with a view to litigation. It was the litigation with *Canniff* that I sought to avoid. * * * By taking the deed from the College, I thought *Canniff* might prosecute for taking a title in litigation. The litigation I meant that was to be avoided by taking the deed from the College to *William* was the *qui tam* action against *George Taylor*.

I do not regret being forced to say that I cannot accept this statement as affording a satisfactory or credible reason for suggesting the transfer. I think Mr. *Wallbridge's* memory must have failed him with respect to this. It is difficult for me to understand how any man, lay or legal, could be induced to believe, without corroborative evidence of an overwhelming character, that any sane lawyer could advise a client to put his property in the name of another with a view to litigation, when he thought that the property could be got without litigation, and when he supposed there would be no litigation, and put the title in the name of a person away in *California*, of whose whereabouts, or even of whose existence, there was at the time no certainty, and that, too, in the year 1851, when access to and communication with *California* was so different from what it is at this day; nor can I bring my mind to believe that without the knowledge or consent of *William*, a responsible man, having apparently large real estate in the country, though absent therefrom, any solicitor would suggest, or any honest man would act on the suggestion, that to enable the actual owner of land to escape a *qui tam* action, he would put the title in the name of an absent man, and so make him liable to the very prosecutions from which he desired his own client

1879

TAYLOR v. WALLBRIDGE.

to escape, and subjecting him to consequences the real owner feared to meet, and that this same solicitor should, without any directions or authority from the party whose name had been so dealt with, institute and defend suits in his name, based on a title so acquired, and thereby expose this absent and innocent man, not only to a possible *qui tam* action, should he return to the country, but involve him in litigation as Plaintiff and Defendant, at law and in equity—thereby subjecting him and his estate to possible penalties and heavy costs. A proceeding so unusual, and, if I may be permitted to say so, to my mind so unjustifiable, I cannot accept as the reason why the transfer was made from *George* to *William*, when I find in the evidence reasons assigned and testified to at the very time the transactions took place, when all was fresh and with surrounding corroborations, which afford a solution so much more reasonable and satisfactory. On the contrary, then, I think the reason for the transfer was, as *George* himself at one time swears, because he had not paid his brother for the land. In other words, as I construe his statement, because the land rightfully belonged to his brother. This view, without compromising anybody, fully justifies the advice of Mr. *Lewis Wallbridge*, which, as *George* says, was this:

> I swore in that suit that my brother was the owner, at the advice of Mr. *Wallbridge;*

And I think the facts will justify the assumption that, in view of all the circumstances, a transfer was made to *William*, and so the legal title placed where the benificial interest was, and thereby *George* was in a position honestly and truthfully to testify that he had no personal interest in the matter, and so was not interested in the result of the suit. That this was so, is somewhat corroborated by the fact that neither of the Defendants called Mr. *Lewis Wallbridge*, who must have

known exactly what the transaction was, for *George* says :

The answer in the *Canniff* suit was made at the advice of Mr. *Lewis Wallbridge*;

And strongly, by the direct evidence of *George*, who, speaking of the litigation in 1851, says :

The facts at the time were much fresher in my memory then than they are now. I was also examined as a witness before the Court at *Toronto*. The evidence I then gave was true, to the best of my belief. I swore, in that suit, that my brother was the owner, by the advice of Mr. *Wallbridge*. I swore, in that suit, if my brother was living, I had no interest; if dead, I would be interested as his heir-at-law;

And more strongly by the sworn statements of *George*, made so far back as 1852 and 1856, when the facts, he says, were—and we well know must have been—so much fresher in his memory.

On the 22nd November, 1852, he went before the Court in the suit of *Canniff* v. *Taylor* as the avowed agent of *William Taylor*, and so expressed to be on the face of the answer, and as such agent defended the suit and caused to be put in *William's* answer these words (to the truth of which he swore), viz. :

Defendant (*William*) by his agent, applied for and obtained the deed of said land from the College and *paid* the balance of principal and interest due the College thereon, as he humbly submits and insists he had a perfect right to do.

It is true, on 29th June, 1874—22 years after—in paragraph 3 of his answer in this suit, he is made to swear :

I defended the *Canniff* suit, not as agent and attorney for Plaintiff, but on my own behalf, as the person beneficially interested in the lands.

And this statement of *William's* interest is put forward, not only in the face of the answer in the *Canniff* suit, but of his sworn deposition made on the 15th May, 1856, in which he says:

1879

TAYLOR v. WALLBRIDGE.

I say, if my brother is dead, I have an interest in the suit; if he is not dead, I have no interest. At present, I am not aware he is dead.

And again:

After the last assignment was made to *William*, I made the payment on the said half lot No. 8 to the College (£148), and obtained the deed for the Defendant (*William*), and in the Defendant's (*William's*) name.

I think I am bound to give credence to these sworn statements, made in 1852 and 1856, in preference to those made in 1874 and later.

There are other circumstances in the case which tend, with considerable force, to confirm the view that *William* was the owner, in addition to the fact stated by *George* that *William* had made several payments to the College, which statement would seem to be accurate, from the fact that the balance paid on 14th April, 1851, on account of principal and interest (£128 10s.), together with what the mother would seem to have paid, would not cover the amount of the purchase-money and interest; and it is not pretended that *George* or *Wallbridge* (if they paid anything) paid more than the amount mentioned in the receipts. The circumstances to which I refer are connected with the power of attorney and deed made under it. The power of attorney appears to me wholly at variance with Mr. *Wallbridge's* contention. His connection with the land he states thus:

George Taylor told me he had a pre-emption for the purchase of certain lands from the *College*. He wanted me to furnish the money and to take a half interest in the land.

And as to the power of attorney, he says:

George had a power of attorney from *William*. He got it at my suggestion. I advised him to do this to get my share of the land.

To accomplish this, *George* would require simply an authority from *William* to convey the dry legal estate. This power neither recognizes any interest of *George*

in the land, nor does it give any direct authority to convey such legal estate; on the contrary, it authorizes *George* to do under it what, if Mr. *Wallbridge* is correct, it was never contemplated he should do, viz., "to sell" this land. But it is not confined to this land; it gives *George* a general power to act as his attorney in the sale or leasing of any lands of which he (*William*) was owner in the Province of *Canada*.

Thus, whilst the inconsistency of the writing with the statement of Mr. *Wallbridge* is established on the one hand, its consistency with the property being *William's* is made apparent on the other.

Looking at the deed to *Wallbridge*, executed under this power, we find the view that the land was the property of *William*, I think, still further strengthened. If the property was really *George's* and had been put in *William's* name, and behind his back, for the sole purpose of accommodating *George* and saving him from possible ulterior consequences, and authority had been obtained to use *William's* name merely to vest in Mr. *Wallbridge* his share, why did Mr. *Wallbridge* insert, or permit to be inserted, in the deed, made only for the purpose of divesting a trustee of a bare legal estate, and vesting it in his *cestui que* trust, or his assignee, covenants on the part of *William* for seizin, good right and title to convey, quiet possession, freedom from incumbrances, and for further assurances. Surely, all this indicates that the power of attorney was intended to accomplish more than Mr. *Wallbridge* would lead us to suppose, and the doings of *George* under it show plainly that he did not so consider it, for he appears to have sold and conveyed under its authority other lands with the full knowledge of *Wallbridge*, who says:

I knew that *George* was selling lots on the hill under power of attorney obtained from *William*. *George* received the monies. I saw the monies paid to him.

1879

TAYLOR v. WALLBRIDGE.

and corroborates with much force the contention of *William*, who, in his bill, alleges that the power of attorney was by him executed while in *California* and sent to the Defendant, *George Taylor*, to enable him to act as trustee and agent for him, the Plaintiff, in the management and sale of the said lands and premises therein mentioned ; and who, in his evidence, on 10th November, 1874, says:

> I sent him the power of attorney because he asked me for it. When I gave him the power of attorney, I don't know that I thought he would sell it. I thought it being a wood lot he might want it to enable him to take care of it.

And which is by no means inconsistent with the statement of *George* that:

> The reason he (Plaintiff) sent me the power of attorney was because he was in debt. I wrote him, I think, for the power of attorney.

And the conveyance under it, not being such an instrument as a bare naked trustee, and one made so without his knowledge or consent, ought to be called on to execute ; but on the contrary, the power of attorney and the deed under it being just such instruments as a purchaser for value would naturally look for from a vendor selling on his own account in his own right, is it not a legitimate inference that the title was as the documents thus indicate ? I may here say, with reference to this power of attorney, I cannot agree with an observation of one of the learned Judges in the Court below that the transactions of April, 1851, though effected in the absence and without the knowledge of the Plaintiff, "were promptly communicated to him."

I cannot discover one tittle of evidence that there was, with the power of attorney, transmitted any particulars whatever. *George* does not say he wrote the particulars, and *Wallbridge* says he never wrote to him, and the power itself, for the reasons I have assigned, affords, to my mind, strong evidence that such was not the case,

or, if they had been, a power consistent with the transaction would have been transmitted for execution by *William*.

The same learned Judge assumes that the power of attorney was drawn in, and sent from, *Cailfornia*; he says the instrument contains internal evidence of having been prepared abroad. Our attention has not been called to any such evidence, and the evidence in this case is directly the reverse. Mr. *Wallbridge* makes it apparent that this power of attorney was drawn in *Canada*, for he says:

> And the power of attoney *was sent* to be executed at my suggestion.

And again he says:

> I never wrote to Mr. *Taylor*; I was instrumental in having power of attorney *sent to him*.

And *William* says:

> I sent $1,000 to him (*George*) in 1851, when he sent the power of attorney.

And he (*William*) says:

> I don't know where the power of attorney was drawn.

Which he must have known, if *George* had not sent it to him to be executed, and if he had had it prepared in *California*. I, therefore, much prefer adopting the conclusion I have suggested, as being perfectly reasonable and natural and involving no imputation of impropriety on any person, supported, as I think it is, by evidence direct and indirect, rather than the suggestions of either *George* or Mr. *Wallbridge*, which are, to my mind, the very reverse. I have dwelt at this very great length on this branch of the case, because I think it the turning point.

Assuming, then, that *William* was the beneficial as well as the legal owner, was there a valid and binding sale and transfer by *William* to *Wallbridge*?

1879

TAYLOR v. WALLBRIDGE.

It has been much pressed on Mr. *Wallbridge's* behalf that the balance due the College was paid by him. It is quite impossible to say with any degree of reasonable certainty who actually advanced the money to pay the balance due the College. *William* did not do it personally, though, if *George's* statement is true, *William* had made two or three payments to the College. *George*, *William* says, (and it is not disputed) was the sole manager of his property in this country ; and it is not disputed that he sold property of *William's* to a very large amount, and it is obvious that large sums from this source, belonging to *William*, must have been from time to time in his hands, an account of which, though written for, *William* could never obtain ; in addition to which, *William* appears to have remitted *George* $1,000 from *California* with the power of attorney, but there is no evidence that he appropriated any of these funds to pay this balance, unless, indeed, such an inference could be drawn from the statement in the answer in the *Canniff* suit, which *George* swore was true :

> That this Defendant (*William*) by his agent, applied for and obtained the deed of the said land, and paid the balance of principal and interest due to the College, as he humbly submits he had a perfect right to do.

If *William*, by his agent, did pay, and that agent had funds belonging to *William* in his hands, the presumption would not be very violent, that the payment was made from such funds. Both *George* and *Wallbridge*, with equal positiveness in some statements, and equal doubtfulness in others, claim to have paid it. But, it seems to me impossible to discover from their contradictory and conflicting statements, whose money went to the College. It is useless to go through or comment on all these different inconsistent statements as to the payment of the money. As everything connected with this payment, apart from the papers, rests on the evid-

ence of *George* and *Wallbridge*, it is only necessary, to show how very unreliable this evidence is (no doubt from failure of memory), to read from *Wallbridge's* testimony. He says:

I paid it to *George Taylor*. I made no entry of it. I knew that *Taylor* swore he paid the money. I think I paid *George Taylor* on account of this land. I can't remember what I paid. I think I paid him £215—the consideration money in the deed. I think Mr. *Taylor* got my brother *Lewis* to send the money to the College. It may have been my money; my impression is it was, but it is so long ago that I can't remember distinctly.

But by whomsoever advanced, the direct testimony of *George* and the written documents show it was transmitted to the College by *George*, for and on account of *William*, for the purpose of obtaining for him the deed, and that the College so understood it is plain, for the Bursar, in his letter to *George* enclosing the receipt for the money, says:

The deed will be made out and forwarded to *William Johnson Taylor* as soon as possible.

If, then, the property really belonged to *William*, I am at a loss to understand how it can be successfully contended that the sale or arrangement, whatever it was, between *George* and *Wallbridge*, and the transfer, under the power of attorney in evidence, to give it effect, can be held to bind *William* or divest him of his interest in the property.

The entire transaction was between *George* and *Wallbridge*, not in reference to *William's* property, but in reference to property they both assumed to belong to *George*, and in which, as they put their whole case, *William* had no beneficial interest. On what principle can such an attempted sale of, or bargain for, *George's* supposed interest or property be now turned into or sustained as a sale of *William's* property? *Wallbridge* purchased, and *George* sold half of his (*George's*) interest in the land. Neither *George* nor

1879

TAYLOR v. WALLBRIDGE.

Wallbridge pretends to say that *George* sold, or proposed to sell, or that *Wallbridge* bought, or proposed to buy, any interest of *William's*. Both repudiated then, and repudiate now, that *William* had any right or interest to dispose of, but acted throughout, and have conducted their defence to this action, on the assumption that *William* had no beneficial interest in the property.

In his answer, *Wallbridge* claims to be an innocent purchaser for value, but, if his evidence is true, it was not of *William's*, but of *George's*, interest; but if these transactions between *George* and *Wallbridge* had had reference to *William's* interest, it seems to me impossible the transactions could stand. I think *George* and *Wallbridge* cannot be separated; the evidence shows, beyond all doubt, that *George* was acting throughout, not only under the advice, but, it may almost be said, under the direction of *Wallbridge* and his brother and partner, and that they were cognizant of all matters connected with the land, and not only advised but controlled their doings in relation thereto, more than *George* himself. It would be a useless waste of time to go through the evidence, in detail, of *George* and *Wallbridge*, and point out the extraordinary and manifold variances and inconsistencies, either as to the time when this alleged sale took place, the terms of the sale, or the alleged consideration. Some idea may be formed by briefly referring to a few irreconcilable statements. *Wallbridge* alleges the sale, or agreement for sale, was before the assignment from *George* to *William*. *William* says it was after litigation commenced, which was after the deed from the College. The written paper which contains, *William* says, the agreement, and is signed by both *George* and *Wallbridge*, and is in *Wallbridge's* handwriting, is dated 7th July, 1853, more than 2 years after the deed from the College, which is dated 24th April, 1851. *Wallbridge* says there

1879

TAYLOR v. WALLBRIDGE.

was no writing in relation to it—that the whole was verbal between him and *George*. The agreement in his own handwriting, and signed by him, is as follows:

7TH JULY, 1853.

Received, from *Adam H. Wallbridge*, the sum of £90 5s. 0d. on account of purchase of one half lot, No. 8, in the second concession of the Township of *Thurlow* and County of *Hastings*, which I have agreed to sell to him for two hundred and fifteen pounds, said *Wallbridge* to bear one half of the expense of the suit now going on respecting said half lot in the Court of Chancery and Queen's Bench, the remaining five hundred dollars to be paid this Fall. If the suit in Chancery does not terminate successfully, then each party to sustain half the loss, and said *Wallbridge* is not then to pay five hundred dollars.

(Signed), G. TAYLOR.
(Signed), ADAM H. WALLBRIDGE.

Wallbridge says the consideration was what he paid the College, and that he made no entry of what he paid. *George* says:

My agreement with *Wallbridge* had not been made before the proceedings were commenced. It was after the proceedings had commenced, and I had got disheartened about the costs that I made the arrangement with *Wallbridge*.

And after the written agreement is brought to light, which is dated 7th July, 1853, and shows an entirely different transaction from any one of those put forward by *George* or *Wallbridge*, he says:

I think the bargain was made before the deed was obtained from the College, and long before this document seems to be signed. I have no recollection whether this contains the bargain between us. I have no recollection that he was to pay me $500 the next Fall. It is in *A. H Wallbridge's* handwriting. I don't know whether I received the money mentioned in the document.

Though he had before stated "I think the agreement or contract with Defendant was in writing;" that he had a copy at home, and had it the previous night; that it was then at home, and that the agreement related to this land.

And when produced, he says:

1879

TAYLOR v. WALLBRIDGE.

The paper writing now produced and shown me is the written agreement with Defendant, *Wallbridge*, and myself. It is signed by Mr. *Wallbridge* and myself.

Wallbridge says:

I think the bargain was made with *George Taylor* about a month or six weeks before the deed issued from the College. No litigation was going on. I made the bargain with *George Taylor* before money was sent to College. My bargain with *George Taylor* was, that I was to pay the College and indemnify him against all costs of suit that might be brought against him respecting the land, and I was to get half the land. * * I do not think there was any memorandum in writing. The litigation took place after the deed was obtained from the College.

At another time, he says:

I paid a balance of a note to *Filliter* to make up the amount of difference between the money I paid the College and the money going to *Taylor*. In making up the account I took the amount of the College money and the amount *Taylor* had paid on chancery suit, and paid the balance on the *Filliter* claim. I never searched my Bank account to see how I paid the money to *Taylor*.

Again, he says:

I paid the money that went to the College. I paid it to *George Taylor*. I made no entry of it. I think I paid *George Taylor* money on account of this land. I can't remember what I paid. I think I paid him £215, the consideration money in the deed.

George says:

Mr. *Wallbridge* paid me no money for the half he got. I conveyed the whole lot to him, and he conveyed back the half to me. This was done at *Wallbridge's* advice. I do not think the money to pay the College was furnished by Defendant (*Wallbridge*.) My remembrance is that I furnished it myself.

And on 15th May, 1856, he swears:

The amount I paid to the College was about £145.

The written paper shows the payment to have been on the 7th July, 1853, and for £90 5s. 0d., instead of £143 7s. 1d., the amount paid the College. Both say nothing remained to be paid. The paper says $500 was still to be paid; and, if *Wallbridge's* account is correct,

he paid the money in 1851; made no entry of it; had no writing to evidence his payment or his agreement in reference to this land, and, therefore, must have continued in that position till 29th December, 1856.

Then, as to this *bonâ fide* purchase for value, it is difficult to understand how any prudent business man of ordinary capacity could make so large a purchase, and on such unusual terms, and pay so much money on account of it, and make no entry of any such payment; take no written memo. of the agreement, or the terms of a transaction of so exceptional a character, and which the law required to be in writing to be binding and effective, and which could not be completed for an indefinite period, and so continue for years without any binding agreement, receipt, voucher or inditia of title, or payment of any kind, or even any entry in his own books; nor is it easy to be understood how Defendants, in the position these parties were—their minds so much at variance as to the particulars of this transaction—should appear before the Court without having examined their books and cash and bank accounts, and exhausted all other means of information calculated to sustain their contention. If they had such means of information, and did not choose to resort to them; or, if they had no such entries and no such accounts, no documents, no books to refer to, they cannot complain, if a transaction conducted so out of the usual and ordinary course of business, and left to rest on evidence so unsatisfactory, is not accepted.

But taking *Wallbridge's* contention in a way the most favorable to him, he has no case. The power of attorney gave no authority to *George* to make any one of the various arrangements spoken of by *George* and *Wallbridge*, and certainly gave no authority to give effect to an arrangement entered into, as *Wallbridge* persists in saying, not only before the title came to

1879

TAYLOR v. WALLBRIDGE.

William from the College, but before *George* assigned to *William*, and, therefore, long before *George* had any authority from *William* to interfere with or dispose of any interest he may have had therein, and certainly the power gave no authority to *George* to convey the whole land to *Wallbridge*, or authority to *Wallbridge* to re-convey half to *George*.

But if the sale was in other respects unobjectionable, the transaction, it seems to me, could not stand. An attorney or trustee for sale is entirely disabled from purchasing the trust property. If *George*, and *Wallbridge* as attorney under him, were acting for *William* in securing the title, in recovering possession and effecting a sale of this property for *William*, they could not sell the property on *William's* behalf to themselves. The rule is now universal, that however fair the transaction, the *cestui que trust* is at liberty to set aside the transaction and take back the property. The law simply will not allow a man to be at the same time a seller and a buyer; therefore, any one intrusted with the sale of another's property, who directly or indirectly becomes the purchaser, commits, *ipso facto*, so far a fraud in the eye of the law that the owner may, at his election, avoid such sale.

In *McPherson* v. *Watts* (1), Lord *Cairns*, Ch., says:

It is here that the pointed observations by Lord *St. Leonards*, in this House, in the case of *Lewis* v. *Hillman* (2), become so very material. They were not observations laying down any new rule of law, for the same principles had already been applied in numerous cases, but what Lord *St. Leonards* said in that case, was this: Take the case of a sale of any kind, which is so fair, so reasonable as to price, so entirely free from anything else that is obnoxious, as to be capable of being supported, yet, if there has entered into that sale this ingredient, that the client has not been made aware that the real purchaser is his law agent—if the purchase has been made in the name of some other person for that law agent—that is a sale which cannot be supported. My Lords, so say I here. Assume, if

(1) L. R. 3 App. Cas. 263. (2) 3 H. L. 607—630.

you please, that in every respect as to price, and as to all other things connected with the sale, this was a sale which might have been supported had the *McPherson* family been told that *Watt* was the purchaser; in my opinion, it cannot be supported from the circumstance that that fact was not disclosed to them.

The defence of the Statute of Limitations is raised by the Defendant's answer.

Chief Justice *Haggarty* says it was conceded by the Respondent, the Defendant, on the argument, that the Statute of Limitations had no application to this case as a bar or otherwise, and I understood it was so admitted on the argument before this Court, but as some doubts have been expressed on this point, it is necessary for me to show why I think the Plaintiff's claim is not so barred.

George says:

I dispossessed *Canniff*, and I went into possession; I cannot tell when.

The means by which he dispossessed *Canniff* was the suit against *Fairman* (*Canniff's* tenant), consequently it must have been after the date of that judgment—27th November, 1856—that he went into possession.

Wallbridge says the land was in possession of *Osborne* (*Canniff's* tenant) when the deed was obtained from the College.

George is examined the 15th May, 1856, and says:

I brought an ejectment against Plaintiff, *Canniff*, in my brother's name, by the advice of *Wallbridge*. The action of ejectment was brought in 1853; that was staid by injunction. *Canniff* is still in possession.

The deed from *W. J. Taylor* by his attorney, *George*, to *A. H. Wallbridge*, is dated the 29th December, 1856, and the bill was filed in this cause on the 25th April, 1874. I cannot conceive how he can claim a possessory interest in this land before the date of the deed to him, and before he had any possession, actual or constructive, and as the judgment in ejectment against

1879

TAYLOR v. WALL-BRIDGE.

Fairman, who held under *Canniff* hostile to all parties, was signed on the 27th November, 1856, and this was the first litigation brought in the name of *William Taylor*, as *A. H. Wallbridge* says by him, to get the possession, and under which possession was obtained, how then can he claim a title by possession before the possession was acquired? From all this, it is abundantly clear that neither *Wallbridge* nor *George* had 20 years possession; so this defence fails.

But it has been urged that the Plaintiff has acquiesced in the sale, and by lapse of time is now estopped from disputing the validity of the sale under the power of attorney. As there never was any sale of *William's* interest in this property, it is somewhat difficult to understand how the doctrine of acquiescence is to be applied to a case of this kind; but suppose it applicable, I am by no means prepared to dispute that, while in cases of expressed trust by act of the parties no time will be a bar, acquiescence for a long time in an improper sale may disable a person from coming into a Court of Equity to set it aside. I am, nevertheless, at a loss to conceive how it can be claimed there was any such acquiescence in this case. Lapse of time can only commence to run from the discovery of the circumstances—until such discovery, or until such reasonable notice of what has happened has been given to the party injured, as to make it his duty, if he intends to seek redress, to make enquiry and to ascertain the circumstances of the case. No man can be supposed to acquiesce in that of which he was in entire ignorance. What are the circumstances under which we are asked to find an acquiescence in this case? The property being the property of *William*, then absent from the country, was, with other large property, placed by him in the charge of *George*, and *George* employed a solici-

tor to assist him in the management and litigation connected with the property. *William* appears, from time to time, to have striven to obtain a knowledge of the state of his property and the doings of his agent, by writing for money and information which he was certainly entitled to, but which he appears to have sought in vain, for it is not pretended that the one or the other was ever sent him. In this state of ignorance as to his affairs, he appears to have returned in October, 1873, and then finds, that while absent, the deed had been obtained in his name, actions at law and equity had been brought in his name, and as the result of such litigations, possession of the property had been obtained in his name; but instead of all this being done for his benefit, he finds that his agent and his attorney in such litigations repudiate his right and his title, and setting up a right in his agent, had under color of a sale, not of his (*William's*) interest, but of an alleged interest of *George*, his agent, divided the property between themselves, by *George* conveying the whole to *Wallbridge*, under an authority from *William* to *George* to sell his (*William's*) property, and *Wallbridge* re-conveying half back to *George*.

This would appear to be the first intimation that the principal had of any act or deed by his agent or attorney inconsistent with his interest or their duty. On the 25th April, six months after discovering the position of his property, he files this bill. Can it be said there has been laches, delay, or acquiescence; on the contrary, I think there has been the greatest promptitude after the facts appear to have come to his knowledge upon which the supposed acquiescence is founded.

But it has been argued that as the deeds from him to *Wallbridge*, and from *Wallbridge* to *George*, were on record, he could have discovered the transactions. This, to me, is simply a monstrous pro-

1879
TAYLOR
v.
WALL-
BRIDGE.

position, as applied to an absent person who leaves an accredited agent behind him to look after his property in his absence, which agent employs an attorney to assist him and represent his principal in Court and out, both of whom he had a perfect right to expect were guarding his interest, and not invading his rights, and both of whom well knew that in his absence any examination of the records by him was simply impossible. To hold that the improper acts of agents or attornies, under the authority confided to them, are to be considered as acquiesced in, because their principal does not cause, during his absence, a constant supervision to be kept over them, would be to enunciate a principle I have never yet heard propounded, and which, I humbly think, would entirely weaken, if not overturn, those principles by which the relation of principal and agent and attorney and client are governed.

Though very unwilling to differ from the majority of the Court of Appeal of *Ontario*, for which Court, I need not say, I have the very highest respect, I cannot avoid the conclusion that the decree of Vice-Chancellor *Proudfoot* was right, and that his decision ought not to have been reversed.

I, therefore, think the appeal must be allowed, the judgment of the Court of Appeal of *Ontario* reversed, and the decree of Vice-Chancellor *Proudfoot*, dated 6th March, 1875, affirmed, with the costs of this appeal, and the costs of the re-hearing, and in the Court of Appeal of *Ontario*.

STRONG, J.:—

The Appellant, by his bill, impeaches a transaction which took place in the year 1851, the bill having been filed in 1874. This lapse of time, though by itself, under

the circumstances of the case, it may have no conclusive effect as constituting either a statutory or equitable bar, ought, at least, to induce the Court to make every fair and reasonable presumption in favour of the validity of a transaction sought to be avoided after such gross delay, and to require strict proof from the Appellant in support of his case. That the Respondent has been prejudiced in his defence by the delay which has occurred is apparent from the fact that the mind and memory of his principal witness, *George Taylor*, has, in this long interval, become so impaired that his recollection of the circumstances attending the original bargain between himself and the Respondent is imperfect and indistinct.

The extraordinary perversion of this property, which was originally a leasehold interest, from the destination of it prescribed by the will of *John Taylor*, who devised it to be divided amongst his wife, his nephew, and such of his children as should reside on the farm—a disposition with which the dealings of his widow and executrix, *Jane Taylor*, in surrendering the lease and entering into a contract of purchase, were entirely inconsistent—calls for no explanation in this suit, for, as the learned Chancellor has observed in his judgment on the rehearing, it was not for the interest of any of the parties litigant to call in question this dealing with the land by *Jane Taylor*, the executrix, since they all claim under her contract of purchase with King's College.

The evidence shows sufficiently that the transfer of the 30th October, 1841, by *George Taylor* to the Appellant, was for value. That the consideration for this sale was $50, both *George Taylor* and the Appellant agree. They differ as to the fact of payment. The Appellant says he paid his brother this sum. *George Taylor* denies this, and in his evidence, both in this

1879

TAYLOR v. WALLBRIDGE.

cause and in the former suit of *Canniff* v. *Taylor*, he swears his brother never did pay him. I think the fair inference from this evidence is in favour of the conclusion, which was arrived at by the majority of the Court of Appeals, that no money was ever paid by the Appellant.

The assignment of the 29th November, 1847, made by the Appellant to *George*, purports on its face to have been an absolute transfer of *William Johnston Taylor's* interest. There is no evidence to show that it was made in trust, or to enable *George* to deal with the property as *William's* agent, except that of the Appellant himself, whose oath in this respect is again contradicted by that of *George*. It is true that no valuable consideration was paid; but, if I am right in assuming that the proof establishes that no part of the price of the previous assignment to him had been paid by *William*, this makes no difference. I deny the proposition that a voluntary assignment, such as this, by itself, warrants the implication of a resulting trust (1); the inference, on the contrary, strengthened here by the fact that the transaction was between persons in the relation of brothers, is that a gift was intended. But, even if there would be *primâ facie* a resulting trust, the implication of such a trust might always be rebutted by the surrounding circumstances.

Then, what have we here? A re-assignment of an executory contract of sale under which no money had been paid by the purchaser, and that, too, a sale of a property of which the price contracted to be paid appears to have been the full value. Under such circumstances, the fair presumption at this distance of time, when we find a re-assignment by the vendee to the vendor, is that a rescission of the contract was in-

(1) *Young* v. *Peachy*, 2 Atkins 254; *Lloyd* v. *Spillett*, 2 Atkins 148.

tended to be effected in an informal manner. All the assignments here are informal, and none of them state the true consideration upon their face. In the case of an ordinary contract of sale, when we find the vendee, six years after the contract, re-assigning to the vendor, no part of the purchase-money having been paid, and the vendor swearing that an absolute assignment was intended, I should think it was out of the question that the transaction itself raised a trust by implication. Then, this leaves it entirely a question upon the evidence, and, I think, the weight of testimony is greatly in favor of *George Taylor's* account of the matter. All the probabilities point to an intention merely to undo the transfer of 1841, so as to revest the interest in the land, under the contract with the College, in the unpaid vendor. It is upon this part of the case, the effect of the assignment of 1847, that, as it appears to me, the only difficulty arises, and I, at first, took a different view of the result of the evidence. Subsequent reconsideration has, however, led me to take the view I have just enunciated, which is, I think, demonstrated to be the correct conclusion in the admirable exposition of, and reasoning upon, the facts contained in the judgment of Mr. Justice *Patterson*.

Then, if the interest in the land was absolutely vested in *George* by the assignment of 1847, I feel no difficulty about the proper result to be attributed to the subsequent transaction, either upon the facts, or as regards the law applicable to those facts. The evidence throws much more light on the facts connected with the assignment of the 12th April, 1851, by *George* to the Appellant, than on the other part of the case. At this date *William* was in *California*, whither he had gone in 1849. No communication was had with him relating to this transfer, and it cannot, therefore, be said for a moment to have had as its basis any con-

1879

TAYLOR v. WALLBRIDGE.

tract or agreement between the brothers. It was entirely voluntary on the part of *George*, and was made, as stated by Mr. *Wallbridge*, at his suggestion, for reasons which he gives. He says :

> By taking the deed from the College, I thought *Canniff* might prosecute for taking a title in litigation. The litigation I meant that was to be avoided by taking the deed from the College to *William*, was the *qui tam* action against *George Taylor*.

At the date of these transactions, in 1851, the penal clauses of the Statute of Maintenance (1) were in full force, and many *qui tam* actions for penalties incurred by dealing with lands in litigation, or the titles of which were in dispute, had been upheld, some under circumstances of peculiar hardship, considerations which soon afterwards led to a legislative enactment repealing those clauses. Much alarm and anxiety in dealing with land in any way in litigation or dispute, although under circumstances to which the Statute could not apply, was, as will be remembered by those engaged in the practice of the law at that time, created by the decisions I have referred to. That the Statute would not have had application, as it clearly would not, since the title to be acquired from the College could not have been a pretenced title within the Statute, makes no difference. The apprehension, though ill-founded, was not at that time altogether unreasonable, and there is nothing incredible, but very much the contrary, in Mr. *Wallbridge's* statement that it constituted the reason for taking the conveyance in the name of the Appellant, *William Taylor*, who, in *California*, would have been beyond the reach of an informer's action for penalties, even if such an action could have been maintained. The object being to take the conveyance in the name of *William*, the assignment was indispensable to attain that end, since

(1) 32 Henry 8, c. 9.

the College officers would not have made the purchase deed to him without a transfer in the established form prescribed and alone recognized by them. The assignment preceded the conveyance by twelve days only, this last instrument being executed on the 24th April, 1851. The money was advanced by *Wallbridge* to *George Taylor*, and paid by the latter to the College.

A power of attorney must have been soon afterwards forwarded to *California*, for it was executed by *William Taylor*, at *Carson's Creek*, in *California*, on the 11th October, 1851. Putting the power of attorney altogether out of the question, the transaction, always assuming that *George* acquired an absolute interest under the assignment of 1847, would have clearly been that of a purchaser paying his own purchase-money and taking the conveyance in the name of a stranger—a transaction which, on the most elementary principles of equity, would have caused a trust to result by implication of law in favour of the real purchaser. The assignment was made merely to satisfy the formalism of the officers of the public body, the College; and the College, in all respects, so far as the law applicable to it is concerned, stood precisely on the same footing as if an ordinary purchaser from a private vendor had paid the purchase-money, and then appointed the conveyance of the land to be made to a third person, without any communication with that third person. As I have said, the legal effect of such a transaction depends on elementary principles which no one will dispute. Then, could the power of attorney in any way detract from the rights of *George Taylor*, if he became, as I maintain he did, by the operation of the resulting trust which arose, the *cestui que* trust of this land, and the true beneficial and equitable owner of the estate. So far from having any such effect, the power of

1879

TAYLOR v. WALLBRIDGE.

attorney materially strengthens the position assumed by the Court of Appeal in this respect. It gave the real owner of the estate power to deal with the bare legal estate which was outstanding in a trustee, and was nothing more than a clumsy mode of attaining the same end which would have been reached by a more artificial process of conveyancing, if *George Taylor*, whom I hold to have been the real purchaser, had taken a conveyance in his brother's name, with a power of appointment in fee limited to himself. I regard the three instruments, the assignment of 12th April, 1851, the purchase deed, and the power of attorney as all parts of the same transaction, the object of which was to vest the legal estate (for the reason given by Mr. *Wallbridge*) in the Appellant for the behoof of *George Taylor*, with a power of free disposition over it reserved in favor of the latter. It was, no doubt, inartificially done, but the science of conveyancing, tested by English models, had not, at that time, attained much perfection in the country districts of *Upper Canada*; and, at all events, we are to judge these impeached transactions by their legal effect and good faith rather than by their symmetry.

I have not noticed the effect of the evidence of *George Taylor*, in the suit of *Canniff* v. *Taylor*. It might have constituted an additional reason for taking the conveyance to *William* that it would, as it was thought, make *George* a good witness in that suit. Certainly, *George Taylor* then swore he had no interest in the land, which was, literally taken, untrue, if I am right in the view which I have taken of the character and effect of the various assignments; but, I think, we find a very sufficient explanation of this in the evidence given by *George Taylor* in this suit after he had entered into an amic-

able compromise with his brother. He says: "I swore to this, because I had made this transfer to him, the Plaintiff." In other words, he says he swore to this statement in ignorance, which, in a layman, might be pardonable, of that provision of the Statute of Frauds which exempts resulting trusts from its operation, and of those judicial decisions of English Equity Courts which have decided that when a man buys and pays his own money and takes a conveyance in the name of another —a stranger—a trust shall result for him who pays. This is all the utmost ingenuity can make of *George Tayor's* evidence, if we accept his explanation, given on his last examination as a witness in this cause, and it seems so reasonable, that I cannot bring myself to reject it; and to bind *Wallbridge* by evidence given behind his back, when he had no right of cross-examination, and was not in any way a party in the cause.

Another point remains to be noticed. It has been put forward as an argument that the deed had, according to the Respondent's own testimony, been taken in the Appellant's name to cloke what was apprehended to be an illegal transaction, and for that reason no trust arises by operation of law. To refute this argument the case of *Childers* v. *Childers* (1) was cited for the Respondent. *Childers* v. *Childers*, so far as I can discover, has no bearing on this objection; but in a case of *Davies* v. *Otty* (2) this precise point arose. There it was held that a conveyance which was made by a party in apprehension of a prosecution for felony, with a view to defeat the forfeiture and escheat of an estate in lands which would have followed a conviction, to a trustee on a secret parol trust to reconvey, should the fact turn out to be that no felony had been committed, did not become absolute and freed from the trust merely

(1) 1 DeG. & J. 482.

(2) 33 Beav. 540; see also *Haigh* v. *Kaye*, L. R. 7 Chy. 469.

1879

TAYLOR v. WALLBRIDGE.

because the settlor had made the conveyance under the influence of a fear which proved to be chimerical, with an intent to defeat the rights of the Crown in the event of his conviction. Here, equally, there was no foundation for the apprehension under which *George Taylor* was advised and induced to take the deed in his brother's name, and consequently there is nothing to obviate his setting up the trust which arises from the payment of the purchase money. Upon these grounds, I am of opinion, that the proper decree was that made by the Court of Chancery on the re-hearing, and affirmed by the Court of Appeal, dismissing the bill with costs.

Had I taken a different view of the facts in regard to what I consider the turning point of this case, the character of the assignment of 1847, I should, notwithstanding, have come to the same conclusion. This appeal, which, in the view of it which I have already stated, depends principally on a single question of fact, would, if the assignment of 1847 is regarded as having been made in trust for the Appellant, and the re-assignment and the conveyance are to be taken as vesting the estate in the Appellant as the true beneficial owner, have turned on questions of law as applied to the transactions between *George Taylor*, as the agent and trustee for the Appellant, and the Respondent. There could, I think, be no doubt but that the power of attorney enabled *George* to sell, and also to perfect a sale by a conveyance in the name of his brother, and that the authority to sell was not confined to a sale in one lot, but authorized a sale in separate parcels. This being so, I should have thought the sale to Mr. *Wallbridge* of one-half the lot in April, 1851, for a price which there is not a word of evidence to show was inadequate—the fact, indeed, so far as there is any proof, being the other way—entirely unimpeachable. For the evidence does not support, what is assumed as a fact in the judgment

1879

TAYLOR v. WALLBRIDGE.

of one of the learned Judges in the Court below, namely, that at the time of the purchase or agreement to purchase by Mr. *Wallbridge* he was the attorney or partner of the attorney, for the Appellant. The only evidence on the point is that of Mr. *Wallbridge*, the Respondent, who says he did not enter into partnership with his brother until Feb. 1, 1853. Therefore, in April, 1851, he was as free to buy as any stranger. It is true that the receipt which constitutes the earliest written evidence of the sale is dated in July, 1853, and that the conveyance to the Respondent was not executed until the 29th December, 1856. *Primâ facie*, no doubt, the contract of sale ought to be referred to the date of the memorandum, but it is only evidence of the agreement, not the agreement itself, and it is quite competent for parties, in order to show that a sale was made at a time when no professional or fiduciary relationship existed, and in order to refute a charge of equitable fraud, to prove by parol testimony that the true contract preceded the date of the written evidence in which it was afterwards recorded. We have, then, a sale to Mr. *Wallbridge* of one-half of this land in April, 1851, at a time when he was under no disability to purchase, as standing in the relationship of solicitor to the vendor. What is there in this evidence which should avoid such a sale? Nothing, except the circumstance that, when the conveyance came to be executed five years after the date of the sale, it was made to include, not only the half of the land which *Wallbridge* had purchased, but also the remaining half which he was to re-convey, and did re-convey, to the vendor's agent and attorney in the matter of the sale. Now, had the original agreement been fettered with this condition, I grant that it ought, if the objection to the sale had been raised in due time, to have constituted a ground for setting it aside. But there is nothing to show that

1879

TAYLOR v. WALLBRIDGE.

it was any part of the agreement, and the memorandum of July does not recognize any such arrangement. If, therefore, it is now to have the effect retrospectively of avoiding the fair, honest and unimpeachable bargain of April, 1851, or of July, 1853, if that is the date which should be assigned to the contract, it can only be on the principle that the Respondent, having concurred with the agent, *George Taylor*, in offending against the rules of equity in carrying out an unimpeachable sale by a conveyance which had the effect of a breach of trust as regards other lands, is to have his own purchase annulled by way of penalty for his concurrence in such a breach of trust in respect of the other lands. The answer to such a position is contained in a simple reference to the rule that a Court of Equity never acts punitively, except in the matter of costs. If the original purchase by Mr. *Wallbridge* was free from the taint of any improper dealing with the lands for the benefit of the trustee, the relief against him, in respect of his concurrence in the breach of trust, was limited to the lands re-conveyed to *George Taylor*.

I have not dwelt much on the legal consequences of the fact that the true date at which to test this transaction is April, 1851, when the original bargain was made, and neither that of the written memorandum nor of the conveyance, because I consider the principle, that a valid contract having been entered into between parties who are, as it is phrased, at arm's length, is not subjected to the rules regulating contracts between solicitor and client, if that relationship should happen to spring up in the interval between the contract and the conveyance, to rest on rules of equity too clear and sound to need demonstration. The other principle, that to show a contract free from equitable fraud, it is allowable to prove that it was concluded at a date anterior to the written instrument by which it is

evidenced, is also, I think, so clear on authority that it would be superfluous to quote cases to establish it.

But there is another consideration which seems entirely to have escaped the observation of one of the learned Judges in the Court below, who lays stress on Mr. *Wallbridge* being the Appellant's Attorney when he purchased. It seems to have been assumed that the incapacity of the solicitor to purchase is absolute. This is clearly not the law. All that the law requires in the case of such purchases—unlike the case of a purchase by a trustee for sale for his own behoof—is that the attorney purchasing shall have withheld from his client, the vendor, no information in his possession which may have influenced him in making the contract, and that he must prove he gave full value (1). There is no suggestion that Mr. *Wallbridge* possessed any information affecting the value of the land which he ought to have communicated; and, as to inadequacy, the only evidence as to value, that of Mr. *Wallbridge* himself, is strong to show that not only was the price as much as the land was worth, but that his purchase has been far from a profitable one. So that, even if we fix the time of the sale at the date of the written memorandum, in July, 1853, when the Respondent had entered into partnership with his brother, the Appellant's solicitor, in the litigation with *Canniff*, I fail to see that, tested by those sound rules which Courts of Equity have laid down for the regulation of transactions between solicitor and client, there would be any ground for impeaching this purchase.

Lastly, I should, if the case depended on that alone, feel that I ought to agree with the learned Vice-Chancellor *Blake* in holding lapse of time (irrespective, of course, of the Statute of Limitations, which can have no

(1) *Cane* v. *Lord Allen*, 2 Dow. 289.

1879

TAYLOR v. WALL-BRIDGE.

application) a sufficient bar to the Appellant's suit. The Appellant might have known, at any time after the 3rd January, 1857, when the two deeds by which the legal estate was vested in *Wallbridge* and *George Taylor*, respectively, were registered, how his attorney had dealt with these lands. It is not, therefore, like the case of a concealed transaction. Where the means of knowledge exist, Courts of Equity, in cases of laches, attribute the same effect to lapse of time as when actual knowledge is proved. Numerous decisions of the Equity tribunals in *Upper Canada*—and it is the law of that portion of the Dominion we are now administering—show that much greater strictness has been applied there, particularly since 1849, when the Court of Chancery was re-organized, as regards laches in cases relating to real property, than that which prevails in *England*, and for the good reason that the constantly increasing value of lands would make the indulgence which is extended in *England* impolitic and inequitable in this Province. I am of opinion that the Appellant's omission, not only to pursue his rights, but even to make any specific enquiry as regards these lands for 18 years, ought alone to be fatal to his claims, even if they were in other respects well founded. And more especially ought this to be the result when, as in the present case, the Defendant has been prejudiced by the loss of evidence.

As a Court of Equity, in considering the effect of lapse of time as an equitable bar, always acts in analogy to the positive rules of law in reference to the effect of time under the Statute of Limitations, I also agree with the learned Vice Chancellor that the Statute of *Canada*, 25 Vic., Cap. 20, passed in 1862, having repealed the provision in the Statutes of Limitations making absence from the Province a disability, the absence of the Appellant

in *California* constitutes by itself no excuse for his laches.

I am of opinion that the order of the Court of Appeal should be affirmed, and this appeal dismissed with costs.

HENRY, J. :—

The Appellant in this case seeks to set aside,as fraudulent, colorable and collusive, a conveyance made by the Defendant, *George Taylor*, as his attorney or agent, to the Respondent (*Wallbridge*) of certain parcels of land situate at or near *Belleville*, *Ontario*, and also a deed made by the Respondent, *Wallbridge*, to *George Taylor*, by which he re-conveyed to the latter, at the same date of the conveyance from *George Taylor* to him, one-half of the land conveyed by *George* to him.

Judgment by default was entered against *Simpson*, one of the Defendants; and *George Taylor* and the Appellant made a settlement, since the suit, in regard to the parcel of land held by him under the conveyance from *Wallbridge*. We have, therefore, only to deal with that part of the case which lies between the Appellant and the Respondent, *Wallbridge*. The latter, in his answer, claims that, although the title of the lands in question was in *William*, *George* had, at the time he conveyed to him, the beneficial interest, and that he, *Wallbridge*, having furnished the money to pay the amount due to the College to *George*, had also a beneficial interest in the land conveyed to *William* by the said College, and that, therefore, *William* was the trustee of *George* or himself.

If such were the case, admitted by *William*, the title still remained in him, but only as such trustee, and, therefore, the conveyance to *Wallbridge* under the

1879

TAYLOR v. WALLBRIDGE.

power of attorney would not be inequitable. We must, therefore, see whether that was the undoubted position of *William*. There is no evidence that he ever admitted that he was the trustee of *George*. There is nothing, I think, in the circumstances to sustain the position that he could be called the trustee of *Wallbridge*. The evidence that he, *Wallbridge*, ever paid any of the consideration for the deed from the College to *William* is contradictory. *Wallbridge* himself does not positively say he paid any of it, but on cross-examination leaves it too contradictory and doubtful to have any effect or weight. He says:

I paid the money that went to the College. I paid it to *George Taylor*. I made no entry of it. I knew that *George Taylor* swore that he paid the money. I think I paid *George Taylor* money on account of this land. I can't remember what I paid. I *think* I paid him £215, the consideration money in the deed. I *think* Mr. *Taylor* got my brother *Lewis* to send the money to the College. It may have been my money. My impression is that it was; but it is so long ago that I cannot remember distinctly.

The fair presumption is, that under the circumstances, as so related by *Wallbridge*, if he advanced any money at all, it was to *George*, and not on *William's* credit; but it would be hard to conclude for a moment that, even by his own showing, there is any evidence to declare *William* his trustee; and *George's* evidence goes rather to negative the fact of any money being advanced by *Wallbridge* to pay the balance due on the land to the College. George says:

I paid the money. I forget how I raised the money. It strikes me I got the money from Mr. *Grass* to pay the College. I have no distinct remembrance. I think, if Defendant *Wallbridge* gave me the money, he charged me with it. * *

He says again, on his cross-examination by Mr. *Wallbridge*:

I do not think the money to pay the College was furnished by the Defendant *Wallbridge*. My remembrance is, that I furnished it myself.

That part of the Respondent's (*Wallbridge*) answer, being unsupported by any reliable evidence, must be ruled out. The defence, on the other ground, is, that *William*, when the deed was made to him by the College, became the trustee of *George*, through the payment by the latter of the sum of £145, the balance due of the purchase-money—by which the beneficial interest became vested in *George*, although the title went to *William*.

To determine that point, we must first see how the parties, *George* and *William*, then stood in relation to the land and to each other. To do this, I will start from the agreement made by *Jane Taylor*, the mother of *William* and *George*, to purchase from the College. That document bears date the 3rd of March, 1832. The consideration £100, of which £10 were paid at the time, and the remainder was to be paid by annual instalments of £10 each, with interest, from the 25th March in that year. *Jane* does not appear to have made any payment beyond the first £10, but she, on the 26th November, 1839, assigned her interest in that agreement to *George Taylor* for the actual consideration of $50.

Under that assignment, the first act of *George* appears to have been a sale by him to *William* of his interest therein. The instrument made by the former to the latter is dated the 30th day of October, 1841, and the consideration agreed upon was $50. The Respondent *Wallbridge* contends that the consideration for the latter assignment was not paid, and, therefore, there is a resulting trust in favor of *George*, but, as will be seen, neither the law nor the evidence sustains that contention. First, as to the evidence, *George* says:

> After I held it (the agreement) some years, through the influence of my mother, I agreed to let Plaintiff have it, which I did. He agreed to pay me what I had paid, but he never did pay me.

1879

TAYLOR v. WALL-BRIDGE.

In his answer to interrogatories in chief, in the suit of *Canniff* against *William*, he makes, in substance, the same statements. Here there was a clear intention to part with all his interest—not a mere conveyance without a consideration or use stated or declared. If it were true that *William* did not pay *George*, the latter might have had an equitable lien upon the land for the $50 *William* had agreed to pay him, if it were a purchase of land; but here it was merely an assignment of a a right to become the owner of it by paying the balance of the purchase money, and no equitable lien could arise. If, however, *George* assigned to *William* under an agreement that *William* was to be merely his agent to complete the purchase, he might, in case of the latter taking a conveyance to himself, have had an equitable demand on *William*, as being his trustee, to convey the land to him. There could, however, be no resulting trust in *William* merely from the failure on his part to pay *George* the $50. A resulting trust arises only where land *is conveyed* without any consideration alleged or paid, or, strictly speaking, where no use is declared, and where, by the evidence, it appears such was the intention of the parties to the conveyance. If A bargains to sell land to B for a certain sum, and that A gives a deed to B, I am not aware of any law by which A can claim a resulting trust in B, if the latter fails to pay the consideration money. Equity might decree a lien in A for the consideration money and any necessary further relief against B for the recovery of the consideration money, but here the remedy ends. The beneficial interest would remain in B, subject to A's equitable lien arising from the non-payment of the consideration money.

William, however, says in his evidence:

I had obtained an assignment at one time of the right my brother had in the land in dispute. * * * I paid *George* $50 at the time I made the purchase, and got the assignment from him.

The evidence is therefore so conflicting that, if the case depended on a determination of that disputed point, I would not feel justified in founding any judgment upon it in favor of the Respondent, who, in such a case, is bound to furnish evidence clear from reasonable doubt, which is not the case here. But in his *vivâ voce* examination in 1856, *George* makes this significant statement respecting his second transfer to *William* a few days previous :

> I cannot tell why Mr. *Wallbridge* advised me to assign to my brother. He advised me to do so and I followed his advice. *I had no reason but that I had not paid my brother for the land.* * * * * * My brother never paid me anything for it.

From the whole of *George's* statements together I should feel inclined to conclude that, as he had been *William's* agent in the sale of his lands, he got the $50 in some shape, if not from *William* direct, for otherwise he would not have considered himself bound to make the last assignment for the reason he gave, that he "had not paid" his brother "for the land."

I consider, then, that *William*, under the assignment from *George*, became legally and equitably his assignee of the right to complete the purchase from the College. *William* retained that right until, being about to leave the country, he, on the 29th of November, 1847, assigned to *George*. About a year after *George's* assignment to him, *William* himself, and by his attorney, Mr. *Lewis Wallbridge* (on the 28th November, 1842), wrote to the bursar of the College in respect to the land ; informed him that he had become the assignee ; that he was then able to pay £25, and wished to learn the longest terms of payment ; and whether he could get a deed on producing the assignment from *George*. No answer to this application was shown ; but we can reasonably conclude that some satisfactory arrangement was made, for *George*, in his deposition before mentioned says :

1879

TAYLOR v. WALLBRIDGE.

My brother had made two or three payments to the College.

The dates of these payments are not given; but they must have been made before *William* went to *California*. They appear to have been made to the knowledge of *George*, and he, during six years, treats *William* as having the beneficial interest; how, then, can he, or any one claiming under him, pretend for a moment there was any such agreement or understanding between him and *William* as would raise a resulting trust in the latter. *William's* position was fully admitted by the College, with the, at least, implied assent of *George;* and how could he claim any beneficial interest afterwards in the land? *William* held the right in question for over six years, and, being about to leave the country, made an assignment, as he alleges without contradiction, of the right in question to *George*, as his agent, without any consideration whatever. As to this position there can be no doubt, for both he and *George* unequivocally so state. *George* says, in his examination in *Canniff* v. *Taylor*:

> The assignment from *William Taylor* to mé was without consideration, and made to me because *William* was going to *California*.

George must, under this evidence, be considered the trustee of *William;* and I can, therefore, understand why it was that Mr. *Wallbridge* advised in 1856 a re-assignment to *William*, and the taking of the deed in his name from the College. Holding the trust for *William*, it would have been a fraud for *George* to have taken the conveyance to himself, and a title under the conveyance consequently defective. *William* and his mother together must have paid seventy or eighty pounds on account of the purchase-money; and no Court of Equity would have permitted *George* to hold the title to the land against his principal in such circumstances. He admits his agency from *William*, and it is shown by the latter and him that he sold thousands

of dollars worth of *William's* lands. Mr. *Wallbridge*, knowing the facts and relationship of *George* to *William* in regard to his lands, might very properly feel that a title through *George*, under such circumstances, would be insecure.

Independently, therefore, of the positive statements of *William* and *George*, the other circumstances afford strong *primâ facie* evidence that the conveyance by *George* was as agent or trustee of *William*. *George*, having so acquired the right in question in 1847, held it till the 12th of April, 1851, when he re-assigned to *William*, as he says, *because he had never paid the latter anything for it.* He must have considered the beneficial interest was in *William*, and having made the transfer to *William*, he is estopped from denying that beneficial interest.

On the 24th of the same month *George* paid the balance of the purchase money, interest and costs, amounting to about £145, and obtained a deed from the College to *William*.

It is contended for the Respondent, *Wallbridge*, that under the circumstances *William* became the trustee of *George* of the beneficial interest in the whole lot, and that he, *Wallbridge*, having received a conveyance from *George* of it, and having retained one-half of it, his title to it is good against *William*, and, if not, that the conveyance to him from *William* by *George* as his attorney or agent transferred *William's* title to him, both at law and in equity. In the first place, then, did the payment of the *balance of the purchase money* by *George* and the conveyance to *William* in consequence thereof create an executory trust in *William* and give *George* the beneficial interest?

The power was expressed to be to *sell* the land in question. Did that power necessarily give the power to *convey?* A parol power to *sell* would certainly not include a power to convey, and does the fact of the

1879

TAYLOR v. WALLBRIDGE.

power being under seal make any difference? When special power is given to perform any prescribed duty or service, it necessarily implies a power to do all subordinate things that are necessary to the performance of that duty or service, and the principal would be bound to the same extent as if all that the agent did were specially stated in the power. After an exhaustive search I can find neither a case nor an authority that a power to sell, even under seal, gives one to convey. Authorizing one to sell or enter into a contract for a sale requires the reposing of much less confidence in an agent than the power to convey and receive the consideration money. No authority was cited in support of the proposition, although one of the grounds taken on the part of the Appellant. I do not, however, base my judgment on that objection; but if it were not rendered unnecessary by other considerations, I would feel bound, as at present advised, to decide against the power to convey. All the authorities concur in the proposition that an agent, constituted so for a particular purpose, and with a limited and circumscribed authority, cannot bind the principal by any act in which he *exceeds his authority* (1).

It is a well settled rule that all written powers, such as letters of attorney, or letters of instruction, shall receive a strict interpretation, and the authority is never extended beyond that which is given in terms, or is absolutely necessary for carrying the authority so given into effect (2).

The power to convey is in no way subordinate to the power to sell or to contract for a sale. The latter power can be exercised by entering into a contract binding on the principal, and may, therefore, *be fully*

(1) Paley on agency by Lloyd, p. 204. See *Fenn* v. *Harrison*, 3 T. R. 757, and 4 T. R. 117.

(2) Paley on agency 192.

executed. The rights and obligations of the principal may thereby be totally changed, so that specific performance would be decreed. Personal property, passing by sale and delivery by an agent, binds the principal, who, by his delivery to the agent, gives him an implied authority to deliver to the purchaser. With real estate it is quite different; and authority to sell is not held to be an authority to make a feofment under the common law; and, by a parity of reasoning, the power to sell would not include one to convey. *Payley* (1) says:

> The agent or solicitor of the vendor cannot, without special authority, receive and give a discharge for the purchase money, and the usual indorsed receipt is in equity no conclusive evidence of payment.

Sugden on vendors (2) says:

> A purchaser cannot safely pay the purchase money to the vendor's attorney without the seller's authority, although he is intrusted with the conveyance and is ready to deliver it up.

From a full consideration of all the authorities, my judgment is irresistibly drawn to the conclusion that *George* had not, under the letter of attorney from *William*, anything more than a power to contract for a sale; and in the construction of written documents it would be wrong and dangerous to speculate as to "the belief of the Plaintiff," that "the power given included all that was necessary to pass the title to a purchaser," as suggested by one of the learned judges. If he had not the power to convey, it necessarily follows that his deed to *Wallbridge* would convey no interest. The general rule, that when an attorney or agent does any act beyond the scope of his power, it is void as between the appointee and the principal, which has always prevailed, and which is elementary in the doctrine of

(1) 1 vol., p. 501.

(2) 8th Am. ed., p. 217; See also *Wilkinson* v. *Candlish*, 5 Ex. 91; *Kent* v. *Thomas*, 1 H. & N. 473; *Lucas* v. *Wilkinson*, 1 H. & N. 420.

1879

TAYLOR v. WALLBRIDGE.

powers, is applicable to this case. The appointee is not bound to deal with the attorney or agent; but if he do, he is bound to inspect the power when in writing, and he is held to understand its legal effect, and must at his peril see that the attorney or agent do not transgress the prescribed boundary.

The subsisting authority in this case, and the only one, was the power of attorney; and as the execution of the deed to *Wallbridge* was by procuration, he was bound to look at and be governed by the authority given to the agent, and ignorance of its restrictive character is no legal or equitable excuse.

The next point to consider is that of the alleged constructive trust in *William*, under the deed to him.

To establish such a trust, parol evidence is admitted, and, also, to rebut the implication of it. It may be shown by evidence of the agreement of the parties, at the time of the purchase and payment; or it may be the result of proved facts from which a beneficial interest may be decreed in the party purchasing and paying for land, and who takes the conveyance to another. There is no doubt that "where a man *buys* land in the name of another, and pays the consideration money, the land will be generally held by the grantee in trust for the person who pays the consideration money" (1); and, if *George*, when paying the balance of the consideration money, comes within that principle, he would, undoubtedly, have the beneficial interest.

The authorities all provide for cases where the purchase was made and the consideration paid by the purchaser, either in whole or some specified proportion of it; but I can find no case of a beneficial interest having been declared in favor of one who did not him-

(1) 7 B. & C. 285. See Bayley, J., p. 284. Holroyd, J., p. 284. J., in *Attwood* v. *Cumings*, and (1) Story Eq. Jur. S. 1201.

self *purchase*, but who only paid a part of the consideration money years after the purchase was made. The purchase in this case was made by *Jane Taylor*, nineteen years before the payment by *George* and the deed to *William*; and the latter had the right to complete the purchase ten years before that time. The first constituent of the rule is, therefore, wholly wanting, and I know of no law or principle by which one man can step in between two contracting parties, and, by an unauthorized payment of a balance of purchase-money, oust the purchaser. By paying only *a balance* he admits the legal position of the purchaser; and doing so, cannot be permitted to deny it, so as to obtain a beneficial interest, and thereby deprive the purchaser of his previous rights. Equity at once opens its eyes to such a transaction, and may properly inquire how a party so acting can expect to turn the purchaser from his rights, under the agreement, into a mere trustee for his beneficial interest. It has been said *William* and his mother only paid a small part of the purchase-money. Between them, as I have shown, they must have paid seventy or eighty pounds; but it matters not how much they paid, the principle is the same; and we are not required here to estimate the proportion. Suppose but fifty out of two hundred pounds remained due, would there be any other principle applicable? Under the agreement for the bargain and sale, the College became a trustee for, and was seized to the use of, *William*. The bargain vested the use to be executed on payment of the balance of the purchase-money. How, then, could *George* step in and divest *William* of his right under the agreement as before stated. There is no question of "lien" in this case. The question of a grantor's "lien" does not arise; and, besides, if *George* had an equitable "lien" *Wallbridge* could not set it up; at all events, it is not set up in this suit.

1879

TAYLOR v. WALLBRIDGE.

The claim here is not for a partial trust to the extent of the money paid by *George*, but for the whole beneficial interest. Had *William* no interest in the land under the payments he could claim credit for, and which *George* got the benefit of?

It is quite certain, if land be purchased by two, or by one for two, and each pays a part of the consideration money, but the conveyance is made to one, there is a constructive trust for the other to the extent of the proportion paid by him. To this, however, there is applicable a further rule which is, says *Brown* on Statute of Frauds (1),

> That though there may be a trust of a part only of the estate by implication of law, it must be of an aliquot part of the whole interest in the property. The whole consideration for the whole estate, or for the moiety, or third or some definite part of the whole, must be paid—the contribution or payment of a sum of money generally for the estate, when such payment does not constitute the whole consideration, does not raise a trust by operation of law for him who pays it; and the reason of the distinction obviously is, that neither the entire interest in the whole estate, nor in any given part of it, could result from such a payment to the party who makes it, without injustice to the grantee, by whom the residue of the consideration is contributed.

And for his doctrine he cites numerous *United States* decisions. He adds:

> Upon the same view it is held, that if the proportion paid towards the consideration, by the party claiming the benefit of the trust, cannot be ascertained, whether because its valuation is, from the nature of the payment, uncertain, or because the sum paid is left uncertain upon the evidence, no trust results by operation of law.

It must be admitted, however, that the amount paid by *George* is certain enough, but the proportion to the whole is not shown by the evidence, and the relative interest in the whole is, therefore, equally uncertain as in the other case, which would leave it, I think, subject to the same objection. It is unnecessary to say

(1) P. 81.

whether the doctrine first quoted should be considered authority or not, for, if the evidence fails to show the amounts paid by each, the authorities concur in saying that no trust exists.

The payment, I conceive, must have formed part of the original transaction. *Washburn* on real estate (1) says:

> But where the husband paid part of the purchase money for land conveyed to the wife, but such payment was subject to the purchase and formed no part of the original transaction, no trust resulted in his favor.

Again:

> If one pays only part of the purchase money and another another part, but the definite proportion cannot be fixed, no trust will result.

Again:

> So where A bought land and paid for it and had the deed made to B, upon his agreement to repay the money at a future time, no trust was raised in favor of A. The intention of the parties to the transaction was, that B and not A should be the beneficial owner.

And again:

> But where one of two joint purchasers upon credit pays the whole debt, it does not raise a resulting trust in his favor. In carrying out the doctrine above stated, it has been held that the payment which raises a resulting trust, must be part of the transaction and relate to the time when the purchase was made. Any subsequent application or advance of the funds of another than the purchaser towards paying the purchase money will not raise a resulting trust.

He truly exhibits the principles acted upon generally in the *United States*, where transfers by deeds of bargain and sale are similar to those in this country, and I find no English authority but sustains the general statement of the law by him. In *Blodgett* v. *Hildreth* (2), it was held that it was unnecessary to show that the purchase money was actually paid at the time the conveyance was made, but that "it would be sufficient to show

(1) Pp. 474, 475, 476, 477. (2) 103 Mass. R. 487.

1879

TAYLOR v. WALLBRIDGE.

that it was paid *in pursuance of the contract by which the purchase was made.*" *Brown* on Statute of frauds (1) says:

> A resulting trust attaches only when the payment is made *at the time of the purchase*, and a subsequent advance will not have that effect.

The payment, then, by *George*, in my opinion, raised no trust in his favor, but if we take his own statements for a guide, it will be unnecessary to think long as to the legal effect of them. In his answer, under oath, in the cause of *Canniff* against *William*, as the agent of the latter in 1852, (the year after the deed to *William*,) he (*George*) says:

> This Defendant (*William*) by his agent (*George*) applied for and obtained the deed of the said land from the said College and paid the balance of principal and interest due to the College thereon, as he humbly submits and insists he had a right to do.

These statements, having been made so soon after the date of the deed, and several years before *George* took any steps to obtain any title to the land for himself, are entitled to every favorable consideration when contrasted with his subsequent ones, made when it became necessary to sustain his alleged fraudulent transfer to *Wallbridge*. If he made the payment as agent of, or in the interest of, *William*, as his friend, he could safely say the latter had done so, and his statement above quoted to that effect is true, and his subsequent statement that he (*George*) paid the money is not in conflict therewith; and it will be observed that in all the subsequent references by *George*, in his examinations in *Canniff* v. *Taylor*, and in this suit, he does not in the slighest degree contradict the statements I have quoted from the answer he put in *as William's agent, in* 1852. I feel bound, therefore, to conclude that the statement, in the answer, that he paid

(1) P. 83.

the money as *William's* agent, is substantially true. He received the conveyance, by his own sworn statement, without consideration from *William*, for whom he subsequently acted as agent in his absence. The latter sent him $1,000 from *California ;* and he sold thousands of dollars' worth of *William's* property ; and he does not allege that he did not repay himself for any money advanced by him, if he really did advance it. If he did subsequently repay himself, he would be estopped from seeking to enforce the trust, if it ever existed. He could not play fast and loose; and having once received payment, his equitable interest was at an end, and he could not revive it, even by a tender back of the money. Situated as he was, he was bound, I think, to show he had not done so before seeking to establish a trust in *William.*

Two points yet remain. The first is, can *Wallbridge* be held to be a purchaser without notice. His title being through the deed executed by *George* under the power, I do not see how it can be contended that he had not sufficient notice. He was the attorney in the ejectment suit against *Canniff's* tenant (*Fairman*) brought for *William* in 1851 immediately after his deed from the College, and so continued until the issue of the *habere* by him in December, 1856, under which the possession of the land was recovered for *William.* In about a month afterwards the conveyance of the whole lot is made to him. His knowledge of *William's* affairs and of *George's* dealings with them commenced as far back as 1851. *George* advised with him respecting the deed from the College. He says himself he had at one time in his possession the agreement of *Jane Taylor* to purchase and all the assignments of it. He was not, it is true, the attorney of *William* in *Canniff's* suit; but when he was such attorney in the ejectment suit, which was staid by an injunction in the former, and

1879

TAYLOR v. WALLBRIDGE.

his right to proceed depended on the success of the equity suit, and the consequent dissolution of the injunction, it is too much to suppose, that in view of all the peculiar circumstances in evidence, he, *Wallbridge*, was unaware of the answer put in by *George* and of the statement therein, that *the defendant by his agent* had paid the balance of the purchase-money. *George* says it was he, *Wallbridge*, that retained Mr. *Mowat* in *Canniff's* suit; and he, as attorney of *William*, should have seen and approved of the answer. I can come to no other conclusion from what I have stated, and from a good deal more which need not be stated, that *Wallbridge* knew well all the circumstances, and, therefore, cannot be held an innocent purchaser for a valuable consideration without notice. Besides, the evidence that he ever paid anything for the land is too uncertain and contradictory—his own statements conflict, as do those of *George*, and they contradict each other, and the receipt contradicts both. He swears he paid *George* £215 in one part of his examination, and then comes down to a doubtful thought that he paid him something. *George* swears he neither paid him the £90 5s. mentioned in the receipt, or any part of the consideration money of his deed. He, *Wallbridge*, says he paid it all before the deed to *William*. The receipt *two years afterwards* is but for £90 5s. If he paid it all about the time of, or before, the deed to *William*, how did it become necessary to pay £90 5s. *two years afterwards*? The receipt, before mentioned, contains a provision for the payment of $500 of a balance the next fall; but if the suit in Chancery did not terminate successfully, each party was to bear half the loss, and the $500, in that event, were not to be paid. The suit in question did "terminate successfully," but still no one pretends the $500 or any part of them were paid, and *George*

swears they were not paid, nor the £90 5s. either. This receipt and agreement clearly show that no money was paid at the time of the deed to *William*, and the evidence otherwise shows that no money was paid afterwards.

There are, too, further fatal objections. *Wallbridge* at the time of the conveyance to him was the adviser of *George*, acting as the agent of *William*, and thereby with full knowledge occupied a fiduciary relation to *William*, and, such as, in my opinion, should prevent his purchasing in the way he did. He advised the whole affair and knew, or was bound to have known, that under the terms of the power *George* had only authority to sell for cash, or at all events for a sum certain, and not to make the payment contingent upon the success of a suit. Besides, if he bought the half only, his taking a deed of the whole under an agreement to convey back immediately to *George* the other half, and thereby make his deed the conduit pipe of a transfer of *William's* title to his agent, *George*, would, independently of anything else, be sufficient to avoid the conveyance to him. It was, under any circumstances, a legal fraud, if nothing further, and one which equity is bound to condemn and frustrate. The bill only asks for a reconveyance of what remained unconveyed by *Wallbridge;* and the questions raised require, as in the words of Lord *Redesdale* in *Hevenden* v. *Annesley* (1) to decide—

> Whether it would be good conscience to interfere in his (Appellant's) favor to take from the Respondent that which would be a defence at law.

I consider we are bound not so to interfere, and if the objection that was raised as to the staleness of his claim, amounting to laches, is not permitted to obtain, our judgment should, I think, be for the

(1) 2 Sch. & Lef. 607.

1879

TAYLOR v. WALL-BRIDGE.

Appellant. The evidence shows that the Respondent's title under the deed was obtained in 1856. The Appellant's bill was filed the 25th April, 1874. The Appellant's claim has not been barred by the Statute of Limitations. By section 31 of chapter 88 of the *Consolidated Statutes of Upper Canada*, the limitation of suits in equity, in respect of lands, is made the same as in law.

Section 32 provides that,

> When any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que* trust, &c., to bring a suit against the trustee or any one claiming through him to recover such land or rent, shall be deemed to have first accrued * * * at and not before the time at which such land or rent shall have been conveyed, &c.

Section 33 provides that,

> In every case of concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent, of which he or the person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might have been, first known or discovered.

Section 34 contains a proviso exempting from the operation of section 33 cases of *bonâ fide* purchasers for valuable consideration.

Section 35 exempts from the operation of the act the rule and jurisdiction of courts of Equity, "in refusing relief on the grounds of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this act."

How then does this legislation affect the rights of the Appellant?

In the first place his claim is not barred by the statute for a good reason. In the first place twenty years had not elapsed from the date of Respondent's conveyance before action, and taking the conveyance estops *Wallbridge* from saying the Appellant was not then in pos-

session; and, secondly, there was a concealed fraud unknown to the Appellant until his return. The conveyance is not to a *bonâ fide* purchaser for valuable consideration, and, therefore, section 33 fully applies.

Archbold v. *Scully* is a case of appeal in 1861 to the House of Lords (1), in which, under the Statute, the Plaintiff's legal remedy was barred several years before action, and the defence of the Statute and acquiescence and laches was set up. In delivering judgment Lord *Wensleydale* says:

> So far as laches is a defence, I take it that, where there is a Statute of Limitations, the objection of simple laches does not apply until the time allowed by the Statute. But acquiescence is a different thing. It means more than laches * * * But the fact of simply neglecting to enforce a claim for the period during which the law permits him to delay, without losing his right, I cannot conceive to be an equitable bar. In this case I cannot say that anything has been done or permitted which falls under the definition of acquiescence.

Lord *Chelmsford*, in the same case, says:

> Have any laches or acquiescence, then, been established to disentitle the Appellant to the relief which he prays? Acquiescence in the sense of mere passive assent cannot be regarded as anything more than laches or delay, as Lord *Cranworth* said in the *Rockdale Company* v. *King* (2): "Mere acquiesence, if by acquiescence is to be understood only the abstaining from legal proceedings, is unimportant. Where one party invades the rights of another, that other does not, in general, deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the Statute of Limitations. In this case, however, there has been no substantial alteration in the condition of the Respondent, and there is nothing in the conduct of the Appellant beyond his having suffered so many years to elapse after the right accrued before its assertion. This, in my opinion, is not sufficient to disentitle him to the assistance of a Court of Equity to obtain the relief which he seeks."

The Appellant, in his petition, claims only a re-conveyance of the land remaining unsold, and in regard to

(1) 9 H. L. 360. (2) 2 Sim. & Stu. 89.

1879

TAYLOR v. WALLBRIDGE.

that part, there being "no substantial alteration in the condition of the Respondent," and nothing whatever in the conduct of the Appellant in the shape of delay to seek the assistance of the Court as soon as he returned and become aware of the transaction which he seeks to avoid, I cannot discover anything like acquiescence, or the slightest evidence of even mere laches or delay. I think, therefore, the Court is bound "by good conscience to interfere in his favor;" that the appeal should be allowed and judgment given in favor of the Appellant, with costs.

Appeal allowed with costs.

Solicitor for Appellant: *George Dean Dickson.*

Solicitors for Respondent: *Fitzgerald & Arnoldi.*