ELIJAH WASHINGTON FAULDS, WILLIAM MARTIN FAULDS, JAMES LINDA FAULDS, WESLEY BELL FAULDS AND MATILDA ELIZABETH FAULDS (PLAINTIFFS) } APPELLANTS.

1885
*March 17.
1886
*March 6.

AND

MARGARET HARPER *et al.* (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgagor and mortgagee—Foreclosure and sale—Purchase by mortgagee—Right to redeem after—Statute of limitations—Trustee for sale.

In a foreclosure suit against the heirs of a deceased mortgagor who were all infants, a decree was made ordering a sale; the lands were sold pursuant to the decree and purchased by J. H., acting for and in collusion with the mortgagee; J. H. immediately after receiving his deed, conveyed to the mortgagee, who thereupon took possession of the lands and thenceforth dealt with them as the absolute owner thereof; by subsequent devises and conveyances the lands became vested in the defendant M. H. who sold them to L, one of the defendants to the suit, a *bonâ fide* purchaser without notice, taking a mortgage for the purchase money. In a suit to redeem the said lands brought by the heirs of the mortgagor some eighteen years after the sale and more than five years after some of the heirs had become of age.

Held,—Reversing the judgment of the Court of Appeal, that the suit being one impeaching a purchase by a trustee for sale the statute of limitations had no application, and that, as the defendants and those under whom they claimed had never been in possession in the character of mortgagees, the plaintiffs were not barred by the provisions of R. S. O. ch. 108 sec. 19, and that the plaintiffs were consequently entitled to a lien upon the mortgage for purchase money given by L.

Held, also, that as it appeared that the plaintiffs were not aware of the fraudulent character of the sale until just before commencing their suit, they could not be said to acquiesce in the possession of the defendants.

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

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APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Chancellor (2).

The facts of the case are fully stated in the previous reports and the following judgments of this court.

McCarthy Q.C. and *Walter Cassels* Q.C. for appellants.

Street Q.C., for respondent.

The points of argument and cases relied on by counsel are fully given in the reports of the case in the court below.

STRONG J.—In 1857 William Faulds purchased from his father, Andrew Faulds, one hundred acres of land in the Township of Malahide, for the price of £875 ($3,500), of which a sum of £400 ($1,600) was paid in cash, and the residue of the purchase money, amounting to £475 (or $1,900), was allowed to remain upon the security of a mortgage of the property. This mortgage, which was effected by a deed dated the 20th of April, 1857, was unpaid at the death of the mortgagor, which occurred on the first of July, 1858. Sometime in 1861, Andrew Faulds, the mortgagee, filed his bill for the foreclosure of the mortgaged property against the co-heirs of his son, the deceased mortgagor, who had died intestate; these co-heirs were the plaintiffs in the present cause, and Eliza Jane Faulds, who died intestate, unmarried, and under the age of twenty-one years, in April, 1868. The plaintiffs, at the date of their father's death, were all infants; the eldest, Elijah Washington Faulds, being then of the age of 14 years, having been born in the year 1844.

By a decree bearing date the 28th of June, 1861, made in the foreclosure suit before mentioned, the mortgaged lands were, in default of the payment at the appointed time of the amount which should be found due to the

(1) 9 Ont. App. R. 537. (2) 2 O. R. 405.

plaintiff, ordered to be sold. Pursuant to this decree, the lands were, upon the 12th of April, 1862, put up for sale by auction in two lots, when Joseph Harper, one of the defendants in this cause, pretended to become the purchaser of the same for the aggregate price of $1,600.

The plaintiffs, in their bill, alleged that Andrew Faulds, the plaintiff in the foreclosure suit, and who, as such, had no right to purchase himself, employed Joseph Harper the ostensible purchaser, to purchase for his behoof, and that Joseph Harper was, in fact, the agent of Andrew Faulds in making the purchase and in carrying out the same; further, they allege that the lands were sold to Joseph Harper at a price greatly below their real value, on account of this combination between Joseph Harper and Andrew Faulds, which had the effect of "damping competition" and was intended to have that effect. The allegations of the bill on this head are contained in the 13th and 14th paragraphs, which are as follows:—

13. Your complainants allege, and the fact is, that the plaintiff in the said foreclosure suit being mortgagee and having no right to purchase for himself at the said sale, employed the said Joseph Harper (the purchaser of the said lands as aforesaid) as his agent in and for and he was in fact the said Andrew Faulds' agent during the carrying out of the said sale.

14. The said lands were sold to the said Joseph Harper at a price greatly below their real value on account of the combination between the said Joseph Harper and Andrew Faulds which had the effect of damping competition and was intended by them to have that effect.

It is not shown that Andrew Faulds, who, as the plaintiff in the cause, must, in the absence of any order to the contrary, be considered the vendor, and as such charged with the conduct of the sale, had leave to bid; nor do the defendants, in their answer, pretend that such leave was obtained.

This purchase by Joseph Harper was carried out by a deed of the 16th of June, 1862, whereby Andrew

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Faulds, as the mortgagee in whom the legal estate was vested, conveyed to Joseph Harper, and by a second deed dated the same day, Joseph Harper re-conveyed the same lands to Andrew Faulds in fee. On the 14th of June, two days before the execution of these conveyances, Andrew Faulds had exercised an act of ownership over the lands by executing a lease, whereby he demised them to one Bennett as his tenant for a year from April, 1862. From the date of the deeds before mentioned, Andrew Faulds assumed to be the absolute owner of the lands, and dealt with them as such up to the time of his death; by his will, he devised his property to his wife (who died before this bill was filed) for life, and directed that upon her death his executors should sell all his real and personal property, and out of the proceeds should pay his son, Thomas Faulds, $500, and divide the residue equally between the testator's son, Andrew Faulds the younger, and his daughters, the defendant Margaret Harper (the wife of Joseph Harper already mentioned) and Elizabeth Linda. The legacy to Thomas Faulds had been paid, and the interests of Andrew Faulds the younger and Elizabeth Linda had become vested by conveyance from the former, and by devise from, and by the death of, the latter, in the defendant Margaret Harper previously to the sale of the lands in question, to the defendant James C. Lane hereafter mentioned.

The testator, Andrew Faulds, appointed Peter Clayton and Walter E. Murray his executors, of whom the former died before the institution of this suit.

The defendant, Margaret Harper, having thus the sole beneficial interest in these lands vested in her, remained in the enjoyment of the property and in possession thereof by her tenants until the 29th of December, 1879, when, as she herself states in her factum filed for the purposes of this appeal, "being the beneficial

owner of the rights of the said lands, she sold and caused the lands to be conveyed to the defendant, James C. Lane, a purchaser for value without notice, who conveyed the same by way of mortgage to her to secure the payment of $4,780.29, being the purchase money and interest, and the said James C. Lane immediately entered into possession as owner, and has ever since remained in such possession undisturbed, save by the proceedings in this action." The defendant, Margaret Harper, being therefore the beneficial and absolute equitable owner of the lands at the time of the sale to Lane, and being, as regards the interest and shares of herself and Elizabeth Linda, a mere volunteer, and it not being alleged or pretended that either she or Elizabeth Linda were purchasers for value without notice in respect of the shares acquired from Andrew Faulds, the testator's son, it follows that the plaintiffs, not having been able to disprove Lane's plea of purchase for value without notice, upon establishing their case were entitled to have a personal decree against Margaret Harper, and also a lien giving effect to the same equities against the purchase money remaining unpaid by Lane, as they would have been entitled to enforce against the land which it represented if it had remained in the hands of Margaret Harper. The defendants, Margaret Harper and her husband, by their answers denied the alleged purchase by Joseph Harper on behalf of Andrew Faulds, and also pleaded the statute of limitations, and that the plaintiffs were bound by laches and acquiescence.

The only fact seriously disputed and upon which any conflicting evidence was given was that as to the real character of the purchase, in other words whether Andrew Faulds, the mortgagee, was in fact the real purchaser at the sale under the decree, through the agency of Joseph Harper. The evid-

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ence on this point was very strong, no less than seven witnesses having deposed to distinct admissions by either Andrew Faulds, or by Joseph Harper at a date anterior to his re-conveyance to Andrew Faulds, that such was the fact. Against this evidence the defendant Harper and his wife opposed no testimony but their own, which was regarded by the learned judge before whom the cause was heard as unsatisfactory, a conclusion which is not found fault with by any of the learned judges in the Court of Appeal, and which indeed a perusal of the depositions of the defendants will satisfy any one was the only result which could have been arrived at.

The cause having been heard before Vice Chancellor Blake on the 13th October, 1880, that learned judge on the same day made a decree declaring the sale to James C. Lane binding, and that the plaintiffs, Wesley Bell Faulds, were entitled each to one-fifth of the proceeds of the sale to James C. Lane by Margaret Harper, after deducting therefrom any balance remaining due upon the mortgage from William Faulds to Andrew Faulds, and further declaring the remaining plaintiffs, who had attained the age of 21 years more than five years before the filing of the bill of complaint herein, barred of their rights by the statute of limitations, and reserving costs and further directions until after the taking of the accounts.

This decree was re-heard at the instance of Margaret Harper, and on 22nd June, 1882, the Divisional Court (Proudfoot and Ferguson JJ.) pronounced a decree varying the decree by declaring each of the five plaintiffs entitled to one-fifth part of the proceeds of the sale to James C. Lane by Margaret Harper, after deducting therefrom any balance remaining due upon the mortgage from William Faulds to Andrew Faulds, and ordering the defendant, Margaret Harper, to pay the

costs of the re-hearing.

The defendant, Margaret Harper, appealed to the Court of Appeal for Ontario against the judgment of the Divisional Court, and judgment was given by that court (Spragge C. J. dissenting), allowing the appeal and dismissing the action with costs. The plaintiffs now appeal to this court against the judgment of the Court of Appeal.

The learned Vice Chancellor apparently founded his judgment on the applicability of the statute of limitations to the plaintiffs' case, treated simply as a bill to redeem, since he held the lapse of ten years a bar to the right of redemption of such of the plaintiffs whose disabilities of non-age ceased more than five years before the filing of the bill, and that those who had attained their age only within five years next before the filing of the bill were alone entitled to redeem, and that their right of redemption was confined to a redemption of their proportionate shares of the equity of redemption. The Divisional Court on the re-hearing proceeded on a different ground, holding that whilst the statute would have been applicable if the only persons entitled to redeem had been the plaintiffs who had attained full age more than five years before the filing of the bill, yet inasmuch as there were others (the plaintiffs, Wesley Bell Faulds and Matilda Elizabeth Faulds,) who had not attained the age of 21 years five years next before the filing of the bill, they were entitled to redeem the whole estate, which could not be redeemed piecemeal. The judgment of the Divisional Court in this last respect was founded on the authority of the case of *Rakestraw* v. *Brewer* (1). The plaintiff's right to the benefit of the exception contained in the statute in favor of persons under disability was rested on the authority of the decision of

(1) Sel. Cas. Ch. 56.

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the Upper Canada Court of Appeal in the case of *Caldwell* v. *Hall* (1), which the learned judges preferred to follow rather than to adopt the construction of the statute laid down in the English cases of *Fos'er* v. *Patterson* (2) and *Kinsman* v. *Rouse* (3). The majority of the Court of Appeal proceeded upon the same *ratio decidendi*, but treated *Caldwell* v. *Hall* as having been overruled by the late English decisions, and on this ground held that the exception of disabilities did not apply in favor of a mortgagor or his representatives seeking to redeem, and therefore reversed the decree below and dismissed the bill. The late Chief Justice of Ontario, who dissented, founded his judgment upon a ground which, although it does not seem to have received consideration from the other learned judges in any of the courts below, appears to me to be entirely right and to be sustained both by principle and authority. The learned Chief Justice considered that the bill was substantially one impeaching a purchase by a trustee for sale, a case to which the statute of limitations had no application, and that there had been no possession attributable to the mortgage title; that this sale was one which, even at the distance of time at which it was impeached, could not upon the evidence be sustained, unless there was acquiescence, of which there was no proof; and that as the defendants and those under whom they claimed had never been in possession in the character of mortgagees, the plaintiffs were not barred by the enactment originally embodied in the 28th section of 3 and 4 W. 4, cap. 27, and now contained in the Ontario R. S., cap. 108, sec. 19.

The language of the learned Chief Justice on this last point is so very clear and satisfactory that I quote it here. He says:

(1) 8 U. C. L. J. 42. (2) 17 Ch. D. 132.
(3) 17 Ch. D. 104.

"Andrew Faulds never was in possession in any other character than that of purchaser. Consistently with that character he could not receive any payment on account of the mortgage debt, for, according to his position, the debt was extinguished, the sum bid by Harper being the amount of it; and for the same reason he could not give such acknowledgment in writing as to the right of the mortgagor as is contemplated by the statute. It cannot therefore lie in his mouth to say that he was in possession as mortgagee, and he cannot invoke the statute of limitations as extinguishing the title of the plaintiffs by reason of his possession in that character."

The Chief Justice refers to no authority, but as I shall show hereafter his proposition is amply supported in that way. As regards the fact of the purchase by Harper having been as an agent or trustee for Andrew Faulds that was not, as indeed it could not have been in view of the evidence and of the finding of the Vice Chancellor, disputed by any of the judges below, and indeed the Chief Justice says that upon the hearing of the appeal even the counsel for the present respondent did not dispute the fact to be as the Vice Chacellor had found it. We may therefore assume that point to be conclusively settled. As regards the effect of such a purchase in a court of equity, more especially when brought about in the secret and covert way in which it was arranged between Andrew Faulds and Harper in the present case, there could be as little difference of opinion, and indeed it does not seem to have been denied that the plaintiffs were entitled to be relieved against the sale, provided they brought themselves within the saving clauses of the statutes of limitations

That a purchase without leave of the court by a mortgagee at a sale under a decree in a suit instituted by him to realize his security, which sale it was his duty to conduct, is void in equity and will be so declared upon the same principle that a purchase by a trustee for sale will be set aside, is too clear and well established a proposition to call for any lengthened examination of authorities. The offending parties themselves

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were conscious of it in the present instance and endeavored to disguise the real fact and their apprehensions were well founded. Authorities of the greatest weight show conclusively that the court will, always, at the option of the party standing in the position of *cestui que* trust, as the heirs of the mortgagee in this case did, set aside such a purchase as conflicting with the duty of the vendor to obtain the very best price attainable for the property to be sold, and as having a tendency, if done openly, to damp the sale.

In the case of *Popham* v. *Exham* (1) the Master of the Rolls in Ireland thus states the rule and the reasons for it. He says :—

It is a well settled principle of courts of equity, that neither the plaintiff nor his solicitor can bid without the leave of the court. The rule more strongly applies in a case like the present, where the same party was the plaintiff, and in effect his own solicitor. It is said that the rule was first established in the case of *Drought* v. *Jones* (2), a few months after the sale in *Popham* v. *Exham*. The rule, however, is not a rule of practice or procedure; it is a rule of equity, founded on this well understood principle that the same person is not to be permitted to fill the double character of vendor and purchaser. A party who has the carriage of proceedings in a cause stands in a fiduciary position to all the parties and encumbrancers in the cause. The jurisdiction exercised by the court, of taking the carriage of the proceedings from a party who does not conduct the suit with due diligence, establishes that. The plaintiff's solicitor prepares conditions of sale. He is bound to see that these conditions are not of such a character as to deter parties from bidding. It is the duty of the plaintiff, acting through his solicitor, to see that the intended sale shall be duly advertised, and hand bills posted and circulated, so as to give publicity to the sale. The time when the sale should take place is often important. The plaintiff and his solicitor, in their character of vendors, have a duty imposed on them to sell for the best price that can be obtained. If the plaintiff or his solicitor purchase, their interest is in direct conflict with their duty, because in their character of purchasers they would or might be anxious to purchase at an under value. The court, therefore, when giving a plaintiff or his

(1) 10 Ir. Ch. Rep. 440. (2) Fl. & K. 317.

solicitor liberty to bid, makes it part of the order that the carriage of the proceedings should be given to some other party or encumbrancer. If no other person will take the carriage of the proceedings, the notice of motion has informed all persons interested of the fact that the plaintiff or his solicitor have obtained liberty to bid, and the proceedings connected with the sale can be narrowly watched. If a plaintiff or his solicitor was to bid openly in his own name, without the leave of the court, the sale would, in my opinion, be impeachable; at all events if it appears to be at an undervalue, and if the proceedings to impeach the sale are taken within a reasonable time. But the objection becomes much more serious if, as in the present case, the purchase is made through a trustee, and where the fact of the plaintiff or his solicitor being the real purchaser is kept concealed from the court, and the Master, and the parties in the cause. In such case, the authorities would appear to establish that the sale is not simply impeachable for undervalue but is actually void.

The bill in the case of *Popham* v. *Exham*, as in the present case, impeached a purchase by the plaintiff in a mortgage suit, made without leave of the court, through the intervention and name of a trustee whose agency was, as here concealed; and although the Master of the Rolls expressly disclaimed all imputation of moral fraud, and there was no evidence of undervalue, the sale was set aside after a lapse of some seventeen years. In the case of *Browne* v. *McClintock* (1), which was also a suit instituted under similar circumstances and for the same purpose as the present, we find Lord Chelmsford saying:

Mr. Browne stood in such a relation to the cause in which the sale was decreed, that he could only have bid for the property by leave of the court. He was plaintiff in the suit and solicitor; and if the biddings, though nominally in trust for Unsworth, were really on behalf of Browne, there was a fraud committed upon the court.

In addition to the foregoing authorities I refer to the cases of *Aikins* v. *Delmage* (2); *Drought* v. *Jones* (3); *O'Connor* v. *Richards* (4); *Price* v. *Moxon* (5).

(1) L. R. 6 H. L. 466.
(2) 12 Ir. Eq. Rep. I.
(3) Fl. & K. 316.
(4) Sau. & Sc. 246.
(5) Cited in 2 Ves. Jr. 54.

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That in the present case the arrangement come to actually had a prejudicial effect on the sale, and that the price was less than the fair value of the property, is fairly to be presumed from the fact that this farm, which had been purchased for $3,500 some five years before, and on account of which an instalment of $1,600 had actually been paid, only realised a price of $1,600 on this sale. The direct evidence as to value given at the hearing is also altogether in favor of the plaintiffs and shows that the property was sold for not more than about one-half its actual value. It was therefore almost of course that this sale should have been set aside, unless the lapse of time afforded sufficient protection to the defendants either as a defence under the statute of limitations or as coupled with acquiescence.

That the statute of limitations has no application to the case of a trustee or other fiduciary agent purchasing in fraud of the rights of his *cestui que* trust or principal is well established by authority. A suit in equity for this purpose has been held not to be, as it is apparent it is not, a suit for the recovery of land, but is considered one to be relieved against a breach of trust or a constructive equitable fraud and to have the purchaser, who, by these means, has obtained the legal estate, declared a trustee of it for the plaintiff. It does not, therefore, come within the 24th section of the 3 and 4 W. 4 cap. 27, re-enacted by the Ontario Revised Statutes, cap. 108 sec. 29, but is left as before the Statute to be dealt with by courts of equity upon the principle of acquiescence or laches (1).

The 24th section of the statute, which provides that suits in equity to recover land must be brought within the same time as an action at law could have been brought if the title of the party had been legal, has been

(1) *Marquis of Clanricarde* v. *Henning* 30 Beav. 175; *Obee* v. *Bishop* I DeG. F. & J. 137; Browne's Limitations as to real property, 405.

held to apply only to cases where some equitable title is asserted which, if it had been a legal title, would have been within the statute, and it only bars equitable rights, so far as they would have been barred if they had been legal rights (1), and cases of breach of trust, and of constructive fraud are not within its terms.

Any case of acquiescence or laches accompanied with that knowledge which is an indispensable ingredient in this defence when set up by a defendant against whom fraud or breach of trust is proved, is here out of the question. No point was made as to this in the court below. The Chief Justice in the Court of Appeal upon this head makes the following observations, which I think indicate a correct appreciation of the evidence:—

In the case before us I do not find, upon looking over the evidence, that the plaintiffs knew, or that any of them knew, that the mortgagee was the real purchaser of the land. The fact was concealed, and the appellant and others claiming under the mortgagee appear always to have maintained that the fact was otherwise, and that Harper was the real as well as the nominal purchaser.

For all that appears the real facts as to the purchase were unknown to the plaintiffs until just before the filing of the Bill.

I have read the evidence several times with a view to ascertain exactly what is proved as regards the plaintiff's knowledge of the fact which is the vital point in this case, that Joseph Harper purchased under a preconcerted arrangement with Andrew Faulds, the vendor, as a trustee for the latter, and I find it impossible, consistent with the proofs, to impute such knowledge to the plaintiffs or any of them at an earlier time than that mentioned by the Chief Justice in the extract I have just read from his judgment. It is true that they all along thought they had some claim upon their aunts in respect of their father's estate, but whether this was regarded by them as a legal or moral claim it is not easy to make out. Now, in order to constitute

(1) *Archbold* v. *Scully* 9 H. L. Cas. 360.

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equitable acquiescence it is incumbent on the party who relies on it to prove, not merely that there was some vague suspicion of wrong, but that actual knowledge of the facts were brought home to the party to be affected by it.

It is said by a text writer (1):—

> Acquiescence also imputes knowledge, or the means of knowledge, of the material facts alleged to have been acquiesced in, for a person cannot be said to have acquiesced in what he did not know, and as to claims which he did not know he could dispute.

And this I adopt as a fair statement of the principles settled by the numerous cases which are referred to as authorities—particularly the *Marquis of Clanricarde* v. *Henning* (2), and *Charter* v. *Trevelyan* (3). In the last well known case the whole principle upon which courts of equity give effect to lapse of time as a defence is succinctly stated by Lord Cottenham, and his judgment has always been considered as remarkable, as well for a correct exposition of the law as for the felicity of the language in which it is expressed. In *Randall* v. *Errington* (4), Sir William Grant states the principle very distinctly as follows:

> To fix acquiescence upon a party it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded and to which it refers.

Applying these principles here it is quite out of the question to say that any such defence is made out. The plaintiffs' case impeaching this sale rests not upon the mere fact that Andrew Faulds purchased in breach of his duty as a trustee for sale, for if he had so bought in the property openly and in his own name, the fact being patent to all the world, notice of it might well have been ascribed to the plaintiffs or at least to

(1) Browne on Limitations p. 516.
(2) 30 Beav. 175.
(3) 4 L. J. N. S. Ch. 209; 11 C. & F. 740.
(4) 10 Ves. 428.

some of them, at a time sufficiently distant to make their subsequent laches a bar; but this is not the case of such an open breach of trust. Here the fiduciary vendor not only betrays the confidence which the court and the guardians of the infant heirs reposed in him, but he accompanies this wrong by another, by concerting a scheme by which his improper conduct should be concealed, thus practising a fraud upon the court as well as upon the beneficiaries, and also rendering it almost impossible that the real nature of the transaction should ever be discovered, unless in the course of time some accident should reveal it to the parties who were wronged, and it is evident that if Harper and Andrew Faulds had not themselves talked of the matter the real truth never would have been discovered. Then the ages of the plaintiffs at the date of the sale are also to be considered as affording another strong argument against this defence. The oldest at that time was not 14 years of age; their mother was not a person who could be expected to discover this fraud; how then could it be expected that such persons were to arrive at a knowledge of this hidden transaction which a person of acuteness and experience could only have discovered. On the whole, then, in my opinion, the defence on this point of acquiescence wholly fails. And had the statute of limitations been directly applicable the same result must have been reached; for by the express terms of section 26 of the original English Act (3 and 4 W. 4 cap. 27), R. S. O. cap. 108 sec. 31, it is enacted:

> That in the case of a concealed fraud the right to bring an action to recover land shall be deemed to have first accrued when such fraud actually was, or with reasonable diligence might have been, first discovered.

I hold, therefore, that there was no impediment in the way of giving the plaintiffs the preliminary relief of

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setting aside the sale and reducing the defendant, Margaret Harper, to the position of a mere mortgagee, as her father, the testator, originally was before he made the purchase, which I hold to have been, in equity, utterly void. Before leaving this part of the case I will quote a very apposite passage from the judgment of the Lord Chancellor of Ireland in the case of (1) *Aikins* v. *Delmage*, already referred to. He says:

> As to the plaintiff, she appears to have been in poverty and indigence throughout, and she was not as fully informed of the particulars of the case as she certainly should have been; but independent of her rights, even supposing she could be considered as acquiescing, the court itself has been deceived in the transaction. This was a sale by the court, conducted by the defendant as an officer of the court, and as such responsible to it for the manner in which that sale was conducted; and yet it is now proved that the facts under which that sale took place were not disclosed to the court. I cannot hold that the doctrine of acquiescence can be extended to a case such as this, where one of the most wholesome rules of the court has been infringed without its knowledge; and if high ground is needed for holding that this sale, even at this distance of time, cannot be supported, I am not afraid of taking that ground, and saying that the court has never been informed of the sale till the hearing of this cause, and has never acquiesced in it.

If this is a correct statement of the law, and I have found nothing in the books to indicate that it is not, there cannot be the slightest pretence for saying that the plaintiffs rights in the present case so far as the sale is concerned, are affected by lapse of time or acquiescence.

Next we have to deal with the question of redemption. The right to this is clear and cannot be disputed unless the statute of limitations applies. That it does not apply was the opinion of the Chief Justice in the Court of Appeal which I have already said appears to me to be correct, and that on grounds so obvious that I hardly expected to be able to find distinct authority for it. I have, however, found such authority. In the work of

(1) 12 Ir. Eq. Rep. 14.

one of the earliest and best commentators on the statutes of limitations, that of the late Mr. Hayes (1), a book which may be safely quoted and acted upon as authority if any text writer may be so trusted, in considering the 28th section of the statute that learned writer says:

> The possession of the mortgagee must have been gained by him in that character; if, therefore, he purchase the equity of redemption, and enter into possession, he cannot set up that possession as the possession of a mortgagee, in answer to the claims of persons seeking to impeach his title as purchaser.

And after citing cases he adds further on:

> In order to constitute a case, within either the new enactment or the old equitable doctrine, there must be the diligence of a mortgagee on the one hand and the laches of a mortgagor on the other (2).

If this is a correct statement of the law, and I accept it as such, it is decisive in favor of the plaintiffs who, not having lost their right to set aside the sale either by laches or acquiescence cannot be barred from redeeming by the operation of the statute on a possession which was never taken or held by the defendants, or their authors in the character of mortgagees. It follows, therefore, that the decree pronounced by the Divisional Court on the re-hearing, although for reasons differing from that court was substantially right. I think it well, however, to add that if I had to choose between the decisions in *Caldwell* v. *Hall* and those in *Kinsman* v. *Rouse* and *Foster* v. *Patterson*, I should certainly have agreed with the learned judges of the Divisional Court; for the reason that since the two cases in 17 Chancery Division, were decided the House of Lords has held in *Pugh* v. *Heath* (3) that a foreclosure suit is an action for the recovery of land. This being so it follows *a fortiori* that a redemption suit is also an action or suit for the recovery of land. And it is impossible, without doing violence to

(1) Treatise on Conveyancing vol. 1 p. 277.

(2) In *re Rafferty* v. *King*, 1 Keen, 601; *Lattee* v. *Dashwood*, 6 Sim. 462.

(3) 7 App. Cas. 235.

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the words of the statute, to hold that the saving of disabilities does not apply to any action or suit, as well in equity as at law, for the recovery of land.

The effect of this construction of the statute would, in my opinion, have been to have entitled the plaintiffs to redeem the entirety, for I do not see how justice can properly be done unless the mortgagee, receiving the whole amount of the mortgage money, is compelled to give back the whole estate. There is no principle on which the mortgage money could be apportioned in such a case, and the mortgagee compelled to receive a proportionate part according to the value of that part of the estate which the mortgagor retained in possession; and paying the whole sum secured, the mortgagor can only have justice done to him by having returned to him the whole security. I find nothing in the statute against this mode of working out the redemption which is that authorized by *Rakestraw* v. *Brewer*.

I omitted to mention a point which was considered of some weight in the Court of Appeal. It was suggested that the case on which the Chief Justice rested his judgment was not sufficiently made by the pleadings. I feel compelled to hold that the whole case for setting aside the sale, which is comprised in the fact that Andrew Faulds really purchased in Harper's name, is fully and sufficiently made by the 13th and 14th paragraphs of the bill already set forth, and in such a way as to satisfy all the requirements of equity pleading according to the rules prevalent in the most technical times. It is true that the bill does not expressly pray that the sale so impeached should be set aside, but as this is a necessary preliminary to the relief by way of redemption specifically prayed, it is clear that the plaintiffs are entitled to avail themselves of the prayer for general relief as sufficientf or this purpose. At all events this court would be bound under the statute 43 Vic. ch. 34 sec. 1, to

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amend the prayer, if it should be necessary to do so, it being apparent that no surprise was operated by the omission of a specific prayer.

The order of the Court of Appeal should be reversed and the decree of the Divisional Court restored, but it should be prefaced by a declaration that the purchase of the lands at the sale under the decree by the defendant, Joseph Harper, was for the benefit of and as a trustee for Andrew Faulds, and that it was fraudulent and void in equity as regards the said Andrew Faulds and all persons claiming under him, save the defendant, Joseph Lane, who, it should be declared, is a purchaser for valuable consideration without notice, and as such entitled to retain the benefit of his purchase, subject to the mortgage made by him in the pleadings mentioned. And it should be ordered and decreed accordingly. Further, there should be added to the decree a direction that the mortgage should be deposited in court, and it should be declared that the plaintiffs have a lien upon it and the money secured thereby for the amount which may be found due to them ; and Lane should be ordered to pay the mortgage money into court as it becomes due. As the decree was varied by the Divisional Court there appears to be some slight verbal errors in the 3rd paragraph of it which must be corrected.

As regards the costs, the plaintiffs are entitled to be paid their costs by the defendants, the Harpers, up to and inclusive of the hearing, and the appellants are entitled to be paid by the same defendants their costs of the re-hearing in the Divisional Court; and of the appeals to the Court of Appeal and to this court. Subsequent costs and further directions are properly reserved by the decree.

Lane, as a purchaser for value without notice, is of course entitled to his costs, which his co-defendants,

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the Harpers, must be ordered to pay to him.

Sir W. J. RITCHIE C.J. and FOURNIER and TASCHEREAU JJ., concurred.

HENRY J.—This is an action brought by the appellants to redeem certain real estate transferred by mortgage by William Faulds, their father, to Andrew Faulds, who was his father, dated the 29th April, 1857, to secure $1,900 and interest.

William Faulds died 1st July, 1858, in possession of the mortgaged premises, intestate, leaving his widow, Matilda, who is still living, and six children. Elijah Washington, born in 1844; James Linda, in 1848; Eliza Jane, in 1850—died unmarried in April, 1868; William Martin, born 23rd May, 1852; Wesley Bell, born 24th February, 1855, and Matilda Elizabeth, born 24th November, 1857.

After the death of the mortgagor, Andrew Faulds, the mortgagee, filed a bill of foreclosure in chancery, and obtained a decree for the sale of the mortgaged premises the 26th June, 1861. The sale, of which the mortgagee had the conduct, took place on the 12th of April, 1862. At that sale Joseph Harper, a son-in-law of Andrew Faulds, became the purchaser for $1,600.

Andrew Faulds conveyed the mortgaged premises to Harper on the 16th of June, 1862, and on the same day Harper reconveyed to Andrew Faulds.

On the 29th December, 1879, the surviving executor of Andrew Faulds, under a power of sale in his will, conveyed the mortgaged premises to James C. Lane, one of the defendants, and the latter on the same day executed a mortgage thereon to Margaret Harper, another of the defendants, to secure the payment of $4,780.29, she being then the only one interested in the estate of her late father.

In 1862, after the execution of the deed to Harper, and

the reconveyance to him by the latter, Andrew Faulds took possession of the premises and continued to hold them till he died, and the defendant, Margaret Harper, and others with and under her, kept possession thereof until the sale to Lane took place, and the latter has held the possession since.

The appellants, as the surviving heirs of William Faulds, the mortgagee, contend that the sale of the mortgaged premises by Andrew Faulds to Harper was in fact no sale in law, and that Harper was merely the agent of Andrew Faulds to purchase the property for him. That such was the case was, I think, abundantly proved, and the six learned judges before whom this case has been heard have so decided. I think their decisions cannot be questioned by this court. The right of the appellants to redeem in the absence of a legal sale is not and cannot be questioned, and for reasons readily suggested to a legal mind no valid sale was made.

The defence of the statute of limitations and laches are pleaded as a defence, and it is therefore necessary to ascertain if the right of the appellants to recover was barred when this action was commenced, as it was by bill of complaint filed on the 27th February, 1880. The law in force as to the limitation of suits in 1862, when Andrew Faulds went into possession, is to be found in the Consolidated Statutes of Upper Canada, passed in 1859, chap. 88. Sec. 21 limits the right of redemption, where the mortgagee has been in possession, to twenty years, and by section 16 the right is then extinguished. Other limitations are enacted in other sections of the Act before the 45th section, which provides that:—

If at the time at which the right of any person to bring an action to recover any land shall have first accrued, as hereinbefore mentioned, such person shall have been an infant, then such person, or the person or persons claiming through him, may, notwithstanding

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the period of twenty years hereinbefore limited shall have expired, bring an action to recover such land at any time within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under any such disability or shall have died.

That section clearly and unmistakeably applied to the provisions of section 21.

By sec. 8 of chap. 1 of the Consolidated Statutes it is provided:

That the said Consolidated Statutes shall not be held to operate as new laws, but shall be constructed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Consolidated Statutes are substituted.

Sec. 9 of the last mentioned Act provides:

But if on any point the provisions of the Consolidated Statutes are not in effect the same as those of the repealed Acts, then as respects all transactions, matters and things subsequent to the time when the said Consolidated Statutes take effect, the provisions contained in them shall prevail.

We need not, therefore, as to this point refer to any of the repealed statutes, for the provisions of the Consolidated Statutes operated from the date they were passed. The provisions of section 45 are, no doubt, applicable to those of section 21, and that the words in the second line of the former of the two sections, "to bring an action to recover any land" includes an action for redemption of mortgaged premises. The authorities go to sustain that proposition. The law relating to disabilities operated until the Act of 1874 was passed. The object of that Act, as stated in the preamble, is to lessen the time for bringing certain actions—in some cases from forty to twenty years, and in other cases from twenty to ten years, "and also to lessen the time for redemption of mortgages," &c. No other object is stated, nor is it stated that the Act is to have any other effect.

By sec. 21 of the Consolidated Statutes the time for

bringing an action for redemption was 20 years. By sec. 8 of the Act of 1874, the time was reduced to ten years—so that the obvious intention of the Act as stated in the preamble was carried out. The words of the two sections are exactly alike with the exception of the substitution of the words "shall have" for the word "has" in the 21st section, and the word "ten" for "twenty." The principal difference between the two Acts arises from the fact that the disability clause, in the Act of 1874, forms section five, which precedes the provision in section 8, by which the right to redeem is limited to ten years.

Section 5 provides:

That if at the time at which the right of any one "to bring the action or suit to recover any land shall have first accrued," shall be under the disability of infancy, then such person or the person claiming through him, "may, notwithstanding the period of ten years or five years (as the case may be), hereinbefore limited, shall have expired," bring an action to recover such land at any time within five years after the disability ceased.

Section 8 provides:

That where a mortgagee shall have obtained possession of any land comprised in his mortgage, the mortgagor shall not bring any action or suit to redeem, but within ten years next after the time the mortgagee obtained such possession, unless in the meantime an acknowledgment in writing of the title of the mortgagor or of his right of redemption signed by the mortgagee and given to the mortgagor or some person claiming the estate, &c.

It is contended on the part of the respondents that the provisions of section 5 must be limited to those cases referred to in the previous sections, and therefore that they cannot properly be extended or applied to the cases referred to in section 8, and that contention has been sustained by three out of the four learned judges of the Court of Appeal, but a different conclusion was arrived at by the learned Chief Justice in the Court of Appeal, by two other learned judges in the Division Court, and by the learned Vice-Chancellor. Indepen-

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dently of this diversity of opinion, it must be admitted that the question is not easy of solution.

From a consideration of the object stated in the preamble to the Act and the position of the sections in the Consolidated Statutes, and in the absence of any good reason that I have been able to find for making the change by which ten years' possession by a mortgagee would absolutely bar the rights of infants incapable in the eye of the law of protecting their own rights, I can hardly arrive at the conclusion that it was so intended. To sustain that conclusion it is only necessary to give a case that is not unlikely to occur. A property is mortgaged for an amount equal to a small percentage of its value by a man who at his death leaves two or three infants, not one of whom are over five or six years of age at the time the mortgagee enters into a possession, as he is entitled to do—he holds that possession for ten years and the right to redeem of the infants, not one of whom is then over sixteen or seventeen years, is forever barred. I cannot think that such was ever deliberately intended to be the result of the change of position of the sections in the Act of 1874 from that in the Consolidated Statutes, and the whole difficulty has been caused by that change. Previous to the Act of 1874 we may safely say that the policy was to protect the rights of infants in such cases by legislative enactments, and I have never heard that the soundness of that policy was questioned in any civilized country. Before the making of such a sweeping change of policy we would naturally expect to hear that the question of changing it had been urged and publicly debated and considered, and I think we are not going out of our way in a case like the present, to suggest, as the result of our knowledge of parliamentary procedure and the knowledge we, as part of the public, are in a position to obtain of the agitation of important public measures, to say that the propriety

of making the change contended for in that policy was not publicly debated or agitated. From every consideration I have been enabled to give to the subject I cannot but feel, and say, that the change in the relative position of the sections was not intended to affect the rights of infants. I am quite aware of the decisions in England to which reference is made in the judgments of the two learned judges of the Court of Appeal, in which a different conclusion was arrived at, but which I consider it unnecessary in this case to criticise, as a decision on the point to determine it, is, in my opinion, unnecessary.

In order to lay a foundation for the defence of the statute of limitations, as pleaded in this case, or to obtain the aid of section 8 of the Act of 1874, it is necessary to establish the position that the possession taken of the mortgaged premises by the mortgagee, and subsequently held by him and those claiming through him, was that of a mortgagee. Looking at the defence let us see how it bears upon the point. It is that Andrew Faulds, the mortgagee, after the death of the mortgagor, obtained an order for foreclosure and sale—that he, as authorized by the order and according to its terms, sold the mortgaged premises to the defendant Harper—that the latter paid him the amount for which the same was sold, upon which he (a month or two after the sale) made the necessary conveyance to Harper—that he subsequently on the same day purchased the same premises from Harper and obtained from him a conveyance in fee simple thereof, upon which he went into possession as such purchaser from Harper and retained that possession till he died, and that the possession of the same has been since held by his devisees, who claim under his last will and testament. That such was the nature and character of the possession proved and contended for on the trial, on the

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part of the defence, one has only to read the evidence of defendants, Harper and his wife. How, then, can the limitation in section 8 before referred to apply? Andrew Faulds clearly, by all the evidence on both sides, took possession, not as a mortgagee by virtue of the grant by mortgage to him, for by his own acts he relinquished that position as soon as he made the sale and conveyance to Harper, and how can he or those claiming under him be permitted for any purpose to assume it again. The object of the statute of limitations was to protect the interests of a mortgagee, who, acting on his right under the mortgage entered into possession as such mortgagee. Before, therefore, he or those claiming through him can evoke the aid of that statute, it must be shown that he entered as such mortgagee and held as such for the prescribed period. Where, then, in this case, is the evidence to sustain such a position? None that I can discover; but, on the contrary, abundant that he did not enter as such mortgagee.

The possession that Andrew Faulds took was that of a purchaser from Harper and those claiming through him are equally affected with him. There is a statute of limitation applicable to that kind of possession by which the rights of others may be barred in ten years. An action to redeem, where the mortgagee has not entered, as such, into possession of the mortgaged premises, is, as I before stated, covered by the general provision in regard to the bringing of actions to recover land as referred to in section 5 of the Act of 1874, which provides for the disability of infants. As to the plaintiffs, Wesley Bell Faulds and Matilda Elizabeth Faulds, the action was brought within the limitation of five years after the disability of infancy had expired.

There is also another important position to be considered. The alleged sale to Harper was fraudulent and void, and the nature and character of the possession

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was *ab initio* fraudulent. Andrew Faulds entered into possession as a *bonâ fide* purchaser from Harper, who, it was alleged, had become a *bonâ fide* purchaser from the former under a sale by which he, Harper, by the conveyance from Andrew Faulds to him, gave him a title in fee simple of the mortgaged premises, and by that sale and conveyance the equity of redemption of the heirs of William Faulds, including the appellants in this case, was forever barred. By the course adopted Andrew Faulds fraudulently got possession of the property, and he and the others holding under him managed to retain that possession. The statute well provides that where the possession of land is obtained by fraudulent means the operation of the statute of limitation commences to run only from the time of the discovery of the fraud by the party or parties interested or from the time when the same might have been discovered.

There is no evidence which shows that the fraud alluded to was discovered by, or known to, any of the appellants until about a year before the commencement of this action. It is not shown that either of the parties to it ever spoke of or admitted it, or that any one of the appellants had any knowledge of it up to the time I have stated, and how, and from whom, were they to learn the nature of the hidden and secret transactions between Andrew Faulds and Harper. It must be recollected that at the time of the sale the eldest of the appellants was but eighteen, and the youngest but five years old. None of them, much less the younger ones, would know at that time anything about property or their rights in regard to property, and would not be likely afterwards to know much more, or to suspect that anything was wrong or fraudulent as to the property in question; and in such a case, I think actual knowledge or something very much the same

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should be shown, and nothing of the kind has been shown. But how can such a position be claimed—that is laches after knowledge of the fraud when the defence set up denies that any such fraud existed, and two of the defendants, Harper and his wife in their evidence, swear that the purchase by Harper was *bonâ fide* and not for Andrew Faulds? The statute of limitations therefore cannot be a bar to the recovery by the appellants. In that case all the appellants are entitled to redeem, and the question that was considered by the learned Vice Chancellor and the learned Judges of the Divisional Court as to shares or interests to be decreed to be redeemed will not arise.

If my views in regard to the matter lastly considered be not sustained, but that it should be adjudged that the younger ones of the appellants are entitled to redeem, then I concur in the views of the learned judges of the Divisional Court, and am of the opinion that a decree for the redemption of the whole of the mortgaged premises should be passed in the usual form with costs in all the courts.

Appeal allowed with costs.

Solicitor for appellants: *T. H. Luscombe.*

Solicitors for respondents: *Street & Becher.*