*Judyment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Webb and another, Executors of the Will of William Lloyd, deceased,* v. *Macpherson, from the High Court of Judicature at Fort William in Bengal; delivered the* 1st *July* 1903.

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Present:

LORD DAVEY.
LORD ROBERTSON.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

THE Appellants are the executors of a gentleman named Lloyd, who was at one time the owner of some property at Darjeeling. By an indenture dated the 17th July 1892 Mr. Lloyd conveyed part of that property—a tea garden of some 800 acres, called the Gopaldhara Tea Estate—to a person named Tucker. The conveyance contains a recital that "the vendor has "agreed with the purchaser for the absolute "sale to him of the hereditaments intended to "be hereby granted * * * free from "encumbrances, in consideration of the sum of "Rs. 81,210, of which Rs. 30,000 is to be paid "on or before the execution of these presents, "and the balance of Rs. 51,210 with interest is "to be secured by the formal undertaking of "the purchaser." It then goes on to recite that "immediately before the execution of these "presents the purchaser has executed in favour "of the vendor a formal undertaking for the "payment to the vendor of the sum of Rs. 51,210, "with interest after the rate at the time and in

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" the manner therein mentioned." The operative part of the covenant declares that " in pursu- " ance of the said agreement and in considera- " tion of the sum of Rs. 30,000 at or before the " execution of these presents paid by the pur- " chaser to the vendor" (the receipt of which was thereby acknowledged), " and in considera- " tion of the sum of Rs. 51,210 secured by " such undertaking as aforesaid the vendor doth " hereby grant unto the purchaser" the land in question. By a memorandum which is dated the 3rd August 1892 and is the " undertaking" referred to in the conveyance as having been executed—it was in fact executed a few days after the conveyance—Mr. Tucker, the purchaser, contracted to pay to Mr. Lloyd, his executors, &c., the sum of Rs. 51,210 by yearly instalments (until the final payment) of not less than 1,000*l.*, and with each instalment to pay interest on the entire amount then due. Three instalments of 1,000*l.* each being roughly equivalent to Rs. 51,210, the contract was one to pay the balance of the purchase money, after payment of the Rs. 30,000 paid on the execution of the conveyance, in three annual instalments of 1,000*l.* each, with interest in the meantime.

It appears from documents in the case that Mr. Tucker, the purchaser, was either the agent of, or a trustee for, one Curphey, who was at that time a minor, Mr. Tucker being his guardian; but their Lordships agree with the High Court that that makes no real difference in the consideration of the case; for if Mr. Tucker was a *prête-nom* for Mr. Curphey, he was equally so as regards the contemporary memorandum; and if, on the other hand, Mr. Tucker was the person to whom the legal estate was granted on behalf of Mr. Curphey, he was the person who entered into the obligation and defined the terms upon which the purchase

money should be paid. For the present purpose it is utterly immaterial whether Mr. Tucker or Mr. Curphey was the real purchaser, because the only question on the present occasion is whether there is a charge for the balance of the purchase-money which has not been paid.

It appears that Mr. Curphey entered into possession of the garden, and did some work upon it, but apparently either from want of skill, or want of capital, or want of attention, he was not very successful. He seems to have fallen into arrears with his payments, and in the latter part of 1893 Mr. Lloyd determined to enter into possession, in order, as he expresses it himself, to save the garden from ruin. In a letter of the 17th November 1893, addressed to Messrs. Sanderson and Co., who had acted as his represesentatives, he says:—"It is a pity to let "the garden go to the dogs; it is true, keeping "these 40 coolies on the place is not much, but "it is all that I can do. Had I known the "coolies were leaving, I would have stepped in "before. Mr. R. Tucker, junior, does not seem "quite successful in his arrangements for paying "me, and possibly the best way out of the mess "would be for me to refund the money and "take back the garden. Mr. Curphey has sold "timber off the place * * * *." The parties, however, did not accept Mr. Lloyd's proposal to refund the money and take the property back, but they allowed him to enter into possession in order to save the property from ruin. In what character did he enter into possession? It was as chargee on the property, and therefore having an interest in its preservation that he entered into possession. At the end of that year the Respondent, Mr. Macpherson, appears upon the scene. In a letter to Mr. Lloyd, dated the 20th December 1893, Mr. Macpherson says:—"Dear Mr. Lloyd, Yours of the 29th

" instant to hand. My reasons for offering you " two-thirds Gopaldhara were because I under- " stood Curphey held one-third, and that you " were on the look out for a banker of the " balance. I am quite prepared to take the " whole of Gopaldhara should you feel disposed to " let me have it." In the result Mr. Macpherson purchased three-fourths of the property from Mr. Tucker. There appears to have been some misapprehension about the title, but on being informed of the true state of the case that the property belonged to Mr. Tucker, he purchased three-fourths of it from Mr. Tucker, and in the commencement of the following year he settled with Mr. Lloyd. It is unnecessary to refer to all the letters which led up to the settlement, and it is sufficient to say that Mr. Macpherson wrote to Mr. Lloyd a letter, dated the 10th March, 1894, shewing what was due both for the instalment of the purchase-money which had become due on the 1st July 1893, and also for Mr. Lloyd's expenditure on what was called " Garden Account " or " Cultivation Account," together with interest on both those sums, the total balance due to Mr. Lloyd on the 31st December 1893 being Rs. 29,115.6.8. After some correspondence Mr. Lloyd agreed to take Rs. 29,000 in discharge of what was due to him as on the 31st December 1893, and a sum of Rs. 1,744.5 on account of the " Cultivation Account" from that date up to the time when Mr. Macpherson was let into possession. Thereupon Mr. Macpherson took possession, and paid his money. About this time, viz., on the 9th July 1894, Mr. Lloyd wrote to Mr. Macpherson with reference to a small sum remaining due. He says:— " Why not pay me that Rs. 286.8.0 you owe " me for walling and lime and cement. What " is the use of your saying you will ask Mr. " Tucker to pay it. Do so if you like, but

" in the meantime you should pay me. You pro-
" mised to pay me up if I gave over the garden
" to you, and on that faith I let you have it.
" Now your great heart baggles at a small item,
" 'the last'; be brave and honest and stump
" up." It is suggested that that means that it was Mr. Lloyd's intention to relieve the estate from the payment of anything on account of subsequent instalments of the purchase-money, because he speaks of his "great heart baggling at a small item, the last." Their Lordships think that Counsel for the Appellants put the right interpretation on that letter, when he suggested that what Mr. Lloyd is speaking of is the "Garden Account." The Rs. 286.8.0 were due on the "Garden Account," and he speaks of them as the last item due on that account. His letter has no relation to the payment of the instalment of purchase-money which had then just become due on the 1st July, but is written altogether *alio intuitu*. Both at their Lordships' Bar, and before the Appellate Court in India, the letter has been much relied on as evidence that Mr. Lloyd referred to his statutory charge for the unpaid purchase-money, but their Lordships are unable to regard the letter as having any effect of that kind.

Mr. Lloyd died on the 15th January 1896, and the present Appellants are his representatives. They commenced an action on the 28th June 1898 against Mr. Macpherson and two other Defendants. As already stated, Mr. Macpherson was the purchaser of three-fourths of the estate from Mr. Tucker, and the other two Defendants were judgment creditors of Mr. Tucker's having rights against the remaining fourth. The object of the action was to have it declared that Mr. Lloyd was entitled to a charge on the estate for the balance of the purchase-money due to him together with the stipulated interest. Section

55 (4) of the Transfer of Property Act (No. IV. of 1882) provides that:—"In the absence of a "contract to the contrary . . . The seller "is entitled, where the ownership of the property "has passed to the buyer before payment of the "whole of the purchase-money, to a charge upon "the property in the hands of the buyer for the "amount of the purchase-money, or any part "thereof remaining unpaid, and for interest on "such amount or part." Mr. Lloyd's executors therefore had a statutory right to a charge upon the property in the hands of Mr. Tucker, and those claiming under Mr. Tucker, unless it can be shown that there was a clear contract to the contrary between the parties. It was contended, first, that the conveyance of July 1892, and the accompanying memorandum of the 3rd August 1892, did contain—the Respondent must put it as high as this—either by express terms or necessary implication, some contract which excluded the right given by the Statute to the vendor; and, secondly, that if that was not so, still Mr. Lloyd, by giving up possession to Mr. Macpherson on the terms already mentioned in March 1894, had abandoned whatever right he may have had up to that time to any charge on the estate. To take the second point first, there is no ground whatever for saying that a mortgagee or chargee who is in possession of an estate as such, and gives up possession to a person entitled to it subject to his charge upon payment of what is then due to him, is precluded from afterwards asserting his right against the estate when further instalments, or further payments, become due to him. Such a proposition was not indeed maintained by Counsel, but it was argued that the letters which passed between Mr. Macpherson and Mr. Lloyd at that time amounted to an abandonment by Mr. Lloyd of any rights he may have had. That point has

already been dealt with, and their Lordships will only say that an examination of the contents of those letters clearly shows that they do not amount to any abandonment of any rights of charge or lien which Mr. Lloyd then had upon the estate.

With reference to the conveyance a number of English cases were cited. No doubt English cases might be useful for the purpose of illustration, but it must be pointed out that the charge which the vendor obtains under the Transfer of Property Act is different in its origin and nature from the vendor's lien given by the Courts of Equity to an unpaid vendor. That lien was a creation of the Court of Equity, and could be modified to the circumstances of the case by the Court of Equity. But in the present case there is a statutory charge. The law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England, and the Transfer of Property Act gives a statutory charge upon the estate to an unpaid vendor unless it be excluded by contract. Such a charge, therefore, stands in quite a different position from a vendor's lien. You have to find something, either express contract, or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the Statute. In their Lordships' opinion there is no ground whatever for saying that that charge is excluded by a mere personal contract to defer payment of a portion of the purchase money, or to take the purchase-money by instalments, nor is it, in their Lordships' opinion, excluded by any contract, covenant, or agreement with respect to the purchase-money which is not inconsistent with the continuance of

the charge. It is quite clear that the agreement by Mr. Tucker, the purchaser, to pay the balance of the purchase-money (Rs. 51,210) in three annual instalments with interest was in no way inconsistent with the existence of a charge to the vendor for the amount of the instalments with interest to become due from time to time.

But there is another point which seems to have found favour with the High Court in Bengal. It was said that no charge ever arose, because the purchase was not in consideration of a sum of money, part of which was paid down and the payment of the balance of which was deferred, but it was a purchase in consideration of a particular covenant. There is no doubt, both on principal and authority, that a conveyance or sale in consideration of a covenant to pay a sum of money in the future is different from a sale in consideration of money which the purchaser covenants to pay. The distinction may seem fine, but it is a real distinction, and it is one which, if made out, might have had the effect which the High Court have given to it. But is that the form of this conveyance? The conveyance, as already pointed out, is made in consideration of a sum of money. The agreement is expressed to be an agreement to sell for a sum of money of which Rs. 30,000 is to be paid, and the rest is to be secured by an instrument of even date, and the operative part of the conveyance is in consideration of Rs. 30,000 paid down, and of a balance which is identified as being the sum secured by the agreement. Their Lordships therefore think that that point also fails, and that there is no contract excluding the operation of the charge.

The Court of the Subordinate Judge seems to have apportioned the charge between the three-fourths of the estate purchased by Mr. Macpherson, and the one-fourth left in Mr. Tucker.

It is perhaps immaterial for the present purpose, but that apportionment is not strictly correct, as Mr. Lloyd's rights could not be affected by the mode in which Mr. Tucker chose to deal with the property, and Mr. Lloyd's charge under the Statute was a charge on the whole property for the whole amount of the balance due to him into whosesoever hands it came through Mr. Tucker; but for the present purpose it is not material to consider that at greater length, as there was no appeal to the High Court from the Decree of the the Subordinate Judge so far as it affects the Defendants other than Macpherson.

Their Lordships will, therefore, humbly advise His Majesty that the Appeal should be allowed, that the Decrees of the High Court and of the Subordinate Judge, so far as they dismiss the Suit against the present Respondent, should be reversed with costs, and that instead thereof it should be declared that the Appellants are entitled to a charge on the Gopaldhara Tea Estate for the unpaid balance of the purchase-money and interest, and that the case ought to be remitted with this declaration to the High Court to take the necessary accounts. The Appellants obtained a Decree against the other two Defendants, who were sued in respect of the fourth share which Mr. Macpherson had not then bought, and a certain sum was apportioned by the Subordinate Judge on that fourth share. They (the Appellants) may, or may not, have received something in respect of that charge, so that in taking the account of what is due to them for principal, interest, and costs, regard must be had to so much of the Decree of the Subordinate Judge as was not appealed against, and their Lordships will so advise His Majesty accordingly. Their Lordships put it in that general way purposely, because they do not wish the High Court to be precluded from dealing with

the matter in such a way as is right; that is to say, the High Court may either take the amount actually received by the Appellants from those two Defendants under the Decree, or they may think it a case in which they ought to charge the Appellants with the amount which they might have received under the Decree in relief of Mr. Macpherson.

A preliminary objection was made by the Respondent to the hearing of the Appeal founded on the form of the certificate of the High Court. The certificate is that the case is a fit one for Appeal to His Majesty in Council, and their Lordships understand it to be given pursuant to Section 595 (*c*) and the latter alternative of Section 600 of the Code of Civil Procedure, and they think that it properly follows the words of the Act and is correct in form. In the case cited by Mr. Bonnerjee (*Rajah Tasadduq Rasul Khan* v. *Manik Chand*, 30 I. A., p. 35) the certificate purported to be given under Section 596, but instead of finding in the form required by Section 600 that as regards its nature the case fulfilled the requirements of Section 596, found specially that the decision of the Appeal Court differed from that of the Court below. This was found to be erroneous owing to the Judge having placed a wrong meaning on the word "decision." It was on that ground alone that the certificate was held to be defective.

The Respondent will pay the Appellants' costs of this Appeal.