1886
*May 31.
*Nov. 8.

THE FEDERAL BANK OF CANADA (PLAINTIFFS) ..... } APPELLANTS;

AND

THE CANADIAN BANK OF COMMERCE (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA.

Sale of land—Voluntary payment by purchaser—Execution against vendor—Lien of third party—Application of proceeds of sale—Interpleader act—Lands taken or sold under execution.

Where the purchaser of land voluntarily paid to the sheriff the amount of an execution in his hands in a *bonâ fide* belief that it was a charge upon the land,

Held, that a party having a lien on said land could not, under the Interpleader Act, claim the money so paid to the sheriff as against the execution creditor, even where he had relinquished his title to the land to enable the owner to carry out the said sale, and was to receive a portion of purchase money.

Semble, that as the lands were neither "taken nor sold under execution," the case was not within the Interpleader Act.

APPEAL from a decision of the Court of Queen's Bench, Manitoba (1) affirming the judgment in favor of the defendants on the trial of an Interpleader issue.

By an agreement under seal made between the Hudson Bay Co. and one Adamson the former agreed to sell to Adamson certain lots of land in Winnipeg. Adamson, being indebted to the Federal Bank of Canada, conveyed his interest in said lots to Renwick, the manager of that bank, by a deed absolute in form but intended only to operate as a mortgage. The Trustees of Knox Church, in Winnipeg, wishing to purchase the lots Renwick re-conveyed his interest in them to Adamson to enable him to get a legal title from the Hudson Bay

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

(1) 2 Man. L. R. 257.

Co. Before the sale to the church was completed the Canadian Bank of Commerce had obtained judgment against Adamson, and placed in the sheriff's hands an execution which bound Adamson's lands. The trustees of Knox Church, believing this to be a charge upon the land they wished to purchase, paid the amount of the execution to the sheriff and received from him a certificate that the land was free from execution. The Federal Bank claimed the money so paid to the sheriff and an interpleader order was obtained to determine to whom it belonged. The judge who tried the issue under the interpleader order decided in favor of the Canadian Bank of Commerce, and the Court of Queen's Bench sustained his decision. The Federal Bank of Canada then appealed to the Supreme Court of Canada.

McCarthy Q.C. for appellants.

The issue agreed on by the parties was simply whether the proceeds of the sale of the lots 9, 225 and 226 of the Hudson's Bay Reserve was the property of the appellants as against the respondents.

Whether this fund was one subject to the sheriff's interpleader (1) is not now open to argument, for the respondents attended upon the granting of the order, and at least a portion of the order is by consent; the order was allowed to stand and was not moved against; the issue was duly settled between the parties pursuant to the order and was tried, and it is too late now to take objection. *Haldan* v. *Beatty* (2); *Wilson* v. *Wilson* (3).

The land was not subject to the execution in the sheriff's hands against Adamson because he had no beneficial interest therein, (1); Adamson was our trustee and he had no right to use the proceeds of this sale to pay off his own debt, and the mere fact of the

(1) Man. Con. Stat. Cap. 37 sec. 53.

(2) 43 U. C. Q. B. 614.

(3) 7 P. R. (Ont.) 407.

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

vendor paying over the money into the sheriff's hands without our knowledge does not give it to the respondents as against us. *Engelback* v. *Nixon* (1); *Duncan* v. *Cashin* (2).

I also contend that there was a resulting trust. Lewin on Trusts (3); *Ex parte James* (4); *Gardner* v. *Rowe* (5).

The question of voluntary payment does not arise at all. It was to remove a cloud on appellant's title and the payment in this case comes within the principles laid down in *Valpy* v. *Manley* (6); *Snowden* v. *Davis* (7); *Carter* v. *Carter* (8).

Robinson Q.C. for respondents:

This is a case not provided for by the statute (9); *Harrison* v. *Wright* (10); and if so there is no right of appeal to this court, for even if the parties are bound by the consent to the judgment of the tribunal of first instance, it does not give the right of appeal.

But admitting there is a right of appeal, the money was voluntarily paid by the vendees on account of the respondent's execution, and there was no arrangement that the money should be paid to the sheriff as agent for the appellants if they were beneficially entitled to the land. *Wilson* v. *Ray* (11); *Morgan* v. *Boyer* (12); Moreover the transaction between Adamson and appellants was, in effect, a mortgage, and under the evidence the re-conveyance was intended to release the security. Lewin on Trusts (13); Then even if appellants had any title or interest in the land, there is no such trust manifested and proved by the evidence to meet the requirements of the 7 sect. of Statute of

(1) L. R. 10 C. P. 645.
(2) L. R. 10 C. P. 554.
(3) Ch. 9, par. 4.
(4) 9 Ch. 609.
(5) 2 Sim. & Stu. 346; 5 Russ. 258.
(6) 1 C. B. 594.
(7) 1 Taunt. 359.
(8) 5 Bing. 406.
(9) Con. stats. Man. Ch. 37, Secs. 53, 38.
(10) 13 M. & W. 816.
(11) 10 A. & E.
(12) 9 U. C. Q. B. 318.
(13) 7 Ed. p. 620.

Frauds. Browne on Statute of Frauds, sect. 89. *Gardner* v. *Rowe* (1).

SIR W. J. RITCHIE C. J.—The Canadian Bank of Commerce, having obtained judgment against one Robert Adamson on the 4th Aug. 1883, caused a writ of *fieri facias de bonis* to be issued thereon directed to the sheriff of the Eastern Judicial District of the Province of Manitoba, and placed the same in his hands directing him to levy $3,513.34 and interest at 6 p. c. from the 4th Aug. 1883 and $6 for the writ and warrant thereon, besides sheriff's poundage, officer's fees, &c. On the same day the defendants caused to be issued and placed in the sheriff's hands, on the said judgment, a writ of *fieri facias de terris* with similar directions. The amount due on these executions was paid to the sheriff, who gives evidence of such payment as follows :—

Q.—You produce executions against Robert Adamson, in whose favour?

A.—The Canadian Bank of Commerce, fi. fa. goods and lands, dated 4th day of August, 1883, received same day at 11:30 a.m.

Q.—Did you ever receive any moneys on any executions or on this against Mr. Adamson, and if so, from whom?

A.—We received from Bain, Blanchard and Mulock $3,648.15 on 14th September, 1883.

Q.—Why was that paid to you?

A.—I was informed at the time it was paid as owing on some land in the city, being Mr. Adamson's land.

Q.—It was received as against lands, not as against goods?

A.—We had no goods received. It was understood at the time that it was some land that got into his name in some way.

Q.—And upon receiving that you gave a certificate that that land was free from execution?

A.—Yes.

Q.—You refused to give that certificate until that money was received?

A.—Yes.

Q.—Did you or not refuse to give that certificate until that money was paid?

(1) 2 Sim. & Stu. 347; 5 Russ. 258.

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Ritchie C.J.

A.—Yes; and immediately after we were notified by you or your firm that Mr. Renwick claimed the money in our hands as trustee or agent or something.

There is really no direct evidence in the case, that I can discover, to show to whom this money belonged, or for whom Bain, Blanchard and Mulock were acting, (beyond the statement of Mr. McKenzie in answer to this question "do you know who paid the money to the sheriff?" He says "I believe Mr. Blanchard acting for Knox Church,") though it is assumed, and probably quite correctly, that the money belonged to Knox Church and Blanchard made the payment for and on their account, and this is to be presumed in the absence of any evidence to the contrary. But of this there can be no doubt; that it was paid to relieve lands, standing in the name of the defendant Adamson, from the execution of the Canadian Bank of Commerce against Adamson, and by reason of which payment the sheriff gave a certificate that the land was free from execution, which certificate the sheriff refused to give until that money was received. Whatever may have been the dealing between Adamson and the Federal Bank or Knox Church, with which the Canadian Bank of Commerce do not appear to have had any connection, and whatever their rights, legal or equitable, as among themselves may be, the Federal Bank has shown nothing whatever, in my opinion, to justify their present claim. The money was paid in discharge of the judgment and execution of the Bank of Commerce with which the Federal Bank is in no way connected. The party who paid the money does not appear to complain, and puts forward no claim. The money, if paid by Knox Church as it appears to have been, was a payment by the purchaser of lands to satisfy an execution which the party paying undoubtedly believed was a charge upon the land. Whether it was so or not is a question not raised by him, he being no party to

these proceedings, and it seems to me, so far as the Canadian Bank of Commerce is concerned, a wholly immaterial question.

At any rate, the party paying appears to have paid the money and obtained what he sought, the sheriff's certificate that the land was free from execution. Thus, the money was paid to the sheriff in satisfaction of the execution, and to and for the use of the judgment creditor, by which payment the judgment creditor's judgment and execution were paid and satisfied. What possible right can this give the Federal Bank to claim this money? Whatever their rights, legal or equitable, if they had any, in the property may have been, or may now be, they have not shown, so far as I can discover, as against the sheriff or the judgment creditors, any right whatever to this money, which was money had and received by the sheriff to and for the use of the judgment creditors. And even if they had established a legal right to, or an equitable interest in, this money, it does not appear to me that any such right or interest could be enforced in this proceeding because, as the Chief Justice of Manitoba observes:—

"The Interpleader Act only applies to the proceeds or value of "any lands or tenements taken or sold under any such proceeding, "and, as he says, the money here claimed is not the proceeds of any "lands or tenements taken or sold &c. This land was not, in fact, "either taken or sold."

I think the appeal should be dismissed.

STRONG J.—The facts material to be considered on the present appeal are not in any way controverted. They are as follows:—On the 29th of August, 1881, the Hudson's Bay Company contracted to sell to Robert Adamson certain lands in the city of Winnipeg, being lots No's. 9, 221, 222, 223, 224, 225, and 226 in block 4 as shewn in the plan of a certain survey by J. S. Dennis. The purchase money was $15,000, one-fifth of which

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Strong J.

was paid down, and the residue was to be paid in four equal annual instalments with interest at 7 p. c. This contract was embodied in an agreement under seal, bearing date on the day mentioned, which was executed by Mr. Brydges, the attorney of the Hudson's Bay Company duly authorised in that behalf, and by Adamson. On the 3rd of March, 1883, Adamson being indebted to the plaintiffs and present appellants, the Federal Bank, in a sum amounting to between $5000 and $6000, in order to secure this debt executed an absolute deed purporting to convey lot No. 9 to Mr. Thomas Renwick, who was then the manager of the Federal Bank, at Winnipeg. It is not pretended by the plaintiffs that this deed was intended to operate otherwise than as a mere mortgage security. Mr. Renwick being examined as a witness at the trial, proves this distinctly. On being shewn the deed, exhibit A, and being asked "For what purpose was that deed given to you,'? he says "I got it for security for the advances made by the Bank to Adamson."

The title being in this state and the trustees of Knox's Church, in Winnipeg, being desirous of purchasing this lot No. 9 and also lots 225 and 226 comprised in Adamson's purchase from the Hudson's Bay Company, as a site for a church, an agreement to sell to the trustees was come to between Adamson and the trustees, and thereupon Renwick, on the 26th of July, 1883, re-conveyed the lands, by an ordinary deed of grant and quit claim absolute in form without covenants, to Adamson. This deed purports on its face to have been made for the nominal consideration of $1. On the same day Frederick McKenzie, who had purchased or otherwise acquired Adamson's interest in lots 225 and 226, also re-conveyed these two lots to Adamson. These re-conveyances are alleged to have been made for the purpose of enabling Adamson to

make a title to the trustees of Knox's Church; in the words of Mr. Renwick "it was to facilitate the transfer from the Hudson's Bay Co. to the church people"; and Mr. McKenzie, in answer to an inquiry as to his reason, gives a similar answer. He says "because I knew I could not get the deed. They "(meaning the Hudson's Bay Co.) would not recognise "any one but Adamson, the original purchaser."

These were, of course, entirely inadequate reasons for this roundabout way of making the re-conveyance by Renwick, since Adamson could have conveyed just as as well without it, but the facts are just as stated. The price to be paid by the church trustees for the three lots, this lot 9 and Mr. McKenzie's two lots, was about $9,000, and Mr. McKenzie says it was agreed that this was to be apportioned $\frac{1}{2}$ to lot 9 and $\frac{1}{2}$ to his two lots. On the 4th of August, 1883, and previously to the execution of the conveyance by Adamson to the Church trustees, there was lodged with the sheriff of the Eastern District of Manitoba fi. fa's against the goods and against the lands of Adamson at the suit of the defendants, the Canadian Bank of Commerce. The fi. fa's were indorsed to levy $\$3513\frac{34}{100}$ and sheriff's fees and poundage and expenses of execution.

These writs of execution were lodged with the sheriff at 11.30 a. m., on the 4th of August, 1883. On the same day but, as I gather from the judgment of the Chief Justice of Manitoba, (who says the case was argued before the Court in Banc on that assumption) subsequently to the lodging of the writs of *Fieri Facias* and when the execution had already become a charge upon the lands, Adamson, by a deed of grant duly executed by him for the alleged consideration of $15,000, conveyed all these lots (9, 225 and 226) to the church trustees in fee.

The sheriff having refused to give the solicitors for

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Strong J.

the purchasers a certificate that the lands were free from execution until the money was paid they, on the 14th Sept., 1883, paid to the sheriff $3, 648.15, in satisfaction of the defendants' execution, and the sheriff thereupon gave the required certificate. The plaintiffs having claimed this money, the sheriff obtained a judgment order that the parties should interplead; and the interpleader issue so directed having been found in favor of the defendants by Mr. Justice Taylor who tried the case without a jury and a rule *nisi* to enter a verdict for the plaintiffs having been discharged by the Court of Queen's Bench, this appeal has been taken from the last mentioned judgment.

The question for the determination of the court is therefore purely one of law as distinguished from fact, and is, I think, easily answered when the rights of the plaintiffs under the conveyances already mentioned and of the defendants under their execution, have been properly considered and defined.

It should be premised that the legal title to the lands in question, up to the 14th Sept. 1883, the date at which the money was paid to the sheriff, the latest material date in the case before us, was outstanding in the original vendors the Hudson's Bay Company. They had not been paid their purchase money, and, of course, could not be compelled to convey until they were paid—indeed, they were not bound to receive the last instalment until the 29th of August, 1885. I think it probable that any difficulty which arose in procuring a conveyance from the Hudson's Bay Co. was not because they would not recognise an assignee of the purchaser, whose rights they could not ignore either under the general law or under the specific form of their contract in which they covenant to convey to the assigns of Adamson) but because, either the parties claiming under Adamson were not prepared to

pay the full amount of the purchase money, or because the officers of the company did not choose to anticipate the dates of payment fixed by the agreement for sale. Be this as it may it is to be borne in mind that the legal estate was always, up to the time the money was paid to the sheriff, in the Hudson's Bay Company, and the several conveyances executed dealt only with purely equitable estates and interests, and the defendants' execution was in like manner a charge on a mere equitable interest and did not bind any legal interest or estate. This is material inasmuch as equitable interests only being dealt with the priority of incumbrances and charges on such interests must depend on precedence in point of time and on that alone. The conveyance by Adamson to Renwick being, by the explicit admission of the latter, intended only to take effect as a mortgage to secure to the plaintiffs the debt due to them, it was of course competent for Adamson at any time to prove this and to have the deed cut down to and treated as a mere security and to redeem the land. So far therefore Adamson's equitable interest in these lands, under his contract of purchase, was vested in Renwick as a mortgagee for the benefit of the plaintiffs subject to an equity of redemption by Adamson. Then as regards the effect of the deed of the 26th of July, 1883, by which Renwick re-conveyed to Adamson for the alleged purpose of facilitating the completion of the sale to the church trustees, I have no difficulty in conceding to the fullest extent the argument of the learned counsel for the plaintiffs that the rights of the Federal Bank were not in the least degree prejudiced but remained entirely unaffected, at least as regards the present defendants, by this re-conveyance. I do not think the Statute of Frauds would have been any obstacle to a Court of Equity in affording the plaintiffs relief if Adamson had attempted to make an inequit-

1886.

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Strong J.

able use of the estate or interest which was re-vested in him by the re-conveyance, such a breach of trust would have been considered inequitable and fraudulent and numerous cases shew that the Statute of Frauds forms no bar to relief in such a case. It is true that if Adamson had acquired the legal estate under this re-conveyance and had conveyed that to a purchaser or incumbrancer for value without notice the case would have been different, and the latter obtaining a legal title would have been entitled to priority over the earlier equitable title. But the defendants here are not in the position of purchasers, or chargees for value without notice as regards the lien of their execution for two reasons: First, an execution creditor can have no better right or title, even when the execution binds a legal estate, than the execution debtor had, but is subject to the same paramount equities which bind the latter (1); and secondly, as already pointed out, the interest of the execution debtor bound by the execution was purely equitable and therefore the lien or charge of the execution was subject to all equities prior in point of date. Whilst I freely adopt this argument I cannot assent to another mode of arriving at the same conclusion which was also urged on behalf of the plaintiffs. It was said that inasmuch as the deed of the 26th of July, 1883, by which Renwick re-conveyed to Adamson, appeared on its face to be a mere voluntary deed for a nominal consideration, there was therefore a resulting trust in favor of Renwick. To this I cannot accede. The doctrine in question of a resulting trust when no valuable consideration appears on the face of the deed is, no doubt, applicable to common law conveyances.

(1) *Wickham* v. *New Brunswick and Canada Railway Company*, L. R. 1 P. C. p. 75; *Whitworth* v. *Gaugain*, 3 Hare 416, 1 Ph. 728; *Beavan* v. *Earl of Oxford*, 6 DeG. M. & G. 507; *Kinderley* v. *Jervis*, 22 Beav. 34; Lewin on Trusts, (8 Ed). p. 247; Coote on Mortgages, (Ed. 5) p. 65.

but it does not, in my opinion, apply either to deeds operating under the Statute of Uses or to merely equitable conveyances. Mr. Lewin (1) it is true holds the contrary, but in two cases cited by him in a foot note to the text in which he advances the proposition, *Lloyd* v *Spillet* (2) ; *Young* v. *Peachy* (3); Lord Hardwicke expressly decided the contrary, and a very high authority on such a point, Mr. Sanders, in his work on Uses and Trusts maintains the same view. The point is, as it appears to me, of no practical importance in the present case, since the plaintiffs attain the same end in another way, and I only mention the point as it is of some importance as regards titles to lands in Ontario, since it would be a great innovation on the practice of conveyancing which has long prevailed in that province if in every conveyance in which a nominal consideration only was expressed it was to be held that a trust by operation of law resulted to the grantor.

We may therefore regard the plaintiffs as having been, at the time when the defendants' execution was lodged in the sheriff's hands, in the eyes of a Court of Equity the first incumbrancers—mortgagees—of this lot No 9; and in considering the case from this point of view we concede to the plaintiffs as high an equity as they can possibly pretend to.

Next to turn to the case of the defendants, we find that their execution debtor Adamson was, on the 4th of August, 1883, when they lodged their execution in the sheriff's hands, entitled to the equity of redemption in lot No. 9, subject only to the mortgage to the Federal Bank, the plaintiffs.

What then was the effect of the defendant's execution on Adamson's interest in this land? It is well known that at common law and without aid from

(1) Lewin on Trusts,(Ed.8) p.144. (2) 2 Atk. p. 150.
(3) 2 Atk. 257.

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Strong J.

statute or the assistance of a Court of Equity by a decree for equitable execution, a legal execution has no effect on an equitable interest in lands. Here, however, a Statute of Manitoba (1) has provided that

> Under the writ of execution against lands, immediately upon its receipt by the sheriff shall be bound, and after the expiration of the time aforesaid, may be sold and conveyed, all or any lands, tenements, and hereditaments of the judgment debtor, wheresoever the same may be in this Province, both equitable and legal, and all his estate, right, title, and interest therein, of what nature and kind soever, &c.

It is therefore manifest that the defendants' writ of execution against the lands of Adamson bound his interest in this lot No. 9 from the date of its delivery to the sheriff on the morning of the 4th of August, 1883.

Therefore at the time Adamson sold and conveyed this land to the Trustees of Knox's Church, on the same 4th of August, 1883, he was the absolute owner of the equitable interest which he originally acquired under the contract of purchase with the Hudson's Bay Company, subject to two incumbrances, which were, first what was in substance if not in form a mortgage to the plaintiffs, and secondly a statutory charge *in invitum* by force of their execution in favor of the defendants. It cannot be disputed that a purchaser, finding the estate he buys encumbered, has a right to apply the purchase money in paying off the incumbrances, and that this right cannot be interfered with by the vendor. Further, the purchaser may pay off the incumbrances in such order as he may choose, subject, of course, to this, that such as are not paid off are left subsisting as charges upon the estate. Thus the property sold being subject to two successive mortgages the purchaser may, if he thinks fit, pay off the 2nd leaving the 1st unpaid. This in no way prejudices the first mortgagee, who in that case has no right to call

(1) Con. Stats. Man., ch. 83 ; amended sec. 60, ch. 11.

upon the second mortgagee to hand over to him the amount received in satisfaction of his debt. And if this is so in the case of a second mortgage no reason can be suggested why it should not apply where the second incumbrance is not a mortgage but a judgment, which, as in the present case, has, by means of an execution issued upon it, become a charge upon the land. The only way in which this right can be controlled is by some contract or agreement on the part of the purchaser. It is not, however, pretended here that the trustees of Knox's Church ever agreed to apply their purchase money in discharge of the plaintiffs' mortgage. All that is said by Mr. Renwick is that there was an agreement between him and Adamson that the proceeds of the sale should be applied to the payment of the Federal Bank. In answer to the question.

As between Mr. Adamson and the Bank who were entitled to the proceeds? Mr. Renwick says "The Federal Bank were, because that was the express understanding I conveyed to him."

But it is not even suggested that the Trustees of the Church, or the defendants ever had notice of, much less that they were parties to, any such arrangement. And in the absence of contract they were in no way affected by it. The result is that the defendants' execution was paid off and, if the plaintiffs, as they insist, still retained their first mortgage, it was left remaining as the first incumbrance on Adamson's interest under the contract, and there is nothing now to prevent the plaintiffs from enforcing it, unless the trustees, having got in the legal estate, are able to shew that they were originally purchasers for valuable consideration without notice of the plaintiffs' rights.

This is the view of the case taken by Mr. Justice Taylor at the trial and which he has enunciated concisely, but none the less accurately, in the judgment

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Strong J.

which he then delivered. In this I entirely agree with him, and though I have written more fully it has been only with a view of ascertaining and defining the positions of the parties; for when this is once done all difficulty vanishes and the case can be at once solved by applying very plain and well settled principles.

If the re-conveyance to Adamson had been indispensable to have enabled him to convey his interest, and had the fact that that deed was executed only on the understanding that the purchase money should be applied in reduction of the plaintiffs' debt, and had notice to the defendants of this arrangement been proved, there might then have been some ground for saying that the defendants ought not to be permitted to retain the money—but even in that case I should doubt if the right of the purchaser to apply the money in paying off such incumbrances as he might select could be controlled.

The Chief Justice and Mr. Justice Killam reached the same result in another way. They determined that the money having been paid by a person entitled to pay it, the defendants having no notice of the arrangement were entitled to say that they were in the position of purchasers for valuable consideration, their execution being satisfied by the payment of the money to the sheriff, and the sheriff's certificate of discharge. The case of *Morley* v. *Pellatt* (1) entirely supports this view, and I think it furnishes an additional and independent reason for dismissing the appeal.

A further point suggested by the learned Chief Justice in the Court below was that there was no jurisdiction to entertain an appeal from Mr. Justice Taylor's decision, inasmuch as the case did not come within the 53rd section of the Manitoba Interpleader Act. (2) That provision only authorises an

(1) 8 B. & C. 722.

(2) Chap. 37 Con. Stats. of Manitoba.

interpleader by the sheriff in the case of lands when a claim is made against an execution creditor to the proceeds of lands or tenements "taken and sold" under any process, &c, the words of the statute being precisely the same as those of the C. S. O., chap. 54, sec. 10. I incline to think that this objection was well founded and, if so, the proceedings before Mr Justice Taylor were in the nature of an arbitration by consent and therefore final (1).

The appeal should be dismissed with costs.

FOURNIER and TASCHEREAU JJ. concurred.

HENRY J.—The plaintiffs, in the interpleader suit, claim that the money paid by the Trustees of Knox Church to the sheriff, under the circumstances, was their money.

The Respondents having a judgment against one Adamson, placed an execution in the sheriff's hands, by which whatever title Adamson had in the lands was bound.

The question as to what that title was never arose, nor has it arisen yet under the peculiar circumstances of this case. Then he having some title, the Trustees of Knox Church, wishing to get a certificate from the sheriff that the land was free from execution, undertook to pay, out of their funds, the amount of this execution.

The plaintiffs claim that this was their money. Now, to look at it in a business point of view, how could they claim it to be their money? No interest of theirs was taken, no title of theirs was interfered with. It was the mere title of Adamson, whatever it was, whether a legal or equitable estate we have no right

(1) *Shortridge* v. *Young*, 12 M. & W. 5. Churchill on Sheriffs p. 193 (Ed. 2nd). Cababé on Interpleader, p. 46. *Atty. Gen. Nova Scotia* v. *Gregory*, 11 App. Cas. 229.

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Fournier J.

nor business to inquire. The sheriff could have sold nothing but the interest of Adamson, and how could a third party come in and claim the money? If a party pays money by fraud he is entitled to relief, but I can see no ground the plaintiffs here have to relief. How can the Federal Bank claim money which they never paid and had no right to charge? How can they ask the Bank of Commerce to repay money to them to which they never had a claim?

Suppose this land had been sold by the sheriff and the purchasers should claim to be entitled to receive a conveyance of the title of Adamson in the lands purchased by him from the Hudson's Bay Company; the Federal Bank might have intervened, and said, "Adamson was merely our agent and therefore the purchaser must pay us our equitable claim."

But that is not the case here. The case is one of a very simple nature. The money was paid by Knox Church to the sheriff and he having handed it over to the execution creditors it bars all claims. I think, therefore, that the appeal should be dismissed with costs.

I may say, in addition, that the statute only affects cases where the land is actually sold, but that it should apply to every case in which an execution is put in the Sheriff 's hands I think was never the intention. I also agree with Mr. Justice Strong's remarks on the case.

GWYNNE J.—I think the appeal must be dismissed upon both of the grounds argued.

1st. that the case is not one for interpleader, and 2nd that the Federal Bank having as they admit conveyed back to Adamson all interest they had in the land for the express purpose of enabling him to perfect his title thereto and then to sell the land to Knox

Church Congregation, they the Federal Bank not appearing in that transaction but contenting themselves with Adamson's promise to pay them out of the monies he should receive on the sale, and the fi. fa. having been paid off and satisfied by the vendees of Adamson for the express purpose of discharging their vendor's land from the operation of the fi. fa. and to complete their title without the Bank of Commerce, so far as appears, having had any notice of the Federal Bank having ever had, or that they claimed to have any interest in the land, the money so paid to the sheriff was, in my opinion, money paid to the use of the Bank of Commerce and cannot be recovered by the Federal Bank either from the Sheriff or the Bank of Commerce. The Federal Bank must bear the consequences of their own act in enabling Adamson to deal with the property as his own.

Appeal dismissed with costs.

Solicitors for appellants: *Archibald, Howell, Hough & Campbell.*

Solicitors for respondents: *Aikins, Culver & Hamilton.*