COLIN H. ROSE, DUNCAN McKENZIE, THOMAS BURKE AND JOHN BURKE (DEFENDANTS)..... APPELLANTS;

AND

CATHERINE PETERKIN (PLAINTIFF)...RESPONDENT.

1884
*May 19.
1885
*Jan. 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Equitable interest in land—Registered instrument executed by same party—Effect of notice to holder—R S. O. ch. 111 *sec.* 81.

R. S. O. ch. 111 sec. 81 declares that "no equitable lien, charge or interest affecting land shall be deemed valid in any court in this Province after this act shall come into operation as against a registered instrument executed by the same party, his heirs or assigns."

Held, that this section does not apply to a case in which the party registering such instrument has notice of the equitable lien, charge or interest, even though the same has been created by parol.

Gwynne J. dissented from the judgment of the court, taking a different view on the facts presented by the evidence.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the Chancellor's decree for redemption by the plaintiff of land purchased by defendants from her vendee.

The facts and pleadings are fully stated in the judgments hereinafter given (2).

Moss Q.C. and *Scane* for appellants.

Atkinson for respondent.

The points relied on and cases cited are fully reviewed in the judgments of the court below and in the judgments hereinafter given.

Sir W. J RITCHIE C.J.—In this case a bill was filed by the plaintiff, Catherine Peterkin, for the redemption of a lot of land in the township of Dover conveyed by

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

(1) See 9 Ont. App. R. 429 and 4 Ont. App. R. 25 where the case is reported under the title of *McFarlane* v. *Peterkin.*

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her and her husband to one James McFarlane in 1866. The allegations in the bill are as follows:—

"1. That on and prior to the 31st day of August, A.D. "1866, the plaintiff was the owner of and seized in fee "simple of the N. W. half of Lot No. 14, in the 13th "Con. of the Township of Dover E., in the said County.

"2. Shortly before the date above mentioned, the "plaintiff being in want of money, by her agent, one "James Peterkin, applied to the defendant James Mc- "Farlane, (who has died *pendente lite*), to advance to her "the sum of $500, on the security of the said land, and "it was agreed by and between the plaintiff and the "said deceased defendant, James McFarlane, that the "said deceased defendant James McFarlane should "advance to the plaintiff the said sum of $500, and that "your complainant and her husband, in manner then "required by law as to married women, should convey "the said land as security for the repayment of the same.

"3. Accordingly on the said 31st day of August, 1866, "in pursuance of such agreement, the said deceased "defendant James McFarlane paid to the plaintiff the "said sum of $500, and the plaintiff and her said husband "thereupon by indenture dated and executed on the said "last mentioned date, and made between the plaintiff and "her husband of the one part, and the deceased defendant "James McFarlane of the other part, conveyed the said "land to the said deceased defendant James McFarlane, "absolutely in fee simple.

"4. The said indenture though absolute in form was "intended by the plaintiff, and it was expressly under- "stood between her, the plaintiff, and the said defendant "James McFarlane, since deceased, that it should stand "only as a security for the re-payment of the said money "from the date of payment of same to her, and that upon "such re-payment the said deceased defendant James Mc- "Farlane should re-convey the said land to the plaintiff

"free from all incumbrances.

"6. No money, except about ten dollars has been re-
"paid to the said deceased defendant, James McFarlane,
"on account of the said sum so advanced, and the whole
"thereof is due with interest except the said ten dollars.

"7. That some time prior to the 13th day of June,
"A.D. 1871, the plaintiff had arranged a sale of one-half
"the said land in order to redeem the same and obtain a
"reconveyance from the said deceased defendant James
"McFarlane, and proposed to the said deceased defendant
"James McFarlane to do so, or to borrow money if he
"required it on the land and redeem it from him, but he
"then informed the plaintiff that he would not allow her
"to either sell the half of it or mortgage it, but that when
"she got the money for him otherwise than by selling or
"borrowing on the said land he would reconvey it to her.

"8. That subsequently the plaintiff made an applica-
"tion to and offered to pay the said deceased defendant
"James McFarlane the said $500 and interest thereon and
"any costs he might be entitled to; but he refused to
"take the same, and he, the defendant, James McFarlane,
"since deceased, then professed and pretended that the
"said indenture being absolute in form he was not bound
"to receive the said money or to treat said indenture as
"a security, and claimed that having an absolute title
"thereunder, he was not bound to reconvey to the plain-
"tiff on payment of said money and interest, that other
"parties took advantage of him when they could, and
"that he was bound to do the same with the plaintiff.

"9. That for some time prior to about and since the
"said last mentioned date the timber growing and being
"on said land became of great value, and the said defen-
"dant, James McFarlane, deceased, about the time of the
"last mentioned date in pursuance of his threat to the
"plaintiff to treat the said conveyance as absolute and
"thereby to cheat and defraud her, did absolutely sell

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"and convey the said land by indenture of bargain and "sale to the defendants, Colin H. Rose and Duncan "McKenzie, who were co-partners at the time in obtain- "ing, manufacturing and selling timber, sawlogs, cord- "wood, and staves, said indenture bearing date the said "13th June, A.D. 1871, for the consideration of to wit "$1,200.

"10. That prior to the sale and conveyance of the said "land by the said deceased defendant, James McFarlane, "to the said defendants, Colin H. Rose and Duncan Mc- "Kenzie, the said last named defendants, had full know- "ledge and actual notice of the plaintiff's claim to said "land and of her right to redeem the same on re-payment "of the said money to the said deceased defendant, James "McFarlane, and took the same from the deceased defen- "dant, James McFarlane, with full notice and knowledge "of the plaintiff's claim and right thereto.

"11. That by indenture of bargain and sale bearing "date 21st June, 1872, the said defendants, Colin H. Rose "and Duncan McKenzie, having previously cut and "removed trees, timber and wood from the said land, of "very great value, to wit over $2,000, conveyed the said "land to the defendant, Thomas Burke, who, prior to the "purchase, sale and conveyance of the said land by the "said deceased defendant, James McFarlane, to the defen- "dants Colin H. Rose and Duncan McKenzie, and by "them to him, had full knowledge of the plaintiff's claim "and right of redemption, and became a purchaser "thereof with notice of the premises.

"11*a*. The said defendants, Colin H. Rose, Duncan "McKenzie and Thomas Burke, on their part, however, "now contend that they are purchasers for value of the "said land, without notice or knowledge of the plain- "tiff's rights.

"12. That by an indenture by way of Mortgage bear- "ing date the 29th day of June, A.D. 1872, the said

"defendant Thomas Burke, conveyed the said land to the "defendants Colin H. Rose and Duncan McKenzie, to "secure the payment of the sum of $1,050 and interest, "which appears by the records of the Registry Office of "the county of Kent to have been assigned by them to "one Zenos W. Watson, by deed of assignment bearing "date the 12th July, A.D. 1872."

The defendants Colin H. Rose and Thomas Burke by their answers admit, for the purposes of this suit, the truth of the allegations contained in the 1st, 2nd, 3rd, 4th, 6th, 7th, 8th 9th and 12th paragraphs of the plaintiff's bill herein.

But Rose says he was not aware that the land after conveyance to J. McFarlane and prior to purchase by him and Duncan McKenzie was ever claimed to be plaintiffs, and was first informed of such claim 30th December, '73, when served with bill. That the purchase by him and McKenzie from McFarlane was in good faith and upon good and valuable consideration, viz., $1,200 and without notice of plaintiff's claim; that his and McKenzie's conveyance to Burke was with no knowledge of plaintiffs claim, nor does he believe Burke had any knowledge thereof.

Burke says he was not aware that Rose and McKenzie had any notice of plaintiffs claim prior to the purchase or during time they owned land, and is informed and believes they had no notice prior to sale to him; that purchase by Rose and McKenzie from McFarlane was *bonâ fide* and upon good and valuable consideration; that he is not aware that plaintiff ever claimed to have any claim after sale to McFarlane and prior to sale by C. H. Rose and McKenzie to himself; is informed, and believes plaintiff never claimed any right thereto during time same was owned by Rose and McKenzie; that he purchased but not with notice of any claim or right of redemption, but *bonâ fide* and for good and

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valuable consideration, viz, $1,550 and without any notice of any claim of plaintiff thereto.

Duncan McKenzie answers—admitting and answering in the same way as Rose—so that plaintiffs case is admitted with the exception of the allegations that Rose and McKenzie had prior to sale by McFarlane to them full knowledge and actual notice of plaintiffs claim, and that Burke prior to sale by McFarlane to Rose and McKenzie, and by them to him had full knowledge of plaintiffs claim and right of redemption, and became a purchaser thereof with such notice.

The case was heard on this state of the pleadings and the court declared the conveyance from plaintiff to McFarlane was intended to be and was only a security for the re-payment to McFarlane of $500 advanced by him to plaintiff on 31st August, 1866, with interest at 6 per cent.

"2. And the court doth 'further declare that the de-
"fendants Colin H. Rose and Duncan McKenzie, pur-
"chased the said lands from the said James McFarlane,
"deceased, with full knowledge and actual notice of the
"plaintiff's claim to said lands, and her right to redeem
"the same, and doth order and decree the same accord-
"ingly.'

"3. And the court doth further declare that the de-
"dfenant Thomas Burke purchased the said lands from
"the said defendants Colin H. Rose and Duncan Mc-
"Kenzie, with full knowledge and actual notice of the
"plaintiff's claim to said lands, and of her right to re-
"deem the same, and doth order and decree the same
"accordingly.

"4. And the court doth further order and decree that
"an injunction do issue out of and under the seal of this
"court, perpetually restraining the said defendant
"Thomas Burke, his servants, workmen and agents, from
"committing any wastes, spoil or destruction on the

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"said lands.

"5. And the court doth further order and decree that "it be referred to the master of this court at Chatham, "to take an account of the amount still due by the plain- "tiff in respect of the advance of five hundred dollars "to her by the said James McFarlane, deceased, in the "first paragrap hhereof mentioned, and also an account "of the value of the timber, trees, and wood cut down "and removed from the said lands by the defendants, or "any of them, or by the said James McFarlane in his "lifetime, and an account of all other waste committed "by them or any of them.

"6. And in the event of the said master finding that "the amount found due by the defendants or any of them "exceeds the amount found due by the plaintiff, or in the "event of the said master finding that the amount found "due by the defendants, or any of them is less than the "amount found due by the plaintiffs, then upon pay- "ment by the plaintiff to the defendant Thomas Burke "of the balance found due by her within six months after "the said master shall have made his report, and at such "time and place as the said master shall appoint, this "court doth further order and decree that the defend- "ants do assign and convey the said lands to the plain- "tiff free and clear of all incumbrances done by them or "any of them; such conveyance to be settled by the said "master in case the parties differ, and to deliver up to "the plaintiff, upon oath, all deeds and writings in their "or any of their custody or power, relating to the said "lands.

"7. And this court doth further order and decree that "the defendants do pay to the plaintiff what, if any- "thing, shall be found due by them, or any of them, in "excess of the amount found due by the plaintiff, and "her costs of this suit up to and inclusive of this decree, "forthwith after taxation thereof by the said master.

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"8. And the said master is to enquire and state what "sum, if any, was due by the plaintiff to the said James "McFarlane, at the time of the tender to him by the "plaintiff, to pay the amount then due, in the eighth "paragraph of the plaintiff's amended bill mentioned, "and whether the sum so tendered was equal to, greater "or less, than the amount then due, and in the event of "the said master finding that the sum so tendered was "equal to or greater than the amount then due, he is to "tax to the plaintiff her costs of this suit subsequent to "this decree, which are to be deducted from the amount, "if anything, found due by her as aforesaid, but in the "event of the said master finding that the amount so "tendered was less than the amount then, due he is to "tax to the defendant John P. Alma, his costs sub-"sequent to this decree, which are to be added to the "amount, if any, found due by the plaintiff as aforesaid.

"9. And this court doth further order that the de-"fendant Thomas Burke do forthwith pay to the plaintiff "ten dollars, her costs of the motion to vary the minutes "of this decree, and to the defendant John P. Alma, five "dollars, his costs of said motion."

Burke appealed and the court of Appeal allowed the appeal and allowed the appellant to file a supplemental answer setting up the defence of the registry laws and such other defence as he may be advised, plaintiff to be at liberty to proceed to a second hearing in the court below.

The plaintiff appealed to the Supreme Court where his appeal was dismissed. Burke filed his supplemental answer, in which he says he gave Rose and McKenzie a mortgage to secure a balance of the purchase money which Rose and McKenzie since assigned to Watson; that he had no notice of plaintiffs claim and purchased and paid the money and gave the mortgage in good faith in reliance on the title as shown by the records

of the registry office, and claims he is a *bonâ fide* purchaser and claims the benefit and protection of the registry laws thereupon.

Thereupon the following replication was filed on the 14th day of March, 1881 :—

"The plaintiff joins issue on the supplemental answer of the defendant, Thomas Burke, filed herein.

"The defendant C. E. Pegley, by petition dated 26th August, 1880, sought to re-open the suit under the first decree as to the defendants, other than the appellant Thomas Burke, by praying for leave to file a supplemental answer.

"On the 21st day of September, A.D. 1880, an order was made by the referee allowing the said petitioner to file a supplemental answer. From this order the plaintiffs appealed to a judge of the Court of Chancery, and upon hearing of such appeal the Hon. V. C. Proudfoot allowed such appeal with costs. The said Pegley appealed from said last mentioned order to the Court of Appeal, and his appeal by the decision of said court was dismissed with costs."

Notice of setting down for examination of witnesses and hearing on the issue raised by the supplementary answer of Thomas Burke was served, and the cause duly came on on the 31st March, 1881. Before the evidence was gone into a question was raised as to what issues were before the court, and it was contended by the defendants' counsel that the whole matter was re-opened, and that the plaintiff was obliged to prove not only notice to the different purchasers, but also the right of redemption. The learned Chancellor decided that the case was re-opened as to the question of notice under the supplemental answer of Thomas Burke, and that that was the only issue before the court, as it affected Thomas Burke.

Mr. Justice Patterson, in his judgment on the appeal

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of Thomas Burke on the refusal of the Chancellor to allow Burke to amend and plead the registry act, says :—

We have no report of the judgment delivered by the learned Chancellor, nor any information as to the views taken by him of the evidence, or of the opinion he may have formed of the witnesses examined before him.

In the judgment delivered on this second hearing we are not left in doubt as to what those views are. The learned Chancellor says :—

The defendant Burke having appealed from my decree giving to the plaintiff a right to redeem the land sold by McFarlane to McKenzie and Rose, and sold by them to Burke, and having been allowed by the Court of Appeal to set up the registration of his title, by supplemental answer, an indulgence which I had refused to him, the cause was again carried down to a hearing before me at the last sitting of the court at Chatham; when further evidence was given on both sides.

Before dealing with the further evidence I desire to say that I refused the indulgences asked for by Burke, because I was satisfied by the evidence which was taken *vivâ voce* before me, that the defence set up was not a righteous one. There was much in the evidence of Burke and McKenzie, especially in that of Burke, which I discredited. I thought him untruthful, and that the weight of evidence upon the question of notice greatly preponderated in favor of the plaintiff. I formed my judgment, of course, not only from the words uttered by the respective witnesses, but from their demeanor, and the many circumstances which aid a judge of fact before whom evidence is given, to form correct judgment as to its truthfulness, and the weight properly due to it.

At the recent hearing I did not, any more than at the former hearing, consider it to be an open question whether or not the dealing between the plaintiff (by her agent James Peterkin), and McFarlane, was a security for the repayment of an advance of money. This fact is so distinctly admitted by the answer of Rose and Burke who answered together, and by the separate answer of McKenzie, that no other evidence of it could be required. Evidence of the fact was indeed given, but I think upon all but one occasion it was given incidentally in the giving of evidence of notice to McKenzie and Burke. I have no reason to suppose that the admissions contained in the answers were made by mistake.

The answers are sworn, and I see no reason to doubt that the admissions were made because the fact admitted had been ascertained

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to be true. At the recent hearing, besides the evidence then given, the evidence given at the previous hearing was before me. My Brother Proudfoot, in his judgment in the Court of Appeal, has commented upon the answer and the evidence of McKenzie. His comment is so accurate and just that I cannot do better than adopt it.

At the recent hearing the plaintiff and James and Alexander Peterkin reiterated the evidence given by them at the previous hearing.

At this hearing the learned Chancellor says material further evidence of notice to Burke was given at the last hearing, the substance of which he gives, and then observes: "Burke was present in court while this evidence was given, but was not called as a witness," his counsel saying that they relied upon the evidence given by him at the former hearing He was called as to one point by the plaintiff, but said nothing as to the evidence which had just been given in his presence. The Chancellor concludes:—

Notice to McKenzie is proved direct from the plaintiff herself, with a good deal of corroborative evidence from other witnesses. Actual notice to Burke is proved to my mind quite as satisfactorily. He learned what claim was made by the plaintiff from herself and from James Peterkin. And the evidence given at the recent hearing in addition to that at the former hearing, proves that he had knowledge, not from one quarter only, but from several, of the plaintiff's claim, and of its nature. His own admissions to Kime and Hardy are corroborative of the same fact. To put it at the lowest, the evidence given at the recent hearing makes it impossible to believe the assertion of Burke that he had not, before he purchased, notice of the plaintiff's claim. It has been said in this case as it has been said in other cases, that it is almost incredible that a man should purchase when he knows of a claim in another, to or upon the same land. But it is not every man that knows of the equitable doctrine that where a man has such notice of title in another as would make his purchase inequitable, an exception is created thereby, to the effect given generally by the Act of Registration. Burke is not the first man who has thought that (to use his own words) if a man has a clear deed he can give a clear deed; and who, to his cost, has acted upon that belief. That belief, and reliance upon advice which he understood (perhaps mistakenly) to have been given to him, that he could purchase, are, I can scarcely doubt, the key to his conduct.

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In my judgment, the evidence has brought home both to McKenzie and to himself notice of the plaintiff's claim, and I think his abstaining from giving evidence at the recent hearing may properly be attributed to a consciousness that he could not deny the evidence given upon that occasion.

The redeemable character of the transaction is admitted on the pleadings and is not now, in my opinion, open to discussion. I think, therefore, the only point we have to consider in this case is: Was the learned Chancellor wrong in finding, as a matter of fact, that McKenzie and Burke had actual notice? If the parties had actual notice, I have no doubt this would defeat the registered title.

After carefully considering the evidence and reading the judgments delivered in this case by the learned Chancellor and the learned Judges in the Court of Appeal, I am unable to say that the Chancellor was wrong in the conclusion at which he arrived on this point, and therefore, I think, the appeal should be dismissed.

STRONG J.—I am of opinion that we ought to dismiss this appeal. I agree with the late Chancellor and Mr. Justice Proudfoot that the only question open on the second hearing, was the defence of the registry act set up by the supplemental answer of Thomas Burke. By the original decree pronounced on the 18th of October, 1876, all questions in the cause which were open at the original hearing were concluded. By the order of the Court of Appeal of the 10th March, 1879, (subsequently affirmed on an appeal to this court) the defendant, Thomas Burke, was allowed to file a supplemental answer "setting up the defence of the registry laws or such other defence as he might be advised." And it was also ordered "that for that purpose the replication filed in the court below be withdrawn if necessary, and that the plaintiff be at liberty to proceed to a

second hearing of the cause in the court below." This order does not, however, disturb the decree which stands undischarged and unaltered, except in so far as it might, in the event, be affected by the determination of the questions to be raised by the supplemental answer of Thomas Burke, and even to that extent only by implication, for the order does not in terms provide for any variation of the decree either presently or prospectively. The only additional defence set up by the supplemental answer of Thomas Burke was that of the registry laws. It appears to me, therefore, that the second hearing was properly restricted to a trial of the questions arising on that defence, namely; whether the defendant, Thomas Burke, had duly registered his conveyance; whether he had, at the time he acquired his title, actual notice of the plaintiff's equity; and whether, if he had such notice, that disentitled him, in equity, to the protection of the registry laws. It is impossible to see how the Chancellor could have admitted further evidence of defences raised upon the original record, concluded, as all such questions were, by a decree which had never been vacated, and which he, at the hearing, had no power to discharge. It would, no doubt, have been better if the original decree had been altogether discharged by the order of the Court of Appeal, with leave to the parties to make use, for the purposes of the second hearing, of the depositions already taken, and to give such further and additional evidence as they might be able to bring forward.

I am able to say that when the practice was first introduced in the Court of Chancery of permitting retrials on the ground of the discovery of new evidence, this was the form of order adopted in such cases by some of the judges, and it has the merit of saving expense without occasioning any inconvenience provided the second hearing is before the same judge as

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the first. This, however, was not the course adopted by the Court of Appeal; the directions of the first decree which determined the issues raised by the defendants other than Thomas Burke, as well as those arising upon the original answer of Thomas Burke, were not displaced, and so the cause was necessarily heard piece meal, and therefore we find no one completed decree containing the decision of the court which has to be sought for partly in the decree of October, 1876, and partly in that of June, 1881. The result of this was that when this cause came before the Court of Appeal the original decree was *res judicata*, and unappealable by lapse of time, no leave to appeal against it having been given, and so the present appeal must be regarded, as it was properly treated by Mr. Justice Proudfoot, as an appeal from the decision of the Chancellor on the single question of the registry laws which was alone open on the second hearing. If this is a correct conclusion it sufficiently accounts for the omission of the counsel for the appellant to raise the question, which has so fully been considered in the judgments of the learned judges of the Court of Appeal, as to the nature and effect of the transaction between Mrs. Peterkin and McFarlane, of which it was incumbent to prove notice, whether it was a conditional sale or a mortgage—a point which appears not to have been taken at the argument, inasmuch as Mr. Justice Patterson says his attention was first called to it by other members of the court after the appeal had been heard. This fact confirms the view I take as to the effect of the order on the first appeal, for the counsel for the appellant would scarcely have passed over such a point had he supposed it to have been open. It appears to me, however, that upon the evidence and the admissions in the answers the Chancellor's conclusions that the transaction was a mortgage and not a

conditional sale were entirely correct. Whether or not the witnesses who gave such evidence were entitled to credit, and whether their testimony was entitled to prevail against that of the witnesses which conflicted with it, was a question for the judge who heard and saw the witnesses and upon which his finding should be held final. Assuming the evidence of James Peterkin to be entitled to credit, as the Chancellor must from his finding have held it to have been, I should have thought it very difficult to say, upon the statement of the facts which we find in his deposition, that a conditional sale and not a mortgage was the true character of the transaction which took place with McFarlane.

James Peterkin's own account is as follows:—

I am brother-in-law of plaintiff's. I saw McFarlane about land in question when Mrs. Peterkin owned it. She sent me to Thompson, son-in-law of McFarlane, asking him to advance money on a mortgage on the property. I saw McFarlane about the land. He came with me out of the house to the shop, and said he would give $500 on the lot and his lifetime to redeem it. I stayed at McFarlane's house all night, and he next morning made me the offer of advancing $500 on the place in the morning, with his lifetime to redeem it. I then went out to Mrs. Peterkin with a deed which was signed the next day. I told her of the arrangement, and she was agreeable. This land was then worth about $1,000. I had conversation with McFarlane about the land before his death, as it was reported that he was going to sell the place. Mrs. Peterkin sent me to ask him whether the half might not be sold so that the other half might be redeemed. I went to him and spoke to him and he seemed to be agreeable; all he wanted he said was his money.

It therefore appears that Peterkin went to McFarlane for the purpose of borrowing money on the security of the land; that he was only authorized by the plaintiff to raise a loan or mortgage not to negotiate a sale; that (as it must be implied) the application actually made was for an advance by way of loan, and that that application was acceded to by McFarlane. The case is not to be looked at solely from the point of view of the

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party who advanced the money, but we are to consider what was said and done by both parties to the transaction. There is nothing, so far as I can see, in this statement (which for the purposes of appeal we are compelled to take as a correct narrative of what actually occurred) showing any intention on the part of the Peterkins to make an absolute sale subject to a right of re-purchase. I take it to be clear that if a man goes to another and asks for a loan on the security of land and receives for answer, "yes, provided you give me an absolute deed of the land," that that would beyond all doubt be a mortgage and not a sale. Then, if he adds, "and you shall have my lifetime to redeem it," can that make any difference? For this is the precise question here. I cannot see that it would. It is no answer to say that there was no loan because McFarlane had no right to recover the money. That is clearly false reasoning, for if there was a loan there was a right to sue for the money as soon as the term of credit expired, and the very question involved in that of mortgage or no mortgage is: Was there or not a loan and a right to sue for recovery of the money? Where the party asking for the money clearly intends a mortgage and nothing else, and the terms of the transaction or the conduct of the other parties do not positively exclude the character of loan, I take it that it must be so considered.

It has often occurred to me that where an absolute deed is given as a security, and where there has been no professional intervention originally in arranging the terms of the transaction, that misunderstanding frequently arises from the mistaken views which the party who advances the money takes of the legal effect of the transaction, in erroneously assuming that an absolute deed gives him an irredeemable right, and that I think is an admissible hypothesis here.

But what I found my opinion upon is this:—Here

there was an application for a loan and for nothing but a loan; it was acceded to, nothing being said between the parties as to a sale, and no intention of selling on the part of the grantor being directly proved or to be inferred; but the party to whom the proposition is made carries it out upon terms as to re-payment not inconsistent with a loan, and in a form which a Court of Equity says shall not affect the right of redemption, and which is therefore also consistent with the assumption that it was a loan. In such a case I should unhesitatingly hold that the true character of the transaction was a mortgage, and not a sale subject to a right of re-purchase, and I should feel that if I did not so hold I should be overturning principles of decision which, having been recognized by the Court of Chancery for nearly forty years (at least since the year 1849), have become part of the established law of property. But when we consider that this point of a conditional sale was never pleaded in the answers, nor raised either in appeal or in the court of first instance, but that on the contrary the defendants in their sworn answers admit that the transaction was a mortgage, I should have thought it impossible to reverse a decree proceeding as much upon the implied admissions of the parties as upon anything else. With what justice could this decree now be reversed when, for all that appears, the plaintiff might, if the point of the conditional sale had been raised by the answer and she had thus been put to proof respecting it, have brought forward overwhelming evidence of her case by proving admissions made by McFarlane or otherwise, and if the decree could not for this reason be reversed, would it be just or reasonable now, some seven years after the original decree was made, to discharge that decree and permit a supplemental answer to be filed, and send the parties down to a third hearing, when no application is made

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by the defendants themselves for any such indulgence? On the whole, looking at the state of the pleadings and the state of the proceedings, this question now raised here in the appellant's factum and in argument, although not argued in the Court of Appeal, seems to me to be wholly untenable.

The question upon which this appeal must therefore depend is that raised by the supplemental answer of Thomas Burke, namely, his claim to priority under the registry laws. For the purpose of postponing a registered instrument Courts of Equity, except in the instance of a single decision which I will presently refer to, have always required actual and direct, as distinguished from merely constructive, notice. What such actual and direct notice is may well be ascertained very shortly by defining constructive notice, and then taking actual notice to be knowledge, not presumed as in the case of constructive notice, but shown to be actually brought home to the party to be charged with it, either by proof of his own admission or by the evidence of witnesses who are able to establish that the very fact, of which notice is to be established, not something which would have led to the discovery of the fact if an enquiry had been pursued, was brought to his knowledge. In *Jones* v. *Smith* (1) Sir James Wigram, V.C., there says that constructive notice occurs in the following cases:

> First, cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered or in some way affected and the court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he could have been led by an inquiry after the charge, incumbrance or other circumstance affecting the property, of which he had actual notice; and secondly, cases in which the court had been satisfied from the evidence before it that the party charged had designedly abstained from enquiry for the very purpose of avoiding notice.

Notice of the kind first described, which merely puts

(1) 1 Hare 55.

the party on enquiry as to the facts of which it is material he should have knowledge, is clearly insufficient to postpone a registered instrument. But it is not to be assumed from this that actual notice to an agent will not bind the principal for the purpose in question. Notice of this latter kind, to which Lord Chelmsford has given the name of imputed notice, being treated as actual notice to the principal and that whatever the character of the agency may be, whether in the case of principal or agent strictly so called, or in that of one partner acting for the partnership, or a trustee for his *cestui que trust*, in all these cases actual notice to the agent is held to be as effectual to postpone a registered instrument as if given to the principal directly (1).

In a case of *Wormald* v. *Maitland* (2), Stuart V. C. held that constructive notice was sufficient to postpone a registered deed. But this case has been distinctly overruled in Ireland by *Russell* v. *Cashell* (3), by Brewster Lord Chancellor, and in England in *Chadwick* v. *Turner* (4), where Turner L. J. says that notice for this purpose "must be clear and distinct and amounting in fact to fraud."

Applying the law as thus stated to the circumstances of the present case the fact of which it was incumbent on the plaintiff to prove actual notice was not that Mrs. Peterkin had some undefined interest in the land, but that she had a right to redeem or recover the land or, in other words, that Macfarlane acquired the land as a security for money lent, and held it as a mortgagee.

What the learned judges who dissented in the Court of Appeal say however is this—whilst they do not propose directly to open the whole case so as to treat

(1) *Tunstall* v. *Trappes* 3 Sim. 286; *Richards* v. *Brereton*, 5 Ir. Jur. 336; *Lenahan* v. *M'Cabe*, 2 Ir. Eq. 342.

(2) 35 L. J. Eq. 69.

(3) 1 Ch. App. 310.

(4) Trin. Term 1867. See Ir. Rep. 1867.

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the first decree as erroneous for giving effect to a right of redemption when there was only right of re-purchase, yet, in effect, they do this indirectly when they come to deal with the secondary question of notice by holding that there having been originally, as between Macfarlane and the plaintiff, no right of redemption, notice of a right to redeem is unavailing. This is in effect to nullify the decree which, as I have already endeavoured to show, was *res judicata*, making the law between the parties and entirely concluding the question of mortgage or no mortgage. It being then an established fact that the conveyance to Macfarlane was, in equity, a mere mortgage, the notice to be proven is notice of that fact and of that fact only. I am also prepared to hold that, putting the decree aside altogether, the evidence and the admissions in the answers sufficiently show that the transaction was really a mortgage and not a sale.

As regards the case of *Barnhart* v. *Greenshields* (1), that was not a case of the registry laws at all, an observation which is of course in the defendant's favor. What is there said as to notice coming from strangers was extra judicial, as the real ground of the decision was that the notice, even if it had come from a party interested, was notice of a fact too remotely connected with the fact of which notice had to be made out, to put the parties on enquiry; but accepting what is there said as giving the correct rule by which to test the evidence in the present case, it may be held that if there was no other evidence of notice here than that alleged to have been received by these defendants in conversation with strangers, that would not be sufficient.

It is to be remarked that the supplemental answer filed by Thomas Burke under the order of the Court of Appeal permitting him to set up in that way the defence of the Registry laws or such other defence as

(1) 9 Moo. P. C. 36.

he might be advised does not properly and sufficiently plead this defence. What should have been pleaded was that the defendant Thomas Burke had duly registered his deed, accompanied by a denial of the allegations of notice in the bill at the time of registration; and the registration of the deed by which the lands were conveyed to Rose and McKenzie should have been pleaded in the same way, accompanied by a similar denial of notice to them at the time of registration. This however is not the mode of pleading adopted, but it is alleged that when Thomas Burke purchased, the title was a registered title and that he purchased in reliance on the title "as shown by the records of the registry office"; there being no denial of the notice to Rose and McKenzie most distinctly and accurately charged by the 11th paragraph of the bill, nor any allegation that the conveyance to Thomas Burke was ever registered (indeed the registration of this last deed nowhere appears in the pleadings), and the only allegation of the registration of the deed to Rose and McKenzie is that included in the statement, already mentioned, that the title was a registered title when Thomas Burke purchased. This was manifestly not a proper mode of pleading and technically it was insufficient. After the great indulgence extended to the defendant by permitting this defence to be set up after decree, it would seem to be no hardship on the defendant to require that he should plead the defence he was permitted to add with reasonable precision and certainty, and in such a way as to show that the registry laws really did constitute a defence. As regards the defendant Thomas Burke I am not however disposed to decide the case on the narrow ground of a point of pleading. But as regards the registration of the deed to Rose and McKenzie the objection to the pleading is not merely technical but is substantial, and I think it is incumbent

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on us to hold, in accordance with the opinion of Mr. Justice Proudfoot, that the defence of the registry laws as applicable to the conveyance to them was not set up and was not intended to be set up, and therefore that the defence in question was confined to the conveyance to Thomas Burke, and that the plaintiff was consequently only called upon to prove notice to that defendant.

I am of opinion that the evidence at the first hearing, without more, was amply sufficient for the plaintiff's purpose in this respect, and was such that, taken in connection with the Chancellor's findings upon it in favor of the plaintiff, it ought to have been held a conclusive answer to the application to let in the supplemental defence; and had I been present when the appeal to this court was heard I should certainly have ventured to express this opinion. The evidence of notice I refer to is that contained in the deposition of the plaintiff herself and of James Peterkin; the latter I do not consider a stranger but as a person who throughout the whole of the transactions with reference to this land acted as the agent of the plaintiff. James Peterkin, it is indeed suggested, had some interest in the land, but however this might have affected the credit to be given to his testimony by the judge in whose presence he was examined, it is otherwise a matter with which these defendants have no concern. Mrs Peterkin in her evidence at the first trial says;—

Talked with Thomas Burke about the land. That was after the conversation with McKenzie, and the spring before McFarlane sold it. He came to the house to see if McFarlane had agreed to sell half of the land so that the other half could be redeemed. Burke was going to buy half if we could arrange about the other half. I told him McFarlane would not sell half to redeem the other. Burke asked me if McFarlane had got a clear deed of the place, and I said he had got a clear deed, giving McFarlane's lifetime to redeem it, or as soon as the money was made up. Burke said he thought that if McFarlane had a clear deed, that he could give a clear deed. I told

him he could give him a clear deed but not a good title. Burke said that if James Peterkin took some one to McFarlane that he would be a strange uncle if he would not do right. McFarlane was Peterkin's uncle by marriage.

James Peterkin, in his deposition taken at the first hearing, is equally explicit as to notice to Burke He says:—

Burke and I had some talk as to the way the property stood. I told Burke that the property was Mrs. Peterkin's, and that I was doing the business for her. Burke wanted me to go to McFarlane and reason the thing with him. But I told Burke I did not think it was of any use, as I had done the best I could. I explained to Burke that McFarlane had got a deed of the land, but that he had given Mrs. Peterkin his lifetime to redeem it.

I told Burke how much money McFarlane had advanced and that $500 was the amount required to redeem it.

If this is not (subject, of course, to the weight and credit to be attached to the witnesses) sufficient proof of notice, I am at a loss to know how notice could ever be proved.

It is direct actual notice that although McFarlane had an absolute conveyance of the land it was redeemable during his lifetime, a strictly true and accurate description of the agreement which had been made with McFarlane, as had been determined by a decree which at the time of the appeal was not open to question. The actual notice required is of course actual notice of facts and not of conclusions of law; it was not requisite that the plaintiff and James Peterkin should, in order to make what they told Burke sufficient notice, have gone further and stated that in legal effect the facts they communicated to him made McFarlane in law a mortgagee of the land. Upon this principle, had the transaction been a conditional sale with a sufficient memorandum in writing, I should still have thought this was sufficient actual notice of it. It is also to be said of this evidence that it establishes notice, not from strangers but from the

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plaintiff herself and her agent, and it was not in the course of a mere casual conversation that the statements were made, but when Burke was contemplating and in negotiation about a purchase of part of the property and was making enquiries about the title with a view to such purchase. Having regard to the nature of the evidence of notice at the first hearing, and to the consideration that the Chancellor had given credit to the witnesses, I should have thought that it would have been proper, in giving the defendant Thomas Burke leave to set up the registry laws, to have confined any further proceedings in the Court of Chancery to a mere argument of the question of law arising upon the 68th section of the registry act. This, however, was not done, and on the 31st March, 1881, nearly six years after the first trial, the issue went down to a second hearing before the same judge, when the same witnesses were again examined, but Thomas Burke, who on the first trial had given evidence on his own behalf and then denied notice, did not, on this subsequent occasion, venture to repeat his denial, though he was called on another point.

Mrs. Peterkin's evidence at the second trial, on the material point, was as follows:—

Q.—Had you ever any talk with Burke? A.—Yes, I had some talk with Mr. Burke.

His Lordship—That was Thomas? A.—Yes.

Mr. Boyd—Was it Thos. Burke? A.—Yes; he came to the house and asked me if McFarlane was agreed to sell one half of the land so as to redeem the other; Thomas Burke called at the house and asked me if Thomas was agreed to sell one-half so that we could redeem the other, and I told him I was not agreed to sell one-half so as to get the other redeemed, and he asked me who deeded the land to McFarlane, and I told him I did, and he asked me what kind of a deed I gave him, and I told him a clear deed, and Burke said he thought if McFarlane got a clear deed he could give a clear deed, and I told him he might give him a clear deed but not a good title, and I told him on account of the claim against it, that I was given McFarlane's lifetime to redeem it.

Q.—When was this? A.—It was the Spring before Rose and McKenzie bought it; that would be the Spring of 1871.

Q.—You told him you had your lifetime to redeem it? A.—McFarlane's lifetime to redeem it; he came to see if McFarlane was agreed to sell one-half to allow us to redeem the other.

Q.—What led to that? A.—We sent James Peterkin, my husband and I, to Mr. Burke to see if he would buy the other one-half so that we could redeem the other.

Q.—Had you any other talk with Thomas Burke about this place after that? A.—Yes, I talked with him after that; he was at the house several times; once he said that no other one could do such a mean thing as McKenzie.

Then James Peterkin gives substantially the same account of what passed between him and Burke but more fully. He says:—

Q.—Had you any talk with Mr. Burke while McFarlane had the place? A.—Yes.

Q.—That is Thomas Burke? A.—Yes.

Q.—Well, what was that? A. I was sent to Mr. Burke to see if he would not buy a part of the place, half of their place to redeem the other.

Q.—Who sent you? A.—My sister-in-law, Mrs Peterkin; I went to Mr. Burke and he came the next day, I think it was, and I showed him over the land and he seemed to be satisfied with the land; still he would rather have the whole of it, he said, but he would give $550 for the half of it.

Q.—What was said to him about the state of the title, about McFarlane? A.—I explained to him that McFarlane had a deed of the land, that he had given his lifetime to redeem it.

Q.—To whom had he given his lifetime to redeem it, did you tell him? A.—To Mrs Peterkin.

Q.—When was that? A.—That was in the spring of 1871, I think; that was just before he sold it to Rose and McKenzie.

Q.—And you wanted to sell half to get money to clear off the rest? A.—Yes.

Q.—$500 was what Macfarlane advanced? A.—Yes.

Q.—Now after McKenzie bought had you any conversation with Burke? A.—I do not recollect of having any.

Q.—Did he say anything to you about McKenzie having bought? A.—Not that I recollect of.

MR. BOYD—You say you do not remember any conversation with Burke after that? A.—No.

Q.—Or his saying anything to you about the land? A. After Mc-

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Kenzie bought it?

Q.---Yes? A.--- I think he said that there was not another man in the Township that was mean enough to buy it, knowing the way it was. Something to that effect.

HIS LORDSHIP—You think he said that? A-----Yes, sir, something to that effect.

HIS LORDSHIP----I do not know exactly what you mean; you think he said something to that effect, and you think it was that; you think that that is what he said, that is what you mean? A.--- Yes.

Burke did not venture to deny this latter evidence of the plaintiff and James Peterkin and it remains therefore uncontradicted.

As I have already stated this evidence, if worthy of credit which was a question for the judge, is in my opinion conclusive to establish actual direct notice, which made it a fraud in Thomas Burke to set up an absolute title under his purchase from Macfarlane and to claim the protection of the registry laws.

In his judgment delivered after the second hearing the Chancellor makes the following observations on the evidence :—

Before dealing with the further evidence I desire to say that I refused the indulgences asked for by Burke, because I was satisfied by the evidence which was taken *vivâ voce* before me that the defence set up was a righteous one. There was much in the evidence of Burke and McKenzie, especially in that of Burke which I discredited. I thought him untruthful, and that the weight of evidence upon the question of notice greatly preponderated in favor of the plaintiff. I formed my judgment, of course, not only from the words uttered by the respective witnesses, but from their demeanor, and the many circumstances which aid a judge of fact before whom evidence is given, to form a correct judgment as to its truthfulness and the weight properly due to it.

The remark attributed to Burke, (and I have no doubt truly attributed to him notwithstanding his denial,) that no one but McKenzie would be mean enough to make the purchase, is also material, for it assumed that McKenzie knew when he made the purchase that the plaintiff had a redeemable interest in the land, an interest which he appears to have supposed was extinguished by McFarlane's sale.

George Kime says that he was present when Burke and Alexander Hardy were talking together, when Burke said that he had consulted

Mr. Atkinson, and also Mr. Scane about purchasing this land; that Mr. Atkinson had advised him not to purchase and that Mr. Scane advised him that he could. Alexander Hardy, who had been examined at the former hearing, also says he had another conversation with Burke besides that spoken of by Kime; that in this other conversation Burke said that Mr. Atkinson had advised him that he could not purchase on account of the claim of the Peterkins; that Mr. Scane advised him that he could; that it was only a question between Mrs. Peterkin and McFarlane.

Burke was present in court while this evidence was given, but was not called as a witness for himself, his counsel saying that he relied upon the evidence given by him at the former hearing. He was called as to one point by the plaintiff, but said nothing as to the evidence which had just been given in his presence.

Actual notice to Burke is proved to my mind quite as satisfactorily. He learned what claim was made by the plaintiff from herself and from James Peterkin. And the evidence given at the recent hearing in addition to that at the former hearing, proves that he had knowledge, not from one quarter only, but from several, of the plaintiff's claim and of its nature. His own admissions to Kime and Hardy are corroborative of the same fact. To put it at the lowest, the evidence given at the recent hearing makes it impossible to believe the assertion of Burke that he had not, before he purchased, notice of the plaintiff's claim. It has been said in this case, as it has been said in other cases, that it is almost incredible that a man should purchase when he knows of a claim in another, to or upon the same land. But it is not every man that knows of the equitable doctrine that where a man has such notice of title in another as would make his purchase inequitable, an exception is created thereby to the effect given generally by the act of registration. Burke is not the first man who has thought that (to use his own words) if a man has a clear deed he can give a clear deed; and who, to his cost, has acted upon that belief. That belief, and reliance upon advice which he understood (perhaps mistakenly) to have been given to him that he could purchase, are, I can scarcely doubt, the key to his conduct.

In my judgment, the evidence has brought home both to McKenzie and to himself notice of the plaintiff's claim, and I think his abstaining from giving evidence at the recent hearing may properly be attributed to a consciousness that he could not deny the evidence given upon that occasion.

My conclusion, therefore, is that the notice amounts to actual knowledge brought home to Burke before he purchased, that the transaction with McFarlane was a

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mortgage, and that the learned judge who heard and saw the witnesses having found that they were truthful and worthy of credit, we must accept that finding as final and conclusive.

There remains to be considered the question of law relating to the effect to be attributed to the 60th section of the Statute 31 Vic. ch. 20, now the 81st section of ch. 111 of the Revised Statutes. This is certainly a point of great general importance, and one which it appears had never, before the present case came before the Court of Appeal, been the subject of decision in an appellate court.

The doctrine which sanctions the holding of notice of an unregistered conveyance to be sufficient to postpone the priority acquired by the statute owes its origin to the decision of Lord King in the case of *Blades* v. *Blades* (1), which was followed by that of Lord Hardwicke in *Le Neve* v. *Le Neve* (2), who then, (speaking of the Middlesex Act), says :—

> The intention of the Registry Act appears from its preamble to be plainly to secure subsequent purchasers and mortgagees against prior secret conveyances and fraudulent incumbrances. Where a person had no notice of a prior conveyance there the registering of the subsequent conveyance shall prevail against the prior, but if he had notice of a prior conveyance then that was not a secret conveyance by which he could be prejudiced * * * It would be a most mischievous thing, if a person taking advantage of the legal form appointed by an act of Parliament, might, under that, protect himself against a prior equity, of which he has notice.

It thus appears that in its origin this doctrine was founded on the construction of the statute into which it was held there ought to be read, as it were by implication, an exception of unregistered conveyances which are not secret but known to a purchaser claiming the protection afforded by the act to registered deeds. It is true that this doctrine has repeatedly been disapproved of by very eminent judges. Sir William

(1) 1 Eq. Cas. Abr. 358 (2) 3 Atk. 646.

Grant, M R., in *Wyatt* v. *Barwell* (1); Lord Romilly, M. R. in *Ford* v. *White* (2); Longfield J. in *re Rorke* (3); Lord Alvanley M R. in *Jolland* v *Stainbridge* (4); Lord Brougham in *Mill* v. *Hill* (5); Bramwell L. J. in *Greaves* v. *Tofield* (6).

But notwithstanding the formidable array of authority against the policy of this rule we find it, so recently as 1874, acted on by the House of Lords in the case of *Agra Bank* v. *Barry* (7), where Lord Cairns C., if he does not express approval of it, does very decisively state and act on the opinion that it is too firmly established to make it either desirable or possible that it should now be repudiated by judicial authority merely (8). He says :—

Any person reading over that act of Parliament (the Irish Registry Act) would perhaps in the first instance conclude, as has often been said, that it was an act absolutely decisive of priority under all circumstances, and enacting that under every circumstance that could be supposed, the deed first registered was to take precedence of a deed which, although it might be executed before, was not registered until afterwards. But, by decisions, which have now, as it seems to me, well established the law, and which it would not be, I think, expedient in any way now to call in question, it has been settled that, notwithstanding the apparent stringency of the words contained in this act of Parliament, still, if a person in Ireland registers a deed, and if at the time he registers the deed either he himself or an agent, whose knowledge is the knowledge of his principal, has notice of an earlier deed, which, though executed, is not registered, the registration which he actually effects will not give him priority over that earlier deed. And, my Lords, I take the explanation of these decisions to be that which was given by Lord King in the case of *Blades* v. *Blades* upwards of 150 years ago, the case which was mentioned just now at your Lordships' Bar. I take the explanation to be this, that inasmuch as the object of the statute is to take care, that by the fact of deeds being placed upon a register, those who

(1) 19 Ves. 435.
(2) 16 Beav. 120.
(3) 13 Ir. Ch. 275.
(4) 3 Ves. 478.
(5) 3 H. L. Cas. 837.
(6) 14 Ch. D. 577.
(7) L. R. 7 H. L. 147.
(8) See also the criticism on the observations of Bramwell L. J. in *Greaves* v. *Tofield* by an American author, the late Mr. J. N. Pomeroy in his treatise on Equity Jurisprudence, vol. 1 p. 472.

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come to register a subsequent deed shall be informed of the earlier title, the end and object of the statute is accomplished if the person coming to register the deed has, *aliunde*, and not by means of the register, notice of a deed affecting the property executed before his own. In that case the notoriety, which it was the object of the statute to secure, is effected, effected in a different way, but effected as absolutely in respect of the person who then comes to register as if he had found upon the register notice of the earlier deed.

Other authorities have more distinctly placed the doctrine on the ground, that a person who purchases with notice of the title of another is guilty of fraud, and that a Court of Equity will not permit a party, so committing a fraud, to avail himself of the provisions of a statute itself enacted for the prevention of fraud. And this principle is one which has long been recognized and applied by Courts of Equity, not merely in cases arising under the Registry Acts, but to cases arising under the Statute of Frauds and the Statute of Wills also; the doctrine of part performance, the admission of parol evidence to establish an absolute deed to be a mortgage, and the conversion of a legatee or devisee into a trustee, being all referable to the same general rule of equity. In *McCormick* v. *Grogan* (1), Lord Westbury says:—

> The Court of Equity has from a very early period decided that even an act of parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an act of parliament intervenes, the Court of Equity, it is true, does not set aside the act of parliament, but it fastens on the individual who gets a title under that act and imposes upon him a personal obligation, because he applies the act as an instrument for accomplishing a fraud.

If we had here to consider only the same question which has been so often decided in England, and which was the subject of the decision in *Barry* v. *Agra Bank*, it would be mere useless prolixity to recapitulate the grounds of the previous decisions, and make the foregoing extracts. But we have not to decide the same question, but an entirely new

(1) L. R. 4 H. L. 97.

one arising on the 68th section of the registry act (Revised Statutes ch. 111 sec. 81), and it thus becomes essential to enquire whether the doctrine of Courts of Equity in postponing a registered purchaser, who has notice of a prior unregistered deed, is one founded on a general rule of equity applicable generally to all prior titles and equities, or upon an exceptional rule, which is to be confined to the case of notice of such titles and equities, as arise upon written instruments, which might themselves have been registered, and therefore a discussion of the reasons which have led Courts of Equity to apply this principle is not irrelevant, but on the contrary, such considerations must form the very foundation of the present adjudication. The section in question (I take it from the Revised Statutes) is as follows:—

No equitable lien, charge, or interest affecting land, shall be deemed valid in any court in this province as against a registered instrument executed by the same party, his heirs or assigns, and tacking shall not be allowed in any case to prevail against the provisions of this act.

The bad draftmanship which is conspicuous in this clause has been well pointed out by Mr. Justice Patterson, but I agree with him that it is impossible to give it any other construction than this, namely, that it only applies to "equitable liens, charges or interests" which arise purely by operation of equity and which do not arise on any written instrument. Such rights arising on written instruments are manifestly provided for by the preceding section, and to hold them to be within the provision now under consideration would be to introduce a direct conflict between the two clauses of the act.

Then it would seem to be proper, in the first instance, to consider what would be the consequence if this 81st section stood alone as an innovation upon the former legislation, and as if the act had contained

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no such enactment as to the effect of notice as that comprised in the 80th section. Would a court of equity in such case have been justified in applying the doctrine of notice, as theretofore applied in respect of unregistered instruments, to equities arising without writing?

Taking either the reasons given by Lord Cairns in *Agra Bank* v. *Barry* that notice affects in another way the same object as that for which registration was required, or the broader grounds for the general rule, laid down by Lord Westbury, that a party who is guilty of fraud is not entitled to the protection of an act of Parliament, it is, I think, manifest that a Court of Equity could not have refused to apply the doctrine of notice to the case of an equitable lien of which there was no written evidence, without making an arbitrary distinction entirely unwarranted by the statement of the law as we have it from both the eminent judges whose words have been quoted.

Then does the provision in the 80th section afford any reason why a distinction should be made.

It is a rule to be regarded in the construction of statutes, sanctioned by many authorities, that if a statute enacts that what was already before the statute a general rule of law applicable to all cases should be thereafter applied in some particular case, an intention to alter the law is not to be implied, but it is rather to be inferred that the legislature intended to lay down the particular rule for greater caution and certainty or for some other reasons. It is also a well understood principle that the jurisdiction of a Court of Equity is never to be considered as taken away because by statute a similar jurisdiction is imposed on courts of law.

If therefore we take these rules of construction as guides in construing the statute now in question there

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will, I think, be little difficulty in arriving at the conclusion that the former jurisdiction of Courts of Equity was retained, and was applicable to the 81st section, notwithstanding the provisions of the 80th section, making the former equitable doctrine of notice a statutory rule thereafter, and as such applicable in courts of law as well as in Courts of Equity, and that the rule "*expressio unius est exclusio alterius*" has no application to these two sections.

I am further of opinion that the omission to make notice applicable to the 81st section can be accounted for on sufficient grounds consistently with the foregoing construction. At the time the original act, from which the revised statute was consolidated, was passed the jurisdiction of law and equity in the Province of Ontario was administered by separate courts. In a court of law a case might frequently arise, and did frequently arise, where the legal title depended on prior registration, entitling a subsequent purchaser to priority over another claiming under a prior unregistered deed passing the legal estate. In such a case, owing to the different principles acted on with reference to the effect of notice by courts of law and courts of equity, the earlier grantee could not succeed at law, even though his adversary admitted the fact of notice; to obtain relief on that ground the first purchaser was compelled to resort to a Court of Equity, although the court of law could just as well have awarded him the same relief. It seems, therefore, very obvious that it was to remedy the inconvenience and injustice which arose in cases of this kind that the 80th section was passed. But as regards cases in which the prior claim was based on some lien, charge or other equity within the 81st section, and not depending on a deed or written instrument at all, such for instance as a vendor's lien, or an equitable mortgage by

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deposit of title deeds, there would have been no use in conferring jurisdiction on courts of law since the competition in such cases not being between two claimants of the legal title, as might well be the case when there were were two succesive deeds the first unregistered and the last registered, but between two equitable claimants, or between an equitable and a legal claimant, it would have been useless to confer jurisdiction upon courts of law to act upon the doctrine of notice in such cases, inasmuch as from the nature of the equitable title of the party claiming priority by reason of notice, such a case never could come within the jurisdiction of a court of law, as that jurisdiction existed when the registry act of 1868 was passed.

For these reasons I think it very clear that the decision of Mowat V. C. in *Forrester* v. *Campbell* (1), was in all respects right and ought to be adhered to.

Although it does not affect the present decision in any way, I think it not out of place to point out here, that the rule as to notice embodied in the 80th section is much more stringent than that recognized in the decisions either upon the English or Irish registry acts. As Mr. Justice Patterson has remarked in his judgment notice after a purchaser has acquired his title and paid his purchase money, if before he has registered his deed, is, by the express words of the 80th section, sufficient to postpone him. This seems a very harsh rule and is one which never prevailed in equity but is in direct opposition to the previous authorities, *Elsey* v. *Lutyens* (2); *Essex* v. *Baugh* (3); *Reddick* v *Glennon* (4); and also contrary to the analogy afforded by the doctrine of tacking and equitable priority generally, by which a purchaser or mortgagee without notice could at any time, and after having had

(1) 17 Grant 379.
(2) 8 Hare 159.
(3) 1 Y & C. 620.
(4) 6 Ir. Jur. 39.

notice, protect himself by getting in a prior legal estate. It is true that Lord Cairns in *Agra Bank* v. *Barry* speaks of notice before registration being sufficient, but as the point did not arise there, and as all the authorities and reasonings to be discovered on the point are against such a rule, I take this to have been unintentional. Having regard to the terms of the 80th section, a purchaser is hardly safe unless his conveyance is executed in the registry office so that it may be placed upon record without allowing an interval for subsequent notice. Indeed this practice of executing deeds in the registry office, is said in a late case in the English Court of Appeals actually to prevail in the North Riding of Yorkshire, though for a less urgent reason than that which calls for it in Ontario.

I am of opinion that this appeal must be dismissed, and with costs.

FOURNIER J.—concurred.

HENRY J.—I think the majority of the Appeal Court of Ontario came to the proper conclusion in this case, and I adopt the judgment of Vice Chancellor Proudfoot as embodying my views as to the issues raised.

When the case was previously before this court I was of the opinion that the money was loaned by Mr. McFarlane on the security of the land conveyed to him absolutely, but which was understood and agreed upon to be subject to the right of redemption during his life.

It has been considered that from the evidence there was but an undertaking in words on the part of Mr. McFarlane to re-sell the land and re-convey it, but I cannot so conclude. The words that are shown to have been used are that Peterkin had during Mr. McFarlane's life time to redeem the property—not to purchase it back.

I also fully concur with the views of Vice Chancellor Proudfoot and those other learned judges who coincided

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with him as to the effect of the Registry Acts in such cases

I think the judgment of court below and the decrees of the learned Chancellor herein should be affirmed with costs.

GWYNNE J.—I am of opinion that the appeal should be allowed with costs and that the plaintiff's bill should be dismissed from the Court of Chancery of Ontario with costs.

The case as asserted by the plaintiff in her bill, in short substance is, that being the owner in fee simple of the land in the bill mentioned, she, through the intervention of her agent, one James Peterkin, applied to one McFarlane for a loan of $500 which McFarlane agreed to lend to her upon the security of the said land, and that upon the advance of the said sum being made by him to her in pursuance of the above agreement, she, by deed dated the 31st August, 1866, conveyed the said land to McFarlane in fee simple, and that, although the said deed was in point of form absolute, it was expressly intended and understood between the plaintiff and McFarlane that it should stand as security only for re-payment of the said sum at any time to the said McFarlane; and that the said McFarlane afterwards in pursuance of a threat made by him to treat the said deed as absolute and thereby to cheat and defraud the plaintiff, by indenture bearing date the 13th June, 1871, in consideration of $1,200 absolutely sold and conveyed the said land to Colin H. Rose and Duncan McKenzie, who prior to the sale and conveyance of the said land to them had full knowledge and actual notice of the plaintiff's right to redeem the said land upon re-payment of the said sum to the said McFarlane, and that by indenture bearing date the 21st of June, 1872, the defendants Rose and McKenzie having previously cut and removed from the said land timber of great value—to wit of the value of $2,000—conveyed the said land in fee to the

defendant Thomas Burke, who prior to the sale of the said land by McFarlane to Rose and McKenzie, and by them to him had full knowledge of the plaintiff's right of redemption aforesaid, and became purchaser thereof with notice of the premises, and the bill prayed, among other things, that it might be declared that the indenture executed by the plaintiff to McFarlane, although absolute in its form, was intended by way of security only for re-payment of the said sum of $500, and legal interest at the most thereon from the date thereof, (although nothing had been said about interest in the bill, nor in the agreement therein alleged as to the borrowing by the plaintiff of the said sum of $500,) and that the plaintiff is entitled, and may be let in, to redeem the said land.

Now, if it were not for the frame of the answer, which upon the evidence as appearing in the cause must, I think, be admitted to have been improvident and uncalled for, there could not be any question upon the subject. But the appellants cannot, I think, in the face of the evidence, be prejudiced by the frame of their answers, the gist and substance of which is that admitting it to be true as alleged in the bill, that although the deed executed by the plaintiff to McFarlane was absolute in point of form, it was agreed between them that it should operate as a mortgage security only for re-payment of the said alleged loan of $500, and subject to redemption upon payment thereof to McFarlane, nevertheless the appellants are not to be prejudiced or affected by any such agreement, intent or understanding, for that they were respectively purchasers for value by registered title without notice of any such agreement or right of redemption.

I entirely agree with the very able judgments of Chief Justice Hagarty and Mr. Justice Burton, in which, as it appears to me, Mr. Justice Paterson also concurred, that the evidence clearly displaces the case

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as alleged in the bill, and shows beyond all doubt that McFarlane never lent or agreed to lend to the plaintiff the said sum of $500, nor any sum; that no debt was ever due from the plaintiff to McFarlane, and that he never agreed to hold the land by way of mortgage security for repayment of any debt; but on the contrary that the transaction which took place between James Peterkin and McFarlane was an out and out sale of land to McFarlane, which was perfected by the execution of the deed by the plaintiff to whom James Peterkin had but shortly previously by deed transferred the land. And the utmost extent of the evidence, assuming it to be uncontradictory in its character and quite true, is that McFarlane verbally and voluntarily, and so in a manner not binding upon him, promised James Peterkin, whom McFarlane regarded as the person selling the land, although the deed to McFarlane was executed by the plaintiff, that he, James Peterkin, might repurchase the land, and that he, McFarlane, would re-sell and convey it to him upon re-payment of the sum of $500 at any time during his, McFarlane's, life time, nothing whatever being said about interest. Now, whether any such promise ever could have been, or, in fact, was given, I do not think it necessary to enquire, for the case does not turn upon the credibility of witnesses; but upon this, that the promise, assuming it to be established by the evidence, is clearly not the agreement alleged in the bill upon which the equity relied upon by the plaintiff is made to rest, and such a promise, even though knowledge of it should be clearly brought home to the appellants, could not justify a finding against them upon the issue upon which they have rested their defence, namely, that they were purchasers for value without notice of the equity relied upon in the bill, namely, that McFarlane acquired the land upon the faith that he should hold it merely as a mortgage security for a loan of a sum of money made by

him to the plaintiff and for which she was his debtor, the land being only held as security for the debt.

The passages in the evidence which are relied upon by the late learned Chancellor as establishing notice to the defendant Thomas Burke are not, in my judgment, evidence of any notice whatever binding upon him, or which can have any effect to defeat his purchase; they are for the most part loose observations made by persons having no interest in the subject, and who had no knowledge whatever of the circumstances under which McFarlane acquired title, or of the nature of the claim which the plaintiff had, if she had any—and her own conduct in abstaining from asserting any claim if she had any while Rose and McKenzie were to her knowledge stripping the land of all its valuable timber might well be regarded as shewing that she had no claim such as she now asserts. A decree against Thomas Burke under the circumstances as appearing in the case cannot, in my judgment, be supported upon the authority of any precedent nor upon any principle of Equity. It carries the doctrine of notice of an equitable claim alleged to exist in a plaintiff defeating a sale to a defendant by a good legal conveyance executed for valuable consideration beyond anything which is in my opinion warranted by any decided case.

Appeal dismissed with costs.

Solicitors for appellants: *Scane, Houston & Craddock.*
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