1881
*Dec. 12.
1882
*April 28.

MARY EMILY JOSEPHINE LAWLOR AND MARY LOUISE AUGUSTINE LAWLOR (PLAINTIFFS)..... } APPELLANTS;

AND

JOHN LAWRENCE LAWLOR (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Estate tail—Mortgage of, in fee simple—Statutory discharge, effect of—R. S. O. ch. 111, *sec.* 9 *and* 67.

Held,—(Reversing the judgment of the Court below, Henry, J. dissenting) that the execution and registration, in accordance with the Revised Statutes of *Ontario*, ch. 111, sec. 67, of a discharge of a mortgage in fee simple made by a tenant in tail reconveys the land to the mortgagor barred of the entail.

APPEAL from a judgment of the Court of Appeal of *Ontario* (1), on appeal to that court from the decree of Vice-Chancellor *Blake*, on a bill filed by the heirs general of *Michael Lawlor*, deceased, other than his eldest son, against his eldest son, for a declaration that the estate tail of *Michael Lawlor* had been barred by the execution by him as tenant in tail of a mortgage in fee simple in pursuance of the *Ontario* Short Forms of Mortgages Act, which mortgage had been paid off by the mortgagor, and discharged by the registration of a certificate under R. S. O. ch. 111, sec. 67.

The case came on by way of motion for decree before his lordship Vice-Chancellor *Blake*, who held that under R. S. O. ch. 100, sec. 9, the estate tail was absolutely barred by the execution of the mortgage.

On appeal, the Court of Appeal held that the giving

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

(1) 6 Ont. App. R. 312.

of the mortgage vested the fee simple in the mortgagee, and that if it had not been redeemed that estate would have remained in him, but (reversing the decision of *Blake*, V.C.,) that the execution and registration of the discharge above referred to operated as a valid and effectual reconveyance to the mortgagor and those claiming under him of the original estate of the mortgagor under R. S. O. ch. 111, sec. 67.

The pleadings are set out at length in the judgments hereinafter given.

Mr. *J. Stewart Tupper* for appellants:

There is no dispute as to the facts, and the sole point for decision is, whether the payment of the mortgage by *Michael Lawlor* in his life-time, upon a day later than the day provided for payment in the mortgage, and the execution by the mortgagees of a statutory certificate of discharge, and the registration of such certificate, had the effect of revesting in *Michael Lawlor* the lands in fee tail or in fee simple.

The appellants submit that *Michael Lawlor* died seized in fee simple of the lands, and that they descended to all his children in fee simple as tenants in common, and not to the eldest son as sole heir of his body: *Re Lawlor* (1); *Leith's* Real Property Statutes (2); *Coote* on Mortgages (3); *Hayes* on Conveyancing (4); *Sugden's* Real Property Statutes (5); *Trust and Loan Co.* v. *Fraser* (6); *Ostrom* v. *Palmer* (7).

R. S. O. ch. 100, sec. 3, enables a tenant in tail to dispose absolutely of the lands entailed for an estate in fee simple. Section 9 provides that a mortgage in fee simple by a tenant in tail is an absolute bar in equity as well as at law against all persons referred

(1) 7 U. C. P. R. 242.
(2) P. 338.
(3) 4th Ed. 330.
(4) 5th Ed. 183, 184, 185.
(5) 2nd Ed. 196, 200.
(6) 18 Grant 19.
(7) 3 Ont. App. R. 61.

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to in section 3 which includes the heir-at-law of the tenant in tail. Section 9 further provides that the execution of a mortgage in fee simple shall have such effect, "notwithstanding any intention to the contrary expressed or implied in the deed by which the disposition is effected." It is also provided by the same section that if the estate created by the mortgage is only an estate *pur autre vie* or lesser estate, then in that case it shall only be a bar so far as may be necessary to give full effect to the mortgage.

The learned judges of the Court of Appeal as well as the learned Vice-Chancellor, agree in the opinion that the land was, by the execution of the mortgage, disentailed, and that the fee simple was in the mortgagees. The judgment of the Court of Appeal is based upon the fact that a statutory certificate of discharge was given by the mortgagees instead of a re-conveyance of the fee simple, which the court admits would have vested it in the mortgagor.

Now the fee simple was in the mortgagees, even after the mortgage money had been paid, and the mortgagor, *Michael Lawlor*, had the right to call for a conveyance of the fee simple. He and his heirs general had the equity to a conveyance of all the estate that was in the mortgagees. His equity of redemption prior to payment was an equity of redemption in him and his heirs general. After the making of the mortgage, there was no right or title left in the original settlor who had created the fee tail, or his heirs, or in those whom he may have indicated in the settlement to be the remainder men, in case the issue in tail should fail. By the creation of the fee simple their interest had been absolutely barred at law and in equity. If the judgment of the Court of Appeal be right, what has become of the fee simple? It was in the mortgagees. They have not reconveyed, it but have carved out of it a lesser estate, and

given it to *Michael Lawlor* and the heirs of his body only. The effect of this would be that upon the failure of direct lineal issue of *Michael Lawlor*, the estate would revert to the mortgagees in fee simple for their own benefit. It is submited that such could not be the intention of the Act. If the statutory form of discharge fell short in law of operating as a conveyance of the fee simple, *Michael Lawlor* nevertheless had the right and equity to have the fee simple re-conveyed, and could have declined to accept the simple discharge prescribed by the statute: *McLennan* v. *McLean* (1). The right is not lost to his heirs general. For the purposes of this suit, it is immaterial that the attempted re-conveyance fell short of what *Michael Lawlor* could demand; just as in the case of no re-conveyance and no certificate of release whatever having been given, the heirs general would be entitled to call for a re-conveyance, and to maintain this suit.

In the case of *Michael Lawlor* dying before redemption, it is submitted that the heirs general would have had the right to redeem, as the estate to be redeemed was a fee simple. If they had after payment by them, taken a statutory certificate of discharge, it is submitted that the effect could not be to give to all of them an estate in fee tail; *a fortiori*, it could not enable the eldest son to step in and say it gave him an estate in fee tail; and yet the statute R. S. O. ch. III, sec. 67, says the registration of such discharge shall be as valid and effectual in law as a release of such mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming, by through or under him or them, of the original estate of the mortgagor. It is evident that a wider meaning must be given to the words, "conveyance of the original estate of the mortgagor," than the interpretation put upon them by the Court of Appeal

(1) 27 Grant 54.

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The intention clearly was that, upon payment of the mortgage and registration of the discharge, all the estate which the mortgagor conveyed to the mortgagee should revest in the mortgagor, and that the words "original estate" will include where necessary any estate that the mortgagor has conferred upon the mortgagee; also, that they will include the estate which, in the present instance, the mortgagor had potentially and virtually in him—viz., a fee simple: 35 *Geo.* III, c. 5; 4 *Will.* IV, c. 20; R. S. O. C. III, sec. 67; *Caledonian Railway Co.* v. *North British Railway Co.* (1).

If it were not so, what would be the effect in the following case? The owner in fee gives his mortgagee a term of ninety-nine years as security for repayment of a loan. The money is paid at the end of ten years. A statutory discharge is given. It cannot be contended that this is "a conveyance of the original estate of the mortgagor," for that would be the conveyance of a fee by the mortgagee who has only a term of years.

Take the case also of one who has only a term of years, and who purports to give a mortgage in fee simple. The mortgagor subsequently acquires the fee simple, and the mortgagee thus also acquires by estoppel the fee. Upon a discharge, it is the fee simple that is conveyed to the mortgagor, and not his *original estate*, which was only a term of years.

Or suppose that Michael Lawlor, after giving the mortgage, had conveyed his equity of redemption in the said lands to A.B., who then redeemed and took a statutory discharge. Could it be contended that such discharge would operate as a conveyance to A.B., not of the fee simple, but of the original estate of Michael Lawlor, which was an estate in fee tail?

Mr. *McIntyre* for respondent:

The respondent's contention on this appeal is two-

(1) 6 App. Cases, 114.

fold, and the establishment of either branch of his case, irrespective of the other, is sufficient to his success.

The first branch is that the former half of R. S. O, sec. 9, ch. 100, does not apply to a mortgage conditioned to be void upon payment, but that such an instrument is within the exceptions enumerated in the latter half of the same section, and, therefore, is only a bar of the estate tail "so far as may be necessary to give full effect to the mortgage."

The usual form of mortgage in *England* contains a proviso for a reconveyance from the mortgagee to the mortgagor upon payment (1). Our Act (R. S. O., ch. 104, schedule B, sec. 2,) provides that upon payment, "these presents and everything in the same contained shall be absolutely null and void."

Now, it is explained by Lord *St. Leonards* (2) that the object of the statute was to put an end to questions of resulting trusts, where the prescribed destination of the estate does not follow the state of the title as existing at the time of the mortgage, and while, therefore, as the lesser of two evils, it is in the general case in the first half of the section provided that the specific intention shall not be the measure of the substantial disposition (as it would be under the established rule in equity,) care is taken in the excepted cases in the latter half to remove from the operation of the statute all dispositions by way of mortgage which do not involve the question of a resulting trust. See also *Hayes* on Conveyancing (3); *Davidson's* Prec. (4).

It is laid down by Mr. *Shelford* in his work on the real property statutes (5), that where a mortgage is intended to be an absolute bar of the entail under the

(1) See Crabb, 4th Ed. ii., 922, and the English text writers passim.

(2) Sugden's R.P. Stats. 199, 200.

(3) 3rd Ed., Vol. ii. 582-3.

(4) 5th Ed. Vol. i, 184-5.

(5) P. 330-1.

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statute the proviso of redemption should not be drawn so as to make the estate of the mortgagee void upon payment, but to direct that he shall re-convey it, (which is the usual form in *England*) to the uses intended.

Again the proviso of redemption in the usual form of copyhold mortgages (1), is that the mortgage shall be void upon payment. A mortgage of copyhold is effected by conditional surrender to be followed by admittance upon default of payment; and it is the opinion of the text-writers that if a legal tenant in tail of copyhold mortgage by conditional surrender which is not followed by admittance, but the money is paid off and the surrender vacated by entry of satisfaction, the estate tail remains unaffected. but that the estate tail would be barred if surrender were followed by admittance (2). Conditional surrender and admittance are corresponding terms and transactions to mortgage under our Act and foreclosure. In other words, our form of mortgage is only a bar of the entail so far as may be necessary to give full effect to it (*i. e.*, in the event of default and foreclosure), and is within the excepted cases enumerated in the latter half of section 9, R. S. O., ch. 100, as to which effect is denied even to an express declaration extending the operation of the charge beyond its immediate purpose, so that the covenant to pay by the mortgagor, his heirs and assigns, which may be urged contra, has no weight or significance.

That payment was made after the day on which it was due is no objection, inasmuch as such payment was made before foreclosure proceedings and was accepted by the mortgagee. *Fisher* on Mortgages (3): "Whether the money be paid or not at the proper time, it is considered sufficient in practice to enter satisfaction on the rolls."

(1) Grabb 4th Ed. ii. 938.
(2) Davidson's Prec. 3rd Ed. ii. 583 note q; Shelford's R. P. Stat. 331.
(3) Vol. ii. S. 1716.

The second branch of the respondent's contention is, that the registration of the certificate of discharge operated as a re-settlement of the estate to the former uses by virtue of section 67 of the Registry Act (1), which provides that "such certificate so registered shall be as valid and effectual in law as a release of such mortgage and a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or any person lawfully claiming, by, through or under him or them, of the original estate of the mortgagor.

Let us assume for the purpose of argument that we are within the general case provided for by the first half of section 9, R. S. O., ch. 100. Neither the Imperial Act nor our own, although denying effect to an intention of the mortgagor expressed or implied, lays any prohibition of the estate to the former uses which may be effected by the same or another instrument (*Davidson's* Prec.) (2).

Our legislature has declared that the registration of a certificate of discharge shall have that effect *videlicet*, a re-conveyance to the mortgagor, his heirs, etc., or any person lawfully claiming by, through, or under him or them of the original estate of the mortgager. Here is express statutory provision for the re-settlement of the estate to the former uses in the events which have happened, and the parties must be presumed to have acted with a knowledge of the law. *Leith's* Real and Personal Property (3); *Smith's* Real and Personal Property (4).

It is urged by the other side against thus reading the Registry Act, as meaning what it says, that the effect of thus re-settling the estate tail by statute would be to leave the reversion in the mortgagees.

But so would the reversion be left in the mortgagees,

(1) R. S. O., c. 111.
(2) 3rd Ed. s. 2, p. 583.
(3) P. 338.
(4) P. 363.

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in case of a re-settlement to the former uses by deed—which it is indisputable may be done and is done.

RITCHIE, C. J.:—

Michael Lawlor, now deceased, was tenant in fee tail in possession of a certain parcel of land in the City of *Toronto*.

In his lifetime, on the 8th February, 1867, he conveyed by indenture of mortgage to the Freehold Permanent Building Society, their successors and assigns for ever, *inter alia*, the said land, and by the said indenture covenanted that he had a good title in fee simple to the said land, and that he had the right to convey the same to the said society.

On the 6th June, 1870, the said *Lawlor* paid off the mortgage,and a certificate of discharge of the same was registered in the Registry Office of the city of *Toronto* on the same day.

The said *Michael Lawlor* died on the second day of June, A.D. 1874, leaving him surviving the following, his only children, *Arthur René Patrick Lawlor*, *Mary Emily Josephine Lawlor*, *Mary Louise Augustine Lawlor*, and *John Lawrence Lawlor*.

The eldest son, *Arthur René Patrick Lawlor*, made a ease to *Moses Staunton*, bearing date the sixteenth day of October, A.D. 1875, for twenty-one years, of the parcel of land firstly described, at the annual rent of three hundred and five dollars per annum.

Moses Staunton died in the year 1877, after having first made his last will and testament, and appointed the said defendants, *James Staunton* and *Sarah Staunton*, his executors thereunder.

Arthur René Patrick Lawlor died on the fourteenth day of September, A.D. 1880, being then in his ninth year.

The defendant, *John Lawrence Lawlor*, is the eldest

brother of *Arthur René Patrick Lawlor*, and his heir-at-law in respect of any entailed estates, and the said *John Lawrence Lawlor* claims to be entitled to the rents and profits under the said lease.

The plaintiffs are willing to confirm said lease and be parties thereto, but submit that the said lease should be reformed and corrected by the plaintiffs being with the defendant, *John Lawrence Lawlor*, made parties thereto, as to the said land secondly described, as lessors, and declared entitled to a proportionate part of the rent. Until the month of January, A.D. 1881, the fact of said mortgage having been given was unknown to the plaintiffs, and to the guardian of the plaintiffs, who was also the guardian of the said *Arthur René Patrick Lawlor*; and it was also unknown to the said *Moses Staunton*.

The plaintiffs pray that it may be declared that the estate tail of said *Michael Lawlor* in the said secondly described lands by said mortgage became enlarged to an estate in fee simple, and that said *Michael Lawlor* at the time of his death was seized in fee simple of said lands, and that the plaintiffs and defendants, *John Lawrence Lawlor* and the deceased *Arthur René Patrick Lawlor*, were entitled to the same as tenants in common in fee simple.

That the said lease may be reformed, and the plaintiffs and defendant, *John Lawrence Lawlor*, be made parties thereto, as lessors, and that the said lease may be amended in all necessary respects, and the plaintiffs declared entitled to a proportionate part of the rent.

That the plaintiffs may have such further and other relief as may be requisite.

That the plaintiffs may be paid their costs of suit out of said property.

Mr. V. C. *Blake* held that the estate tail of *Michael*

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Lawlor (deceased) in the lands in question, was absolutely barred by his execution of the said mortgage in fee simple, and that his children were entitled to the same as tenants in common.

Long previously to the year 1834, mortgages could be released or discharged on the records of the county by a certificate, the form of which was given by statute, but the effect of such certificate as affecting the title was not declared by statute, so that, notwithstanding such certificate discharging the mortgage, the estate conveyed to the mortgagee, in the absence of a reconveyance, if the condition on which the estate had been conveyed had not been fulfilled, remained in him. To obviate this difficulty and save the necessity of a reconveyance, the 4 *William IV.*, ch. 16 (1834), was passed to deal with the estate conveyed by the mortgagors to the mortgagees and is entitled "An Act concerning the release of Mortgages," and after reciting that

> Whereas it may have happened that by reason of the non-payment of the sum of money, or of the non-performance of the condition mentioned in any mortgage at the time therein limited for payment or for performance of the same, the original estate in law may have become vested in the mortgagee, his heirs or assigns:

(which, be it remarked, could only have been the estate actually conveyed to the mortgagee).

> And whereas after such estate shall so have become vested, the money secured by such mortgage, or the condition therein expressed as a defeasance of the same, may have been paid or performed respectively, and the mortgagee, his executors, administrators or assigns, may have executed a certificate of payment or performance of the condition of such mortgage: And whereas such certificate so given does not in law so operate as a re-conveyance of the original estate of such mortgagor, or as a release or defeasance of such mortgage.
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> * * * *
>
> It is enacted: That any certificate by any mortgagee, his heirs, administrators or assigns, heretofore given and registered under the provisions of an act passed in the thirty-

fifth year of the reign of His Majesty King *George III*, intituled "An Act for the public registering of deeds, conveyances, wills and other incumbrances which shall be made or may affect any lands, tenements or hereditaments within the province, or which may be hereafter registered under the provisions of this Act, whether the same shall have been given or shall hereafter be given, either before or after the time limited by such mortgage for payment or performance as aforesaid, shall be and the same is hereby declared to be valid and effectual in law as a release of such mortgage, and as a reconveyance of the original estate of the mortgagor therein mentioned: Provided that such certificate, if given after the expiration of the period within which the mortgagor had a right in equity to redeem, shall not have the effect of defeating any title other than a title remaining vested in the mortgagee, or his heirs, executors or administrators.

The registry laws were consolidated and amended by the 9th *Vic.*, chap. 34, in which the provision, as regards such certificates, was in the very words of the 4th *Wm. IV.*, chap. 16. In that same year the 9th *Vic.*, chap. 2, was passed in reference to estates in tail.

The sections of these two acts as affecting the question now under consideration, are as follows:

9th *Vic.*, chap. 34, section 24:

Provided always, and be it enacted: That any certificate of payment or performance of the condition of any mortgage by the mortgagee, his heirs, executors, administrators or assigns heretofore given, and registered under the provisions of the Act herein first above cited and repealed, or which having been given under the provisions of the said Act may be registered under this Act, or which may be hereafter given and registered under the provisions of this Act, whether the same shall have been given or shall hereafter be given either before or after the time limited by such mortgage for payment or performance as aforesaid, shall be and the same is hereby declared to be valid and effectual in law as a release of such mortgage, and as a reconveyance of the original estate of the mortgagor therein mentioned.

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9th *Vic.*, chap. 2, section 3:

And be it enacted: That after the first day of July, one thousand eight hundred and forty-six, every actual

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tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of, for an estate in fee simple absolute or for any less estate, the lands entailed as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous Act would have been vested in, or might have been claimed by the person making the disposition, at the time of his making the same, and also as against all persons, including the Queen's Most Excellent Majesty, Her heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail, saving always the right of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons except those against whom such disposition is by this Act authorized to be made.

Section 9:

Provided always, and be it enacted: That if a tenant in tail of lands shall make a disposition of the same, under this Act, by way of mortgage, or for any other limited purpose, then, and in such case, such disposion shall, to the extent of the estate thereby created, be an absolute bar in equity, as well as at law, to all persons as against whom such disposition is by this Act authorized to be made, notwithstanding an intention to the contrary may be expressed or implied in the deed by which the disposition may be effected.

The policy and object of these acts relating to mortgages was to enable a mortgagee on payment of the mortgage money by a simple and short process to revest in the mortgagor the estate conveyed by him to the mortgagee, that is to say to give to a registered certificate the force and effect of a conveyance, but not to give to such a certificate any other or greater operation. The policy and object of the legislature in regard to estates tail was to discourage estates tail and to get rid of such estates by a simple and easy process, and therefore power was given to a tenant in tail to bar the entail by a conveyance in fee, and, though the conveyance in fee was only by way of mortgage in fee, the statute made such a conveyance operate as a bar of the estate tail both at law and in equity. It is stated in the judg-

ment of Mr. Justice *Burton* that the framers of the enactment relating to the effect of the discharging of a mortgage had in their mind such a case as the present and that the parties here have contracted also on that assumption. I cannot appreciate the force of this observation, as applied by the learned judge. If the parties here referred to are the mortgagor and mortgagee, it is clear from the mortgage itself that they contracted not only without reference to an estate tail, but unquestionably with reference to an estate in fee, for not only does the mortgage by express words convey a fee, but the mortgagor covenants that he has a good title in fee simple to the said lands and has a right to convey the same as he does by said mortgage. As to the assumption that the framers of the act relating to the effect of the registered certificate of discharge of a mortgage had in their mind such a case as the present, it is, I think, very plainly rebutted by the fact that when the original act was framed, there was no such Act as the 9 *Vic.*, ch. 34, relating to estates tail, and therefore it could not have been then contemplated that the language used would have any reference to or bearing on a case like the present. But apart from the consideration of the scope and object of the act, I think it is still more strongly rebutted by the language of the act itself, because, I think, so far from the literal words of the 9 *Vic.*, ch. 34, and the act of which it was a consolidation, supporting the view for which the learned judge was contending, the literal words of those statutes are in exact accordance with the contention of the appellants. As to the policy and object of the act, the only estate of the mortgagor which the legislature could have contemplated should pass by operation of law by virtue of a registered discharge of the mortgage and revest in the mortgagor was the estate he had conveyed to the mortgagee, because in the absence of any such act as the 9 *Vic.*, ch. 2, relat-

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ing to estates in tail, the effect of any deed the mortgagor could at that time execute could only have the effect of conveying the title and estate he himself had and could give the mortgagee no other or greater estate, and no deed back from the mortgagee could give the mortgagor any other better or greater estate than he had received, and the literal words of these acts show the release was to be equivalent to a re-conveyance, which, if this word means anything, I take to be a conveyance back of what had been previously conveyed; the term re-conveyance would be unsuitable and inconsistent, if instead of the mortgagee conveying back the estate he had received, he was to convey another and different estate, or as has been suggested, that notwithstanding the literal words of the statute, the effect of his release was not to operate as a re-conveyance to the mortgagor, but was to operate as a re-settling of the estate, in other words conveying back to the original settlor, living or dead, the estate in fee, and carving thereout an estate tail to the mortgagor: certainly a very large departure from the literal words of the statute. In this same statute the intention is not alone indicated by the term "re-conveyance," nor in the fact that at the time of its passage the original estate of the mortgagor, capable of being re-conveyed, could only be the estate conveyed by him, but there is to be found a clear meaning given to the words "the original estate of the mortgagor," in the words which immediately follow "mentioned therein," and the sentence reads thus: "shall be and the same is hereby declared to be valid and effectual as a release of such mortgage and as a re-conveyance of the original estate of the mortgagor therein mentioned." As the matter being dealt with was the estate and not the personalty of the mortgagor, it seems to me the words in this sentence "mentioned therein," taken in

connection with the word "re-conveyance," may be read as applying to the estate and not to the mortgagor.

This then was the position of matters up to the Revised Statutes O. c. 111 sec. 27 and Consolidated Act 31 *Vic.*, ch. 20. Though the word "conveyance" is substituted for "re-conveyance," and the words "therein mentioned" are omitted in the revised and consolidated statutes, I have searched in vain to discover one word indicating any intention on the part of the legislature to give to a registered certificate any greater or other effect than it was intended to have, and could only have had, under the original Act and the 9th *Vic.* But, apart from mere verbal phraseology, the statute unequivocally declares that a mortgage shall bar the estate tail both at law and in equity, and that it shall destroy the estate tail and convert it into an estate in fee, and this is to be accomplished notwithstanding any intention to the contrary, express or implied, in the deed by which the disposition is effected, clearly establishing the policy of the law as unfavorable to estates tail; and, such an estate having been got rid of by this statutory operation, it is not, I think, unreasonable, before an estate tail is held to be re-established by virtue of the statute, to ask that an intention that such should take place should be very clearly manifested. An estate in fee having been, by virtue of the mortgage, created and vested in the mortgagee, its continuance is, in my opinion, alone consistent with the policy of the law and leads to no inconsistencies or incongruities; and recreating an estate tail on the contrary, is inconsistent with such policy involving possible and probable anomalies and inconsistencies which never could have been intended by the legislature.

If the words "original estate" refer to the tenancy in tail of the mortgagor, it is not difficult to suggest circumstances of by no means improbable occurrence

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which would lead to complications and anomalies of an inconsistent and unreasonable character.

If the effect is simply to vest in the mortgagor an estate in tail, should the issue in tail fail, to whom is the estate to go? Is it to revest in the mortgagor or his heirs, or to go to the original owner in fee or his heir? If the former, surely such a state of things could never have been intended; if the latter, to accomplish this you must depart from the literal language and construe it so as to make the registered certificate amount, not to a conveyance to the mortgagor of his original estate, but to a conveyance to the settlor, whose tenant in tail the mortgagor was, if living, or his heirs, if dead, of his original estate, while, by virtue of the statute and the mortgage, all his estate, both at law and equity, has been taken from him, so that, if the literal words of the statute are to prevail, no words are to be found clothing the settlor with his original estate, or with his original estate with a tenancy in tail carved out of it? Or, in case of the death of the mortgagor, is the eldest son alone entitled to redeem? Or, if the mortgagee elects to reconvey, to whom is the reconveyance to be made, and what is the estate he is to reconvey, and to whom? Or, again should the mortgagor die and the mortgage money is paid out of his personal estate, which would be the fund primarily liable, are the shares of all the children in the personal estate to contribute to such payment, and the eldest son take the whole mortgaged premises released from the mortgage debt? Or, is their money to be taken and they compelled to look to him for reimbursement? Or, in view of the contingencies so pertinently suggested by Mr. *Tupper* in his very clear and very able argument, what would be the effect in the following case:—The owner in fee gives his mortgagee a term

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of ninety-nine years as security for repayment of a loan. The money is paid at the end of ten years. A statutory discharge is given. Can it be contended that this is "conveyance of the original estate of the mortgagor," for that would be the conveyance of a fee by the mortgagee who has only a term of years.

Take the case also of one who has only a term of years, and who purports to give a mortgage in fee simple. The mortgagor subsequently acquires the fee simple, and the mortgagee thus also acquires by estoppel the fee. Upon a discharge, it is the fee simple that is conveyed to the mortgagor, and not his original estate, which was only a term of years.

Suppose that *Michael Lawlor*, after giving the mortgage, had conveyed his equity of redemption in the said lands to *A. B.*, who then redeemed and took a statutory discharge. Could it be contended that such discharge would operate as a conveyance to *A.B.*, not of the fee simple, but of the original estate of *Michael Lawlor*, which was an estate in fee tail.

But assuming the words used have the literal meaning attributed to them in the court below, and are to be read and construed without reference to the previous statutes *in pari materiâ*, which I think ought not to be, I cannot think that as opposed to the policy and object of the Act, they are so inflexible that they cannot be read as conveying the intention of the Legislature, that the release was to operate as a conveyance to the mortgagor of all the estate the mortgagor at the time of the making of the mortgage had the power and ability of conveying, and which he by the mortgage did actually convey to the mortgagee. I cannot think this is a forced or constrained construction. It is a well established principle that in construing acts of Parliament the literal signification of the words is not to be

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adhered to, if such a construction would involve a manifest inconsistency or absurdity.

And in the *Caledonian Railway Co. v. North British Railway Co.* (1) it was said by Lord *Selborne*, L. C.:

> The more literal construction ought not to prevail, if it is opposed to the intention of the Legislature, as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.
>
> * * * * * * * *

And by Lord *Blackburn*:

> The matter turns upon the construction of an Act of Parliament which is an instrument in writing. I believe there is no dispute at all that in construing an instrument in writing, we are to consider what the facts were in respect to which it was framed, and the object as appearing from the instrument, and taking all those together, we are to see what is the intention appearing from the language, when used with reference to such facts, and with such an object.

In *Ex parte Walton*; *re Levy* (2), *Jessel*, M. R. says:—

> This case raises a very important question as to the proper construction to be put upon the 23rd section of the Bankruptcy Act, 1869. Before considering the exact words of the section in question, I should like to say a word or two as to the rule which is binding on all courts when they are concerned to construe statutes or other instruments. Whatever may have been the rule in times past as to the interpretation of statutes, the rules which are to be applied are now well recognized. In order to show what those rules are, I am about to cite some passages from the last case on the subject, that of the *Caledonian Railway Company* v. *The North British Railway Company* (3), decided by the House of Lords on the 17th of February last. That is not only the last decision as to the construction of statutes, but it is a very recent decision. It was an appeal from the Court of Sessions in *Scotland*, but it is an authority binding on this court inasmuch as the law on the subject is the same both in *England* and *Scotland*. The appellants there said that the literal effect should be given to the words of the statute, although by such a construction effect would not be given to the preamble of the statute. But in his judgment the Lord Chancellor, Lord *Selborne*, said: "The more literal construc-

(1) 6 App. Cases 114.

(2) 45 L. T. N. S. 2.

(3) 6 App. Cases 114.

tion ought not to prevail if (as the court below has thought) it is opposed to the intention of the legislature as apparent by the statute; and if the words are sufficiently flexible to admit of some construction by which that intention will be better effectuated." And Lord *Blackburn* cited with approval the opinion of Lord *Wensleydale* which he called the golden rule for construing all written engagements, and which in the case of *Grey* v. *Pearson* (1), he stated thus: "That in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no further."

Believing, therefore, that the construction of this act contended for by appellant is in accordance with the intention of the legislature as expressed in the original enactments, and with the policy of the law, and leads to no inconveniences or inconsistencies whatever, while the opposite construction would in a great variety of cases be anomalous and inconsistent, and is not warranted by the literal language of the act, I think the appellants contention should prevail.

I am of opinion that the legislature intended that the release should be equivalent to and have the same effect as a conveyance by deed, that it was not intended that the mortgagor should receive back from the mortgagee an inferior or lesser estate than he had conveyed to him; in other words, that the legislature intended that the release should, by operation of law, take out of the mortgagee all the estate vested in him, and vest the same in the mortgagor, thus giving back to the mortgagor just what the mortgagee received from him—no more nor less.

When the case was first opened I must say I was impressed with the observations of the court below upon the wording of the Act, but, on a critical and further

(1) 29 L. T. Rep. O. S. 71; 6 H. of L. Cases 106.

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consideration of the case and the consideration of Mr. *Tupper's* clear and, I now think, conclusive argument, all doubts have been removed from my mind.

STRONG, J.:—

This is a suit instituted in the Court of Chancery of *Ontario* by the appellants, who are the heirs general of *Michael Lawlor*, deceased, other than the respondent, against his eldest surviving son, the present respondent, as heir in tail of his father, praying a declaration by the court that the estate tail of *Michael Lawlor* in the lands in question had been barred and converted into a fee simple by the execution by *Michael Lawlor*, when tenant in tail in possession, of a mortgage in fee simple, and that his children were therefore entitled as heirs general to the same as tenants in common in fee simple.

There was no dispute as to the facts, and the only point for decision is whether the payment of the mortgage debt by *Michael Lawlor* in his lifetime upon a day later than the day of payment appointed in the mortgage deed, and the execution by the mortgagees of a statutory certificate of discharge and the registration of such certificate under the provisions of the Registry Act, had the effect of revesting in the mortgagor the legal estate in fee simple or in fee tail.

The appellants contend that *Michael Lawlor* died seised in fee simple of the lands in question, and that they consequently descended to all his children as tenants in common in fee simple. The respondent on the other hand insists that, although the effect of the mortgage by *Michael Lawlor*, a tenant in tail in possession, was to vest an estate in fee simple in the mortgagees, yet that by force of the Registry Act, declaring the effect to be given to the registration of the discharge of a mortgage, the fee simple which had been acquired by the mortgagees did not pass to the mort-

gagor, but the original estate tail which he had up to the date of the execution of the mortgage was revived and revested in him. The cause was originally heard before Vice Chancellor *Proudfoot*, who made a decree in accordance with the prayer of the bill. This decree was afterwards reversed by the Court of Appeals, from whose decision the present appeal has been brought.

By the act respecting the Assurance of Estates Tail, Revised Statutes of *Ontario*, ch. 100, sec. 9, which is a transcript of the 21st section of the English Act for the abolition of Fines and Recoveries, 3 & 4 *W. IV.*, ch. 74, it is enacted that:

> If a tenant in tail of lands makes a disposition of the same under this act by way of mortgage or for any other limited purpose, then such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well as at law to all persons as against whom such disposition is by this act authorized to be made notwithstanding any intention to the contrary expressed or implied in the deed by which the disposition is effected.

The effect of this provision was, therefore, to make the mortgage in fee executed by *Michael Lawlor* an absolute bar to his heir in tail, in other words, to convert his estate tail into a fee simple as effectually as if he had executed a disentailing assurance under the statute by granting the estate to a grantee in fee limiting the use to himself in fee simple. The mortgagees, therefore, took a legal estate in fee simple, and *Michael Lawlor* could, upon payment, have insisted upon a reconveyance to himself in fee, and if the mortgagees had refused so to re-convey, they could have been compelled to do so by the decree of a Court of Equity in a suit instituted for that purpose. The re-conveyance was, however, not carried out by a formal deed, but by means of a discharge of the mortgage in the form prescribed by the 67th section of the Registry Act, (Rev. Stat. *Ont.* ch. 111,) which enacts that the registration of

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a certificate by the mortgagee of the due payment of the mortgage money shall be as "Valid and effectual in law as a release of such mortgage and as a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or any person lawfully claiming by, through, or under him, or them, of the original estate of the mortgagor."

The Court of Appeals determined that by the operation of this provision in the present case the effect of registering the certificate was to revive in *Michael Lawlor* the estate tail, which by force of the section of the act relating to estates tail already quoted had been absolutely barred by the execution of the mortgage in fee. This decision is based entirely upon the construction given to the words in the clause of the Registry Act before quoted: "the original estate of the mortgagor." I am unable to concur in this conclusion, for I am of opinion, that the effect of the registered certificate must be to vest in the mortgagor the entire legal estate held by the mortgagee, and of which, after payment, he was a mere trustee for the mortgagor.

The sole object of the provision in the Registry Act was manifestly to afford a cheap and simple method of enabling mortgagors to obtain a re-conveyance; it was originally enacted long before the statute relating to the abolition of estates tail, having been first contained in a statute of *Upper Canada* containing this provision relating to the discharge of mortgages alone, which was passed in 1834, and it has been embodied in its original terms in the subsequent Registry Acts and in the three successive revisions of the statute law of *Upper Canada* and *Ontario* which have since been made. I think we are called upon to construe the words "release" and "conveyance of the original estate of the mortgagor," as meaning that the whole estate which originally passed to the mortgagee, and of which the equity

of redemption remains in the mortgagor, should be deemed to pass by the effect of the registration. To give the words the strict verbal construction ascribed to them by the court below, would be to prevent the manifest intention of the framers of the Act, which could have been no other than that I have mentioned, to substitute for a formal reconveyance a less expensive and more expeditious mode of revesting the estate in the mortgagor. Could it be pretended that in case a tenant for life, having also a power to appoint the fee simple, should have made a mortgage by executing the power and appointing the fee simple to the mortgagee, also conveying his life estate for the same purpose by the same instrument and limiting the equity of redemption to himself in fee, thus not merely executing the power for the purpose of the mortgage but absolutely, were to take a statutory discharge and register it, that would have the effect of revesting in the mortgagor, not merely the life estate, but also of restoring the power which would be exhausted and gone. This, however, would be the effect of the strict construction given to the words "original estate of the mortgagor," by the Court of Appeals, for the operation of a conveyance by a tenant in tail in possession in passing a fee under the statute is strictly the execution of a statutory power, and the analogy between it and a conventional power in the case which I put is for all present purposes perfect.

Further, the words of the section of the Registry Act prescribing the effect of the discharge have not, as it appears to me, been sufficiently considered; the discharge is to be valid and effectual as "a release of such mortgage." I do not construe the release here meant as a mere release of the debt, for a release of a debt already paid and declared to be paid and satisfied by the certificate would be useless. I consider this expression as having refer-

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ence to the legal estate held by the mortgagee, and I read it as being used in the same sense as the term "release" is applied to a conveyance of the legal estate by a trustee to his *cestui que trust*—not used, it is true, as the strict technical definition of the legal conveyance adopted to pass the estate, but including in a generic sense any conveyance by which the estate of the trustee is re-conveyed to the *cestui que trust*. I think, therefore, that by force of the words "release of such mortgage," the statute clearly enough expresses that the whole estate held as a trustee by the satisfied mortgagee shall pass to his *cestui que trust*, the mortgagor, in as large an estate as that which the latter has in the equity of redemption vested in him at the time the certificate is registered. Any other construction than this, it appears to me, would be in direct contravention of the policy of the act relating to estates tail, which, by the strong provision of the clause in question, enacting that the conveyance of a fee simple for a limited purpose merely shall constitute an absolute bar, an effect which no expression by the parties of a contrary intention shall control, is shown to be the principle that an estate tail once discharged or enlarged into a fee simple for any purpose is not to be kept alive or revived.

If the words of this provision for the registry of the discharge were so strong as to admit of no other construction than that adopted by the Court of Appeals, I should consider that that enactment, originally passed long before the statute relating to the assurances of estates tail, had no application to the case of a mortgage of such an estate vesting the fee simple in the mortgagee. For the reasons, however, which I have before stated, I am of opinion that this statutory mode of reconveyance is applicable alike to a case such as the present, as well as to the case of a mortgage in fee created by a tenant for life having power to appoint

the fee, and that in both cases the effect of registering the certificate is to clothe the equitable estate vested in the mortgagor with the legal estate of the mortgagee, although that legal estate may not be the same estate as that held by the mortgagor prior to the execution of the mortgage, but only the estate originally acquired by the mortgagee under the operation of the mortgage.

I think the Vice Chancellor took a correct view of the construction to be placed upon the clause in question, and that his decree ought to be restored by reversing the order of the Court of Appeals, which must of course be with costs.

FOURNIER, J., concurrred with *Ritchie*, C.J.

HENRY, J.:

The tenant in tail of the land in question in this suit made a conveyance by way of mortgage, and thereby under the provisions of section 9 of chapter 100 of the revised statutes of *Ontario*, converted the estate into one of fee simple, which was held during the currency of the mortgage by the mortgagee. The mortgage was paid off by the tenant in tail and a certificate of discharge as provided by the Registry Act was obtained and duly registered, as provided by sec. 68 of ch. 111 of the revised statutes.

The question then is, what estate had the mortgagor after the mortgage was so discharged? Upon the settlement of that question the rights of the parties in this suit depend.

There is no doubt but the mortgagees held for the time an estate in fee simple and the rights of all parties were barred for the time.

The mortgage not having been paid off when due I consider of no consequence. The mortgagees received payment, and it matters little at what time provided it was done in the lifetime of the mortgagor. They gave a certificate which put an end to any title they at any time had.

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Section 6 of ch. 99 of the revised statutes provides that a certificate of payment or discharge of a mortgage "at whatsoever time given, and whether before or after the time limited by the mortgage for payment or performance, shall, if in conformity with the Registry Act, be valid to all intents and purposes whatsoever."

There was no re-conveyance from the mortgagees, and therefore I think it unnecessary to consider what the effect of such might be. One statute enabled the tenant in tail to convey in fee by a mortgage, and another statute—passed twenty-two years afterwards—provides for the release and discharge of the mortgage, thereby determining the title and estate of the mortgagees whatever it was. The 68th sec. of ch. 100 of the revised statutes (enacted 31 *Vic.*, ch. 20, sec. 60), provides that the "certificate so registered shall be as valid and effectual in law as a release of such mortgage and as a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or of any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor."

By the provision of the statute the tenant in tail is enabled to mortgage in fee and thereby convey a higher title than he held, but in the absence of a conveyance back to him of the higher estate he could not claim to have such, particularly when the statute provides otherwise. The mere payment of the mortgage has not the qualities of a conveyance, and the section of the Registry Act expressly provides that the only effect of the certificate is to give him the original estate he held. To decide otherwise would be to turn his life estate into one of fee simple to the manifest injury of those in remainder, and to defeat the object of the creator of the estate. It is true that in a plain case we could not be influenced by those considerations, but in one in which there is doubt they should not be ignored.

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Were there the provision in the mortgage for a reconveyance, the mortgagor, having conveyed an estate in fee simple, might, on payment of the mortgage, have insisted upon a reconveyance of the same estate, but under the mortgage in this case all that could be asked for was a release or discharge. Such was given, but by operation of the statute it only remitted the title the party originally held, and nothing more nor less.

There is no doubt that the mortgage unredeemed would have barred all parties, but I cannot arrive at the conclusion that the Legislature intended the provision to apply to a case where the mortgage is redeemed and discharged, nor can I see upon principle how any one can become entitled to an interest in real estate without a conveyance.

If the tenant in this case obtained the title in fee simple, whom did he get it from? Certainly not from the mortgagees, for they made no conveyance to him, and no one else gave it to him. If he did not hold it the appellants cannot recover, and it is not necessary to decide by whom else it is held.

I am of opinion there was not an estate in fee in the mortgagor at the time of his death, and therefore I think the appeal should be dismissed with costs.

GWYNNE, J.:

I am of opinion that the appeal should be allowed, and that the judgment of the Court of Chancery be restored. Any other judgment would, in my opinion, constitute a repeal of the Disentailing Estate Act. The costs of all parties in appeal should be ordered to come out of the estate.

Appeal allowed with costs out of the estate.

Solicitors for appellants: *Foy & Tupper.*

Solicitors for respondent: *McCarthy, Hoskin, Plumb & Creelman.*