THE TRUST AND LOAN COMPANY OF UPPER CANADA..... } APPELLANTS;

AND

HENRY JONES RUTTAN..... .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Deed—Escrow—Estoppel.

To a declaration on a covenant for quiet enjoyment in a mortgage to the Plaintiffs (Appellants), executed by T., the Defendants' grantee, R., one of the Defendants (the Respondent), pleaded that T. did not, after the making of that deed, convey to the Plaintiffs.

The deed from Defendants to T. was dated 22nd June, 1855, and the mortgage from T. to the Plaintiffs was dated 10th April, 1855. Both were registered on the 28th July, 1855—the *deed* first. It appeared that there were two mortgages from T. to the Plaintiffs on another lot, when this mortgage was made, and instead of which it was given. After executing this mortgage, T. found

PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier, and Henry, J. J.

that a deed from the Defendants to him was necessary to give the legal title, and he got the deed in question. The two mortgages were not discharged until the 16th August, 1855.

Held:—On appeal, affirming the judgment of the Court of Queen's Bench, Ontario, and reversing the judgment of the Court of Appeal, that the whole transaction shewed that the mortgage was not intended to take effect until the perfecting of T.'s title and *the discharge of the other mortgages for which it was given*, and that the Plantiffs, therefore, could recover.

Held also (Per Strong J., the Chief Justice concurring):—that assuming the deed of the 10th of April to have been a completed instrument from its date, the usual covenant contained in it that the grantor was seized in fee at the date of the deed created an estoppel, and that the estoppel was fed by the estate T. acquired by deed of the 22nd June, 1855.

[Henry, J., dissenting.]

Appeal from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of the Court of Queen's Bench of that Province (2) refusing a rule *nisi* to set aside the verdict for the Plaintiffs and to enter a verdict for the Defendant Ruttan.

This was an action commenced in the Court of Queen's Bench for Ontario for breach of covenant for title contained in a deed, bearing date the 22nd June, 1855, and made between the Respondent and Henry Covert of the first part, and Henry H. Thompson of the second part. Thompson, by deed, dated 10th April, 1855, had mortgaged the same lands to the Appellants.

The declaration alleged that the Defendants, by deed, conveyed certain lands to one Thompson, and covenanted with the said Thompson, his heirs and assigns, that "it shall and may be lawful to and for "the said party of the second part, his heirs and "assigns, peaceably and quietly to enter into and have,

(1) Reported 1 App. Rep. O., 26; (2) Reported 32 U. C. Q. B., 222.

"hold, use, possess, occupy and enjoy the aforesaid "lands, tenements, hereditaments and premises hereby "conveyed or intended so to be, with the appurten- "ances, without the let, suit, hindrance, interruption, "or denial of them the said parties of the first part, "their heirs and assigns, or any other person or persons "whomsoever; all that free and clear and freely and "clearly acquitted, exonerated and discharged of and "from all arrears of taxes * * * all former con- "veyances, mortgages, &c.: * * * * for, as the "fact is, the said Thompson, afterwards, for the valuable "consideration of £450, lawful money of Canada, then "paid by the Plantiffs to the said Henry Huddleston "Thompson, by deed, conveyed the said lands and the "estate of the said Thompson therein to the Plaintiffs: "and the Plaintiffs, after the execution of the said deed "to the Plaintiffs, entered into and continued for some "time in the quiet and undisturbed possession of the "premises, yet the Plaintiffs say that after the execu- "tion and delivery of the said deed to the said Thomp- "son, and after the conveyance to the Plaintiffs, certain "persons named (naming them), * * * to whom "a good title to the premises as against the Plaintiffs "and the Defendants, and from either of them, had "accrued in manner hereinafter mentioned, filed their "Bill in the Court of Chancery for Upper Canada "against the said Plaintiffs, the Trust and Loan Com- "pany, and others, and the said Defendants hereto, "Henry Covert and Henry Jones Ruttan, as Defendants, "whereby, after alleging as the fact was, that the said "Defendants hereto, before and at the time of the date "of the said conveyance to the said Henry Huddle- "stone Thompson were seized of the said premises "only upon trust for the said Hannah Eveline Thompson,

"the wife of the "said Henry Huddlestone Thompson, "during her life, and after her decease for the children "of the said Henry Huddlestone Thompson on the "body of his "said wife to be begotten, as tenants in "common, and in default of such issue for the heirs of "one William Hamilton Thompson, and that the said "Defendants hereto had no beneficial interest in or title "to the said premises, although no declaration of the "said trusts appeared on the face of the conveyance "under which the said Defendants hereto were at law "seized of the said premises, and that the said Plain- "tiffs in the said suit in Chancery were the children of "the said Henry Huddlestone Thompson on the body of "his said wife begotten, it was prayed amongst other "things that the said deeds from the Defendants to the "said Henry Huddlestone Thompson, and from the "said Henry Huddlestone Thompson to the Plain- "tiffs, should be delivered up to be cancelled, and the "said Plaintiffs the Trust and Loan Company ordered "to convey the premises to the Plaintiffs named in "the said Bill, and such proceedings were thereupon "had and taken in such suit that on the 15th day of "November, 1867, a decree was duly made and pro- "nounced by the said Court declaring that the said "Hannah Eveline Thompson and the Plaintiffs in the "said suit in the said Court of Chancery (naming "them), were and are benefically entitled to the said "lands, and ordering and decreeing amongst other "things that two proper persons should be appointed "trustees to hold the said lands and premises in trust "for the said Hannah Eveline Thompson for life and "for the said Plaintiffs in the said suit in the said "Court of Chancery as lawful issue of her body by the "said Henry Huddlestone Thompson begotten, as

"tenants in common in fee, and that the Plaintiffs "should execute to such trustees a conveyance of the "said lands to hold for the said Henry Huddlestone "and others (naming them), upon the said trusts there- "by declared, and that the Plaintiffs should deliver "up all deeds, writings and documents in their custody, "possession, or power, including the said deeds from "the Defendants to the said Henry Huddlestone Thomp- "son and from the said Henry Huddlestone Thompson, "to the Plaintiffs to the said trustees, and should de- "liver up possession of the said premises to the said trus- "tees, by reason of which the Plaintiffs have not only "lost and been deprived of the said lands and premises "but have also been obliged to pay the costs and "charges sustained by the said Plaintiffs in the said "suit in Chancery, &c."

The Respondent pleaded that the alleged deed to Henry Huddlestone Thompson was not his deed, and for a second plea: "that the said Henry Huddlestone Thompson did not, after the making of the deed, convey the said lands to the Plaintiffs as alleged."

The original cause was tried before *Galt*, J., at Cobourg, in the Fall of 1870, without a jury.

A new trial to assess damages was ordered by the Court of Queen's Bench (1) and took place at the Spring Assizes, 1875, at Cobourg, before *Richards*, C. J.

From the evidence taken and proceedings had at the trial, the facts are as follows: In 1855, Henry Huddlestone Thompson applied to Plaintiffs for a loan. When money is raised on a loan from Plaintiffs, the money is paid on the applicant's order. The Solicitor makes two reports on the loan—first, when application is made; and, second, when securities are

(1) See case as reported in 32 U. C. Q. B., 222.

completed. E. T. Boulton, Esq., a barrister of Cobourg, did most of the business for his father, the local agent of the Trust and Loan Company; saw the deed of 22nd June, 1855, with full covenants, from Defendants to Thompson, and the mortgage from Thompson to the Company (10th April, 1855), executed; and in his evidence stated that he must have received instructions to prepare the deed from Plaintiffs' solicitors at Kington.

The mortgage and the deed were registered on the same day, viz.: 28th July, 1855, the deed first, being numbered 836 and the mortgage 837. The Company's solicitors made the first report on the 6th August.

The practice of the Company was not to pay money until the mortgage had been returned registered. The money advanced on the mortgage was paid on the order of Henry Huddlestone Thompson, dated 7th August, 1855, and was applied to pay off two mortgages which previously existed.

The second report of the Appellants' solicitor, when the securities were completed, was made on the 10th August, 1855, the concluding part of this report being as follows:

"I further certify, that the deeds enumerated in "Schedule A are the deeds now delivered by me to the "Company, together with the mortgage deed executed "by Henry H. Thompson, and that the sum of four hun- "dred and fifty pounds may now be safely advanced and "paid to him by releasing the properties mortgaged in "Reg. Nos. 708 and 945.

"Dated the 10th day of August, 1855.

(Signed), "JOHN A. MACDONALD,
Solicitor to the Trust and Loan Company of Upper Canada."

The two discharges were dated 16th August, 1855, and were registered on the same day.

Richards, C. J., decided, that under the evidence and the judgment of the Court (1), the reasonable inference was, that the mortgage was not accepted by the Plaintiffs until after the deed from the Defendants to Thompson, and he found for the Plaintiffs and assessed damages at $4,731.70.

In Easter Term following, Mr. Armour, Q. C., for Defendant Henry Jones Ruttan, moved for a Rule *Nisi* to set aside the verdict, and to enter a verdict for said Defendant Ruttan on his second plea.

The application was refused.

From this judgment, Respondent appealed to the Court of Appeal for Ontario. The appeal was allowed, and it was ordered that a verdict be entered for the Respondent on the issue joined on the second plea of Respondent. Appellants thereupon appealed to the Supreme Court of Canada.

January, 25th, 1877.

Mr. *J. Bethune*, Q. C., for the Appellants:—

The action is for breach of covenant for title contained in a deed, dated 22nd June, 1855, and made between Respondent and H. Covert, of the first part, and H. H. Thompson, of the second part. The covenants were absolute and were broken. The Appellants claim that they are assignees of that covenant by virtue of a mortgage from H. H. Thompson to them, and are entitled to maintain an action upon the covenants. The whole difficulty arises from the fact that the date of the

(1) See 32 U. C. Q. B., 222.

mortgage is earlier than the date of the deed. The mortgage in question was given in lieu and in satisfaction of two other mortgages, and no money whatever passed at the date of the mortgage. The question is one of fact, and great weight should, therefore, be given to the impression of the learned Judge who sat at the trial. The learned Judge declares there was sufficient evidence to shew that the deed was never delivered to the Appellant's until the 10th August. The only witness examined was E. T. Boulton, and his evidence is not unsatisfactory, when we take into consideration the time elapsed since the transaction had taken place. This witness says, that he must have received instructions from Appellants' solicitors to prepare the deed of the 22nd June. It is evident that the Company's solicitors treated the mortgage as subsequent to this sale, and that the deed was not delivered as a deed by Thompson to the Appellants until after he got the conveyance from the Defendants.

There must be two acts coinciding to constitute a good delivery. An intention to accept and also an intention to deliver.

In this case there is no evidence that the corporation ever intended to delegate any right of accepting to Mr. Boulton or Mr. Macdonald. The money was not paid to Thompson till after the making of the deed to him by Respondent, and no person could have had any benefit in treating the mortgage as a deed delivered on the 10th April. The registration is some evidence of that fact, for the latest made instrument, the deed, is registered first, as no. 836, and the mortgage is registered after the deed as no. 837. A deed may be an escrow till after registration. *Parker* v. *Hill* (1).

(1) 8 Met., 447.

The learned counsel relied also on the report of the judgment of the Court of Queen's Bench in this cause (1); *Bell* v. *McKindsey* (2); the opinion of the learned Chief Justice of the Common Pleas, dissenting from the judgment of the Court of Appeal; *Jackson* v. *Phipps* (3); *Washburn* on Real Property (4); one of the Acts of Incorporation of the Appellants (5).

Mr. *Christopher Robinson*, Q. C., for Respondent:—

If it is found that this deed is an escrow, it will be going a good deal further than any other case.

It was not until after the mortgage was made to the Appellants that it was discovered the legal estate was with the Defendants (Ruttan & Covert), and in the absence of any evidence to the contrary, the legal presumption is, that the mortgage was delivered on the date which it bore. *Hayward* v. *Thacker* (6). The evidence of the witness Boulton shewed, that so far as the mortgagor had anything to do with it, he delivered and completed the delivery as far as he could on the 10th April, 1855. He did not, nor was he called upon to do thereafter any act in respect of the execution or delivery of the said mortgage. In ordinary cases of a deed executed, and left with the party's attorney, the deed cannot be an escrow, unless delivered to the attorney as such, not to be delivered till the consideration money is paid or some other condition performed. The deed could not be delivered as an escrow to the party himself. *Cumberlege* v. *Lawson* (7); *Washburn* on Real Property (8).

(1) 32 U. C. Q. B., 222; (2) 3 Grant's E. & App. Rep., 1; (3) 12 Johnson's Reports (N. Y. State), 418; (4) Vol 3, p.262; (5) 7 Vic., c. 63 (Canada), secs. 2 & 68; (6) 31 U. C. Q. B., 427; (7) 1 C. B. N. S., 718; (8) 3 Vol., p. 267, 3rd ed.

A delivery even to a third party is valid and effectual when the grantor parts with all control over the deed. *Doe Garnons* v. *Knight* (1).

Moreover, it must be intended by *both* parties that the delivery should only operate as the delivery of an escrow. *Gudgen* v. *Besset* (2).

Thompson, when he signed and delivered the mortgage to the agent of the Appellants, did all he could, and his estate completely passed. As to power of an agent to accept delivery of an instrument, I refer to *Cincinnati, Wilmington & Zanesville R. R. Co.* v. *Iliff* (3); also *Washburn*, Real Property (4).

Now, the estate of which Thompson divested himself could not remain suspended, but passed at once to the Plaintiffs and became vested in them, subject, however, to be disclaimed by them if they thought fit so to do, which they never did, but until such disclaimer the said estate would remain vested in them. *Cartwright* v. *Glover* (5).

It was quite competent to the Appellants here, on discovering that the mortgagor had no title, to procure a new mortgage, and so obtain the benefit of the covenant in question. Not having thought proper to do so, they cannot infer that the mortgage was only intended to operate as an escrow. The remarks of *Smith, J.*, in *Xenos* v. *Wickham* (6), are here applicable: "That it is better to adhere to plain inferences of fact than to attempt to remedy inconveniences of a negligent mode of doing business by making the facts bend to the exigencies of the negligence."

If actual acceptance, by some overt act of the Plaintiffs, were necessary, in order that the estate, purported

(1) 5 B. & C., 671; (2) 6 E. & B., 992; (3) 13 Ohio State R., 249; (4) 3 Vol., p. 292.; (5) 2 Giffard, 620; (6) L. R. 2 H. L., 306.

to be conveyed by the said mortgage, should be vested in them, a like overt act of actual acceptance by Thompson was necessary, in order that the estate, purported to be conveyed by the said deed, should be vested in him, and none such was proved; a verdict ought, therefore, to have been entered for the Defendant Ruttan, on the plea of *non est factum.*

Admitting that the Plaintiffs had the right to take the mortgage and to keep it until they should have an opportunity to determine whether they would accept it or not, and then to refuse it or accept it, the estate thereby conveyed would nevertheless vest in them, and remain vested in them until such determination was arrived at.

Admitting that the estate purported to be conveyed by the said mortgage did not vest in the Plaintiffs until an actual acceptance thereof by them by some overt act, yet such actual acceptance would be of the estate of which Thompson divested himself by his execution of the said mortgage, and would have relation back to the time when he so divested himself.

The learned counsel also relied upon the following authorities:

Muirhead v. *McDougall, et al* (1); *Mackechnie* v. *Mackechnie* (2); *Exton* v. *Scott* (3); *Muir* v. *Dunnett* (4); *Childers* v. *Childers* (5); *McFarlane* v. *Andes Insurance Company* (6); *Doe Spafford* v. *Brown et al* (7); *Thompson* v. *Leach* (8); *Thompson* v. *Leach* (9); *Butler & Baker's* case (10); *Doe Garnons* v. *Knight* (11); *Xenos* v. *Wickham* (12); *Cumberlege* v. *Lawson* (13).

(1) 5 U. C. Q. B., O. S., 642. (2) 7 Grant, 23. (3) 6 Sim., 31. (4) 11 Grant, 85. (5) 1 K. & J., 315. (6) 20 Grant, 486. (7) 3 U. C. Q. B., O. S., 92. (8) 2 Ventris, 198. (9) 3 Mod., 296. (10) 2 Coke, p. 68, ed. of 1826. (11) 5 B. & C., 671. (12) 13 C. B., N. S., 381; also in 14 C. B., N. S., 435, and 2 L. R., H. L., 296. (13) 1 C. B., N. S., 709.

Mr. *Bethune*, Q. C., in reply :—

Mr. Boulton was not Appellants' agent when Thompson left the mortgage with Boulton, as it was in the hands of a stranger.

June 28th, 1877.

RITCHIE, J.:—

The transaction out of which this controversy arises was an extremely simple one. Thompson, on the 1st day of March, 1855, applied to Plaintiffs for a loan, to enable him to discharge an indebtedness to them, and offered certain property in security. It is obvious, at the outset, that Plaintiffs never intended to make such an advance unless the security was deemed adequate and the title to the property unquestionable; and it is equally clear, that Thompson never intended to convey or incumber the property unless Plaintiffs made the advance. In other words, the making the advance was to be dependent on the adequacy and validity of the security, on the one hand; and the giving the security was to be dependent on the making of the advance, on the other.

With a view to the completion of this very natural and simple transaction, and doubtless for convenience and expedition, Thompson, on the 10th of August, 1855, executed a mortgage to Plaintiffs, which was left with Boulton, a son of a local agent of the Company.

He gives this account of the transaction :—

" I am a Barrister and an Attorney. My father was the " local agent of the Trust and Loan Company here. I " did most of the business. I saw the deed of 22nd " June, 1855, from Defendants to Thompson, and the

" mortgage from Thompson to the Company (10th " April, 1855,) executed. I recollect G. S. Boulton was " Registrar at the time, and he was Deputy Registrar " at one time, and I have no doubt he was Deputy " Registrar at that time. The deed is in the hand " writing of William Henry Van Ingren. The mort- " gage must have been drawn at Kingston and sent up " to me. The name of Mr. Thompson is in my hand- " writing. I must have received instructions to pre- " pare the deed from the Plaintiffs' office at Kingston. " I can't say from which of the Messrs. Macdonald. I " know Mr. Thompson going to Kingston about the " matter. I don't recollect specially anything about " this. In the usual course of business the mortgage " would be registered as soon as possible after I received " it, unless I received instructions to the contrary, " and for that reason *I have no doubt I must have received* " *such instructions or I would not have kept it in that way.* " I looked for correspondence in the matter. Could not " find any. It may be that Mr. Thompson, who went " down several times himself, may have brought up " some instructions which may have been mislaid. I " looked all through the Trust and Loan Company's cor- " respondence and could not find it."

Cross-examined.

" I only recollect going to the *Globe* once and seeing " Mr. and Mrs. Thompson execute this. It was sent by " the Company to us to be executed. I have no doubt " I took it away. I can't recollect if I sent it down to " Kingston, or kept it until it was registered. This " deed from the Defendants to Thompson, I must have " been instructed in some way by the Company to see " it done. To the best of my recollection Thompson " brought up letters. I can't say if the £1000 was paid. " I don't remember if it was."

Re-examined.

"If Mr. Thompson had come to me and asked me to "draw the deed to perfect the title, I think I would "have done it, but I don't think that was the case in "this matter. I could find no trace of any, only the "charges. I think Mr. Thompson got the money at "Kingston himself."

The directions issued by the Company to be observed by applicants contain the following:

"If, however, the applicant is desirous of saving "time and is willing to incur the expenses of obtaining "the Registrar's certificates before the sufficient value of "the property is ascertained, he may transmit to this "office the abstract and certificates with his deeds, when "he sends this application and the receipt for the pay- "ment to the Commercial Bank M. D. In this case the "Title and Registrar's certificate, with the other docu- "ments, will be submitted to the Company's solicitor "for his report, as soon as the Commissioners are satis- "fied of the value of the property, and the information, "&c., regarding the title may be required."

At the time this mortgage was left with Boulton, the report of the appraisers of the Company as to the value of the property had been received by the Company and had been "considered and referred to the Company's "solicitor for his report on the validity of the applicant's "title to the property described in the schedule." It is, to my mind, very clear, that pending this reference and while the transaction was incomplete, the mortgage was not to be recorded, as Boulton's evidence very clearly shows, but to be transmitted, as it appears to have been, to the Company's solicitor (as we find it in his hands as will subsequently appear) obviously to abide the result of his report and the final action of the Com-

pany. On the 6th of August, 1855, the Company's solicitor reported the title good, and expressed the opinion, that a loan to the amount required might be be safely made to the applicant, to pay off his prior loans to the Company. On the 7th day of August the solicitor's report was considered by the Commissioners, and the application was by them again referred to the Company's solicitor to *prepare* and *register* the necessary *deeds and securities*, and to report on the completion; and, on the same day, the applicant gave an order on the Commissioners to pay the proceeds of the loan to the Hon. J. A. McDonald, or a McDonald. All this very clearly shows, that, up to this time, the Company had not accepted any "deeds or securities," or then knew that they had been already prepared or recorded; neither can I discover, that, up to this time, they had, by act or assent, expressed or implied, in any way implicated or bound themselves, nor that they intended to do so till the final certificate of the solicitor was forthcoming. On the 10th of August the solicitor certified that the mortgage had been executed on the 10th April, 1855, but he does not say delivered, and that a memorial for the registry of such deed was executed at the same time, and was duly registered on the 28th July, 1855, and, in conclusion, he certified in these words "that the deeds enumerated in Schedule A are "the deeds *now* delivered by me to the Commissioners "of this Company, together with the mortgage deed "executed by H. H. Thompson, and that the sum of "£450 may *now* be safely advanced and paid to him by "releasing the properties mortgaged in Reg. Nos. 708 "and 945"

This, in my opinion, was the first and only delivery of this mortgage to Plaintiffs, with the intention of

passing the estate to them. When so delivered they were accepted by the Company, and a receipt, signed by the Commissioners, in these words: "We have "*this day* received from the Company's Solicitor the "deeds set forth in the annexed schedule A, and we "have deposited the same, together with a duplicate of "this report, in the strong room of this office. Dated "10th day of August, 1855. (Signed) F. A. Harper, "Commissioner." This was, in my opinion, the first and only acceptance of the deeds by Plaintiffs, and this completed the transaction, which, till then, was, in all its parts, incomplete, that is to say, without binding effect on any party, and up to which time the mortgage was to be held only for the purpose of being delivered to the grantees on the completion and final settlement of the transaction, as it actually was; and this, no doubt, would have satisfactorily terminated the matter but for subsequent proceedings, by which the deed from Ruttan & Covert to Thompson, dated the 22nd June, and registered immediately before the mortgage from Thompson to Plaintiffs, was set aside as being a breach of the trust on which the property was conveyed to them.

I cannot discover in this transaction anything whatever from which I can even infer that Plaintiffs ever intended to accept a delivery of this mortgage as passing the estate, or as being in anyway binding on either themselves or Thompson, until the delivery by their Solicitor, on the final winding up of the matter; nor can I discover the slightest ground for supposing Thompson ever intended to burthen or encumber his property with a mortgage, unless he obtained the loan for which the mortgage was to be the security. Until the application was made, the Plaintiffs satisfied as to

the value and validity of title, loan agreed to be made and mortgage delivered, and accepted as a valid and binding security therefor,—the transaction, and every part of it, was merely in course of negotiation and arrangement, and nothing final or binding on either party. That the mortgage never was intended to operate in any way other than as a security for a loan, and was not to be operative to pass any estate until such loan was made. That it was in the hands of Boulton, or the Solicitor, simply as part of an incomplete transaction, for convenience and to expedite the completion of the business, and that, in so doing, Plaintiffs acquired no right in, or title under, the mortgage, and Thompson parted with no right, title or interest in the property. All the direct evidence and surrounding circumstances of the case negativing, in my opinion, any idea that the delivery to Boulton, or the Company's Solicitor, was a delivery to pass the property to the grantees, the time not having arrived when it was either consistent with the nature of the transaction or the interests of either party that such a delivery should take place.

I have, therefore, no difficulty in arriving at the conclusion that leaving the security with Boulton, and with the Solicitor of the Company, was simply for the convenience of all parties, its ultimate destination being dependent on the final result, to be delivered to the Plaintiffs when the transaction was closed by the loan being made, to be handed back to Thompson if the negotiation failed, and Plaintiffs refused to make the loan; and I think it equally apparent, that it was the intention of all parties that the deed from Ruttan & Covert to Thompson was executed and delivered for the express purpose of passing the property to Thomp-

son and confirming his title therein, and to take effect anterior to the mortgage, to enable him to give a good and valid mortgage to Plaintiffs for the loan he was then endeavoring to obtain from them, any other conclusion being, to my mind, at variance with the accomplishment of the object all parties had in view, and inconsistent with the transaction itself.

I think the principles enunciated by Sir *Charles Hall* in *Watkins* v. *Nash* (1) so very applicable to this case that I quote them at length:

"But, it is said that the deed thus executed could "not be an escrow, because it was not delivered to a "stranger, and that is no doubt the way in which the "rule is stated in some of the text-books—*Sheppard's* "*Touchstone*, for instance--but when those authorities "are examined, it will be found that it is not merely a "technical question, as to whether or not the deed is "delivered into the hands of A B to be held condition-"ally, but when a delivery to a stranger is spoken of, "what is meant is a delivery of a character negativing "its being a delivery to the grantee or to the party "who is to have the benefit of the instrument. You "cannot deliver the deed to the grantee himself, it is "said, because that would be inconsistent with its pre-"serving the character of an escrow. But, if upon the "whole of the transaction it be clear that the delivery "was not intended to be a delivery to the grantee at "that time, but that it was to be something different, "then you must not give effect to the delivery as being "a complete delivery, that not being the intent of the "persons who executed the instrument. As regards "the instrument in question, it might very well, under "the circumstances, be meant and taken as a delivery

(1) L. R. 20 Eq., 265.

"by Watkins to Collins, to be held by him for the pur-
"pose of being delivered over to the grantee when the
"transaction was complete. I see no difficulty what-
"ever in that view being adopted.

"Then, as regards the subsequent delivery, when the
"deed was executed on the 18th April, 1872, by Collins,
"I see no difficulty, if necessary, in holding that, if that
"were a delivery to Skyrme himself, it was a delivery
"to him as an agent for all parties for the purpose of
"that delivery. And in holding that there may be a
"delivery to a third party for the benefit of all parties,
"I am confirmed by the authority of *Millership* v.
"*Brookes.* (1)

"The circumstances of that case are not exactly the
"same as those in the present, and perhaps the person
"to whom the instrument was delivered there was
"really a third person and a stranger; but I consider
"the principle upon which that case proceeded, was
"this: That the delivery was not to the grantee or the
"person who was to have the benefit of the deed, but
"was to some one as the person who was to hold or to
"be considered as holding the deed in an incomplete
"state for the benefit of all parties. Therefore, if it
"be true, as it appears from Mr. Collins's cross-examina-
"tion, that the delivery was to Skyrme, I should not
"feel that to be insuperable evidence against the
"memorandum, which was undoubtedly signed at the
"time, to the effect that the deed was to be an escrow
"and was not intended to be delivered to the grantee.
"But I might go further and say, if it were necessary
"to determine the question, that the document might
"be an escrow, even though there was no particular
"person selected, who, under the circumstances, could

(1) 5 H. & N., 797.

"be considered as being the person into whose hands "it was delivered, it being clear that there was no "delivery at all to the grantee; that the delivery was "not intended to be a delivery to the grantee at all, "and that it was intended to be an instrument incom- "plete as a transfer of the legal estate until the con- "ditions prescribed had been performed. That being "so, it follows that, in my judgment, the Plaintiffs "retain and have the legal estate in the property un- "affected by anything which has taken place.

The appeal, therefore, must, in my opinion, be allowed.

STRONG, J.:—

I have come to the conclusion, that the finding of the learned Chief Justice who tried this case was the correct inference to be drawn from the evidence, and that the appeal ought to be allowed. There is no difficulty about the rule of law applicable to this part of the case.

Although it was formerly essential to make a sealed instrument operate as a mere escrow that express words should be used, such is not now the state of the law, and what would otherwise be an absolute delivery as a deed may be restricted by evidence of the surrounding circumstances shewing that only a conditional delivery could have been intended. Numerous cases, some of which I refer to below, shew this (1). They establish no other rule

(1) *Bowker* v. *Burdekin*, 11 M. & W., 147; *Millership* v. *Brookes*, 5 H. & N., 798; *Pym* v. *Campbell*, 6 E. & B., 370; *Davis* v. *Jones*, 17 C. B., 625; *Gudgen* v. *Besset*, 6 E. & B., 986; *Murray* v. *Ld. Stair*, 2 B. & C., 82; *Christie* v. *Wimington*, 8 Exch., 287; *Furness* v. *Meek*, 27 L. J., N. S., Exch., 34; *Boyd* v. *Hind*, 25 L. J., N. S., Exch., 247.

of law than that I have just mentioned, but they shew the application of the rule to a variety of cases.

I think the whole dealing makes it plain beyond question that there was no delivery of the deed until after the perfection of the title, and that, therefore, the verdict should not have been interfered with.

But for another reason, I think, the Appellants are entitled to succeed on this appeal. Granting that the mortgage deed was absolutely delivered and accepted as a perfect deed as early as the date it bears, I should still be of opinion that the Plaintiffs would be entitled to recover in this action. This mortgage deed of the 10th April, 1855, although it contains no recital, comprises the usual absolute mortgagor's covenants for title. Now, for upwards of 40 years, it has been held in Upper Canada, that covenants for title, especially the usual covenant that the granting party is seized in fee at the date of the deed, a covenant which this deed contains in the absolute not in the ordinary restricted form, are as effectual in working an estoppel as a recital to the same effect would have been. The cases to which I refer, and which are always referred to as the leading cases on this point, are three: *Doe Hennesey* v. *Myers* (1), *Doe Irvine* v. *Webster* (2), *McLean* v. *Laidlaw* (3). Whether these decisions, attributing to the covenants the same efficacy as positive certain recitals are right, it is now too late (4) to inquire, as the principle has become a fixed rule of the law of property in the Province of Ontario, too well established therein to be shaken; and it is, of course, the law of that Province that this Court must administer on an appeal relating to real property situated there, just as

(1) 2. U. C. Q. B., O. S., 424; (2) 2. U. C. Q. B., 224; (3) 2. U. C. Q. B., 222; (4) See *Ram* on legal judgments, p. 292.

much as it is the Scotch law which the House of Lords administers with reference to land in Scotland.

There was, therefore, an estoppel worked by the mortgage deed of the 10th April, 1855, provided nothing passed by the deed. That nothing could have passed is apparent from the history of the title which is in evidence. The legal estate was outstanding in the Defendants, and, assuming that they were trustees for Thompson, he would still have been at law a mere tenant at will by whose conveyance nothing could have passed. It is out of the question to say that, because Thompson was in possession, an interest must be assumed to have passed by his deed; if we had nothing more before us than the fact of Thompson's possession, that would be *primâ facie* evidence of seisin in fee, but we have the whole title before us, from which it appears that Thompson had no estate, except possibly a tenancy at will, which, of course, was put an end to as soon as he assumed to convey. Therefore nothing passed by his conveyance.

That this mortgage deed operated as a conveyance under the Statute of Uses, would make no difference, on the authorities already quoted and some others which I will presently refer to. The estoppel is not worked by the conveyance, as in the case of feoffment or a fine, but by the instrument which is evidence of the conveyance—the indenture. In other words, the estoppel is produced not by the nature of the assurance, —a conveyance by way of bargain and sale operating under the Statute of Uses—but by the nature of the instrument—an indenture—by which that assurance is effected (1). This was the doctrine acted on by Vice

(1.) *Cornish* on Purchase Deeds, p. 7, and *Cornish* Essay on Uses, p. 179.

Chancellor *Leach* in the case of *Bensley* v. *Burdon* (1), upon which *Doe Irvine* v. *Webster* in a great measure proceeded.

In that case it was held that a recital in the release part of a conveyance by lease and release estopped the releasors, though contained in a deed operating as an innocent conveyance.

This decision was afterwards affirmed in appeal by Lord Chancellor *Lyndhurst* (2) and on the same grounds.

It is true, Sir *Edward Sugden*, in *Lloyd* v. *Lloyd* (3) questions this decision, but he does not advert to its having been affirmed in appeal, nor to the distinction between the estoppel having been effected not by the assurance but by the instrument; and he relies on *Right* v. *Bucknell* (4) as having overruled *Bensley* v. *Burdon*, in which he was certainly in error, for a careful perusal of Lord *Tenterden's* judgment in that case will show that though *Bensley* v. *Burdon* is referred to, not a word of disapproval of it is uttered; the decision in *Right* v. *Bucknell* proceeded on the uncertainty of the recital, which was that the grantor was legally *or equitably* entitled. It therefore results from these authorities that the deed of the 10th April, 1855, if it took effect at that date, as a deed duly delivered and accepted, estopped Thompson from denying that he was then seized in fee. Before leaving this part of the case, however, I should add, that the principle of *Bensley* v. *Burdon* and *Doe Irvine* v. *Webster* is affirmed in two New York cases, both decisions of Chancellor *Kent*: *Jackson* v. *Bull* (5) and *Jackson* v. *Murray* (6).

Then, it is a well established principle of the law of

(1) 2 Sim. & Stu., 519; (2) 8 Law Journal, p. 85; (3) 4 Dru. v. War., 369; (4) 12 B. & Ad., 278; (5) 1 Johns. Cases, 80; (6) 12 Johns., 2.

estoppel, that if a man is estopped from denying that he had a particular estate which he has assumed to convey and he afterwards acquires that estate, the estoppel is said to be fed on the accrual of the interest which, by force of the estoppel, is at once carried over to the party in whose favor the estoppel has been created (1).

The leading case *Doe* v. *Oliver*, by which this doctrine was finally established, was a case of a fine where the nature of the conveyance or assurance, not the mere recital in the deed, worked the estoppel; and it was, both in *Bensley* v. *Burdon* and in *Doe Irving* v. *Webster*, denied that this doctrine was applicable to an estoppel by deed merely. In both these cases, however, it was applied to estoppel by indenture; and many cases proceeding on this principle, besides those quoted, are to be found in the reports of the Upper Canada Common Law Courts. This same doctrine has been recognized in a late case in the Supreme Court of the United States, *Irvine* v. *Irvine* (2), where *Strong*, J, says: "It is a general rule that when "one makes a deed of land, covenanting that "he is the owner, and subsequently acquires an "outstanding and adverse title, his new acquisition "enures to the benefit of his grantee, on the principle "of estoppel. As the deed of the Plaintiff in this case "contained an assertion that he was well seized in fee, "and had good right to sell and convey in fee, it would "not be difficult, were it necessary, to show that in "law he was acting for his grantee."

Therefore, the mortgage deed of the 10th April, 1855, assuming it to have been, as the Defendants contend, a

(1) Doe *Christmas* v. *Oliver*, 10 B. & C., 181; 2 Smith's L. C. p. 751; (2) 9 Wallace, (U. S.), 617.

completed instrument, from its date, created an estoppel by the operation of which, when on the 22nd June, 1855, the Defendants conveyed the fee to Thompson, that estate was at once transferred to and vested in the Plaintiffs; in other words, the estoppel was fed by the estate Thompson acquired.

Then, the covenants, being adherent to the estate, were necessarily transferred with it to the Plaintiffs. It is out of the question, that this transfer of the estate to the Plaintiffs, being effected by operation of law by force of the estoppel, that the Plaintiffs are any less or otherwise assignees of the estate than they would have been if Thompson, immediately on the execution of the Defendants conveyance to him, had, *eo instanti*, passed it by an actual conveyance to the Plaintiffs. In truth, the previous mortgage deed creating the estoppel operated as a conveyance by anticipation of the fee which the Defendants conveyed to Thompson, having a continuous effect until it fastened on the estate and passed it to the Plaintiffs. The doctrine of relation has nothing to do with this, and the rule that the operation of the doctrine of relation is not to prejudice third parties is in no way interfered with. It could have made no difference to the Defendants whether the estate vested in the Plaintiffs by force of the estoppel or under a conveyance executed subsequently to the deed to Thompson; in one case, as well the other, the benefits of the covenants ran with the land.

So that, whether the deed of the 10th April, 1855, was a completely executed instrument before or not until after the deed of the 22nd June, 1855, either way the Plaintiffs are entitled to sue on the covenants in the latter deed.

In my judgment, the order of the Court of Appeal should be reversed and the judgment of the Court of Queen's Bench refusing the Rule *nisi* to set aside this verdict and to enter a verdict for the Defendant Ruttan should be restored and affirmed, with costs to the Appellants in this Court and also in the Court of Appeal.

The CHIEF JUSTICE and TASCHEREAU and FOURNIER, J. J., concurred in the foregoing judgments.

HENRY, J.:—

The Appellants, who are the Plaintiffs in this case, seek to recover on a covenant contained in a mortgage to them, signed by Henry Huddleston Thompson and Hannah Eveline Thompson, his wife, dated the 10th day of April, 1855, and on certain covenants contained in a deed of bargain and sale from one Henry Covert and Henry Jones Ruttan, the Respondent, dated the 22nd day of June, 1855, being seventy-three days after the date of the mortgage.

It is contended by the Appellants, that although the mortgage was signed and otherwise executed, it was not, in effect, accepted by the Appellants until *after* the execution of the deed; and that, therefore, the Appellants are entitled, under the mortgage and the covenants therein, to the benefit of the covenants in the deed *subsequently* made to Thompson; and it is also contended for them, that even if the mortgage were fully executed and accepted before the deed, the Respondent is nevertheless liable to them under the deed and covenants to Thompson by *estoppel*. I have given the points involved every possible consideration, and in the view I take

of the law bearing on them, I regret to find myself occupying a position in opposition to the rest of the court. I have endeavoured to reconcile my views with those of my learned brethren, but the more I have investigated and considered them, I am, unfortunately perhaps, the further removed from them. I am somewhat relieved, however, by the reflection that I am not quite alone, and that I am but adopting the views embraced in the judgments of three of the learned judges of the Court of Appeals for the Province of Ontario and, upon the first point, of Mr. Justice *Galt* who, on the first trial, found that the mortgage was *executed before the deed* and therefore found the second issue, which raised that point, for the Respondent.

The appellants, in their declaration, allege the execution of the deed to Thompson, and then allege that Thompson *afterwards* made the mortgage to them. The respondent, in his second plea, takes issue on that most material allegation, and says: "that the said Henry Huddleston Thompson did not *after* the making of the said covenant convey the lands to the plaintiffs as alleged."

That, then, is the simple issue to determine this case, for I cannot but think that a covenant of the Respondent *subsequent* to the mortgage will not render him liable to the *previous* assignees of Thompson, and upon which point I will speak further on. Leaving out of consideration, for the present, the latter point, let us consider the obligations of the contesting parties as to the proof of the issue. The affirmative of it is on the Appellants, and if they fail to give reasonably satisfactory evidence, the result must be against them, they, in that event, failing to prove their case. I have searched

in vain for such evidence. They give in evidence a mortgage dated the 10th of April, 1855. If *no evidence is adduced* as to the execution, the *date* of the instrument *is conclusive as to the time of its execution.* We have, however, the evidence of Boulton, who is a subscribing witness to the mortgage, and also to the deed. He says he saw the mortgage *executed* and that "it must have been drawn at Kingston and sent up to him." His father was then the local agent of the Appellants at Cobourg, and he says: "I did most of the business." He further says: "I must have received instructions to prepare the deed from the plaintiffs' office at Kingston." In his cross-examination, speaking of the mortgage, he says: "*It was sent by the Company to us to be executed*" "I have no doubt I took it away," that is after "seeing Mr. and Mrs. Thompson *execute it.*" "I can't recollect if I sent it down to Kingston, or kept it until it was registered." This, then, is the evidence of what occurred; and the whole evidence as to the execution of the mortgage, and that, too, on the part of the Appellants. The mortgage sent to him by the Plaintiffs *to be executed* is executed, and taken possession of and retained with the full consent of Thompson, by him who was the agent of the Plaintiffs *to get it executed* for them. This, then, is as perfect a delivery as could be, and just as effectual as if Thompson handed the paper to the Plaintiffs personally, and Thompson could not, in any way, have contested the delivery on the ground of non-acceptance, and how then can the Plaintiffs?

A witness, James O. N. Ireland, is examined. He says: "I am in the Plaintiffs' employ," but he does not say in what capacity, whether as a mere *clerk* or *labourer* or it might be a *messenger*. His evidence is not entitled to any weight as he says he knew nothing of

the transaction formerly, but was examined apparently to make evidence of what was not properly receivable evidence, viz: the books and papers of the Appellants; to shew what, *at the time of his giving evidence*, was the course pursued by the Company; leaving to imagination what it might have been at the time the mortgage was executed. I submit that such evidence could only be regularly given by a party cognizant of the practice of the Company at the date of the loan in question. He says: "I have no personal knowledge of the transaction of 1855." "*I have referred to the books and papers as to them.*" How can the *books* and *papers* of the Plaintiffs be evidence in their own favour? "I first became connected with the Company in January, 1856." This witness thus clearly shows his incompetency to state what course the Company pursued in regard to loans in 1855, the date of Thompson's transaction; and what *he* might say as to something taking place in China whilst he was in Canada, would be as properly evidence to bind Thompson or the Respondent. The mortgage, fully executed as far as Thompson and wife could do so, is taken into the possession of the Plaintiffs through their agent at Cobourg—if not by the governing authorities at Kingston—without any condition annexed. It always remained with them afterwards, and there is nothing to show they annexed any condition to their acceptance of it. The mortgage was payable with interest from its date, and if *presumptions* are to govern, I may *presume* that Thompson so paid it, for under the evidence he was clearly liable to so pay it. If we look at the statements of Thompson, who was examined on the first trial, which is more legitimate evidence than that of Ireland, we have the most conclusive evidence

that the delivery to Boulton was *a full execution* of the mortgage. He says: "This mortgage was made in "substitution of two mortgages on lot number five, "which previously existed. No money passed on the "execution by me of the mortgage to the Plaintiffs." In April the mortgage was executed. "*I was not aware* "*that anything further to be done was required at that* "*time.*" What then took place between the Company and Thompson as an intimation that the acceptance of the mortgage was conditional? Nothing in the slightest degree; and I maintain that the interest of Thompson passed immediately and the execution of the mortgage was complete. Thompson's application had been made, and the report of the appraiser received on the 10th of March, and, on the 24th of the same month, referred to the Company's solicitor for his report on the title. The next step is the preparation, by the Appellants, of the mortgage dated the 10th April, and the sending of it *for execution* by Thompson and wife. Why was that done? Why should a mortgage be prepared before the title was found satisfactory? In the absence of any proof explaining that part of the transaction (and it is a matter wholly within the knowledge of the Appellants) the irresistible conclusion of Thompson, or any one in his position, would be, that the title had been reported on favorably; and that, as he says, he had nothing more to do but to expect his other mortgages would be thereupon released; and I feel bound so to presume in the absence of a satisfactory explanation to the contrary. It may be said that it happened a long time ago, and that we ought not now to require such proofs as would be expected in regard to a later transaction. It may be, that it is thus unfortunate for the Appellants; but I know of no statute of limitations under which

they can be permitted to recover when unable to give evidence necessary to maintain their action. The presumptions of law are against them, and they cannot or, at least, ought not, by invoking wild presumptions of fact without proof, be permitted to destroy those legal landmarks that long experience has approved; and, in the words of *Smith*, J., in *Xenos* v. *Wickham* (1), quoted by Chief Justice *Draper* in this case: "It "is better to adhere to plain inferences of fact than to "attempt to remedy the inconvenience of a negligent "mode of doing business by making the facts bend to "the exigencies of negligence." To give effect to the contention that there was no binding acceptance of the mortgage, I think, would be construing the evidence, not according to its legal effect, but indulging in conjecture and speculation as to something that might or might not have been passing in the minds of the Appellants, or their agents, of which there is no proof, and in the absence of any suggestion that anything in opposition to the full acceptance of the mortgage, at the time it was executed and delivered by Thompson and wife to Boulton, was communicated to Thompson. From the whole transaction up to that, Thompson had not the slighest reason to suppose anything but that his two other mortgages would be released; and I have yet to learn that he could not then have, by law, enforced a release, leaving the Appellants for their security to look to the mortgage so fully executed in substitution. It is true, the other mortgages were not released till after the deed from the Respondent, but suppose, even *after the deed was executed*, the transaction was left inchoate by the Appeliants, through negligence or otherwise, and some months elapsed, and a valuable build-

(1) L. R. 2 H. L., 306.

ing destroyed without insurance that rendered the security insufficient, and it was then again found the title was defective, could they (the Appellants) then say " we only accepted the mortgage conditionally, and " now we decline the loan ? " They might as well, as to say so now. I admit the strength of the case *supposed* by Mr. Justice *Wilson*, that the Appellants, as to the mortgage, if prepared and executed and handed to them might have said " Leave it with us ; we will look it over, and tell you whether we will take it or not ; or, " Let us enquire into the title first and ascertain the " value of the land, but recollect we will not, and do " not, accept the mortgage at present. If you will do " that, you may leave it ; if not, we shall have nothing " to say to it, and you can take it away at once " I freely admit the soundness of the learned Judge's conclusion, that by so receiving the mortgage they would not have accepted the estate ; or that there was any delivery binding on them in law. Now, what I allege to be essentially absent is the slighest analogy between the case as thus put and the one presented by the evidence. The first important difference is that the Appellants never said anything of the kind ; but, on the contrary, by preparing and sending, through Boulton, the mortgage to Thompson *for execution*, they virtually said what was, in part, the fact : " We have had " your property appraised, and the result, on the 24th of " last month (March) was satisfactory, and on that day we " referred the matter of title to our solicitors, who have " reported favorably," or (as they might have done) " we " are satisfied as to the title, and upon your executing " and returning the mortgage to us we will release your " other mortgages." If they were not in a position to give such an intimation to Thompson they should not

have sent the mortgage for execution and induced him so to believe, and they cannot now be permitted to escape consequences produced by their own negligence. If it was necessary, as the learned Judge properly suggests, that something of the kind should be stated by a party taking the delivery of an executed instrument to avoid the binding legal presumption that he has fully accepted it and the benefits under it, then there is, in this case, a most striking absence of any such; and there is then nothing to rebut the legal presumption of acceptance. The language of Lord *Wensleydale*, in *Bowker* v. *Burdekin* (1), as quoted by Mr. Justice *Wilson*, is, no doubt, now the law: "That in order to "constitute the delivery of a writing as an escrow, it "is not necessary that it should be done by express "words, *but you are to look at all the facts attending the "execution—to all that took place at the time, and to the "result of the transaction;*" but what is His Lordship's conclusion: "And, *therefore*, though it is in form, an "absolute delivery, if it can be reasonably inferred that "it was delivered not to take effect as a deed *till a certain "condition* was performed, it will nevertheless operate "as an escrow." That doctrine does not, however, touch the present case. It is not here a question raised on a contention of the grantor, that he annexed, either expressly or by implication, any condition to qualify the delivery and make the instrument an escrow, nor do the applicants so contend. Their contention is wide apart from that position. They admit it (the mortgage) was *fully executed* by Thompson, but contend that they did not accept it; but in which, I maintain, they have wholly failed to rebut the legal presumption of accept-

(1) 11 M. & W., 147.

ance, which I must characterize as conclusive under the whole of the facts proved.

No sufficient evidence is before us of the application of Thompson. A witness on the trial (Henry Weller, Deputy Registrar and Master in Chancery) produced on the trial several deeds and papers, amongst others one, in respect to which he says: "I have an application for a loan, in a printed "form, dated 1st March, 1855, purporting to be signed "by Henry Huddlestone Thompson, &c." This paper is among the documents in the case, but it was not proved as Thompson's. The witness does not tell where he got it, and all he can say is, that it purported to be signed by Thompson. The execution by Thompson was not, however, disputed. There is nothing, in the application or schedule annexed to it, to show that the mortgage subsequently executed would be understood by Thompson as intended to be received conditionally only. A paper headed "Directions to be observed by the Applicant," also appears amongst the papers. No reference is made to it in the evidence or other documents, but, even if regularly in evidence, there is nothing in it affecting the question or the positions occupied respectively by the parties at the time the mortgage was delivered to Boulton, the agent. After the sending of the mortgage *for execution*, and its execution subsequently, the unconditional acceptance is an estoppel *in pais*, as to any allegation of prior circumstances to qualify the full execution of it. I can come to no other conclusion, under the circumstances, than that it became immediately operative; and, I may add, that I feel bound, in the absence of the evidence to the contrary, to conclude that such, at that time, was the real intention of the parties. *Further light*

may have suggested, and no doubt did suggest the procuring of the deed from the Respondent and Covert, and it is to be regretted that further light still was not thrown upon the title by a perusal of the declaration of trust which it is shown was, at the time of the transaction, in the possession of the Appellants or their solicitors who negligently failed to provide against it and caused the present difficulty.

I have now to consider the second point. Whether the deed to Thompson, being subsequent to the mortgage, the covenants in the former enured to the benefit of the Appellants on the execution of that deed? It is admitted on all sides, that where a party sells and conveys land by deed, to which he has *no* title, and subsequently obtains one, the estate by estoppel previously existing, is fed; and the deed, taking effect in *interest*, it is no longer a title by *estoppel*. The grantee becomes, therefore, the owner in fee—the title of all others being thus centred in him. As regards "Covenants" the law is far different. The conveyance of the legal title and the covenants go *with the land* to a *subsequent* assignee. I maintain, however, that it is only *thus* they pass and not by "estoppel." They pass only by assignment and that, when carrying the *title*, becomes the *conduit pipe* and *the only one*. Thompson made no conveyance *bearing the title*, for he had it not till the subsequent deed gave it to him, and as he, by the mortgage, conveyed *no title*, there was no transfer of the *covenants*. *Washburn* (vol. 3, p. 469) on the subject of "Covenants Running with the Land," says: "In the first place, there is the requisite privity "of estate between the grantor, who is the covenantor, "and the purchaser or holder of the land, in relation "to which the covenant is entered into. In the next

" place the covenant, for the title entered into, and " formed a parcel of the contract by which, and of the " consideration for which, the grant of the land was " made; and whoever purchases the one is supposed to " pay also for the other, and to become thereby con- " stituted in all respects in the place of the first cove- " nantee, so far as the right of being indemnified for " any failure or defect of title."

But before considering the inapplicability of the principles just quoted to the case in hand, I feel it right to test the title of the Appellants—after the deed to Thompson. Their title under Thompson's deed was, at first, one by estoppel only. There may be a question whether the deed to Thompson conveyed the *title* to him, as the Court of Chancery, by its judgment—binding on the Appellants who have adopted it as the groundwork of their action—declared it null and void, so far as we are enlightened by the pleadings and evidence, and that the appellants took no title under it. We have not before us the *nature of the trust*, and it is quite possible, if we had seen the declaration of it, we might have discovered that the Trustees had no power to *convey* or *transfer*, but merely to hold; and it it is quite possible, and even probable, that such was the case. The Plaintiffs had the power of showing the exact position but did not do so, and I do not feel bound to put such a construction as will necessarily favor a party claiming who, with the means of furnishing light, leaves us in darkness as to an important fact. It may, therefore, be contended that Thompson, subsequently to the mortgage, obtained no title by which the estoppel would be fed. In that case, can his position be likened to one who had made a deed and had acquired *a subsequent title*, when the Appellants

contend the deed to him was *ultra vires* and gave him no title, without explaining how? The case is peculiar, but I am at a loss to find, in the absence of the declaration of trust, how the appellants had, under the circumstances, anything more than a title by estoppel; and if they always remained without title, the covenants of the respondent cannot, though said to run with the land, be said ever to have reached them, because no title ever did.

"A covenant real cannot be conveyed to the assignee "of the land unless the assignor has a capacity to con- "vey the land itself to which the covenant is incident.

"Where the grantor is not seized of the land at the "time of conveying, his covenants of warranty do not "attach to the land and run with it"—2 *Sugden* on Vendors (1); citing *Slater* v. *Mason* (2); *Pike* v. *Galvin* (3); *Randolf* v. *Kinney* (4).

The same doctrine will be found in 4 Kent, Com., 556, n. "A."

How then could Thompson convey the covenants, which are said to run with the land, when, at the time, he could not convey the land? If respondent had only the title to hold as trustee, he could not convey, and therefore his covenant did not run with the land.

The law is, no doubt, clear that when a party to a deed is estopped by it, all his privies in estate, such as his heirs, executors, administrators or assigns, according as the estate is real or personal, are also bound by the estoppel, and that when the grantor subsequently *acquires the title* it gives an estate in interest to his assignee against every one except one holding a paramount title. "If a lessor at the time of making the

(1) 8th Amer. Ed., p. 240. Note G. to par. 577; (2) 1 Met. Mass. R., 450; (3) 29 Maine, 186; (4) 3 Rand, 394.

lease hath nothing in the land, but afterwards get it by purchase, this is a good lease by *estoppel*. For the act of the ancestor shall bind the heir; and the act of the principal his substitute, or such as claim under him by any *subsequent* assignment."

"So a privy in estate is bound, as if A demises the manor of D and afterwards purchases the manor and sells it to B. B is estopped (1). If A leases land to B in which he hath nothing, and then purchases a lease for 21 years, and *afterwards* leases the land to C for 10 years, and all is found by verdict the Court will adjudge the title good by the estoppel (2). A stranger to a deed is beyond the influence of estoppels, and if he do not become a privy in estate *afterwards*, he cannot be effected by the conveyance. The Appellants never became privies in estate. They were, I maintain, "strangers to the deed," and not having afterwards becoming privies in estate, they continue to occupy the same position of "strangers to the deed." Suppose the Appellants had been lessees of Thompson, who had no title, with independent covenants by each party to the other, which, in ordinary cases, would run with the land, and that Thompson had subsequently received a title by lease from the owner, would the Appellants, without having accepted a subsequent lease from Thompson, be liable for his covenants to the owner? I think I can safely answer in the negative—for there would be no privity of contract, and, if not, the *owner*, surely, would not be answerable to them under any covenant in his lease to Thompson. In fact, although their title by estoppel would be turned into an estate in interest, there would be *no privity of contract.* Estoppels may be turned into estates in interest, but, unless the *cove-*

(1) 1 Salk., 276; 1 Raym. R., 729; (2) 1 Salk, 276.

nants are assigned, I maintain they remain only as between the original parties to them. To make the Respondent liable, without an assignment by Thompson after his deed, would be about as regular as to make the maker of a promissory note out liable to an action on it, without indorsement, by an assignee of the payee, months or years before the making of the note, and which note was not included in the assignment. The note passes by *subsequent* endorsement and the covenants by *subsequent* assignment with the estate, and I can discover by no case, doctrine or decision, why, on principle, there should be any "relation" by which to sustain an action in the one any more than in the other case. In this case the covenants were not assigned by the previous mortgage of Thompson, for when that conveyance was executed he had none to assign. *Pollexfen*, R. 67, "The law, as it seemeth, is so in cases of obligations, covenants or personal contracts, which cannot be turned into an estate; but in other cases where the estate is bound by the *conclusion* and converted into the interest, although the jury find the matter at large, yet the Court shall judge according to the law and the estate is good by reason of the estoppel."

Here is the proper legal distinction drawn between covenants, obligations, &c., and the creation of an estate by estoppel.

I have thus, by the doctrine cited from *Sugden* and elsewhere, and otherwise shown, that a covenant cannot be conveyed where the assignee has no capacity to convey the land itself. Had a conveyance been made by Thompson *subsequent* to his deed from Respondent, if the latter had the power of conveying the title, there would have been a privity of contract between the latter and the Appellants, and, therefore, Thompson,

having *then* the fee simple under the deed, could have conveyed the covenants of Respondent to the Appellants. I have searched the books in vain for any authority for the doctrine that covenants will pass merely by estoppel, and I can find no case where an attempt was made to enforce a covenant in a deed or lease where there was not a *subsequent* assignment by the grantee or lessee. And, as no assignment was made by Thompson subsequent to his deed from Respondent, (although the Appellants might have compelled one) the covenants in the deed to Thompson did not pass to the Appellants; and they, therefore, cannot have an action on them. The doctrine of "relation" is well put by Mr. Justice *Wilson*, which I fully adopt, and feel it unnecessary to add to what he has said on that point.

Upon the two points in question, I am decidedly in favor of the Respondent, and think that the appeal should be dismissed with costs.

Appeal allowed with costs.

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