an act of the next session, Congress abolished maritime prize on inland waters, and required captured vessels and goods on board, as well as all other captured property, to be turned over to the Treasury agents, or to the proper officers of the courts. This act became a law a few weeks after the capture now under consideration, and does not apply to it. It is cited only in illustration of the general policy of legislation, to mitigate, as far as practicable, the harshness of the rules of war, and preserve for loyal owners, obliged by circumstances to remain in rebel States, all property, or its proceeds, to which they have just claims, and which may in any way come to the possession of the Government or its officers.

We think it clear that the cotton in controversy was not maritime prize, but should have been turned over to the agents of the Treasury Department, to be disposed of under the act of March 12th, 1863. Not having been so turned over, but having been sold by order of the District Court, its proceeds should now be paid into the Treasury of the United States, in order that the claimant, when the rebellion is suppressed, or she has been able to leave the rebel region, may have the opportunity to bring her suit in the Court of Claims, and, on making the proof required by the act, have the proper decree.

The decree of the District Court is reversed, and the cause remanded, with directions to

DISMISS THE LIBEL.

TOBEY v. LEONARDS.

1. Positive statements in an answer to a bill in equity—the answer being responsive to the bill—are not to be overcome, except by more testimony than that of one witness; but by such superior testimony they may be overcome; and where, as was the fact here, *seven* witnesses asserted the contrary of what was averred in such answer, the answer will be disregarded.

Statement of the case.

2. A man may lawfully transfer all his interest in property which is about to become the subject of suit, for the purpose of making himself a witness in such suit; and while his testimony is to be carefully, and, perhaps, suspiciously scrutinized, when contradicting the positive statements made by a defendant in equity responsively to the complainant's bill, such testimony is still to be judged of by the ordinary rules which govern in the law of evidence, and to be credited or discredited accordingly.
3. The introduction of children as witnesses in an angry family quarrel rebuked by the court.

THIS was a suit relating to certain transactions of a man of advanced years, and of somewhat marked characteristics and temper, named *Jonathan* Tobey, a farmer and old resident, as his father, whose name he bore, had been before him, of the neighborhood of New Bedford, in Massachusetts.

Mr. Tobey, it seemed, had, through a long life, been an active person in county affairs of the region round New Bedford; a road contractor for the county, &c. &c. As one consequence, either of this fact, or of a temper naturally inclined to controversies, he was not unfrequently in suits; and among other suits had a bitter one—prolonged through twenty-five years—with his county.* "It occasioned considerable feeling. There was a good deal of discussion about it. Tobey issued one or more pamphlets for distribution. He had some very warm personal supporters, and there were some who were opposed to him. He was a noted man." The present controversy, although it had nothing to do with county concerns, seemed to have excited more interest in the neighborhood of its origin than, as a private controversy, properly belonged to it. One cause for this was, perhaps, that it had the element of a family quarrel. Tobey, Senior, or, as he is otherwise above styled, *Jonathan* Tobey, in order to be himself a witness in the cause, had sold all his interest in the subject of suit, once his own, to a son named *Stephen* Tobey, who was now suing his own brother-in-law, one

* Tobey *v.* County of Bristol, 3 Story, 800; the last case apparently ever decided by Story, J. Tobey, it was said, had removed from Massachusetts to Rhode Island, in order that he might sue in the Federal court, and get his case before, what all admitted, was an unprejudiced tribunal.

Statement of the case.

Horatio Leonard, and a certain *Nehemiah* Leonard, father of this brother-in-law Horatio. Numerous members of the family of Tobey,—William Tobey, Leonard Tobey, Joshua Tobey,—came to the support of their brother or kinsman; Mrs. Hannah Tobey, at the age of seventy, coming with them; while minors from the house of Leonard—Master Horatio Herbert Leonard, Master Stephen Henry Leonard, and Miss Laura Anna Leonard—the last *at the age of eleven*—testifying to what had been said in "the nursery"—were produced in support of theirs. Twenty witnesses were called to impeach Tobey, Senior's, character, including, as the counsel for the defendants noted in their brief, "mayors, members of the legislature, councillors, justices of the peace and of the quorum, county commissioners, deputy sheriffs, city marshals, aldermen, assessors, city treasurers and collectors, trustees of the lunatic State hospitals, keepers of the jails, and overseers of the house of correction;" while these were met, by twenty, and *seven* added, not less worthy of belief, as Tobey's counsel seemed to signify, in the fact, that their judgment and integrity had evidence quite as good as the preamble of a patent, and that *their* posts of honor had been the private station. These all testified that Tobey, Senior, was entirely worthy of belief; and some descriptions which he gave of the boundaries of his generally described "homestead" hereinafter mentioned, and which descriptions of his it was attempted to attack, seemed to have been more accurately conceived by him and told, than they were either conceived of or told by others who denied them.

The suit, therefore, was somewhat special in its circumstances; and in its questions of fact—the form into which it was resolved by this court—presented conflict in the evidence.

The outline case on which the proceeding, one in equity, rested—as derived from the record, and from the statement of the learned Justice (Wayne), who presented the whole with great detail and clearness before giving the judgment of the court—was essentially as follows:

In 1830, Tobey, Senior, owned certain real estate situated

in New Bedford and Fairhaven; part patrimonial, part acquired by purchase. For the two preceding years he had been engaged in building a county road, and had been obliged to obtain loans for that purpose; and, among others, one of $5000 of Mr. William Rotch, Junior, a gentleman of fortune, who had wanted him to make the county road by a special route, and who seems to have been kindly disposed to him. Finding, in 1830, that he could not obtain payment of the county of what he claimed, except by a long litigation, he made, without request, a mortgage to Mr. Rotch to secure this indebtedness. The mortgage conveys "my homestead farm, situate in the said New Bedford, being the same which I hold by virtue of the last will and testament of my father, Jonathan Tobey." After the making of this mortgage, he bought, in 1837, a wood-lot of one Sweet; and, in 1839, obtained title to another tract of land from the commonwealth. In 1846 he conveyed *all* his real estate in New Bedford and Fairhaven to one of his sons named Stephen, and another son, Leonard, in mortgage, to secure a debt which had been due for a long time to this son—as it seemed, a dutiful one; Leonard, in 1848, assigning all his interest in the mortgage to his brother Stephen. In 1849, Mr. Rotch made peaceable entry upon the premises mortgaged to him, for the purpose of foreclosing his mortgage. From 1830 down to the filing of this bill, old Mr. Tobey remained in possession of all the property referred to in both mortgages, and used and occupied them as his own. He never paid any interest or any part of the principal of the Rotch mortgage, and never paid any rent for the premises; and, during the lifetime of Mr. Rotch, was never called upon so to do. In 1858, the administrators of Mr. Rotch, then lately deceased, brought an action of ejectment against him to remove him from the mortgaged premises. When this action was about to ripen into a judgment, efforts were made by Tobey, the father, and his son, Stephen, to raise money to buy the mortgage; it being known by them that it could be bought for considerably less than the amount of it. Among others, Tobey, Senior, applied to his son-in-law.

Statement of the case.

Horatio Leonard, to obtain, through *him*, assistance of his father, *Nehemiah* Leonard. The Leonards ascertained that the mortgage could be bought for $2500, and that they then could have a year to pay it in. They then informed old Mr. Tobey, *as was alleged by them*, *the Tobeys*, that if they, the Tobeys (father and son Stephen), could provide for the payment of this amount before it would fall due, and would give as security all Tobey, Senior's, real estate, and would transfer Stephen's interest under his mortgage, they would help them by purchasing the Rotch mortgage. The Leonards, it was certain, did purchase for themselves, or for somebody else, the mortgage of Mr. Rotch.

At the time of the negotiation it was proposed, according to the statement of the Tobeys, that Tobey, Senior, and his son Stephen, should cut $1000 of wood off the place towards the debt. Tobey, Senior, was at this time sick, and Horatio Leonard got the deeds from the Tobeys to him drawn up. It had been agreed, *as was said by the Tobeys*, that a writing should be also drawn up, stating the terms upon which the property should be reconveyed. *No such writing was ever made.* Leonard, according to the account given by the Tobeys, insisted on having absolute deeds and quit-claims, with a release of dower by the wife of Jonathan Tobey, an aged woman, of Tobey's other property, as well as of the homestead, in order, as he said, that the title might be clear on its face, and that he might borrow money, if he wanted to do so; and such deeds were made. After the deeds passed, on the same day, Horatio Leonard applied to his father-in-law, old Mr. Tobey, for a bill of sale of all the stock and farming utensils on the farm, which was given him.

After this, Stephen Tobey began to cut wood, and cut about one hundred cords. Horatio Leonard also sold to one Hawes standing wood to the amount of $840. In June, Horatio Leonard became embarrassed in business; and his father, Nehemiah, undertook to aid him. To secure himself in so doing, he took the Tobey estate from his son and sold it. Old Tobey and his son Stephen then made application

for a reconveyance to them of this property, in accordance with what they called or deemed their right, offering to pay; as they said that it had been agreed they should have a right to do.

Upon this application, Leonard, the father, refused to convey to the Tobeys, except on payment of $5000; and, upon their refusal to take the land upon these terms, he sold it to the defendants, R. & J. Ashley, for that sum; *they* agreeing to convey to one Spooner a portion of the estate.

Stephen Tobey, who, by his father's transfer to him, was sole party in interest, now filed his bill in the Circuit Court of the United States for the Massachusetts District, against all these parties; that is to say, against Leonard, father and son, Ashley, Spooner, for a reconveyance, as above said; for compensation in waste and damage in cutting and removing the wood and grass,—the complainant offering to perform what he called his part of the agreement, by paying such sums of money and doing such other acts as the court should deem equitable and just.

The Leonards, father and son, filed separate answers *responsive to the bill, and denying positively and specifically its allegations.* But the testimony of seven unimpeached witnesses, Messrs. Jones Robinson, Edward Chase, George Barney, Sampson Reynolds, Alden Lawrence, Leonard Tobey, and William Tobey, tended to show, or did show, admissions by the Leonards that the transaction was a mortgage only, or in the nature of one.

On the other hand, the testimony of T. M. Stetson, Esq., a young professional gentleman of good character in New Bedford, who had been counsel of the elder Tobey and was more or less familiar with the case, and with the understanding of both Tobey and Leonard, as expressed to *him* at *certain times and places*, and under circumstances not, perhaps, the best to educe the fullest ideas of the parties, went to a different conclusion. It appeared, however, as a fact, that after Leonard, the son, had got a conveyance from the Tobeys, he wished his father-in-law, Tobey, Senior, to devise the property to him in his will; a draft of which he

caused to be prepared to this effect without Mr. Tobey's knowledge.

The other defendants in the case, the Ashleys, Spooner, and Hawes, also filed answers, denying the allegations, but leaving it reasonably plain that they were not purchasers from the elder Leonard, without notice of the claim of Tobey.

Some defence was made, too, in supplemental answers setting up a conditional conveyance by Tobey, Senior, to one Clap, and some similar conveyance to the Wareham Bank.

The Massachusetts Statute of Frauds thus enacts: "No trust concerning lands, except such as may arise or result by implication of law, shall be created or declared, unless by an instrument in writing, signed by the party creating or declaring the same, or by his attorney."

The court below dismissed the bill, the presiding judge giving an opinion at length. On appeal, the case was ably argued here by *Messrs. Sydney Bartlett and Thaxter, for the appellant, Tobey, and by Messrs. Olney and Thomas, contra;* the argument turning, in part, on the point how far the case was affected by the Massachusetts Statute of Frauds; a matter thought by this court unnecessary to be considered by it.

Mr. Justice WAYNE, having stated the pleadings, delivered the opinion of the court:

This cause has been argued with ability, and we are brought to the consideration of it with every advantage, in any way applicable to the rights of the parties in a court of equity, by the written opinion of our brother who tried it, and gave the decree in the Circuit Court.

The allegation is that the purchase made by the Leonards of the Rotch heirs was in behalf and for the benefit of the Tobeys, and that the conveyances by the Tobeys were made as security for the payment by them of the notes for twenty-five hundred dollars, given to the Rotch heirs. This is the issue between the parties, and the question is which of them is sustained by the proofs.

"Denials in answer to a bill in equity to the extent of their relation to facts within the knowledge of the respondent, when they are responsive to the allegations of the bill of complaint, must be received as evidence. Courts of equity cannot decree against such denials in the answer of the respondent on the testimony of a single witness. On the contrary, the rule is universal, under such circumstances, that the complainant must have two witnesses, or one witness and corroborative circumstances, or he is not entitled to relief. The rule stands upon the reason, that when a complainant calls upon the respondent to answer allegations, he admits the answer to be evidence; and if it is testimony in the case, it is equal to the testimony of any other witnesses, and the complainant cannot prevail if the balance of proof is not in his favor; he must have circumstances in addition to his single witness in order to turn the balance."*

This, no doubt, is the general rule of chancery;† but it is one which does not, in the present case, apply, for here *seven* unimpeached witnesses state that in business interviews either with Horatio or Nehemiah Leonard, in relation to their purchase of the homestead farm, or to matters in some way connected with it, the defendants, one or the other of them, said, in language which could not be mistaken, that the purchase of the Rotch mortgage had been made to assist Jonathan Tobey to pay the debt due upon it. We proceed to state this testimony, and the impressions made upon us by it.

Horatio Leonard said to the witness *Jones Robinson*, that he himself and his father had given a note for it payable in a year for $2500, and that the complainant and his father must get the wood off to meet it, and that he only wanted them to pay the note and to pay himself for his trouble; and added it was to be paid for from the wood, and if there was not enough, that he should sell some of the real estate.

* Opinion in this case on the circuit per Clifford, J. See, also, Clarke *v.* Van Tiersdyke, 9 Cranch, 160; Hughes *v.* Blake, 6 Wheaton, 468; cited by the learned justice.

† Parker *v.* Phetteplace, 1 Wallace, 684.

Another witness, *Edward Chase*, swears that Horatio Leonard said to him, after relating the circumstances of the purchase of the Rotch mortgage, in connection with the impoverished condition of the Tobeys, that he had taken hold to help them.

George Barney, a third witness, says that he had a conversation with Horatio Leonard; that he mentioned that he had purchased the farm formerly owned by Jonathan Tobey, &c., with an intention *to sell it back to the owner;* that he had done so to prevent it from going into the hands of strangers, and to keep a home for the old people, and *that he was to be repaid* the money spent in purchasing the farm.

Sampson Reynolds, a fourth witness, swears, that Nehemiah Leonard said to him that his son had married Jonathan Tobey's daughter, and that he had a notion to take up the Rotch mortgage, cutting and selling wood enough to pay off the debt, and letting the old man have a home there as long as he lived.

Alden Lawrence, a fifth, testifies that Nehemiah Leonard said to him, that he had taken the property for the accommodation of the old gentleman, as he was liable to be turned out of house and home at any time; took it to preserve a home for the old folks; and the witness understood him to say "that he calculated to take the wood, and would then turn the property back."

Leonard Tobey, the brother of the complainant, and a sixth witness, deposes that he called upon Nehemiah Leonard, who, after expressing his regret that there should be a misunderstanding between his son Horatio and Jonathan Tobey, said, in substance, that he would use his influence to get Horatio to convey the mortgage to his father and brother, and that he was willing to give up the place if the money was refunded. He also said that Jonathan Tobey came to him as a last resort; that the arrangement was that Horatio should see that wood enough was cut to meet the notes at maturity.

William Tobey, the seventh witness, testifies that he was intimately acquainted with Horatio Leonard for seven years,

including the year 1859, and that he called upon him at his place of business in Boston in reference to the matter, and said he had made a proposition to Stephen Tobey, that himself and Stephen should buy the claim of the Rotch heirs; Stephen to put in his claim; that they should be interested and improve the farm and occupy it together; and that, if Stephen should die *without heirs, his interest should be willed to the children of Horatio.* He added, that Stephen would not agree to it, and seemed to have a feeling that it was meant to take advantage of him. "He expressed the wish that I would go to New Bedford and bring about the arrangement, saying that he would pay my expenses. He said his motives were pure, that he did not know it would be of any use to him, but thought it would be to his children; that it would be a good home for Stephen, and his father and mother, and that he wanted the farm to remain in the family." In reply to one interrogatory, the witness answered, that, after speaking of other matters relating to the purchase of the farm, Nehemiah Leonard added, that he had at first refused to assist in raising the money to buy it; that he had finally agreed to it from the friendly feeling he had for the Tobeys, and his only object for complying with their wishes and his son's request was to benefit the family. He also said that Jonathan Tobey came to him as a last resort, and that the arrangement was that Horatio should see that wood enough was cut to meet the notes at maturity.

The testimony of the preceding seven witnesses must be considered, in connection with that of Jonathan Tobey, who had sold out all his interest in the property to his son, the complainant, to *enable himself to be a witness upon the trial of the cause.*

Our first remark is, that such a sale for such a purpose is allowable, and that its lawfulness has been sanctioned by this court* even when the sale was to a party who had no previous interest. We say next that the attempt by the

* Babcock *v.* Wyman, 19 Howard, 289.

defendants to discredit Jonathan Tobey as a man of truth is a failure, in fact, from all that the witnesses, introduced for such purpose, had said or could say about him, and that all that they did say has been rebutted by the evidence of witnesses more numerous than the former and as respectable. Some of them had known Tobey for years in the social relations of his life and in his public business; all of them swore without any qualification that they believe him to be a correct man, and that they would believe him upon his oath. No point of his testimony in this case is contradicted by any witness, and all that he has said is in harmony with the motive which could only have induced him to place himself in a position to aid in the restoration of his son to his rights, to whom he owed a debt of six thousand dollars with long years of interest, against the contrivance of a son-in-law to whom he owed nothing; and who had succeeded in getting all of the estate of both for a very insufficient consideration, without the payment of a cent in fact. Tobey's statement of his agreement with the Leonards to give them a quit-claim for his entire estate, has not been disproved either directly or inferentially by circumstances or by any witness, and has only been denied by the defendants in their answers. He has neither qualified nor modified the facts to which he has sworn in his replies to the questions put to him in behalf of the complainant, or to such as were asked by the defendants. His answers as to the lands which he owned, besides those included in the Rotch mortgage, correspond with the subsequent surveys with as much exactness as the circumstances of his manner of acquiring them permitted. It is appropriate to say that his account is not contradicted in the answers of the defendants to the bill, excepting the effort made by them to enlarge the quantity of the real estate to be attached to the homestead farm, contrary to its boundaries, as it had been conveyed to Horatio Leonard by the Rotch heirs. Tobey's narrative of his connection with William Rotch, how he became indebted to him for his advances of money to construct a county road which Mr. Rotch wanted to be made, to give him a shorter and better route from his

place to Boston, of Mr. Rotch's offers to advance him money as he might need it, if he would undertake the construction of the road, and after he had completed it of the litigation for the sum due to him under the contract, and of his losses in consequence, are all substantiated by documents which show plainly the causes of his pecuniary embarrassments, and of some of his peculiarities in litigation during a long life, and up to the time when, as Nehemiah Leonard has said, "he came to me as a last resort to get his aid to purchase the Rotch mortgage."

The testimony of such a witness as Jonathan Tobey is to be scrutinized, no doubt, carefully and with great caution, perhaps with suspicion, before it can be allowed to invalidate the denials of respondents of the allegations of a bill in equity. But we have thus faithfully scrutinized it in this instance, in connection with all the testimony introduced by the defendants, and without any impression having been made upon us that Jonathan Tobey had not told the truth in regard to this transaction.

The witness who is most relied upon by the defendants to prove that there had been no stipulation for a bond or written instrument between the parties for a reconveyance of the property to Jonathan Tobey, is T. M. Stetson, Esq., who had been the counsel of Tobey from February, 1858, to December, 1859.

Fairer or more proper testimony, indeed, than that of this gentleman could not have been given. It is marked by forbearance and caution; but, in our opinion, it does not disprove that there had been a private arrangement between the parties for a reconveyance of the property to the complainant and his father, when the notes given for the Rotch farm should have been provided for or were paid. Mr. Stetson says that he told Jonathan Tobey and the complainant that he could make no defence in the ejectment suit pending against the plaintiff's title and evidence, and that it had been delayed by his suggestion that it might be settled. That afterwards he met Horatio Leonard, whom

he supposed to be a man of means, and told him he thought he could make it an object to buy the property from the agent of the Rotch heirs. He refused, on account of there having been so many conveyances about the property, and on account of the well-known character of Jonathan Tobey for litigation; but he said if he could have the *whole property without any question or lawsuit*, that he did not know but that he would take it; but that he must have *the whole or none*. The witness told this to Mr. Tobey. "We talked over the position of the suit," says Mr. Stetson, "and Mr. Tobey said that he might as well discontinue his defence. This I told to Horatio Leonard. A few days after, Jonathan Tobey, Stephen Tobey and Horatio Leonard came into my office. Horatio said he had seen the agent for the Rotch heirs, and had learned their price. He said he was not going to get into a lawsuit, and would not buy unless he could get a clear and good title. He also asked me if I considered the Rotch title such a one. I said that I did, with the evidence which they had, but that of course it was better to get releases and quit-claims from every one who thought he had any interest in the property. I then stated that I thought the better way for Leonard to get the whole title was to have the Rotch suit perfected by a judgment and execution levied. Leonard then said that was what he wanted and must have. Jonathan Tobey seemed to wish Leonard to become the owner of the property, and executed his quit-claim for it. Stephen Tobey, after some conversation, executed his release, both being done before the witness." The papers had been drawn by Mr. Stetson before the meeting at his office, and we understand him to say that he does not recollect by whom he was directed to draw them. We also understand him to say that he knew nothing of any private arrangement between the parties for a reconveyance of the property to the Tobeys before or after the quit-claim deeds were given in his office. In fact, Mr. Stetson confines himself to what occurred and was said there, without alluding to any conversation they may have had elsewhere, leaving the fact of an understanding for a reconveyance to the testimony in the

case as that might be. In our view it is not at all likely that such an arrangement would have been mentioned to him by either party, before or when he was advising as counsel, or as the friend or agent of all of them, how a title to the property could be perfected. Such a device to defeat it as that one party was to have a right to a reconveyance of the property, upon paying the notes with interest, which had been given in payment for the Rotch mortgage, and that Horatio Leonard was to have a title in paper to the homestead farm, and all the real estate besides, with all the advantages of using both for his own benefit, with a secret condition to relinquish and reconvey to the Tobeys, would probably have been met by Mr. Stetson with a suggestion that a condition of that kind, under all the circumstances and his position then, would not be consistent with the ethics of his profession, the law requiring as a fairer mode in such a case, that such a condition should be a part of the deed, or if it was to operate as a defeasance, that it must be "made *eodem modo*, as the thing to be defeated was created."*

We conclude that the testimony and corroborating circumstances resulting from it, with other proofs in the record, overrule the denials by the defendants of the allegations.

One of these corroborative proofs is the fact, that after the Leonards had ascertained that the Rotch mortgage could be bought for twenty-five hundred dollars upon time, and had actually bargained with the Rotch heirs for the purchase of it, according to the described boundaries and contents of the homestead as set out in the suit to eject Jonathan Tobey, and ascertained that he was the owner of other real estate not a part of it, and that all of the real estate had been mortgaged to the complainant,—Horatio Leonard, under such circumstances, should have pretended and represented to Jonathan Tobey and his wife that a quit-claim for the property, with his wife's relinquishment of dower, was necessary to give him a clear title to enable him to borrow money upon it; and should then have stated to the Tobeys that he

* Shepherd's Touchstone, 390.

must have conveyances for all of the real estate, as a prerequisite, before he would buy the Rotch mortgage, being then the purchaser of it, with arrangements then going on for him to secure from the heirs of Rotch their title. We think that such a condition was a menace, made at a time when the Tobeys were helpless and deprived of all hope of getting relief; and that Horatio Leonard must have known its effect would be to coerce them to compliance with his terms. Under the circumstances, as they are detailed in the answer of Horatio Leonard, we view it as a contrivance to vest in himself the whole property, under the guise of buying the Rotch mortgage for the benefit of Jonathan Tobey. It is difficult, too, for us to credit the narrative of Horatio Leonard, that an old man, with an aged wife, pressed by embarrassment and distress, as he then was, should have been willing to divest himself of everything that he owned, without the reservation of something to live upon, and somewhere to live, and all this with the view of giving everything that he had in the world to a son-in-law, to keep the homestead in the latter's family, to the exclusion not only of himself and wife, but all his other children, and particularly so of his son, the complainant, to whom he owed at that time six thousand dollars, with long years of interest, and who had been for many years the stay and support of his father and mother. And this aspect of the case, as to the arrangement for a reconveyance of the property to the Tobeys, when Horatio Leonard demanded titles to the whole of the property, is much strengthened by the fact that Horatio Leonard, after having got a title to the homestead farm, and conveyances for everything that the Tobeys had, became so restless concerning the lawfulness of his right to the property, that he made a virtual acknowledgment of Jonathan Tobey's interest in it, by asking the old man to make a will in his favor, and actually employed counsel to draw it, and that without having previously mentioned his intention to Mr. Tobey. Mr. Stetson mentions the fact in his testimony, and the accidental cause of its having been defeated.

We have carefully examined and considered the whole

testimony given by the defendants in the case, but it is without weight sufficient to counterpoise the conclusion to which we tend.

Nor is it inappropriate for us to say, concerning much of the testimony introduced by Horatio Leonard, that, when the father of a family introduces the juvenile members of it as witnesses in such a litigation as *this* has been, it cannot be done without its being considered as a forlorn effort of parental obliquity.

As a result, we concur in the opinion,—That it has been established by the proofs in this case, as the rules of evidence require the denials of the allegations in a bill of equity to be disproved, that the payment made by Nehemiah Leonard and Horatio Leonard, for the purchase of the homestead farm was intended by them to be an advance of money for the benefit of Jonathan Tobey: That the conveyances executed by Jonathan Tobey and his wife to Horatio Leonard, and the release given by the complainant to him, of all his interest in the real estate purporting to have been conveyed by them, were intended by the parties to them, and were so received by Horatio Leonard, as securities for the repayment of the notes with interest, for twenty-five hundred dollars paid by Nehemiah and Horatio Leonard to the heirs of Rotch for the homestead farm, and that the defendant, Horatio Leonard, agreed to reconvey the real estate property attached to it, and all the rest of the real estate conveyed to him, when payment should be made of the sum of money advanced by the Leonards for the benefit of Jonathan Tobey, and such reasonable compensation as might be claimed by them for their agency and aid in the transaction. We are also of opinion,—when the complainant tendered to Nehemiah Leonard the sum necessary to pay the notes with interest, which had been given to the Rotch heirs, at the same time asking for a reconveyance of the property,—that he was entitled to it, and that it should have been made, and that the subsequent sale of it, as it was made, was in fraud of the complainant's rights.

Opinion of the court.

We have carefully considered the answers of R. and J. and R. Ashley, Spooner, and Hawes, to the allegations of the complainant's bill. Notwithstanding their denials of them, their narratives in each of their answers of their purchases of parcels of the real estate in controversy, connected with the testimony, establish the fact, that when they respectively made their purchases of the real estate from Nehemiah Leonard, or from the Ashleys, that each of them had such notice of the rights claimed to all of the real estate by the complainant, and of what had been the rights to it by Jonathan Tobey before he made a sale of it to the complainant, and that neither of them can be protected in a court of equity, as having been *bonâ fide* purchasers without notice.

Our attention has also been given to the supplemental answers of the defendants to the bill of the complainant, relating to a conditional conveyance by Jonathan Tobey, of real estate in the County of Bristol, to secure Clapp from any liability he might incur by indorsing Tobey's paper, and Tobey's release of his interest and transfer of all his rights in a conveyance to the Wareham Bank. In our opinion, this interposes no obstacle to rendering a decree for the complainant.

From the opinion which we have above expressed of the character of the transaction between the Leonards and the Tobeys, it becomes unnecessary for us to discuss the point made by all of the defendants in the cause, that they were not liable to the complainant, as the statute of Massachusetts had declared that no action shall be brought upon any sale of lands, tenements, or hereditaments, or of any interest in or concerning them, unless the promise, contract, or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the judge charged therewith, or by some person by him lawfully authorized.

DECREE REVERSED, and the defendants ordered to reconvey to the complainant all the real and personal estate (Ashleys,

Spooner, and Hawes, to join in the conveyance of the real), on repayment of the $2500, with interest, deducting $840, with interest, received by the defendant, Horatio, for wood standing on the land and sold. The cause remanded, with directions to proceed accordingly.

GRIER and CLIFFORD, JJ., dissented.

MILWAUKIE AND MINNESOTA RAILROAD COMPANY AND FLEMING, APPELLANTS, *v.* SOUTTER, SURVIVOR.

An order of the Circuit Court, on a bill to foreclose a mortgage, ascertaining—in intended execution of a mandate from this court—the amount of interest due on the mortgage, directing payment within one year, and providing for an order of sale in default of payment, is a "decree" and a "final decree," so far as that any person aggrieved by supposed error in finding the amount of interest, or in the court's below having omitted to carry out the entire mandate of this court, may appeal. *Appeal* is a proper way in which to bring the matter before this court.

A DECREE had been made some time since in this court, against the La Crosse and Milwaukie, and the Milwaukie and Minnesota Railroad Companies, the road being then in the hands of a receiver, on a bill in equity, filed in the Federal court of Wisconsin, to foreclose a mortgage given by the former company on its road, &c., to two persons, named Bronson and Soutter (of whom the former was now dead), to secure certain bonds which the former road had issued, on which the interest was unpaid.

The mandate to the court below, ran thus:

"It is ordered that this cause be remanded, &c., with directions to enter a decree for all the interest due, and secured by the mortgage, with costs; that the courts *ascertain the amount of moneys in the hands of the receiver or receivers, from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest, and apply it to the same;* and that if the