1887

*Mar. 15, 16.

*June 8.

SAMUEL BURGESS AND HAMMEL MADDEN DEROCHE (PLAINTIFFS) APPELLANTS;

AND

MICHAEL J. CONWAY (DEFENDANT)....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Sale of land—Subject to mortgage—Absolute sale—Sale of Equity of redemption—Consideration in deed.

B. sold to C. land mortgaged to a loan society. The consideration in the deed was $1,400 and the sum of $104 was paid to B. C. afterwards paid $1,081 and obtained a discharge of the mortgage. B. brought an action to recover the balance of the difference between the amount paid the society and said sum of $1,400, and on the trial he testified that he intended to sell the land for a fixed price; that he had been informed by W., father-in-law of C., that there would be about $300 coming to him; that he had

*PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

demurred to the acceptance of the sum offered $104, but was informed by C., and the lawyer's clerk, who drew the deed, that they had figured it out and that was all that would be due him after paying the mortgage; that he was incapable of figuring it himself and accepted it on this representation. C. claimed that the transaction was only a purchase by him of the equity of redemption, and that B. had accepted $104 in full for the same.

Held, reversing the judgment of the Court of Appeal, Taschereau and Gwynne JJ. dissenting, that the weight of evidence was in favor of the claim made by B., that the transaction was an absolute sale of the land for $1,400; and independently of that, the deed itself would be sufficient evidence to support such claim in the absence of satisfactory proof of fraud or mistake.

APPEAL from a decision of the Court of Appeal for Ontario, reversing the judgment of the Divisional Court and restoring the verdict at the trial in favor of the defendant.

The plaintiff, Burgess, was the owner of a lot of land mortgaged to a Loan Society, and being in arrears with his payments he determined to sell it. He had been notified that the Society would accept $1,068 to discharge the mortgage, and he effected a sale to the defendant Conway. The parties went to a lawyer's office and a conveyance was drawn up in which $1,400 was declared to be the consideration for the sale. The sum of $104.50 was paid to the plaintiff, the defendant and the clerk who prepared the conveyance stating that this would be the balance coming to him, and the deed was executed. The defendant, a few months afterwards, paid off the mortgage for $1,081.

Burgess afterwards assigned to one Deroche a claim against the defendant for a balance on this transaction, and a suit was brought by him and Deroche to recover it. On the trial he testified that it had been represented to him before the sale that there would be some $300 coming to him; that when the $104 was tendered to him he demurred about taking it, but the defendant stated that he and the clerk had figured it out and that was all that was coming, and that Whelan, defendant's

father-in-law, who had told him he would get $300, had figured it wrongly; that he was incapable of figuring it himself and took the amount offered, supposing that it was the proper amount He claimed that the sale was for a fixed price, $1,400, for the land, and that he was entitled to the difference between that amount and the sum paid by the defendant to discharge the mortgage.

The defendant, on the other hand, claimed that there was no price fixed, but that the transaction was merely a sale by Burgess of his equity of redemption in the land, and that was sold for the sum accepted when the deed was executed, namely, $104.50.

At the trial a verdict was given for the defendant, the learned judge finding, as matters of fact, that there was a fixed price of $1,400 on the land, but that Burgess had accepted $104.50 in payment of the same. The Divisional Court reversed this verdict and gave judgment for the plaintiff for $215, with interest. The Court of Appeal restored the judgment of the judge at the trial. The plaintiffs then appealed to the Supreme Court of Canada.

Moss Q. C. for the appellant, referred to *Gamble* v. *Gummerson* (1); *Cameron* v. *Carter* (2); Sugden on Vendors (3); *Foakes* v. *Beer* (4).

Robinson Q. C. for the respondent cited *Grasset* v. *Carter* (5).

Sir W. J. Ritchie C. J. and Fournier J. concurred in the judgment prepared by Mr. Justice Henry and were of opinion that the appeal should be allowed.

STRONG J.—This is an action to enforce a vendor's lien for an unpaid residue of the purchase money of a

(1) 9 Gr. 193.
(2) 9 O. R. 426.
(3) Am. ed., vol. 2; p. 578.
(4) 9 App. Cas. 605.
(5) 10 Can. S. C. R. 105.

1887
BURGESS
v.
CONWAY.
Strong J.

parcel of land sold by the appellant Burgess to the respondent. The other plaintiff Deroche is the assignee of Burgess. The learned judge who tried the action, Mr. Justice Rose, expressly finds that the sale was a sale not of the mere equity of redemption subject to a mortgage, but of the land, at the price of $1,400. The learned judge's own words are as follows:—

The facts, as it appears to me, stand somewhat in the following order. It is admitted the plaintiff and defendant contracted that the sale of the property should be for $1,400, and that the plaintiff Burgess should have the difference between the amount of the mortgage upon the land and $1,400.

That this was the true character of the purchase is, also, demonstrated by the statement of the consideration money in the conveyance by which it was carried out. The price is there stated to have been $1,400. Further, two at least of the learned judges in the Court of Appeal, the Chief Justice and Mr. Justice Patterson, agree in this view of the evidence. The learned Chief Justice says:—

The judge considered, and I fully agree, that the contract was to sell the land at the price of $1,400.

Mr. Justice Patterson says:—

Two facts are clear and both parties agree about them, the price agreed on was $1,400, and a sum to be paid as that which the defendant was to pay the plaintiff besides assuming the mortgage was agreed on and paid.

Had the facts that the sale was one of the land itself for $1,400, and not a sale of the equity of redemption for $104, not been thus, according to all the findings of all the courts below, incontrovertibly established by the extrinsic evidence, the purchase deed would in itself, in the absence of any allegation in the defendant's pleading that by error and mistake it incorrectly stated terms of the sale, have been conclusive. The sale having been carried into execution by conveyance the terms of the deed by which it was so carried out must be considered as binding on the parties,

1887
BURGESS
v.
CONWAY.
Strong J.

until displaced upon some equitable grounds of mistake or fraud; none such having been alleged, and the evidence being insufficient to establish such a defence even if it had been pleaded, we must take the contract as it is stated to have been in the instrument by which the parties have completed the purchase. Then, the deed shows that the price was $1,400, and in the face of the absolute covenant against incumbrances contained in it, it is impossible to admit the respondent's pretension that the sale was one of the equity of redemption subject to the mortgage.

This being the state of the case as to the two facts upon which the decision of the case must turn, it appears to me that the appellant does not subject himself to the objection that he is asking the court to vary the findings of fact which have been arrived at by the court which saw and heard the witnesses, and so to resile from the rule laid down in the case of "The Picton" (1) and other cases. So far from doing this the very basis of the appellants' case is that the facts are as they have been expressly found by the three courts which have already had the case under their consideration. If the rule in question has any application to this appeal, it ought to be applied against the respondent who is seeking to alter the findings of all the courts which have passed upon the evidence by contending that the sale was one of the vendor's equity of redemption merely, for the price of $104.50 the payment of which was, therefore, a full discharge of the purchase money.

Starting then from these facts that the sale was one of an estate in mortgage for the price of $1400 the rights of the parties are easily determinable by applying rules well settled and understood in the practice of conveyancing, rules not founded on any

(1) 4 Can. S. C. R. 648.

1887
BURGESS
v.
CONWAY.
Strong J.

technical or arbitrary principles, but resting on grounds of practical convenience and justice. The vendor was clearly entitled to the benefit of the whole price at which he sold his land, but the purchaser was entitled so to apply his purchase money as to protect himself against the incumbrance of which he had notice at the time of his purchase. The strictly regular mode of doing this, according to the practice laid down in the English books, is to require that the mortgagee shall become a party to the conveyance if his mortgage is overdue, or if he is willing to receive his money. In either of these cases the purchaser is therefore entitled to apply so much of the purchase money as may be required to the discharge of the incumbrance. In case the mortgage money should not have become payable and the mortgagee should not be willing to anticipate the date fixed for payment the purchaser is entitled to retain in his own hands an amount equivalent to that which will be required to discharge the incumbrance at its maturity, and the sum so reserved must be invested for the benefit of the vendor so as to produce a reasonable rate of interest—the rule being that whenever the purchaser gets into possession and receives rents and profits from that date the vendor is entitled to interest on unpaid purchase money. The amount to be paid for the incumbrance is a matter with which the purchaser has nothing whatever to do ; the money so applied is considered as being applied for the benefit of the vendor, and he is at liberty to enter into any arrangement he may be able to effect with the mortgagee. If he can get the mortgagee to discharge his mortgage, trusting to personal security or taking other real security, or if he can procure the mortgagee to make an abatement in the amount of his debt, he is at liberty to do so, and any such arrangement enures for

1887

BURGESS
v.
CONWAY.

Strong J.

his benefit. The purchaser is bound to pay or account to the vendor for the whole price stipulated for, and all he can insist upon is his right so to pay it as to protect himself against the incumbrance. These are the strict rights of vendor and purchaser as administered by the court when a sale is carried out under a judgment for specific performance and also in completing the sale of an estate made under the decree or judgment of the court itself, and I am not aware that they are in any way different when the court has to determine them for any other purpose. In this country, where a mortgage can be more readily discharged by the registration of a statutory certificate of payment, it is not usual in completing a purchase to make the mortgagee a party to the conveyance, but the same purpose is more inexpensively and conveniently effected by discharging the incumbrance under the registry act. In all other respects it is the strict right of either vendor or purchaser to require that the practice, as laid down by the most esteemed writers on the law of vendor and purchaser, and as I have briefly stated it, should be followed.

The question in the present case is therefore reduced to this simple one: Has the $1400, which it is admitted on all hands was the price for which the appellant sold his land, been paid by the vendee? It is out of the question to say, and indeed it has not been suggested, that the bargain to buy and sell for $1400 dollars was superseded by any subsequent and different contract, and the only matter to be determined can therefore be: Has this admitted price been paid or satisfied?

It is matter of elementary law that an obligation for the payment of money arising upon a contract whether the money so to be paid is due under a contract for the sale of land, or by virtue of any other agreement, can only be discharged by release, accord and satisfaction, or

1887
BURGESS
v.
CONWAY.
Strong J.

the payment of the full amount which the creditor has stipulated for and not by the payment of any less sum though accepted expressly in discharge. Here there is no suggestion of any collateral accord and satisfaction nor is any release set up; therefore, before the debt can be held to have been discharged payment must be proved, according to the general rule applicable to all payments, of the full amount to which the creditor was originally entitled. When we arrive at this stage and see, as I think it must plainly be seen, that the question between the parties is in reality one, not as to the terms of a contract (for that question is concluded by findings which all the courts have acquiesced in), but one concerning only the payment of an admitted price, all difficulty vanishes for then it cannot, in the face of the recent decision in the House of Lords *Foakes* v. *Beer* (1), be pretended that the appellant was bound by his acceptance of $104.50 if more was actually due to him even though he accepted it absolutely as in satisfaction and discharge. Then it is not insisted that in addition to the $104.50 paid to the appellant on the 9th January, 1885, the respondent has paid more than $1081—the amount of the draft for $1073, forwarded by Whelan on the 27th of February, 1885, and the $8 additional claimed by Mr. Cameron and sent by Whelan on the 5th of March 1885, making in all $1,081 paid to the mortgagees. The consequence is inevitable that the purchase money has not been paid in full. The aggregate amount of the two sums so paid to the appellant himself and to the mortgagees being deducted from the $1400 leaves a balance still due to the appellants of 214.50 on which they are entitled to interest from the 9th January, 1885, the date of the conveyance.

I have thought it sufficient to rest my opinion on the ground that the $104.50 could not be payment of the

(1) 9 App. Cas. 605.

1887
BURGESS
v.
CONWAY.
Strong J.

larger amount remaining due as the residue o the purchase money after deducting the amount paid to the mortgagees. But even if there had been an actual release, or if there had been some collateral satisfaction, I should have thought the error in calculation fatal to the respondent's contention.

I need scarcely say that the debt was clearly a proper subject of assignment, and I am of opinion that the assignee and assignor were properly conjoined as plaintiffs; neither of these questions seem to have given rise to any doubt in the courts below and therefore call for no further observation,

I am of opinion that the appeal should be allowed with costs in all the courts.

HENRY J.—The appellants in their declaration claim to recover from the respondent a sum of about $215 and interest as the balance of the purchase money of a lot of land, and of the consideration of a deed of conveyance thereof made by Burgess to the respondent, which claim was assigned by Burgess to his co-appellant for the benefit of creditors with a resulting trust to himself. It is alleged by the appellants that the land was sold for $1,400, subject to a mortgage held by the Hamilton Provident and Loan Society upon which, at the time of the sale in question, there was due $1,068, and for which sum the society had communicated to the parties its readiness to release it.

The respondent denies by his pleading that the price of the land as agreed on was $1,400, and alleges:

That said Burgess offered to sell said equity of redemption to defendant for the price or sum of $104 50. The defendant accepted said offer and paid said Burgess said last mentioned sum, and no further or other sum was due.

Upon these counter allegations issue was joined and, to come to a proper conclusion, it is necessary to consult the evidence on both sides.

About the time of the sale of the land, and shortly previous thereto, Burgess, being in default for two instalments, was called upon by the society for payment. Being unable to pay the instalments due he determined to sell the land, which he did to a man named Wagar for $1,500. The sale was not perfected and he (Burgess) having met the respondent at the office of his father-in-law (Whelan) at Centreville, alleges that he offered the land to the respondent at $50 less than the amount he had bargained for with Wagar—that after some figuring by the respondent a bargain was concluded for $1,400. This took place at Centreville, and it was agreed that the respondent and Burgess and the wife of the latter should go next morning (Friday) to Napanee to have the bargain consummated by the necessary conveyances for that purpose, to be made out by a solicitor. This is fully corroborated and sustained by a disinterested witness who was present. It is shown too that Burgess himself, although one of the appellants, has but a trifling, if any, interest in the result. It is further shown that it was the respondent who retained the professional services of the conveyancer, and gave him instructions as to the writing of the deed and that it was executed, as so written, by Burgess and his wife, and the evidence shows that it was written and signed before the alleged purchase by the respondent of what he alleges to be the right of the equity of redemption. The respondent in his evidence takes the position that no bargain or agreement had been made or entered into, except at the office of the conveyancer; and that that made there was for the equity of redemption for the sum of $104.50. The whole of the facts which are not disputed are, to my mind, conclusive against sustaining that position. In the first place it may be fairly asked why the parties went a distance of about fifteen miles away from their homes to negotiate a

1887

BURGESS
v.
CONWAY.

Henry J.

bargain? And why was the wife of Burgess taken there? And if no bargain had been previously made, how was it that the consideration of the deed was made, at the instance of the respondent, $1,400. No explanation of these facts is given by the respondent, and when he does not give any are they not, in connection with the testimony of the plaintiffs witnesses, conclusive against the respondent. Exhibit 1 is as follows:--

Statutory deed, dated January 9th, 1885, registered same day at 3.55 p.m., made by plaintiff Samuel Burgess of the first part, Elizabeth M. A. Burgess his wife (who joins for the purpose of barring her dower only) of the second part, and defendant of the third part, whereby in consideration of $1,400 (the payment of which is therein acknowledged and a receipt for the money signed in the margin) the lands in question were conveyed to the defendant.

Here, then, is shown, not a conveyance of the equity of redemption but a deed in fee simple; with a statement of the joining therein of the wife of Burgess to bar her dower; and the consideration therein is stated to be $1400. By the solemn instrument referred to the amount to be paid for the land was agreed to be $1400 and how then can the respondent be permitted to contradict it? That deed is the best evidence against the respondent, who is a party to it, to establish the contention of the appellants, and I hold that he, the respondent, cannot repudiate it unless he could clearly and by irresistible evidence show that the insertion of that sum as the consideration was made through error or fraud, or by equally irresistible evidence that it was contrary to the terms of the bargain which the parties had made and went to Napanee to have carried out. Such has not been attempted to be shown. It is, however shown that before the delivery of the deed some figuring, as Burgess calls it, was done by Currie, the clerk who prepared the deed, and the respondent, and after some conversation with Burgess the sum of $104.50 was

announced by them to him as the balance coming to him after providing for the payment of the mortgage. This he demurred to as Whalen, the father-in-law of the respondent, had made a calculation when Burgess was about selling to Wagar, by which Burgess would be entitled to about $300. On his so demurring and stating that such was the case the respondent and Currie told him that Whalen did not understand figuring; and that he had made a mistake. Hearing that Burgess reluctantly submitted to what they said and received the $104.50 as the balance due him. I have just quoted from the evidence of Burgess; and from the manner in which he gave it, and from the surrounding circumstances, I have satisfied myself that his evidence is more reliable than that of the two others referred to. Currie knew personally nothing of what took place before the parties went to the office. His evidence therefore does not sustain that of the respondent as to matters previous. The respondent, therefore, is wholly unsustained when he, to some extent but inferentially only, contradicts the evidence of the witnesses of the appellant as to the bargain of the previous day. I feel bound, under that evidence sustained by admitted facts and by uncontradicted statements, to find that a bargain for $1400 was entered into and that the parties went to Napanee to have it completed.

Having arrived, then, at that conclusion where can a defence be found to the appellant's action?

That defence consists of the allegation that the respondent purchased the equity of redemption for $104.50 and that he paid it. It will be seen that the defence is not that the respondent purchased for $1400 but that subsequently, and before the execution of the deed, Burgess agreed to take a less sum which was paid to him. That defence under the evidence,

1887
BURGESS
v.
CONWAY.
Henry J.

would not be sufficient, but the testimony of Burgess being more probable should be acted on.

The more I have considered the evidence and surrounding circumstances the more firmly I have been convinced that Burgess was imposed upon when he received the $104.50. The respondent admits that at the time of the dispute as to the balance due to Burgess that he said to Burgess that the time for paying off the mortgage for $1068 had expired and he adds

Mr. Drury said if Mr. Conway assumes that or pays anything out of it he will be doing it on his own responsibility,

meaning that if Conway did not charge Burgess $1313 be would run the risk of losing the difference between that sum and $1068 and when Drury made that statement Conway says

I told Burgess the time had passed for the Company's offer.

It is plain then that they falsely and fraudulently persuaded Burgess that he (Conway) would have to pay the larger amount when he at the time knew full well that he could have the mortgage released for the smaller one.

Burgess was examined and cross examined at great length and amongst other questions was asked

How much did you expect to get? A. The way Conway and Whalen figured there was between three and four hundred dollars coming to me. Q. $1075 was the amount against the place? A. Yes. Q. That would be $375 difference? A. Yes that is what Conway and Whalen said would be coming to me—That is the way they spoke the day before—Thursday.

These statements were either true or false. If the latter we should expect them to have been contradicted by Conway and Whalen but they were not; and when both were examined as witnesses and were silent as to those statements of Burgess are we not bound to believe them? He appears to have been rather an illiterate man unable to make the calculations required to ascertain the sum really due him. He says he was dissatisfied first and last. He says they, Conway and

Drury, did not go over any calculations with him but merely gave results.

He was asked in cross-examination

Then how did you come to quietly accept $104 without asking some explanation? A. I asked Conway and Drury how it was and they said Mr. Whalen didn't understand figuring it.

He is asked by His Lordship the presiding Judge:

What did you understand the mistake to be? A. That there should be more money coming to me than I got. Q. Why? A. The way Whalen figured it to me and the way Conway figured it when we made the bargain—I did not figure it myself—I was not capable of figuring it.

If those statements are true, and I fully believe them to be so, it requires but a slight imagination to picture the position of this man, incapable of making the necessary calculations, in the hands of the other two, an unconscious victim.

The law governing this case is plain and well ascertained and establishes the right of the appellants to recover the difference between the amount the respondent paid to redeem the mortgage to which is to be added the $104.50 paid and the sum of $1400. I think the judgment of the Divisional Court should de sustained and that the judgment of this court should sustain it with costs.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed for the reasons stated in the judgment of Mr. Justice Gwynne.

GWYNNE J.—In my opinion it is to be regretted that the judgment of Mr. Justice Rose, who tried the case, was interfered with by the Divisional Court of Queen's Bench. I quite agree with those learned judges of the courts below who have held that the question was purely one of fact, which the learned judge who heard the witnesses had the best opportunity to determine. That question

1887
BURGESS
v.
CONWAY.
Gwynne J.

was: What was the agreement between the parties upon which the deed executed by Burgess in favor of Conway was executed? And the learned judge has in effect found, as matter of fact, that the bargain was that Conway was to give $1400 for the fee simple estate in the land, of which sum the mortgage to the Hamilton Provident Loan Society should be counted as part, to the amount which appeared upon its face to be secured by it, and not to the amount which the company would accept in satisfaction of it if paid before its maturity, and that the difference between such face value of the mortgage and $1400.00 should be paid in cash to Burgess; that thereupon a calculation was made in Burgess' presence to ascertain the amount so coming to him in cash which was ascertained to be $84.50 or thereabouts; that thereupon Burgess suggested that he should receive interest upon instalments of the mortgage which he had already paid, to which Conway assented, the amount being ascertained to be about $20.00, which sum added to the $84.50, making together $104.50, Conway paid to Burgess, whereupon Burgess executed a deed to Conway which, although in terms purporting to convey the fee simple estate in the land did in fact pass only, as it only could pass, Burgess' interest therein, that is to say his equity of redemption subject to the mortgage to the loan society which Conway assumed. With the bargain so concluded the learned judge has found that Burgess was and expressed himself to be well satisfied.

Subsequently Conway paid the mortgage before its maturity the company accepting in discharge of it a less sum than the amount appearing on its face to be secured by it and thereby realised a sum of money the prospect of realising which the learned judge found to have been Conway's motive for concluding the above

bargain with Burgess. This sum of money is the subject of this suit and upon the above findings the learned judge rendered a verdict and judgment for the defendant. The Court of Appeal for Ontario has concurred in this view; and unless we can pronounce it to be clearly erroneous we are not justified in interfering with it. So far from thinking it to be erroneous I concur in the findings of the learned judge. The appeal therefore, in my opinion, should be dismissed with costs.

Appeal allowed with costs.

Solicitors for Appellant: *Deroche & Madden.*

Solicitors for Respondent: *Kerr & Bull.*