[HIGH COURT OF AUSTRALIA.]

ROWE . . . . . APPELLANT;

PLAINTIFF,

AND

OADES . . . . . RESPONDENT.

DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1905.

PERTH, *Oct.* 13, 16, 17.

Griffith C.J., Barton and O'Connor JJ.

Construction of document—Sale and re-purchase—Mortgage—Laches.

An absolute assignment, containing nothing to show that the relation of debtor and creditor is to exist between the parties, or that the assignee is only to have the remedies of a mortgagee, does not become a mortgage merely by reason of a collateral verbal stipulation for a right of re-purchase.

The appellant executed a transfer of certain shares in a gold-mining lease to the respondent. A contemporaneous document was signed by the respondent as follows:—"I hereby agree to transfer to H. T. Rowe or his assigns . . . two shares in gold-mining lease . . . when called on, upon H. T. Rowe paying me the sum of £8 10s." The appellant alleged that the transaction was in reality a mortgage of the shares to secure a loan of £6, and that the £2 10s. represented interest, but it was not suggested that the loan was repayable at any particular time. The transfer and agreement were dated 28th April, 1900. In January, 1904, the appellant sued for a declaration that the respondent held the shares on his behalf, and that he was entitled to one-sixth of the gold won from the mine since 28th April, 1900.

Held, affirming the decison of the Full Court of Western Australia, but on different grounds, that the transaction of 28th April, 1900, constituted a sale with an option of re-purchase and not a mortgage, and that appellant, not having exercised his option within a reasonable time, could not maintain the action.

The facts are fully stated in the judgment of *Griffith* C.J.

Villeneuve-Smith, (with him *Jenkins*), for the appellant. The agreement of April 28th, 1900, was intended as a mortgage

H. C. OF A. 1905.

ROWE v. OADES.

giving the appellant the right to redeem at his option. If the intention of the parties at the time of the execution of the document was to give a security, defects in the legal form of the document will not alter its real character. In any event the appellant had the option of re-purchase, and is entitled to a return of his share on payment of £8 10s.

[GRIFFITH C.J.—He was entitled to re-purchase within a reasonable time.]

He offered to assist in the working of the mine, but the respondent led him to believe the mine could be worked satisfactorily without him.

[GRIFFITH C.J.—His evidence on that point was not believed by the Court below.]

After June, 1901, there was no laches. The mine was then paying well and yielding dividends. If there had been any lying-by, it was induced by the respondent. He cited *Port* v. *Bain* (1).

[GRIFFITH C.J. referred to *De Waal* v. *Adler* (2).]

Pilkington, (with him *Northmore*), for the respondent. The transfer is absolute, and the document of April 28th is an option. Assuming it were a mortgage, the parties were in the relation of co-owners as well as mortgagor and mortgagee, and the respondent does not lose the rights of a co-owner by becoming mortgagee as well: *Steers* v. *Rogers* (3). The remedies of the parties are not mutual and reciprocal, and therefore there can have been no mortgage: *Williams* v. *Owen* (4); *Goodham* v. *Grierson* (5); *Holmes* v. *Matthews* (6). The documents, on the face of them, purport to be an absolute transfer, and the onus is on appellant of proving them to be a mortgage: *Alderson* v. *White* (7). The appellant has been guilty of laches. The continual assertion of a claim, unaccompanied by any act to give effect to it, will not keep alive a right which would otherwise be precluded: *Clegg* v. *Edmondson* (8); *Rule* v. *Jewell* (9).

(1) 2 V.R. (E.), 177.
(2) 12 App. Cas., 141.
(3) (1893) A.C., 232.
(4) 5 My. & C., 303, *per Cottenham*, L.C., at p. 307.
(5) 2 Ba. & B., 278, *per Manners*, L.C., at p. 279.
(6) 9 Moo. P.C.C., 413.
(7) 2 De G. & J., 97.
(8) 8 De G. M. & G., 787.
(9) 18 Ch. D., 660.

Villeneuve-Smith, in reply. The meaning of the transaction is that the property becomes the respondent's unless the appellant pays within a reasonable time. Notice should have been given the appellant before the respondent could claim the property: *Deverges* v. *Sandeman, Clark & Co.* (1).

Cur. adv. vult.

17th October.

GRIFFITH C.J. The plaintiff in this case claimed two 12th shares in a Gold Mining Lease known as the Devon Consols. The statement of claim asks for a declaration that the defendant, who was the registered holder of the shares, held them on behalf of the plaintiff, and that the plaintiff was entitled to one-sixth of the gold won from the mine since 28th of April, 1900. The action was brought in January, 1904. The case intended to be made upon the statement of claim is rather difficult to understand. It begins by alleging that the plaintiff obtained from the defendant a loan of £6 on the security of the shares, for which he promised to pay a fixed sum of £2 10s. for interest, whereupon he assigned the shares to the defendant. It then goes on to allege a contemporaneous agreement for re-transfer, which is set out in these words—"Kalgoorlie, 28th April, 1900. I hereby agree to transfer to H. T. Rowe, or his assignee, one-sixth (1-6th), equal to two shares in Gold Mining Lease No. 3880E, when called upon, upon H. T. Rowe paying me the sum of £8 10s." In the statement of claim the plaintiff apparently rested his case upon the rights conferred by that document. The statement of claim proceeds to allege that, in January, 1904, the plaintiff tendered £8 10s. to the defendant, but that the defendant refused to transfer the shares. At the trial, however, the case made seems rather to have been, not that the plaintiff was entitled to the rights conferred upon him by the terms of that document, but that he was entitled to the rights of a mortgagor against a mortgagee on the footing that the transfer of the shares was not absolute, but was made by way of mortgage. That view was contested by the defendant, who denied that he had made any loan or advance, and said that the transfer was made without any present consideration, and for the purpose of putting the defendant in a position to go into

(1) (1902) 1 Ch., 579.

H. C. OF A. 1905.

ROWE v. OADES.

Griffith C.J.

the market and show that he had a right to sell the shares. The case was tried before Mr. Justice *Parker*, who came to the conclusion upon the evidence, that the transaction was intended by the parties to be a mortgage, and he accordingly applied the principle of "once a mortgage, always a mortgage" to the case, and gave judgment for the plaintiff. On appeal to the Full Court that judgment was reversed. Of the learned Judges in the Full Court, the Chief Justice was of opinion that the transaction was intended to be a mortgage; *Burnside* J. inclined to the same opinion, but thought that is was not material whether it was a mortgage or a transfer with a contemporaneous agreement for re-purchase. *McMillan* J. was of opinion that the transaction was an absolute transfer, with a contemporaneous agreement for re-purchase. All the learned Judges were of opinion that, whatever rights the plaintiff had had, he lost them by reason of his long delay in asserting them.

Now, the transaction is recorded in two documents—the transfer, which is in the usual form, and the document I have read. These documents represent the form in which the parties chose to record the agreement entered into between them. The second document was prepared by the plaintiff himself. It is true that a Court of Equity will, in some circumstances, treat a transaction as a mortgage, although it bears the appearance of an absolute sale, if it appears that the parties intended it to be so. In the case of *Williams* v. *Owen* (1), referred to by *McMillan* J., in his judgment, Lord *Cottenham* L.C., said: "This Court will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, if it appears the parties intended it to be a mortgage is, no doubt, true; but it is equally clear, that if the parties intended an absolute sale, a contemporaneous agreement for a re-purchase, not acted upon, will not, of itself, entitle the vendor to redeem." *Primâ facie*, the effect of written instruments cannot be controlled by oral evidence; and I do not know of any instance where, an agreement having been reduced into writing, the Court has treated the case as a mortgage, unless it was a case in which the plaintiff would, in strictness, have been entitled to claim rectification of the instru-

(1) 5 My. & C., 303, at p. 306.

ment, or a case of fraud. Here there is no question of fraud; and as to the document, which was prepared by the plaintiff himself, no case for rectification was made, if it could have been made under such circumstances. It therefore appears to me that all that is to be done is to interpret the document and give effect to the rights conferred by it. *McMillan* J., after quoting the passage from *Williams* v. *Owen* (1) which I have just read, referred to the case of *Alderson* v. *White* (2), where a similar point was before the Court; and where Lord *Cranworth* L.C., said —"The rule of law on this subject is one dictated by common sense; that *primâ facie* an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to re-purchase. In every such case the question is, what, upon a fair construction, is the meaning of the instrument?" In that case counsel for the defendant had pointed out that it was a case in which rectification ought properly to have been asked, but they did not press the objection. *McMillan* J. then referred to the case of *Goodman* v. *Grierson* (3), where Lord Chancellor *Manners* said:—"The fair criterion, by which the Court is to decide whether this deed is to be a mortgage or not, I apprehend to be this, are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to?" In the case of *Alderson* v. *White* (4), Lord *Cranworth* referred to that dictum with approval. In *Williams* v. *Owen* (5) Lord *Cottenham* made this remark:—"If the transaction was a mortgage, there must be a debt."

I proceed to apply these principles to the present case. In my opinion, the words, "I agree to transfer to Rowe two shares when called upon," operate to confer an option on someone. On whom? Clearly on the plaintiff. The defendant agreed to transfer the shares if the plaintiff called upon him to do so. There was no obligation upon the plaintiff to pay unless he chose; and it is clear that the defendant could not, in the face of the document,

(1) 5 My. & C., 303, at p. 306.
(2) 2 DeG. & J., 97, at p. 105.
(3) 2 Ba. & B., 274, at p. 279.
(4) 2 DeG. & J., 97.
(5) 5 My. & C., 303.

H. C. OF A. 1905.

ROWE v. OADES.

Griffith C.J.

have sued for the £8 10s. It would be a curious state of things to exist between mortgagor and mortgagee that the debt should not be payable except at the option of the mortgagor. Such an agreement is, in my opinion, inconsistent with the nature of a mortgage. It is an option or offer to sell given to the party who has the option, and the rights of the parties under it must be determined by the rules applicable to such cases. Regarding this document, then, as a contract made on 28th of April, 1900, by the defendant to sell these shares to the plaintiff for £8 10s., on demand, it must be construed according to the ordinary rules of law applicable to such a contract. One of these terms is that the option given by such a contract shall be exercised within a reasonable time. If authority is required for this proposition, it is to be found in the case of *De Waal* v. *Adler* (1). Then, was the time from 26th April, 1900, to January, 1904, a reasonable time for the exercise of such an option in the case of mining shares? The question really answers itself. Moreover, it appeared on the evidence that, until the end of 1901, the shares were valueless, and that for all that time the defendant had the burden of keeping the mine represented, and providing the necessary labor, the plaintiff undertaking no risk. The fact that the mine afterwards became valuable makes no difference as to the question whether a reasonable time had elapsed before the exercise of the option. It appears to me that, if the plaintiff had sued on the contract at law, it would have been a complete answer to say that he had not, within a reasonable time, called for a transfer of the shares. The matter was treated in the Full Court as one of laches, and, if the case is regarded as an action for specific performance, laches would be a complete answer. I do not refer to the evidence in detail, because I think there is nothing in it which would justify the Court in departing from the plain language of the written contract. If, however, the case were to be treated as a mortgage by one of several co-owners to another, I am inclined to think, with the learned Chief Justice and *Burnside* J., that the principles of laches, applicable to interests in mines, would be applicable, notwithstanding that the relation of mortgagor and

(1) 12 App. Cas., 141.

mortgagee was added to the relation of co-owners. In my opinion, therefore, the appeal should be dismissed.

BARTON J. I am of the same opinion. I might content myself by saying that, after an examination of the authorities cited by *McMillan* J., I entirely agree with his opinion, and the reasons which he gave. Here are two documents, prepared by the plaintiff himself. He comes into Court questioning their meaning, and wishing to place upon them a construction different from that which they *primâ facie* bear. That being his position, upon him is the onus of showing that the contract contained in those documents is not what the documents show upon their face. In my opinion, the plaintiff has failed in sustaining that burden, and, after a patient hearing, I see no reason to come to any other conclusion than that the documents mean just what they say. The parties, then, have made an arrangement, under which, by calling upon the defendant, the plaintiff could buy back the shares which he had sold to the defendant, and which the defendant, nevertheless, was willing to allow him to re-purchase, "when called upon." That, of course, meant that the demand for re-purchase was to be made within a reasonable time. Something like twenty months elapsed after the mine had become payable, during which time the plaintiff lay by, and, in my opinion, he has not sufficiently excused himself for the delay which has taken place, so as to show that his demand was within reason as to time. Even if he had established, as he has not done, a constructive trust, then he would have been rightly met by reasoning similar to that with which the plaintiff was met in the case of *Clegg* v. *Edmondson* (1), where we find *Turner* L.J., using these words —"We have to deal in this case, not with a direct but with a constructive trust, not with property subject merely to the ordinary contingencies by which all property is affected, and maintained at a moderate and scarcely varying expense, but with mining property which is subject to extraordinary contingencies, and which can be rendered productive only by large and uncertain outlay. The authorities, I think, fully warrant us in saying that the rules which govern cases of direct trust, and apply to property

(1) 8 DeG. M. & G., 787, at p. 808.

H. C. OF A. 1905.

ROWE v. OADES.

Barton J.

of an ordinary character, are not equally applicable to cases of constructive trust, and to property of the description which we have here to deal with. It is said indeed, on the part of the plaintiffs, that these mines had been tried, and that there was no uncertainty attaching to the value of them, but I do not find from the evidence that they had been explored to any such extent as could render their values certain, and, on the contrary, the evidence shows that faults were met with in the workings under the new lease, and the expenses of the workings would of course depend upon the nature and extent of those faults. What expenditure they would occasion, or to what extent they would affect the value of the mines, could not of course be foreseen. If they had led to ruinous expenditure, and had rendered the mines unproductive, nothing would of course have been heard of this claim of the plaintiffs, and there would have been no claim against them. Are they then in justice entitled to reap the benefit when they could not have been made subject to the loss?" And his Lordship continues (1):—"A mine which a man works is in the nature of a trade carried on by him. It requires his time, care, attention and skill to be bestowed on it, besides the possible expenditure and risk of capital, nor can any degree of science, foresight and examination afford a sure guarantee against sudden losses, disappointments and reverses. In such cases, a man having an adverse claim in equity on the ground of constructive trust should pursue it promptly, and not by empty words merely. He should show himself in good time willing to participate in possible loss as well as profit, not play a game in which he alone risks nothing." The plaintiff, if he has, or ever had, any equitable claim, has not been willing to come into equity to assert it. He has stood aloof while the other party, originally his co-owner in this lease, has been working the property, running all the risk, and, throughout the transaction, taking upon himself the whole of the burden which the plaintiff was never willing to undertake or share in any way whatever. Under these circumstances, that he should come to the Court and make this claim at this late stage is quite out of the question. In my opinion, the learned Judges in the Full Court of this State were perfectly right in the course they took, and this appeal should, therefore, be refused.

(1) 8 DeG. M. & G., 787, at p. 814.

O'CONNOR J. I entirely agree with the conclusions arrived at by the Supreme Court of this State. These parties, some five years ago, made an agreement, which they reduced into writing. One of them now seeks to vary that agreement, alleging that the written document does not represent the agreement the parties arrived at. At common law the plaintiff would not be permitted to take up that position. He would not be allowed even to give evidence of the conditions which, from his recollection of conversations, he now wishes to add to the written contract. There are, however, certain circumstances in which a court of equity will allow a party to come into Court and allege that a written agreement does not, for some reason, contain the real agreement between the parties. But it is only under exceptional circumstances that equity will allow parties to impugn the correctness of their own record of their agreement. Fraud must be proved, or there must be evidence of mistake, or it must be shown that one party is taking an inequitable advantage of some term of the written contract. In my opinion, there is nothing shown here which would justify a Court in coming to the conclusion that the agreement really arrived at by the parties was not fully expressed in the document which they signed. From the reasons given by *McMillan* J., supported as they are by strong authorities, I have come to the conclusion that the documents which have been under consideration do not amount to a mortgage or a pledge, nor can they have any other operation than that which, on the face of them, they were intended to have—that is to say, a sale of the interest of Rowe to Oades, and a contract on the part of Oades to re-transfer to Rowe on the latter tendering £8 10s. There is no time mentioned in the writing within which Rowe is to ask for the re-transfer; but the law will imply a term of the contract in that respect—the request for transfer must be within a reasonable time—and it seems to me to be of small moment whether the plaintiff's delay is described as *lâches*, or as a failure to exercise his right to a re-transfer within a reasonable time. In either view the Court requires the party seeking its aid to do what is reasonable. There are some passages in the judgment of Lord *Chelmsford* L.C., in the case of *Clarke* v. *Hart* (1)

(1) 6 H.L.C., 633, at p. 656.

H. C. OF A. 1905.

ROWE v. OADES.

O'Connor J.

which seem to me to bear upon the question, what is reasonable, when the parties are dealing with this species of property. His Lordship said—"The case of mines has always been considered by a court of equity to be a peculiar one. The property is of a very precarious description, fluctuating continually, sudden emergencies arising which require an instant supply of capital, and in which the faithful performance of engagements is absolutely necessary for the prosperity and even the existence of the concern. And, therefore, where parties under these circumstances stand by and watch the progress of the adventure, to see whether it is prosperous or the contrary, determining that they will intervene only in case the affairs of the mine should turn out prosperous, but determining to hold off if a different state of things should exist, courts of equity have said that those are parties who are to receive no encouragement; that if they come to the Court for relief, its doors will be closed against them; that their conduct being inequitable, they have no right to equitable relief." These principles may well be applied to the facts in this case. I have read very carefully the evidence given upon both sides, and I have come to the conclusion that the decision of the Supreme Court, upon the evidence with regard to the conduct of the plaintiff, is right. He did not, within a reasonable time, claim his right to a re-transfer. He did not take the course which, as a reasonable man, he ought to have taken. He stood by to see whether the mine was going to be prosperous; he seemed afraid to take upon himself the burden of ownership so long as he saw any likelihood of liability, and it was only when all risk of liability was over that he came in to take advantage of the agreement under which he might, at a nominal cost, claim a share in a prosperous mine; equity will not allow a party who has acted in that way to seek its aid. The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for appellant, *Jenkins.*

Solicitor, for respondent, *Darbyshire.*

H. E. M.