*Pratt and others, original Complainants, *v.* Thomas Law and William Campbell, original Defendants.

Thomas Law, original Complainant, *v.* Pratt and others, original Defendants.

Pratt and others, original Complainants, *v.* William N. Duncanson and Samuel Ward, original Defendants.

William Campbell, original Complainant, *v.* Pratt and others, and Duncanson and Ward, original Defendants.

Lands in the City of Washington.—Building covenant.—Relief in equity.—Equitable lien.—Discovery.—Attachment.

In the sales of lots, in the city of Washington, the lots are not chargeable for their proportion of an internal alley, laid out for the common benefit of those lots; although the practice so to charge them has been heretofore universally acquiesced in by purchasers; and if a purchaser has acquiesced in that practice, and has received a conveyance, accordingly, without objection, yet he does not thereby acquire a fee-simple in such proportion of the alley, and may, in equity, recover back the purchase-money which he has paid therefor.

If a purchaser of city lots stipulates to build, within a limited time, a house on every third lot purchased, or in that proportion, and receives conveyances for the greater part of the lots, he is not bound to build, in proportion to the lots conveyed, unless the whole number be conveyed.

In a case where it would be difficult to ascertain the injury resulting from the breach of contract, or the sum in damages by which the injury might be compensated, this court will not themselves ascertain the injury nor the damages, nor direct an issue *quantum damnificatus.*

Where a contract for the sale of land has been in part executed, by a conveyance of part of the land, and the vendor is unable to convey the residue, a court of equity will decree the repayment of a proportionate part of the purchase-money, with interest.

If three persons mortgage their joint property, to indemnify the drawer of bills of exchange, drawn for their accommodation, in case of protest; and if each of the mortgagors agree to take up a third part of the bills, upon their return under protest, and two of them neglect to take up their two-thirds, whereby the other mortgagor is compelled to take up the whole of the bills, in consequence of which, he requests the drawer not to release the mortgage, but to hold it for his benefit, a lien in equity is thereby created upon the mortgaged property, to the amount of two-thirds of the bills, in favor of that mortgagor who took up the whole.

Quære? Whether a subsequent incumbrancer can compel a prior incumbrancer to disclose the consideration which he gave for the notes of the debtor, upon which his incumbrance was founded?

An equity of redemption of real estate, in Maryland, is liable to attachment.

February 22d, 1815. These several suits in chancery, in the Circuit Court for the county of Washington, in the district of Columbia, being involved in each other, and relating to the same property, were heard and argued as one cause.

The first of these suits, in the order of time, was that of Pratt and others *v.* Duncanson and Ward, which was instituted on the 24th of March 1801. The bill prayed that Duncanson and Ward might be enjoined from selling certain squares in the city of Washington, which had been mortgaged by Morris, Nicholson and Greenleaf, to Duncanson, to indemnify him against the return of certain bills of exchange, which he had drawn for their accommodation, to the amount of 12,000*l.* sterling, a part whereof, viz., 7600*l.*, it was alleged had been taken up by Ward, who claimed payment from Duncanson, and persuaded him to advertise the mortgaged property for sale. The bill alleged, that although the bills had been taken up by Ward, he had done it

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

as the agent of Greenleaf, one of the mortgagors, and with his funds; and *prayed for general relief. The squares which were thus mortgaged to Duncanson, were included in a previous mortgage to Thomas Law. [*457

The next suit in order of time, was that of Pratt and others *v.* Thomas Law and William Campbell. The bill was filed on the 14th of December 1804. Its objects was to compel Law to release to the complainants, who were assignees of Morris, Nicholson and Greenleaf, certain squares in the city of Washington, which had been mortgaged by them, to secure to him the conveyance of certain lots and squares, in the same city, which they had contracted to convey to him, and which he was to select from a larger number, which they had purchased of the commissioners of the city; to compel Law to complete his selection; and to vacate certain releases made by him, at the solicitation of Campbell, who had attached the equity of redemption of some of the squares, which were included in the mortgage to Law.

The third suit, in the order of time, was that of Thomas Law *v.* Pratt and others. The bill was filed on the 4th of October 1805, and its object was, to foreclose the mortgage given to secure to Law the conveyance of 2,400,000 square feet of land, in the city of Washington, agreeable to a certain contract between him and Morris, Nicholson and Greenleaf; because about 400,000 square feet, which Law contended he had selected agreeable to his contract, had not been conveyed to him.

The last of these suits, in the order of time, was that of William Campbell *v.* Pratt and others (assignees of Morris, Nicholson and Greenleaf), and W. M. Duncanson and Samuel Ward. The bill was filed in June 1806, and was in the nature of a bill of interpleader. Its object was, to obtain a release from Duncanson, of the mortgage given to him by Morris, Nicholson and Greenleaf, to indemnify him against the return of certain bills of exchange drawn by him for their accommodation, and which Campbell alleged had been taken up by them, or some of them; which release, if made, would inure to the benefit of Campbell, inasmuch as he had attached, and under the proceedings upon the attachment, had *purchased, Morris and Nicholson's equity of redemption. [*458

In order to understand the argument of counsel, and the opinion of the court, it may be necessary to state more minutely the allegations of the parties.

The bill of Pratt and others against Law and Campbell stated, that Morris, Nicholson and Greenleaf, on the 3d of December 1794, gave to the defendant, Thomas Law, their bond, with the condition to convey to him in fee-simple, within ninety days from that date, "2,400,000 square feet of land in the city of Washington, the said Law having paid them the sum of five pence Pennsylvania currency, per square foot, for the same." That on the 4th of December 1794 (the day after the date of the bond), a written agreement was executed between the same parties, by which (after reciting the bond), Morris, Nicholson and Greenleaf covenanted, that if Law should, within eighteen months, be displeased with his purchase, they would return him the purchase-money, with interest, at the expiration of that term. And Law covenanted, that if, within the same term, he should finally determine to keep the land, he would, within four years from the time of such deter-

mination, cause to be built on every third lot, or in that proportion, one brick dwelling-house, or other brick building, at least two stories high; the lots were supposed to average 5265 square feet, each. The bill further charged, that Law did, within the limited time, elect to keep the land, and thereby became liable to build the houses mentioned in the agreement of the 4th of December 1794, but had not built them. That on the 10th of March 1795, the parties entered into another agreement, by which Law was "to have his selection, under his contract of the 4th of December last, in all squares in which the said Morris and Greenleaf have a right of selection, excepting water property, and excepting such squares as are now appropriated, or respecting which the said Morris, Nicholson and Greenleaf have made arrangements, a list of which squares is hereunto annexed." By the same agreement, Morris, Nicholson and Greenleaf covenanted to mortgage to Law other squares and lots, which were then in their possession, until
*459] they could give him *a good title to such property as he might select; Law agreed to give up his right to return the property, and thereby made the purchase absolute. He also agreed, to select by squares, and not by lots, and to close his selection, within ninety days from the date of the agreement, and stipulated, that the houses which he was to build should be such houses as Morris and Greenleaf were obliged to build by contract with the commissioners.

The bill further stated that Morris, Nicholson and Greenleaf, agreeable to that contract, on the 4th of September 1795, mortgaged to Law 857 lots, and 3333 square feet of land, the condition of which mortgage was, that Morris, Nicholson and Greenleaf should pay the penalty of the bond, or, agreeable to its condition, and to the contract of the 10th of March 1795, convey to Law, in fee-simple, with general warranty, 2,400,000 square feet, in the city of Washington. That Law selected about 2,000,000 square feet, but in making his selections, violated his agreement of the 10th of March 1795, by selecting lots in squares from which he was excluded by that agreement, to the injury of Greenleaf, who never assented to such selection. That Law had obtained titles to about 2,000,000 of square feet, and that there remain to be conveyed to him about 400,000 square feet, when he should have complied with his contract of selection, and when he should have built the stipulated number of houses.

That on the 13th of May 1796, Greenleaf conveyed to Robert Morris and John Nicholson, all his interest in the city of Washington, excepting three squares, "and excepting all such lots, lands and tenements as were either conveyed or sold, or agreed to be conveyed, by all or either of them, the said Greenleaf, Morris and Nicholson, or any of their agents or attorneys, to any person, prior to the 10th of July 1795." That on the 26th of June 1797, Morris, Nicholson and Greenleaf conveyed all their interest in the city of Washington, to Pratt and others, the present complainants.

*460] *That Law, knowing the complainants' interest in the property, and with intent to injure the complainants, and to benefit the defendant, Campbell, on the 4th of September, and 5th of October 1797, executed two deeds, releasing to Morris, Nicholson and Greenleaf, part of the mortgaged property, which had been attached by Campbell; which releases were executed by Law, with a full knowledge of the interest of the complainants in the morgaged property; in defiance of their express prohibition; and

with a fraudulent intent to vest the legal estate in Morris and Nicholson, so as to give effect to the attachment of Campbell. That Campbell had engaged to indemnify Law for that act. That the releases were executed, without the knowledge or consent of Morris, Nicholson and Greenleaf, or either of them, and were never delivered to them, or either of them, but were put on record by Law. The complainants prayed, that those deeds of release might be vacated and annulled. They stated, that they were ready, able and willing to carry into effect the contracts between Law and Morris, Nicholson and Greenleaf, and to do everything that in justice and equity ought to be done on their part; but that Law had refused and neglected to build the houses, and to make his selection within the time limited, and out of the squares prescribed; had violated his contract in setting up a claim and keeping the property mortgaged as a collateral security for making him titles to property, which titles he had prevented, by refusing to select the property, &c. The bill required Campbell to state when, from whom, and at what price he obtained the notes of Morris and Nicholson, upon which his attachment was issued; and prayed for general relief.

The answer of Law admitted, that he had received conveyances for "about 2,000,000 of square feet of ground, under the contract, but not within the time stipulated;" it stated the number and kind of houses which he had built; denied that he was bound to receive conveyances with a condition to build; the building contract being independent of the contract to convey the land. It stated, that he was induced to enter into the building contract, by the contract which Morris, Nicholson and Greenleaf had entered into with the commissioners, and others to build *a large number of houses, which contract, it averred, they never complied with. It [*461 stated also, that Morris and Nicholson assigned Law's building contract to the commissioners of the city, and that the present complainants were not the assignees thereof, nor had any interest therein; and that if they had, their remedy was at law and not in equity.

With regard to the releases of September and October 1797, he said, that the mortgaged property was more than ample security; that Morris and Nicholson were, in 1797, generally deemed bankrupts, that their creditors were suing out attachments, and he thought it unjust to keep covered, by his mortgage, from fair creditors, a property so much more than enough to secure his demands, and therefore, executed those releases. He admitted, that Campbell gave him a bond of indemnity, but denied, that he received any compensation. He admitted also, that one of the complainants desired him not to execute them; but he disregarded the request.

Exceptions having been taken to this answer, Mr. Law filed an amended answer, in which he insisted, that he was released from his building contract, because he had not received titles for all the lots he had purchased; or that, as he had originally four years from the date of the contract, to complete his buildings, and was to have had his titles in ninety days, he ought to be allowed four years from the time of receiving his titles. He affirmed, that he made his selection, within the time limited by his contract, and exhibited a copy thereof. He averred, that by the contract of March 10th, 1795, he had a right to select as well from the property which Greenleaf had contracted to purchase in his own name from D. Carroll, as from that which Morris and Greenleaf had contracted to purchase from the commissioners of the city.

That on the 14th of March 1796, after much trouble and vexation, he received his first conveyance of a part of his lots, amounting to 773,122¼ square feet; to obtain which, he had to release to Morris, Nicholson and Greenleaf a part of the mortgaged property, viz., squares Nos. 465, 468, 469, 470, 495, and 498. He averred, that any variation which might appear between his original selection and the squares afterwards conveyed to him, *was occa- *462]
sioned by the slow compliance on the part of Morris, Nicholson and Greenleaf with their contracts with Carroll and the commissioners. He stated, that they gave him full liberty to make another selection of any lots within their purchases or contracts, and referred to Morris and Nicholson's letter to him, of the 17th of September 1796, in which they said, "you may select by squares, out of any that are within our selection, although not chosen by you already, except water property, or where we have, since your selection, or before, improved on, or contracted for the sale of, that which you desire; and we wish you now to name the squares, as the selection and titles shall be completed for you without delay."

That in consequence of that letter, he made another selection, including other squares, and on the 20th of July 1797, received another conveyance of lots from the commissioners, containing 1,142,068¼ square feet. That he also received a deed, dated January 28th, 1797, directly from Morris and Nicholson, for 128,223 square feet, the title to which had since been decided by the chancellor of Maryland, not to have been in them, but the commissioners of the city.

He also stated, that after receiving these three conveyances, "he had selected to have the residue of what was due, conveyed to him out of the half of square 743, square 699, and square 696, containing 314,829½ square feet, which, if the deed of January 28th, 1797, had remained good, would have been near the *quota* to which he were entitled; but the said squares, or the proper portion thereof, never were conveyed, though the said Morris and Nicholson frequently promised so to do. That the said squares were a part of the property which they had contracted to purchase of the said Carroll, according to their contract of the 26th of September 1793" (a copy of which is exhibited, and appeared to be a contract by Greenleaf alone, with Carroll). He referred to a letter from Morris and Nicholson to him, of the 19th of March 1797, in which they said, "we are equally anxious with you to get Mr. Carroll paid, on his (Mr. Carroll's) account, upon our account, and upon your own account; and yet, with all this anxiety, we do not agree to sign the articles, which were *handed us yesterday; our objections *463]
thereto will be filed. But to make your mind at ease on the subject of the property to be conveyed to you by Mr. Carroll, and ours at ease about getting our property released from your mortgage, which it then ought to be, we propose to enter into a contract, with penalty, with you, to fix a limited time, within which the money shall be tendered to Mr. Carroll, say in six weeks, and on your part to covenant therein, that upon so doing you will release to us our mortgage, when Mr. Carroll makes the titles." He referred also to a letter from Mr. Morris to him, of the 21st of June 1797, in which Mr. Morris said, "I am in pursuit of money for Mr. Carroll, and expect success, but I hope, when it comes, he will not plague himself, and embarrass us, by a refusal of it. He ought to have had his money, and

I have always lamented, that we could not pay it, when due, but certainly we will pay as soon as we can."

The answer then averred, that Morris and Nicholson never paid the purchase-money due to Mr. Carroll, nor in any other respect complied with the contract with him, whereby they forfeited all right to the purchase of the property therein mentioned, and disabled themselves from conveying to the defendant, Law, the property he had so selected. That one of the purposes of the deed of assignment, under which the complainants claimed title, was, to pay Mr. Carroll, $13,000 due upon that contract, whereby it became their duty to pay that sum, so as to obtain titles for the defendant, Law; but they never did pay that sum to Mr. Carroll, and it was not now in their power to comply specifically with the contract between the defendant, Law, and Morris, Nicholson and Greenleaf.

To this answer, exceptions were also taken, and the complainants, Pratt and others, filed an amended bill, in which they contended, that the defendant, Law, had not made his selection in due time and manner, according to the original contract; that, therefore, the complainants might now satisfy the balance of the contract, by a conveyance of such lots as they should deem proper; and under that idea, had tendered to Mr. Law a conveyance for the quantity of land which he had a right to claim. *That by [*464
the original contract, Mr. Law had a right to select only out of the property which Morris and Greenleaf had contracted to purchase from the commissioners; for that was the only contract which gave them a right of selection. The complainants also contended, that if, upon Mr. Law's failure to select his lots, within the time limited, the right of selection did not revert to Morris, Nicholson and Greenleaf, yet he was bound to close his selection in a reasonable time, and before Morris and Nicholson had completed their selection, under the contract of Morris and Greenleaf with the commissioners; and that, after closing their selection, they were not bound to convey to Mr. Law, any lots not selected by them, or not before that time selected by him and notified to them. They admitted, that although Mr. Law had forfeited his right of selection, yet Morris and Nicholson, being desirous of gratifying him, and of stimulating him to make the stipulated improvements, caused to be conveyed to him, by deeds dated the 14th of March 1796, and the 20th of July 1797, 1,935,008 square feet of land, without annexing thereto the condition of building, which they had a right to insist upon, including therein sundry lots, not within his right of selection, whereby he obtained more valuable lots, and on better terms, than he was entitled to under his contracts.

They averred, that they are the *bonâ fide* purchasers, for a valuable consideration, of Morris, Nicholson and Greenleaf's equity of redemption in the mortgaged property, without notice of any agreements or transactions between them and the said Law, other than those which appeared on the face of the bond of the 3d of December 1794, the agreement of the 4th of December 1794, that of March 10th 1795, and the mortgage of the 4th of September 1795; and were not in equity bound by any other agreement, if any such existed.

They further stated, that the legal estate of the mortgaged premises, never was in Morris and Nicholson, or either of them, but was in Greenleaf alone. That after Greenleaf had sold to Morris and Nicholson, his interest

in the Washington lots, being largely their creditor, he caused all their prop-
*465] erty in the city to be attached by *process, issued under the laws of Maryland, on the 21st of April 1797, which attachment was for the benefit of the complainants, and was laid on the same property which, on the following day, was attached at the suit of the defendant, Campbell, which attachment, in favor of Greenleaf, was continued until and after the 26th of June 1797, when Morris and Nicholson assigned and transferred to the complainants, for a valuable consideration, all the attached property; whereupon, Greenleaf's attachment was dismissed by consent of the parties, inasmuch as the complainants had, by the assignment, obtained all the benefit which they could have obtained by prosecuting the attachment to judgment of condemnation. They averred, therefore, that if the defendant, Campbell, had any equitable claim to the property, by virtue of his attachment, the complainants had a prior equitable claim, by virtue of their prior attachment.

But they averred also, that neither Morris nor Nicholson ever had such an estate in the mortgaged premises as could be the subject of an attachment at law, or as could be condemned at law, or as could be seized and sold under a *fieri facias*; and that the defendant, Campbell, had notice of the complainants' legal and equitable title, when he purchased the property. That if Morris and Nicholson had any equitable interest therein, it was subject to the duty of doing justice to Greenleaf, the legal proprietor, by paying all they owed him, before the trust, as to them, would be decreed to be performed; and if they had an equity of redemption in the mortgaged lots, and if anything was seized, condemned and sold, under the said Campbell's attachment, it could only be the right which Morris and Nicholson had to redeem the said lots, by conveying to Mr. Law the balance of property due to him, and by satisfying all equitable claims which Greenleaf had upon them. And that, if the complainants should be compelled to convey to Mr. Law, the balance of property which he claimed, the defendant, Campbell, could have no right to the lots, as against the complainants, until he should have satisfied them for all the property which they should have been so
*466] compelled to convey to the defendant, *Law, and should also have satisfied all equitable claims of Greenleaf upon Morris and Nicholson.

The complainants further stated, that they had been informed and believed, that the attachments of the defendant, Campbell, were founded upon notes of Morris and Nicholson, purchased upon speculation, in market, and at a price far below their nominal value; and they contended, that Campbell could not, in equity, recover, even if he had a prior lien upon the lots, more than the *bonâ fide* actual value which he gave for the notes, with legal interest thereon. They called upon him to state what consideration he gave for the notes; and at what price he purchased in the mortgaged lots, at the sale under the *fi. fa.* issued upon the judgment on his attachments.

The answer of the defendant, Campbell, disclaimed all benefit and title under or by virtue of the releases executed by the defendant, Law, at his request; but claimed to hold entirely under the judgment of the court of appeals of Maryland upon his attachments; and referred to his bill of interpleader (as he termed it), and the transcript of the record of the court of appeals of Maryland exhibited therewith; by which transcript, it appeared,

that the attachments were issued on the 21st of April 1797, by virtue of the act of assembly of Maryland, of 1795, ch. 56, entitled "a supplement to the act, entitled an act directing the manner of suing out attachments in this province and limiting the extent of them;" and commanded the sheriff "to attach, seize, take and safe-keep all the land, tenements, goods, chattels and credits," of Robert Morris, which should be found in his bailiwick, "to the value of, as well the damages aforesaid, as," &c.; and to have the same before the judges of the general court, &c., then and there to be condemned, according to the act of assembly aforesaid, to the use of the said W. Campbell, unless the said Robert Morris should appear and answer to the said William Campbell, in a plea of trespass on the case, &c., according to law. The sheriff was also commanded to make known to the garnishees, that they appear, &c., to show cause why the lands, tenements, &c., should not be condemned, and execution thereof had and made, as in other cases of recoveries and judgments given in courts of record, according to the directions of the act of assembly, *aforesaid, &c. The like process was issued against the property of Mr. Nicholson. [*467

On the 22d of April 1797, the sheriff levied these attachments on part of the property included in the mortgage to Law, and particularly set forth in the sheriff's return. On the return of these attachments, Morris and Nicholson appeared by attorney, and upon argument, the general court quashed the sheriff's return; whereupon, Campbell took a bill of exceptions, which stated, that the plaintiff, Campbell, offered in evidence the deed of the 13th of May 1796, from Greenleaf, to Morris and Nicholson; whereby Greenleaf conveyed to them all his property in the city of Washington, excepting three squares, "and excepting all such squares, lots, lands and tenements, as were either conveyed or sold, or agreed to be conveyed, either by all or either of them, the said Morris, Nicholson and Greenleaf, or any of their agents, prior to the 10th of July 1795. That Campbell prayed condemnation of one moiety of certain squares, particularly described, as the property of Morris, and the other moiety as the property of Mr. Nicholson. That Morris and Nicholson offered in evidence, the mortgage to Mr. Law, of the 4th of September 1795, which included those squares; and that Campbell offered in evidence one of the releases of Mr. Law, dated the 5th of October 1797, to Morris, Nicholson and Greenleaf, which are mentioned in the bill of Pratt and others *v.* Law and Cambell; Morris and Nicholson then offered in evidence the deed of trust from Morris, Nicholson and Greenleaf to the complainants, Pratt and others, of the 26th of June 1797, conveying to them all the right and interest of Morris, Nicholson and Greenleaf, in the city of Washington; and proved, that the aforesaid deed of release from Mr. Law, to Morris, Nicholson and Greenleaf, was lodged by Mr. Law alone, in the proper office, to be recorded; and that it was executed by Mr. Law, with a knowledge of the aforesaid deed of trust to the complainants, against their will and express prohibition, and without the knowledge or assent of Morris, Nicholson and Greenleaf, or either of them; whereupon, the general court of Maryland was *of opinion, that neither Morris and Nicholson, nor either, had "such an estate in those squares, whereof the plaintiff could have judgment of condemnation." [*468

Upon this bill of exceptions, the cause was carried to the court of appeals of Maryland, who reversed the judgment of the general court "as to the

land contained in the return of the sheriff of Prince George's county ;" and adjudged, "that the lands and tenements so as aforesaid attached, that is to say," &c. (describing them) "be condemned towards satisfying unto the said William Campbell, as well the said sum of," &c., "and that the said W. Campbell have thereof execution," &c. "Whereupon, execution issued from the court of appeals, returnable to the general court." This execution was a special *fieri facias*, which, after reciting the attachment, the sheriff's return, the judgment of the general court, the writ of error, and the judgment of the court of appeals, commanded the sheriff of Prince George's county, that of the lands and tenements attached (describing the squares, &c.), he cause to be made the damages and costs, &c. Upon this execution, the sheriff sold the attached property to W. Campbell, the plaintiff, for a comparatively small sum.

Under these proceedings, the defendant, Campbell, in his answer, contended, that, by the laws and constitution of Maryland, his title and interest in the said lots was conclusive upon all the world, and that the judgment of the court of appeals of Maryland could not be opened. He admitted, however, that he acquired by those proceedings, no more interest or title than Morris and Nicholson had in the property, at the time of the attachment, and that Mr. Law's mortgage was a prior incumbrance ; but denied, that there was any other lien or incumbrance thereon. He contended, that he had a right to redeem the lots from that mortgage, on any terms which should be agreed upon between him and Mr. Law. He affirmed, that the complainants knew of his attachment, when they took their deed of assignment of the property. He denied, that the complainants had any valid attachment, prior to his. He admitted, that Morris and Nicholson had only
*469] an *equitable title in the lots, at the time of his attachment. He admitted, that he knew of the assignment to the complainants, when Mr. Law executed his release, and at the time he purchased the property under his attachment.

He demurred to so much of the bill as charged that he purchased the notes of Morris and Nicholson (upon which the attachment issued) on speculation, at a low price, and to so much as required him to state what consideration he paid therefor. To this answer, the complainants excepted, because the defendant, Campbell, did not answer that part of the bill to which he demurred.

The bill of Law against Pratt and others, stated the bond of Morris, Nicholson and Greenleaf, of the 3d December 1794, to convey to him 2,400,000 square feet of ground, in the city of Washington ; the agreement of the 10th of March 1795 ; and the mortgage of the 4th of September 1795. That he had received conveyances for 773,121¼ square feet, on the 14th of March 1796 ; for 1,142,068½ square feet, on the 20th of July 1797 ; and for 128,223 square feet, by a subsequent conveyance, the title of which last-mentioned quantity was defective. That Morris and Nicholson, having obtained all the right, title and interest of all the joint property of Morris, Nicholson and Greenleaf, in the city of Washington, in the year 1797, became insolvent, and conveyed the same to the defendants, Pratt and others. That neither Morris, Nicholson and Greenleaf, nor the defendants, Pratt and others, did procure from the commissioners of the city of Wash-

ington, a good, clear and sufficient title to the property, out of which the complainant, Law, had the right of selection ; so that, although he made his selection, and requested a conveyance of the remaining 400,000 square feet, the defendants refused to convey the same, and are unable to comply with the engagements of Morris, Nicholson and Greenleaf with him. Wherefore, he prayed a decree, that they should pay him the original purchase-money of five pence, Pennsylvania currency, per square foot, for the amount of square feet unconveyed, with interest from the 3d December 1794, by a certain day ; and in default thereof, that they should be foreclosed of their equity of redemption ; and for general relief.

The joint and several answer of the defendants, Pratt *and others, admitted the bond of 3d December 1794, the agreement of the 10th [*470 of March 1795, and the mortgage of the 4th of September 1795, which, it averred, was executed to remedy a defect in a former mortgage of the 11th May 1795. The defendants also produced the agreement of the 4th of December 1794. They admitted, that the complainant, Law, had received good titles to 1,915,189¾ square feet, in part compliance with the condition of the bond ; and that the title to the 128,223 square feet was defective. They admitted, that Morris, Nicholson and Greenleaf became insolvent, and conveyed all their interest to these defendants, as trustees for certain creditors. They did not admit, that either they, or Morris, Nicholson & Greenleaf were ever bound to procure a good title to all the property out of which the complainant had a right to select ; nor that he made his selection within the time limited by the contract of the 10th of March 1795 ; nor that they, or Morris, Nicholson and Greenleaf ever refused to convey to him any property which he had a right to demand under those agreements. They said, that they had been informed and believed, that the complainant, Law, never made a definite and final selection of lots to justify the condition of the bond ; but, without authority or limitation of time, assumed the right of varying his choice, from time to time, according as circumstances indicated a prospect of increasing value, and did not confine himself to the property, nor to the terms contained in the contract of the 10th of March 1795. They admitted, however, that Morris and Nicholson, as a matter of indulgence, acquiesced in the selections thus made, so far as they had the ability to convey the lots so selected. They contended, that upon the complainant's having failed to make his selection within the limited time, the right to select reverted to Morris, Nicholson and Greenleaf and that the complainants, as their assignees, had a right to select and tender a conveyance for the balance remaining unconveyed ; and that they had done so, but the complainant refused to accept the same.

They contended, also, that the complainant was not entitled to relief in equity, until he should have complied with *his agreement to build [*471 certain houses, according to the agreements of the 4th of December 1794, and 10th of March 1795 ; and they averred, that the damage they had sustained by reason of his not having built the houses, exceeded the value of the property remaining to be conveyed to him.

They claimed the benefit of his releases of certain parts of the mortgaged property, dated March 11th, 1796, September 4th, and October 5th, 1797, copies of which they exhibited ; and they denied, in general terms, that the mortgage was forfeited or the condition thereof broken.

After replication to this answer, the complainant, Law, filed an amended bill, stating in substance the same matters which were contained in his answers to the bill of Pratt and others against him. To this amended bill, the defendants, Pratt and others, filed their answer, referring to the proceedings in all the causes before mentioned, and praying that the whole might be considered as one cause. They averred, that the building contract constituted a material part of the consideration in the sale of lots to the complainant; that the assignment of that contract to the commissioners of the city, by Morris and Nicholson, was not valid, and did not exonerate the complainant from his obligation in equity to perform it. They proceeded to state with more minuteness, the facts and transactions stated in their original and amended bills against Law and Campbell.

They denied, that Morris and Nicholson could authorize the complainant to make a new selection, so as to embarrass the mortgaged property, or to disable themselves from complying with the terms of the mortgage, whereby subsequent incumbrancers, whose rights accrued before such new selection, could be defeated. They denied also, that they were bound by any agreements between the complainant and Morris and Nicholson, of which they had not notice, at the time of the assignment to these defendants.

*472] *The complainant having, in his amended bill, stated, that he had solicited to have the residue of what was due to him conveyed out of half of square 743, square 699, square 696, square 730, and the square north of 697, the defendants, in their answer, denied his right to select either of those squares. As to the square 743, which was the only one in which Morris and Greenleaf ever held any definite interest, they averred, that all their interest therein, consisting of one moiety thereof had been conveyed to him. That as to the squares 696 and 730, the complainant was expressly prohibited from selecting them, by the contract of the 10th of March 1795; and that neither of the squares 699, 730, 696, and north of 697 were mentioned in the complainant's selection of December 5th, 1795, nor in any former selection pretended to have been made by him; that neither of those squares ever belonged to Morris, Nicholson and Greenleaf, or either of them, nor were included in the 6000 lots bought by Morris and Greenleaf of the commissioners, or had been apportioned to them or either of them, or could of right be claimed by them or either of them, under any contract. To this answer, there was a general replication.

The bill of Pratt and others against Duncanson and Ward, was originally filed to obtain an injunction to prevent Duncanson from selling certain squares which he had advertised for sale, under a mortgage dated the 12th of September 1795, given to him by Morris, Nicholson and Greenleaf, to indemnify him against the return of certain bills of exchange which he had drawn for their accommodation, for 12,000*l.* sterling, 7600*l.* sterling of which had been taken up by the defendant, Ward, with the funds of Greenleaf, and the residue by Greenleaf himself; and to obtain a conveyance of those squares to the complainants, who were the assignees of Morris, Nicholson and Greenleaf's equity of redemption. Those squares were all included in the prior mortgage to Thomas Law.

After Duncanson and Ward had filed their answers, and testimony had

been taken in the cause, by which it appeared, that the facts stated in the bill were true, William Campbell filed a bill against all the parties to the cause, viz: Pratt and others, assignees of Morris, *Nicholson [*473 and Greenleaf, and Duncanson and Ward, in which bill (which he called a bill of interpleader), he set forth his attachment of the squares included in the mortgage to Duncanson, the condemnation thereof by the judgment of the court of appeals of Maryland (while the city of Washington was under the jurisdiction of Maryland), the *fieri facias* issued upon that judgment, and his purchase of the squares at the sheriff's sale; whereby he averred he acquired the equity of redemption of those squares. He stated, that the bills, mentioned in the mortgage, had all been discharged by Morris, Nicholson and Greenleaf, or one of them, or with their funds, and the property thereby exonerated; and prayed for a conveyance thereof to him; and for general relief.

The defendants, Pratt and others, in their answer, admitted, that they had heard, that the complainant, Campbell, claimed the lots mentioned in his bill, by virtue of a pretended judgment of condemnation, upon certain pretended attachments, issued upon certain pretended claims against Morris and Nicholson; but they denied the validity of those claims, and of all proceedings founded thereon; and averred, that if any such judgments of condemnation had been obtained, they were obtained, as they believed, by fraud and imposition practised upon the court rendering such judgments, by producing to such court certain pretended deeds of release, fraudulently executed by Thomas Law (meaning the releases mentioned in the bill of Pratt and others *v.* Law and Campbell). They averred, that they were not parties to such judgments, and could not be bound thereby. That the proceedings exhibited by the complainant appeared to be proceedings at law, and not in equity; and therefore, that if the complainant had any title under those proceedings, it must be a title at law, and his remedy was at law and not in equity; and that no proceeding by these defendants against Duncanson and Ward, in equity, could injure the complainant's title at law, if any he had. They, therefore, denied his right to relief in equity, and contended, that the court, as a court of equity, had not jurisdiction in the case stated by the complainant in his bill. They did not admit, that any valid attachment was laid on the property, before the assignment from Morris, Nicholson and Greenleaf to them. They averred, that on the day before the date of Campbell's attachment, Greenleaf, being a large creditor *of Morris and Nicholson, caused attachments, in his name, but for the use of these defend- [*474 ants, to be laid on the same property; which attachments remained in full force (if the property was liable to attachment for the debts of Morris and Nicholson), until and after their assignment of their interest therein to these defendants, when they, having by the assignment obtained all the benefit which they could have obtained by prosecuting the attachments to judgment of condemnation and sale, caused the attachments to be dismissed. And therefore, that if Campbell could claim any title in equity, under his attachments, these defendants had a prior claim in equity, by virtue of their prior attachments, and the assignment from Morris, Nicholson and Greenleaf. They denied, that the legal title was ever in Morris and Nicholson, or either of them, but was in Greenleaf alone, until conveyed to Thomas Law, by the mortgage of the 4th of September 1795, in whom it remained, until his

releases of the 4th of September, and 5th of October 1797, which releases, if valid, inured to the benefit of these defendants.

As to certain squares contained in the mortgage to Duncanson, viz., the square east of 546, the square east of 547, the squares 549 and 596, the square east of 596, and the square 597, they averred, that long before Campbell's pretended attachment, viz., on the 20th of June 1796, Morris and Nicholson conveyed to the said Greenleaf all their interest therein, for a valuable consideration, since which time, Morris and Nicholson have never had any interest therein. They averred, that the complainant had notice of all these facts, at the time of his purchase at the sheriff's sale, under his attachment.

They contended also, that if the complainant could, by any process of law, attach the equity of redemption, yet he could have no remedy in equity, unless he had offered and could show himself able to redeem the property, by a compliance with the contract between Law and Morris, Nicholson and Greenleaf, which he had not done.

They said, they had heard and believed, that the complainant's pre-
*475] tended attachments were founded on notes *of Morris and Nicholson, purchased in market, at a great discount, as an object of speculation, with a view to take the chance of such an attachment; and they were advised, that if the complainant should in equity have a prior lien on the property, he could not claim, in equity (as against these defendants who were *bonâ fide* creditors of Morris and Nicholson, and purchasers of their equity of redemption, for a valuable consideration, and who were seeking for satisfaction out of the same fund) more than the amount of money actually paid by the complainant, for the said notes and bills, with lawful interest thereon.

One of the defendants, John Miller, junior, assignee of Greenleaf, under the bankrupt law of the United States, answering separately, for himself, stated, that the bills for 12,000*l.* sterling, in the bill mentioned, were sold, and the proceeds thereof equally divided between Morris, Nicholson and Greenleaf, each of whom were bound in equity, as well as by agreement, to take up one-third of the amount, if they should come back protested. That they did come back protested; that Morris and Nicholson wholly failed to take up any part thereof, but the whole was paid by Greenleaf, with his own separate funds, and that Morris and Nicholson were still indebted to him for two-thirds of the amount of the 12,000*l.* sterling, with interest, charges, damages and costs of protest, and were also otherwise largely indebted to him, at the time of the attachment. That upon taking up the bills, Greenleaf informed Duncanson thereof, and forbade him to release the mortgage, on his intimating a design so to do, and requested him to retain the same as a security to him (Greenleaf), for the two-thirds of the amount of the said bills, which Duncanson agreed to do; and thereby became in equity a trustee of the mortgage for the benefit of Greenleaf; and this defendant, as his assignee, claimed a right to stand on the same equitable ground as Duncanson would have stood upon, if the bills had not been taken up, so far as respects two-thirds of the amount of the bills, with damages, &c.; and therefore, to have a prior equity to that of the complainant, if any he had.

There was evidence tending to show that Mr. Law made a selection of squares, within the time stipulated. And that the public property in

those squares, which *Morris and Greenleaf had contracted to purchase of the commissioners, was more than sufficient to satisfy Mr. Law's contract. That the commissioners had conveyed to him about 2,000,000 of square feet; and that it was probable, they would have conveyed the remaining 400,000 square feet also, at the same time, if Mr. Law would have taken them out of the squares contained in his first selection. No tender, however, was made to him of the balance out of those squares, and there was evidence that Morris and Nicholson had acquiesced in Mr. Law's claim to have part of the property which Greenleaf had contracted to purchase of Mr. Carroll, although neither Greenleaf nor Morris and Greenleaf, ever had any right of selection in that property. There was also evidence, that it was the universal practice of the commissioners, in selling lots, to charge each lot with the proportion of the alley laid out for the general benefit of the lots in the squares; and that such practice had been universally acquiesced in.

With regard to the opinion of the court of appeals of Maryland, upon the subject of Campbell's attachment, there was evidence, that the counsel for Morris and Nicholson had written a letter to Judge RUMSEY, the chief judge of the court of appeals of Maryland, requesting to know the extent and ground of the opinion of the court, upon which the judgment was rendered; and received from him the following answer:

"The court of appeals signed a regular judgment, under their hands. It does not contain the point upon which they gave it; but my brethren thought the covenant for a quiet enjoyment(*a*) was a lease for years, which was an interest subject to attachment, and this influenced their judgment, and they gave it accordingly. The opinion (whether a fee-simple, or an estate for years), will not alter the nature of the judgment, which, in my opinion, will be only of such interest as the party had in the estate, and, if tried in ejectment, can only operate so far. I own, privately, I was of opinion, that an attachment ought to lie against a mortgagor's interest, because he is considered, in chancery, as the *owner; because I would not send a man to chancery in so plain a case, where there [*477 ought to have been conformity in law; and because all men would secure themselves under this artifice. This also was agreeable to the practice of the city of London, where an equitable interest is attachable. But on this, the judges gave no opinion. Sufficient to them, was it, that in their opinion, any interest was attachable, and upon ejectment this would have been disclosed. In conformity to my opinion, I pointed out a case or two, that was in my common-place book, to Mr. Shaff, that indicated an equitable interest attachable. But this was done as an individual, not as a judge; but, being at the time of judgment, he might have mistaken. At the same time, I remarked, and do so now, that the distresses of my family and my own state of health, where such, that I could not be so much master of the subject as I wished.

"You were wrong, in delaying opening the points so long, in which you obliged the court to give a judgment, so late in the cause. And wherein is their judgment (hastily obtained), better than that of other courts? It

(*a*) The mortgage from Morris, Nicholson and Greenleaf to Mr. Law, contained a covenant that they should quietly enjoy the mortgaged property, until the condition of the mortgage should be broken.

quite destroys the use of a court of the last resort. I have opposed, I shall hereafter oppose, this practice, *totis viribus, ergo caveto.*

"There is no impropriety in asking the court's opinion; they always wish their sentiments to be known; and will, I hope, in a land of law and liberty, always be willing to disclose them when required. I am, &c.

"1st March 1801."

These causes having been heard together as one cause, the court below decreed as follows:

In the case of Pratt and others *v.* Law and Campbell, "that the complainants' bill be dismissed."

*478] *In the case of Law *v.* Pratt and others, that the defendants should pay to the complainant, on or before the 1st of April 1814, $25,832.88, being the original purchase-money for the part not conveyed, with interest from the 3d of December 1794, and in default thereof, that the mortgaged property should be sold to raise the same, &c.

In the case of Pratt and others *v.* Duncanson and Ward, no decree appeared to have been made.

In the case of Campbell *v.* Pratt and others (assignees of Morris, Nicholson and Greenleaf) and Duncanson and Ward, the defendants, Duncanson and Ward, never answered the bill, nor was it taken for confessed against them, nor was the bill dismissed or abated as to them, but the court below decreed, "that the defendants," Pratt and others, "and William M. Duncanson and Samuel Ward, release, convey and transfer to the complainant, William Campbell, all their interest and estate in the squares and lots of land sold under the complainant's attachment, as mentioned and set forth in his bill; and that the said complainant, his heirs and assigns, be for ever quieted in the title, possession and enjoyment of said squares and lots, against all the claims, interest and estate of the said defendants." From these decrees, Pratt and others appealed to this court.

The cases were argued, at great length, by *Jones* and *P. B. Key*, for the appellants, and by *J. Law*, *F. S. Key* and *Pinkney*, for the appellees, Law and Campbell.

In the case of Law *v.* Pratt and others, the argument turned almost entirely upon questions of fact.

In the cases of Pratt and others *v.* Law and Campbell, and Campbell *v.* Pratt and others, and Ward and Duncanson, the following questions were made: 1. Whether Campbell, by the judgment of condemnation, in the

*479] court of appeals of Maryland, and the proceedings *under it, acquired Morris and Nicholson's equity of redemption in the squares attached? 2. Whether J. Miller, the assignee of Greenleaf, had a prior equitable lien upon the squares mortgaged to Duncanson, to the extent of the two-thirds of the amount of the bills of exchange secured by that mortgage? 3. Whether Campbell was bound to disclose the consideration he gave for Morris and Nicholson's notes, upon which he obtained the attachments?

P. B. Key, for the appellants, contended, 1. As to the first point, that nothing was condemned under those attachments, but the legal estate of Morris and Nicholson, if they had any. An equitable estate is not liable to attachment or execution under the laws of Maryland. The judgment of the

court of appeals of Maryland, in this case, does not purport to condemn the equity of redemption, nor to designate what interest in the land Morris and Nicholson had.

It appears, by the letter from Judge Rumsey, the chief justice of that court, that the majority of the court was of opinion, that the covenant in the mortgage to Mr. Law, that Morris, Nicholson and Greenleaf should quietly enjoy the land, until default made, gave them a legal estate, in the nature of an estate for years, which was liable to condemnation; and that the court intended to condemn nothing more than the legal estate, whatever it might be, which Morris and Nicholson had in the land, at the time of the attachment. That it was the legal, and not the equitable estate, which they considered liable to condemnation, appears from the language of the judge. "But on this," says he (meaning, on the question whether an attachment ought to lie against a mortgagor's interest), "the judges gave no opinion. Sufficient to them, was it, that, in their opinion, any interest was attachable, and upon ejectment, this would have been disclosed." Now, no interest could, in Maryland, have been maintained upon ejectment, but a *legal [*480 estate; which shows that the court of appeals contemplated the condemnation of a legal interest only. This is sufficient to show that the judgment of the court of appeals is not conclusive evidence, that the equity of redemption of Morris and Nicholson was affected by the attachment.

By the construction which the courts of Maryland have uniformly given to the British statute of 5 Geo. II., making lands in the colonies liable for debts, nothing but the legal estate is liable to execution at law. The rule is the same in England. *Plunket* v. *Penson*, 2 Atk. 292; *Shirley* v. *Watts*, 3 Ibid. 200; *Burden* v. *Kennedy*, Ibid. 739. The act of assembly of Maryland, 1794, ch. 60, § 10, is founded upon this known and acknowledged rule of law. It recites, that "whereas, it often occurs, that persons against whom judgments or decrees are obtained, hold and possess, or claim, lands, tenements or hereditaments, by equitable title only, and the creditor or creditors of such persons are often without remedy, either at law or in equity," and then goes on to give the chancellor power to decree a sale of the equitable title; and to give the purchaser all the remedies which the person had whose equitable title is thus sold. The act of Maryland in 1810 (ch. 60) which, for the first time, subjected equitable estates to legal process, was passed ten years after the judgment of the court of appeals in this case, and is strong, if not conclusive evidence, that such estates were not, before that time, liable to such process.

But if an equity of redemption be liable to attachment, yet the complainants' equity is prior to that of Campbell, for they had a prior attachment, in the name of Greenleaf, against Morris and Nicholson, which was continued until they obtained an assignment of that equity of redemption which was the object of their suit. If I attach the personal property of a man, and before condemnation, he sell it to me, in satisfaction of my claim, I am under no obligation to proceed with my suit to judgment. I have already obtained the fruit of my action. If he does voluntarily, what the law would compel him to do, it is sufficient.

*2. As to the prior equity of Miller, assignee of Greenleaf under the [*481 bankrupt law of the United States. Greenleaf conveyed his rights in the Washington property, on the 13th of May, 1796, with certain excep-

tions, reservations and conditions. That conveyance was expressly made subject to this mortgage to Duncanson. All the rights of Greenleaf, growing out of those exceptions, reservations and conditions, were assigned by the bankruptcy, to Miller, one of the defendants to Campbell's bill, and one of the complainants in the bill against Law and Campbell. The bills secured by the mortgage to Duncanson were sold, and the proceeds equally divided between Morris, Nicholson and Greenleaf, each of whom agreed to take up one-third of the amount thereof, if they should return protested. They returned protested, and Greenleaf was obliged to take up the whole. Upon doing this, he requested Duncanson not to release the mortgage, but to retain it as his security. This Duncanson agreed to do; and thereby became a trustee, in equity, of the mortgage, for the benefit of Greenleaf. Ten of these squares, mortgaged to Duncanson, had been conveyed by Morris and Nicholson to Greenleaf, in June 1796, subject to Law's and Duncanson's mortgage; Morris and Nicholson, therefore, at the time of the attachment, had no equity of redemption in those ten squares. Four other squares are claimed by Ashley, another of these defendants, to whom Morris and Nicholson had assigned their equity of redemption, prior to Campbell's attachment.

3. As against these defendants, who are seeking satisfaction out of the same fund with Campbell, he ought not, even if he has a prior lien, to be permitted to enforce it, beyond the amount of what he paid for Morris and Nicholson's notes, with interest. Equity will not permit him to profit by our loss. "Equality is equity" (Maxims in Equity, p. 9). "A stranger who buys in a prior incumbrance shall be allowed only what he really paid, as against other incumbrancers." 1 Vern. 476. "But as against the owner of
*482] *the estate, who made the incumbrance, or his heir, he shall be allowed the whole that is due upon it." Morris and Nicholson, it is true, could not set up this defence; but we, who are their *bonâ fide* creditors, and assignees of their equity of redemption, for a valuable consideration, have a right to redeem Campbell's incumbrance, by paying him his purchase-money and interest.

F. S. Key, for Campbell, relinquished the claim as to the ten squares, conveyed to Greenleaf, and the four squares assigned to Ashley.

As to Miller's claim to a lien, in consequence of Greenleaf's payment of the bills, he contended, that no such lien was thereby created, or could be created, without an actual assignment of the mortgage. The condition of the mortgage was, that Morris, Nicholson and Greenleaf, or one of them, should take up the bills. One of them did take up the bills, and thereby the mortgage was discharged. The lien no longer existed, and the property reverted to Morris and Nicholson.

As to the claim that Campbell should be compelled to take only what he gave for the notes, he contended, that the judgment of the court of appeals had ascertained the amount of this debt, and that the judgment could not now be opened.

As to the question whether an equitable interest could be attached, he relied upon the judgment of the court of appeals as conclusive.

As to the prior attachment by Greenleaf, for the use of Pratt and others, he contended, that it created no lien, inasmuch as it was not pros-

ecuted to judgment. That the attachment and the deed of assignment could not be connected together, so as to preserve the inchoate lien which was commmenced by the attachment.

Pinkney, on the same side.—Campbell contends, not only that he has an equitable, but a legal title. His attachment gave him a legal title to an equitable thing. If it did not, it gave him no title. *Upon the great principles of justice, real property is as much liable for a man's [*483 debts, as personal. Uses were never extended in England until the statue of Hen. VIII. And the courts always refused to extend trusts, until the statue of frauds authorized them so to do. Nor could an equity of redemption be affected at law.

But this question here turns wholly upon the local law of Maryland, and the construction of the statute under which these attachments were issued. It is the act of 1795, ch. 56, which authorizes a justice of peace, &c., to issue his warrant to the clerk of the court, requiring him to issue an attachment "against the lands, tenements, goods, chattels and credits" of the debtor. The single question is, whether these were the lands of Morris and Nicholson, at the time of the attachment.

From the time of the colonization of Maryland, its jurisprudence has been divided between courts of law, and courts of chancery. If the statute speaks the language of the courts of chancery, as well as of law, the case is clear. In chancery, the mortgagor, and not the mortgagee, is owner of the land; the equity of redemption descends to the heir; the testator may devise it; his wife is entitled to dower; the husband is tenant by curtesy; in short, the mortgagor is owner of the land, as against all the world, except the mortgagee. The legislature, by its acts, speaks to the whole jurisprudence of the state, not to one branch only. A trust-estate was liable to execution and attachment long before. Why should not an equity of redemption be equally liable? The act expressly makes *credits* liable to attachment, which was as contrary to the course of the common law, as to subject equitable interests in land to condemnation. Lord MANSFIELD, in a case in Douglas's reports (2 Doug. 610), says, it is an affront to common sense, to say, that the mortgagor is not the real owner. The equity of redemption is the substantial ownership, in the view of all the world.

The act of Maryland of 1810, applies to executions *only, and not [*484 to attachments upon equitable interests in lands. The legislature supposed the case of attachments already provided for. The act of 1794 only shows that the legislature thought equitable interests in lands ought to be as much liable for debts, as legal interests. They also thought it expedient to give the purchaser of an equitable interest under the decree of the court, all the remedies, legal as well as equitable, which the debtor formerly had. The case of *Waters* v. *Stewart* (1 Caines Cases 47) is precisely analogous to this. The statute of New York, upon which that case arose, subjected to execution, "lands, tenements and real estate;" under which expressions, it was decided, that an equity of redemption of a mortgage in fee, was liable to be sold by virtue of a *fieri facias*.

It is said, however, that the court of appeals in Maryland was of opinion, that the covenant for quiet enjoyment was equivalent to a lease for years, which is a legal estate, and that they did not mean to condemn anything

more than that legal interest. But that covenant created no legal estate. No specific term was mentioned, during which Morris and Nicholson should hold it. It was not an estate for years. If anything was condemned by the judgment of the court of appeals, it must have been the equity of redemption; for that was the only interest in Morris and Nicholson, at the time of the attachment. To that equity of redemption, Campbell acquired a legal right.

But is said, that Campbell purchased the notes of Morris and Nicholson at a discount, and ought to be permitted to enforce his lien only to the extent of his purchase-money and interest. There is no evidence of the fact; but if there was, yet, if he was guilty of no fraud, he became the creditor of Morris and Nicholson, to the full amount of the notes; he was *pari gradu* with the other creditors, and he who got the first attachment was in the best situation. Campbell obtained the first effective lien. That of Greenleaf
*485] was only incipient; *it was abandoned, before it was complete; the assignment cannot be connected with it. The claim under the attachment, is a claim in the *post;* that under the assignment, is a claim in the *per.* No two claims can be more distinct. They cannot be amalgamated, nor is the latter a continuation of the former. The deed does not purport to be a continuation of the lien; nor could it transfer what Morris and Nicholson did not possess. *Non dat qui non habet.*

But it has been objected, that the judgment cannot be executed by a *fieri facias,* which is applicable only to legal estates in possession. But if the condemnation of an equity of redemption is sanctioned by the act, the sale of that equity under a *fieri facias* is equally sanctioned; the one is a necessary consequence of the other. An execution is as natural to a decree in equity, as to a judgment at law: in both cases, the thing is to be taken to satisfy the debt.

This is no longer a mere equitable lien. It is a right of property, derived from the attachment, the judgment, the execution, the sale and the purchase, which it may be necessary for a court of equity to effectuate; but the right is a legal right.

This was a proceeding *in rem,* and the judgment of the court of appeals of Maryland, is conclusive against all the world.

As to the rule cited from Maxims in Equity, p. 9, and found also in 1 Vern. 479, that "a stranger who buys in a prior incumbrance shall be allowed only what he really paid, as against other incumbrancers;" its authority is doubtful. It is questioned by two cases; one in Salkeld, cited in the margin; and the other in 2 Atk. 54, *Mullet* v. *Park.* And the doctrine applies only to agents, trustees, heirs-at-law, or executors. Campbell's incumbrance was a legal one: he had a statute title.

P. B. Key, in reply.—There cannot be a legal title to an equitable
*486] thing: it *is a solecism. No legal right can exist, without a legal remedy. It is true, there may be tenant by curtesy in an equity of redemption; but he has no legal estate. He has a just title, but it is an equitable title. His remedy is in equity, and not at law. A trust-estate may be sold under a *fieri facias,* because such a proceeding is expressly authorized by the statute of frauds. The general rule is, that equitable rights must be enforced by equitable means, and legal rights, by legal means.

The case in New York was decided upon the statute of that state, and a long previous practice under the statute of 5 Geo. II., c. 7.

The judgment of the court of appeals of Maryland does not purport to decide what sort of a title Morris and Nicholson had in the property attached. It was sufficient for them, that Morris and Nicholson were in possession. They considered that possession, under a covenant for quiet enjoyment, as a legal estate; and they gave judgment of condemnation, in order that Campbell might make out his title in ejectment. So says the Chief Judge of that court, in his letter, and that opinion is perfectly consistent with the terms of the judgment. No inference can be drawn from the judgment, that the court was of opinion, that an equity of redemption was subject to attachment; and the judge affirms that on that point the court gave no opinion. The point is, therefore, entirely open for discussion. No case has been produced from Maryland, in which an equity of redemption has been sold under a *fieri facias* or attachment. The want of such a case is strong evidence of the universal opinion of the courts of judicature, in Maryland, upon that point; and the statutes of 1794, c. 60, and 1810, c. 160, seem conclusively to show what was the opinion of the legislature.

March 11th, 1815. JOHNSON, J., delivered the opinion of the court, as follows:—In order to present a distinct view of the numerous questions which arise out of this intricate and voluminous case, we will pursue them through a history of the transactions in which they originated, and consider them in order as they occur.

*It is well known, that at the founding of this city, the proprietors of the soil gratuitously relinquished a proportion of their property to commissioners appointed to receive it. Morris, Nicholson and Greenleaf purchased city lands to the amount of fifty millions of square feet, to which quantity they were entitled on the 3d of December 1794. Of this quantity, 6000 lots were purchased from the commissioners; 220 lots, of Daniel Carroll, and the residue, of other persons not necessary to be specified in this case. In the agreement with the commissioners, they stipulate to choose the lots by squares; to build twenty houses *per annum* for seven years; and until the year 1796, not to sell, without the building stipulation. In the agreement with Carroll, the division was to take place by lots; not by selection, but alternately in order; and a variety of building and other stipulations were entered into, which, not being complied with, Carroll re-entered on his land, and the contract was finally abandoned. [*487

On the 3d of December 1794, Law entered into a contract with Morris, Nicholson and Greenleaf, for the purchase of 2,400,000 square feet of city land, at the rate of five pence, Pennsylvania currency, per foot, for which Law paid them 50,000*l.*, and took their bond to convey him that quantity of land, in the penalty of 100,000*l.* To secure this bond, the mortgage was given, which is the principal subject of these suits.

On the 13th of May 1796, Greenleaf conveyed all his estate and interest in the Washington lands, to Morris and Nicholson, who, on the 26th of June 1797, executed an assignment of all their interest to these complainants, (Pratt and others). Greenleaf afterwards becoming bankrupt, John Miller, one of these complainants, was made his assignee.

In the several bills and answers relative to these transactions, there

are various contradictory assertions on *the subject of fraud; but as there is no evidence to sustain any charge of that kind, and all the various writings executed between the parties appear fair, unimpeached and reconcilable, we shall wholly reject the consideration of that subject, and dispose of the case upon the unequivocal meaning of the contracts of the parties, and their various acts which have relation to the execution of those contracts.

By the bond to make titles, dated December 3d, 1794, Morris, Nicholson and Greenleaf are simply bound to make titles to Law, for the specified quantity of land in the city of Washington, leaving the situation of it, and the mode of selection, entirely undefined, and of course, retaining it to themselves. On the day following, the same parties entered into articles of agreement, having relation to objects which appear not to have entered into their contemplation originally, and which, on the face of them, bear the appearance of perfect reciprocity. An option is given to Law to decline his purchase, in eighteen months, and Law stipulates, that if he should not then decline it, he shall be bound to improve every third lot, pursuant to the original contract of Morris and Greenleaf with the commissioners, in a specified time.

On the 10th of March 1795, Law purchases other concessions. By relinquishing his right of declining the purchase, he is allowed the right of selecting the property to be conveyed to him, "excepting water property, and excepting such squares as are now appropriated, or respecting which the said Morris, Nicholson and Greenleaf have made arrangements." A list of the excepted squares is subjoined, numerically distinguished. Morris, Nicholson and Greenleaf also stipulate to secure Law in the discharge of their contract, by a mortgage of other lands in the city, "which are now in their possession, until they can give good and sufficient titles to the said Law, of such property as he may select, and of which the titles are not already vested in them," but Law is to select by squares; to select in ninety days, and to build in conformity with Morris and Greenleaf's contract with the commissioners. *From this contract, emanated the mortgage of the 4th of September 1795.

*489]

It was evidently incumbent on Law to make his selection in ninety days, or show some adequate cause to excuse him from the discharge of that part of his agreement. The evidence that he did make his selection in the prescribed time, is contained in his amended answer, drawn from him by express allegations in the bill, and an exception to his answer, in which he swears that his selection was made in due time, and that a copy of his selection, thus made, was, in due time, communicated to the other parties. This fact, therefore, being uncontradicted by any evidence, and confirmed by the solicitude expressed by Law, in all his correspondence, to obtain his titles, must be considered as established, and throws upon the opposite party an obligation to show either, that he complied with the selection so made, or some sufficient reason why it was not complied with. For these purposes, they contend, that it was in part complied with, and that it was the fault of Law himself, that it was not wholly complied with.

I. It appears, that on the 14th of March 1796, there were conveyed to Law, 792,939 square feet of ground; and on the 20th of July 1797, 1,155,857 square feet. In these conveyances, Law acquiesces, with two exceptions: 1. That 128,223 square feet, contained in squares 727, 789 and 729,

have since been recovered of him by due course of law: 2. That in the computation of square feet, supposed to be conveyed to him, are included the superficies of the alleys passing through those squares in which the entire squares were not conveyed. To understand this objection, it is necessary to remark that, in the division between the commissioners and the proprietors, it frequently happened, that several lots in a square were assigned to the proprietor. In the selections made by Morris and Nicholson, and in those made by Law, the exigency of the agreement to choose by *squares was considered as gratified by the choice of all that part of a square which had been allotted to the commissioners. [*490

To the first exception, the assignees reply, that Law was conusant of the defect of title in the squares alluded to; that he took them with his eyes open, and therefore, cannot now claim indemnity. But we do not subscribe to this opinion. There is no evidence in the case, that he did agree to take these squares *cum onere*. The letter of the 1st of September 1799, proves nothing of the kind. The condition of the obligation is not complied with, by a conveyance of a defective title. The obligation to convey a good and sufficient title, with a general warranty, will carry with it the obligation to refund, in case of eviction. Law's knowledge of the incumbered state of the title is of no consequence, whilst the opposite party was under an obligation to make that title good and sufficient. The assignees are, in this respect, in no better situation than the original parties. Their rights and interests are altogether subordinate to those of Law. They take the property in every respect incumbered with the obligation to make good the contracts of Morris, Nicholson and Greenleaf with him, not only on general principles, but by express exception in favor of existing liens and incumbrances.

With regard to the allowance for the superficies of the alleys, we remark, that if the alleys be comprised under the denomination of streets, the conveyance of the ground which they cover would be void, and unquestionably, will not amount to a ratification of the contract. But from the president's instructions of the 17th of October 1791, there is reason to think, that they were rights of way, appurtenant to the lots of each square, respectively. If this claim of Law's extended to the alleys in those squares, of which the whole was conveyed to him, there would be some ground for disputing it. But as it is confined to those squares only in which the right could not be merged, because some one or more of the lots were the property of another, we think, the allowance ought to be made; for Law certainly has not acquired a title in fee-simple in those alleys.

*II. It is contended, that it was in Law's power to have obtained a full performance; and they charge him with various acts to which alone they attribute the non-compliance on their part. 1. His frequent varying of his selections. On this subject, there is a great variety of evidence and many contradictory allegations. But upon the whole, it appears, that after acquiescing in a number of changes, the selections, about the last of the year 1796, settled down to 699, 696 and half of 743, and the deficiency, if any, to be supplied out of squares 730, and north of 697. But Law's inclination to vary his selections furnishes no sufficient excuse; for a tender of a conveyance, conformable to any one of those selections, would have been a performance. [*491

On the 5th of December 1796, it appears, a deed was tendered, and this is asserted to have been a legal performance of their part of the agreement. Law contends that it was not, because it contained the building stipulation, a distinct, independent contract, and which ought not to have been made a part of this conveyance. This question appears, at that time, to have been submitted to counsel, and decided in favor of Law. Whether correctly or not, it is now too late to inquire ; for it appears to have been acquiesced in, and conveyances executed for nearly the whole of the same land which was contained in the tendered deed. The conveyance tendered cannot, even if in unexceptionable form, be now considered as a performance for the balance unconveyed, since the land contained in it constitutes a great part of that for which credit is given upon the agreement ; and after receiving conveyances in a different form, it is surely too late now, to contend for the sufficiency of those tendered.

III. It is contended, that the selection of squares 696, 699 and 743 was not sanctioned by the contract of March 1795, and therefore, Morris and Nicholson were under no obligation to convey. It appears, that these squares
*492] were situated in Carroll's *land, and in the division between Carroll and the commissioners, were assigned to the former. They thus became a part of that land out of which Morris and Nicholson were to be entitled to have conveyed to them their 220 lots, and it is contended, that Law's right of selection could not extend to these lots, because they were to be assigned alternately ; whereas, Law's right of selection was to be made by squares out of those in which Morris and Greenleaf had the right of selection. It appears, however, that Morris and Nicholson acquiesced in Law's right to select from Carroll's land, and in a letter of March 19th, 1797, explicitly acknowledge it.

The solution of this apparent inconsistency is to be found in an observation previously made on another point in this case. A selection by squares was, in practice, considered by these parties as complied with, when made of all those lots contained in any given square which were owned by the party bound to convey. There could then be no reason for excluding Law from enjoying his right of selection from among the squares contained in Carroll's land. The objection certainly comes too late at this day. In Morris's letter to Mr. Cranch, of February 22d, 1796, is contained an express recognition of the correctness of that selection, or, at least, of his acceptance of it in lieu of one more correctly made. This act, with its attendant consequences, must be considered by this court as giving legitimacy to the selection, though it had been otherwise indefensible. Had Law been then informed, that this selection was not authorized by contract, he would have been thrown on his right to amend his selection, at a time when he might have done it, with little prejudice to his interest. But at this time, it is surely too late to retract an assent given nearly twenty years ago.

With regard to the two other squares selected, as it was only provisional, to make up any deficiency that might exist, after conveying the three positively selected ; until the three absolutely chosen were conveyed, nothing final could be done with these.

The last objection is founded on Law's failure to comply with his build-
*493] ing contract. *But to this we answer : Law was not restricted as to the specific lots on which the buildings were to be erected. His

choice, therefore, extended over the whole, and the obligation was not complete, until the whole land was conveyed to him. We are of opinion, that the selection was sufficiently proved ; and that Morris, Nicholson and Greenleaf were in default with regard to the deficiency of land. On them, therefore, must fall the consequences, of a state of things produced by their own default.

But there are other reasons, furnished by the case, in support of this opinion. Law had advanced very considerably, in the discharge of his building contract. He asserts (and it is hardly possible to believe otherwise), that he was originally induced to enter into that stipulation, in consideration of similar stipulations entered into by Morris, Nicholson and Greenleaf with the commissioners and Carroll, and urges their failure, as his excuse in part for desisting from building. But be this as it may, it is impossible for the ingenuity of man to devise any expedient, by which a mean of comparison can be resorted to, that would enable this court, or a jury, to ascertain the injury resulting from this cause, or the sum in damages by which it may be compensated. We, therefore, put the building contract entirely out of the case.

It then only remains to decide, what remedy Law is entitled to? It is contended, in behalf of Morris, Nicholson and Greenleaf, that it should be by specific performance, or by an issue *quantum damnificatus ;* that, at any rate, it should not be by a decree to refund the purchase-money, with interest, as the value of the residue was necessarily diminished by the gratification of so large a proportion of his right to select.

To obtain a specific performance is no object of Law's bill ; it is incumbent on the opposite party, therefore, to show some ground of right to force such a decree upon him. But considering, as we do, that Law is not in default, there can be no reason to decree a specific performance [*494 *when everything shows that it would be productive of nothing but loss. Besides, a specific performance, such as would answer the ends of justice between these parties, has now become impossible. Carroll's property is resumed ; a large proportion of the land purchased of the commissioners, sold under legal process, and thus the benefit of selection so diminished, that if performance were to take place, it must take place stripped of this its most valuable appendage ; whilst the diminution of the value of property, and the change of circumstances, produced by a lapse of twenty years, would render it mockery to call any execution specific.

An issue *quantum damnificatus* it is certainly competent to this court to order in this case ; but it is not consistent with the equity practice to order it, in any case in which the court can lay hold of a simple, equitable and precise rule to ascertain the amount which it ought to decree. In this case, the failure on the part of Morris, Nicholson and Greenleaf, certainly, was as early as December 1796, at a time when there is no reason to suppose that any diminution in the value of property had taken place.

And as to the argument, that the value of the right of selection diminished in proportion to the exercise of it ; that each subsequent choice was of less value than the preceding, we think, it is a sufficient answer, that Law never appears to have enjoyed the full benefit of his right of selection, in consequence of the difficulties which appear, at all times, to have obstructed his getting titles from the commissioners or others. And finally, when his choice

settled down upon the squares 727, 789 and 729, and on Carroll's squares 696, 699 and half of 743, he was evicted from the three former, and never could get the title to the three latter. Now, these squares nearly make up his deficiency, and there is reason to believe, they are among the most valuable of his choice. At any rate, they appear to have been the favorite objects of his choice. We are, therefore, of opinion, that the rule of equity in this case is that adopted by the court below; to wit, refunding, at the rate of purchase, according to the quantity actually deficient; but that interest is to be calculated only from the time when the selections were finally made, which we fix at 1st of January 1797. *With regard to the actual deficiency, it is understood, that there will be no difficulty in adjusting it, as the measurement and calculations of Mr. King will be acquiesced in.

*495]

We must next determine in what manner the money to be decreed to Law, in pursuance of the foregoing principles, is to be raised from the mortgaged premises, and this leads us to the connection between the interests of Law, and those of Campbell and Duncanson. Campbell was holder of the negotiable paper of Morris and Nicholson to a considerable amount. Greenleaf had conveyed to Morris and Nicholson all his interest in the mortgaged premises, so that each of them was entitled to an undivided half part of the equity of redemption. Campbell sued out an attachment against Morris and Nicholson, severally, under the laws of Maryland (as this part of the district was then under the jurisdiction of Maryland), and had it levied on sundry of these mortgaged squares, specifically designating them by their numbers. An issue was made up, and at the trial before the court to which the writ was returnable, the question was distinctly made, whether the equitable interest of the defendants in these squares was the subject of attachment. That court decided, that they were not; and the plaintiff appealed to the court of appeals to have their judgment reversed. On the hearing before the court of appeals, the decision of that court is reversed, and the squares attached are specifically and numerically condemned to satisfy the debt due to Campbell. And finally, process issues out of that court, to the sheriff of the county, reciting the attachment and condemnation of these squares, describing them with equal precision, and commanding the sheriff to make, from the said lands, the money necessary to satisfy the judgment. Under this writ, the squares, so condemned, were sold; Campbell becomes the purchaser; and Law, at the instance of Campbell, and without the privity of the assignees, executes a release to Morris and Nicholson, which is put on record; at the same time, taking a bond of indemnity from Campbell, against all consequences that might result from this act.

*496] *Much ability has been exhibited in argument, on the question whether an equitable interest in lands and tenements be the subject of attachment, under the laws of Maryland. But we are of opinion, that we are not now at liberty to enter into the consideration of that question. The decision of the court of appeals is final and conclusive on this point; the question was fully brought before them; and although it had not fixed the law, would have fixed the fate of these lands, beyond reversal.

Some doubt is entertained, by one member of the court, whether the laws of Maryland go further than to authorize the condemnation of this interest to satisfy the judgment, so as to leave the plaintiff still under the

necessity of applying to an equitable tribunal to effect a sale. But the majority are of opinion, that the attachment-act, in making this interest tangible, makes it subject to the ordinary process of the law-courts, and that, in vesting in the courts in which the condemnation takes place, the power to issue execution, as in case of other judgments, it has left it with those courts so to fashion its process as to meet the exigency of each case. In this case, the very special nature of the execution shows that it has been fashioned with great care and learning. We, therefore, hold the sale, under this execution, to be valid.

Some conclusions were attempted to be drawn, in favor of the assignees, from the inadequacy of the price at which the property sold, and from the following state of facts: Greenleaf had issued an attachment, to the use of the assignees, against this property of Morris and Nicholson, a day prior to that of Campbell. Subsequent to that of Campbell, Morris and Nicholson assigned all their interest in this property to these assignees. Greenleaf's attachment was never prosecuted to judgment.

It is contended, that this union between the prior lien and the interest attached, defeats the immediate lien. But we cannot admit this conclusion. *Levying an attachment has the double effect of creating a lien, and instituting an action. But the lien is only inchoate; it awaits the [*497 judgment of the court for its consummation, and must fall with the suit. To decide otherwise, would be to permit the defendant, by collusion, or his own act, to nullify the lien of the subsequent attachment.

As to the inadquacy of price, the evidence is full, to show that it was produced altogether by the steps taken by the agents of the assignees, to embarrass or prevent the sale, and by the supposed weight of the incumbrances resting upon the land. In this respect, therefore, there is no imputation to be cast upon Campbell.

With regard to the release, it is very evident, that, as it was never accepted by the assignees, it ought in no wise to operate to their prejudice; nor ought Campbell to derive any benefit from it, as it was gratuitously proposed by him, under an arrangement with Law. Give efficacy to this release, and consider how it will operate? Campbell purchases at a reduced price, subject to an incumbrance; but give effect to this release, and he holds an absolute fee, absolved from all incumbrance.

Again, the property mortgaged to Law, is liable for the whole amount to be raised for his indemnity; but give efficacy to this release, and whilst Campbell acquires an unincumbered estate, on the one hand; on the other, the residue of the mortgaged property (that of which the assignees have not been deprived by sale of the sheriff) must be sacrificed, to raise the money due to Law. From this, it will follow, either that a ratable abatement should be made by Law, proportionate to the squares by him released to Campbell, or that those squares should contribute their due proportion towards paying Law.

Before we proceed to apply these principles to the final disposal of the case, it is necessary to show in what manner the interests of Duncanson and Ward become involved with those of these other parties. Duncanson, at at the request of Morris, Nicholson and *Greenleaf, and for their use, [*498 drew bills on a variety of correspondents to the amount of 12,000*l.* On the 12th of September 1795, Norris, Nicholson and Greenleaf executed

a mortgage of eighteen squares in the city of Washington to indemnify Duncanson against the return of these bills. They were eighteen of the squares previously mortgaged to Law. Of these bills, about 7600*l.* were returned under protest, as the property of Ward; and that sum, together with the damages, was paid on the 26th of December 1796, to Ward, by Greenleaf. No satisfaction was entered on the mortgage, nor any assignment demanded, until a day long subsequent. The residue of the bills were also returned and paid by Greenleaf. Thus circumstanced, whilst the mortgage appeared on record in full life, when, in fact, defunct, as the purpose for which it was created had been answered, the attachment of Campbell was levied on thirteen of these squares, and they were finally condemned, sold and purchased by him. After the sale, notice was given to Duncanson, not to release, and that an assignment to Miller, the assignee of Greenleaf, would be demanded of him. The demand of Greenleaf, on Morris and Nicholson, arising from taking up these bills, was contained in his assignment to Miller; and this payment is among the items making up the debit side of the account stated between Greenleaf and Morris and Nicholson. Miller, the assignee, contends, that he is entitled to such an assignment from Duncanson, and therefore, to be considered in this court as entitled to all the advantages which he would have derived from such an assignment, if actually made.

On the one hand, Campbell had, at the sale, all the benefit of this sum, as an existing incumbrance upon the land. It was, in fact, so much credited on the purchase-money for which it sold; but on the other, it is contended, that it was a fraud upon the public, to keep up the appearance of an existing mortgage on this property, when it was in fact satisfied; that the agents of the assignees alone knew this fact, and good faith demanded of them that they should have avowed it.

*499] *We are of opinion, that the answer to this argument is complete. The assignees did not conceive it to be a satisfied mortgage; they then supposed, and now contend, that an equitable interest in the security, given for the payment of the bills, resulted to Greenleaf for two-thirds of the sum paid by him on the bills, and passed to them on the assignment. This reply, whether correct in point of law or not, certainly removes all imputation of fraud. But if it did not, what reason can be assigned why Campbell should take to himself a benefit from it? Had it been productive, in any mode, of injury or loss to him, it might have been urged with some plausibility; but there is no reason to suppose, that any such effect has resulted from it. It could only operate to produce the sales of the squares; and in this respect, all the effects produced by it resulted to his benefit altogether.

One thing is indisputable; that if this mortgage be decreed satisfied, Campbell has acquired an interest which he never purchased, and acquired that interest in property which ought otherwise belong to the assignees. It might, perhaps, be made a question, whether the whole amount, apparently secured by the mortgage, ought not to be made the measure of compensation to the assignees; for to that amount, it may reasonably be supposed, the price of the property was reduced at the sale; to that amount were they damnified, and to that amount, the purchaser was benefited. But it would not be consistent with the nature of these purchases, to apply that rule to them with strictness. The uncertainty under which a purchase

is made, when made subject to an unliquidated incumbrance, gives such a purchase somewhat the nature of a speculation, which the purchaser ought, to a reasonable extent, to have the benefit of, if it prove lucrative. It is, therefore, only on the ground of an equitable existing lien upon the mortgaged premises, or equitable claim upon Campbell, that the court can decree in favor of the assignees. And as Campbell has filed his bill of interpleader, in the nature of a bill to redeem, we think, the court at liberty, when decreeing in his favor, to impose on him such equitable terms as the nature of the case suggests.

The foregoing reasoning proves that Campbell ought, in conscience, to make compensation to the mortgagor,* the former proprietor of the fee, for that part of the interest which the mortgage appeared to [*500 cover. He did not purchase it, and therefore, although strict right may secure to him the whole, he ought to be charged with a sum in compensation for the interest so acquired, above what was proposed to be sold.

Again, had these bills not been taken up, and the holder prosecuted all the drawers and indorsers to insolvency, there can be no doubt, that the holder would have been entitled to charge the mortgaged premises, in equity, with the payment of the bills. But what difference is there, in equity, between the case of any other holder of these bills, and that of Greenleaf, who, when liable, equitably, only for one-third, was compelled to take up the whole, and did it with his own funds? It consists only in this—that the one becomes creditor for the whole; the other only for two-thirds.

Upon the whole, we are of opinion, that the thirteen squares purchased by Campbell should be ratably charged with the payment of the debt resulting, under these transactions, from Morris and Nicholson, to Greenleaf.

Pratt and others, Plaintiffs below, *v.* Thomas Law and William Campbell.

Decree.—This cause came on to be heard, &c. Whereupon, it is ordered, adjudged and decreed, that the decree of the circuit court for the district of Columbia, in this case be reversed and annulled; and this court decrees, that the complainants shall be permitted to redeem the mortgaged premises, exclusive of those squares purchased by the said William Campbell, upon paying and satisfying to the said Thomas Law, at the rate of five pence, Pensylvania currency, per square foot, for the actual difference between the number of square feet conveyed to the said Law, and the number of 2,400,000 square feet which Morris, Nicholson and Greenleaf were bound to convey, deducting from the number of square feet, said to have been conveyed to Law, the square feet covered by the alleys in those squares in which the entire square was not conveyed to Law, with interest on the sum so to be liquidated, calculated from the first day of January 1797, at six per cent. *And it is further decreed, that [*501 towards paying and satisfying the sum so to be ascertained, the said William Campbell do pay and contribute a sum proportionate to the ratio, which the squares purchased by him bear to the residue of the premises mortgaged to Law, in quantity of square feet, with interest thereon from the first of January 1797. That on payment of the said sum, the said

Thomas Law shall re-convey to the complainants all those squares, or other mortgaged premises which were not sold as aforesaid; and to the said William Campbell all those squares which the said William Campbell attached and purchased as in bill and answer set forth.

And the court further decrees, that if the said William Campbell shall not, in six months after the liquidation of the sum to be paid by him and notice thereof, with interest thereon as aforesaid, pay and satisfy to the said complainants, the sum so liquidated, then the said squares, so purchased by him, shall be sold, under order of the said circuit court, to pay and satisfy that sum; and that this cause be remanded to the said circuit court, for further proceedings necessary to carry into effect this decree.

PRATT and others, Defendants below, *v.* THOMAS LAW.

DECREE.—This cause came on to be heard, &c. Whereupon, it is ordered, adjudged and decreed, that the decree of the circuit court be reversed and annulled; and this court decrees, that the said mortgaged premises, whereof the said Thomas Law prays foreclosure, shall be sold, under order of the circuit court for the district of Columbia, in the county of Washington, to pay and satisfy, to the said Thomas Law, so much of the sum adjudged to the said Law, in the case of these defendants against the said Law and W. Campbell, decided at this term, as will be proportionate to the ratio which the said portion of the said premises bears to that proportion of the said premises to which the said Law executed a release
*502] in favor of Campbell, as in bill mentioned; unless the said *complainants shall, in six months after liquidation of the said sum, and notice thereof, pay and satisfy to the said Law, so much of the said sum as is, in this decree, ordered to be raised. Upon payment of which sum, the said Law (shall) release to the said complainants, his interest in the said premises.

It is further ordered, that this cause be remanded to the circuit court for the district of Columbia, in the county of Washington, for further proceedings to carry into effect this decree.

PRATT and others, Defendants below, *v.* WILLIAM CAMPBELL.

DECREE.—This cause came on to be heard, &c. Whereupon, it is ordered, adjudged and decreed, that the decree of the circuit court be reversed and annulled; and this court decrees, that whenever William Campbell shall pay and satisfy to John Miller, junior, assignee of James Greenleaf, so much of the two-thirds of the sum paid by Greenleaf on the bills secured by the mortgage to Duncanson, as will be proportionate to the ratio which the squares bought by Campbell, subject to the mortgage to Duncanson, bear, in quantity, to the whole eighteen squares mortgaged to Duncanson, then the said Campbell shall hold the said squares so purchased by him, free and discharged of the said mortgage; and the said Duncanson, and the complainants, shall thereupon convey and assign to the said Campbell all their right and interest in the said squares so purchased by him. And it is further ordered and decreed, that if the said Campbell shall not,

within six months next after the liquidation of the sum to be paid by him, and notice thereof, pay and satisfy the said sum to the said Miller, then the said squares so purchased by him shall be sold, under order of the circuit court, and the proceeds thereof applied to the payment thereof; having regard, nevertheless, to any other existing prior lien upon the said squares; and this cause is remanded to the circuit court for further proceedings thereon, to carry into effect this decree.[1]

---

[1] See Campbell *v.* Pratt, 5 Wheat. 429; Same *v.* Same, 2 Pet. 354.