1884
*May. 17.
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*Jan'y 12.

OGLE ROBERT GOWAN PECK AND JOHN COLEMAN (PLAINTIFFS)..... } APPELLANTS;

AND

CHARLES POWELL (DEFENDANT)..... ..RESPONDENT.

OGLE ROBERT GOWAN PECK, JOHN COLEMAN AND GEORGE BRETT (DEFENDANTS)..... } APPELLANTS;

AND

CHARLES POWELL (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Patent, sale of—Specific performance—32 & 33 Vic., ch. 11, sec. 17—(Patent Act)—Renewal.

On 1st June, 1877, C. P. the owner of a patent for an improved pump which had only about a month to run, but was renewable for

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

1884

PECK v. POWELL.

two further terms of five years each, agreed to sell to P. *et al.*, his pump patent for five counties, and by deed of same date he granted, sold, and set over to P. *et al.* "all the right, title, interest, which I have in the said invention, as secured by me by said letters patent for, to and in the said limits of the counties of," &c. The *habendum* in the deed was "to the full end of the term for which the letters patent are granted." The consideration was $4,500, of which $1,500 was paid down, and mortgages given on the land on which the business was carried on, and on the chattels for the residue. The patent expired on the 19th July, 1877, and C. P. renewed it in his own name for the further term of five years, and P. *et al.* having made default in June, 1878, C. P. filed his bill asking for payment of the balance of purchase money, or in default for a sale of the land. Almost at the same time P. *et al.* brought a suit against C. P. to enforce specific performance of the agreement for sale of the patent right for the full period to which C. P. was entitled to renew the same under the patent laws.

Held,—In the suit *Peck et al.* v. *Powell*, reversing the judgment of the Court of Appeal, that under the agreement and assignment plaintiffs were entitled to the extension as well as the current term.

And in the suit *Powell* v. *Peck et al.*, affirming the judgment of the Court of Appeal, that C. P. was entitled to a decree for the redemption or foreclosure of the mortgaged premises with costs.

Per Strong, J.,—According to the principles upon which a court of equity acts in carrying into execution by its decree such contracts and agreements as are properly the subject of its jurisdiction, the court will always execute the whole or such parts of the agreement as remain executory, but if the parties have thought fit before the institution of the suit, to carry out any of the terms of the contract, such executed portions will not be disturbed.

Per Henry and Gwynne, JJ.,—That the decrees in the Court of Chancery should be consolidated and the decree for sale in default of payment in the suit of *Powell* v. *Peck et al.*, delayed until P. had assigned the renewal term.

APPEALS from a judgment of the Court of Appeal for Ontario (1), reversing the decree of the Court of Chancery (2).

(1) 8 Ont. App. R. 498. (2) 26 Gr. 322.

1884

PECK
v.
POWELL.

The respondent, (Charles Powell,) sued the appellants, (Peck, Coleman and Brett,) to enforce payment of a mortgage for $3,000 due to respondent in respect of a sale by him to them of his interest under a patent for an improved pump. Almost at the same time the appellants, Peck *et al*, began the suit of *Peck* v. *Powell*, to enforce specific performance of an agreement dated 1st June, 1877, for sale of such patent right for the full period to which respondent was entitled to renew the same under the patent laws.

The defence set up in the suit of *Powell* v. *Peck*, was the same as the case which Peck *et al* sought to make in *Peck* v. *Powell*, namely, that when the agreement of the 1st June, 1877, was made, Powell falsely represented that letters mentioned or referred to in the said agreement for certain new and useful improvements, known as the "cone pump and its connections," had ten years to run, whereas the fact was, that unless in the meantime renewed, said letters would have expired in a few weeks, and Peck *et al* claimed in consequence of such misrepresentation that they were not bound to pay the mortgage money sued in *Powell* v. *Peck*, and that Powell's proceedings should be restrained until Powell had made good his representations and carry out his contract with respect to said patent.

Powell answered that he never intended to sell, and Peck *et al* never intended to purchase any more that the limited interest conveyed in the assignment of the 1st June, 1877.

The agreement and assignment are set out in the judgment of Ritchie, C.J.

The causes were heard together in the Court of Chancery, and in the Court of Appeal, and there was but one argument in both appeals before the Supreme Court of Canada.

1884

PECK
v.
POWELL.

Hector Cameron, Q. C., and *Fitzgerald* with him, for appellants.

Dalton McCarthy, Q.C., and *Moss*, Q C., for respondent.

Sir W. J. RITCHIE C. J.—There are two appeals of *Peck et al.* v. *Powell* standing for judgment.

The first turns upon the question whether the patent rights which had been sold by Powell for five counties included all rights of renewal, and the second turns upon the right of vendor to foreclose a mortgage given by purchaser to secure balance of purchase-money.

The patent is dated 19th July, 1872, and expired on the 19th July, 1877.

The assignment by Powell to Peck and others, though dated 1st June, 1877, was not executed till the 23rd June, 1877, less than one month before date of expiring.

The assignment of Powell to Peck is as follows:

Whereas, I, Charles Powell, of the city of Toronto, in the county of York, did obtain letters patent of Canada for certain new and useful improvements in pumps known as "the cone pump and its connections," which letters patent bear date the 19th of July, 1872.

And whereas, O. G. Peck, John Coleman and George Brett are desirous of acquiring an interest therein:

Now this Indenture Witnesseth, that for and in consideration of the sum of six thousand five hundred dollars to me in hand paid, the receipts of which is hereby acknowledged, I have granted, sold and set over, and do hereby grant, sell and set over unto the said Peck, Coleman and Brett, all the right, title and interest which I have in the said invention, as secured to me by said letters patent, for, to and in the limits of the counties of York, Halton, Peel, Simcoe and Ontario, and in no other place or places, the same to be held and enjoyed by the said Peck, Coleman and Brett for their own use and behoof of their legal representatives, to the full end of the term for which the said letters patent are granted, as fully and entirely as the same would have been held by me, had this grant and sale not been made, save and except such portions of the above territory as may have been sold by the patentee before the 1st day April, 1877.

In testimony hereof I hereunto set my hand and affix my seal this 1st day of June, 1877.

1885

PECK
v.
POWELL.

Ritchie C.J.

The memorandum of bargain and sale of same date is as follows:

Said Powell agrees to sell, and the said Peck agrees to buy, the said Powell's right, title, and interest in the said Powell's pump manufacturing business, together with the land on which the buildings stand, at or for the sum of four thousand five hundred dollars, payable as follows:—Fifteen hundred dollars, the 16th day of June instant, with interest at 10 per cent.; also, the sum of three thousand dollars, to be secured by first mortgage on the property, (with insurance clauses,) and machinery and plant, stock on hand and chattels. One thousand dollars to be paid on the first day of June, 1878; one thousand dollars on the first day of June, 1879, and one thousand dollars on the first day of June, 1880, together with the interest at the rate of eight per cent. per annum, payable half-yearly, on all unpaid sums, on the first days of June and December in each and every year until fully paid and satisfied; the first payment of interest on the three thousand dollar mortgage on the 1st day of December next ensuing; the payment of the above-named $1,500 is to be made secure by assignment of mortgage from Mrs. Ogle R. Gowan to C. Powell, guaranteed by her and Mr. Peck; Powell to assign his interest in his pump patents to Mr. Peck for the counties of York, Halton, Peel, Simcoe, and Ontario; Powell to pay all debts incurred before this date on account of said business, so far as he shall have been party to or cognizant of some; Powell not to be responsible for any debt incurred, unless the goods have been actually delivered and accepted; all assets owing to the firm to be paid to Powell, and are his property absolutely, namely, all outstanding accounts and notes or other assets and balances; Mr. Peck is to assume all Powell's guarantee liabilities in reference to pumps; John Coleman and George Brett, with both their wives, are to join in the mortgages to C. Powell.

(Signed), CHARLES POWELL,
OGLE R. PECK,
JOHN COLEMAN,
GEORGE BRETT.

Signed, sealed and delivered in the presence of }

The right of extension being, under our law, secured by statute to the holder of the patent, whether he be the patentee or his assignee, I agree with Mr. Justice Patterson, that when Powell, by his agreement of 1st July, 1877, undertook "to assign his interest in his

pump patents to Mr. Peck for the counties of York, Peel, Simcoe, Halton and Ontario;" and, when by his deed of the same date, he granted, sold, and set over to Peck, Coleman and Brett, "all the right, title and interest which I have in the said invention, as secured to me by said letters patent for, to, and in the said limits of the counties of York, etc.," he parted with all his interest, so far as the five counties were concerned; and that part of his interest, and, in fact, the only substantial part which existed when he executed these documents, was the statutory right of extension The deed has an *habendum* "to the full end of the term for which the said letters patent are granted, as fully and entirely as the same would have been held and enjoyed by me, had this grant and sale not been made, save and except such portions of the above territory as may have been sold by the patentee before the first day of April, 1877." And I also agree with him that this had not the effect of restricting the previous grant to the term existing at the time so as to exclude the grantee from the right of renewal or extension; on the contrary, that it makes it more clear that, within the limits of the territory described, the grantor divests himself of all title up to the last moment of the current term, and thus to affirm the status of the grantee as being at, as well as before, the expiration of term of five years, the holder of the patent and the person entitled under section 17 to the extension, so far as the right had relation to that territory.

And Powell having taken the extension in his own name for the whole Dominion, he should be decreed to execute such instruments or do whatever acts may be necessary to vest in Peck and Coleman their right and title in such extension. I think, therefore, that Peck, as to the case of *Peck* v. *Powell*, should have a decree affirming his right to the patent in these five counties

1885

PECK v. POWELL.

(of York, Peel, Simcoe, Halton and Ontario,) and as to the case of *Powell* v. *Peck*, Powell should have a decree of foreclosure.

Ritchie C.J.

STRONG J.—In the case of *Peck* v. *Powell* I agree in all respects with Mr. Justice Patterson, who has shown in his very clear judgment that the principles of the English and American cases as to the right of an assignee of a patent to the benefit of the statutory extension, do not apply to patents issued under the Dominion Statute applicable to this patent. In the United States the renewal was granted under the former Act of Congress (now repealed), not as a matter of right, but in the discretion, judicial, or quasi-judicial, of commissioners after a hearing of the parties interested. In England, in like manner, the extension is granted by the Judicial Committee of the Privy Council, who are also bound to hear the parties.

Under the Dominion Statute applicable to this patent the extension is not a matter of judicial discretion, but can be claimed as an absolute right by the holder of the patent, just as a renewal of a term can be claimed by a lessee whose lease contains a covenant to that effect. And I am of opinion, therefore, that the analogy between an assignment of a patent granted under this statute, and the assignment of a lease with a right of renewal, is perfect. The appellants could not insist upon a partial renewal confined to the five counties in respect of which the respondent agreed to assign to them, but so soon as a renewal was obtained by the latter he became, under the words of the agreement to sell and assign all his right, title, and interest in the patent, a trustee of the renewed patent for the appellants in respect of those counties. This, then, being the proper construction and effect of the written agreement entered into between the parties, the decree pro-

perly directed a specific performance of that agreement according to the construction mentioned, by ordering an assignment of the renewed patent for the renewed term of five years, unless the evidence shows that there was some mistake in the agreement, which, on the ordinary principles applicable to relief by way of specific performance, made it improper so to carry out the contract. After attentively considering the evidence, I see no sufficient ground for withholding from the appellants the relief sought to which they are *primâ facie* entitled on the construction of the agreement in the way I have mentioned, and as it has been construed by Mr. Justice Patterson. I think, therefore, the decree was entirely right and ought to be affirmed, and that the order of the Court of Appeal to the contrary should be reversed. I may add that although I do not proceed entirely upon the same grounds as those the Chancellor placed his judgment upon, I am far from saying that if the case depended upon the considerations with which he dealt, the decree would have been wrong; on the contrary I incline to think that in this view also the appellants would have been entitled to succeed. I have no doubt whatever that the case in the aspect in which I view it, is open on the pleadings, the agreement is set forth in the bill and the material facts stated; it is not incumbent on a plaintiff in equity to set forth in his bill the arguments by which he intends to sustain his case, he can claim any relief which his allegations of fact entitle him to consistently with the relief prayed.

I cannot, however, agree that the decree pronounced in *Powell* v. *Peck* was correct, nor can I assent to the modification of that decree proposed by Mr. Justice Patterson; on the contrary, for the reasons which I will proceed to state, it appears to me very clear that the order of the Court of Appeal reversing it ought to be affirmed, though I am led to this conclusion by reasons

1885

PECK v. POWELL.

Strong J.

altogether different from those upon which the majority of the court of below acted. Although the agreement of the 1st June, 1870, was executory, being in terms an agreement to assign and not a final or completed assignment, the consideration paid and given for it was executed, part of that consideration being the mortgage, the foreclosure of which is now sought in this suit. A compliance with the equitable obligations to carry that agreement into specific execution was not a condition precedent to the right to enforce the security for the purchase-money, more especially after the purchasers had already to some extent had the benefit of the patent. Nothing can, as it appears to me, be better established both at law and in equity than that the obligations of the vendor, in respect of the assignment and conveyance of the patent, and those of the purchaser in respect of the payment of the purchase-money under this security given for it, had (having regard to the way in which the parties had acted under it) become distinct and independent. At law they would be clearly so regarded. Had the respondent (the mortgagee) sued at law upon the covenant in the mortgage deed to recover the money secured by it, there would have been no legal defence to the action founded on the omission or refusal of the plaintiff in the action to assign the renewed term. Then what equity could have been asserted to restrain such an action? None that I can see, for if the obligations of the vendor in respect of the assurance of the thing sold, and those of the purchaser in respect of the price, are independent at law, I am not aware of any principle upon which they could be differently construed in equity after the contract has been executed on the part of the purchaser to the extent of paying or securing the price, more especially after there has been a partial performance by the vendor and a partial enjoyment of the consideration for

the mortgage by the purchaser. For to say that the vendor shall not in such a case be entitled to realise his security for the purchase money, is tantamount to saying that he shall have nothing for the valuable consideration the purchaser has already had the benefit of. The only way in which justice can be done in such a case is by treating the liabilities of the parties in equity, as at law, as independent of each other, and leaving the purchaser to his remedies upon the contract at law and in equity. This is very analagous to a case in which a purchaser of land under an executed contract of purchase sues his vendor in equity, for a specific performance of the covenant for further assurance. In such supposed case I have never understood that if the purchase money happens to be unpaid and secured by mortgage, the court will enjoin the mortgagee (that is the vendor) from enforcing his security until he has executed the further assurance. The only case so far as I know, or have been able to discover upon looking into authorities in which a court of equity has ever interfered with a security for the purchase-money upon a ground of a breach of the vendor's covenants in the conveyance, is where there has been a breach of the covenant against incumbrances; in that case, which, however was always regarded as exceptional, some authorities decided in the Ontario Court of Chancery do, it is true, countenance the principle that the court will give the purchaser a lien, for the encumbrance which constitutes a breach of the covenant, upon the unpaid purchase-money secured by mortgage; in other words, it will set-off what the purchaser may be liable to pay to the holder of the paramount incumbrance against the unpaid purchase-money secured by mortgage; and this, it was formerly held, would be done even against an assignee of the mort-

1885

PECK v. POWELL.

Strong J.

gage (1). This doctrine has, however, been much narrowed, if not entirely displaced, by a later decision of the Court of Appeal in the case of *Eagleson* v. *Howe* (2), which latter case restored the authority of a former decision of the late Vice-Chancellor Esten (a very high authority on such a question) in the case of *Tully* v. *Bradbury* (3). If, however, the case of *Henderson* v. *Brown* stood unimpeached, it would not help the mortgagor, since in the case to which it applied, the relief afforded amounted to nothing more than a set-off or recoupment of liquidated and ascertained sums, which is not the case here. If the purchase-money here had not been secured by an executed and completed security, but the provisions of the agreement respecting it had remained wholly executory, the case would have admitted of very different considerations, for, in that case, the court, in decreeing a specific performance, would have provided for the execution of the reciprocal covenants or stipulations on both sides.

According to the principles upon which a court of equity acts in carrying into execution by its decree such contracts and agreements as are properly the subjects of its jurisdiction, the court will always execute the whole, or such portions of the agreement as remain executory, but if the parties have thought fit before the institution of the suit to carry out any of the terms of the contract, such executed portions will not be disturbed. But I cannot distinguish between the case of a mortgage given to secure the purchase-money and that of the actual payment of the money; and, in the latter case, I take it to be altogether out of the question to say that a court of equity would, if there appeared to be some further interest which a purchaser was entitled to call upon the vendor to assure to him, under a

(1) *Henderson* v. *Brown*, 18 Gr. 79. (2) 3 Ont. App. Rep. 566.
(3) 8 Gr. 561.

covenant for further assurance, the purchasers right to which was disputed by the vendor, and, in the judgment of the court, wrongfully disputed, merely upon that ground, decree a repayment of purchase-money already paid, more especially in a case like the present where part of the benefit of the purchase had been actually enjoyed by the purchaser. A fair test of the correctness of such a principle as that just adverted to is to put the converse case of a purchaser, suing in equity for a further assurance under the vendor's covenant to that effect, being met by the objection, that he was not entitled to maintain his suit for the reason that he was in default as regards the payment of his purchase-money. In that case I apprehend there could be no doubt that the non-payment of the purchase-money would be no defence to the relief by way of further assurance, and if this is a correct assumption, reciprocally, the refusal to execute a further assurance could be no defence to an action for the purchase-money, either at law or in equity. In such a case the liabilities would be regarded as distinct and independent. The case of *Gibson* v. *Goldsmid* (1), appears to be a clear authority for this. In that case a partnership had been dissolved, and certain foreign shares in a joint stock company, which had belonged to the partnership, were transferred to the plaintiff, it being recited in the deed of dissolution that they were transferable by delivery. The deed contained a covenant for further assurance. It afterwards appeared that the shares in question were not transferable by delivery, but that a formal written transfer was necessary, which being refused by the other partner, a suit was brought against him for specific performance of the covenant for further assurance, to which it was set up as a defence that the plaintiff was himself in default to the defendant in respect of a

(1) 5 DeG. McN. & G. 757.

1885

PECK v. POWELL.

Strong J.

covenant, to indemnify him against partnership debts, contained in the same deed. To this defence, which was assumed by the court to be founded on fact, the Master of the Rolls in the first instance gave effect by making the payment of any balance found due in an account to be taken under the indemnity covenant, a condition precedent to the relief the plaintiff sought; but upon appeal the Lords Justices (Knight Bruce and Turner) reversed this decree and directed a performance of the covenant. In the valuable judgment of Lord Justice Turner the grounds of the decision are fully and clearly stated. He says it was argued on behalf of the defendant "that he who seeks equity must do equity;" but, as the Lord Justice shows very clearly, that maxim is not adopted by the court in the wide and popular sense often attributed to it, but as meaning that a Court of Equity will impose upon the plaintiff, as a condition of relief, submission to equities which the defendant, if a plaintiff, could actively assert against him in respect of the same subject matter, but not a submission to such equitable rights as the defendant could actively, as plaintiff, enforce against the defendant in respect of distinct and independent matters; and he quotes, with approval, a passage from the judgment of Sir James Wigram in *Hannam* v. *Keating* (1) to this effect. The Lord Justice then proceeds to point out that in the case before the court the covenant for indemnity was a distinct and independent matter.

That case seems to me here an authority on two points: first, it establishes that even where covenants are still executory, they will, if independent and distinct, according to the proper legal construction of the instrument, be regarded as separate subjects of relief in equity; and secondly, that a defendant cannot merely, owing

(1) 4 Hare 1.

to his position on the record, and upon a construction and application of the maxim "that he who seeks equity must do equity," insist on a right to interpose obstacles to the equities asserted by the plaintiff, which he could not assert as a plaintiff seeking relief. The present case is much stronger than that cited, for here the plaintiff is not seeking to enforce an executory covenant but something entirely foreign to the original agreement, namely, to realize the security given in satisfaction and discharge of the original liability for the payment of the price, and therefore to enforce an executed—not an executory—part of the original agreement. That the respondent's position on the record as plaintiff can make no difference, as compelling him to submit to a different measure of equity from that which the defendant could enforce against him if their relative positions were reversed, is also, as has been shown, a point conclusively settled by *Gibson* v. *Goldsmid*, and the cases there referred to.

I repeat that if the agreement of the 1st June, 1870, had not been in any respect carried into execution by the appellants (the mortgagors), but if the clauses of that instrument to be performed on their part had been left, as the expression is, *in fieri*, then, no doubt, in decreeing specific performance, the court would have taken care to provide that they should not be compelled to pay their money or execute the security for it, until their rights under the contract were properly assured to them. But where the appellants executed the mortgage deed without insisting on a precedent or contemporaneous performance by the vendor of the obligations on his part, they voluntarily put it out of the power of the court so to protect them and waived any claim which they might have had, to retain the purchase money in their own hands until the vendor's obligations to them were duly performed, and by so doing they

1885

PECK v. POWELL.

Strong J.

must be considered as indicating an intention thenceforward to rely solely upon such remedies as they might have against the vendor upon the stipulations contained in the contract.

The result is, that my judgment must be that the decree in *Peck* v. *Powell* should be restored and affirmed, and the order of the Court of Appeal reversing it should be discharged; and that the decree in *Powell* v. *Peck*, (the foreclosure suit) as entered under the order of the Court of Appeal, should be affirmed.

There should be no costs to either party of this appeal, and in the Court of Appeal there should be no costs. In the Court of Chancery Peck should have all the costs of *Peck* v. *Powell* as provided for by the decree in that case, and in *Powell* v. *Peck* the plaintiff should have only the costs of an ordinary foreclosure suit, to be added to the debt in the usual way.

FOURNIER J. concurred.

HENRY J.—I have had no difficulty in arriving at the conclusion that Powell always had an interest in the five counties. I think, therefore, the plaintiffs in that suit were entitled to recover. In fact, at the time that the agreement was made the patent right had expired within a few days, and, if he did not convey the right to the two renewals, and the right as far as these five counties were concerned in these renewals, he gave no value at all to the parties for the mortgage they gave as security for the payment of the amount agreed upon. I think, therefore, independently of the legal construction of the document, that the parties intended that should be the case. The difficulty I see in the matter is this: The second renewal has been obtained, the third may be obtained by Powell hereafter.

In the case of *Powell* v. *Peck et al.*, I do not think Powell should obtain the benefit of the foreclosure of

the mortgage and the payment of the mortgage money, until he conveys the right to the five counties to the defendants, and gives security that he will obtain an extension of the right for another five years, and give them the benefit of it. It appears to me that is necessary to secure them. Otherwise, he may not renew that patent; he may not pay the money on it and in that case these parties will lose; and they cannot themselves do so under the Act. Powell must renew it, and, if he does, he will become the trustee for the benefit of those parties as far as the five counties are concerned. I think, under the circumstances, as he has contested and kept back all these matters since almost the time of the first agreement, he ought not to get costs for the foreclosure of the mortgage or to get the foreclosure until he gives value. I think the two matters ought to be held, and referred back to the court for a decree to be passed in accordance with the suggestion of the judgment of my learned brother Gwynne on the subject, and left there for the court to take measures to secure the rights of the parties.

GWYNNE J.—The late learned Chancellor of Ontario, Chancellor Spragge, before whom the above cases were tried together had such infinitely superior opportunity of eliminating the truth from the contradictory evidence of the respective parties who gave their evidence before him, than a judge of a Court of Appeal can possibly have, that I can have no hesitation in adopting the conclusion of fact arrived at by him, namely, that there was a representation made by Powell, the defendant in one of the above suits and the plaintiff in the other, that the patent in the cone pump and its connections, which, in the month of June, 1877, he was selling to Peck, Coleman and Brett, for the counties of York, Halton, Peel, Simcoe and Ontario was good for ten years, and

1885

PECK v. POWELL.

Gwynne J.

that it was upon the faith of this representation that Peck, Coleman and Brett signed the agreement of the 1st of June, 1877, which was in evidence. In the learned Chancellor's criticism of the evidence bearing upon this question, I entirely concur. But I am of opinion, further, that the said agreement of the 1st June, 1877, and the assignment in pursuance thereof, dated on the same 1st of June, although executed later on in that month, were in their terms sufficient in equity, if not in law, to pass to Powell's said assignees all right and title to renewal of the letters patent for the said article, which, he (Powell) then had, as regards the said five counties, and to make him a trustee for his said assignees of any renewal of the said letters patent, which should be obtained by him as regards those counties. By the agreement Powell undertook to assign his interest in his pump patents to Mr. Peck for the above named counties, and by the assignment, after reciting that on the 19th day of July, 1872, he had obtained letters patent of that date for certain new and useful improvements in pumps known as "The Cone Pump and its Connections," and that O. G. Peck, John Coleman, and George Brett were desirous of acquiring an interest therein, it is witnessed, that for the consideration therein mentioned, he, the said Powell, did thereby grant, sell and set over unto the saidP eck, Coleman and Brett:—

> All the right, title and interest which I have in the said invention as secured to me by said letters patent, for, to, and in the limits of the counties of York, Halton, Peel, Simcoe and Ontario, and in no other place or places, the same to be held and enjoyed to the said Peck, Coleman and Brett for their own use and behoof of their legal representatives to the full end and term for which the said letters patent are granted, as fully and entirely as the same would have been held by me had this grant and sale not been made.

Now, by force of the Act respecting patents of invention then in force, 32 and 33 Vic., ch. 11, as a right, title

and interest, which Powell then had in his invention as secured to him by the said letters patent of the 19th July, 1872, was the right, at, or before the expiration of the five years mentioned in the said letters patent of obtaining an extension of the said letters patent for another period of five years, and of obtaining again after the expiration of such second five years a further extension for other five years. It was thus, in point of fact, substantially true that the letters patent of the 19th July, 1872, were in the month of June, 1877, good for the period of ten years, which, as matter of fact, the learned chancellor has found that Powell represented them to be, and upon the faith of which representation Peck and his co-purchasers completed the purchase; and as this right of obtaining such extensions of the said letters patent of the 19th July, 1872, was a right incident to the said letters patent and vested in Powell, as the then holder thereof, it was a right which the terms of assignment executed by Powell as affecting the said five counties were sufficient to pass in equity, if not in law, to Powell's assignees; and when Powell by an instrument duly executed under the statute procured to issue to himself an extension of the said letters patent for a second period of five years from the 19th of July, 1877, over the whole of the Dominion of Canada, or a much larger portion thereof than was composed within the five counties to which the assignment of the date of the 1st June was limited, he became a trustee of such extension of the said letters patent and of all benefit thereof, as to the said five counties for the use and behoof of his said assignees, and having wholly repudiated such position, and having insisted upon retaining for his own use and benefit such extension of the said letters patent as well over the said five counties as over all other parts of the Dominion, and upon his having the right of disposing of the said extension, as to the

1885

PECK v. POWELL.

Gwynne J.

said five counties as he might think fit, the decree of the learned chancellor of the 2nd day of April, 1879, in the suit of *Peck et al* v. *Powell*, that the defendant Powell should, by a good and sufficient deed, free from incumbrances, assign and transfer to the plaintiffs therein the patent right secured by such extension for such second period of five years as regards the said five counties, and that he should do all things necessary to convey and assign to the plaintiffs by a good and sufficient conveyance in the law, the further right to obtain a further extension of the said letters patent, as affecting the said five counties, for the further period of five years from the expiration of the said second period, such deed to be approved by the Master in case the parties should differ about the same, and that the said defendant should pay to the said plaintiffs all costs as were by the said decree directed to be paid to them, was a decree quite warranted by the fact as found by the learned chancellor, and by the true construction of the agreement and assignment in the plaintiff's bill, relied upon and proved in evidence. This relief, as well as relief by way of an injunction as prayed for by the bill, was relief properly granted to the said plaintiffs under the case made by the bill, and established in evidence, and under the prayer for general relief, as well as under the special relief prayed for by the bill. It may be that by force of the statute 46 Vic. ch. 19, the latter part of this decree would be now unnecessary if the defendant Powell should execute a good and sufficient deed in the law, transferring to the said plaintiffs all right, title, and interest vested in him, in and to the said extension of the said letters patent obtained in the month of July, 1877, in so far as the said five counties are concerned, so that the plaintiffs may register the same according to law, but in view of the persistent contestation and denial to the present time by the defendant Powell of

1885

PECK v. POWELL.

Gwynne J.

the plaintiffs' right to the benefit of such extension, and the assertion by him of his own sole right and title therein and thereto, the plaintiffs are, in my opinion, entitled to the full benefit of the decree of the learned chancellor for the execution by the defendant of a good and sufficient deed in the law, transferring to the plaintiffs, free from incumbrances, such extension of the said letters patent and all the said respondent's right, title and interest therein and thereto as regards the said five counties.

The case of *Powell* v. *Peck et al.* was a bill praying for payment of money secured by mortgage on certain lands therein mentioned, and in default thereof for a sale of the mortgaged lands. To this bill the defendants set up by way of defence the agreement for the sale by Powell of his interest in the cone pump patent over the afore-named five counties, and the deed of transfer thereof, as set out in the bill of complaint at the suit of *Peck et al.* v. *Powell*, and averring by way of defence the several matters alleged in their bill and the payment into court of the sum of $735, in pursuance of an order made in the said suit wherein they were plaintiffs, they prayed, by way of cross relief, relief similar to that prayed for in their bill of complaint, and they, by their said answer, offered to pay to the plaintiff Powell the sum for which the mortgage in question was given, in accordance with the terms of the said mortgage as soon as the plaintiff should make good his representations and assurances, but they submitted that until the said plaintiff should do so they were not under any default, and that the plaintiff had no claim against them in respect of the said mortgage. The plaintiff, having joined issue to the said answer, relied upon the contention which he set up by way of defence to the bill at the suit of *Peck et al.* Both cases were tried together, and at the same time as the learned chancellor made the

1885

PECK v. POWELL.

Gwynne J.

decree above set out in the case of *Peck et al.* v. *Powell*, he made a decree in the mortgage suit to the effect that the bill of complaint of the plaintiff Powell should be dismissed with costs, but without prejudice to the right of the plaintiff to take proceedings on the mortgage in his bill mentioned, so soon as he should make good to the defendants, Peck *et al.* the consideration for which the said mortgage was given. Assuming the decree of the learned chancellor in the case at the suit of *Peck et al.* v. *Powell* to be, as I think it was, correct, I can see no substantial ground of objection to his decree in the case of *Powell* v. *Peck et al*, the plaintiff therein having persisted throughout, as indeed he still did, upon these appeals, that all that he transferred or agreed to transfer to Peck *et al* was an interest in the cone pump and its connections until the 19th July, 1877.

In my opinion, therefore, these appeals should be allowed with costs to be paid by the respondent to the appellants, and as the appellants by their answer to the respondent's bill have offered to pay to the respondent the sum for which the mortgage was given, so soon as the plaintiff in that suit should make good to them the benefit of their purchase of the patent right in the said cone pump over the said five counties for the full period of such patent right, we may, I think, vary the decrees as made in the Court of Chancery by consolidating the two suits into one and directing one decree to be made therein to the effect following: Direct the suits to be consolidated and declare that the agreement of the 1st June, 1877, in the second paragraph of the bill of complaint of *Peck et al.* v. *Powell* is valid and binding upon the parties thereto, and that the plaintiffs are entitled to have the representations of the defendant Powell in said paragraph set out made good and decree the same accordingly. Declare that the said instrument under the hand and

seal of the said Powell of the date of the same 1st of June, whereby the said Powell purported to grant, sell and set over unto the said Peck, Coleman and Brett in the agreement mentioned all right, title and interest, which he, the said Powell, had in the said invention of the cone pump and its connections therein mentioned secured to him by letters patent thereof as respects the counties of York, Halton, Peel, Simcoe and Ontario, was sufficient to transfer, and did transfer to the grantees therein named all his, the said Powell's, right, title and interest in and to the said letters patent and to the said patented article, as regards the said five counties, including in such rights and interest all right to the benefit of any extension that might be granted of the said letters patent under the provisions of the statute in that behalf (32 and 33 Vic., ch. 11), in so far as such five counties are concerned, and declare that the patentee, Powell, having by an instrument duly executed under the provisions of the said statute procured to himself an extension of the said letters patent of the 19th July, 1872, for five years from the 18th of July, 1877, over the whole of the Dominion of Canada, he thereby became and now is a trustee for his said assignees named in the said deed of transfer of the 1st of June, 1877, of the benefit of such extension, in so far as the same relates to and affects the said five counties. Order and decree that the said Powell do forthwith assign and transfer to the plaintiffs, Peck and Coleman, by a good and sufficient conveyance in the law free from all incumbrance, all benefit of, and all the right, title and interest of the said Powell in and to the said extension of the said letters patent from the 19th July, 1877, in virtue of the instrument securing or purporting to secure the sums to him in so far as such extension relates to the said five counties. Such conveyance to be approved by the master, in case the parties differ,

1885

PECK v. POWELL.

Gwynne J.

about the same, in which all proper parties are to join as the master shall direct, order and decree, that the defendant Powell do pay to the plaintiffs Peck and Coleman, all costs of the said consolidated suits, less such costs as shall be taxed as consequent upon adjournment of the hearing of the cause of *Peck at al* v. *Powell*, obtained upon the part of the plaintiff therein, which costs are to be taxed and allowed to Powell by way of set-off against the costs hereby made payable by him; and upon the execution by Powell of such good and sufficient deed as aforesaid, decree that an account be taken of what remains due to Powell upon the security of the mortgage in the pleadings mentioned in case the parties differ about the same with the usual decree for sale of the mortgaged premises in default of payment of costs up to the hearing, to be paid by Powell, and subsequent costs and further directions reserved.

In *Peck et al.* (*plaintiffs*) v. *Powell* (*defendant*)—*Appeal allowed without costs.*

In *Peck et al.* (*defendants*) v. *Powell* (*plaintiff*)—*Judgment of Court of Appeal varied as to costs of that court. Subject to such variation appeal dimissed, without costs.*

Solicitors for appellants: *Fitzgerald & Beck.*

Solicitors for respondents: *Delamere, Black, Reesor & Keefer.*