1891
*Nov. 20, 23, 24.
1892
*May 2.

MARGARET S. McMICKEN, BY WILLIAM B. SCARTH, HER NEXT FRIEND (PLAINTIFF)..... APPELLANT;

AND

THE ONTARIO BANK AND OTHERS (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA.

Evidence--Deed absolute in form intended to operate as mortgage—Intention--Character of evidence of.

To induce a court to declare a deed, absolute on its face, to have been intended to operate as a mortgage only the evidence of such intention must be of the clearest, most conclusive and unquestionable character.

APPEAL from a decision of the Court of Queen's Bench, Manitoba, affirming the judgment at the trial by which plaintiff's bill of complaint was dismissed.

The facts of this case are fully set out in the judgment of Mr. Justice Gwynne.

The result of the trial before Mr. Justice Dubuc was that the plaintiff's bill was dismissed, and on a rehearing before the Chief Justice and Dubuc J., (Bain and Killam JJ. having been engaged in the case while at the bar,) the decision of the trial judge was affirmed. The plaintiff appealed.

Haegel Q.C. and *Kennedy* Q.C., for the appellant referred to *Peugh* v. *Davis* (1); *Russell* v. *Southard* (2); *Holmes* v. *Matthews* (3); *Locking* v. *Parker* (4).

*PRESENT:—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

(1) 96 U.S.R. 332.
(2) 12 How. 139.
(3) 3 Gr. 379.
(4) 8 Ch. App. 30.

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McCarthy Q.C. and *Richards* for the respondents cited *Turner* v. *Collins* (1); *Lindsay Petroleum Co.* v. *Hurd* (2).

Sir W. J. RITCHIE C.J.—I am of opinion that this appeal should be dismissed with costs.

STRONG J.—Assuming the law as to the admission of parol evidence to establish that the conveyances, under which the respondents claim, were intended to operate merely by way of security and not as absolute deeds to be as the appellants contend, I am nevertheless of opinion that this appeal must be dismissed. The conveyance is impeached on the ground of fraud and misrepresentation, and in the alternative it is alleged that it was given as a mere mortgage or security. Neither of these alternative cases is supported by the evidence.

Treating the questions on which the decision depends exclusively as questions of fact it is, in my opinion, manifest that the appellant fails to establish either of the propositions she contends for.

As I am, on this head, entirely of the same opinion as the learned Chief Justice of Manitoba it would serve no useful purpose to enter upon an analysis of the evidence. I therefore content myself with saying that I agree with the Chief Justice of Manitoba and adopt his judgment as to the facts of the case. The objections to the deed founded on the Banking Act are fully answered in the able judgment delivered by Mr. Justice Dubuc on the original hearing.

The appeal must therefore be dismissed.

TASCHEREAU J.—I am also of opinion that the appeal should be dismissed. The appellant's bill of

(1) 7 Ch. App. 329.

(2) L.R. 5 P.C. 221.

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complaint was rightly dismissed in the court below. The case turns mainly upon the questions of fact, and we cannot, in my opinion, interfere with the finding of the learned judge at the trial, concurred in as it was by the court *in banco*. The fact that there was virtually only one judge who re-heard the case cannot affect the result.

GWYNNE J.—By indenture of lease bearing date the 14th day of June, 1875, Alexander McMicken, then carrying on the business of a private banker in the city of Winnipeg, in the province of Manitoba, and being possessed, under a contract of purchase made with the Hudson Bay Company, of town lots numbers 33 and 34 in block 3 according to a map or plan of the Hudson Bay Company's Reserve at Fort Garry, dated the 1st day of July, 1872, and registered in the registry office of the county of Selkirk, of which town lots the said Hudson Bay Company were seized in fee, did demise and lease the said two lots to the Ontario Bank for the term of three years, to be computed from the date of the said indenture at the yearly rent of $1,600, to be paid to the said Alexander McMicken, his heirs and assigns; and by the said indenture the said Alexander McMicken covenanted that at the expiration of the said term he would extend the lease of the said premises for a further period of two years at the same rent if requested so to do by the said Ontario Bank. In the summer of the year 1877 the said bank, at the request of the said Alexander McMicken, advanced and paid to the Hudson Bay Company the amount due by the said Alexander McMicken to the said company as and for the purchase money of the said two lots, and of another town lot numbered 48 in the said block 3, described in the same plan of the said company's survey at Fort Garry, amounting in the

whole to the sum of $2,700, and thereupon the said company, by three several deeds bearing date respectively the 3rd of July, 1877, granted, bargained, sold and conveyed the said three lots severally and respectively unto the said Alexander McMicken, his heirs and assigns forever. On the 23rd April, 1877, the said Alexander McMicken, by a deed of bargain and sale of that date, for the consideration therein expressed of $1,500, acknowledged to have been paid to him by one Gilbert McMicken, the father of the said Alexander McMicken, granted, bargained, sold and conveyed unto his said father in fee simple, the said three lots numbered 33, 34 and 48, and also a considerable number of other lots in the province of Manitoba, by the following description, that is to say :

The south half of section thirty-five in Township eleven, Range (4) four east of the principal meridian according to the Dominion Government survey of the province of Manitoba, also all those lots in the city of Winnipeg in said province described as follows, viz. : Lots numbers twenty-eight (28), thirty-three (33), thirty-four (34), thirty-seven (37), forty-eight (48), and the south half of lot thirty-six (36) all in block three (3) according to a map or plan of the Hudson Bay Company's Reserve at Fort Garry signed by Donald Alexander Smith, dated the first day of July, A.D. 1872, and duly filed in the registry office for the county of Selkirk. Also that lot of land in Winnipeg aforesaid on the north side of Notre Dame street bounded on the west by a lot belonging to one Charles Turner, on the north by a lot belonging to one Robert Patterson, on the east by a lot now or formerly belonging to one John Schultz, on the south by Notre Dame street, and having a frontage and depth of one chain ; also acre lots numbers forty-four (44), forty-five (45), forty-six (46), forty-seven (47), and forty-eight (48) as the same are shown on a subdivision of the James Ross estate known as lot number nine (9) of the Dominion Government survey of the parish of St. John made by Duncan Sinclair, D.L.S. and registered in the registry office of the county of Selkirk as number forty-five (45).

And the said Alexander McMicken covenanted with the said Gilbert McMicken that he the said Alexander McMicken had right to convey the said lands in

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manner aforesaid free from all incumbrances. In the year 1875 a firm of hardware merchants, trading in the city of Winnipeg under the name and style of McMicken and Taylor, one of the partners in which firm, namely, Hamilton Grant McMicken, was a son of the said Gilbert McMicken, became indebted to the said bank upon the paper of the said firm discounted for the firm upon which paper the said Gilbert McMicken was liable as endorser. In the month of February, 1876, the liability of the firm and of Gilbert McMicken as their endorser to the bank, amounted to the sum of $8,000; to secure Gilbert McMicken for such his liability as endorser, and for his undertaking to renew the paper of the firm from time to time, the firm gave to him security by a chattel mortgage upon certain goods and chattels of the firm. This chattel mortgage was duly renewed in February, 1877, the liability of Gilbert McMicken to the bank as endorser of the paper of the firm in the bank still continuing to exist as in the previous year. In the month of September, 1877, the said Alexander McMicken was indebted to the bank in the sum of $4,000, theretofore advanced and lent to him and for which the bank then held his promissory note. He was also indebted to the bank in the further sum of $6,000 theretofore advanced to him, and for which the bank held his note endorsed by the said Gilbert McMicken. On the 17th September, 1877, by indenture of mortgage of that date, Gilbert McMicken, at the special instance and request, as he himself says, of his son, the said Alexander McMicken, conveyed the said town lots Nos. 33, 34 and 48, by way of security to the Ontario Bank for the principal sum of $12,700 together with interest as in the said indenture mentioned, such principal sum being composed of the said sums of $2,700 $4,000 and $6,000, in which the said Alexander Mc-

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Micken was so indebted to the bank. This indenture of mortgage was subject to a proviso for avoiding the same upon payment of the said principal sum with interest thereon at the rate in the said indenture mentioned on or before the 15th day of August, 1878, and that in default of such payment the said bank upon giving one month's notice might enter upon, lease, or sell the said lands. This indenture was duly registered in the registry office in and for the city of Winnipeg on the 20th day of September, 1877. Upon the 24th day of November, 1877, the said bank recovered a judgment in the Court of Queen's Bench in the province of Manitoba against the said Gilbert McMicken, as endorser of certain promissory notes of the firm of McMicken & Taylor for the sum of $7,707.75 then due by him as such endorser to the bank; a certificate of that judgment was duly registered in the registry office of the county of Selkirk upon the said 24th day of November. This registration according to the law of Manitoba had the effect of making the said judgment operate as a charge upon all lands within the said county of Selkirk whereof the said Gilbert McMicken was seized, or whereunto he was entitled. On the same 24th day of November, 1877, the said bank recovered two several judgments in the Court of Queen's Bench of the province of Manitoba against the said Gilbert McMicken and Alexander McMicken for the further sums respectively of $417.90 and $403.79. Upon these three judgments writs of *fieri facias* against the goods and also against the lands of the defendants in the said respective judgments were issued out of the said court and placed in the hands of the sheriff of the said county of Selkirk; the several writs against goods were renewed for one year upon and from the 19th day of November, 1878, but were not again renewed, and the said writs against lands were never renewed.

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Prior to the month of November, 1877, the said firm of McMicken & Taylor had become insolvent and the said Gilbert McMicken turned over to their assignee in insolvency the chattel mortgage executed by the said firm as security to him for his endorsing their paper to the Ontario Bank. The evidence of this point is that of Mr. Gilbert McMicken himself, who, in his evidence says that:—

He did nothing with the chattel mortgage himself—that was left among McMicken & Taylor's effects when they went into insolvency, the property being turned over.

The moneys secured by the above mortgage not having been paid according to the tenor thereof, the bank on the 24th November, 1878, filed a bill of foreclosure of the mortgage against the said Gilbert McMicken, in the proper court in that behalf in the province of Manitoba, and a decree *nisi* for foreclosure appears to have been obtained therein, proceedings upon which the bank at the special instance and request of the said Gilbert McMicken agreed to stay, and did accordingly stay by a letter of the date of the 8th of November, 1878, addressed by the general manager of the bank at Toronto, to the agent of the bank at Winnipeg, which letter is as follows:

GEORGE BROWN, Esq., Manager, Winnipeg.

DEAR SIR,—I telegraphed you to-day to stay the proceedings in the matter of foreclosure of the mortgage against Mr. McMicken. We have a letter from him asking that proceedings may be withdrawn until the expiry of our present lease about 18 months hence, which my board are not willing to agree to, but for the present consent to a stay of proceedings, with the hope that Mr. McMicken will use his best efforts to pay off our claims and get the property entirely into his own hands.

Truly yours,

D. FISHER,
Gen. Manager.

While the proceedings were thus stayed, both Gilbert McMicken and his son Alexander entered into

negotiations with one McCrosson, to procure him to purchase the lots numbered 33 and 34, and these negotiations appear to have proceeded so far that a price was agreed upon to be paid by McCrosson, which was somewhat in excess of the amount due under the mortgage, subject to the concurrence of the bank.

In relation to this negotiation Mr. Gilbert McMicken, on the 10th July, 1879, addressed and sent the letter following to the cashier of the bank at Toronto :

WINNIPEG, 10th July, 1879.

TO THE CASHIER ONTARIO BANK, TORONTO.

DEAR SIR,—I have to request the favour of your bringing the subjoined proposition before your board, and to ask for it a favourable consideration inasmuch as by accepting it the bank will be secured in an early cash settlement of the indebtedness for which the mortgage now existing is pressed to foreclosure. The effect to me would be merely the saving of the back lot which was included in the mortgage to give the bank greater security. I would wish very much to get as early a reply as convenient, and as the season for building is wearing on, the party to whom reference is made in the proposition is also very desirous of early information on the subject, so that if it meets the concurrence of the board he might at once contract for material.

I am, dear Sir,

Your obedient servant,

G. McMICKEN.

The proposition inclosed in this letter is as follows :

WINNIPEG, 18th July, 1879.

Proposition for submission to the board of directors of the Ontario Bank *re* the mortgage of G. McMicken on property in Winnipeg, viz., that the bank, on the mortgagor at once yielding up his equity of redemption, sell or make over to Thomas McCrosson the two lots on Main street for the amount of the debt, $12,700, McCrosson to pay $700 cash, to bind himself to build forthwith on the vacant space a building to cost not less than $6,000, to make over the rents to the bank of the new building with a further cash payment of not less than $2,000 yearly until the whole is paid off. The bank, as soon as McCrosson has erected the said buildings to release to me the back lot. This would make certain the bank being recouped their whole advance within three years. Respectfully submitted by

G. McMICKEN.

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Upon the 8th of August, 1879, Mr. Gilbert McMicken addressed and sent to the cashier of the bank at Toronto, by the hands of Mr. McCrosson, the following letter:

WINNIPEG, 8th August, 1879.

DEAR SIR,—Mr. McCrosson having occasion to be in Toronto, will call upon you respecting the proposition I submitted to you of date 10th July for the purchase of the two lots on Main street now under mortgage by me to the bank securing indebtedness of A. McMicken. To the proposition then submitted I have hot heard from you, and hoped when Lt.-Governor Macdonald arrived he would have been able to deal in some measure with it. I think the offer of Mr. McC. a good one for the bank, and it will aid me in so far as I wrote to you. Mr. McC. will now offer a substitutional proposal should the bank prefer it, viz.: Waiving building obligation to pay the bank weekly payments of $100 until the whole sum of $12,700 and interest is paid off.

I would respectfully urge the acceptance of one or other of these offers of Mr. McC. He is a reliable man in every respect.

Yours truly,

G. McMICKEN.

Lieutenant-Governor Macdonald referred to in the above latter was a director in the bank and a friend of Mr. McMicken, and whom Mr. McMicken had been in negotiation with to procure his influence with the board of the bank in support of his applications to the bank in relation to the matter.

Neither of the above offers was accepted by the bank. It will be observed that in neither of them was any provision whatever proposed to be made for payment of the amount remaining due to the bank on the judgment recovered against Gilbert McMicken for the sum of $7,707.75 upon which a balance exceeding $4,400 still remained due, the difference having been paid out of the estate of McMicken & Taylor; nor was any provision proposed for payment of the amounts due upon the two judgments recovered against Gilbert and Alexander McMicken for the several sums of $417.90 and $403.79. The agent of

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the bank at Winnipeg appears to have been opposed to the acceptance of any arrangement which did not provide for the payment of the whole of the amount remaining due under the said respective judgments as well as of the amount due upon the security of the mortgage, under the apprehension that otherwise the bank would be prejudiced in the recovery of the amount due under the judgments. The negotiations between the McMickens and McCrosson for the purchase by the latter of the two lots Nos. 33 and 34 proceeded so far that one W. H. Ross, a solicitor then practising in Winnipeg, since deceased, was employed to investigate the title to the lots for McCrosson. He appears to have found upon registry in the registry office of the county of Selkirk deeds to the purport and effect following:—

1st. An indenture bearing date the 1st day of September, A.D. 1877, and registered upon the 1st day of October in that year and purporting to be made between Gilbert McMicken, of the city of Winnipeg, Esquire, of the first part and Margaret Jane McMicken of the same place, wife of Alexander McMicken of the second part, whereby the said Gilbert McMicken for the expressed consideration of one thousand five hundred dollars therein acknowledged to have been paid to him by the said Margaret Sarah McMicken, did grant unto her, her heirs and assigns forever, the several pieces of land in the said indenture mentioned, comprising all of the several parcels of land mentioned in the above recited indenture of the 3rd day of April, 1877, and by that indenture conveyed to Gilbert McMicken by Alexander McMicken, except the lot No. 28 in the block number (3) three in the city of Winnipeg in that indenture mentioned, and comprising also another lot of land not in that indenture of the 3rd of April mentioned, described as being situate on the

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south side of Notre Dame street in the city of Winnipeg, and as being lot number ten according to a map or plan of the property of one John Shultz, known as lot number two of the Dominion Government surveys of the parish of St. Johns on file in the registry office of the county of Selkirk; 2ndly. An indenture bearing date the 28th day of October, A.D. 1874, registered in the registry office of the county of Selkirk on the 11th day of November, 1874, and purporting to be made between Alexander McMicken, of the first part, and Gilbert McMicken and Sedley Blanchard, of the second part, whereby the said Alexander McMicken for and in consideration of one dollar therein expressed to have been paid to him did grant, bargain, sell and confirm unto them the said Gilbert McMicken and Sedley Blanchard and the survivor of them and the heirs and assigns of such survivor for ever, all that land and premises in the said city of Winnipeg described as follows (the said lots 33 and 34 in block 3), together with all and singular the buildings and improvements to the same belonging or in any wise appertaining; in trust nevertheless and for the uses following and none other, that is to say, for the sole and separate use of Margaret Sarah McMicken, the wife of the said Alexander McMicken, party of the first part for and during her natural life, and so as she alone or such person as she shall appoint shall take and receive the rents, issues and profits thereof, and so as her said husband shall not in any wise intermeddle therewith, and in case the said Alexander McMicken shall survive his said wife then in trust to reconvey the said lands and premises to him the said Alexander McMicken, his heirs and assigns upon the death of the said Margaret Sarah McMicken; and in case the said Margaret Sarah McMicken shall survive the said Alexander, then upon

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the death of the said Margaret Sarah McMicken in trust to reconvey the said lands and premises to the lawful heirs of the said Alexander McMicken. Provided, however, that the said trustees or the survivor of them, the heirs, executors or administrators of such survivor, shall hold the said lands and premises upon the further trust to sell and convey the whole or any part of the aforesaid premises and appurtenances to any person or persons and for such sum or sums of money as the said Alexander McMicken and Margaret Sarah McMicken, by writing under their hands and seals, and duly executed at any time during their natural lives, may appoint and direct; and 3rdly. An instrument under the hands and seals of the said Alexander and Margaret Sarah McMicken, bearing date the 21st day of December, A.D. 1874, and registered in the registry office for the county of Selkirk on the 20th day of January, A.D. 1875, in the words following :—

We, Alexander McMicken, of the city of Winnipeg, in the Province of Manitoba, banker, and Margaret Sarah McMicken, wife of the said Alexander McMicken, under and by virtue of the provision in that behalf, made in a certain deed of trust made by the said Alexander McMicken to you Gilbert McMicken and Sedley Blanchard, both of the city of Winnipeg, Esquires, dated the 28th day of October, A.D. 1874, and duly registered in the registry office in and for the county of Selkirk, in said province of Manitoba, in book 5, folio 261, do hereby authorize, enjoin, empower and direct you, the said Gilbert McMicken and Sedley Blanchard as trustees, under and by virtue of the said indenture of trust to convey, transfer, sell and make over to Alexander McMicken above named, in consideration of the sum of one dollar the lands and premises in said trust deed mentioned and described and conveyed or intended so to be, and to hold the same unto the said Alexander McMicken, his heirs and assigns to his and their own free and absolute use, benefit and behoof for ever.

With reference to these two latter instruments Alexander McMicken stated in his evidence that he deeded the lots 33 and 34 to his father and Mr. Blanchard (who was his solicitor and since deceased) as trustees

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for his wife, and that afterwards he got into difficulty and that Mr. Blanchard and one Mr. McArthur thought it would look better for him to have the property put back into his own name again and that it was done; ultimately he says it was conveyed to his father who, with his consent, gave the mortgage to the bank to secure $12,700. The conveyance to his father was that of the 3rd April, 1877, whereby, for the consideration expressed therein of $1,500, Alexander conveyed to his father not only the said lots Nos. 33 and 34, but all the other property therein mentioned and above detailed. How the registration of these instruments escaped the notice of the solicitor of the bank who had instituted for them the suit against Gilbert McMicken alone for the foreclosure of the mortgage was not explained, the solicitor having died in the year 1881, long prior to the commencement of this suit. It was suggested that the non-discovery of the existence of the deed of the date of the 1st September, 1877, was attributable to the default and neglect of the registrar. But however this may be, the bank first acquired knowledge of the existence of any such deed by the discovery made by Mr. W. H. Ross upon behalf of Mr. McCrosson having been communicated to Mr. Brown, the agent of the bank at Winnipeg upon or immediately before the 20th of September, 1879, upon which day he left Winnipeg on leave for his summer holiday, and did not return until the 16th of October. During his absence a Mr. Smith, an inspector of the bank, discharged his duties and he applied to Mr. Ross who had discovered the deed upon registry and procured from him for the bank his opinion respecting the interests of the bank under the circumstances, which opinion he forwarded to the head office of the Bank at Toronto; meantime the solicitor of the bank in the foreclosure suit against Mr. Gilbert McMicken, finding his proceedings in that

suit rendered nugatory by the discovery of the deed of the 1st of September, 1877, fited a new bill of foreclosure against Margaret S. McMicken, the grantee of that deed. The agent of the bank upon his return to Winnipeg, upon the 16th of October, immediately renewed negotiations with Mr. Gilbert McMicken to procure a settlement of the bank's claim, and he retained Mr. W. H. Ross who had discovered the deed on registry, and since deceased, to act as solicitor of the bank in the matter, who as such solicitor procured the execution of the deed of the 22nd October, 1879, whereby Margaret Sarah McMicken, wife of Alexander McMicken of the city of Winnipeg, in the province of Manitoba, and the said Alexander McMicken, of the same place, gentleman, therein described as the parties of the first part, in consideration of the sum of fifteen thousand dollars of lawful money of Canada therein acknowledged to have been paid to them, the said parties of the first part, did grant unto the Ontario Bank the parties to the said deed of the second part their successors and assigns for ever, lots numbers thirty-three, thirty-four and forty-eight in block three of the Hudson's Bay Company's survey, in said city of Winnipeg, to have and to hold to the said parties of the second part to the said deed, their successors and assigns, to and for their sole and only use for ever. And the said parties of the first part did thereby covenant with the said parties of the second part that they had power to convey the said lands to the said parties of the second part, and that the said parties of the second part should have quiet possession of the said lands free from all incumbrances, and that the said parties of the first part would execute such further assurances of the said lands as might be requisite. And the said parties of the first part released to the said parties of the second part all their claims upon the said lands.

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In order to the perfection of the title purported to be conveyed by the said deed Mr. Ross prepared, and procured to be signed by the said Gilbert and Alexander McMicken, the declaration following :—

We, Gilbert McMicken and Alexander McMicken, of the city of Winnipeg in the county of Selkirk, do hereby declare that the conveyance from Alexander McMicken to Gilbert McMicken of lots thirty-three, thirty-four and forty-eight, block 3, H. B. Co. survey, was made for valuable consideration, as Alexander McMicken at that time owed a much larger amount to Gilbert McMicken than the value of the property over and above mortgage to Ontario Bank, and that Gilbert McMicken was not intended to be a trustee for Alex. McMicken, but *bonâ fide* absolute owner in fee simple.

(Signed,) G. McMICKEN.
" A. McMICKEN.

Dated Oct. 22, 1879.

Mr. Ross at the same time procured to be signed by the said Gilbert McMicken, Alexander McMicken and Margaret Sarah McMicken a receipt in the words following :—

Received from the Ontario Bank payment in full of all charges, claims or accounts against the Ontario Bank by us, and we hereby release the Ontario Bank from all such charges, claims or accounts now due or accruing due.

Dated at Winnipeg the 22nd day of October, A.D. 1879.

(Signed,) G. McMICKEN.
" A. McMICKEN.
" MARGARET S. McMICKEN.

And at the same time he procured to be signed by the manager of the bank at Winnipeg a receipt in the words following :—

Received from Gilbert McMicken and Alexander McMicken payment in full of all charges, claims and accounts whether by judgment or otherwise due by them, or either of them, to the Ontario Bank, save and except a note for nine hundred dollars due by Gilbert McMicken, and we hereby release all such claims.

Dated at Winnipeg the 22nd day of October, A D. 1879.

(Sgd.) GEORGE BROWN,
Manager.

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Upon the 12th of November, 1879, Mr. Ross forwarded to the manager of the bank a letter signed in the name of the firm of Ross, Ross and Killam of which he was a member, explaining the reasons why he, as the solicitor employed by the bank in the matter, had taken the precautions which, by the above papers, he appears to have taken in closing the transaction wherein he says:—

Re McMICKEN.

DEAR SIR,—Referring to the lands with respect to which we advised Mr. Smith by letter on the 9th ult., we have now at your request to explain the steps since taken to secure the equity of redemption to the bank. Subsequently to our writing that letter, Mr. Alex. McMicken in endeavouring to induce us to accept the title for the party then proposing to purchase from Mrs. McMicken, informed us that it was not correct that Mr. Gilbert McMicken got the property without consideration, but that it was transferred in consideration of a debt due from Alexander to Gilbert McMicken, and on further pressing it appeared from Gilbert McMicken that he really had an interest in the property and only conveyed it to Mrs. McMicken when he, Gilbert, became involved, and in order to prevent its being taken under execution against him, and we have little doubt that Gilbert McMicken's previous contention that he only held as trustee and had no interest in the property was solely for the purpose of preventing its being held for his own liabilities. At any rate we have procured written statements from Mr. and Mrs. Alexander McMicken and Mr. Gilbert McMicken to the effect mentioned which should be sufficient to induce a purchaser to take the title, as Gilbert McMicken's only liabilities of consequence are to your bank, and any purchaser buying from you for value relying on these statements would be protected. Mr. and Mrs. Alex. McMicken have now by deed duly executed, conveyed these lands to your bank for the expressed consideration of $15,000, but the real consideration is a receipt in full for all debts due the bank from both Alexander and Gilbert McMicken or either of them separately, except a note of Gilbert McMicken's for $900. This consideration is a good one, and even if it should at any time turn out that the conveyance by Alexander McMicken to Gilbert McMicken was wholly without consideration and simply a blind, this conveyance would merely give a preference over other creditors, and would not on that account be void except under proceedings in insolvency which are hardly likely to be now taken against Alexander McMicken as he has been left alone

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so long. In every view this is the best arrangement in the bank's interest that could be made.

It is to avoid this deed and wholly to alter its character that the present suit was instituted. The first proceeding taken for this purpose was a bill of complaint filed by the plaintiff on the 7th day of July, 1885, wherein she alleged that on the 17th day of September, 1877, Gilbert McMicken was the owner in fee simple of lots 33, 34 and 48 in block 3 in the Hudson Bay Company's reserve in the city of Winnipeg, and that by an indenture of that date registered in the registry office of the city of Winnipeg on the 20th day of the said month of September, he conveyed the said lands to the Ontario Bank as collateral security for the payment of three promissory notes made in favour of the bank, amounting in all to $12,700, and interest thereon, and that by an indenture purporting to bear date the 1st day of September, 1877, and registered in the registry office for the city of Winnipeg, the said Gilbert McMicken conveyed all his right, title and interest in and to the above described lands to her the said plaintiff. She then alleged that in the early part of the month of October, 1879, the defendants, namely, the Ontario Bank, made the following proposal to her, to wit:

> That the plaintiff should convey to the defendants all her right, title and interest whatsoever in and to the said lands and premises in trust for the defendants to sell or otherwise dispose of the same and apply the proceeds of such sale or disposal in and towards, first, the payment of the said three promissory notes amounting in all to $12,700, then the payment of a certain promissory note upon which the said Gilbert McMicken was liable to the defendants, and lastly, that whatever surplus there might be after the said four promissory notes were paid out of the proceeds of the sale or disposal as aforesaid of the said lands and premises, should be forthwith paid over to the plaintiff by the defendants.

She then alleged that she agreed to that proposal and thereupon executed the deed of the 22nd October,

1879, in which her husband joined her in conveying the said lands and premises to the bank, and she averred that she never would have executed that conveyance if the defendants had not undertaken to pay over to the plaintiff whatever surplus there might be after the said four promissory notes had been paid out of the proceeds of the sale of the said lands. And she averred that the lands had been sold and that after payment of the said promissory notes there remained a surplus which the defendants refuse to pay to her, and she prayed for an account and payment to her of such surplus. Upon an examination on oath of the plaintiff on this bill she stated that she conveyed the property to the bank to pay off her husband's liability to the bank; that there had been a mortgage on the property but that she did not know whether or not it was existing at the time she conveyed to the bank; that she did not know enough of business to tell who made the mortgage; that she supposed it was given by herself; that so far as she remembered she thought it was; that her husband was indebted to the bank, but that she really did not know whether the mortgage was given to secure that debt or not; that she knew really nothing about the conveyance herself. Being asked what was the arrangements made with the bank, her answer was: that the deed was given to pay off the liability of her husband to the bank; and she added:

> Of course the property was much more valuable than the amount of my husband's debt, and the arrangement I wished made, and that was talked of, was that it was to pay my husband's debt, and then the property was to come back to me, or what was left of it. My father-in-law's liability was also included in what the property was to be security for.

Being asked who talked of this arrangement, she replied that it was her father-in-law, her husband and her solicitor. Being asked whether that arrangement

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had ever been assented to by the bank, her answer was, "Well, I think it was, that was the understanding so far as I know." Being asked whether they, by which I understand any officers of the bank, were present at any of these interviews between her father-in-law, her husband and her solicitor, she answered, "No." Being asked if she could explain why the bank having already a mortgage upon the property required a deed from her, she answered, "I don't know enough about business to tell you." Being asked if she knew whether the deed given by her was given to cover any greater indebtedness than was covered by the mortgage, her answer was :—

I know the deed covered my father-in-law's debt as well as my husband's, but I really don't know enough of business to tell you. I know I owned the property and I know I gave the deed, but I left the business to my husband and my solicitor.

Being asked if the bank made a proposal to her to convey to them on the terms set out in the bill, she answered, "Not to me personally, but they did to my husband and solicitor."

Being asked who were present at the time she signed the deed, she answered—"The late William Ross, George Brown, my husband and myself, and I think my father-in-law, though I am not sure as to him."

The Mr. Ross here mentioned was the solicitor acting for the bank in the matter; George Brown was the bank agent.

Being then asked whether anything was said at that time, she answered :

Yes, there was a little conversation. I asked Mr. Brown if he was not going to give me something, a silk dress or something, referring to the old custom, and he said, "Never mind, you'll get something better than that out of it by-and-bye." Previous to that there was no conversation.

Being asked if anything was said at that meeting as to the property being conveyed in trust, she answered,

"Not that I remember." She said further that "she thought that was the only meeting at which an officer of the bank was present.

Being asked if any other documents were signed that day besides the deed, she replied, "Not that I know of." She did not remember having signed a receipt. She did not remember how often she had signed her name. She remembered giving the deed to relieve her husband and her father-in-law; that she was willing to give the deed because of a conversation of Governor McDonald with her father-in-law in which McDonald assured her father-in-law that the bank only wanted the amount of the debt and that anything over and above that would come back to her, and for that reason she consented to sign the deed. Being asked if she was present at that conversation between Mr. McDonald and her father-in-law, she answered, "no." Her attention having been drawn to the statement in her bill of complaint that Gilbert McMicken, her father-in-law, was the owner of these lands, she said:

> I don't think he was the owner. I got the property from my husband; he settled it upon me when he went into business, when it was free from debt and from any liabilities.

Being asked where that settlement was she answered that she supposed it was in the registry office. Being asked if she knew of her husband conveying the property in question to her father-in-law in 1877, she answered: "I don't know. I don't know about dates." She did not know that her father-in-law was the absolute owner of the property at any time. She did not think he was. Being asked why Gilbert McMicken conveyed the property to her as stated in the bill in September, 1877, she answered: "I don't understand what you mean." Being asked then how he came to execute that conveyance to her, she answered that she

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did not know. Being asked if any conversation had passed between him and her for that deed, she replied: "How do you mean?" Being asked if she paid him anything, she replied: "Oh no, nothing." She did not know whether he was in difficulty then, in Sept., 1877, or not; she knew of none except that of 1879, when she relieved him and her husband, and being asked again to state the circumstances under which she executed the deed to the bank she replied that it was to relieve her husband and her father-in-law, owing to a debt they then owed the bank, but that it was, so far as she knew, on the understanding that it was only to secure a debt, and what was over was to come back to her, and that she did it on account of what Governor McDonald told her father-in-law. Being asked why she did not have a declaration of trust or something like that when the deed was given, she answered that she left all those things to her husband, that he and her solicitor attended to all her business. The result of that examination of the plaintiff appears to amount simply to this, that she executed the deed impeached to relieve her husband and father-in-law from certain debts they then owed the bank, and that she had herself no personal knowledge of any agreement having been entered into by the bank or any of its officers qualifying the terms of the deed as executed by her. She denies having had any information as to such an agreement having been contemplated or made other than what was received from her father-in-law or her husband; and no reason whatever has been suggested why, if any such agreement had been made or contemplated, it was not reduced into writing. It is not suggested that the bank or any of its officers objected to the deed being drawn up and expressed in the true terms of the actual agreement between the parties to it. Afterwards and by an order

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of the 3rd day of October, 1888, that bill was dismissed for non-compliance by the plaintiff therein with another order of the court that she should appoint a next friend to carry on the suit on her behalf; and upon the 28th day of December, 1888, the bill of complaint now under consideration was filed. In that bill the plaintiff's claim to the equitable relief which she prays for is placed upon a wholly different foundation from that stated in the bill filed by her on the 7th July, 1885. In the bill now under consideration she avers the lease of the 14th June, 1875, by Alexander McMicken of the lots 33 and 34 in block 3, to the Ontario Bank, and that by indenture dated the 23rd April, 1877, Alexander McMicken conveyed the same lots and lot No. 48 in the said block 3, to Gilbert McMicken in fee, then the mortgage of the 17th September, 1877, by Gilbert McMicken to the bank in security for the principal sum of $12,700. She then avers that by indentures dated on or about the first day of October, 1877, Gilbert McMicken granted and conveyed the same lands to her in fee. Then in the 8th paragraph of her bill she alleges the recovery by the bank on the 24th of November, 1877, of a judgment for $7,707.75 against Gilbert McMicken as endorser upon paper of McMicken and Taylor, and that Gilbert McMicken transferred certain chattel property of McMicken and Taylor which Gilbert held under a chattel mortgage as security for his endorsing the paper of the said firm, the proceeds of which chattel property she avers the bank did receive or should have received. She then avers the insolvency of McMicken and Taylor and the receipt by the bank of a dividend of 40 cents in the dollar out of their estate applicable to payment of the said judgment. She then in the 12th and 13th paragraphs of her bill alleges the particular grounds upon which her claim for the relief prayed is founded, as follows:—

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12. In or about the month of October, 1879, the defendants, the Ontario Bank, through the defendant Brown acting as their agent and manager by falsely representing to your complainant that if said judgment against the defendant Gilbert McMicken was not paid off or secured every means of recovering the full amount thereof would be taken, and that the said defendant, Gilbert McMicken, would be harassed and pressed for payment in every possible way, and that proceedings of a serious nature against the defendant Gilbert McMicken would be taken, also falsely alleging that the full amount of the said judgment was still due to the defendants the Ontario Bank, and concealing the fact that the defendants, the Ontario Bank, held any security for payment of the judgment set forth in the 8th paragraph of this bill of complaint or that they had been paid any moneys on account thereof, on the 22nd day of October, 1879, induced your complainant to execute to the defendants the Ontario Bank the deed of the said lots 33, 34 and 48 on the terms and conditions hereinafter set forth in order to save said defendant Gilbert McMicken from being harassed and annoyed as aforesaid.

13. The deed mentioned in the last preceding paragraph pretended to be executed for the consideration therein expressed of $15,000 then paid by the defendants the Ontario Bank to your complainant, the receipt whereof your complainant thereby pretended to acknowledge and purported to convey with the ordinary covenants of title an absolute estate in fee simple, free from incumbrances to the defendants the Ontario Bank, whereas in fact no money was then or at any other time paid to your complainant by the defendants the Ontario Bank, and the said deed, though absolute in form, was intended to be and is a mortgage to secure to the defendants the Ontario Bank the judgment set forth in the 8th paragraph of this bill of complaint and was executed for no other purpose whatever.

She then in the 17th paragraph of her bill alleged that the bank took possession of the lands leased to them by Alexander McMicken by the lease of the 14th June, 1875, in the 3rd paragraph of the bill mentioned and since the execution of the mortgage by Gilbert McMicken to the bank, in the 5th paragraph of the bill mentioned, have paid no rent under said lease to any one entitled thereto, but since the execution of said mortgage have been in possession of the lands leased as mortgagees in possession; and in the 18th paragraph of the bill she alleges that the bank, with the assent of

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the complainant and after consultation with her, have sold portions of the said lands and have received as purchase money and rents more than enough to pay any moneys they may be entitled to on said mortgage by Gilbert McMicken, and any moneys that may be due to them, if any, on the judgment set forth in the 8th paragraph of said bill. And the bill prays that it may be declared that the deed set forth in the 12th paragraph of the bill, that is the deed of the 22nd of October, 1879, was intended to be and is a mortgage to secure the moneys due on said judgment, and that the complainant may be let in to redeem the said lands remaining unsold, and that the defendants, the Ontario Bank, may be ordered to reconvey to the complainant the said lands on payment of any moneys that may be found due and owing to the defendants, the Ontario Bank, under and by virtue of said judgment and said mortgage; and that in the event of the said deed of the 22nd October, 1879, not being held to be a mortgage that it may be declared that the said deed was obtained from complainant by fraudulent and false representations, and on that ground should be declared void and set aside, and that it may be declared invalid and void as being in contravention of the charter of the bank and the several acts of the Dominion of Canada relating to banks and banking; or that, in default of such relief being granted, that the bank may be ordered to pay to complainant the sum of $15,000; and that the defendant George Brown and the defendants the Ontario Bank may be ordered to pay to the complainant any profits received by them or either of them by reason of the sale of any portion of the mortgaged premises.

The plaintiff was examined as a witness on her own behalf in support of the relief claimed in this her bill of complaint, and upon her examination in chief

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she stated that she did not remember any transaction in the year 1879 in relation to the property in question only that she gave the deed to the bank; that previously to giving that deed she had not personally any conversation with any person relating to the giving of the deed, but that her husband on two or three occasions which she mentioned in the summer of 1879 had conversations in her presence with the defendant Brown, and being asked to state the substance of such conversations she answered:

My father-in-law owed the bank, and Mr. Brown wanted a deed given of this property to pay off the debt of my husband and my father-in-law, and that it would make all things smooth and it would relieve my father-in-law of his liability and make all things smooth and right, and that he was constantly pressed by the authorities in Toronto, the heads of the bank.

And being asked if Mr. Brown had said anything else she answered: "No, I don't remember anything —that was the conversation—and she added, "and of course anything that was over and above" when she was interrupted by her counsel asking: "Was the property to be sold?" To which she replied, "Yes, Mr. McDonald having been up here, assured my father-in-law"—and her stating anything which Mr. McDonald may have assured her father-in-law being objected to she was asked by her counsel "What was the conversation?"

She answered:

He wanted me to give the deed to the bank for these two debts, and that all over and above would come back to me after the property was sold. Being asked: How came you to sign this deed at all? She answered: My husband asked me to sign it. Being then asked: Did you sign more than this deed? She answered, I signed other papers; I don't know what they were, but I signed everything else that I was asked to sign on that occasion.

She said further that with the exception of the occasion of her signing the deed she had personally no transaction with the bank or any of its officers in rela-

tion to the matter. To a question put to her in the following form: "You say this deed was not read over to you at the time it was signed?" she answered, "I don't think it was. I am sure it was not." She added that the transaction was not explained to her in any way—that she simply did what her husband told her.

On her cross-examination she said that she did not remember having ever heard that her husband conveyed the property in question to her father-in-law in 1877. She did not know that her father-in-law had mortgaged the property to the bank. She had heard of mortgages and deeds and all that but could not tell anything about them. When she executed the deed to the bank she knew that there was a mortgage on the property for a debt of her husband's of $12,000, but she knew nothing about her father-in-law having conveyed the property to her. She did not remember having ever been consulted about that. She first heard in 1879 of the mortgage that was given to the bank for her husband's debt. She had not been consulted about that, that her husband attended to her business and did not consult her about anything much; that he attended to all her business and that she did not know anything about the deeds—that he never consulted her. Being then shown the declaration signed by her husband and father-in-law on the 22nd of October, 1879, upon the occasion of the execution of the deed she professed to know nothing at all about it. She admitted that her husband knew more about the ownership of property than she knew herself; she could give no explanation as to how her husband signed that declaration; and being thereupon asked whether as between him and her he would not be more correct than she was, she answered, "in business matters I know very little about." She left all her business with her husband. The deed was given as she supposed to pay off both

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the debt of her husband and of her father-in-law, that is, the two debts already spoken of the mortgage and the judgment; she understood the deed was to pay those two debts. Then her examination upon former occasions is produced. She is shown one wherein she had said that she never heard Mr. Brown speak of the terms upon which the deed was to be given; she admitted her signature to the examination and she said that she supposed that that meant she had not personally. Then she said that she did not remember that a deed was mentioned but that he wished to have the payment of the debt attended to; but she did not remember that the giving of the deed or the terms upon which it should be given was specifically referred to. The instructions for the former suit she said were given by her husband but with her consent. She did not remember whether she accompanied him or not when he gave instructions to the solicitor, but she did not think that she did. Then with reference to a stable on lot 48 which she said she occupied for some time after the execution of the deed of the 22nd October, 1879, she said there was no agreement whatever with the bank that she should so use it. She "just stayed there" she said, that is to say, her husband who lived some distance off kept a horse there for some time.

She said that she never had any conversation or interview with Mr. Brown or any other officer of the bank about giving the deed; that Mr. Brown had spoken to her husband in her presence about the matter in the summer of 1879. Being asked how she had heard him speak about the giving a deed, she replied, "Not often of the deed, I was speaking more of the liability than of the deed. I heard Mr. Brown talking of the debt;" and again that "he wished to have the paying of the debt attended to;" and again that "he was pressing to have papa's liability attended to." She did

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not remember that the terms upon which a deed should be given was ever specially referred to. She said in fact that:

> What she understood was that the deed when given would pay her husband's and her father-in-law's liability, and her father-in-law told her that Governor McDonald had assured him that all the bank wanted was their money and that when the property was sold everything over that debt would be returned to her, and upon that understanding she signed the deed.

The plaintiff has, in my opinion, wholly failed to establish her contention. I do not think it necessary to review the cases in which parol evidence has been received to qualify and cut down a deed of conveyance of land which is absolute in its terms into a mortgage. In cases of this kind, as is laid down by the Privy Council in *Holmes* v. *Matthews* (1), the onus rests altogether upon the appellant not only to rebut the presumption that the title as appearing in the written instrument is in perfect accordance with the intention of the parties, but he must also establish to the satisfaction of the appellate court that the judgment of the court below adverse to his contention is erroneous. In *Rose* v. *Hickey* (2), decided in this court in 1880, we held that the evidence necessary for this purpose must be of the clearest and most conclusive and unquestionable character. It will be sufficient to refer to the facts of the case of *Lincoln* v. *Wright* (3) and the judgment therein as the case ordinarily relied upon in illustration of the principles upon which the court proceeds in cases of this nature and of the evidence required to justify the court in declaring a deed absolute on its face to be different from what its terms represent it to be. In *Lincoln* v. *Wright* (3) certain real property of the plaintiff, together with a policy of

(1) 9 Moore P.C. 413; also reported in 5 Grant Ch. Rep. 108.

(2) Cassels's Dig. 292.

(3) 5 Jur. N.S. 1142.

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insurance effected by him upon his own life, were under mortgage as security for a loan to the plaintiff. The mortgage deed contained a power of sale by the mortgagee. The mortgaged property consisted of seven cottages, in one of which the plaintiff himself resided, a chapel or meeting-house and six acres of land. The plaintiff, while the mortgage was current, executed a deed whereby he conveyed and assigned all his estate and effects to one Gamble upon trust for the benefit of his creditors. Afterwards the mortgagee caused the property to be put up for sale under the power in his mortgage, but no sale was effected. Shortly afterwards Gamble was informed by his solicitors, who were also solicitors for the mortgagee, that the mortgagee had been offered £220 for the property, and that unless a higher price could be obtained it would be sold at that price. The bill stated that thereupon Gamble communicated with the plaintiff who at once went to a Mr. Wright since deceased, the father of the defendant, his daughter, and asked him to purchase the property for the plaintiff upon the terms that Mr. Wright should be repaid the purchase money and interest out of the rents of the cottages and chapel, and that he should also allow the plaintiff to continue in the occupation of the house and land which he then occupied. On the evening of the following day the plaintiff and Gamble called on Mr. Wright, who told Gamble that the plaintiff had been asking him to buy the property for the family of the plaintiff, and he was anxious to know if the money would be safe. Gamble in reply assured him that it would, and pointed out the mode in which he could repay himself with interest, and Mr. Wright then agreed to purchase the plaintiff's interest, which was a life interest in the mortgaged property, and the said policy of life insurance in behalf of and for the benefit of the plaintiff on the terms that Wright should

pay £230 as purchase money and retain the rents of the cottages and chapel, and apply the same towards liquidating or reimbursing to himself the said sum of £230, and that in the meantime the plaintiff should pay interest and retain possession of the messuage then occupied by him and pay the premiums to accrue due on the policy. Gamble then added that it would be necessary to raise the rents of the other cottages, and that this with the income from the chapel would enable the plaintiff to pay £50 yearly in liquidation of the sum advanced. This arrangement was communicated to the mortgagee who acquiesced in it and the bill alleged that Mr. Wright, upon the 24th October, 1855, became the purchaser upon the terms and conditions above mentioned. From the time of the contract the plaintiff continued to reside in the house in which he had before resided and never paid any rent but he paid all taxes. He also regularly paid the premiums on the policy, except one in June, 1858, which he also would have paid but that he learned that it had been paid by some person acting on behalf of the defendant without any request on his part; when the premium for 1856 was due the plaintiff received a note from Mr. Wright informing him that the same must be paid without delay. Towards the end of the year 1855 Mr. Gamble had a conversation with Mr. Wright which led the former to suspect that Wright meant to depart from the arrangement and to claim the property as his own, and he thereupon wrote to Wright a letter reminding him of the original terms and stating his suspicions, in answer to which letter Wright wrote to Gamble as follows:—

January 8th, 1886.

SIR,—I do not understand the purport of your note. You and Lincoln cannot have forgotten the conditions on which I purchased the life interest, namely, that I would allow him and his family the use of the house and land, paying therefor the policy and other outgoings,

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and that I would take the cottages and the meeting-house, commonly called a chapel, into my own hands, and that he should pay for the furniture by instalments. These are the conditions I named to Mr. Brown and several other neighbours even before I made the purchase. The deed which the society holds from Lincoln, Mr. Partridge has informed me, is null and void. The rent I have fixed upon is £10 a year to be paid in advance commencing on the day of purchase.

Yours obediently,

JOSEPH WRIGHT.

On the 15th June, 1856, Mr. Wright wrote to a member of the religious society which had previously rented the chapel the following letter :—

SIR,—You no doubt may be aware that I have purchased the life interest of Mr. John Lincoln, allowing him the house in which he lives and the land rent free for the benefit of his wife and young children, keeping in my possession the cottages and the meeting-house, commonly called a chapel, upon the latter of which I have fixed a rent of £10 per year to be paid in advance, commencing on the 24th October, 1855, the day on which the purchase was made.

Mr. Wright died at the end of the year 1856, and by his will he devised all his real estate to his daughter the defendant, then under age, and he appointed one Thomas Beck her guardian and sole executor of his will. Mr. Wright had received the rents during his life, and since his death they had been received by Mr. Beck, his daughter's guardian. After Mr. Wright's death Mr. Beck offered to allow the plaintiff £10 a year for his life if he would give up the house and land. The bill alleged that this offer was a repetition of one which had been made by Mr. Wright in his lifetime. Upon the plaintiff refusing Beck's offer he, as a next friend of Miss Wright, instituted an action of ejectment against Lincoln, who thereupon filed his bill praying for an injunction and a decree that Wright had purchased the premises as trustee for the plaintiff, and that upon payment to Wright's representatives of what was due to them they might be decreed to convey and assign the property and the policy to the plaintiff.

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Now with reference to the case as alleged in that bill, the agreement upon which it was alleged Wright had purchased the premises for and on behalf of the plaintiff was most unequivocally proved by Mr. Gamble, a perfectly disinterested witness, whose narrative of which had taken place left no doubt and could leave no doubt as to the truth of the allegations in the bill. This fact was dwelt upon by V. C. Kindersley, who heard the case, and who was of opinion that the letters of Wright were consistent with that agreement and supported the plaintiff's case. Referring to the facts of the case he said :—

> The agreement was clearly proved by the plaintiff and Gamble who was a disinterested witness, and the letters of Wright were consistent with it.

The fact that the plaintiff also paid the premiums on the policy was a strong circumstance in support of the plaintiff's case, as in perfect accordance with the agreement established by the disinterested witness Gamble. A decree was accordingly made as prayed. Upon appeal Lord Justice Turner said :—

> The question was whether there has been such an agreement as the bill alleged. His mind was satisfied that there had been, the questions deposed to as having been put by Mr. Wright whether the investment would be safe, whether the interest would be regularly paid and the arrangement for repaying the principal out of the surplus interest and other similar particulars, satisfied his mind even more than if the evidence had been more positively direct. If no such agreement existed to what could Mr. Beck's offer of £10 a year be ascribed. The case was not one of mere trust but of equitable fraud.

It is to be observed that the complainant in no part of her evidence has asserted that after the return of Mr. Brown to Winnipeg on the 16th October, 1879, she was present at any interview between him and her husband or her father-in-law, or any other person in relation to the matter excepting the one occasion of her executing the deed which she did, as she says, because

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her husband asked her. Upon that occasion also she signed the receipt of that date together with her husband and father-in-law at the direction and request of her husband. Now as to the conversations which she speaks of as having taken place in the summer of 1879, there does not appear to be any reason to entertain any doubt that, while these conversations are alleged to have taken place, neither Mr. Brown nor the bank had any knowledge that the plaintiff had or claimed to have any estate in the lands in question which the bank were proceeding in court to foreclose as the property of Gilbert McMicken alone who had executed the mortgage; these conversations therefore must have, as indeed the plaintiff in her cross-examination admits, related wholly to Mr. Brown's pressing to get Gilbert McMicken's liability upon the judgment against him as endorser of McMicken and Taylor's property paid as well as his mortgage debt for the recovery of which the foreclosure proceedings were pending, and to the difference upon that subject existing between Mr. Brown and him as appearing in Mr. Gilbert McMicken's correspondence with the bank. The reference made to what Gilbert McMicken alleged had taken place between himself and Governor McDonald, who appears to have been supposed to have had some influence with the board of directors of the bank, to procure them to take Mr. McMicken's view of the propositions made by him instead of the view which appears to have been taken by the Winnipeg manager of the bank appears to have been the sole foundation for the plaintiff's expectation, if she ever did expect, to receive any surplus of the value of the mortgaged property if any should remain after payment of what was due to the bank in virtue of the mortgage and said judgment. In connection with these alleged conversations it is not to be lost sight of that

the representations alleged in the plaintiff's letter as having been made to her by Mr. Brown, and which are there made to be the sole foundation of the plaintiff's claim entirely, are in both of the letters filed by her, the instructions for which must have been given by the plaintiff and her husband (or perhaps by her husband alone), stated to have been made "in the month of October, 1879," while it appears that Mr. Brown was not in Winnipeg from the 20th September until the 16th October, and the deed was executed on the 22nd —six days after his return. Moreover, it is to be borne in mind that the allegation in the bill of the delivery to Mr. Brown and the sale by him, and the receipt by him of the proceeds of the value of, the chattel property assigned to Gilbert McMicken by McMicken and Taylor by way of security to him for endorsing their paper, is proved to be without foundation by Gilbert McMicken himself who gave evidence that that property was left by him to be dealt with in the insolvency of McMicken and Taylor as their property out of which the bank received their dividend of 40 cents equally as all other creditors of the firm.

Mr. Ross, the solicitor acting for the bank in the matter of the deed of October, 1879, and who is since deceased, appears, in view of the relationship between the parties appearing on the registry to have been from time to time owners of the property, and in view of the consideration appearing on the deeds by which the property thereby conveyed was conveyed from the one to the other, to have taken not unnecessary or unreasonable precautions in procuring the execution of the deed, and of the other documents required by him to be signed at the same time for the purpose of protecting the bank from any claim being thereafter made in respect of the property either by Gilbert McMicken, Alexander McMicken or his wife, the present plaintiff.

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She had no better title to the mortgaged lots than she had to all the other property purported to be conveyed to her by the deed executed to her by Gilbert McMicken. That she paid nothing whatever by way of consideration for that deed is admitted by herself. She could not say why that deed was executed. She did not seem to know that it ever had been executed. The solicitor, Mr. Ross, appears to have had abundant reason to doubt the validity of that deed, and if invalid it is plain that the plaintiff had no title to the property. Under these circumstances her readiness to sign without inquiry whatever her husband should direct her to sign is easily understood. However Mr. Ross acted apparently with great prudence in requiring Gilbert McMicken and Alexander to sign the statement as to title which they declared to be true, as appears in the exhibit 42, and to get them and the present plaintiff to sign the receipt contained in exhibit 43 executed at the same time as the deed, for by that receipt all claims as to the rent payable under the lease which had been credited by the bank on the account kept with the mortgage debt were effectually determined whether such rent belonged in truth either to Alexander McMicken alone in whole or in part, or to Gilbert, or to the present plaintiff to whom it is clear that it did, in point of fact, belong ever since the date of the deed from Gilbert McMicken to her if Gilbert McMicken's own title and his conveyance to her could be held to have been executed *bonâ fide* for value. Again it is to be observed that in no part of the plaintiff's evidence is there any pretense that Mr. Brown ever made the allegations and representations alleged in the 12th paragraph of her bill, and which are made the corner stone of the foundation upon which the plaintiff's claim for relief is in her bill rested. True it is that Alexander McMicken alleges that in August, 1879, Mr. Brown did promise him

that if the bank got a deed of the property, and if upon its being sold it should realize more than enough to pay the two debts, the balance should come to his wife. He also says that on the morning that the deed was executed he finally made an arrangement with Mr. Brown that his, Alexander's, wife should sign the deed upon the distinct understanding that she should receive any surplus in the event of there being any after payment of said two debts out of the proceeds of the sale of the lands.

Now it sufficiently, I think, appears upon the evidence that Alexander McMicken is in reality the person interested in this action, and that it is he who is carrying it on, in the name it is true of his wife, but for his own benefit, although he is named on the record as a defendant. His evidence then must be regarded as that of a person most deeply interested; and when given for the purpose of varying the terms and effect of a deed deliberately signed by himself without any explanation being offered as to why what he alleges to have been the true terms upon which the deed was given were not reduced into writing must be received with the greatest caution and indeed suspicion. He was aware of the foreclosure proceedings taken against Gilbert McMicken on the mortgage. It was after the decree *nisi* was obtained in that suit that Gilbert McMicken was endeavouring to make the terms with the bank which appear in his letters, while Brown, the agent of the bank, was pressing to get a settlement of the amount due under the judgment, as well as that due under the mortgage. As I have already observed there is no reason to doubt the truth of the fact alleged by Mr. Brown, that neither the bank nor he had any knowledge that the plaintiff claimed to have any interest in the property until the discovery of the deed on registry from Gilbert to her by Mr. Ross as

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solicitor for McCrosson on the occasion of his investigating the title with a view to negotiations between Gilbert and Alexander McMicken and McCrosson for the sale by Gilbert to McCrosson if they could obtain the concurrence of the bank. This discovery appears to have been first communicated to Mr. Brown immediately before his leaving Winnipeg on the 20th September, 1879. During the whole of the summer of that year Mr. Gilbert McMicken was dealing with the property, and was dealt with by the bank, as being sole owner of the equity of redemption therein. It seems, therefore, difficult to conceive that during the period Brown was negotiating with Alexander McMicken as representing his wife as true owner of that equity of redemption, and was making propositions to him or agreements with him founded upon the fact that his wife was the owner of the equity of redemption in the property mortgaged by Gilbert McMicken to the bank. I must say that, in my opinion, no reliance can be placed upon any of the evidence given to that effect.

Then with reference to what is alleged by Alexander to have taken place on the morning of the 22nd October, what he alleges took place then is, that what was said was said as in repetition merely of something alleged to have been previously agreed upon in the summer. He offers no reason whatever why, if that was the arrangement, it was not reduced into writing. There is no suggestion that the bank or their agent, Mr. Brown, wished that the true terms of the transaction should not appear in writing; however, Mr. Brown says that the arrangement as to the giving of the deed was not made with Alexander McMicken at all, but that it was made between him and Mr. Gilbert McMicken, and that the agreement was that the bank should have a deed of the property in liquidation of the whole indebtedness, irrespective of a note of

$900.00 which was Gilbert's own personal indebtedness. I may here repeat that there is no evidence that Mr. Brown ever claimed or asserted that the whole of the amount recovered by the judgment against Gilbert McMicken as endorser of the McMicken and Taylor paper still remained due, nor is there any reason to infer that either Gilbert or Alexander was ignorant that the bank had received the dividend of 40 cents in the dollar, declared out of the estate of McMicken and Taylor in insolvency and for which the bank had given credit on the judgment. Now this agreement alleged by Brown to have been made with him by Gilbert McMicken is the very one which was in terms subsequently carried out by Mr. Ross. Mr. Brown also says that when he and Gilbert McMicken made the above agreement Gilbert went out of his Brown's office to see Alexander, and to arrange to have the deed drawn, and we have the evidence of a young man then a student in the office of Mr. Ross who was acting in the matter as solicitor of the bank, that Alexander McMicken came to Mr. Ross's office and had an interview with Mr. Ross, and that he then gave instructions for preparation of the deed, saying that

> he was giving the bank the property, and that they were to release their claims against his father and himself, and that he wanted the deed drawn and sent across the river.

Thereupon it appears that Mr. Ross, in view it would seem of the doubtful state of the title, required the transaction to be closed by the execution of the several documents which accompanied the deed, and which were prepared by himself in his own handwriting. It is true that Alexander McMicken denies that he did give instructions for the preparation of the deed as alleged by the witness who testified to that effect, but as the onus lies upon the parties who seek

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to vary the terms and effect of a deed deliberately executed by themselves it is sufficient to say that after the death of the solicitor who prepared and required the documents accompanying the deed to be signed, and after the death of the sole witness to the execution of the deed, there would be no security whatever in transactions affecting the transfer of the absolute interest in real estate if a court should interfere, upon such evidence as is given by the interested parties here, to vary the title as appearing in the documents so prepared and signed by the parties who now allege that those documents do not represent the intention of the parties.

In my opinion the appeal must be dismissed with costs.

PATTERSON J. concurred in dismissing the appeal.

Appeal dismissed with costs.

Solicitors for appellant: *Kennedy & O'Reilly.*

Solicitors for respondents, the Ontario Bank and Brown: *Richards & Bradshaw.*

Solicitor for respondents McMickens: *J. W. E. Darby.*