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*Nov. 25.
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THE UTTERSON LUMBER COMPANY (Limited) (DEFENDANTS)..... } APPELLANTS;

AND

SIMPSON RENNIE (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Description of property—Omission by mistake—Rectification—Subsequent purchase—Conditions—Notice.

M. & B. owners of certain village lots of land were in possession of an adjoining water lot in a lake, the title to which was in the crown and to which, according to the practice of the Crown Lands Department, they had a right of pre-emption. On this water lot they erected a mill on cribwork built on the bottom of the lake. A mortgage given to R. of the village lots and certain other lands was intended to comprise the water lot and mill but the latter were omitted by mistake of the solicitor who prepared the instrument. M. & B. afterwards executed separate instruments in the form of a chattel mortgage purporting to mortgage certain chattel property and the said mill to two other persons.

M. & B. having become insolvent assigned all their property for the benefit of their creditors and the assignee sold at auction all their property including the mill. The sale was made subject to certain printed conditions one of which was that as all the information relating to the titles of the property was set out in the schedules, stock list and inventory the vendor would not warrant the correctness of the same and that no other claims existed "but the purchaser must take subject to all claims thereon, and whether herein mentioned or not, and subject to all exemptions in law." These conditions were signed by the purchasers to whom the assignee executed a conveyance of all the property so sold. Before the sale the assignee had procured the two last above mentioned mortgages executed by M. & B. to be paid off by a person who advanced the money and he took an assignment to himself after the sale paying the amount out of the purchase money. The

*PRESENT :—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

conveyance to the purchasers at the sale purported to be made in pursuance of all powers contained in these mortgages.

R., the mortgagee of the village lots, brought an action to have his mortgage rectified so as to include the water lot and mill property omitted by mistake. The purchasers at the auction sale set up the defence of purchase for valuable consideration without notice.

Held, affirming the decision of the Court of Appeal, Gwynne and Patterson JJ. dissenting, that there being ample evidence to establish, and the trial judge having found, that the mortgage was intended to cover the water lot and mill, and that the purchasers had notice of R's equity before paying the purchase money and taking a conveyance, these facts must be taken to be established and the findings deemed final on this appeal and they establish R's right to have his mortgage reformed.

Held, per Strong J.—1. The water lot and mill thereon were capable of being mortgaged as real estate and might, in equity, be dealt with by an instrument in form of a chattel mortgage if sufficiently described, and the description "mill property" in the mortgages in question would pass the land covered with water on which the mill was erected.

2. In the case of charges upon equitable property where the legal estate is outstanding the defence of purchase for valuable consideration without notice is, in general, inapplicable, the rule being that all such chargees take rank according to priority in point of time, but R., not having an actual charge but merely an equitable claim for rectification such defence was not precluded.

3. The purchasers at the sale could not set up want of notice in themselves and their immediate grantors without showing that the original mortgagees in whose shoes they stood were also purchasers for valuable consideration with notice.

4. By the condition of sale which they signed the purchasers incapacitated themselves from setting up this defence.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment in favour of the plaintiff.

The facts are sufficiently stated in the above headnote and in the judgments hereinafter given.

Laidlaw Q.C. for the appellants agreed that the original mortgagors, Mahood & Brown, had no title to the water lot and that the mill and machinery were improperly dealt with as real estate in the courts

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below, citing *Moffatt* v. *Coulson* (1); *Tidey* v. *Craib* (2).

Blackstock Q. C., and Dickson for the respondent referred to *Adams* v. *Watson Manufacturing Co.* (3).

Sir W. J. RITCHIE C.J.—I think there was ample evidence to sustain the finding of the judge of first instance, confirmed by the unanimous decision of the Court of Appeal, viz., that the plaintiff's mortgage was intended to cover the mill and machinery and water lots and that they were omitted from the mortgage by mutual mistake, and defendants acquired the title after they had actual notice of plaintiff's claim, and subject to which defendants hold their title to the mill property in question; therefore this appeal must be dismissed.

STRONG J.—An accurate statement of the facts and the documentary evidence is indispensable to a right understanding of this case.

Messrs. Brown & Mahood were lumberers and mill-owners carrying on their business at the village of Port Sydney in the township of Stephenson in the Muskoka district. At this place they had a property consisting of village lots nos. 5, 6, 7 and 8, and they were also in possession of a water lot in Mary's Lake in front of the property mentioned. Upon this water lot they had erected a shingle mill. This mill was built upon a crib. Mahood in his evidence given at the trial describes it thus:—

> The main part of the building is built on a crib thirty feet by forty feet and then there is an extension of twenty-five feet.

This description, which is the only one I find in the evidence, implies that the mill was built upon and

(1) 19 U. C. Q. B. 341. (2) 4 O. R. 696.
(3) 15 O.R. 218; 16 Ont. App. R. 2.

fastened to a cribwork which itself was affixed to the realty, being built upon the bottom of the lake. The title to this water lot was in the crown and the only title of Brown & Mahood was that arising from the mere fact of possession, coupled with the right of pre-emption, which, according to the practice of the Crown Lands Department as proved by Mr. Kirkwood, an officer of that department, they as owners of the adjacent lots on the shores of the lake would be, and were in fact, recognized as having. The mill lot and the buildings upon it and the machinery affixed in the mill were, therefore, as far as Brown & Mahood had any title thereto, realty dependent on a mere equitable title.

Then on the 21st of November, 1887, Brown & Mahood executed an instrument in the ordinary form of a chattel mortgage which purported to be a mortgage upon the machinery in the mill, and, also, upon the mill itself described in the instrument as the "mill building" to Joseph H. Parkinson to secure $1,994.

On the 8th of December, 1887, the same parties executed a mortgage of the village lots and certain other lands to the plaintiff Simpson Rennie, the present respondent, to secure $2,500 which sum was actually lent and advanced by the respondent and appropriated to the payment of a prior mortgage made by Brown & Mahood to a Mr. Stephenson. It is proved beyond question, and as the learned judge who tried the action, Mr. Justice Falconbridge, has so found, it must on the present appeal be taken as an established fact, that the mortgage to the respondent was intended to comprise the water lot and mill erected thereon, and that this latter property was omitted therefrom by the mistake of the solicitor who prepared it. Subsequently to the mortgage to the respondent, and on the 2nd of January, 1888, Brown

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& Mahood, the mortgagors, executed an instrument in the ordinary form of a chattel mortgage, by which they purported to mortgage certain chattel property, and, also, the mill described as "the mill building" to one George Hughes to secure the payment of certain monies therein mentioned. Further, on the 17th of January, 1888, and on the 16th February, 1888, the same mortgagors executed instruments comprising the mill property in all respects similar to that formerly executed in favour of Hughes to one Alfred Hunt to secure monies therein respectively mentioned.

On the 25th of May, 1888, Brown and Mahood, having become insolvent, made an assignment for the benefit of their creditors to Robert Gray pursuant to the Ontario act respecting assignments and preferences by insolvent persons.

On the 6th November, 1888, Gray, the assignee, caused all the assigned property including the mill property in question to be sold by auction. At this sale Messrs. William A. Mitchell, John W. Lang, William W. Park, James Todhunter and Thomas H. Steele, all creditors of the insolvents, became the purchasers of the insolvents' real estate and other property for the price of $16,050.

This sale was made subject to certain printed conditions of sale, the 10th of which is as follows:—

> The vendor has in the schedules hereto annexed, and in the stock list and inventory hereinbefore referred to, set forth all the information that he has been able to obtain relating to the titles to the various parcels, and the vendor shall not be understood to contract or warrant that the said information is correct or that no other claims are existing upon the said properties or any or either of them but the purchaser must take subject to all claims thereon whether herein mentioned or not and subject to all exemption in law.

These conditions of sale were duly signed by the purchasers.

Subsequently, and on the 5th February, 1889, the assignee Gray executed a conveyance to the purchasers of all the property comprised in the sale by auction, and the purchasers having afterwards, in accordance with the statute law of Ontario, formed themselves into a trading corporation or joint stock company under the title of the Utterson Lumber Company (Limited) which company is the present appellant, the original purchasers on the 12th March, 1889, conveyed all the property acquired under their purchase to the appellants.

Prior to the auction sale, and in the month of June, 1888, Gray had procured one Jenkins to advance the money required to pay off Parkinson, Hughes and Hunt, which Jenkins did, taking an assignment of the previously mentioned securities held by those mortgagees respectively.

Subsequently to the auction sale, but possibly before the conveyance to the purchasers, Gray acquired these securities by assignment from Jenkins who appears to have been paid off out of the purchase money paid by the purchasers at the sale of the 6th November, 1888. The purchase deed of the 5th February, 1889, executed by Gray for the purpose of conveying the estate purchased to the purchasers at the sale purports to be made in exercise of all powers contained in any of the prior mortgages. It is impossible, however, that if the mill property is to be regarded as realty any benefit could accrue to the purchasers from this form of conveyancing inasmuch as the powers of sale in the several mortgages to Parkinson, Hughes and Hunt, in which the mill property was included, were restricted in terms to the chattel property comprised in those instruments.

This being the state of facts and the history of the title the respondent brought this action against the

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appellants for the rectification of his mortgage by including therein the mill property which, as before stated, he clearly and satisfactorily establishes had been omitted therefrom by the error and mistake of the conveyancer who prepared the mortgage deed.

The appellants set up that they are purchasers for valuable consideration without notice.

So far as the appellants' own purchase at the sale of the 6th of November, 1888, is concerned it is out of the question to say that they are purchasers for value without notice, and this for two reasons. First, they had beyond all doubt or question, if the evidence given on behalf of the respondent is to be credited, full and precise notice of the respondent's equity before they paid their purchase money and took their conveyance, and the learned trial judge who tried the action without a jury having distinctly found in the respondent's favour on this point his finding must for all present purposes be deemed final. This finding of Mr. Justice Falconbridge is in these words:—

> The evidence that the plaintiff's mortgage was intended to cover the water lot including the mill is irrefragable. As to notice I think the plaintiff has proved his case. The testimony of Mr. Gray is confirmatory of plaintiff's position, and I regard the evidence of defendant Mitchell as pointing in the same direction. I find both facts in plaintiff's favour.

This is conclusive of the only contested facts in the case, and in the face of this finding the appellants are not entitled to be considered as purchasers without notice. There is, however, an additional reason for holding them disentitled to the benefit of such a defence. By the 10th condition of sale they expressly purchased subject to all outstanding equities and have thus incapacitated themselves from claiming to be purchasers without notice of any equity, whatever it may be, to which the property was subject in the assignee's hands. We have, however, to consider what

the position of the defendants is as assignees of the chattel mortgages transferred to Gray by Parkinson, Hughes and Hunt respectively.

They are now the holders and assignees for value of those mortgages which have not merged in the equity of redemption and which they are therefore still entitled to set up as existing securities.

The water lot, the mill erected upon it and the machinery affixed being, as I hold, all realty, but realty to which the mortgagors Brown and Mahood had only a precarious equitable title dependent entirely on their possession and pre-emption right, the legal estate being in the crown, was nevertheless susceptible of being made the subject of a mortgage security as real estate. That this property might in equity be effectually dealt with by an instrument which was in the usual form of and purported to be a mortgage of chattels, provided it appeared to be sufficiently ascertained by an appropriate denomination sufficient to describe it, cannot be doubted. Then the description given of it in the several chattel mortgages executed in favour of Parkinson, Hughes and Hunt as the "mill property" was ample for the purpose of passing not only the mill building, but also the land covered with water on which it was erected and was, so far as the limits of an ordinary water lot extended, appurtenant to it, and would probably be held a sufficient description for the purposes of a formal legal conveyance. This being so there were at the time the appellants got in their chattel mortgages, at least so far as we know from the evidence before us, four equitable charges or claims in respect of this mill property which in order of date stood as follows: Parkinson's mortgage first, then the respondent's equity to have his mortgage rectified so as to include the mill, and then the subsequent mortgages of Hughes and Hunt in order of their respective dates.

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Now in the case of charges upon equitable property where the legal estate is outstanding the defence of purchase for valuable consideration without notice is in general inapplicable, the rule being that all such chargees take rank according to their priority in point of time. The respondent had not, however, an actual charge as the other mortgagees had, and although as between mere equitable chargees the defence of a purchase for value without notice does not apply, yet an equitable chargee for value not having the legal estate is, it has been held, entitled to set up the defence of want of notice as against one who has not an actual charge, but a mere equity such as the respondent's here, to have a conveyance or mortgage rectified. This is the law of courts of equity as laid down by Lord Westbury in the case of *Philips* v. *Philips* (1) where the whole doctrine of equity in connection with this peculiar defence of purchase for valuable consideration without notice is analysed and explained, and the different cases to which it applies analysed and classified, Lord Westbury there distinguishing between the case of an actual equitable estate or interest and "those in which there are circumstances that give rise to an equity as distinguished from an equitable estate as for example an equity to set aside a deed for fraud or to correct it for mistake," lays it down that in the latter class of cases it is not essential that a defendant should have the legal estate. And to the same effect is the decision of Lord St. Leonards in the case of *Bowen* v. *Evans* (2).

If there had been no assignment of these mortgages by Hughes and Hunt, and those persons had been brought before the court by the respondent claiming

(1) 4 De G. F. & J. 208; See an admirable commentary on the case of *Philips* v. *Philips* in Haynes Outlines of Equity, Supplt. Chapters 1, 2 & 3.

(2) 1 J. & LaT. 178.

priority over them, it would have been open to them to have pleaded this defence and it must have prevailed in default of proof of notice to them of the respondent's equity before they paid their money or took these mortgages. Then, although the appellants had notice before they took their conveyance from Gray and were therefore, as regards their own purchase, not entitled to insist on the defence of purchase for value without notice, yet they would still have been in a position as regards the mortgages of Hughes and Hunt to set up the defence that these assignors were such purchasers and to shelter themselves under the equitable defence which the latter would have been entitled to. There are, however, in my opinion, reasons why the appellants are not now entitled to insist on this defence to the clear *primâ facie* right to equitable relief which the respondent has established. First, whilst the appellants do plead that they were themselves, and that their immediate grantors who purchased at the auction sale also were, purchasers for value without notice, a defence which utterly fails on the evidence, they have not pleaded that the mortgagees Hughes and Hunt, in whose shoes they stand, were such purchasers; and they have not, therefore, put the respondent, as they should have done, to prove notice to those incumbrancers. It is impossible, therefore, that they can now be entitled to the benefit of the defence. Further in the face of the 10th condition of sale under which they purchased and by which they expressly undertook to be subject to all outstanding equities against the property, I should have thought it impossible that they could have maintained this defence in respect of securities which they also acquired from Gray under the same deed. I cannot agree with Mr. Justice Osler who was of opinion that the condition of sale referred to was superseded by the conveyance.

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As regards Parkinson's mortgage, in the view which I take, that charge is anterior in point of date to the respondent's mortgage and the appellants are clearly entitled to priority in respect of it over the respondent. There is, however, nothing in the formal judgment pronounced by Mr. Justice Falconbridge to prejudice this right of the appellants to priority in respect of the mortgage debt assigned to them by Parkinson. The judgment merely directs that the respondent's mortgage shall be reformed so as to cover the water lot, mill and machinery.

It is possible that it may be entirely immaterial whether the respondent has priority over the mortgages given to Hughes and Hunt or not. Should it turn out upon taking the accounts (which are not, however, directed by the judgment and in respect of the omission to direct which no complaint has been made by either party) that the proportion of the purchase money attributable to the property held in security by the plaintiff including the mill property is sufficient to pay his principal, interest and costs, as well as the amounts due on the mortgages of Hughes and Hunt, and also that due on Parkinson's mortgage, no question of priority will, of course, arise, but it is impossible to foresee, from the materials before the court on the present appeal, how this will be.

The appeal must be dismissed with costs.

TASCHEREAU J. concurred.

GWYNNE J.—The question in this case simply is whether the evidence discloses such a case as justifies the court, as against the defendants who derive title under certain mortgages, to decree the reformation of a mortgage by the insertion therein of certain property not inserted therein upon the suggestion and allega-

tion, that the property sought to be inserted in the mortgage was by the mere error and mutual mistake of the mortgagors and mortgagee omitted, and that the defendants purchased with full notice that it was so omitted by mistake.

Early in the year 1887 one Stephenson, then a practising attorney in the city of Toronto, appears to have made, or to have procured to be made, pecuniary advances to a firm carrying on the business of a general store and lumbering at Utterson in the county of Muskoka under the name of Brown and Mahood. Mr. Brown, the senior member of the firm, was a man advanced in years and Mahood, the other member of the firm, was his son-in-law. In security for the repayment of these advances a mortgage securing repayment of the sum of $2,500 was executed by, as I understand the evidence, Brown, in whom the fee was vested, upon lot 22 in the 7th concession of the township of Stephenson in favour of Stephenson the attorney, or his father, as mortgagee; the whole transaction was negotiated and arranged by Stephenson the attorney. In the summer of 1887, and after the execution of the above mortgage, Mahood contracted with one Alfred Hunt, the owner in fee of certain village lots known as village lots 5, 6, 7 and 8 in the village of Port Sydney as shown on Mary Anne Ladell's survey of part of that village registered in the registry office for the district of Muskoka on the 8th day of May, 1875, for the purchase of the said village lots. These village lots were conveyed by Hunt to Mahood by a deed of bargain and sale, bearing date the 20th and registered upon the 24th August, 1887. These village lots were separated from the waters of St. Mary's Lake, in the township of Stephenson, by a piece of land which, in the original survey of the township of Stephenson, was reserved as

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a road allowance reserve along the water's edge of the lake, and between the lake and lot no. 25, in the 6th concession of the said township of Stephenson, upon which lot the said village lots 5, 6, 7 and 8 in the village of Port Sydney were laid down. When Mahood contracted to buy the village lots he and his father-in-law, constituting the said firm of Brown and Mahood, contemplated erecting a steam shingle mill in the waters of the said lake opposite to the said village lots. At this time there was another person who either in point of fact was, or was believed by Mahood to be, trying to get possession of a water lot in front of the said village lots with the view of preventing Brown and Mahood from erecting the mill contemplated to be erected by them there; and in consequence Mahood came down to the Crown Land Office in Toronto to see, as he says, what could be done, and if they could buy, and he was told at the Crown Land Office that they could not buy unless they brought a plan prepared by a provincial surveyor showing the property applied for. This must have taken place as early as July, 1887, for in that month Mahood employed a provincial surveyor to survey and make a plan of a water lot in the lake on the north side of the said reservation for road allowance and opposite to the said village lots 5 and 6.

The surveyor so employed accordingly surveyed and made a plan of the water lot, which plan, however, Mahood says he did not get until some time after. Upon this subject he says:

> I don't remember when we bought the lots (the village lots). I think they were bought some time in June, if I am not mistaken, but it was about three weeks or a month afterwards before we got the surveyor out surveying, working to lay out the mill site for us. He said he would send us up a little plan of it when he had time to make it, we were not in a hurry for it we said; we would get it in the fall.

The plan was produced at the trial and it bore date July 13, 1887. Upon this Mahood said in his evidence

that it must have been prepared about the time it bears date, but that he did not get it then, and he added:—

I got it prepared with the intention of making application to the Crown Land Department for that water frontage. The application was never made until late in the same winter of 1887-8. I think it (the plan) lay in Mr. Brown's office for a long time after we had it prepared. It was prepared shortly after we bought the village lots—prepared to apply for the water frontage. We never made application. I was intending to make application. I went personally to the department and asked about how to proceed in the matter.

Having thus learned how to proceed to acquire title to the water lot upon which they proposed erecting the mill they proceeded with its erection upon a crib built out in the waters of the lake and they put in the machinery, so that they had the mill in operation in October, 1887. Upon the whole, then, it would seem, I think, very probable that the negotiations for the purchase, and perhaps the contract for the purchase, of the village lots was made, as Mahood in one place says he thinks the purchase was made, in June, 1887, and that about that time Mahood went to the Crown Land Office to ascertain how to acquire a water lot for their mill site. In another part of his evidence, not already quoted, he says:—

We were informed that one Sydney Smith was going to make application for the water lots to prevent us building the mill, and in order to prevent that I went to the Crown Land Department to get information.

Having been there informed that no sale could be made without a plan of the property made by a Provincial Surveyor, he employed a surveyor for the purpose, and being apparently satisfied with the information he obtained in the Crown Land Office that thus he could acquire a title he proceeded at once to erect the mill and had it in operation in October, not doubting but that on making his application at some

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future time to the Crown Land Department he could get a title to the lot on which the mill was so erected. In the month of November, 1887, Brown and Mahood effected a loan of $1,194.00 from one Parkinson; the security agreed upon for such loan was a chattel mortgage upon the said mill, and the machinery therein, and a quantity of logs and a stock of dry goods, groceries, &c., and a policy of insurance upon said chattels, and also a mortgage upon said village lots nos. 5, 6, 7 and 8, and other lands. To perfect this transaction a chattel mortgage was executed by the mortgagors Brown and Mahood respectively, and also a real estate mortgage, bearing date respectively the 28th day of November, and registered in the proper offices for the registration of such respective instruments on the 26th day of November, 1887, and a policy of insurance was, upon the 24th day of said month of November, effected by the mortgagors in the sum of $3,000 upon the said mill and the machinery therein, by which policy, which was delivered with the said mortgages to Parkinson as his security, it was provided that the loss if any should be paid to him. By the chattel mortgage the said mortgagors conveyed, bargained and assigned to the mortgagee all and singular the goods and chattels enumerated as follows, namely, one shingle machine bought from Polson iron works, all the shaftings, pulleys, belting and piping, and one incubator, a quantity of hose, one mill wheel, and jackladder and drag saw in the mill building in the village of Port Sidney, in the township of Stephenson, on the shore of Mary Lake, and also the said mill building belonging to the said mortgagors, and also all the pine timber cut and being cut into logs upon lot number 8, in the 2nd and 3rd concessions of the said township of Stephenson, also all the dry goods, groceries, wooden

ware, ready-made clothing, boots and shoes, and generally all the stock in trade and fixtures owned by the mortgagors in and upon the premises at Utterson, in said township of Stephenson where the mortgagors carried on the business of merchants. And in the said chattel mortgage it was declared that it was executed upon the express condition that if the mortgagors should well and truly pay or cause to be paid to the said mortgagee the full sum of $1,194.00 as follows: $645.00 on the 22nd day of January, 1888, $345.00 on the 22nd day of February, 1888, $345.00 on the 22nd day of March, 1888, $337.50 on the 22nd day of April, 1888, and the sum of $322.00 on the 22nd day of May, 1888, then that the said chattel mortgage and every thing therein contained should cease and determine; but it was thereby provided that in case default should be made in the payment of the said above sums together with interest or of any part thereof then and in such case it should be lawful for the mortgagee, his executors, administrators or assigns, to enter upon any premises whatsoever where the said chattels or any part thereof should be and to sell the same or any of them, or any part thereof, either by public auction or private sale as to them or any of them should seem meet; and it was further provided that it should not be incumbent on the mortgagee, his executors, administrators or assigns, to sell the said goods and chattels, but that in case of default in payment of the said sum of money with interest it should be lawful for the mortgagee, his executors, administrators or assigns, peaceably and quietly to have, hold, use, occupy, possess and enjoy the said goods and chattels without the let, molestation, eviction, hindrance or interruption of the mortgagors, their executors, administrators or assigns, or any of them or of any other person whom-

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soever. By the real estate mortgage, which was executed in pursuance of the act respecting short forms of mortgages, the mortgagors did grant and mortgage unto the said mortgagee, his heirs and assigns, the said village lots nos. 5, 6, 7 and 8 and also lots nos. 15 and 16 in the 6th concession and part of lot no. 15 in the 7th concession of the said township of Stephenson upon which last mentioned lot was situate the store of the said mortgagors where they carried on their business as merchants. This mortgage contained a power of sale of the lands thereby mortgaged upon default in payment of any part of the monies thereby secured. In this month of November, 1887, Stephenson the attorney, who had procured from Brown and Mahood the mortgage on lot 22 in the 7th concession of Stephenson in security for $2,500.00, was negotiating with Rennie for the sale to him of that mortgage, and within a week after the perfection of the securities upon the loan effected by Brown and Mahood with Parkinson, Stephenson took Rennie to Port Sidney to Brown and Mahood's place there. Brown was then living on his farm on the lot 22 and Mahood was at Utterson attending to their general store business. Hugh Brown, the son of Brown the senior partner in the firm of Brown and Mahood, was in charge at Port Sidney. He says that on that day Stephenson said to him that Mr. Rennie was not satisfied with the security on the farm alone, which was the property in the Stephenson mortgage, that he wanted the village lots and the mill put in, to which Hugh, as he says, replied that he did not think that he (Stephenson) would have any trouble about that. This was all that Hugh Brown professed to know upon this point. Rennie never spoke to him upon the subject. He knew nothing in point of fact, as far at least as appeared by his evidence, as to what authority,

if any, Stephenson ever got from Brown and Mahood, or either of them, as to adding the mill or the village lots to the farm lot in the Stephenson mortgage as a security to Rennie; in short, Hugh Brown's evidence as to what was the intention of Brown and Mahood, or either of them, or of Stephenson himself or Rennie upon the subject, was utterly valueless. He did not profess to have any knowledge whether Brown and Mahood, or either of them, had come to any definite agreement with Rennie or with Stephenson on his behalf upon the subject. Mahood was at the time attending to the store at Utterson where Stephenson and Rennie stopped on the evening of the day that they had been at Port Sidney, namely, the 30th of November or 1st December, '87. Now, Mahood's evidence is that on that occasion Stephenson came into the store at Utterson and taking him apart said to him that Rennie was not satisfied with the security of the Stephenson mortgage and asked him if they (that is if Brown and Mahood) would have any objection to putting in the mill property. Nothing with regard to the mortgage or money was mentioned in Mr. Rennie's presence. He was asked if Stephenson had spoken of the village lots, to which he replied, yes. He was then asked what he had said about them, to which he replied: "Well it was just mentioned—the mill property." Again, he said that "the mill went with the village lots;" and again, that as they had no deed for the mill property, that is, for the water lot on which the mill was situate, the description of the village lots was supposed to cover the mill; and he said that Mr. Stephenson asked him for a description of the mill property and that he replied that the only description they had was that of the village lots, which he wrote on a slip of paper and gave it to him. Mahood

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did not give Mr. Stephenson any information as to the mortgage transaction with Parkinson which, as we have seen, was completed only a few days previously, and the money, a loan of which was effected thereon, had been paid to Brown and Mahood, but it may be presumed that Mr. Stephenson, who was himself an attorney, and who by Mr. Rennie's evidence appears to have been acting for him, became aware of the negotiations which had been effected on the 20th November. Mr. Rennie says that he told Mr. Stephenson to find out that the mill and the village lots were clear, and that the money should be ready as soon as he should get the papers executed; and he says that on the 15th December he paid the money to Stephenson. He received it, not at all for Brown and Mahood, but for himself or his father. On the 8th day of December, 1887, Brown and Mahood executed a mortgage sent to them by Stephenson for their signatures. By that instrument the farm lot no. 22 in the 7th concession of the township of Stephenson and the village lots nos. 5, 6, 7 and 8, in the village of Port Sidney, by the precise description given to them in the deed from Hunt to Mahood, and in the mortgage from Brown and Mahood to Parkinson, were purported to be conveyed to Simpson Rennie as security for $2,500 therein alleged to have been advanced and lent by Rennie to Brown and Mahood. This instrument when executed by Brown and Mahood was returned by them to Stephenson, and the plaintiff Rennie says that he received it from Stephenson on the 18th December and then paid him the $2,500. In point of fact, as Mahood admits, (and he is the witness upon whom the plaintiff mainly relies in support of the contention raised by him in this suit,) Brown and Mahood never received any portion of this money nor was it ever intended that they should; the mortgage was the re-

sult of a transaction wholly between Stephenson and the plaintiff, and was executed by Brown and Mahood wholly by way of substitution for the Stephenson mortgage. On the 2nd day January, 1888, Brown and Mahood effected a loan of $693 from one George Hughes in security for which they gave Hughes a chattel mortgage upon the mill building and the machinery therein by the same description as that given in respect thereof in the chattel mortgage to Parkinson. The chattel mortgage to Hughes contained precisely the same powers as to sale and otherwise in case of default in payment of the said amount thereby secured as were contained in Parkinson's chattel mortgage, and was duly filed of registry in the proper office in that behalf on the 12th day of January, 1888.

On the 17th day of January, 1888, Brown and Mahood executed a further chattel mortgage upon a large quantity of chattels therein enumerated, including the stock in trade of dry goods, groceries, &c. in their store at Utterson, and "the shingle bolts, mill machinery and plant which are at and beside the mill owned by the mortgagors on the shore of Mary's Lake," &c., to one Alfred Hunt in security for $2,519.73, due by them to him. This mortgage also contained all the provisions as to powers of sale and otherwise that were contained in the Parkinson mortgage, and was duly filed of registry on the 18th January, 1888.

Upon the 16th of February, 1888, Brown and Mahood, in security for a further advance of $2,500.00 made to them by Alfred Hunt, executed in his favour a further chattel mortgage upon the same property as that described in the mortgage of the 17th January, and containing similar provisions as to sale and otherwise in case of default in payment of the moneys thereby secured. This mortgage was duly filed of registry in the proper office in that behalf on the 25th

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day of February, 1888, and on the same 16th February Brown and Mahood also executed in favour of the said Alfred Hunt a mortgage upon certain real estate therein mentioned in security for the same sum of $2,500. Now Mahood said in his evidence that at the time he gave to Stephenson a description of the village lots 5, 6, 7 and 8 the Parkinson loan had not been arranged for at all, and that he always thought the Rennie mortgage was prior to that of Parkinson until the summer of 1888. He also said that before executing the Rennie mortgage he read it and saw that the mill was not included in it. He was asked by the plaintiff's counsel in relation to this the following question :

What did you think and intend the discription to cover ?

To which he answered—

"We always held the description to cover the water frontage as well as the lots."

He was then asked—

What he meant when he said on his cross examination that when he executed the Rennie mortgage he knew it did not cover the mill ?

To which he answered—

"I mean to say that it did not expressly mention the mill."

Whereupon the plaintiff's counsel put a question to him in the following form :

You mean to say by that it did not mention the mill in so many words but you thought the mill was covered by the description of the lots ?

To which he answered—

Yes.

Now Mahood knew that he had purchased the village lots from Hunt. We have it from his own lips that at the time of his purchasing them he was informed that another person was trying to acquire the water frontage for the purpose of preventing him and his partner Brown erecting the mill they contemplated erecting there, and that in order to prevent that he went down to Toronto to the Crown Lands Depart-

ment for the purpose of endeavoring to secure the water frontage himself, and that he was there instructed how to proceed for that purpose, viz : to get a Provincial Land Surveyor to make a survey and plan and description of the water lot as required; that in adoption of these instructions he employed a surveyor to make and that such surveyor did make for him a plan of the lot for the express purpose of his making application to the Crown Lands Department for the water frontage as and for the site of the mill. The plan was prepared as we have seen in July, 1887. On the 21st of November following he executed to Parkinson a mortgage on the village lots by the description given to them in the deed from Hunt to him and on the same day he also gave Parkinson a chattel mortgage executed by Brown and himself upon the mill and machinery therein which they covenanted to insure in the interest of Parkinson, and on the 24th November they procured a policy as covenanted with a provision that in case of loss the amount should be paid to Parkinson. Now from all this it is quite plain that Mahood knew well that the description of the village lots in the deed from Hunt to him did not and could not cover any water lot in front and that the title to a water lot in front of the village lots which were separated from the lake by a road could only be obtained from the Crown Lands Department, for which purpose he had the plan made which shewed the metes and bounds of the water lot desired to be acquired by Mahood and upon which he and Brown erected their mill. Mahood thus well knew that the water lot upon which the mill was erected was wholly distinct from the village lots and was not covered by their description. When, then, he told Mr. Stephenson, if he did tell him, that the description of the village lots covered the mill, and that this was the only description he had or could give

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of the mill property; and when he said that he and Brown always held that the description of the village lots did cover the water lot in front upon which the mill was erected; and when he said that the Parkinson loan had not been arranged for at all when he gave Mr. Stephenson the description of the village lots, and that he always thought until the summer of 1888 that the Rennie mortgage was prior to that to Parkinson, and that when he executed the Rennie mortgage although he knew the mill was not mentioned in it still that he considered it to be covered by the description of the village lots; he was stating what is shown from his own lips in other parts of his evidence to be untrue. Indeed it is utterly impossible to believe that within the short space intervening between the 21st and 30th November he could have forgotten the transaction as to the Parkinson mortgage. The dealings also of Brown and Mahood with the mill property subsequently to the execution of the Rennie mortgage by giving chattel mortgages thereon in security for further loans show a deliberate intention to deal with that property as property in which they had only a chattel interest and which was wholly distinct from the village lots of which Mahood was seized in fee. If at the time of the execution of the Rennie mortgage Brown and Mahood entertained any intention to give to Rennie any security upon the mill property it could only have been to put Rennie in the same position in relation to the mill as he was by the mortgage which they executed placed in relation to the village lots, that is to say, as a second mortgagee only subsequent to Parkinson; and that intention, if entertained, would, it is reasonable to assume, have been given effect to by chattel mortgage as in the case of Parkinson. Now it is quite apparent that this would not have been at all in accord with Mr. Rennie's intention, for he says that

he told Mr. Stephenson, who appears to have been negotiating with him for the sale to him of the Stephenson mortgage which was on the farm on lot 22 on the 7th concession alone, that if the mill and the village lots were clear, and if a mortgage were drawn to him including them with the farm he would take it, otherwise not; and he told Mr. Stephenson to find out if the mill and the village lots were clear so that he could have what he was stipulating for on a clear mortgage upon the farm and on the mill and on the village lots. I can, therefore, arrive at no other conclusion than that the plaintiff has failed to establish the first step necessary to be established by him in support of the contention asserted in this case, namely, that by an agreement entered into between Brown and Mahood and Rennie the mill property and the right thereto, such as it was, of Brown and Mahood should have been inserted in the mortgage executed to Rennie and that this was, merely by their mutual mistake, omitted. It may be and perhaps is the fact that Rennie has been deceived and defrauded by Stephenson, who, it is said, subsequently left the country, and who appears to have been the only person who, in the character of or in the interest of the holder of the Stephenson mortgage, had any agreement with the plaintiff in respect of the transaction which Stephenson perfected by procuring Brown and Mahood to sign the mortgage which Stephenson prepared for them to sign, and which they did sign just as he had prepared it, in perfect ignorance, so far as appears, of its not expressing, if it did not express, the intention Stephenson had in preparing it in the form in which he did prepare it. But whatever equity the plaintiff may have against Stephenson it is obvious that against the defendants he can have none to the prejudice of the rights vested in Parkinson and his assigns by the instruments executed by Brown

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and Mahood if the defendants come within the designation of assigns of Parkinson, and as such entitled to the benefit of the powers which were vested in him. It is only necessary now to show how the defendants claim title.

On the 25th May, 1888, Brown and Mahood made an assignment of all their property, real and personal, to one Robert H. Gray for the benefit of all their creditors. At this time all the estate which Brown and Mahood had in the property in question, and in the village lots also, was an equity of redemption; all the legal estate of Brown and Mahood and the absolute power of sale thereof was vested in the mortgagees Parkinson, Hunt, and others. Nothing whatever, in the property now in question, passed to Gray by the assignment made to him by Brown and Mahood but such equity of redemption as was in them subject to the provisions in the mortgages to Parkinson and others. All the property of Brown and Mahood was mortgaged by instruments conveying to the mortgagees full power of sale in case of default in payment of any of the monies secured by the respective mortgages, and so Gray could not convey to any one any legal interest whatever in any part of the mortgaged property; the assignment to him for the benefit of creditors was therefore in effect almost illusory, and this fact he soon realised, for immediately upon the execution of the assignment to him bailiffs were put in possession of the mill and other chattel property mentioned in certain of the chattel mortgages under the powers in that behalf vested in the mortgagees for default in payment of moneys by these mortgages secured. In this state of things the assignee Gray, who was himself a creditor of Brown and Mahood, endeavoured to procure one Jenkins to purchase the mortgages held by the parties who had

taken possession with the view, apparently, of acting conjointly with him so as to effect a sale of the estate of the insolvents. Jenkins, before agreeing to complete such purchase, had an interview with Robert Brown and James Mahood, members of the firm of Brown and Mahood, and Hugh R. Brown, son of Robert Brown, who claimed to have had an interest in some part of the property mortgaged, and upon the 18th June, 1888, an agreement was entered into by and between the above parties, to which also the assignee Gray was a party, whereby it was agreed that Jenkins at the request of all of the said parties should buy the Hunt mortgages at the sum of $5,170.85; the Hughes mortgage at $696.48; and the Parkinson mortgages at $2,493.34; and pay all costs incurred in respect thereof and the costs of the assignment of the said mortgages and insurance policy to him, and in consideration thereof all the parties to the said agreement ratified and confirmed the said mortgages as valid and subsisting securities to Jenkins and he was thereby vested with full power to realize all the said assets as mortgagee in possession with power to sell the stock of logs in the log or manufactured and sell the product or in any way he might think expedient deducting all costs, outlay and expenses and a reasonable compensation for care, risk, time and trouble and interest at the same rate as Brown and Mahood had been paying and all expenses incurred by him, and it was declared that he should not be liable for any loss or depreciation of assets unless they arose by his wilful neglect or default. Under this agreement Jenkins purchased the mortgages mentioned therein.

Subsequently conditions of sale upon which the property should be offered for sale were prepared by a solicitor acting for Jenkins and approved by a solicitor acting for Gray the assignee. In these conditions under

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the head real estate the lands to be offered for sale were inserted including the village lots 5, 6, 7 and 8 in the village of Port Sidney. Also all the following:

TIMBER INTERESTS.

All the right, title and interest of Robert Brown, James Mahood, Janet Brown, Janet Mahood and Hugh Reside Brown, and of Robert Jenkins the assignee of certain mortgages given by the said parties or some of them to Alfred Hunt, Richard H. Parkinson and George Hughes in and to the timber now standing, lying and being on the following lots, viz., (naming them) timber licenses, &c., cut timber, &c., also the mill of Brown and Mahood at Port Sidney and the machinery thereon in running order subject to the claim of Polson & Company for about $500.00.

Then among the conditions of sale were inserted the following:—

1. All the said property shall be sold in one parcel.

5. The properties are sold subject to the five several mortgages set forth in the schedule annexed and marked "No. 5," and to the liens on machinery set forth in "Schedule No. 6," and any other liens thereon, particulars of the amounts due upon which are set forth as accurately as obtainable, and also to any government dues upon any timber cut or uncut.

9. The vendor agrees to obtain, contemporaneously with the making of the final payment, a conveyance, assignment or discharge, as may be preferred by the purchaser of Robert Jenkins' interest in the several parcels above mentioned.

16. The purchaser shall at the time of sale sign the agreement hereto annexed for the completion of the purchase, and in the event of his failure to do so the property may be put up at any time within two hours after the acceptance of the purchaser's bidding without any further advertisement of sale; and any deficiency in the price obtainable upon the second offering for sale together with any costs occasioned by such failure shall be made good by the bidder whose bid shall be first accepted and who shall make default as aforesaid.

Then followed the contract of purchase to be signed by the purchaser. Among the five mortgages mentioned in the schedule no. 5 was inserted Rennie's as follows:—

Simpson Rennie $2,500 and interest at 9 per cent. from 8th December, 1887, payable quarterly. Principal payable in five annual instalments of $500 each, first payable 8th December, 1888.

Land covered lots 5, 6, 7 and 8, Port Sidney, and lot 22 in 7th concession Stephenson.

The sale was advertised to take place on the 6th November, 1888, but prior thereto and on the 2nd day of November, 1888, a further indenture under seal was entered into by and between the said Robert Brown, Janet Brown, his wife, and Hugh R. Brown of the first part; James Mahood and Janet Mahood, his wife, of the second part; Robert Jenkins of the third part and Robert H. Gray, assignee of the assets of Brown and Mahood, of the fourth part, whereby the parties of the first and second parts:—

By way of confirmation and further assurance in consideration of the position of Gray as assignee of Brown and Mahood for benefit of creditors and of the purchase by Jenkins of the Hunt, Parkinson and Hughes mortgages and of future advances by him and of the management of affairs by Gray in the interest and for the protection of the estate and of the dealings and transactions on account of the parties interested in the assets grant, assign and release all their and each of their partnership and several assets, estate and effects to Gray his heirs and assigns subject to the said mortgages assigned to Jenkins his heirs and assigns which are hereby confirmed to him his heirs and assigns and to his future advances commission and expenses which are declared to have priority over the claims of unsecured creditors.

And it was thereby among other things further agreed that the sale of the said assets, estate and effects should be in one lot subject, by the consent of Jenkins, to the incumbrances on each parcel which had priority over him and that the price should be payable fifty per cent at the time of sale, balance in thirty days, to be applied first in payment of the claim of Jenkins as aforesaid and the balance if any to the unsecured creditors; that the sale should be proceeded with on the day advertised by the assignee; and that Jenkins should be at liberty to bid at the sale and buy the said assets, estate and effects as any other bidder and should if he bought take the absolute title as purchaser free from any objection that he is assignee of the said mortgages or is

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interested in the said assets, estate and effects and all legal objections were waived; and it was further agreed that all necessary parties should join in and sign all necessary deeds and papers to perfect a registered title of the said assets, estate and effects to a purchaser. In accordance with the provisions of this instrument the sale was proceeded with on the day advertised by the assignee, viz., the 6th of November, and at such sale one Mitchell on behalf of himself and others associated with him was the highest bidder and became purchaser subject to the conditions of sale and signed the contract of purchase at the foot thereof.

Under the circumstances above detailed and in view of the two special agreements of the 18th June and of the 2nd November signed by the respective parties thereto and of the conditions of sale it cannot, I think, be disputed that the sale in point of fact was, and was intended to be, a sale made by Jenkins as possessed of the legal estate and by Gray as assignee of the equity of redemption of all the parties interested in the property sold, and so made for the purpose of securing an undoubted title to the person becoming purchaser under the conditions of sale. In so far as the plaintiff in the present action is concerned the sale of lot 22 in the 7th concession of Stephenson, and of the village lots 5, 6, 7 and 8 in Port Sidney, was by the special consent of Jenkins made subject to Rennie's mortgage thereon; shortly after the execution of the agreement of the 18th June the assignee Gray instructed his solicitor, who is now the plaintiff's solicitor, to ascertain the particulars of the Rennie mortgage. This gentleman had, it seems, been partner of Mr. Stephenson who drew the mortgage, and who received from Rennie the moneys advanced upon the security thereof. He applied to Mr. Rennie and received from him the mortgage for the

purpose of supplying the particulars required, and on the 20th July, 1888, addressed the following letter to Mr. Gray:—

RE BROWN & MAHOOD.

DEAR SIR,—The Rennie mortgage bears date 8th day of December, 1887, is made by Robert Brown, James Mahood and their wives to bar dower only to Mr. Simpson Rennie, Scarborough, farmer, securing $2,500 with interest at 9 per cent per annum, payable in five equal annual instalments of $500 each on the 8th day of December in each year, with interest quarterly on the 8th days of March, June, September and December, the first of such payments of interest to be made on the 8th day of March, 1888. The property charged is lot 22 in the 7th concession of Stephenson containing one hundred acres more or less, and village lots nos. 5, 6, 7 and 8 as shown on Mary Ladelle's survey of part of the village of Port Sidney in the township of Stephenson, these said lots forming a part of lot 25 in the 6th concession of Stephenson. Nothing has been paid on account of this mortgage.

Very truly yours,

R. M. DICKSON.

Upon the faith of the accuracy of this information the conditions of sale were prepared wherein the mill is shown as offered for sale wholly distinct from all real property under the description of the mill of Brown & Mahood at Port Sidney, and the village lots separately as real estate. Upon the 6th December, the purchaser Mitchell appears to have paid the balance of his purchase money and thereby, under the terms of his contract and the conditions of sale and of the instruments of the 18th June and 21st November became entitled to the benefit of the interest acquired by Jenkins as assignee of the Parkinson mortgage on the mill as the first chattel mortgage executed thereon which title was in most express terms ratified and confirmed by the instruments of the 18th June and 2nd of November by all the parties called as witnesses on the part of the plaintiff in the present action for the purpose of avoiding the expressed purport tenor and effect of so many instruments ex-

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ecuted under their hands and of defeating the title of the persons who have purchased upon the faith of those instruments. Now the means adopted for giving effect to the condition upon which Mitchell became purchaser at the sale, that the benefit of the title and interest acquired by Jenkins as assignee of the mortgages assigned to him, which title and interest were expressly ratified and confirmed by the instruments of the 18th June and 2nd November, 1888, should be secured to Mitchell the purchaser at the sale, was that a deed of assignment by Jenkins to Gray of the mortgages which had been assigned to Jenkins was prepared for execution and executed by Jenkins and a deed was prepared for execution and executed by Gray, the party thereto of the first part to and in favor of Mitchell, and the persons jointly associated with him in the purchase made by him at the sale, the parties to the said deed of the second part, whereby after recital of the deed in trust for creditors, executed by Brown & Mahood to Gray, and the several mortgages which had been executed by Robert Brown and James Mahood to Parkinson and the others of which Jenkins had become the purchaser, and the assignment thereof to Jenkins and the several instruments of the 18th of June and the 2nd November, 1888, and that Gray had by and with the consent and concurrence of Robert Brown, Janet Brown, Hugh R. Brown, James Mahood, and Janet Mahood, and by and with the consent and concurrence of the said Jenkins, duly advertised all the real and personal estate mentioned in the instruments of the 18th June and 2nd November, for sale on the terms mentioned in the conditions of sale by public auction at Toronto, on the 6th November, 1888, and the assignment by Jenkins to Gray of the said several indentures of mortgage so as aforesaid

assigned to him, he (Gray) for the consideration of the sum, which was the sum for which Mitchell purchased at the sale, and in pursuance of the powers contained in the several recited instruments, did grant and convey unto the said parties of the second part to the said deed all the real and personal estate therein mentioned and described, being the property as described in the conditions of sale under which Mitchell had become the purchaser at the sale, to have and to hold to the said parties of the second part to the said deed, their heirs, executors, administrators and assigns for ever. I cannot entertain a doubt that the effect of this deed was to vest in Mitchell and his associates, the parties thereto of the second part, the title and interest which by his purchase at the sale he became entitled to on payment of his purchase money the balance of which appears to have been paid in accordance with the conditions of sale, on the 6th December, 188 , and that the deed vested in Mitchell and his said associates the legal right and title to the mill which was vested in Jenkins by the assignment to him of the chattel mortgages thereon, which were ratified and confirmed by the instruments of the 18th June and 2nd of November in pursuance of the powers contained in which instruments the deed is expressed to be executed. Upon no principle of law, equity or morality, can the decree made in his cause be, in my opinion, supported in so far as it directs that the mortgage executed to Rennie:—

> Shall be reformed so as to cover in addition to the lands therein described (the water lot particularly described in the decree,) and that the said water lot together with the shingle mill, engine, boilers, machinery and fixtures situate therein be charged with the plaintiff's said mortgage in the same manner as if the same had been originally described in the said mortgage when it was executed and delivered.

As to this water lot Brown and Mahood never had any title thereto vested in them, and as to the mill and

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the machinery therein they had already when the mortgage to the plaintiff was executed been mortgaged for more than their value by instruments to the protection and benefit of which Mitchell by his contract of purchase became entitled as purchaser from Jenkins the assignee of those mortgages under the powers of sale contained therein. The principle which lies at the foundation of the case made and the relief prayed by way of reformation of the mortgage is that there was an agreement between the mortgagors and the mortgagee that the water lot in question should have been inserted in the mortgage, and that it was omitted merely by mutual error, inadvertence and mistake. I have already given my reason for arriving at the conclusion that the evidence fails to show that there ever was any such agreement, or that when Brown and Mahood executed the Rennie mortgage they intended that the water lot should have been inserted therein. That they entertained such intention is wholly inconsistent not only, as I have shown, with Mahood's own evidence in divers particulars, but with all the chattel mortgages and with the provisions of the instruments of the 18th June and 2nd of November, which ratified and confirmed those mortgages in the hands of Jenkins as the assignee thereof, and inconsistent, also, with the conditions of sale of which Brown and Mahood were well aware and under which Mitchell purchased. That Rennie when he received the mortgage entertained the belief that the water lot was or was intended to be inserted in the mortgage is wholly inconsistent with the letter of his solicitor of the 19th November, 1888, to Mitchell after the sale at the auction and with Rennie's own affidavit by way of proof of his mortgage debt made in April, 1889, in both of which he makes his claim solely upon the farm lot, no. 22 in the 7th concession of Stephenson, and the

village lots describing them as lots nos. 5, 6, 7 and 8, according to Ladelle's survey of part of the village of Port Sidney. If it were necessary I should also be obliged to arrive at a conclusion adverse to the plaintiff upon the question of notice, in view of the positive denial of every one of the parties sought to be affected with the notice charged of the truth of the statements in that respect of the witnesses testifying to such notice. Moreover the notice as spoken of by those witnesses seems to have been not that Rennie claimed that it was intended that the water lot should have been inserted in the mortgage in addition to the other lands and that this had been omitted by the mutual mistake and inadvertence of himself and of his mortgagors, but that, in point of fact, his mortgage did cover the water lot, a wholly different thing, and which as we see the mortgage clearly did not. However, for the reasons that under the conditions of sale upon which Mitchell became purchaser he and those claiming through him are entitled to the full protection and benefit of the Parkinson chattel mortgage and the other chattel mortgages on the mill and machinery therein assigned to and held by Jenkins, and for the reason that the evidence fails to establish any agreement or intention upon the part of Brown and Mahood that the water lot and mill should have been included in the mortgage to Rennie, I am of opinion that the passage to which I have referred must be eliminated from the decree whatever may have been Rennie's belief when he received the mortgage, and that the ordinary decree on foreclosure of the property mentioned in the mortgage must be substituted. The case is not, in my opinion, at all one for the peculiar relief prayed and by the decree granted.

PATTERSON J.—The respondent, who is plaintiff in the action, claims:

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(1). To have the said mortgage reformed so that it may become charged upon the said water lot, shingle mill, engine, boiler, machinery and fixtures: (2). Foreclosure of the said mortgage.

His right to a foreclosure is not disputed. The appeal relates altogether to the first claim. There is no case whatever made for charging the water lot. It never was the property of the mortgagors, nor did they ever pretend that it was. It was crown land. The mortgagors had taken some preliminary steps with a view to the purchase of the lot but they had not purchased it. Relying on their ability to purchase it they had constructed on it the shingle mill, not attaching it to the soil but resting it on cribs. In this way they occupied as much of the ground as the cribs stood upon, but without any title. The mill and machinery were chattels. The mortgagors so understood and treated them. They mortgaged them as chattels to Parkinson and to Hughes and to Hunt who filed their mortgages under the Chattel Mortgages Act, and at a later date seized the property by their bailiff. The Parkinson mortgage was made a few days before that which the plaintiff asks to have reformed, but, as Mahood one of the mortgagors says, after the agreement with the plaintiff. The mortgages were all made within three months, viz.: in November and December, 1887, and in January and February, 1888. Looking at the evidence of Mahood and of Hugh Brown and the plaintiff, who are the only people who speak of the negotiation on which the claim for reformation is based, we do not find a word of mortgaging the water lot. What they speak of is the mill. No doubt that term would colloquially include the land the mill stood on, and a conveyance of a building forming part of the freehold would have in law the effect of conveying the land; but here "the mill" means the chattel structure. That is unquestionably so in the mouth

of Mahood. He explains his idea in one place by saying: "The mill we had went with the village lots," apparently regarding the mill as in a sense appurtenant to the village lots, though of course it would not pass under a conveyance of those lots with the appurtenances. It is possible, and perhaps not unlikely, that the plaintiff when he stipulated for security on the mill had not his attention called to the fact that the mill was merely a chattel and did not form part of the freehold, but Mahood was under no misconception on that score, and what the plaintiff has to establish is not merely that he thought he was to get the water lot but that that was the mutual understanding.

This apprehension of the character of the mill and machinery, as being chattels and not realty, is very important in one aspect of the case. It is not discussed in the judgment of the court below though made prominent in the formal reasons of appeal, but Mr. Justice Maclennan, who delivered the judgment of the court, when he says that he thinks it "clearly proved that it was the intention and agreement of the parties that the security the plaintiff was to receive for his advance of $2,500 included the mill and machinery, and that the latter were omitted from the mortgage by mutual mistake," does not hint that that property was not regarded as chattel property. I take it that the reporter's note of the observation attributed to the learned judge who tried the action, viz., "the evidence that the plaintiff's mortgage was intended to cover the water lot, including the mill, &c., is irrefragable," must be incorrect, there being no evidence whatever that the water lot was intended to be conveyed, whatever may have been the case as to the mill, &c., but the contrary being obviously the fact. It may also be noticed that in the scheduled description of the properties sold by Gray, the assignee, the mill appears as a chattel and not as realty.

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Assuming, then, that there was a verbal agreement to give security on this chattel property, and therefore in equity a mortgage of it, the Ontario statute respecting Mortgages and Sales of Personal Property (1) has to be reckoned with. A mortgage, or conveyance of personal chattels intended to operate as a mortgage, which is not accompanied by an immediate delivery and an actual and continued charge of possession of the things mortgaged, is absolutely null and void as against subsequent purchasers or mortgagees in good faith for valuable consideration, unless registered as provided by the act with the prescribed affidavits.

The appellants are purchasers in good faith for valuable consideration. Notice of an unregistered chattel mortgage does not save it as against the statute. Some evidence was given for the purpose of showing notice in this case before the payment of all the purchase money. It was, as I think, beside the question under the Chattel Mortgage Act. The property passed without delivery by the sale made by the assignee. Blackburn on Sales c. 3. And by R. S. O. (2):—

> It shall in no case be necessary, in order to maintain the defence of purchaser for value without notice, to prove payment of the mortgage money or purchase money or any part thereof.

It appears to me impossible for the plaintiff to maintain his claim against these purchasers in the face of the Chattel Mortgage Act.

But dealing with the matter apart from that statute, and on the same principles as if the asserted agreement were for the conveyance of land, the difficulties in the way of the plaintiff seem equally insuperable.

There were four mortgages ahead of him, the Parkinson mortgage being earlier in time, and the mortgage to Hughes and the two mortgages to Hunt having been taken without notice of the asserted equity. The legal estate was in Parkinson.

(1) R. S. O. (1887) c. 125. (2) Ch. 100 s. 36.

The judgment proceeds, if I understand it correctly, on the ground that those four mortgages had been redeemed by Gray the assignee and that the appellants purchased simply from Gray who could convey only what the original mortgagors could have conveyed, namely, the mill charged with the plaintiff's debt, and that the actual conveyance not having been made till after the *lis pendens* was registered the plaintiff can assert against the purchasers his right to a reformation of his deed.

I do not so understand the transaction.

The conditions of sale expressly bound the vendor

> to obtain, contemporaneously to the making of the final payment, a conveyance, assignment or discharge, as may be preferred by the purchaser, of Robert Jenkins' interest in the several parcels above mentioned.

Robert Jenkins' interest was all the title under the Parkinson mortgage and the other mortgages. Those mortgages were never discharged, but were assigned to Gray and so kept alive, and Gray by his deed, which recited the mortgages, the assignment of them to Jenkins and the assignment of them by Jenkins to Gray, together with other matters, did "in pursuance and exercise of the powers contained in the said in part recited instruments and of all other powers enabling him in that behalf," convey the lands to the purchasers.

The purchasers take, as I understand it, all the estate and rights of Parkinson, Hughes and Hunt against whom it is not pretended that the present claim could be asserted.

In my opinion the appeal should be allowed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Bain, Laidlaw & Kappelle.*

Solicitors for respondent: *Dickson & Erwin.*