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politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which I cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy.

Let judgment be entered for defendants Thomas Victor Roberts and George Brian Humphreys with costs.

Upon the application of Mr. Berkeley His Honour certified for two counsel.

Mr. Moody informed the Court that he was instructed to apply for a review of the decision of the Court in respect to all the defendants and asked if he could be afforded an opportunity of considering His Honour's judgment.

His Honour intimated that a copy of his judgment would be available for the learned counsel's use as soon as the same could be printed, and directed any application for review to be made to the Supreme Court of Fiji.

The Court was closed by proclamation.

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#### [CIVIL JURISDICTION.]

[ACTION No. 2, 1913.]

GRIFFITHS *v.* THOMAS.

Document of Title—a lease deposited with defendant by way of security—delivery of—right to redeem property constituting security upon payment of all moneys due—once a mortgage always a mortgage (see *Newcomb v. Bonham*, 1681), 1 Vern. 7, clogging the equity of redemption—extension of security beyond the time provided for the payment of the mortgage debt—reasonableness thereof.

*Held*, transaction an equitable mortgage by deposit—further covenant not independent of mortgage contract, plaintiff having paid off the mortgages due is entitled to the delivery of the lease, the deposit of which constituted a part of the mortgage security, defendant not entitled to retain possession of the lease until the expiration of the term thereof in that the further covenant does not operate against redemption and even if it did such restriction would be unreasonable.

C. MAJOR, C.J. This is an action wherein the plaintiff, John Joseph Griffiths, claims from the defendant, Frederick Arthur Thomas, the delivery up of a document of title, that is to say, a lease bearing date the 31st day of December, 1908, from Mary Ann Macdonald to the plaintiff demising to the

plaintiff the premises in the town of Suva known as "Macdonald's Hotel" for a term of 15 years computed from the first day of January, 1909.

At the hearing of the action the plaintiff was permitted to amend his statement of claim by adding thereto an alternative claim for redemption of the property above mentioned.

The plaintiff claims damages for the detention of the document.

The facts of the case are these:—

The plaintiff having in the month of December, 1908, entered into negotiations with Mary Ann Macdonald for the purchase of the business of hotelkeeper carried on by the latter at Macdonald's hotel, it was agreed between them that the plaintiff should pay to Mrs. Macdonald the sum of £1,800 and that Mrs. Macdonald should lease the land and premises to the plaintiff for the term of fifteen years. This agreement was reduced to writing, but for failure of proper proof the document is not before me.

Of the sum of £1,800, £1,000 was to be paid at once and the balance of £800 by four bills of exchange of six, twelve, eighteen and twenty-four months respectively. The plaintiff had himself cash amounting to the sum of four hundred pounds, and requested the defendant to advance to him the sum of £600 to complete the £1,000, and also to guarantee the payment of the four bills given to Mrs. Macdonald. This the defendant agreed to do upon certain terms, and those terms were embodied in a document dated the 31st December, 1908.

This deed was made between the plaintiff and the defendant and contained the following recital:—

Whereas by an agreement dated the 7th day of December, 1908, made between Mary Ann Macdonald of the one part and the said John Joseph Griffiths of the other part the said John Joseph Griffiths purchased the ingoing of the Macdonald's hotel Suva at the price of £1,800 upon the terms and conditions herein appearing.

The duplicate agreement coming from the hands of the plaintiff contains the words "therein appearing." This recital is followed by the recitals of the terms of payments to Mrs. Macdonald by the plaintiff, the application to the defendant for assistance in manner above described, and the defendant's agreement to give the assistance, and for the consideration therein mentioned the plaintiff for himself, his executors, administrators, and assigns covenanted with the defendant, his executors, administrators, and assigns (1) to pay the sum of £600 and interest by three equal instalments in nine,

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fifteen and twenty-one months from the date of the deed, giving bills of exchange payable accordingly, and to give a bill of sale to the defendant to secure (*inter alia*) that sum; (2) to deposit his lease of the premises (i.e., of Macdonald's hotel) with the defendant and observe and perform all the covenants and conditions therein contained. A covenant against assignment of the plaintiff's interest in the lease without the defendant's consent follows and the deed proceeds:—

The said John Joseph Griffiths shall at all times during the term of his lease of the said Macdonald's hotel buy from the said Frederick Arthur Thomas all wines spirits beers and other spirituous liquors of whatsoever nature required in the business of hotelkeeper at Macdonald's hotel aforesaid and for any temporary licence which she may hold in Suva at an advance on the landed price of same in Suva of ten pounds per centum.

Stipulations follow for payment for goods supplied by the defendant to the plaintiff immediately and in the future, for the transfer to the defendant of the lease and licence of the premises if the plaintiff shall fail to perform any of the covenants and conditions in the deed contained, and other ancillary provisions which it is unnecessary to rehearse.

On the same 31st day of December, 1908, Mrs. Macdonald executed a lease of the hotel premises to the plaintiff. The lease is for a term of fifteen years and contains covenants by the lessee to pay rates and taxes, not to transfer or sublet without the lessor's consent, to conduct the business as publican in an orderly manner, to apply for a renewal of the lease, and some other covenants not material to the case.

By indenture dated the 4th day of January, 1909, being a mortgage of chattels after reciting the application to the mortgagee by the mortgagor to advance him the sum of £600 and to guarantee the payment of four bills of exchange given by the mortgagor to Mrs. Macdonald, and the agreement of the mortgagee to do so upon the security of the mortgage, the mortgagor thereby assigned to the mortgagee all and singular the stock in trade, utensils, fittings, goods, furniture, personal chattels and effects belonging to the mortgagor in, upon and about the hotel premises, subject to the usual proviso for redemption, and proviso for entry upon default of payment of the £600 and interest, or of any promissory note or notes accepted by the mortgagee in respect thereof, or of any money which the mortgagee might be called upon to pay under his guarantee to Mrs. Macdonald. The four bills of exchange so described in the mortgage—but they are promissory notes—are set forth in the schedule.

By a deed expressed to be a memorandum of agreement dated the 20th day of August, 1912, between Frederick Arthur Thomas of the one part and Messrs. Robbie Kaad & Co. Limited of the other part after reciting that Thomas (the vendor) had agreed with Robbie Kaad & Co. (the purchasers) to transfer to them all his business, business premises, stock in trade, office and business furniture and plant, and the goodwill of his business and the benefit of any contracts and agreements in connection therewith and that the purchasers had agreed to pay to the vendor the sum of £6,400 therefor, it was witnessed that the vendor thereby assigned unto the purchasers their successors and assigns all his estate and interest in his business theretofore carried on by him in Fiji and elsewhere in connection with his Fiji business, together with the lease of his premises in Suva and the lease of the hotel premises at Lautoka, and his whole interest therein and also all stock in trade, &c., used in connection with his business and the benefit of the agreements made by the vendor with John Joseph Griffiths of Macdonald's Hotel, Suva, and Patrick Costello, of the Lautoka hotel, for the supply of wines, spirits, beers and other drinks to them and the benefits and privileges thereunder and the goodwill of his business.

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The deed contains the following additional clauses:—

And the vendor doth hereby appoint the purchasers and their nominee or nominees for the time being his true and lawful attorney and attorneys to carry on if they think fit the business of wine and spirit merchants in his name and on his behalf and to use his name for such purposes but the vendor is to account to the purchasers their successors and assigns for any profits made in connection with any business so carried on in his name and for these last mentioned purposes the vendor authorises the purchasers to make use of his name as they deem fit.

And the vendor for himself his heirs, executors administrators assigns covenants with the purchasers their successors and assigns that he will not during the period of five years from the date of these presents enter upon or engage in any business of a character similar to that in which he has been heretofore engaged and which he now assigns and transfers to the purchasers at any place within the Colony of Fiji directly or indirectly and either alone or in partnership or as manager clerk or agent or as member of any joint stock company or corporation.

Meanwhile, that is to say, from January, 1909, to this period of 1912, the plaintiff was carrying on his business as a hotelkeeper on the hotel premises and obtaining his supplies of liquor therefor from the defendant. He had also discharged

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his liability to Mrs. Macdonald upon the bills of exchange (or promissory note) in her favour, and on the 31st July, 1912, was indebted to the defendant, on an account including the original advance of £600 and charges for goods supplied in a sum of £657 5s. 8d. On the 25th August, 1912, the defendant having informed the plaintiff that he was retiring from business, requested the plaintiff to sign on—as it had been described—with Messrs. Robbie Kaad & Co. for purchase of liquors used in the plaintiff's business. This the plaintiff declines to do and the defendant demanded payment of his account. The plaintiff accordingly then and there paid the defendant £500 on account, and on the 26th September paid the balance of his debt, £157 5s. 8d., together with a sum of £129 19s. 7d. due on private account, making together the sum of £287 5s. 3d. for which he obtained a full discharge from the defendant.

Having fulfilled his obligations to the defendant, the plaintiff conceiving himself to be entitled to the return of documents (including the lease of the hotel premises) held by the defendant under the agreement of the 31st December, 1908, and the bill of sale of the 4th January, 1909, applied to the defendant for their return. The defendant promised "to bring them along," but did not do so, and being about to leave Fiji for New Zealand (having received a valedictory address from his former employees of a highly complimentary and, indeed, affectionate nature) the plaintiff renewed his application for his documents. The defendant said he had overlooked the matter and would attend to it on his return from the neighbouring Dominion. On that return, some six or seven weeks after, the plaintiff made a fresh effort to obtain his documents when the defendant after a lapse of some days "brought along" the documents. They did not, however, include the lease of the hotel premises which, upon inquiry for it by the plaintiff, he was told by the defendant he could not get. After vainly endeavouring for some days to obtain the lease from the defendant, the plaintiff commenced these proceedings by issuing a writ of summons on the 9th January last.

Now it appears that Thomas returned to the Colony from New Zealand on the 6th January last. On the 9th of the month he gave a power of attorney to Henry Alexandra Amos, till he retired from business a year ago his confidential clerk and manager, generally for him and in his name and on his behalf to carry on his business as a wine and spirit merchant in Fiji and elsewhere in connection with his Fiji business and to

act as his attorney in relation to purchases, sales, exchange and other dealings with wines, spirits, liquors and other things usually dealt with by him in that business.

On the 28th February last, by means which are not very clear, Thomas having again left the Colony, Amos obtained the issue to Thomas of a wholesale liquor licence from the licensing authority in Suva, and some time after that, the precise date has not been given, but it appears from the evidence of Amos at the hearing to have been but a short time ago, for the protection of Thomas's interests, a room 15 feet by 15 feet in the premises now occupied by the defendant's assignees, Robbie Kaad & Co., was set apart for the transaction of Thomas's business as a wine and spirit merchant. In that room Amos tells us, ale in casks—he does not know the quantity, but he is sure there is some—has been kept for a short time. It has been bought from Robbie Kaad & Co.

In the circumstances and upon the construction of the documents above set forth, the plaintiff contends that having paid all moneys due to the defendant upon the security (a) of the equitable mortgage by deposit of the lease under the agreement of the 31st December, 1908, and (b) of the mortgage of chattels of the 4th January, 1909, he has fulfilled all the necessary terms of his right to redeem, that nothing being due to the defendant under the mortgages, he has in fact redeemed, and is entitled to the delivery of the lease the deposit of which constituted a part of the mortgage security.

To those contentions the defendant demurs. I read from his statement of defence as follows:—

By the deed in the statement of claim mentioned the said Mary Ann Macdonald demised and leased the lands in the statement of claim mentioned to the plaintiff for a term of 15 years from the 1st day of January, 1909, and thereupon by indenture bearing date the 31st day of December, 1909, and made between the plaintiff of the one part and the defendant of the other part, the plaintiff for the consideration in the said indenture set forth agreed to deposit the deed in the statement of claim mentioned with the defendant until the expiration of the term by the said deed demised and in pursuance of the said agreement in the said indenture contained the plaintiff deposited the said deed with the said defendant and the term by the said deed demised has not yet expired but is now vested in the plaintiff and the defendant now holds the said deed under and in pursuance of the agreement in the said indenture contained which agreement is now in full force and effect, and the defendant is entitled to the possession of the deed.

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To that defence the plaintiff replied averring the payment of all moneys due to the defendant under the deed of the 31st December, 1908, and the bill of sale of the 4th January, 1909, and further that the defendant having covenanted in the former to supply the plaintiff with liquors for the hotel, in the month of August ceased to do so and retired from business and left the Colony.

Upon that reply the defendant joined issue.

The issues in the action thus presented for trial involve consideration of the question (1) whether the plaintiff has paid to the defendant all moneys due to him under the deeds securing the same, (2) whether if and notwithstanding that that payment has been made, the defendant, that is to say, of course, the defendant to the exclusion of anyone else is entitled still to retain the lease deposited with him by the plaintiff in connection with the plaintiff's debt until the expiration of the term thereby granted. That the plaintiff has paid the defendant all moneys due to him upon security of the bill of sale is admitted, and, upon that payment apart from any legal obligations whereby the right of the plaintiff is restricted or postponed, it is the law that his right to redeem the property constituting that security, that is to say, his equitable estate or interest therein cannot be defeated.

But the defendant contends (1) that the deposit of the lease was not by way of mortgage at all but a pledge or pawn of the document. I cannot agree. It is first and foremost, a deposit. The memorandum in writing accompanying the deposit, that is to say, the deed of the 31st December, 1908, uses the technical and appropriate word. Then the deed recites the agreement of the defendant to advance money and incur pecuniary obligation to Mrs. Macdonald upon the covenants thereafter contained, of which the covenant to deposit is one. The word "mortgage," it is true, as Dr. Brough urges, nowhere appears in the deed, but that absence cannot do away the effect of the presence of other expressions, any one of which, viewed in the light of all the circumstances attending the loan is sufficient, to make the transaction an equitable mortgage by deposit. Hence it becomes necessary to determine the further question, this being an equitable mortgage by default and the debt for which it remained security having been paid, by what legal obligation on the part of the plaintiff is the defendant entitled to retain possession of the deposited deed.

The defendant contends that the plaintiff deposited the lease with him until the expiration of the term thereby

demised, that is to say, until the 31st December, 1923. There is no covenant in the deed to do so only to deposit, and without more, that could only mean and, by law, held to be a deposit or security during the continuance of the mortgage. But the mortgage debt has been paid and the equity of redemption is active.

What more does the defendant allege in support of his claim to possession of the deed? This: that the plaintiff covenanted at all times during the term of his lease to buy from the defendant all liquors for the hotel, and deposited the document of title as security for the performance of the covenant. The plaintiff replies to that, that the defendant on his part covenanted to supply the liquor at all times during the term of the plaintiff's lease, but has in fact ceased to do so by retiring from business, and that therefore the mutual obligation is at an end and the security given by the plaintiff for the performance of his part of that obligation is determined by the defendant's default.

Now, the defendant has put in issue the fact of his retiring from business and his incapacity to perform his obligations upon which the existence of his security depends. The plea that the defendant covenanted to supply liquors to the plaintiff is wanting in particularity for there is no express covenant by him to do so. But the covenant is implied by law not only from the nature of the transactions, but also from the expressions used in the deed, and the Court will construe the deed accordingly. The defendant wished to secure to himself the purchase by the plaintiff of all liquors for the hotel at all times during the term of the lease and the plaintiff covenanted so to purchase. And by the deed the plaintiff covenanted to pay in a certain way for "all goods supplied by the said Frederick Arthur Thomas."

That was therefore an implied covenant by the defendant to supply the plaintiff with all his liquors. He claims to have done so (notwithstanding his retirement from business), and to be ready and willing to continue to do so because he is still carrying on the business of wine and spirit merchant.

Let me say at once and emphatically that the defendant is not carrying on business, and I look with surprise and disfavour upon the methods employed by him to induce the plaintiff and the Court to believe that he does. The "hurrying to and fro," the drafting "in hot haste" of January and February last, the obtaining of a licence, 15-feet square room and closet as business premises, followed by requests for a

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week in May last (when the plaintiff was not at the hotel) to receive in good order and condition goods from F. A. Thomas in the face of his retirement and when, for eight months after that retirement, his assignees, with whom he had covenanted not to carry on the business of a wine and spirit merchant in Fiji, had been supplying the plaintiff with the defendant's name carefully obliterated in the "please receive" books, and their own substituted. These have been all impudent acts to apply to them no harsher term. When they are followed by the evidence of Mr. Amos, who has received no account from Robbie Kaad & Co. for goods supplied to the defendant for his "business," who has not got and does not know of any orders from Thomas for liquor from Robbie Kaad & Co., who has made no sale to anyone on Thomas's account except to the plaintiff, and those the "sales" of May last, and who has no books of the defendant's "business," the nature of the attempts to hoodwink the plaintiff is plain, and the fact that all this has been due to permission of Robbie Kaad & Co., the defendant's assignees, does not improve the situation.

Dr. Brough very properly and wisely made but the slightest allusion to the so-called business of the defendant and directed his argument to the effect of the assignment from the defendant to Robbie Kaad & Co. In regard to that assignment I shall have something to say presently.

Holding therefore (1) that the defendant held the lease by way of equitable mortgage as security not only for the repayment by the plaintiff of his debt to the defendant and for the latter's liability to Mrs. Macdonald, but also for the due performance of the plaintiff's covenant to buy his liquors from the defendant, (2) that the plaintiff has paid his debt to the defendant and the defendant is not under any obligation on the plaintiff's behalf to Mrs. Macdonald, and (3) that the defendant is in breach of his covenant to supply liquors to the plaintiff and cannot repair that breach and has thereby absolved the plaintiff from his part of their mutual and independent agreement it seems plain that the defendant cannot any longer retain possession of the lease.

But as I have already said the defence at the hearing and the pleadings went further. Dr. Brough contended that although the mortgage debt had been paid and although the defendant was not himself supplying, could not himself supply, the plaintiff with liquors, the plaintiff had covenanted with the defendant and his assignees, that the defendant had assigned the benefit of the plaintiff's covenant to Messrs. Robbie

Kaad & Co. and that they were entitled to insist on the retention of the lease as security for its performance.

Now, Robbie Kaad & Co. are not parties to this action, and this defence is obviously inconsistent with that raised in the pleadings. But for the reasons already given the learned counsel was driven into the inconsistency. Mr. Crompton did not demur to it, and it has been the occasion of very able, learned and exhaustive argument at the bar for which I am greatly indebted.

For the purposes of consideration of these arguments I must place the defendant's assignees in the defendant's shoes, for, though some reference has been made by Mr. Crompton to the question of the assignability of the plaintiff's covenant, it has not been argued nor definitely propounded for decision.

With the general rule that it is not possible in a mortgage contract to give to the mortgagee a collateral benefit outside the mortgage contract and continuing after redemption, nor to impose any burden or restriction upon a mortgagor after he has paid the principal, interest and costs due under the mortgage and so clog or fetter his right to redeem, we are familiar. That has been established by a long line of authorities from *Newcomb v. Bonham* in (1681) 1 Vern. 7, when Lord Nottingham made the phrase "once a mortgage always a mortgage" so often used since to the present time.

Amongst those authorities are *Santley v. Wilde* (1890) 2 Ch. 474, cited by Dr. Brough; *Salt v. Marquis of Northampton* (1892) A.C. 1, *Noakes v. Rice* (1902) A.C. 24, *Samuel v. Jarrah Timber, &c., Corporation* (1904) A.C. 323, and *Bradley v. Carritt* (1903) A.C. 253, cited by Mr. Crompton.

There is, however, the correlative and qualifying proposition that a transaction between the mortgagee relating to the mortgaged property, but subsequent to and independent of the mortgage contract, may be valid and subsist as not transgressing the rule against clogging the equity of redemption.

That proposition does not apply to the facts in this case, for I cannot agree that the transaction of the 31st January, 1908, in which the deposit of the lease was made to secure the performance of the covenant to buy liquors was independent of the mortgage contract. That contract is contained as much in the deed as in the bill of sale and the deposit of the lease was as much part of the security for the repayment of the loan as was the subsequent bill of sale.

Dr. Brough has much insisted upon the applicability of the cases of *Santley v. Wilde*, supra, and *Biggs v. Hoddenot* (1898)

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2 Ch. 307. Dealing with *Santley v. Wilde* first, for the sake of convenience and brevity, I take the summary of the facts of that case from the judgment of Lord Alverstone, then Master of the Rolls, when the case of *Noakes v. Rice*, supra, was before the Court of Appeal. After saying:—

Speaking for myself, I do not know that I should have come to the same decision as that at which the Court of Appeal arrived in *Santley v. Wilde* on the facts of that case without some difficulty but for the purposes of to-day it is only important that we should see that we are not departing from the rule or primary material principle laid down in *Santley v. Wilde* because it is binding on us . . . but when that judgment of the Court of Appeal is understood I do not think it purported to infringe, or did infringe, in any way on the doctrine recognised by the House of Lords in *Salt v. Northampton (Marquis)*.

Lord Alverstone continued:—

The facts were that Miss Santley who was going to open a theatre, by the terms of her mortgage agreed that she would pay the principal and interest back by instalments running over five years, and would give a certain share of the profits for the remaining five years, the total term being ten years.

Here, even if a covenant to buy liquors from the mortgagee can be considered to be in the same category as a covenant to pay a proportion of profits—which I am strongly inclined to think it cannot—the term is for fifteen years and it is sought to extend the security for a period of eleven years beyond the time provided for the payment of the mortgage debt. On the authority of the text-books on this subject, I find that there is no decision reported in which an extension of the kind beyond seven years has been found to be reasonable, and were the question of reasonableness involved here I should say that the extension claimed is unreasonable and cannot be enforced.

But even so, as pointed out by the learned counsel for the plaintiff, the authority of *Santley v. Wilde* is to-day very doubtful value. When *Noakes v. Rice* went to the House of Lords, Lord Macnaughten in his judgment, when referring to *Browne v. Ryan* decided by the Irish Courts, said:—

The judgments of the learned judges in the Court of Appeal (Ireland) seem to me, if I may venture to say so, to contain a very clear exposition of the law. They had occasion to consider the judgment of the English Courts of Appeal in *Santley v. Wilde* and they expressed their disapproval of the conclusion at which that Court arrived. Speaking for myself with all deference to Lord Lindley, I cannot help sharing that view. I did not dissent from the propositions laid down by Lord Lindley, taking them separately. But the

transaction in that case seems to me to have been, nothing more than an ordinary mortgage to secure an advance of money with a superadded obligation offending against the settled principles of equity in that it rendered redemption impossible.

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Lord Davey said:—

I do not dissent from the opinion expressed by Lord Lindley, when Master of the Rolls, in *Santley v. Wilde*. . . . I confess I should have decided that case differently from the way in which it was dealt with in the Court of Appeal.

And doubts have been known in *Santley v. Wilde* since *Noakes v. Rice*. I venture to express my humble agreement with the learned Judges who have discussed *Santley v. Wilde*, and to say that I also would have decided it differently.

Turning to *Biggs v. Hoddenot*, while it resembles this case in that the mortgagors of an hotel to a brewer covenanted that they would deal exclusively with the mortgagee for all beer and malt liquor sold on the mortgaged premises, it differs in that there the mortgagor could not redeem for five years and the liability on the covenant extend to eleven years more. In *Biggs v. Hoddenot* the mortgagors were only compelled to perform their covenant to buy liquors during the continuance of the security; and that security was expressly provided to continue for five years. Here the security continues so long as, first, the defendant's liability on the promissory notes to Mrs. Macdonald continued, and, secondly, the plaintiff's liability on his promissory notes to the defendant continued. I cannot consider this case either as in point of the defendant's contention, but opposed to it.

In *De Beers Consolidated Mines Ltd. v. B.S.A. Company* (1912) A.C. 52, also cited by Dr. Brough, the House of Lords held that upon the construction of the particular agreement in question the stipulation which it was contended constituted a clog on the equity of redemption was not a part of the mortgage transaction and was not therefore a clog. In the judgment of Lord Loreburn, L.C., his Lordship says:—

Your Lordships are unquestionably bound by this rule of equity and I have no intention of evading it, but I must point out that if it is to govern in this case, then one party to an honest and, in morals as well as business, perfectly unimpeachable contract, is enabled to get rid of its obligation. That would be a deplorable consequence to flow from an equitable rule . . . . But I am glad to arrive at the conclusion that the present case does not fall within it at all, and for the following reasons. When a mortgage is paid off the property secured is as free and the owner must be as

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free to dispose of it, as if there had never been a mortgage at all and any device to prevent full redemption when the sum if due is paid will be void. Now, it appears to me (I say it with all respect) that when the mortgage or charge in the present case came into being, either in law or in equity, the diamondiferous land which was included in the mortgage was already subject to this licence, and so the right to work the diamondiferous land was never included in the mortgage or charge.

In this case the covenant to buy liquors from the defendant was included in the mortgage; it had no existence antecedent to the mortgage, it was a substantial part of the mortgage contract itself.

For the covenant to buy liquors to extend to the whole term of the lease in this case would offend against the doctrine of equity that a proviso against or restricting redemption for a period is not binding in the absence of a mutual provision for the continuance of the loan for that period.

In *Morgan v. Jeffreys* (1910) Ch. 620 an hotelkeeper mortgaged the hotel to a brewer to secure £5,500 and interest, and he covenanted to buy all beer and other liquors consumed in the hotel from the mortgagee for a period of 28 years and so long after as any money should remain due upon the security. The deed also provided that the mortgagor should not be entitled to pay off the mortgage before the expiration of the term of twenty-eight years. It was held that the proviso against redemption for twenty-eight years, even if it might be supported, in a case where there is a similar provision against calling in the mortgage exceeded all reasonable limits, and could not be enforced. Here there is not even a postponement of the right to redeem to the end of the term of the lease, but it is sought to make the covenant operate against redemption for eleven years after payment of the mortgage.

Were it necessary to do so I should hold such restriction of the right to redeem to be unreasonable for there is no reported case, says the contributor of the article entitled "mortgage" in Halsbury's Laws of England, in which a restriction for more than seven years has been held good.

It is not necessary for me to refer to the other cases which have been cited at the bar. They only affirm the principles which I have mentioned and which seem to me to determine the action to the plaintiff's favour.

The defendant must deliver up the lease deposited with him in pursuance of the deed of the 31st day of December, 1908.

As to the question of damages, the plaintiff has said that the lease would be useful to him as security for an overdraft at his bankers. He has not given any instance in which he has applied to the Bank for pecuniary assistance and has been refused because he could not deposit his lease as security. A nominal sum only therefore can be awarded, and I fix that sum at £10.

There must be judgment that the plaintiff do recover the lease from the defendant together with £10 damages for its detention.

The defendant must pay the plaintiff's costs of suit.

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## [APPELLATE JURISDICTION.]

[ACTION No. 29, 1915.]

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Nov. 10.

INDAR SINGH AND JUDHAN v. KALIA AND SAMUNDARI.

*Res judicata*—inherent jurisdiction of Court to prevent abuse of its procedure—Action under Ordinance No. 1 of 1892 (the Emigration Ordinance 1892) a bar to an action for breach of promise in the circumstances.

Sir CHARLES DAVSON, C.J. This is an application by defendants to stay further proceedings in this action, on the ground that the matter is *res judicata* and that the action is frivolous and vexatious and an abuse of the process of the Court, and it is clear that this Court has an inherent right to prevent such abuse of its procedure. (*Reichel v. Magrath*, 14 Appeal Cases, p. 665).

The indorsement on the writ alleges that "Judhan agreed to carry out the marriage of Samundari," the daughter of himself and the other defendant, Kalia, on her attaining the age of 14, and, in paragraph 3, that defendants have refused and neglected to carry out the agreement; but there is no direct averment of any undertaking or promise by either of the female defendants. Plaintiff claims £100 damages.

The statement of claim avers that plaintiff gave to defendants jewellery, clothing, and cash to the value of £45 "in consideration of the marriage and registration of marriage." The ground of application is, substantially, that on the 18th March this year plaintiff issued a writ (No. 27 of 1915) against the first defendant in which he claimed—