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O'Connor to proceed *in formâ pauperis*, and the security was reduced to £1. The proper method, if the appellant has property and should pay the costs, is to apply to have him dispaupered; but we will not grant leave to apply to dispauper, as we think this litigation has gone on long enough. You will get the £1 paid into Court.

Appeal dismissed.

Solicitor for respondent, *E. W. Downes.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

RICH . . . . . APPELLANT;
PLAINTIFF,

AND

STRELITZ BROS. & MOSS . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 29, 30, 31. *Nov.* 1, 5.

Griffith C.J., Barton and Higgins, JJ.

Practice—New trial—Trial with jury—Misdirection—Fraud—Amendment of pleadings before High Court.

In an action tried with a jury, the plaintiff sought to have a certain contract set aside on the ground of a conspiracy to defraud him. The case was left to the jury generally, and they found for the defendants. No objection was taken at the time to the Judge not having put specific questions to the jury.

Held, that the plaintiff was not entitled to a new trial on the ground of misdirection.

Quære, whether, under the circumstances, the plaintiff was, on the hearing of the appeal before the High Court, entitled to amend his pleadings in order to raise a new case suggested to be disclosed by the evidence, and to have a new trial.

By consent, and subject to terms, order of the Supreme Court of Western Australia varied.

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The plaintiff, a dealer in bark, being in difficulties with his bark-stripping contractors and with the firm that was financing him, went to the defendants, Strelitz Bros., for assistance, and was by them referred to the defendant Moss, who helped him out of his difficulties. Moss, who in reality was the agent of Strelitz Bros. in the whole transaction, except for about £500 of his own, exacted from plaintiff very stringent terms in a mortgage and contemporaneous agreement, controlling the disposal of all bark coming through the plaintiff's hands, and the distribution of the proceeds to be derived from selling the bark and from a right of action which the plaintiff had against his former financial backers for not accepting delivery of the bark, which they were under contract to buy from him at a fixed price. After the defendant Moss had advanced about £26,000 in relieving plaintiff, and in obtaining and marketing the bark, tenders were on Moss's advice called for the purchase of the whole quantity in one lot, and the tender of the defendants Strelitz Bros. was accepted for about £17,000, thus leaving the plaintiff heavily indebted under the mortgage and agreement. Plaintiff, having made a claim against his former backers, and compromised it for £3,000, brought the present action against Strelitz Bros. and Moss as joint defendants in which, after setting out in detail the facts on which he relied, he claimed to have the agreement cancelled and the sale of the bark to Strelitz Bros. set aside, and for an account of their profits from the re-sale of the bark. At the trial the case was treated as a charge of a conspiracy by the defendants to defraud the plaintiff, and the jury were, in effect, asked whether they believed the plaintiff's version of the facts or the defendants'. They found for the defendants, and judgment was entered for them. The plaintiff moved for a new trial on the grounds that the jury were misdirected, and that the Judge should have asked them certain questions (which are set out in the judgment of *Griffith* C.J.) This was refused by the Supreme Court, and the plaintiff appealed to the High Court.

Haynes K.C. and *Robinson*, for the appellant. This action is brought by a mortgagor to set aside a sale made to mortgagees, because effected under pressure and by the advice of the mort-

gagee's solicitor. The mortgagor had no independent advice, and the sale was at an undervalue. The plaintiff is entitled to the profits made on the resale of the bark.

[GRIFFITH C.J.—You suggest that the question is whether the sale to the mortgagees was effected with the full knowledge and consent of the mortgagor, or under concealment and oppression.]

That question was never put to the jury; there has been a complete mistrial; it was wrong of the Judge to put it to the jury that the plaintiff must prove fraud throughout.

[GRIFFITH C.J.—That is the case you made at the trial. How can you raise a different case now?]

It was always before the jury upon the pleadings, and the case made by the plaintiff that the sale by the plaintiff to the mortgagees was not free, fair, or voluntary; but the question was not properly submitted to them. The proper questions raised by the statement of claim were never submitted to the jury, namely, that the plaintiff had no independent advice at the time of the sale, but was under the dominion of the defendant Moss, who advised and induced him to sell to the mortgagees at an undervalue. These allegations in the statement of claim were borne out by the evidence, and afford ample ground for relief. The onus was upon the defendants to prove that the transaction was not unfair: *Gibson* v. *Jeyes* (1); *Macleod* v. *Jones* (2).

[HIGGINS J. referred to *Prees* v. *Coke* (3); *Reeve* v. *Lisle* (4); *Kevan* v. *Joyce* (5).]

Pilkington K.C. (with him *Northmore*), for the respondents.

This was a transaction practically of partnership between joint adventurers. A co-adventurer may take a mortgage over or purchase his partner's share. The only case set up by the pleadings or put to the jury by the plaintiff was one of plain fraud, which failed for want of proof. The respondents should not be called on now to meet a new case altogether: *Kerr on Fraud*, 3rd ed., pp. 394, 414-5; *Wilde* v. *Gibson* (6). No case for relief is made out by the pleadings and evidence. Although independent advice may not have been obtained, the plaintiff must show, in

(1) 6 Ves., 266, at p. 271.
(2) 24 Ch. D., 289.
(3) L.R. 6 Ch., 645.
(4) (1902) A.C., 461.
(5) (1896) 1 I.R., 442, at p. 468.
(6) 1 H.L.C., 605.

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the absence of proof of a fiduciary relation, that he was actively prevented from getting the advice: *Harrison* v. *Guest* (1).

[BARTON J.—Where on the face of the bill there has been disclosed enough to set up an equity to relief, besides several charges of personal fraud which failed, the Court has dismissed with costs so much of the bill as was founded on the charges of personal fraud, and has granted the relief otherwise appearing to be claimable: *Thomson* v. *Eastwood* (2).]

A mortgage bargain for collateral advantage is only void if it is unconscionable or infringes the rule against a clog. The relation between a mortgagor and a mortgagee purchaser is governed by the same rules as between an ordinary vendor and purchaser: *Ashburner on Mortgages*, p. 511; *Melbourne Banking Corporation* v. *Brougham* (3); the party impeaching the sale must prove the existence of oppression or undue influence: *Salt* v. *Marquis of Northampton* (4). The plaintiff, by his own conduct in destroying the right of action against Wills & Co., has made it impossible to restore the parties *in integrum*, and is therefore limited to an action for deceit, unless the defendants consent to redemption and an account upon plaintiff bringing the proceeds of the compromise into Court.

Even if the questions suggested by the plaintiff's counsel, but not pressed upon the Judge, were all answered in his favour, they would not have entitled him to judgment. There was never any demand that the question whether plaintiff had acted freely and voluntarily in the sale should be put to the jury. A new case cannot be picked out from the pleadings and set up on appeal: *Wilde* v. *Gibson* (5); *Archbold* v. *Commissioners of Charitable Bequests for Ireland* (6); *Glasscott* v. *Lang* (7); *Hickson* v. *Lombard* (8).

[BARTON J. referred to *Parr* v. *Jewell* (9).]

If no proper direction was asked from the Judge, plaintiff cannot now complain: *Graham & Sons* v. *Mayor of Huddersfield* (10); *Nevill* v. *Fine Art and General Insurance Co.* (11).

(1) 6 DeG. M. & G., 424; 8 H.L.C., 482.
(2) 2 App. Cas., 215, at p. 243.
(3) 7 App. Cas, 307.
(4) (1892) A.C., 1, at p. 18.
(5) 1 H.L.C., 605.
(6) 2 H.L.C., 440.
(7) 2 Ph., 310.
(8) L.R. 1 H.L., 324.
(9) 1 Kay & J., 671.
(10) 12 T.L.R., 36.
(11) (1897) A.C., 68.

Robinson in reply. The defendants themselves raised the issue that the sale was free, fair and voluntary, and this was in issue throughout the case. The plaintiff is entitled to amend, as the abortive trial was due to the action of the Judge in not leaving to the jury the questions of fact properly raised by the pleadings which claimed relief otherwise than upon fraud.

Cur. adv. vult.

5th November.

GRIFFITH C.J. This is an action brought by the appellant against the respondents claiming relief in respect of a deed dated 4th November 1904, and also in respect of a sale of a large quantity of bark mortgaged by the plaintiff to one of the defendants by mortgage of the same date. It is necessary to refer somewhat in detail to the pleadings, because it is not quite clear what is the nature of the relief which the plaintiff really claimed. The plaintiff was a dealer in mallet bark, the defendant Moss was a solicitor at Fremantle, and the other defendants, Strelitz Brothers, were merchants carrying on business in Perth and Fremantle. Before November 1904, the plaintiff had given a mortgage by way of bill of sale to one Rischbeith, trading as Henry Wills and Co., over all the bark that he might have or might acquire in the course of his business, and there was a separate agreement by which that firm was to buy from him all the bark at a fixed price. The plaintiff desired to pay them off, and applied to the defendants Strelitz Brothers for assistance. They referred him to Moss, and the result was that on 4th November a bill of sale was executed by which the plaintiff assigned all the mallet bark to Moss by way of mortgage on terms which it is not necessary to mention. He also executed a contemporaneous deed by which provision was made for the division of any profits which might accrue to the plaintiff from his speculation in the mallet bark over which he was giving security. Amongst other stipulations in that agreement was one to the effect that the defendant Moss, the mortgagee, should have the benefit of the plaintiff's contract with Henry Wills and Co. for the purchase of the bark at a fixed price. The benefit of this agreement was therefore part of the security which Moss obtained

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under that transaction. It is alleged that very soon afterwards Henry Wills and Co. refused to perform their contract for the purchase of the mallet bark from the plaintiff, whereupon it became necessary to make some other arrangements for disposing of it. The statement of claim, after setting out facts which I have stated in substance, goes on to allege that at the time of making the deed and mortgage the plaintiff was pressed and threatened with legal proceedings by Rischbeith and in straitened circumstances, and that the defendant J. D. Moss took advantage of his knowledge of the plaintiff's embarrassed position, and exacted wholly unreasonable and oppressive terms which the plaintiff was forced to accept to avoid being financially ruined. It then alleges that the plaintiff executed the mortgage and agreement and the defendant Moss paid off Rischbeith, and that thereafter the plaintiff was in the power of the defendant Moss, who exercised complete dominion over him in all business transactions, and thereafter acted as his legal adviser until June 1905: that at the instance and under the advice of the defendant Moss the plaintiff caused to be tendered to Rischbeith certain mallet bark of which acceptance was refused, so that an action for about £10,000 damages for breach of contract might be brought against Rischbeith in the name of and apparently for the benefit of the plaintiff, but in truth and reality for the benefit of the defendant J. D. Moss: that at the instance and under the advice of the defendant Moss the plaintiff caused tenders to be called for the purchase of the whole of the bark in one lot so as to ascertain the amount of damages recoverable against Rischbeith as aforesaid: that owing to a mistake of the defendant Moss fresh tenders had to be called for, and that defendant negligently and improperly failed to give due or proper notice, and the plaintiff acting under his advice and at his instance, and relying upon his representations, was induced to accept the tender of the defendants Strelitz Bros. for the purchase of the whole of the bark at £2 9s. 6d. per ton although higher tenders had been sent in: that these representations were, amongst others, that it was better to sell in one lot even though the price was lower, and that the plaintiff was quite entitled to do so, and that in fact there would be no loss as the damages recoverable from Rischbeith would be the difference

between the sale price and the price at which he had agreed to purchase, and that in fact it did not affect the plaintiff and was a matter more affecting the defendant Moss's interest: that the bark was so sold to the defendants Strelitz Brothers at a price much below its actual value: that subsequently to and on or about 23rd June 1905 the defendant Moss endeavoured to force the plaintiff to sign a further champertous agreement with him, and the plaintiff, having refused, obtained independent advice and became aware for the first time (although he had suspected it before) that the defendants Strelitz Brothers were the real mortgagees, and that the defendant Moss was used as a blind, and that the rendering of financial assistance to the plaintiff was a ruse, and the sole object of the defendants Strelitz Brothers was to acquire the plaintiff's property at an under value. The plaintiff claimed a declaration that the mortgage was for the benefit of the defendants Strelitz Brothers, and an order that the purchase by the defendants Strelitz Brothers of the mallet bark should be set aside and proper accounts taken, and further that the agreement of 4th November should be declared void and be delivered up for cancellation. The bark was in fact sold, under circumstances to which it is not necessary to refer in detail, to the defendants Strelitz Brothers. It was sold nominally by the plaintiff, no doubt acting under the advice of the defendant Moss, or in concert with him—whether under his influence or not is a matter which is not material for my present purpose. Subsequently the plaintiff made a claim against Henry Wills and Co. for damages for their refusal to accept the bark and compromised that claim for £3,000, and received the money. The bark, or the greater part of it, has since been re-sold by the defendants Strelitz Brothers the purchasers. In point of fact Strelitz Brothers were the lenders of the money secured by the bill of sale of 4th November, and Moss was a trustee for them except as to a sum of £500 in which he was personally interested. The defendants in their defence practically denied the case made by the plaintiff, and alleged that the sale of the bark to Strelitz Brothers was made with the plaintiff's full consent and with full knowledge of all the facts. The case came on for trial before *Burnside* J. and a jury. The jury was not asked to find any

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specific facts, but the whole case was left to them. The view which the learned Judge took of the case made by the plaintiff, judging, I suppose, by the way the case was conducted, appears by his summing up. He said:—"Now what is the claim? The plaintiff says that this was a fraudulent sale, and in his statement of claim he sets out a set of circumstances which he says indicate that this sale was the outcome of a conspiracy which found its origin at the time of the entering into this bill of sale or agreements on the part of Messrs. Strelitz Bros. whereby they intended to secretly get possession of his (plaintiff's) mallet bark at an undervalue. Now, gentlemen, if you see evidence of such a conspiracy, and if from the circumstances of the case you come to that conclusion then, as I have said, you will be justified in saying that this was a fraudulent transaction. On the other hand the defendants deny it altogether, and they have told a story, which, as I have already indicated, may be worthy of your consideration." Then practically the learned Judge left the jury to say whether they believed the plaintiff's version of the transaction, or the defendants'. The jury found, with respect to the claim to set aside the agreement of the 4th November, that the plaintiff was in straitened circumstances to the knowledge of the defendant Moss who took advantage thereof to exact wholly unreasonable and oppressive terms. That finding, of course, did not of itself entitle the plaintiff to any relief; it did not entitle him to have the agreement set aside, and before us no point has been made on that finding of the jury. They also found that the sale of the bark to defendants Strelitz Brothers was not fraudulent, and on that finding the learned Judge gave judgment for the defendants. On appeal to the Full Court the appeal was dismissed. With respect to the sale of the bark, it is now claimed that there should be a new trial on the ground, in substance, of misdirection. It is not disputed that there was such a conflict of evidence that the verdict of the jury cannot be impeached as one which reasonable men could not come to on the case left to them; but the plaintiff says that there was in fact a misdirection because the learned Judge did not leave proper questions to the jury; that he only left a general question, and not specific questions. The questions

which the learned counsel for the plaintiff desired or suggested should be put to the jury, as supplied by the learned counsel to us here, though they do not appear on the Judge's notes, were :— (1) When did the plaintiff first definitely know that Strelitz Brothers were the real mortgagees? (2) In calling for tenders did the plaintiff rely on the advice of Moss and Strelitz Brothers? (3) When selling, was the plaintiff advised or induced by the defendant Moss to accept Strelitz Brothers' tender? (4) Did Moss act diligently in plaintiff's interests on and subsequent to the calling for tenders? It is admitted that at one period of the trial the learned counsel for the plaintiff suggested that these questions should be put to the jury, but at the conclusion of the learned Judge's summing up, after leaving the general question as I have stated, he said in the presence of counsel :—"If you find that it was a fraudulent sale, in the circumstances I have told you, you will say so; and remember that the plaintiff has to prove to your satisfaction those circumstances which would justify such a verdict. On the other hand, if you are not satisfied that it was a fraudulent sale you will say so, and there will end the difficulties of the case so far as you are concerned. Neither counsel desire that I should put any special questions to you, so I shall leave the case at that." The objection that the learned Judge did not leave to the jury those questions, which it is now said he ought to have left, can only be taken on the ground that it was in substance a misdirection, that is, that if the jury had been properly directed they would have been told, "If you answer those questions or some of them in favour of the plaintiff he will be entitled to a verdict." I pass over for a moment the first question. Taking the second, "In calling for tenders did the plaintiff rely on the advice of Moss and Strelitz Brothers?" it is obvious that the answer to that would not by itself carry the case any further. The same observation applies to the next question, "When selling, was the plaintiff advised or induced by the defendant Moss to accept Strelitz Brothers' tender?" So to the next question, "Did Moss act diligently in plaintiff's interests on and subsequent to the calling for tenders?" The first question, "When did the plaintiff first definitely know that Strelitz Brothers were the real mortgagees?" raises a more difficult point. It is suggested now

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(we do not know what was suggested at the trial, but whatever was suggested does not seem to have attracted the attention of the learned Judge) that if the plaintiff did not know that Strelitz Brothers, the purchasers of the bark, were the real mortgagees of the bark, some question might arise dependent on the relationship of the plaintiff, as owner of the equity of redemption, to them as mortgagees. If the owner of an equity of redemption sells to the mortgagee, not knowing that he is the mortgagee, he might in some circumstances be entitled to some relief. He might or he might not. But there is a preliminary question of fact, "Did the plaintiff know that the defendants Strelitz Brothers were the real mortgagees?" Upon that there was a conflict of evidence, but it is contended for the defendants that, even if the question had been answered in the negative, it would have been so contrary to the weight of evidence that the verdict could not stand. On the other hand it is suggested that some case might be spelt out from the pleadings, or spelt out from the evidence, on which the plaintiff might be entitled to some relief; of what kind is not specified in particular. The most likely kind of relief suggested was that founded on the doctrine under which it is said that a bargain by a mortgagee with the owner of the equity of redemption to purchase the mortgage property may be set aside if it is oppressive and unconscionable; but even that was not suggested to this Court until argument had proceeded for two days. Under ordinary circumstances, the verdict of the jury being right, the parties having chosen their battle ground and the plaintiff having been beaten, there would be an end of the case. We were pressed with the authority of cases in which it has been held, in substance, that when a plaintiff comes into Court and makes a case of personal fraud against the defendants and is beaten, he cannot afterwards pick out fragments from the evidence and pleadings tending to show a case of constructive fraud, and say, "I might have been entitled to judgment on that ground." Reliance was also placed on the words of Lord *Halsbury* L.C. in the case of *Nevill* v. *Fine Art and General Insurance Co* (1):—

"What puts him (the appellant) out of Court in that respect (*i.e.*,

(1) (1897) A.C., 68, at p. 76.

in asking for a new trial) is this, that where you are complaining of non-direction of the Judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial; for the obvious reason that if you thought you had got enough you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect." On the other hand, it is said that from the evidence in this case it could be spelt out that the plaintiff did not know, when he sold the bark, that he was selling it to the mortgagees, that the defendant Moss was trustee for the mortgagees, and exercised some dominion over the plaintiff, and therefore the sale might have been oppressive and unconscionable; and also that Moss was solicitor for the plaintiff, who therefore should have had independent advice. This, it was said, showed that the plaintiff might be entitled, under some unspecified doctrine of equity, to have the sale of the bark set aside or to have an account of the profits made on the re-sale. If a new trial were granted, it is clear that the pleadings would have to be radically amended in some manner which has not been specified.

It would seem that, although the practice as to nonsuit is abolished by the rules of Court, yet the same result can be obtained by dismissing an action without prejudice to the bringing of a new one: See *Fox* v. *Star Newspaper Co.* (1). If, therefore, the plaintiff is entitled to ask in this case (as to which I have grave doubts) for leave to amend his pleadings and make a new case, which would only be granted on stringent terms, the same result could be obtained in a more convenient manner, by giving leave to bring a new action. Mr. Pilkington offers no objection to leave being given to bring a fresh action on any ground other than actual fraud in the sale of the bark, which has already been disposed of by the jury. I therefore say no more as to the merits of the case. It is admitted that if such leave is given to the plaintiff it should be on terms. The terms suggested, to which no objection is offered, were that he should bring his action within a limited time, three months, that he should pay into Court the £3,000, the portion of

(1) (1898) 1 Q.B., 636; (1900) A.C., 19.

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the security which he has or had in his pocket, and that he should pay the costs of this unsuccessful action. On the other hand Mr. Robinson very properly says that if that is done it would be unfair to go on with the bankruptcy proceedings now pending against the plaintiff. Under these circumstances, to do justice between the parties, I think the order should be as follows:—

Order that judgment for the defendants upon the claim be varied so that it shall stand as an order dismissing the action with costs without prejudice to any such action as the plaintiff may be advised to bring other than an action impeaching the sale of December 1904 on the ground of actual fraud in the sale itself. But this order is upon the condition that such action be brought within three months from this date, and that the plaintiff do within that time bring into Court in such action the sum of £3,000, and do further within that time pay to the defendant his taxed costs of this action and of this appeal, and that upon the failure of the plaintiff to comply with these conditions this appeal shall stand dismissed with costs. Liberty to apply. The order will be prefaced by a statement that the respondents by their counsel undertake to consent to a stay of the proceedings now pending in bankruptcy against the appellant for the period of three months from this date, and do not offer any objection to the order.

BARTON J. I am of the same opinion. I wish to refer to that portion of the proposed order which deals with the bringing of a new action. While I desire to abstain entirely from the use of any expression which might prejudice either party in future proceedings, at the same time I must say that I have entertained considerable doubt as to whether, in the absence of any agreement on the part of the defendants, this would have been a case in which the Court ought to have embodied in its order leave either to amend or to bring a fresh action. The cases of *Wilde* v. *Gibson* (1) and *Hickson* v. *Lombard* (2) are familiar, the one affirming that, where a plaintiff by his pleadings rests his case upon fraud, he cannot have liberty to support it on any other ground; and the other, nineteen years later, in which Lord

(1) 1 H.L.C., 605.

(2) L.R. 1 H.L., 324.

Cranworth put a similar principle in this way (1):—"I subscribe most readily to the doctrine that, where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the bill facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief. A defendant, in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward. If, indeed, relief is asked alternatively, either on the ground of fraud, or, failing that ground, then on some other equity, a plaintiff may fail on the first but succeed on the latter alternative. But, then, the attention of the defendant has been distinctly directed to it, and he has been called on to answer the case according to both alternatives." Lord *Cranworth* there, it seems to me, expresses the principle on which the Court should proceed, and I must say, looking at the statement of claim and upon due consideration of the whole case—there being no alternative case set up, but simply one of fraud or nothing—that I have not been able to convince myself that there is such a separable case of what may be called constructive or legal fraud to be gathered from the pleadings as would justify the Court in saying that the case is not merely of one texture, and that upon the separable case or claim leave may be given to denude the pleadings of the matter pertaining to personal fraud upon which the plaintiff has claimed, and to proceed, on a remission of the case, with that separable case or claim on which he might have founded an alternative case in his statement of claim. I only say I am not satisfied on that point. I know it is a very difficult point, and it is as well perhaps that the action of the parties has relieved the Court of coming to a conclusion upon that admitted difficulty. All that I feel called upon to say is that, had consent not been given, I should, perhaps, not have been a party to the leave being granted, which now, upon consent, is given to the plaintiff. I concur in my learned brother's judgment.

HIGGINS J. I am of opinion that justice will be done sub-

(1) L.R. 1 H.L., 324, at p. 336.

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stantially by the order indicated by the Chief Justice; but as it is my duty to make up my own mind upon these matters, I desire to add some remarks so as to prevent misapprehension. At the same time, as there may be a re-trial of the matters in dispute, it is my duty to avoid saying anything by way of comment on the facts which is not absolutely necessary. The main question which has been discussed is the validity of the sale of the mallet bark to Strelitz Brothers. This case has been put forward in the statement of claim, and by the addresses of counsel at the trial, as one of actual fraud; and in the summing up of the primary Judge it was put as if the only question were had there been a vile conspiracy from first to last. That case has failed, and the jury's finding is conclusive. But there are allegations and facts which may or may not be sufficient to enable the plaintiff to impeach the sale as void or voidable; facts which were obscurely pointed at to some extent by certain questions which plaintiff's counsel sought to have put to the jury at the trial. In one aspect, it may possibly be put as a sale of the equity of redemption by the mortgagor to the mortgagees. In another aspect, in may be put as being in substance a sale by Moss the mortgagee, that is, by his principals, Strelitz Brothers the mortgagees, to Strelitz Brothers the mortgagees. It may also be put as a sale by Strelitz Brothers the real mortgagees through Moss the solicitor, who was also solicitor for the mortgagor, and took benefits for himself and for his principal. If the transaction can be put in any of these aspects, the effect would be, of course, to throw the burden of proof in a different direction. The plaintiff now says he would like to mend his hand. He did not suggest any amendment before the primary Judge; and the Full Court had to deal with the case as it was then presented, and made, I think, the proper order; but I take a strong view as to the duty of the Court when a party wants an amendment. I take it that it is the duty of the Court, providing it can compel compensation in the way of costs, to allow a party liberal opportunity for amendment before final judgment. I take the view which was expressed so strongly by *Bramwell* L.J. in *Tildesley* v. *Harper* (1) where he says:—"My practice has always been to give leave to amend unless

(1) 10 Ch. D., 393, at p. 396.

I have been satisfied that the party applying was acting *malâ fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." In *Cropper* v. *Smith* (1), *Bowen* L.J. said :—" I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party." Therefore, personally speaking, I would be inclined to give leave to bring a fresh action whether the defendants' counsel had waived the objection or not; but at the same time a defendant must have full opportunity of meeting all these allegations and all these facts from their new aspect. As the trial has been a fiasco owing to the plaintiff's way of putting the case, the plaintiff ought to bear the costs, and ought also to bring into Court the £3,000 which he wrongfully took away from the security. There has not been much discussion yet as to giving effect to the agreement of the 4th November 1904; and unless the sale of the mallet bark to Strelitz Brothers be declared void the agreement of the 4th November is of little importance—I mean that any contest as to this agreement is of little importance, inasmuch as there will be no money to be distributed as profits. With regard to this agreement, it cannot be forgotten that the jury have found that the bargain was oppressive, and that the plaintiff was in straitened circumstances, to the knowledge of the defendant Moss, who took advantage thereof to exact wholly unreasonable and oppressive terms. But if the sale of the mallet bark to the defendants Strelitz Brothers be declared void, plaintiff would probably have to attack the agreement, in which case the defendants may find out that he is put to it to support exceptional clauses under the agreement in regard to getting, not merely his principal interest and costs, but the best share of the profits as well. I am only anxious that the Court should not be treated as deciding that the provisions of that agreement can be supported, my desire being to leave that question absolutely open to the parties in any further litigation.

The respondents by their counsel undertaking to consent to a stay of the proceedings

(1) 26 Ch. D., 700, at p. 710.

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now pending in bankruptcy against the appellant for the period of three months from this date and not offering any objection to this order: Ordered that the judgment for the defendants upon the claim be varied so that it shall stand as an order dismissing the action with costs, without prejudice to any such action as the plaintiff may be advised to bring, other than an action impeaching the sale of December 1904 *on the ground of actual fraud in the sale itself; but this order is upon the condition that any such action shall be brought within three months from this date, and that the plaintiff do within that time bring into Court in such action the sum of* £3,000, *and do further within that time pay to the defendants their taxed costs of this action and of this appeal, and that upon the failure of the plaintiff to comply with these conditions this appeal stand dismissed with costs. Liberty to apply.*

Solicitors, for the appellants, *R. S. Haynes & Co.*
Solicitors, for the respondents, *Northmore, Lukin & Hale.*

N. G. P.