

1893	PETER IMRIE, (DEFENDANT)..	.....APPELLANT ;
*Nov. 30.		
Dec. 1.	AND	
1894	BLOWERS ARCHIBALD, ANNIE	} RESPONDENTS.
*Nov. 5.	BREFFIT, WILLIAM H. ARCHIBALD AND OTHERS, (PLAINTIFFS	
1895	AND DEFENDANTS).....	
*Mar. 11.		
—	ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.	

*Mortgage of trust estate—Equity running with estate—Equitable recourse by—Construction of deed—Description of lands—False demonstration—Water lots—Accretion to lands—After acquired title—Contribution to redeem—Discharge of mortgage—Parol evidence to explain deed—Estoppel by deed.*

On the dissolution of the firm of A. & Co. by the retirement of C. D. A. the business was carried on by the remaining partners T. A. and B. A. on the same premises, which were the property of C. D. A., the continuing partners agreeing to pay off a mortgage thereon as one of the old firm's debts. They neglected to pay and the property was sold by the sheriff under a foreclosure decree, when they purchased and took a deed describing the lands as in said mortgage, one side being bounded by "the windings of the shore" of Sydney Harbour, and including a "water lot," part of which was known as the "stone ballast heap," in front of the shore lands. They immediately re-mortgaged the lands by the same description adding a further or alternative description and, at the end, the following words:—"Also all and singular the water lots and docks in front of the said lots,"—although in fact they then owned none except those covered by the description in the deed from the sheriff, and they gave at the same time a collateral bond to the mortgagees for the amount of their mortgage. They then conveyed the equity to C. D. A., giving him a bond of indemnity against the mortgage they had so executed. Some time afterwards T. A. and B. A. acquired by grant certain other water lots in front of the mortgaged property

\*PRESENT :—Sir Henry Strong C.J., and Fournier, Taschereau, Gwynne and King JJ.

and used and occupied them as part of their business premises along with the mortgaged lands. C. D. A. sold the equity of redemption subject to the mortgage. and T. A. and B. A. settled their obligation under the indemnity bond by a com- promise with the assignees of C. D. A., paying \$8,000, and obtained their discharge. Upon proceedings being taken by the assignees of the mortgagees to foreclose the mortgage, and against T. A. and B. A. upon the collateral bond, T. A. and B. A. paid the amount due and the foreclosure proceedings were continued for their benefit.

1894

IMRIE  
v.

ARCHIBALD.

*Held*, that the liability of the mortgagors was fully satisfied and discharged by the compromise, and as they were afterwards obliged to pay the outstanding encumbrance they were entitled to take an assignment and enforce the mortgage by foreclosure proceedings against the lands.

Per Gwynne J.—The mortgagors were only entitled to foreclosure for the realization of the amount actually paid by them in compromising their liability under the indemnity bond.

*Held*, further, that as the construction of the mortgage depended upon the state of the property at the time it was made parol evidence would be admitted to explain the ambiguity in the description of the lands intended to be affected :

That as there were no specific descriptions or recitals tending to shew that any other property was intended to be covered by the mortgage beyond what would be satisfied by including the water lot described as the "Stone ballast heap," the after-acquired water lots would not be charged or liable to contribute ratably towards redemption of the mortgage :

That even admitting that the description was sufficient to include the after-acquired property, such property was not liable to contribute towards payment of the mortgage debt.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment of Mr. Justice Ritchie for foreclosure of a mortgage.

The facts and questions at issue sufficiently appear by the head-note and in the judgments reported.

*Borden* Q.C. for the appellant.

Besides the water lots described in the mortgage, certain other water lots purchased by the mortgagors since the making of the mortgage, became bound

1894  
 IMRIE  
 v.  
 ARCHIBALD.  
 —

by the mortgage and must bear a proportion of the mortgage debt. *Trust & Loan Co. v. Ruttan* (1); *Bensley v. Burdon* (2); *Irvine v. Irvine* (3); *Rawley on Covenants* (4); *Jones on Mortgages* (5); *Goodtitle v. Bailey* (6).

If the plaintiffs had owned the subsequently acquired water lots at the time of the execution of the mortgage, they could not have foreclosed only that portion of the property of which the defendant has become the purchaser. The same result follows if the subsequently acquired lands became bound by the mortgage. *Jones v. Beck* (7); *Fisher on Mortgages* (8); *Story's Equity Jurisprudence* (9); *Jones on Mortgages* (10); *Allen v. Clark* (11).

The words "subject to a mortgage, dated 24th May," contained in the deed from plaintiff to C. D. Archibald, do not imply or amount to a covenant or undertaking on the part of C. D. Archibald to pay off the mortgage debt. They cannot do more than make the land conveyed to him liable to contribute a proportionate part of the mortgage debt. The land so conveyed was only a portion of the lands which had been granted by the mortgage in question. *Fiske v. Tolman* (12); *Pike v. Goodnow* (13); *Strong v. Converse* (14); *Drury v. Tremont Co.* (15).

The mortgage debt has been discharged by payment. If the plaintiffs had paid on the day after the execution of the bond of indemnity it cannot be doubted that the mortgage would be thereby discharged.

(1) 1 Can. S.C.R. 564.

(2) 2 Sim. & Stu. 519.

(3) 9 Wall. 617.

(4) 5 ed.s. 252 p. 380, s. 264 p. 423 to 1624, 1625 note 4.

(5) Secs. 561, 679, 825, 1483.

(6) Cowp. 597.

(7) 18 Gr. 671.

(8) 4 ed. s. 1100 and 1103.

(9) S. 1233d, and cases cited, and note 4.

(10) Secs. 743, 1089 to 1092, 1620

(11) 17 Pick, 47, (Mass).

(12) 124 Mass. 254.

(13) 12 Allen [Mass.] 472.

(14) 8 Allen [Mass.] 557.

(15) 13 Allen [Mass.] 168.

The present liability to pay and present right to receive concurring in the same person operated as payment and performance of the contract. Per Wilde C. J., in *Harmer v. Steele* (1).

1894  
IMRIE  
v.  
ARCHIBALD.

The bond of indemnity was barred by the statute of limitations when the compromise took place more than twenty-one years after it was made. The bond, being so barred, had ceased to effect or operate upon the rights of the persons in whom the mortgaged premises were vested.

Irrespective of the bond of indemnity plaintiffs were bound to discharge the mortgage and to indemnify therefrom the lands of C. D. Archibald. A mere release of that obligation would not affect any subsequent payment of the mortgage debt by the mortgagors, or prevent such payment from operating as a discharge of the mortgage.

The bond of indemnity was not a registered document and did not affect the title to the land as against the defendant who had no notice thereof. It was therefore a matter of no moment to him to know the terms of the alleged bond. The burthen is upon plaintiffs to prove notice to the defendant of this bond and compromise thereof, and they have failed to do so. Defendant's position is the same as if he had purchased with notice of the bond of indemnity, and as if that bond had remained unreleased. Under these circumstances a subsequent payment of their debt by the mortgagors would discharge the mortgage. Can the mortgagors by taking an assignment of their own mortgage acquire any right other than that of having the \$8,000 paid by them on the indemnity bond applied or appropriated in payment of the mortgage debt?

On the question of notice counsel referred to *Kettlewell v. Watson* (2); *Ware v. Egmont* (3), *Hamilton v. Royse* (4).

(1) 4 Ex. 1.

(3) 4 DeG. M. & G. 460.

(2) 21 Ch. D. 704.

(4) 2 Sch. & Lef. 315.

1894

IMRIE

v.

ARCHIBALD.

Ross Q.C., for the respondents.

Charles D. Archibald in the mortgage to Forman included the "ballast heap" lot as well as no. 6, and therefore under the sheriff's deed Thomas D. and Blowers Archibald obtained title to it, and when they came to mortgage the Cameron and Ferris lots they took the description of the lots in their own deed and gave an alternative or further description only. This alternative description does not in terms cover more than 5, 6 and the "ballast heap" lots, and if the words do include anything beyond these the last words should be rejected, as *falso demonstratio*.

The equity of redemption passed to defendant, Peter Imrie, subject to the mortgage. The deed will be construed by the state of the property at the time it was made, and the court should hear extrinsic evidence to explain the description. *Brady v. Sadler* (1); *Templeman v. Martin* (2); *Hubbard v. Hubbard* (3); *Cox v. Friedly* (4); *Hall v. Lund* (5); Washburn on Real Property (6); Broom's Legal Maxims (7).

The mortgage describes the property as fronting on Spanish River or Sydney Harbour, and gives the natural boundaries, in favour of which a presumption exists. "Fronting on" is equivalent to bounded by, and is quite unlike "fronting." Angell on Water Courses (8). Where land intervenes between a building or lot and the street, then the building or lot cannot be said to "front on" or "abut on" the street. *Lightbound v. Bebington Local Board* (9); *Newport Sanitary Authority v. Graham* (10); *Wakefield Local Board v. Lee* (11).

In *Litchfield v. Scituate* (12) it was held that the words

(1) 17 Ont. App. R. 365.

(7) P. 497.

(2) 4 B. &amp; Ad. 771.

(8) 7 ed. s. 26a.

(3) 15 Q.B. 227.

(9) 14 Q.B.D. 849; 16 Q.B.D.

(4) 33 Penn. 125.

577.

(5) 1 H. &amp; C. 676.

(10) 9 Q.B.D. 183.

(6) 4 ed. vol. 3, p. 384.

(11) 1 Ex. D. 336.

(12) 136 Mass. 39.

"bounded by the sea" or "by the harbour" takes, in that State, to low water. In this country it would be to ordinary high water mark. In *Washburn on Real Property* (1), a case is mentioned in which a property was "bounded by the highlands," and the line was required to follow the indentures of the hills. The description in the mortgage would, therefore, be incorrect if the "ballast heap" is excluded, for it, and not Sydney harbour, would then form part of the southern boundary. And see *Iler v. Nolan* (2); *Cartwright v. Dettor* (3); *Mahoney v. Campbell* (4); *Gillen v. Haynes* (5); *White v. Gay* (6); *Roe v. Vernon* (7); *Rooke v. Kensington* (8); *Moore v. McGrath* (9); *Walsh v. Trevannion* (10).

1894  
IMRIE  
v.  
ARCHIBALD.  
—

There is a presumption that the description covers only the property owned. *Hurly v. Brown* (11). At the time of making the mortgage T. D. and B. Archibald owned no water lots in front of 5 and 6 except the "ballast heap."

In any case they are entitled to foreclose and sell such two lots for the whole amount of the mortgage, irrespective of the water lots in front of them.

T. D. and B. Archibald had the right either to pay the mortgagees or C. D. Archibald, who would then be bound to protect them from the mortgagees.

The release to plaintiffs on the compromise had the same effect as payment in full. *Cowper v. Green* (12).

After this payment and release the land remained as the primary fund for payment of the mortgage debt. The rights of the mortgagees would be unimpaired, but T. D. and B. Archibald could call on the owner of the equity of redemption to protect them.

(1) 4 ed. vol. 3, p. 405.

(2) 21 U.C.Q.B. 309.

(3) 19 U.C.Q.B. 210.

(4) 15 U.C.Q.B. 396.

(5) 33 U.C.Q.B. 516.

(6) 9 N.H. 126.

(7) 5 East 51.

(8) 2 K. & J. 753.

(9) Cowp. 9.

(10) 16 Sim. 178.

(11) 98 Mass. 545.

(12) 7 M. & W. 638.

1894  
 IMRIE  
 v.  
 ARCHIBALD.

A grantee can not sue his grantor on covenants for title and further assurance when at the time of deed the grantee has the title to the lands of which the grantor has not title but for which he has covenanted.

THE CHIEF JUSTICE.—This is an action for the foreclosure of a mortgage dated the 24th of May, 1859, by which certain lands at Sydney, Cape Breton, were mortgaged by Thomas Dickson Archibald and Blowers Archibald to William Gammell and John Christie, to secure the payment of six thousand pounds and interest.

The plaintiffs, James C. Mackintosh and Edward P. T. Goldsmith, are the executors of John S. McLean, deceased, in whom the mortgage became vested under a transfer from the mortgagees and several subsequent mesne assignments, and the principal defendant is Peter Imrie in whom the equity of redemption is now vested and who claims title under the mortgagors and through several intermediate conveyances of the equity of redemption. In the events which have happened and which will be hereafter stated, John S. McLean became *pendente lite* a trustee of the mortgage for the original mortgagors, and the action was subsequently prosecuted for the benefit of Blowers Archibald and the executors of Thomas D. Archibald, who are now the parties having the beneficial interest in the mortgage.

In order that the case may be clearly understood it is necessary to state the circumstances which led to the creation of this mortgage and also to refer to some of the dealings with the equity of redemption, which will explain the apparently anomalous circumstance that we find the parties who were the original mortgagors now seeking the foreclosure of the mortgage which they themselves created.

For some time before the 31st December, 1853, Thomas Dickson Archibald, Blowers Archibald and Charles

Dickson Archibald had carried on business in co-partnership, at Sydney, as ship agents, ship builders and merchants, under the firm name of Archibald & Co. On the last mentioned date this copartnership was dissolved, and a deed of dissolution was executed by which it was agreed that Charles Dickson Archibald should retire from the business, leaving it to be carried on by the two other partners, the latter agreeing to pay the debts of the firm, including a debt due to James Forman, to secure which Charles Dickson Archibald had, in 1849, mortgaged certain lands and buildings at Sydney on which the partnership business had been carried on and which were his own separate property, and which are the same lands and properties which are comprised in the mortgage in question in this action. Charles Dickson Archibald thenceforth resided in England and the other two partners continued to carry on the business in Cape Breton. Some time before the 16th of May, 1859, proceedings were taken by Forman, the mortgagee under the mortgage of 1849, for the foreclosure of that security and the sale of the lands comprised in it, and in that foreclosure suit a decree had been made under which, according to the established practice of the Supreme Court of Nova Scotia, the mortgaged property was sold by the sheriff and purchased for the amount of the mortgage debt, interest and costs, by Thomas Dickson Archibald and Blowers Archibald, to whom the sheriff on the 16th of May, 1859, executed a deed of sale. In order to raise the money to effect this purchase Thomas Dickson Archibald and Blowers Archibald had recourse to a loan from William Gammell and John Christie, and in order to secure this loan Thomas Dickson Archibald and Blowers Archibald on the 24th of May, 1859, executed two several bonds, each for the payment of three thousand pounds, to Gammel and

1895  
 IMRIE  
 v.  
 ARCHIBALD.  
 —  
 The Chief  
 Justice.  
 —



1895  
 IMRIE  
 v.  
 ARCHIBALD.  
 —  
 The Chief  
 Justice,  
 —

Christie respectively, and for further security executed on the same day the mortgage which is the subject of the present action. Charles Dickson Archibald, having discovered the fact of the making of this mortgage soon after it was effected, insisted that his former copartners had improperly dealt with his property by re-mortgaging it in the way mentioned, as they undoubtedly had, inasmuch as by the agreement of dissolution they were bound to exonerate it from Forman's mortgage the burden of which they had assumed. Thereupon on the 20th July, 1859, Thomas Dickson Archibald and Blowers Archibald conveyed their equity of redemption to Charles Dickson Archibald, and they also executed a bond, bearing the same date, by which they bound themselves to Charles Dickson Archibald to indemnify him against the mortgage to Gammell and Christie. This bond recited the mortgage, the conveyance of the equity of redemption before stated, and that the obligors had agreed to indemnify Charles Dickson Archibald against the incumbrance on his lands, and the condition was as follows :

Now the condition of this obligation is such, that if the said Thomas Dickson Archibald and Blowers Archibald, their heirs, executors administrators and assigns, do and shall well and truly indemnify and save harmless the said Charles Dickson Archibald, his heirs and assigns, from all claims of the said William Gammell and John Christie for or on account of said mortgage, and shall discharge the debt due on said premises that the same may be finally free from all liability on account of said mortgage, then the foregoing obligation to be void, otherwise to remain in full force and virtue.

On the 26th July, 1859, by an indenture of that date made between Charles Dickson Archibald and his son Charles William Archibald, the former, for the valuable consideration therein stated, conveyed to the latter in fee simple the lands and hereditaments comprised in the mortgage to Gammell and Christie. Subsequently, and on the 3rd of June, 1862, by indenture of that

date made between Charles William Archibald and Annie Parker, the former conveyed to the latter for the valuable consideration therein expressed the same lands and hereditaments, in fee simple.

1895  
IMRIE  
v.  
ARCHIBALD.  
The Chief  
Justice.

Subsequently, Charles Dickson Archibald was declared a bankrupt in England, and Thomas Ritchie Grassie was appointed the creditors' assignee of his estate. A dispute thereupon arose between Mrs. Parker (who had previously intermarried with John Hearne Breffit), and the assignee as to which of them was entitled to the indemnity bond of the 20th of July, 1859, and the money secured thereby. Mrs. Breffit claimed that this bond formed part of her separate estate, and the assignee insisted that it formed part of the bankrupt's assets. Thereupon this dispute was compromised (subject to the approval of the Court of Bankruptcy), and a memorandum of agreement to that effect bearing date the 23rd of May, 1882, was executed. By this instrument, which recited the dispute, it was agreed that Mrs. Breffit should call in and compel payment of the full amount secured by the indemnity bond, and that of the amount she should so recover she should pay over to Mr. Grassie, as the assignee in bankruptcy of Thomas Dickson Archibald, one clear half, which Grassie should accept in full satisfaction and discharge of his claim in respect of the said bond. And it was provided that the agreement should be void and of no effect unless sanctioned by Her Majesty's London Court of Bankruptcy. This agreement which, as I have said, recited that Mrs. Breffit claimed title to the bond as part of her own separate estate, was duly sanctioned and confirmed by the Court of Bankruptcy, by an order bearing date the 15th of October, 1884.

In an indenture bearing date the 5th of November, 1884, and made between Annie Breffit and John Hearne

1895  
IMRIE  
v.  
ARCHIBALD.

The Chief  
Justice.

Breffit, her husband, of the first part, Thomas Ritchie Grassie, the assignee in bankruptcy of Charles Dickson Archibald, of the second part, and Thomas Dickson Archibald and Blowers Archibald of the third part, and duly executed by the parties of the first and second parts, after reciting the bond of the 20th of July, 1859, the dispute between Mrs. Breffit and Grassie as to which was entitled to the benefit thereof, the agreement of the 23rd of May, 1882, before stated, and the order in bankruptcy of the 15th October, 1884, approving the compromise, there were recitals in the words following :

And whereas the said Thomas Dickson Archibald and Blowers Archibald are unable to pay the said principal moneys and interest secured by the said bond, and also dispute their liability to pay the same, and whereas the said parties hereto of the first and second parts, being satisfied of their inability to pay the said moneys in full, and in settlement of the said dispute as to liabilities, agreed with the said Thomas Dickson Archibald and Blowers Archibald, subject to the sanction of the said court, to accept in settlement and discharge of the moneys payable by virtue of the said bond the sum of \$8,000 in four promissory notes of \$2,000 each, with interest, to be signed by the four members of the firm of Messrs. Archibald & Company, of Cape Breton, and also signed or indorsed by Mr. McLean, president of the Bank of Nova Scotia.

There was then a further recital that the notes had been drawn and indorsed as agreed, and had, at the request of Mrs. Breffit and Mr. Grassie, been made payable to the joint order of Mr. Charles Harris Hodgson and Mr. Arthur Torriano Rickards, the former being the solicitor of Mrs. Breffit and the latter the solicitor of Mr. Grassie, and that the notes so made and indorsed had been handed to the said Mr. Hodgson and Mr. Rickards, and that upon the notes being so handed over as aforesaid Mrs. Breffit and her husband, and Mr. Grassie, had agreed to execute the release thereafter contained, and it was witnessed that in pursuance of the agreement and in consideration of the premises, the

said Annie Breffit and John Hearne Breffit and Thomas Ritchie Grassie thereby released the said Thomas Dickson Archibald and Blowers Archibald, their and each of their estates and effects, from the bond of the 20th July, 1859, and from the sum of six thousand pounds and interest intended to be thereby secured and every part thereof, provided that the release should not extend to the \$8,000 secured by the four promissory notes given in pursuance of the agreement.

1895  
IMRIE  
v.  
ARCHIBALD,  
—  
The Chief  
Justice.  
—

By a memorandum indorsed on the bond, also dated the 5th November, 1884, and signed by Annie Breffit and Thomas Ritchie Grassie, it was declared that the moneys secured thereby having become vested in the last named persons, all claims in respect of the bond had been duly satisfied by the four promissory notes given in pursuance of the contemporaneous agreement, that Mrs. Breffit and her husband, and Grassie, had released the obligors, and that the bond was given up to the obligors to be cancelled. Subsequently Mrs. Breffit sold and conveyed the lands to the defendant, Peter Imrie, in whom, subject to the mortgage, the same are now vested. I have not thought it necessary to trace the chain of title by which, through several assignments and wills, the mortgage of 1859 became vested in certain persons claiming under the mortgagees Gammell and Christie. Nothing is in dispute respecting these transfers. It is sufficient to say that the property was about to be sold to satisfy the mortgage, when, at the request of Thomas Dickson Archibald and Blowers Archibald, the late Mr. John S. McLean advanced the money due upon the mortgage, which was thereupon, by deed dated 30th July, 1888, assigned to him by George Imrie, John Love Imrie and Mary Gammell, the parties entitled thereto.

Thereupon Mr. McLean continued this action, which had been previously begun, for his own benefit, and

1895  
 IMRIE  
 of  
 ARCHIBALD.  
 The Chief  
 Justice.

he having since died is now represented in it by his executors.

Subsequently Messrs. Archibald (Thomas Dickson Archibald and Blowers Archibald) paid off to Mr. McLean, or to his executors, his advance, and the action is now being carried on for the benefit of Blowers Archibald and the executors of Thomas Dickson Archibald, who are the real and beneficial parties in interest entitled to the money secured by the mortgage of 1859.

In addition to the documentary evidence very little oral proof was given. Of this the only portion now material relates to certain questions as to the parcels comprised in the several mortgages of 1849 and 1859. It is not according to the English practice to raise questions of parcel or no parcel in a foreclosure suit, but under the practice prevailing in Nova Scotia according to which mortgaged lands are sold in a foreclosure suit by the sheriff, without particulars or conditions of sale, it may be convenient, in order that there may be some ascertainment of the subject of the sale, and it is with a view to this that the evidence in question was given. The cause was originally heard before Mr. Justice Ritchie who made the decree asked for by the plaintiffs—the present respondents—and this decree was affirmed on appeal by the full court, composed of Mr. Justice Weatherbe, Mr. Justice Ritchie and Mr. Justice Townshend, Mr. Justice Weatherbe not agreeing in all respects with the other members of the court.

No question was made in either of the courts below as to the right of the original mortgagors, Thomas Dickson Archibald (now represented by his executors) and Blowers Archibald, to a foreclosure judgment, nor has any such question been raised before this court either in the factums or on argument. It seems to be quite plain that in the events which have happened,

and having regard to the transactions which have taken place, the Messrs. Archibald, although originally they were the parties who created the mortgage and therefore primarily the debtors bound to pay it, have become as well entitled to stand in the place of the mortgagees and to take the benefit of the assignment made to their trustee Mr. McLean as if they had previously to that assignment been entire strangers to the transaction. Originally no doubt Messrs. Archibald were the parties primarily liable to pay off this mortgage, not merely as between them and the mortgagees, but also as between them and Charles Dickson Archibald. They had purchased the lands of the latter under a sheriff's sale to realize the debt secured by the mortgage to Forman in 1849 which, by the articles of dissolution, they were bound to pay in exoneration of those lands. Therefore, having mortgaged those lands which were vested in them as mere trustees for Charles Dickson Archibald, they were, on general principles of equity, under an obligation to indemnify him against the debt with which they had improperly burdened his property. Being so bound they recognized their liability and put it into a formal shape by executing the indemnity bond. Then it cannot be doubted that if they had subsequently paid the amount secured by their mortgage to Gammell and Christie into the hands of Charles Dickson Archibald whilst he was the owner of the equity of redemption, they would have satisfied this obligation and the previous order of liability would have become inverted, and they, although still liable to the mortgagees, would as between themselves and Charles Dickson Archibald and those claiming under him have been no longer liable to indemnify them against the debt.

Then, upon the bankruptcy of Charles Dickson Archibald, the right to the indemnity must have vested

1895  
 IMRIE  
 v.  
 ARCHIBALD.  
 —  
 The Chief  
 Justice.  
 —

1895  
IMRIE  
v.  
ARCHIBALD.  
The Chief  
Justice.

either in his assignee as a personal debt or in the person in whom the equity of redemption in the mortgaged lands had become vested. I have no doubt but that Mrs. Breffit, who was the owner of the estate which she had acquired as a purchaser for valuable consideration, was entitled to the indemnity which in equity ran with the lands. This seems to have been a matter of some doubt since it was made the subject of a compromise which was confirmed by the Bankruptcy Court. But it makes no difference, for supposing that the Messrs. Archibald (T. D. and Blowers) had paid off the full amount of the debt of six thousand pounds to Mr. Grassie and Mrs. Breffit under an arrangement between them to divide the amount, they releasing the Messrs. Archibald, they would then be no longer liable to pay or contribute to the payment of the mortgage debt as between themselves and those claiming under Charles Dickson Archibald, and if compelled to pay by the enforcement of their personal liability by the mortgagees, they could have insisted upon being subrogated to the rights of the mortgagees and have enforced the charge upon the lands. If this were not so they would have been compelled to pay twice over without any recourse to recoup them, for that would have been the result if, first having paid the indemnity to the persons entitled to it, they had then been compelled by the mortgagees to satisfy their personal obligation under the covenants in the mortgage deed, and were not entitled to take an assignment of the mortgage as a security for the second payment. The Messrs. Archibald were therefore exactly in the position of a vendor of an estate in mortgage, who is bound, if there is no provision to the contrary, to indemnify the purchaser against the outstanding incumbrance; if he does this by paying the money to the purchaser himself he satisfies his obligation, and if he is subsequently com-

pelled by the mortgagee to pay in fulfilment of his personal liability, there is nothing to preclude him from taking a transfer of the mortgage and from enforcing it against the purchaser from himself. All this is too plain to need demonstration.

1895  
IMRIE  
v.  
ARCHIBALD,  
—  
The Chief  
Justice.  
—

Then, as Mr. Justice Townshend points out, the effect of the transaction between the assignee in bankruptcy and Mrs. Breffit and the Archibalds, has just the same effect as if they had paid the full amount of the six thousand pounds into the hands of Charles Dickson Archibald while he still retained the property.

The points really in controversy before Mr. Justice Ritchie at the trial, and before the court in *banc*, related first to the sufficiency of the description of parcels in the Forman mortgage to comprise a piece of land known as the "Ballast Heap," and secondly, as to the effect of the mortgage of 1859 to charge certain water-lots, the title to which was not acquired by the mortgagors or by one of them until some time after the date of the mortgage.

As to the first point, that respecting the "Ballast Heap," we must go back to the mortgage to Forman in 1849, for if this parcel of land was not included in that mortgage the mortgagors, in the mortgage of 1859, would have had no title to it, their title to any of the lands depending on the sheriff's deed, the description in which followed that in Forman's mortgage.

So much of that description as has reference to the question now under consideration is as follows :

Also all the estate, right, title, interest and reversion of the said Charles Dickson Archibald, of and in and to those two certain lots of land situate and being at the Bar of North Sydney, aforesaid, and which heretofore belonged to John Ferris and John Cameron, the said lots fronting on the waters of Sydney Harbour or Spanish River, and being bounded on the east by the property of Samuel Plant, and on the west by the property of the General Mining Association, and containing each one hundred acres, more or less, the said lots being now in the occupation of Messrs. Archibald & Company.



1895  
 IMRIE  
 v.  
 ARCHIBALD.  
 The Chief  
 Justice.  
 —

At the date of the mortgage to Forman there was vested in the mortgagor, Charles Dickson Archibald, the title to certain lots or parcels of land which were then in the occupation of the firm of Archibald and Company, and which had been acquired as follows:— First, lot number five, containing 120 acres, more or less, had been on the 20th January, 1792, granted by the Crown to John Henry, and had through certain conveyances made by one John Cameron become (except as regards five small parcels) vested in fee simple in Charles Dickson Archibald. Lot number six, also containing 120 acres, more or less, was originally granted by the Crown on the 1st of June, 1794, to one Francis Jones whose devisee had conveyed it to John Ferris, by whose representatives it was conveyed to Charles Dickson Archibald in 1838.

The Ballast Heap lot contained three-fourths of an acre. It was a water lot filled in by discharged ballast and was originally granted by the Crown on the 8th of April, 1826, to the same John Ferris who had acquired the title to lot no. 6. It was immediately in front of lot no. 6, and was described in the Crown grant as "part of the stone ballast heap in front of lot no. 6." It formed in fact a projection or continuation of lot no. 6, into the waters of the harbour. This ballast heap was included, by the same description as that contained in the Crown grant, in the same conveyance of the 1st of May, 1838, by which the representatives of John Ferris conveyed to Charles Dickson Archibald lot no. 6. The respondents in their factum state the following proposition :

The deed will be construed by the state of the property at the time the deed was made and the court will endeavour to put itself in the position of the parties to find out their intention, and will if necessary hear extrinsic evidence to explain the description.

To this proposition I assent and the parol evidence as to the state of the property at the date of the mort-

gage deed was, it appears to me, admissible. It appears from this evidence that long before 1849 the ballast heap and lot no. 6 were one solid piece of land; that the former lot had become an accretion to the latter; that on the ballast heap lot there was a wharf or dock; that the buildings in which the business of the firm of which Charles Dickson Archibald was a member was carried on, were situated partly on lot no. 6 but principally on the ballast heap; that in short the ballast heap and lot no. 6 were used indiscriminately for that purpose. Then, lot no. 6 did not "front on" the waters of the harbour inasmuch as the ballast heap intervened between the water and lot no. 6 to a certain extent of water frontage, and that the description in the deed "fronting on the waters of Sydney Harbour or Spanish River" would therefore not be applicable if it was intended to convey only lot no. 6 excluding the ballast heap lot, but would be entirely applicable if the description in the mortgage deed is construed as including the ballast heap lot as an accretion to or an extension of lot no. 6. Blowers Archibald, examined as a witness, says that what was called the Ferris property in 1838 was "no. 6 and the lot below the road (*i.e.* the ballast heap lot) with buildings 1, 2 and 3 on it," and again the same witness says:

I don't recollect any particular instance where any person called that lot the Ferris property, but it was generally called the Ferris property; it was called in 1838 the Ferris property.

Edward Phalen, another witness, says:

I always knew this property occupied by the Archibalds to go by the name of the Ferris property.

Taking this evidence as to the denomination which the property had by usage acquired in connection with the description, "fronting on the waters of Sydney harbour or Spanish river," I have no difficulty in agreeing with both the courts below in holding that

1895  
IMRIE  
v.  
ARCHIBALD.  
The Chief  
Justice.

1895  
 ~~~~~  
 IMRIE  
 v.  
 ARCHIBALD.  
 ———  
 The Chief  
 Justice.  
 ———

the ballast heap lot was included in the mortgage to Forman as part of the land referred to as formerly belonging to John Ferris. That the mortgage to Gammell and Christie also included the ballast heap is demonstrated by the same description, and is strengthened by the additional description of the land mortgaged "as being all the property formerly and now in the occupation of Messrs. Archibald & Company," which would be falsified by the non-inclusion of this ballast heap lot, and also by the general words, "also all and singular the water lots and docks in front of said lots." The conveyance by Thomas Dickson Archibald and Blowers Archibald to Charles Dickson Archibald was, for the reasons before given, also sufficient. The same observation applies *a fortiori* to the conveyance from Charles Dickson Archibald to Charles William Archibald, for that deed not only describes the land as formerly belonging to John Ferris and fronting on the waters of the harbour, but it also refers expressly to water lots in front of lot no. 6, and to the description in a lease made by Charles Dickson Archibald to the firm of Archibald & Company, which beyond all question included the ballast heap, since it describes the subject of the lease as "docks, wharves, stores and other erections on the southern side" of the main road, a description which could only apply to property which included the ballast heap. And, for the reasons just given, the descriptions of the parcels in the conveyance by Charles William Archibald to Mrs. Breffit, and by Mrs. Breffit to Peter Imrie, were also inclusive of the piece of land in question. Upon this head, which, as the question of parcel or no parcel always does, involves a question of fact only, I therefore agree with the judgment appealed against.

Another point which is urged by the appellant is this. It is said that inasmuch as the mortgage of 1859 to

Gammell and Christie, which is now sought to be foreclosed, having contained the general description "also all and singular the water lots and docks in front of said lots," and inasmuch as Thomas Dickson Archibald afterwards, in 1860, acquired title to other water lots in front of the lots described, that this after acquired property belonging to the mortgagor became subject to the mortgage, and is consequently liable to contribute to the mortgage debt in proportion to its value relatively to the other lands in exoneration *pro tanto* of the owner of the equity of redemption. There is more than one conclusive answer to this contention. First, the description is not a specific description but a general description which would be satisfied by applying it to the ballast heap lot. Then, the doctrine of estoppel cannot apply for the mortgage was a deed operating under the statute of uses, an innocent conveyance, unlike a fine or feoffment, which by itself will not work an estoppel (1). Then, it contains no recital by which, apart from the operation of the deed itself, an estoppel might have been created. That the covenants will not work an estoppel is now established by the decision of Jessel M.R. in the case of *The General Discount Co. v. The Liberator Building Society* (2). Apart from the common law doctrine of estoppel however, if there had been an unambiguous specific description of property as a subject of the mortgage to which the mortgagor had no title at the date of the mortgage but had afterwards acquired a title, a court of equity would no doubt under ordinary circumstances have interfered (except as against a *bonâ fide* purchaser for value without notice of the equity of redemption) in favour of the mortgagees to charge such after acquired lands with the mortgage debt, but the answer to any argument

1895  
 IMRIE  
 v.  
 ARCHIBALD.  
 —  
 The Chief  
 Justice.  
 —

(1) *Bensley v. Burdon* 2 Sim. & Stu. 519. (2) 10 Ch. D. 15.  
 25½

1895  
 IMRIE  
 v.  
 ARCHIBALD.  
 —  
 The Chief  
 Justice.  
 —

founded on that doctrine is conclusive from what I have already mentioned that no intention is indicated to include such after acquired property by the general words used, and also from other reasons which I shall proceed to state.

If there had been a specific description of the after acquired water lots so that the intention to include them had been free from all doubt, the mortgagees being therefore entitled to the benefit of the equity which I have referred to, the proposition of the appellant that they ought to bear a ratable proportion of the mortgage debt would even then have been unsustainable, for the equity in question could not have been available to the purchaser of the equity of redemption in the face of the transaction between the mortgagors, the Archibalds, on the one hand, and Mrs. Breffit and the assignee in bankruptcy of Charles Dickson Archibald, on the other hand. By that transaction the liability of Blowers Archibald and Thomas Dickson Archibald, the mortgagors, to indemnify Charles Dickson Archibald, was satisfied and discharged as fully and completely as if the former had actually paid the whole amount of six thousand pounds secured by the bond (1).

This being so, even if the other conditions of the right to the equitable liability to contribution had been present, it is manifest that it could not have been applied without the inequitable and unjust result of compelling payment twice over (*i. e. pro tanto*) according to the relative value of the subsequently acquired lots. In this respect also I therefore entirely agree with the judgment of Mr. Justice Townshend.

Lastly, a further question has been raised which is not set up in the pleadings and which does not seem to have been brought under the notice of the learned

(1) Cowper & Green 7 M. & W. 638.

judges who dealt with the case in the courts below, and which is not in any way adverted to in the appellant's factum. It is said that Mrs. Breffit, being a married woman, was not bound by the compromise transaction which resulted in the discharge of the indemnity bond. I am of opinion that there is nothing in this objection. It sufficiently appears that the indemnity bond, so far as Mrs. Breffit was entitled to the benefit of it, was her separate property. This appears from a recital in the memorandum of agreement of the 23rd of May, 1882, entered into by Mrs. Breffit and her husband, and Mr Grassie, the assignee. That recital is as follows :

And whereas the said Annie Breffit claims to be beneficially entitled as part of her separate estate to the said sum of six thousand pounds and interest, secured by the said bond, and which claim to the extent of the same being separate estate of his wife the said John Hearne Breffit expressly admits and acknowledges, testified by his being a party hereto.

There is only printed in the appeal book before us the part of this memorandum of agreement executed by Mr. Grassie, but if there were nothing more than this, from it and the subsequent confirmation in the Bankruptcy Court and the settlement I should, in the absence of any defence based on this alleged incompetency being raised by the pleadings, have thought it one not to be now given effect to. There is, however, much more, for the deed of release of the 5th of November, 1884, by which the indemnity bond was discharged and the compromise was carried out, Mrs. Breffit and her husband both being parties to the deed, fully recites the agreement of the 23rd of May, 1882, and its confirmation by the Court of Bankruptcy. This, therefore, read together with the recited agreement is an express recognition of Mrs. Breffit's title by herself and her husband to the money secured by the bond as money settled to her separate use. Under these circum-

1895  
IMRIE  
v.  
ARCHIBALD.  
The Chief  
Justice.

1895  
 IMRIE  
 v.  
 ARCHIBALD.  
 —  
 The Chief  
 Justice.  
 —

stances it appears to be beyond question that this court ought not now to give effect on behalf of Mrs. Breffit to an objection which she has not suggested herself, and which in any case would be unsustainable, more especially as it appears from the deed of release and from other documents in evidence that in the matter of the agreement with Mr. Grassie, as well as in the compromise of the bond debt, Mrs. Grassie was advised by Mr. Hodgson, a solicitor, who acted for her alone and who must be presumed to have watched over her interests.

The appeal is dismissed with costs.

FOURNIER, TASCHEREAU and KING JJ. concurred.

GWYNNE J.— This action is brought by and in the interest of and for the benefit of the defendant Blowers Archibald one of the mortgagors in the mortgage in the pleadings mentioned, in his own right and as co-executor with William H. Archibald (another defendant) of the last will and testament of Thomas D. Archibald the other mortgagor in the mortgage which is now sought to be foreclosed in the names of the mortgagees and their representatives and an assignee of the mortgage who holds the same in trust for the mortgagors as plaintiffs, but in the interest of the mortgagors against the appellant who claims title in the manner hereinafter mentioned. This claim of the mortgagors is based upon an equity upon which they rely as entitling them to be reimbursed out of the mortgaged lands whereof the appellant is now seized by title derived by mesne conveyances from Charles Dickson Archibald to whom, as the mortgagors allege, the land was sold by them subject to the mortgage, and the mortgagors having in discharge of their covenant contained in the mortgage paid to the mortgagees the

mortgage debt, they contend that they have now an equity which entitles them to use the names of the mortgagees and of their assignees as aforesaid, in the interest of them the mortgagors to reimburse themselves out of the mortgaged lands the amount so paid by them to the mortgagees with interest thereon.

1895  
IMRIE  
v.  
ARCHIBALD.  
Gwynne J.

This equity so invoked by the mortgagors is founded upon the principle that when lands in mortgage are sold by the mortgagor subject to the mortgage the mortgage debt is treated as the amount of, or part of, the purchase money agreed to be paid by the vendee, and that therefore if the vendee does not pay the mortgage debt but leaves the mortgagor to do so under his personal obligation, an equity arises in favour of the mortgagor, upon his paying the mortgage debt, to keep the mortgage alive for his own benefit, and in the name of the mortgagee or an assignee of the mortgagee to enforce the mortgage against the mortgaged lands in order to reimburse himself to the amount of the mortgage debt so paid by him. One of the questions involved in this, in some respects very singular and complicated case is, whether the circumstances of the present case are such as to entitle the mortgagors to have the benefit of that equitable principle to any, and if any to what, amount.

The mortgage now sought to be foreclosed in the interest of the mortgagors, was executed upon the lands therein mentioned to the mortgagees therein mentioned, upon the 24th May, 1859. The only title which the mortgagors Blowers Archibald and Thomas D. Archibald at the time of the execution of the said mortgage had to the lands therein mentioned, was acquired by them in virtue of a sheriff's deed executed upon the 16th of the said month of May, 1859, under a decree of foreclosure and sale, made in a suit for the foreclosure of a certain mortgage bearing date the 27th day



1895 of September, 1849, and made by one Charles Dickson  
 IMRIE Archibald, since deceased, as mortgagor, to and in  
 v. favour of one James Forman, as mortgagee, and for the  
 ARCHIBALD. sale of the premises thereby mortgaged.

Gwynne J. Charles Dickson Archibald, the mortgagor in that mortgage, was at the time of the execution of the mortgage a partner in a trading firm consisting of himself and the said Blowers Archibald and Thomas D. Archibald, and the mortgage was executed upon property belonging to the said Charles Dickson Archibald alone in security for a sum of money which was the debt of the firm. In the month of December, 1853, the firm was dissolved by the retirement of the said Charles Dickson Archibald therefrom. By a deed of dissolution then executed the continuing partners Blowers Archibald and Thomas D. Archibald covenanted with the said Charles Dickson Archibald that they would as quickly as possible wind up the affairs of the old firm by collecting the assets and discharging the liabilities thereof, and that so soon as they should have discharged the debts due to the several creditors of the firm who should sign a deed of arrangement agreed upon as containing the terms of the dissolution, and so soon as they should be able to pay all the debts of the firm, including the said mortgage debt to Forman, which the said Charles Dickson Archibald was by the said mortgage primarily liable to pay, they would repay him such amount and also any other amount which he should be legally liable to pay, and should pay as a partner in the said firm. The decree of foreclosure in the suit upon the Forman mortgage appears to have been obtained and the sale thereunder to have taken place during the absence of Charles Dickson Archibald in England. There is a letter among the exhibits dated the 26th of May, 1859, from Thomas D. Archibald at Sydney, Cape Breton, addressed to Charles

Dickson Archibald, by which it appears that the latter had, upon the 14th of the same month of May, written from New York to the former remonstrating against the foreclosure proceedings and complaining that until his arrival at New York from England he had never heard of such proceedings having been taken, for in that letter of the 26th May, Thomas D. Archibald makes use of the following language :

1895  
IMRIE  
v.  
ARCHIBALD.  
Gwynne J.

It appears to me very strange indeed that up to the time of your writing from New York you did not know that Forman had foreclosed his mortgage and sold your property on the 4th May. It was advertised on the 29th of March and Adams Archibald was in communication with Edward at New York respecting the sale. Some time previous to my leaving Halifax in the spring I took it for granted that you were advised of the time the sale was to take place, and had made up your mind to let it go. Finding the property was to be sold over our heads I made arrangements to purchase it, and bought it in at the sheriff's sale for £4,500. I got the money from Gammell and Christie and gave them a mortgage from the sheriff's deed. Had I not been prepared to purchase it would have fallen into the hands of a young Englishman by the name of Butler, who came out to reside here and brought with him some £6,000 to invest. I was glad to get possession of it for I expected opposition from various quarters. It is better it should fall into our hands than into the hands of strangers, and I presume you will be pleased to find it is so.

In addition to the fact already shown, that by the deed of dissolution Thomas D. Archibald and Blowers Archibald, who had undertaken the winding up of the affairs of the dissolved firm, were out of the assets of the firm eventually to pay off the amount secured by the mortgage as a debt of the firm, Blowers Archibald, in his evidence given in the present case, states some facts which throw light upon the passage above extracted from the letter of the 26th May, 1859, which tend to show that in purchasing at the foreclosure sale Thomas D. and Blowers Archibald were in fact "buying in" the property to protect Charles Dickson Archibald's rights and interests there-

1895  
IMRIE  
v.  
ARCHIBALD  
Gwynne J.

in, and in recognition of their own liability to pay the debts secured by the mortgage out of assets of the firm, and for protection also of their own interests as occupying a part, if not the whole, of the property called the Ferris property, under Charles Dickson Archibald, in carrying on the business which they carried on since the retirement of Charles Dickson Archibald and the dissolution thereby of the old firm, and that they had no idea of acquiring the property as their own absolute property. By the evidence of Blowers Archibald it appears that the firm, which consisted of himself and Thomas D. and Charles Dickson Archibald, was formed in 1838 upon the dissolution of a firm theretofore existing under the name of S. G. Archibald & Co.; that S. G. Archibald & Co. up to and at the time of the dissolution of that firm occupied property called the Ferris property under a lease from S. G. Archibald, the then owner thereof in fee, which lease expired in 1838. That the new firm of Archibald & Co., formed in 1838, continued to occupy the same property under Charles Dickson Archibald, the then owner thereof in fee, until the dissolution of the firm in 1853, and that thereafter Thomas D. Archibald and Blowers Archibald, who still carried on the same business, continued to occupy the same property under Charles Dickson Archibald until and at the time of the sheriff's sale under the decree in the suit upon the Forman mortgage, which covered a part at least if not the whole of the property called the Ferris property. It is obvious, therefore, that in 1859, when the property in that mortgage was offered for sale under the decree of foreclosure, Thomas D. Archibald and Blowers Archibald had a sufficient motive to have induced them to have "bought in" the property, as Thomas D. Archibald expresses himself in the letter of the 26th May, 1859, in the interest of Charles Dickson

Archibald, as well as in their own interest and not for themselves adverse to Charles Dickson Archibald, and this seems to explain the expression in the letter to the effect that he Thomas D. Archibald presumed that Charles Dickson Archibald would have been pleased to find that they had "bought in" the property. Accordingly we find that upon the arrival of Charles Dickson Archibald at Sydney from England, where he appears to have taken up his permanent abode, he and Thomas D. Archibald and Blowers Archibald seem to have come to an understanding with each other whereby the said Thomas D. and Blowers Archibald in recognition of Charles Dickson Archibald's right and claim to have the property so purchased reconveyed to him, agreed to convey to him to have and to hold to the use of himself, his heirs and assigns, in fee simple the estate which they then had in the lands mortgaged, that is to say, subject to the mortgage, but that they would keep him, his heirs and assigns and the lands absolutely indemnified, and saved harmless from all claim by the mortgagees upon the land for the mortgage debt. This arrangement so agreed upon was carried into effect by the execution by the said Thomas D. Archibald and Blowers Archibald of an indenture bearing date the 20th July, 1859, and a bond of the same date also executed by them. By the indenture they conveyed, among other lands, unto the said Charles D. Archibald, his heirs and assigns, the lands which were described as follows, that is to say :

Those two certain lots of land situate and being at the Bar of North Sydney aforesaid, which formerly belonged to John Ferris and John Cameron, the said lots fronting on the waters of Sydney Harbour or Spanish River, and being bounded on the east by the property of Samuel Plant, and on the west by the property of the General Mining Association and containing each 100 acres, more or less, the said lots being now or formerly in the occupation of Archibald and Company.

1895  
 IMRIE  
 v.  
 ARCHIBALD.  
 Gwynne J.

1895  
 IMRIE  
 v.  
 ARCHIBALD.  
 Gwynne J.

Also all that lot or parcel of land at North Sydney aforesaid, on which the brick store or warehouse is situated, and which formerly belonged to Clark and Archibald, the above mentioned lots described as formerly belonging to John Ferris and John Cameron, and containing 100 acres each, more or less, being subject to a mortgage dated the 24th day of the month of May now last past, and made between the said parties of the first part, and William Gammell and John Christie, Esquires, of little Bras d'Or, in the county of Cape Breton, for a consideration therein contained, together with all and singular the houses, outhouses, buildings and improvements therein and thereto belonging. To have and to hold (subject nevertheless to the mortgage incumbrance to the said William Gammell and John Christie) of the two certain lots hereinbefore mentioned unto the said Charles Dickson Archibald, his heirs and assigns forever.

The bond of even date with the above indenture was executed in a penalty of £12,000, Nova Scotia currency, and the recitals and conditions thereof are as follows:

Whereas the real estate belonging to the said Charles Dickson Archibald situate at the Bar (so called) North Sydney, in the county of Cape Breton, recently in the name of the said Thomas Dickson Archibald and Blowers Archibald consisting of two lots of land formerly belonging to John Ferris and John Cameron containing each one hundred acres more or less hath been conveyed by way of mortgage to William Gammell and John Christie for the consideration of the sum of six thousand pounds by the said Thomas Dickson Archibald and Blowers Archibald by indenture bearing date the 24th day of May in the present year as by reference to said indenture will appear.

And whereas the said Thomas Dickson Archibald and Blowers Archibald have this day conveyed the said premises to the said Charles Dickson Archibald and have agreed to pay off and discharge the said sum of six thousand pounds and all interest due thereon, and to save harmless the said Charles Dickson Archibald, his heirs and assigns, from all claims or demands of the said William Gammell and John Christie, and to relieve the said real estate from all liability under the said mortgage, they having received the benefit of the amount for which said mortgage was given.

Now the condition of this obligation is such that if the said Thomas Dickson Archibald and Blowers Archibald their heirs, executors, administrators and assigns do and shall well and truly indemnify and save harmless the said Charles Dickson Archibald his heirs and assigns from all claims of the said William Gammell and John Christie for and on

account of the said mortgage and shall discharge the debt due on said premises that the same may be finally free from all liability on account of said mortgage then the foregoing obligation to be void, otherwise to remain in full force and virtue.

1895

IMRIE

v.

ARCHIBALD.

The recitals in their instrument contain a statement of pre-existing facts which are here acknowledged as such for the purpose of explaining why the obligors should enter into the obligation contained in the bond to protect and save harmless the grantee of the real estate, which had been conveyed by the indenture of even date, and his heirs and assigns, subject to a mortgage, and the real estate itself so conveyed from all liability under that mortgage. The facts so admitted to exist substantially are to the effect that the real estate mortgaged by the obligors, although appearing on registry in their names as the legal owners thereof so as to make the mortgage legal and binding in the hands of the mortgagees, was in truth and justice and in equity the property of the obligee, to whom the mortgagors had in recognition of such his right conveyed by the indenture of even date the estate remaining; and that as the mortgagors had taken advantage of their apparent legal title to mortgage, as their own, lands which in truth and equity were the property of the obligee in security for moneys lent to and received and enjoyed by the mortgagors to their own use, justice and equity required that they should indemnify the transferee of the land, who was the true owner thereof, and his heirs and assigns, and the land itself so transferred from all liability under the mortgage. These facts being admitted or proved would have entitled Charles Dickson Archibald, wholly apart from the bond and if none had ever been executed, to have obtained relief in equity and indemnity from the mortgagors against the mortgage so executed, and this even after the execution of the indenture, which

Gwynne J.

1895 had conveyed the lands to him and his heirs and assigns, in terms "subject to the mortgage." Those words in the indenture in the presence of the above facts would be construed as having been inserted for the purpose merely of designating the estate which the grantors had; but to the transfer of such estate there would be attached, by reason of the facts admitted, a right in equity vested in the grantee, his heirs and assigns, to have the lands relieved by the mortgagors thereof from all liability under the mortgage; and in such a case, in the event of the mortgagors paying off the mortgage and procuring a transfer of it to a trustee for their benefit, they never could have made the claim now made by them of enforcing the mortgage in the names of the mortgagees, or of the transferee thereof, for their own benefit against the lands mortgaged upon the ground that they had expressly conveyed the lands to Charles Dickson Archibald subject to the mortgage. Now the only benefit which Charles Dickson Archibald obtained by reason of the execution of the bond of the 20th July, 1859, was that he and his heirs and assigns should have the additional security of the right of maintaining an action at law upon the bond, and of recovering thereon to the amount of the penalty as security for such damage as they should sustain by reason of a breach of the condition of the bond to be assigned upon the record in the action and proved. Upon the same 20th day of July, 1859, Charles Dickson Archibald by an indenture of lease of that date demised and let to the said Thomas D. Archibald and Blowers Archibald for a term of 21 years, to be computed from the 1st day of the then present month of July, at a rental of £100 per annum of the money of Nova Scotia for the first ten years, and of £200 of like money per annum for the residue of the term, a certain water lot therein particularly described, the descrip-

tion of which has a bearing upon the second question raised in this case, and will have to be considered by and bye, but need not be set out at present.

Upon the 26th of July, 1859, Charles Dickson Archibald, by an indenture of bargain and sale, granted, bargained, sold and conveyed unto one Charles William Archibald, his heirs and assigns, to have and to have and hold to his and their own use for ever

1895  
IMRIE  
v.  
ARCHIBALD.  
Gwynne J.

those two certain lots of land situate at the bar of North Sydney, in the Island of Cape Breton, known as lots numbers 5 and 6, theretofore belonging to John Cameron and John Ferris, deceased, said lots fronting on the waters of Sydney or Spanish River, and being bounded on the east by the property of Samuel Plant, and on the west by the property of the General Mining Association, and containing each 100 acres, more or less, subject to a lease of part of the said premises to Thomas Dickson Archibald and Blowers Archibald. Also all the front of lot no. 2, situate near the above described lots, as the same was reserved on the sale and conveyance of the residue of the said lot no. 2 to one William Peppet, and also all and singular those wharf and water lots, and lands covered with water, situate and being in front of the said lots nos. 2, 5 and 6, as the same are delineated and described in the grant thereof to the said Charles Dickson Archibald, together with all and singular the houses, stores, warehouses, buildings, piers, wharves, quays and docks, &c., to the said several lots and parcels of land, and land covered with water belonging.

It is admitted that this indenture was drawn by Charles Dickson Archibald himself and not by a professional man, and the fact that it was so drawn is urged on the part of the appellant as explaining a passage therein which, as the appellant insists, is manifestly an erroneous statement of matter of fact, but which, on the contrary, is relied upon by the respondents as supporting their contention upon the second question arising in this case, and to which I shall have occasion to refer by and bye. I am at present dealing only with the question as to the equity, if any, which the mortgagors have to enforce in their own interest the mortgage in the names of the mort-



1895  
IMRIE  
v.  
ARCHIBALD.  
—  
Gwynne J.  
—

gagees upon the land mortgaged, whatever they may have been, deferring for the present the consideration of the question of what lands were mortgaged, which is the second question in the case. Upon the 3rd day of June, 1862, the said Charles William Archibald, by an indenture of bargain and sale of that date, granted, bargained, sold and confirmed unto Anne Parker, then a widow residing in England, and to her heirs and assigns, all the several lots of land and land covered with water which had been conveyed to him by the said indenture of the 26th July, 1859. The said Anne Parker afterwards intermarried with one John Hearne Breffit, whose wife she was in the month of May, 1882, when the transaction next hereinafter mentioned took place between her and one Thomas Ritchie Grassie, who is said to have been the creditors' assignee in England of the estate and effects of the said Charles Dickson Archibald, who in his life time, but then deceased, had become bankrupt in England. At this time Mrs. Breffit was seized of the whole of the estate which Charles Dickson Archibald had at the time of the execution by him of the indenture of 26th July, 1859, in the lands mortgaged by Thomas D. Archibald and Blowers Archibald by the indenture of the 24th May, 1859, and of all the rights and equities existing against the mortgagors in that indenture by reason of the existence of the facts which occasioned the execution of the bond of the 20th July, 1859. No one but herself and her husband in her right had any estate or interest in the estate in the said lands so conveyed to her, nor in the equities attached thereto against the mortgagors arising out of the existence of the facts aforesaid, nor in the said bond of the 20th July, 1859. That bond was not a money bond, conditional for the payment of money to the obligee, his executors, administrators or assigns. It was simply a

bond the condition of which was to indemnify Charles Dickson Archibald as the true owner of the land mortgaged wrongfully by the mortgagors who had only apparently a legal title, which apparent title made the mortgage good in the interests of the mortgagees against the land, and released the heirs and assigns of the said Charles Dickson Archibald and the lands mortgaged from all liability under the mortgage ; in such a bond the creditors' assignee in bankruptcy had no interest, as it is not pretended nor alleged that he had any estate or interest in the lands to be indemnified from the mortgage.

1895  
IMRIE  
v.  
ARCHIBALD.  
Gwynne J.

An instrument to which the signature of Thomas R. Grassie alone is appended has been produced in evidence which purports to contain the terms of an agreement entered into in the month of May, 1882, between Mrs. Breffit and her husband of the one part and the said Thomas R. Grassie of the other part. It is as follows :

Memorandum of agreement made on the twenty-third day of May, one thousand eight hundred and eighty-two between Annie Breffit formerly Annie Parker widow, now the wife of John Hearne Breffit of Snarebrook in the county of Essex, gentleman, and the said John Hearne Breffit of the one part, and Thomas Ritchie Grassie of Gresham House Old Broad street in the city of London of the other part creditors' assignee of the estate and effects of one Charles Dickson Archibald deceased a bankrupt.

Whereas by a bond dated the twentieth day of July, one thousand eight hundred and fifty-nine, under the hands and seals of Thomas Dickson Archibald and Blowers Archibald, the said Thomas Dickson Archibald and Blowers Archibald became bound unto Charles Dickson Archibald the above named bankrupt in a penal sum for securing payment by the said Thomas Dickson Archibald and Blowers Archibald their executors administrators and assigns, unto the said Charles Dickson Archibald his executors administrators and assigns of a certain sum of six thousand pounds and interest therein mentioned which said sum in the events which have happened is now due and owing ; and whereas the said Annie Breffit claims to be beneficially entitled as part of her separate estate to the said

1895

IMRIE  
v.  
ARCHIBALD.

Gwynne J.

sum of six thousand pounds and interest secured by the said bond, and which claim, to the extent of the same being separate estate of his wife, the said John Hearne Breffit hereby expressly admits and acknowledges, testified by his being a party hereto, but her claim is disputed by the said Thomas Ritchie Grassie as such creditors' assignee as aforesaid; and whereas the said Annie Breffit has applied to the said Thomas Ritchie Grassie to allow her to use his name for the purpose of taking proceedings for the recovery of the money due upon the said bond and has offered to pay to the said Thomas Ritchie Grassie, as creditors' assignee as aforesaid, one clear half of all moneys which she may recover in such proceedings in discharge of all his claim as such assignee to the moneys secured by the said bond, and the said Thomas Ritchie Grassie is willing to accept such offer upon the conditions hereinafter contained, provided he obtains the sanction of the Court of Bankruptcy to this agreement. Now it is hereby agreed between the said parties as follows:

1. That the said Thomas Ritchie Grassie shall empower the said Annie Breffit, her executors, administrators and assigns, in the name of him the said Thomas Ritchie Grassie as creditors' assignee as aforesaid, and his successors in interest, to call in and compel payment of the said debt of six thousand pounds and of all interest for the same and by all legal proceedings to enforce the said bond, and to give effectual discharges of the said debt, and for that purpose shall execute all such further documents to be prepared at the expense of the said Annie Breffit as shall be necessary.

2. That the said Annie Breffit shall with all due diligence and reasonable speed after this agreement shall have been sanctioned as hereinafter provided, take all such steps and proceedings legal and otherwise at her own sole cost and expense, as shall be necessary for recovering the said sum of six thousand pounds and interest and enforcing the said bond, and shall pay to the said Thomas Ritchie Grassie, as such creditors' assignee or his successors in interest, one clear half of any and all sums received or recovered by virtue of the said bond, free from any deduction, which same sum or sums the said Thomas Ritchie Grassie shall accept in full satisfaction and discharge of all right, title, claim and interest of him the said Thomas Ritchie Grassie as such creditors' assignee, his successors in interest, of, in and to the said bond and the moneys thereby secured.

3. That the said John Hearne Breffit and Annie Breffit shall indemnify and hold harmless the said Thomas Ritchie Grassie, his executors, administrators, assigns and his successors in interest, and the estate of the said bankrupt, against all costs, expenses, payments, judgments, orders, claims, actions, suits and liabilities whatsoever occasioned by or

in any way incidental to, or arising out of any acts or proceedings legal or otherwise that may be necessary to enforce the said bond and recover the moneys thereby secured or otherwise arising directly or indirectly from the use of his name.

4. That notwithstanding anything to the contrary herein contained, this agreement shall be void and of no effect, unless sanctioned by Her Majesty's London Court of Bankruptcy upon application duly made, as witness the hands of the said parties.

1895  
IMRIE  
v.  
ARCHIBALD.  
Gwynne J.

This instrument appears to be signed by Thomas R. Grassie alone, but it appears to have been recognized by an indenture bearing date the 5th day of November. 1884, which is executed under the hands and seals of Mrs. Breffit and her husband and the said Thomas R. Grassie which is in the terms following :

This indenture made the fifth day of November, 1884, between Annie Breffit the wife of John Hearne Breffit of Tyne Villa, &c., &c., &c., gentleman, and the said John Hearne Breffit of the first part, and Thomas Ritchie Grassie of, &c., in the city of London, creditors' assignee of the estate and effects of Charles Dickson Archibald deceased, a bankrupt of the second part, and Thomas Dickson Archibald and Blowers Archibald both of Nova Scotia of the third part. Whereas by a bond dated the 20th day of July, 1859, under the hands and seals of the said Thomas Dickson Archibald and Blowers Archibald, the said Thomas Dickson Archibald and Blowers Archibald became bound to Charles Dickson Archibald the above named bankrupt in a penal sum for securing payment by the said Thomas Dickson Archibald and Blowers Archibald unto the said Charles Dickson Archibald his executors, administrators and assigns of a certain sum of six thousand pounds and interest therein mentioned. And whereas the said Annie Breffit and Thomas Ritchie Grassie have both claimed to be entitled to the principal moneys and interest secured by the said bond. And whereas by an agreement bearing date the 23rd day of May, 1882, and made subject to the sanction of the London Court of Bankruptcy between the said Annie Breffit and John Hearne Breffit of the one part and the said Thomas Ritchie Grassie of the other part, the said parties agreed to take proceedings upon the said bond for the recovery of the moneys thereby secured in the manner therein provided and to divide all moneys recovered by virtue of the said bond in equal moieties between them, that is to say, that the said Thomas Ritchie Grassie should receive and take one moiety thereof and the said Annie Breffit the other moiety thereof, and such arrangement was afterwards sanctioned and the agreement duly confirmed by order of the London Court of

1895 Bankruptcy made on the 15th day of June, 1882. And whereas the  
 IMRIE said Thomas Dickson Archibald and Blowers Archibald are unable to  
 v. pay the said principal moneys and interest secured by the said bond  
 ARCHIBALD. and also dispute their liability to pay the same. And whereas the said  
 Gwynne J. parties hereto of the first and second parts being satisfied of their inability to pay the said moneys in full and in settlement of the said dispute as to liabilities, agreed with the said Thomas Dickson Archibald and Blowers Archibald subject to the sanction of the said court, to accept in settlement and discharge of the moneys payable by virtue of the said bond, the sum of eight thousand dollars in four promissory notes of two thousand dollars each Canadian currency with interest to be signed by five members of the firm of Messrs. Archibald and Company of Cape Breton, and also signed or indorsed by Mr. McLean the president of the Bank of Nova Scotia, such notes to bear date the 16th day of June, 1884, and to be payable respectively on the 31st days of December, 1884, 1885, 1886 and 1887. And whereas such agreement was duly sanctioned and confirmed by the London Court of Bankruptcy by an order bearing date the 15th day of October, 1894. And whereas the said four promissory notes have been drawn for the said respective amounts and interest, and have been signed by five members of the firm of Messrs. Archibald and Company, and have been indorsed by Mr. McLean, the president of the said bank, and at the request of the said Annie Breffit and John Hearne Breffit and Thomas Ritchie Grassie, have been made payable to the joint order of Charles Harris Hodgson, the solicitor for the said Annie Breffit and John Hearne Breffit, and to the order of Arthur Torriano Rickards, the solicitor of the said Thomas Ritchie Grassie. And whereas the said promissory notes have at the like request of the said Annie Breffit, John Hearne Breffit and Thomas Ritchie Grassie, been handed to the said Charles Harris Hodgson and Arthur Torriano Rickards on their behalf, as they the said Annie Breffit, John Hearne Breffit and Thomas Ritchie Grassie, do hereby respectively admit and acknowledge. And whereas upon such promissory notes being handed over as aforesaid, the said Annie Breffit, John Hearne Breffit and Thomas Ritchie Grassie, agreed to execute such release as hereinafter mentioned. Now this indenture witnesseth, that in pursuance of such agreement and in consideration of the premises the said Annie Breffit and John Hearne Breffit and Thomas Ritchie Grassie do and each of them doth hereby release the said Thomas Dickson Archibald and Blowers Archibald, their and each of their heirs, executors, administrators, estates and effects from the said bond dated the 20th day of July, 1859, and from the sum of £6,000 and interest intended to be thereby secured, and every part thereof. Provided always, and it is hereby agreed and declared that

this present release shall not extend to the said sum of eight thousand dollars secured by the four promissory notes before mentioned, or any part thereof.

1895

IMRIE  
v.

And on the back of the said bond is indorsed a memorandum which is signed by the said Annie Breffit and Thomas Ritchie Grassie, and bearing date the same 5th day of November, 1884, which is as follows :—

ARCHIBALD.

Gwynne J.

Memorandum—the principal moneys and interest secured by the within bond have become vested jointly in Annie Breffit, wife of John Hearne Breffit of Tyne Villa, Grove Hill, Woodford, in the County of Essex, gentleman, and Thomas Ritchie Grassie of Gresham House, London, creditors' assignee of the within named Charles Dickson Archibald, and all claims in respect of the within bond have been duly satisfied by the transfer by the within named obligators to the said Annie Breffit and Thomas Ritchie Grassie, of four promissory notes for two thousand dollars each, payable respectively on the 31st days of December, 1884, 1885, 1886 and 1887, respectively, and the said Annie Breffit, John Hearne Breffit and Thomas Ritchie Grassie have by indenture bearing even date with this memorandum released the said obligors from the said bond and the moneys intended to be thereby secured and the said bond has accordingly been given up to the obligors and cancelled.

(Signed) ANNIE BREFFIT.

“

THOS. R. GRASSIE,

Assignee in Bankruptcy of C. D. Archibald.

I am unable, I must confess, to understand by what means Mrs. Breffit and her husband could have been induced to sign these instruments which so misrepresent the true nature, purport and effect of the bond and its conditions, and which are so at variance with her real rights and interest in the lands mortgaged and in the bond. Their having signed the instruments is, to my mind, only explicable by their having been ignorant of Mrs. Breffit's title and estate in the lands, and of her equitable rights against the mortgagors, by reason of her deriving title from Charles Dickson Archibald, the true owner of the land as against the mortgagors. However, they have signed the instruments and we must now determine the effect of their

1895.  
 IMRIE  
 v.  
 ARCHIBALD.  
 Gwynne J.

having done so upon the present action, for to whatever extent the estate of Mrs. Breffit in the lands was affected by them, the estate of the appellant must be affected also, as he derives title from her by a deed dated the 10th April, 1885. The statement of claim is framed as an ordinary action for foreclosure of a mortgage instituted by the mortgagees, and a person deriving title by assignment from them against the mortgagors and parties alleged to be seized of the equity of redemption, of whom the appellant is one, subject to the mortgage. The appellant in his defence among other defences alleged that the mortgage was paid off by the mortgagors and so satisfied and that the present action was instituted by them in their own interest, but in the name of the mortgagees and a person to whom they had procured the mortgage to be assigned, but in trust for their benefit. In their reply to this defence the mortgagors, for there is no doubt that the action is instituted by them and in their interest, set up what is the true foundation upon which the first question in this case, as it appears to me, must depend. They allege, as they do also in their defence to a counter claim of the appellant :

That before the said Peter Imrie became purchaser of the equity of redemption in the lands and premises described in the said mortgage, the said Thomas Dickson Archibald and Blowers Archibald agreed with the said Annie Breffit and John Hearne Breffit, who were the immediate predecessors in title of the said Peter Imrie in the said lands and premises and the then owners thereof, that they the said Thomas Dickson Archibald and Blowers Archibald would pay to the said Annie Breffit and John Hearne Breffit the amount of the said mortgage debt and the interest due thereon, and that said mortgage should remain a charge on the said lots of land, and that the said lots should be a security therefor, and that the said Annie Breffit and John Hearne Breffit would assume said mortgage debt and the interest due thereon, and release the said Thomas Dickson Archibald and Blowers Archibald from all liability therefor ; that the said Thomas Dickson Archibald and Blowers Archibald accordingly did pay to the said Annie Breffit and

John Hearne Breffit the whole of said mortgage debt and all interest due thereon, and the said Peter Imrie had notice and knowledge of said facts at and before the time he became purchaser of the lands described in said mortgage.

1895

IMRIE  
v.

ARCHIBALD.

Upon the above allegations is rested the right of the mortgagors who, as now clearly appears, having paid and discharged the mortgage debt, have instituted this action in their own interest but in the names of the mortgagees and their assignee, who holds the mortgage in trust for the mortgagors, to charge the lands and the estate of the appellant therein with the principal of the mortgage debt so paid off amounting to \$23,360 and the interest thereon from the 1st of June, 1880, which interest it is claimed amounted upon the 5th February, 1889, to \$12,172.80. It is in support of the above allegations that the several documents executed respectively by Mrs. Breffit, her husband, and Thomas Ritchie Grassie were produced; there was no evidence whatever of such an agreement having been entered into or any agreement of a like effect unless the instruments produced contain within themselves such an agreement; there is no pretense that the whole mortgage debt and interest was as is alleged paid to Mrs. Breffit and John Hearne Breffit; but what is now contended is that the instruments in themselves contain an agreement quite different from that alleged, namely, that in consideration of the eight thousand dollars paid by Thomas Dickson Archibald and Blowers Archibald as mentioned in the instruments, Mrs. Breffit and her husband would assume the said mortgage debt and the interest due thereon and that the said mortgage should remain a charge upon the said Annie Breffit's estate in the said lands and that she and her husband would release the mortgagors from all liability therefor. This contention, as already observed, is quite different from that alleged in the pleadings by the mortgagors and in

Gwynne J.



1895  
IMRIE  
v.  
ARCHIBALD.  
—  
Gwynne J.  
—

my opinion it cannot prevail. I cannot but think that if it had been represented to Mrs. Breffit and her husband that by the instruments which they signed they were charging her estate in the lands or incurring any obligation to pay the mortgage debt and interest and to indemnify the mortgagors from the payment thereof they never would have signed the instruments, nor if that had really been their intention could the instruments have been framed in the shape in which they were. Having regard to the circumstances under which the indenture of the 20th of July, 1859, was executed, although that deed purported to convey the lands to Charles Dickson Archibald, his heirs and assigns, subject however to the mortgage, if the mortgagors had paid off the mortgage in the life time of Charles Dickson Archibald they never could have asserted any equity against him to be indemnified to the amount of the mortgage debt out of the lands so conveyed to him even though no bond of indemnity had ever been executed by the mortgagors; the facts the existence of which occasioned the execution of the bond would have afforded a complete answer to any such claim if asserted on behalf of the mortgagors. So neither could the mortgagors make any such claim against the heirs or assigns of the said Charles Dickson Archibald; the estate of his heirs or assigns in the lands conveyed to him by that indenture would be entitled to the same protection from the assertion of such an equity by the mortgagors as Charles Dickson Archibald would himself have been entitled to, if living, and still seized of the lands so conveyed to him. The mortgagors, therefore, cannot succeed in the present suit in virtue of the words "subject to the mortgage," &c., &c., contained in the indenture of the 20th July, 1859. The question is not one between the mortgagees *bonâ fide* seeking to enforce their mortgage security against

persons who as between themselves and the mortgagees are undoubtedly seized only of an estate in the lands subject to the mortgage, but the question is: What right, legal or equitable, have the mortgagors after having in discharge of their personal obligation to the mortgagees paid and satisfied them their mortgage debt to claim to be indemnified for such payment out of the mortgaged lands whereof the appellant is seized by title derived from Charles D. Archibald, to whom the mortgagors had reconveyed the lands, nominally it is true, "subject to the mortgage," but in reality for the purpose of revesting in him, his heirs and assigns, his own property, the apparent title to which the mortgagors had acquired under circumstances which vested in him the right in equity to have the lands reconveyed to him indemnified from the mortgage? The mortgagors can only sustain such a claim in virtue of an express contract of the appellant or of some one under whom he claims title. In view of the circumstances under which the indenture of the 20th July, 1859, was executed, there was not as already shown any such contract involved in that indenture notwithstanding the words "subject to the mortgage," &c., &c., therein used. There was no contract existing whereby Mrs. Breffit was under any obligation either personally or through her estate in the lands to indemnify the mortgagors against the payment of their mortgage debt prior to the execution by her upon the 5th November, 1884, of the release of the bond of the 20th July, 1859, nor at any time unless such a contract is contained expressly in the terms of that release. If the bond so released had never been executed the circumstances which constituted the occasion of its having been executed, when executed, were in themselves sufficient to exclude all idea of Charles D. Archibald, his heirs or assigns, being under any obliga-

1895  
 IMRIE  
 v.  
 ARCHIBALD.  
 Gwynne J.

1895  
 IMRIE  
 v.  
 ARCHIBALD.  
 ———  
 Gwynne J.

tion whatever to indemnify the mortgagors against the payment of their mortgage debt in whole or in part. It is impossible therefore, in my opinion, to hold that the release of such a bond can place the assigns of Charles D. Archibald in a worse position than they would have been in if the bond had never been executed. There had been no original contract of indemnity in existence which could be said to have been suspended only during the existence of the bond and reinstated by its release. The release contains no language amounting to a personal covenant to indemnify the mortgagors against the payment of their debt to the mortgagees, and there is no language used competent to create a charge by Mrs. Breffit in favour of the mortgagors upon her estate in the lands; and moreover such a charge even if expressly stated could only be made valid by a deed executed by Mrs. Breffit, she having been a married woman, in a precise manner prescribed by statute and not pursued in the execution of the release.

In fine there can, I think, be no doubt that that instrument did not operate nor was it ever intended to operate as an instrument creating a charge upon Mrs. Breffit's estate in the lands in favour of the mortgagors, and if it did not create such a charge there is no instrument which did.

Upon what then can this equity which is insisted upon by the mortgagors be rested? There is nothing whatever in my opinion upon which it can be at all rested unless it be upon the fact of the payment of the eight thousand dollars which the mortgagors paid apart from all consideration of the accompanying release of the bond; upon that payment it may I think be rested but limited to the amount so paid and interest thereon.

In the absence of all evidence of any such agreement as that alleged by the mortgagors

in the pleadings for their indemnity against the mortgage debt having been actually entered into between them and Mrs. Breffit and her husband, and having in view what were her real rights and interests at the time of the payment of the \$8,000, and the incorrect manner in which her rights and interests were represented in the instruments signed by her, I think it impossible to construe these instruments or any of them as amounting to an agreement in consideration of the \$8,000 paid by the mortgagors to Mrs. Breffit and the assignee in bankruptcy of Charles Dickson Archibald in equal shares to charge Mrs. Breffit's estate in the lands, or the lands, with a sum then amounting, according to the mortgagors' own showing, to the principal sum of \$23,360, and interest thereon from the 1st of June, 1880, an amount exceeding \$6,000, in the whole upwards of \$29,360. As to the recital in the instruments that the mortgagors were unable to pay more than the \$8,000, which seems to have been thought necessary to be inserted to give appearance of fairness to the arrangement, no stress can be laid on this, for the mortgagors seem to have had no difficulty in paying off the mortgage debt and all arrears of interest when sued by the mortgagees in 1887. To the extent of the amount of the \$8,000 which was paid by the mortgagors in November, 1884, I think we may recognize their equitable right to be reimbursed out of the lands mortgaged. Mrs. Breffit must, I think, be regarded as having received the whole of that sum; for the amount which the assignee in bankruptcy of Charles Dickson Archibald who had no claim whatever upon the mortgagors received, must I think be considered as given to him by Mrs. Breffit who herself had no claim whatever to any part of the sum so paid unless by way of indemnity to herself and her estate from the mortgagees' claim under the mortgage to whom

1895  
 IMRIE  
 v.  
 ARCHIBALD.  
 Gwynne J.

1895  
 IMRIE  
 v.  
 ARCHIBALD.  
 Gwynne J.

six thousand of the eight thousand dollars was then overdue for arrears of interest, not having applied the money in payment of the claims of the mortgagees; the mortgagors having paid off the mortgage in full may be permitted I think to claim indemnity out of the lands mortgaged and the appellant's estate therein to the amount of the said sum of \$8,000 and interest thereon from the 5th day of November, 1884.

This leads to the consideration of the second question which is as to what were the lands mortgaged, which question is really narrowed to this: Was any, and if any what part of a certain water lot which was granted by the Crown to one John Ferris by letters patent dated the 8th April, 1826, covered by the mortgage? The water lot so granted is described in the said letters patent as

a water lot on the northern shore of the north-west branch of Sydney or Spanish River being part of the stone ballast heap in front of lot no. 6 granted to Francis Jones, beginning at a stake south forty-three degrees west one hundred and eight links from the south-eastern corner boundary of said lot no. 6, and thence bounded by the outline of the ballast heap to within a few paces of the extreme end, so as measure four hundred links from the shore at the extreme length to intersect the western outline of the said ballast heap at three hundred and fifty-five links from the shore, thence following the said outline to the shore, and thence along the shore to the place of commencement; also a projection on the eastern side line of the ballast heap, and near the south-eastern extremity thereof measuring sixteen feet in breadth and fifty feet in length, making the whole of the extreme breadth two hundred and four links, containing about three-quarters of an acre.

By an indenture bearing date the 1st May, 1838, the administrators of the estate of John Ferris, jr., conveyed to Charles Dickson Archibald, in fee simple, lot no. 6, on the north-west arm of Spanish River, by the description contained in the grant thereof from the Crown to one Francis Jones, dated 1st June, 1794, namely, as follows:—

Beginning at the south-east corner of lot no. 5 below the said mill creek, from thence running by the magnet north  $33^{\circ}$  W. 156 chains (of four rods each) more or less, to the north-east corner boundary of lot no. 5, thence north  $57^{\circ}$  east 8 chains, thence south  $33^{\circ}$  east 155 chains, more or less, to the shore of the river as above mentioned, thence westerly following the windings of the said shore to the place of beginning,

1895

IMRIE  
v.

ARCHIBALD.

Gwynne J.

and also the above water lot in front of the said lot no. 6, as described in the said letters patent therefor to the said John Ferris, dated 8th April, 1826. By letters patent bearing date the 28th day of December, 1847, three several water lots lying in front of shore lots nos. 2, 5 and 6, on the north shore of the north-west arm of Sydney harbour were granted by the Crown to Charles Dickson Archibald by special descriptions respectively in the said letters patent mentioned, the description of the water lot in front of the shore lot no. 6 is so drawn as to include within its limits the stone ballast heap lot as granted to John Ferris by letters patent of the 8th of April, 1826; and the description was so framed doubtless because Charles Dickson Archibald was then seized in fee of the water lot or stone ballast heap lot so granted to John Ferris. The description is as follows:

Also a lot lying in front of the shore lot no. 6 heretofore granted to Francis Jones bounded by a line beginning on the shore at the western boundary of the said lot number six and thence running south thirty-three degrees east eleven chains and twenty links more or less into the harbour to the general boundary line aforesaid

(namely, a line extending north fifty-seven degrees east from the south end of the water lot lying in front of the shore lot number two)—

thence north fifty-seven degrees east, eight chains, thence north thirty-three degrees west, ten chains and eighty links more or less to the shore at the eastern boundary of the said lot number six, and thence westerly along the shore boundary of the said lot number six and along the boundary of a wharf lot containing about three roods heretofore granted to John Ferris the younger to the place of commencement, containing eight acres and eight perches more or less.

1895

IMRIE

v.

ARCHIBALD.

Gwynne J.

The shore lot no. 5 was granted by the Crown to one John Henry by letters patent bearing date the 20th January, 1792, by the following description :

All that tract or lot of land situate, lying and being on the north-east side of the north-west arm of Prince William Henry's Sound, and known and distinguished as lot number five which is butted and abounded as follows, viz., beginning at a fir tree on the bank side being the south-west corner boundary of lot no. 6, thence running by the magnet north thirty-three degrees west one hundred and fifty-six chains of four rods each ; thence south fifty-seven degrees west eight chains ; thence south thirty-three degrees east one hundred and fifty-seven chains more or less to the shore side of the arm aforesaid, and from thence to be bounded down stream by the several courses of the said shore to the boundary first mentioned, containing in the whole by estimation one hundred and ten acres more or less.

This lot was conveyed by John Henry the grantee to John Cameron in fee simple by indenture bearing date the 2nd of August, 1822, by the same description as that contained in the original grant thereof from the Crown and by John Cameron to Samuel George Archibald by indenture bearing date the 4th May, 1839, by the same description, excepting, however, therefrom certain parcels thereof theretofore conveyed by John Cameron to divers persons therein mentioned, by the deeds therein mentioned, and by indenture bearing date the 27th June, 1839, Samuel George Archibald conveyed to Charles Dickson Archibald the lands so conveyed to him, and by an indenture bearing date the 1st of February, 1838, the said Charles Dickson Archibald became seized in fee simple of one of the pieces so excepted. Now, the indenture of mortgage bearing date the 27th day of September, 1849, executed by Charles Dickson Archibald to John Forman, covered several parcels of land besides those with which we are at present concerned ; these latter are therein described as follows :—

Also all the estate, right, title, interest, equity and reversion of the said Charles Dickson Archibald, of, in and to those two certain lots of land

situate and being at the bar at North Sydney aforesaid, and which heretofore belonged to John Ferris and John Cameron, the said lots fronting on the waters of Sydney harbour or Spanish river, and being bounded on the east by the property of Samuel Plant, and on the west by the property of the General Mining Association, and containing each one hundred acres, more or less, the said lots being now in the tenure and occupation of Messrs. Archibald and Company, and also all the right, title, interest, equity and reversion which he hath, or hereafter may or can have, in or to all that lot, piece or parcel of land at North Sydney aforesaid, on which the brick store or warehouse is situate, and which formerly belonged to Clarke and Archibald.

1895

IMRIE  
v.

ARCHIBALD.

Gwynne J.

The question we have now to deal with is twofold, namely: 1st. Does the above description cover (as is averred by the respondents, the mortgagors, in whose interest the mortgage of the 24th May, 1859, is sought to be foreclosed, but denied by the appellant,) the stone ballast heap lot granted to John Ferris, jr., by the letters patent dated the 8th April, 1826? And 2nd, if it does, is that lot covered by the description in the mortgage of the 24th May, 1859? As to the first branch of this question it is difficult to conceive that by the description given Charles Dickson Archibald intended to include that lot which the letters patent of the 28th December, 1847, included within the limits of the larger water lot by those letters patent granted, whereby the smaller lot so became part of the larger water lot as to be utterly inaccessible by water save over the waters outside of the smaller and within the limits of the larger water lot, and so became valueless except as part of the larger water lot. Then by the evidence of Mr. John McLean, who has known the premises as far back as 1831 and thenceforward, it appears that Plant owned the land lot east of the Ferris land lot no. 6, and that he did not own any property east of the stone ballast heap lot, all east of that lot being land covered with water and used as a public dock; so much of which land covered with water as lay east of the ballast heap lot and in front



1895  
IMRIE  
v.  
ARCHIBALD.  
Gwynne J.

of the land lot no. 6 is covered by the letters patent of the 28th December, 1847. Then he says further that he never knew of the ballast heap lot being spoken of as part of the land lot, that it was generally spoken of as the Ferris water lot; when Ferris owned it, it was always known to be and called a water lot. Then Blowers Archibald in his evidence says, that Archibald & Co. did not occupy the whole of the Ferris land lot in 1838, 1849 and 1859, that they occupied about one quarter of the land lot no. 6 at those dates, and about 12 acres of the land lot no. 5, that they were acting as Charles Dickson Archibald's agents in respect of the back of lot no. 5, and were in possession for him but paid no rent for the rear part of those lots, that this possession continued up to the time when the mortgage of the 24th May, 1859, was executed, and as I understand him also until 1882. Between 1838 and 1859, he says that Archibald & Co. built a number of buildings on the land lots nos. 5 and 6 above the road, that is above the road which separated or was supposed to be on the line which separated the land lots from the water lots in front, that the price of those buildings was debited to Charles Dickson Archibald and the rent was paid by paying him 6 per cent on the cost of the buildings.

Then he further says, that in 1836 he went to the North Bar to take charge of the store which Clarke and Archibald then had there upon the Ferris property, which he indicates as store marked no. 1 on a plan produced. This store seems to be placed partly upon what was or was supposed to be part of the ballast heap lot and partly on the road which is situate upon the lot no. 6 and separates the water lot in front of lot no. 6 from the part of that lot which was occupied by Archibald & Co. from 1838 under Charles Dickson Archibald.

We have thus as it appears to me the clearest possible evidence that the land or shore lots nos. 5 and 6 alone in themselves answer the description of the land mortgaged as the "two lots which heretofore belonged to John Ferris and John Cameron."

1895  
 IMRIE  
 v.  
 ARCHIBALD.  
 Gwynne J.

They are two lots containing each one hundred acres; taking them together they were bounded on the east by property of Samuel Plant and on the west by property of the General Mining Association; they did front on the waters of Sydney harbour and they were then in the occupation of Messrs. Archibald and Company, while the ballast heap lot never was bounded on the east by property of Samuel Plant and instead of fronting upon the waters of Sydney harbour it was a water lot situate in the waters of that harbour. In 1849 it had become and was in point of fact used as parcel of the greater water lot granted by the letters patent of the 28th December, 1847, to Charles Dickson Archibald, and that it should have then been dealt with as the old ballast heap lot, or intended to be covered by the description given in the mortgage is to my mind inconceivable, but such a construction becomes impossible when we find that besides the two lots containing each 100 acres, as above described, the mortgage expressly covers "also the brick store which formerly belonged to Clarke and Archibald," and which appears to have been or to have been suffered to be partly upon the lot no. 6 and partly upon the ballast heap lot. It is impossible to say that any part of the ballast heap lot was included in the mortgage unless it be so much as was covered by the brick store which formerly belonged to Clarke and Archibald. The mortgage therefore in fact covered only so much of the two land lots nos. 5 and 6 as the mortgagor Charles Dickson Archibald was seized of, and the brick store formerly occupied by Clarke and Archibald.

1895  
 IMRIE  
 v.  
 ARCHIBALD,  
 ———  
 Gwynne J.

Then by the mortgage of the 24th May, 1859, now sought to be foreclosed in the interest of the mortgagors they, after stating the two lots intended to be mortgaged according to the precise description contained in the Forman mortgage, add these words—“further described as follows,” and then set out the description given of the lots nos. 5 and 6 respectively in the original grants thereof from the Crown, from which they make certain exceptions, thus alleging in effect that the two lots granted by the Forman mortgage were the land lots 5 and 6 or the mortgagor's interest therein. The mortgage then proceeds thus—

Also all and singular the water lots and docks in front of said lots and all the right and title of the said Thomas Dickson Archibald and Blowers Archibald therein and thereto with the wharves stores and erections together with all houses outhouses buildings and improvements thereon and thereto belonging, etc.

And this is only the clause which can be appealed to as being sufficient to cover the brick store which formerly belonged to Clarke and Archibald, and which in those terms was covered by the Forman mortgage. It is, however, now argued by and on behalf of the mortgagors in the indenture of the mortgage of the 24th May, 1859, that this clause commencing “also all and singular the water lots,” &c., is part of the previous sentence, and therefore that what the mortgage says is that the prior part of the description of the two lots, as taken from the Forman mortgage covered the land lots 5 and 6, and also all and singular the water lots in front of those lots, but such a construction is plainly impossible, for it would include the whole of the eight-acre water lot in front of lot no. 6, and the water lot in front of lot no. 5, the former of which was leased to Thomas Dickson Archibald and Blowers Archibald for 21 years by the indenture of lease of the 20th July, 1859, and the latter subsequently sold by Charles

Dickson Archibald ; and, moreover, there is no pretense that any part of those water lots, nor until this argument was used, which is so at variance with the residue of the argument of the mortgagors, was it ever contended, that by the Forman mortgage any water lot was covered unless it was the small ballast heap lot ; the argument, therefore, that the clause in the mortgage commencing " also all and singular the water lots and docks in front of the said lots," &c., is to be read as part of the previous sentence cannot be entertained, and the result is that the effect to be given to this sentence can only be to cover the brick store which formerly belonged to Clarke and Archibald mentioned in the Forman mortgage, which together with the mortgagors' estate in the lots nos. 5 and 6, is all that the mortgage can cover of the property of Charles Dickson Archibald in which the appellant is interested.

1895  
IMRIE  
v.  
ARCHIBALD.  
Gwynne J.

It seems to me to be scarcely necessary to refer to the argument addressed to us founded upon the position in which the words

subject to a lease of part of the said premises to Thomas Dickson Archibald and Blowers Archibald

appear in the conveyance of the 26th July, 1859, from Charles Dickson Archibald to Charles William Archibald, for the language affords really no foundation for the argument ; the language is that the lots known as lots nos. 5 and 6 were as to part thereof subject to a lease to Thomas Dickson Archibald and Blowers Archibald. How that lease was executed, whether by deed or by parol, and for what term is not stated ; the lease by the indenture of the 20th July, 1859, plainly is not such a lease as is spoken of in this sentence, for that lease does not affect, or purport to affect, any part of the lots nos. 5 and 6, but is expressly confined to a water lot in front of lot no. 6, situate on the south side of the road, which

1895  
IMRIE  
 v.  
ARCHIBALD.  
 Gwynne J. by the evidence is shown to separate the shore lot no. 6 from the water lot in front thereof; in short, it is the water lot as granted by the letters patent of the 27th December, 1847, and includes the so-called ballast heap lot. The evidence also shows that the lots nos. 5 and 6, or so much thereof as was the property of Charles Dickson Archibald, was then in the occupation of Thomas Dickson Archibald and Blowers Archibald, and such occupation may have been by lease, by deed or by parol; or which perhaps is more probable, as the deed was prepared by the grantor himself, and as the deed conveys also

all those wharf and water lots in front of the said lots 2, 5 and 6, as the same are delineated and described in the grant thereof to the said Charles Dickson Archibald, together with all and singular the stores, warehouses, buildings, &c., to the said water lots belonging.

The words "subject to a lease of part of the said premises," should have been (and would have been if the lease had been prepared by a professional man), inserted at the close of this description of the water lots in which case they would accurately apply to the lease of the 20th July, 1859, but placed as they are they plainly cannot, and as the mortgagors' argument can only rest upon the words as they are used, and as so used they do not support their contention, which is that the appellant as deriving title from Charles Dickson Archibald is estopped by this language in the deed from Charles Dickson Archibald to Charles William Archibald from contesting as against these mortgagors that the so-called ballast heap lot is not covered by their mortgage, there is, as I have said, no foundation in my opinion for this contention.

The decree, in my opinion, should be foreclosure and sale only of the estate which Charles Dickson Archibald, at the time of the execution of the mortgage of September, 1849, had in the shore lots nos. 5 and 6, and

in the brick store which had theretofore belonged to Clarke and Archibald, with all such directions as may be necessary to determine the identity of this building, for the realization only of the sum of \$8,000, with interest thereon at 6 per cent per annum from the 5th November, 1885, each party to pay their own costs of this appeal.

1895  
 IMRIE  
 u.  
 ARCHIBALD.  
 Gwynne J.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Borden, Ritchie, Parker  
 & Chisholm.*

Solicitors for the respondents: *Ross, Sedgewick &  
 Mackay.*

---