

benefit of the defendant *Harwood* ; because he does not ask it ; and because his liability, as set forth and admitted by himself in his answer, may well be separated from any charge against the other defendant *Mullikin* ; therefore the judgment of the court, so far as it has bound his interests in favour of those creditors whose claims he has not paid, must be allowed to stand and have its full force ; and will only be so modified as to let in other existing incumbrances upon the property conveyed in addition to that of the mortgage. Hence it is perfectly manifest, that *Harwood* is a witness whose interest cannot be at all affected if the decree remains altogether as it now stands ; and if it should be opened for the benefit of the trustee, and *cestui que trusts* under the deed of the 7th April 1810, and no further than to let in their incumbrance in addition to that of the mortgage ; then, as *Harwood*, has been introduced to have it opened for that purpose, he is a witness testifying against his own interest ; so that, in either view of the subject, he is a competent witness upon the present occasion.

The competency of the witness *Nicholas Brewer* has also been objected to on the ground of his having an interest which must be affected by the decision now called for. The principles which have been just applied to the case of the witness *Harwood* have in some respects a bearing upon the situation of this witness. He is the solicitor of the plaintiff, and the trustee appointed by the decree to make the sale. The judgment of the court, so far as regards his client and the defendant *Harwood*, must be allowed to stand ; and therefore he has earned some compensation as the solicitor of the plaintiff. He has not even yet, however, qualified himself, by giving bond, to act as trustee under the decree ; but, in consideration of his forbearing to execute his trust, and of an extension of credit agreed to between the plaintiff and the defendant *Harwood*, he, *Harwood*, paid to *Brewer* \$200, as it is said, in part of his commissions ; and it is *Brewer's* liability to refund this sum, in case the decree should not be executed as it stands, that makes him, as is alleged, a witness interested to maintain the decree in favour of the plaintiff by whom he is produced. Forbearance to sue is a consideration sufficient in law to give validity to a promise.(e) And according to the rules and practice of the court, a trustee is only allowed full commission upon the amount of an actual sale ; and if the parties prevent him from making

(e) Selw. N. P. 56.