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mines Pty
(in liq) v
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85] WAR

[HIGH COURT OF AUSTRALIA.]

WOSSIDLO APPELLANT ;

AND

CATT AND ANOTHER RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF
SOUTH AUSTRALIA.

Vendor and Purchaser—Vendor's lien—Transfer of land—Consideration covenant to pay annuity—Intention of annuitant—Reliance upon covenant—Exclusion of lien.

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ADELAIDE,
Oct. 4.
—
SYDNEY,
Nov. 30.
—
Rich, Starke,
Dixon and
McTiernan JJ.

An indenture made between W. and C. recited that W. had requested C. to purchase from W. certain personal property and two pieces of land, and, as consideration for the sale, to pay the respective sums and annuity thereafter covenanted to be paid, and to execute the said indenture for securing payment thereof, which C. had agreed to do. By the indenture C. covenanted to pay certain sums in cash as the full purchase money for the personal property, and, as consideration for the sale of the land, to pay W. an annuity during her lifetime. By a transfer bearing the same date, and subsequently registered, W. transferred the land to C. in consideration of his "having by deed of covenant bearing even date herewith covenanted with me to pay to me during my lifetime an annuity of" C. made the cash payments which were expressed to be the consideration for the sale of the personal property, and, so long as he lived, the annuity was duly paid. C. re-sold one of the pieces of land, but at his death, which occurred later, he was still the registered proprietor of the remaining piece of land. After his death payment of the annuity fell into arrear.

Held that W. must be taken to have intended to rely on a personal covenant for payment of the annuity, and that she had no lien on the unsold piece of land for the unpaid portion of the annuity.

Mackreth v. Symmons, (1808) 15 Ves. Jun. 329 ; 33 E.R. 778, applied.

Decision of the Supreme Court of South Australia (Full Court) : *In re Wossidlo*, (1934) S.A.S.R. 268, affirmed.

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On 13th January 1926 a deed of covenant in the following terms was entered into :—

“ This indenture made the thirteenth day of January One thousand nine hundred and twenty-six between Alfred Clifford Catt of Adelaide in the State of South Australia Auctioneer of the one part and Antonie Henriette Matilda Wossidlo (in the Certificate of Title hereinafter referred to called “ Tony Wossidlo ”) of Mitcham in the said State Married Woman of the other part whereas the said Antonie Henriette Matilda Wossidlo being seized and possessed of the lands comprised in Certificates of Title Register Book Volume 95 Folio 57 and Volume 1273 Folio 192 a Commonwealth Bond representing the sum of £200 payable on the fifteenth day of September One thousand nine hundred and twenty-eight and certain household and other effects has requested the said Alfred Clifford Catt to purchase from her the said War Bond household and other effects and the said lands and as consideration for the sale thereof by her to him to pay to her the respective sums and annuity hereinafter covenanted by him to be paid to her and to execute these Presents for securing payment thereof which the said Alfred Clifford Catt has agreed to do now this indenture witnesseth that in pursuance of his said agreement the said Alfred Catt doth hereby for himself his heirs executors and administrators covenant with the said Antonie Henriette Matilda Wossidlo that he the said Alfred Clifford Catt his heirs executors or administrators will on the delivery to him of the said War Bond household and other effects together with the said Certificates of Title and a duly executed transfer to him of the said lands pay to the said Antonie Henriette Matilda Wossidlo the sum of One Hundred Pounds and if the said Antonie Henriette Matilda Wossidlo shall be living on the tenth day of January One thousand nine hundred and twenty-seven will pay to her a further sum of four hundred pounds which said sums or such of them as shall become payable pursuant to this covenant shall be the full purchase money of the said War Bond household and other effects. And as consideration for the sale to him by the said Antonie Henriette Matilda Wossidlo of the said lands the said Alfred Clifford Catt doth hereby covenant with the said Antonie Henriette Matilda Wossidlo

that he his heirs executors or administrators will during her lifetime pay to her an annuity of one hundred and fourteen pounds by equal calendar monthly payments computing from the Tenth day of March One thousand nine hundred and twenty-six the first of such payments to be made on the Tenth day of April next."

On the same day Mrs. Wossidlo executed a memorandum of transfer in the following terms:—"I, Tony Wossidlo of West Mitcham Married Woman being registered as the proprietor of an estate in fee simple subject however to such encumbrances liens and interests as are notified by Memorandum underwritten or endorsed thereon in the whole of the land comprised in Certificates of Title Register Book Volume 95 Folio 57 and Volume 1273 Folio 192. In consideration of Alfred Clifford Catt of Adelaide Auctioneer having by Deed of Covenant bearing even date herewith covenanted with me to pay to me during my lifetime an annuity of One Hundred and Fourteen Pounds do hereby transfer to the said Alfred Clifford Catt all my estate and interest in the said land above described."

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This transfer was registered on 14th January 1926. The two sums of £100 and £400 were duly paid to Mrs. Wossidlo pursuant to the deed, and the annuity therein provided for was paid to her during the lifetime of Alfred Clifford Catt. During Alfred Clifford Catt's lifetime the land comprised in Certificate of Title Register Book Volume 1273 Folio 192 was sold by him. Alfred Clifford Catt died on 3rd October 1930, and after his death the annuity fell into arrears. On 21st October 1930 Mrs. Wossidlo lodged a caveat against the title to the land comprised in Certificate of Title Register Book Volume 95 Folio 57, claiming that she had an equitable lien on the land for the unpaid portion of the annuity provided for in the deed. The executors of Alfred Clifford Catt, the present respondents, applied by summons for the removal of the caveat, but the summons was dismissed by *Richards J.* An appeal to the Full Court of South Australia was allowed, *Richards J.*'s order was set aside, and it was ordered that the caveat be removed.

From this decision the appellant now appealed to the High Court.

Shierlaw (with him *Frisby Smith*), for the appellant. A vendor's lien continues until expressly or impliedly waived, and the onus is

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on the vendee to show manifest waiver (*Sugden on Vendors and Purchasers*, 14th ed. (1862), pp. 675, 676 ; *White and Tudor's Leading Cases in Equity*, 4th ed. (1872), vol. I., p. 317 ; *Mackreth v. Symmons* (1)).

It is now too late to contend that there is no lien when the consideration is an annuity, nor does the fact that the annuity is dependent on life amount to waiver. Where a bond or other security is given as a mode of payment, that is not evidence of waiver (*Winter v. Anson* (Lord) (2)).

[RICH J. referred to *Earl of Jersey v. Briton Ferry Floating Dock Co.* (3).]

For there to be waiver the other security must be taken in substitution for the lien. A covenant to pay formerly gave the creditor advantages (e.g., priority in bankruptcy) over simple contract debts. The division of the consideration in the indenture shows that the appellant was retaining her lien on the land but not on the other property. The indenture and the transfer are separate only because a transfer is the statutory method of conveying *Real Property Act* land, and to interpret them they must be read together. The fact that the deed contains no reference to vendor's lien leaves unaffected the prima facie inference that a lien exists. Why should the appellant be taken to have given up a lien in exchange for what she already had—a personal liability to pay ? On the true construction of the operative part of the deed, the lien is preserved, but, at least, the operative part is ambiguous, so that the recitals must be looked at and rule the construction (*Norton on Deeds*, 2nd ed. (1928), p. 201 ; *Frail v. Ellis* (4)). If the deed read alone does not mean that the appellant is giving up anything, the addition of the transfer is immaterial. [Counsel also referred to *Buckland v. Pocknell* (5) ; *Pell v. Midland and South Wales Railway Co.* (6) ; *Dansk Rekylriffel Syndikat Artieselskab v. Snell* (7) ; *Leggott v. Barrett* (8) ; *Australian Gypsum Ltd. and Australian Plaster Co. v. Hume Steel Ltd.* (9) ; *Dixon v. Gayfere* (10).]

(1) (1808) 15 Ves. Jun. 329 ; 33 E.R. 778.	(6) (1869) 20 L.T. 288.
(2) (1828) 3 Russ. 488 ; 38 E.R. 658.	(7) (1908) 2 Ch. 127, at p. 136.
(3) (1869) L.R. 7 Eq. 409.	(8) (1880) 15 Ch. D. 306.
(4) (1852) 16 Beav. 350 ; 51 E.R. 814.	(9) (1930) 45 C.L.R. 54.
(5) (1843) 13 Sim. 406 ; 60 E.R. 157.	(10) (1857) 1 DeG. & J. 655 ; 44 E.R. 878.

Mayo K.C. (with him *Astley*), for the respondents. It is not conceded that a right to payment of money by way of annuity gives rise to a lien. Whenever a lien has been held to exist, there has been something in the nature of a formal settlement in the background (e.g., *Tardiff v. Scrugan* (1)). It is not a question of whether an equity is waived, but of whether it exists. First we go to the transfer, and at common law the transfer is conclusive (*Groongal Pastoral Co. (in Liquidation) v. Falkiner* (2)). Unless the transfer is ratified in the proper manner, it is conclusive even though it varies from the antecedent contract. All that equity will do in such proceedings as these is to see whether the terms of the transfer as to consideration have been carried out. The deed of covenant need be examined only to see whether it complies with the transfer. Here it clearly does. In any event the appellant's argument fails, because there is no ambiguity in the operative part of the covenant (*Buckland v. Pocknell* (3)).

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Cur. adv. vult.

The following written judgments were delivered :—

Nov. 30.

RICH J. This is an appeal from an order of the Full Court of South Australia setting aside an order made by *Richards* J. The facts from which the question for our consideration emerges are set out in the judgment of *Murray* C.J. as follows :—“ This is an appeal from an order of Mr. Justice *Richards* dismissing a summons for the removal of a caveat lodged on the 16th October 1930 by Antonie Henriette Matilda Wossidlo in the Lands Titles Office forbidding any dealing with the estate or interest of Alfred Clifford Catt deceased in the lands comprised in Certificate of Title Register Book Volume 95 Folio 57. The appellants who were the applicants under the summons are the executors of the Will of Alfred Clifford Catt who died on the 3rd October 1930. It appears from the affidavits that the deceased and Mrs. Wossidlo executed an indenture on the 13th January 1926 whereby after reciting that ‘ the said Antonie Henriette Matilda Wossidlo being seized and possessed of the lands comprised in Certificate of Title Register Book Volume 95 Folio 57 and Volume 1273

(1) (1769) unreported. [Cited in 1 Bro. C.C. 423 ; 28 E.R. 1216.]

(2) (1924) 35 C.L.R. 157.

(3) (1843) 13 Sim. 406 ; 60 E.R. 157.

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Folio 192 a Commonwealth Bond representing the sum of £200 payable on the fifteenth day of September One thousand nine hundred and twenty-eight and certain household and other effects has requested the said Alfred Clifford Catt to purchase from her the said War Bond household and other effects and the said lands and as consideration for the sale thereof by her to him to pay to her the respective sums and annuity hereinafter covenanted by him to be paid to her and to execute these presents for securing payment thereof which the said Alfred Clifford Catt has agreed to do ' it was witnessed that ' in pursuance of his said agreement the said Alfred Clifford Catt doth hereby for himself his heirs executors and administrators covenant with the said Antonie Henriette Matilda Wossidlo that he the said Alfred Clifford Catt his heirs executors or administrators will on the delivery to him of the said War Bond household and other effects together with the said Certificates of Title and a duly executed transfer to him of the said lands pay to the said Antonie Henriette Matilda Wossidlo the sum of One hundred pounds And if the said Antonie Henriette Matilda Wossidlo shall be living on the 10th day of January One thousand nine hundred and twenty-seven will pay to her a further sum of Four hundred pounds which said sums or such of them as shall become payable pursuant to this covenant shall be the full purchase money of the said War Bond household and other effects. And as consideration for the sale to him by the said Antonie Henriette Matilda Wossidlo of the said lands the said Alfred Clifford Catt doth hereby covenant with the said Antonie Henriette Matilda Wossidlo that he his heirs executors or administrators will during her lifetime pay to her an annuity of One hundred and fourteen pounds by equal calendar monthly payments computing from the Tenth day of March One thousand nine hundred and twenty-six the first of such payments to be made on the Tenth day of April next.' On the same day as this deed was signed Mrs. Wossidlo executed a Memorandum of Transfer in these terms: ' I Tony Wossidlo of West Mitcham Married Woman being registered as the proprietor of an estate in fee simple subject however to such encumbrances liens and interests as are notified by such memorandum underwritten or endorsed thereon in the whole of the land comprised in Certificates of Title Register Book Volume 95 Folio 57 and Volume

1273 Folio 192. In consideration of Alfred Clifford Catt of Adelaide Auctioneer having by deed of covenant bearing even date herewith covenanted with me to pay to me during my lifetime an annuity of One hundred and Fourteen pounds do hereby transfer to the said Alfred Clifford Catt all my estate and interest in the said land above described.' The transfer was registered on the 14th January 1926.

It is not disputed that the two sums of £100 and £400 were duly paid to Mrs. Wossidlo pursuant to the Indenture, or that the annuity was paid to her during Catt's lifetime. But since Catt's death on the 3rd October 1930 the annuity has fallen into arrear. On the 16th October 1930 Mrs. Wossidlo lodged the caveat in question against the title to the land comprised in Certificate of Title Register Book Volume 95 Folio 57. She could not include the other piece of land in the caveat as it had been sold by Catt before his death.

Mrs. Wossidlo claims that she has an equitable lien on the land which Catt had not disposed of for the unpaid portion of the annuity secured to her by the indenture."

"The doctrine of 'vendor's lien' is one created by equity as part of a scheme of equitable adjustment of mutual rights and obligations applying, unless negatived, to every ordinary contract of sale of land," (per *Isaacs J.*, as he then was, in *Davies v. Littlejohn* (1)). "The prima facie right of an unpaid vendor of land to an equitable lien upon it for the amount of his unpaid purchase money is too well established to be disputed. The right arises whenever there is a valid contract of sale and the time for completing that contract has arrived and the purchase money is not duly paid.' That is a clear statement of the rule. But there are cases where it does not apply" (*Barker v. Stickney* (2), citing *Kettlewell v. Watson* (3); and cf. *Thompson v. Palmer* (4)). The question is whether this is such a case. "The doctrine is probably derived from the civil law as to goods" (*Mackreth v. Symmons* (5)), "but it can also be based on the principle that equity regards that as done which ought to be done" (*Ashburner, Principles of Equity*, 1st ed. (1902), p. 341; *Shaw v. Foster* (6)). In equity a contract for the sale of land passes the property

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(1) (1923) 34 C.L.R. 174, at p. 185.

(2) (1919) 1 K.B. 121, at p. 125.

(3) (1884) 26 Ch. D. 501, at p. 507.

(4) (1933) 49 C.L.R. 507, at p. 537.

(5) (1808) 15 Ves. Jun., at pp. 344, 345; 33 E.R., at p. 783.

(6) (1872) L.R. 5 H.L. 321, at pp. 356, 357.

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to the purchaser, and the vendor has a lien on it for the price which becomes operative as from the time at which the contract ought to have been completed, and continues until the price is paid, unless a contrary intention appears. That intention is to be gathered from the words of the contract and the inferences from the nature of the transaction in question. In the normal course conveyance and payment are synchronous, but the price may take any form, and if it consists in the giving of a covenant it is "paid" when the covenant is given, notwithstanding that the covenant may itself involve the making of payment. When the consideration is an agreement to pay a life annuity, it is natural to infer that the vendor annuitant relied upon the covenant as the substitution for the property. A life annuity involves a series of recurrent payments extending over a quite unknown time. No doubt it has a present value, but the vendor has not stipulated for its present value, but for the annual payments. By parting immediately with the legal estate a vendor in an ordinary case, where the price is a definite sum, may be regarded as anticipating the completion of the transaction by payment. But in the case of a life annuity a very different intention is to be inferred from his parting with the legal estate (Cf. *Dyke v. Rindall* (1); *Dixon v. Gayfere* (2)). If he did not intend the beneficial ownership of the property to be fully imparted to the purchaser until the final payment of the annuity was made, the transaction into which he entered would take rather the complexion of a *post mortem* disposition, the disponent being let into immediate possession. The obvious purpose of transferring the legal estate to the person undertaking the liability to pay the annuity is to invest him with complete enjoyment of the ownership of the land, legal and beneficial, including the power of alienation. The vendor, in bargaining for a personal covenant only to pay the annuity, has impliedly shown that it is upon this she is content to rely. Had it been otherwise the annuity might have been charged or secured over the land quite effectively either at law or in equity. I am therefore of opinion that the decision appealed from is right, and that the appeal should be dismissed with costs.

(1) (1852) 2 DeG. M. & G. 209, at p. 219; 42 E.R. 851, at p. 855.

(2) (1855) 21 Beav. 118, at p. 122; 52 E.R. 803, at p. 805; (1857) 1 DeG. & J., at p. 661; 44 E.R., at p. 880.

STARKE J. A vendor of land has an equitable lien upon the land for his unpaid purchase money. Such a lien has been held to extend to a sale made in consideration of an annuity or other periodical payment, unless the parties' intention appears to be that there shall be no such lien (*Mackreth v. Symmons* (1); *White and Tudor's Leading Cases in Equity*, 7th ed. (1897), vol. II., p. 926; *Sugden, Vendors and Purchasers*, 14th ed. (1862), pp. 676 *et seq.*).

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In the present case, Tony Wossidlo transferred land to Alfred Clifford Catt, in consideration of Catt having, by deed, covenanted to pay Wossidlo during her lifetime an annuity of £114 by equal monthly payments. The learned Judges of the Supreme Court of South Australia elaborately reviewed the relevant cases, and concluded that no lien existed upon the property in respect of the annuity. In this conclusion I agree. It is improbable, to my mind, despite the observations of Lord *St Leonards* (*Sugden, Vendors and Purchasers*, 14th ed. (1862), at pp. 677, 678) that the parties intended to subject the estate to a burden for so indefinite a period as the life of Tony Wossidlo (*Dixon v. Gayfer* (2); *Mackreth v. Symmons* (3)). And the form the transaction took indicates that Tony Wossidlo was to rely upon the covenant for payment of her annuity, and not upon any lien over the property (*Buckland v. Pocknell* (4)).

The appeal should be dismissed.

DIXON J. The late Alfred Clifford Catt carried on a business as a land and estate agent and broker. He bought and sold houses and land in Adelaide and its suburbs. In January 1926, in the course of his business, he entered into a transaction with the appellant, who appears to have regarded it as insuring a provision for her old age. She agreed to transfer to him a piece of land, a Commonwealth bond for £200 and some household and other effects. The consideration for the bond and other effects was £100 payable on the transfer and £400 payable in the following January, if she then lived. The consideration for the land was to be an annual sum of £114 payable monthly during her life. Catt died on 30th

(1) (1808) 15 Ves. Jun. 329; 33 E.R. 778. (3) (1808) 15 Ves. Jun. 329; 33 E.R. 778.
(2) (1855) 21 Beav. 118; 52 E.R. 803; (4) (1843) 13 Sim. 406; 60 E.R. 157.
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October 1930 without having transferred the land. After his death the payments of the annuity fell into arrear. The appellant then claimed that the payment of the annuity was secured by a vendor's lien over the land, to protect which she lodged a caveat. The Supreme Court of South Australia, consisting of *Murray C.J.*, *Napier* and *Angas Parsons JJ.*, has held that no such lien exists, and has reversed a decision to the contrary of *Richards J.* In the memorandum of transfer, by which the appellant transferred the land to Catt, the consideration was expressed to be a covenant to pay during the transferor's lifetime an annuity of £114. The deed of covenant referred to recited an agreement by Catt to purchase from the appellant the lands and to pay the annuity therefor. It proceeded to witness that, in pursuance of the agreement and as consideration for the sale of the lands, Catt covenanted that he would, during her lifetime, pay her the annuity by equal monthly instalments.

The lien of an unpaid vendor arises by operation of law, but its existence is commonly ascribed to the fact that he does not intend to transfer the beneficial ownership of his estate except in exchange for the stipulated price. Where an owner of land transfers it in exchange for a contractual promise on the part of the transferee to pay a life annuity, and does not secure the annuity over the land or take it in the form of a rent charge, it seems difficult to regard the transaction as one to which the doctrine can apply so as to give rise to a vendor's lien. But in an early case of *Tardiff v. Scrughan*, cited in *Blackburn v. Gregson* (1), Lord *Camden* decided that an annuity, which children agreed to pay to their parents who transferred their property to them, was secured upon the estate. *Sugden*, in his *Vendors and Purchasers*, the first edition of which was published in 1805 whilst he was still a young conveyancer and before he was called to the Bar, accepted this decision as establishing that, when an estate was sold for an annuity, a vendor's lien was raised in the vendor's favour to secure its payment. But in *Mackreth v. Symmons* (2) Lord *Eldon* expressed the contrary view. His opinion appears to have been that, in bargaining for a life annuity as consideration for his land, a vendor could scarcely intend to rely on the security

(1) (1785) 1 Bro. C.C. 420, at p. 423; 28 E.R. 1215, at p. 1216.

(2) (1808) 15 Ves. Jun., at pp. 350, 352; 33 E.R., at pp. 786, 787.

of the estate in respect of each recurrent payment throughout a long period of uncertain duration. When, some months after the judgment, a motion to vary the minutes came before him (1), Lord *Eldon* took occasion to mention the view expressed in *Sugden's* work, which he described as "a book of considerable merit." After referring to a decision in the Register's Book, he said: "I mention this to show, that I have not withdrawn from the opinion I have expressed upon this subject; as to which, conceiving it to be of great importance, I should, if convinced, be very ready to retract: but, having endeavoured to collect all the doctrine of the Court upon it, I am sure I am right in that."

These rival opinions gave rise to a controversy which seems never to have been finally resolved. Its course may be seen from the following references: *Winter v. Anson* (Lord) (2); *Clarke v. Royle* (3); *Buckland v. Pocknell* (4); *Matthew v. Bowler* (5); see *Barker v. Stickney* (6); *Dixon v. Gayfere* (7). After *Buckland v. Pocknell* (8), *Sugden* said that it set everything again afloat — see *Sugden's Vendors and Purchasers*, 14th ed. (1862), ch. 19, sec. 16, p. 678. It is clear, however, that the actual decisions, as opposed to the various forms of reasoning upon which they have been based, support Lord *Eldon's* view rather than that of Lord *St. Leonards*. This view, particularly in transactions of modern times, seems more in keeping with the intention of the parties, and, in my opinion, it is more consonant with a correct application of principle. Where a covenant, or other contractual obligation for a life annuity is taken by a transferor in exchange for a transfer of a legal estate in land, and the annuity is not expressly secured over the land, it is difficult to understand him as intending to invest the transferee with full beneficial ownership only when and if the annuity is paid. His intention is evident to take the obligation of the covenant in exchange for his land, and to depend upon it for the repayment of his annuity.

For these reasons I think the appeal should be dismissed with costs.

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(1) (1808) 15 Ves. Jun., at p. 355; 33 E.R., at p. 787.
(2) (1828) 3 Russ. 488, at p. 491; 38 E.R. 658, at p. 660; (1823) 1 Sim. & S. 434; 57 E.R. 174.
(3) (1830) 3 Sim. 499, at p. 502; 57 E.R. 1085, at p. 1086.
(4) (1843) 13 Sim., at pp. 411, 412; 60 E.R., at p. 160.
(5) (1847) 6 Hare 110, at p. 111; 67 E.R. 1102, at p. 1103.
(6) (1918) 2 K.B. 356, at p. 363.
(7) (1857) 1 DeG. & J., at pp. 660, 661; 44 E.R., at p. 880.
(8) (1843) 13 Sim. 406; 60 E.R. 157.

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McTIERNAN J. I agree that the appeal should be dismissed. In equity a special agreement is not necessary to give the vendor a lien on the land for the purchase price: the lien is a consequence of the contract. But equity does not bring this consequence about through varying the agreement or making an agreement for the parties, or extending the agreement contrary to its just intent. Hence in *Dixon v. Gayfere* (1), Sir John Romilly M.R. decided that "the contract made between the parties excluded the lien on the estate for the payment of the annuity." In that case the purchaser, in consideration of the conveyance of the property, agreed to pay the vendor £25 and "to grant an annuity of £50 per annum," during the lives of three persons mentioned, to be secured by bond. The contract is, the Master of the Rolls continued, "that an annuity shall be granted, and shall be secured by bond, in consideration of which the estate shall be conveyed. The whole of this and the acts of the parties appear to me to show that the construction of the contract is to discharge the land from the lien, the existence of which would render it almost unsaleable in the hands of the purchaser."

Lord Cranworth L.C. said on appeal (2):—"The subject is canvassed by Lord St. Leonards in his work on *Vendors and Purchasers*, and the conclusion at which I have arrived on all the authorities is, that the Master of the Rolls is right in saying that no general rule can be laid down, and that we must be guided by the circumstances of each particular case. I not only concur with the Master of the Rolls in thinking that there is no lien of necessity in the case of a sale for an annuity, but I agree also in the opinion that the circumstances of this case exclude the notion that the parties could have so intended, and I come to that conclusion very much on the same ground as his Honor, namely, that it could not have been intended to make a purchase of an estate, so that it would be inalienable for so long a period as that of three lives. When the purchase money is a gross sum the charge is easy to deal with, by paying it off, but the consideration here being an annuity for three lives, I confess that I should be slow to believe that the purchaser and vendor could possibly have understood that the estate was to be inalienable

(1) (1855) 21 Beav., at p. 121; 52 E.R., at p. 805.

(2) (1857) 1 DeG. & J., at p. 661; 44 E.R., at p. 880.

for so long a period, as it would be if the annuity were charged on it, since an incumbrance of that description would not be redeemable at the option of the landowner. There are some expressions which have been adverted to in the agreement itself, which, though less conclusive, lead to the same inference, but the substantial ground of my decision is, that it is not possible to suppose the purchaser to have intended to take subject to such a burden." This decision was given in 1857 and the authorities which the Lord Chancellor discussed in his judgment were *Tardiff v. Scrugan* (1); *Remington v. Deverall* (2); *Matthew v. Bowler* (3); *Buckland v. Pocknell* (4); *Clarke v. Royle* (5); *Mackreth v. Symmons* (6). The principle laid down by Lord Cranworth was adopted by Sir James Bacon V.C. in *In re Albert Life Assurance Co.*; *Ex parte Western Life Assurance Society* (7). The Vice-Chancellor also cites Lord St. Leonard's comment on *Clarke v. Royle* in *Vendors and Purchasers*, 14th ed. (1862), p. 673. "There is a marked distinction between a conveyance as for money paid with a separate security for the price whether by covenant, bond or note, and a conveyance expressed to be in consideration of covenants which the purchaser enters into by the deed itself." In *Earl of Jersey v. Briton Ferry Floating Dock Co.* (8) Sir W. M. James V.C. approves of the views expressed by *Leach* V.C. in *Winter v. Anson (Lord)* (9) and says they are not affected by the decision of Lord Chancellor *Lyndhurst*, who came to a different conclusion on appeal. *James* V.C. makes it clear that equity will not assume a vendor's lien, if to do so would be contrary to the manifest intention of the parties. Referring to *Winter v. Anson (Lord)* (9), the Vice-Chancellor said:—"Now let us consider what the effect of these doctrines is, as applied to this case. A man conveys a piece of land for the construction of a public work, in consideration of an annual payment. It appears to me to be quite contrary to the intention of the parties to suppose the vendor was reserving to himself a right at some future time to enter and destroy the public

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(1) (1769) unreported. [Cited in 1 Bro. C.C., at p. 423; 28 E.R., at p. 1216.]
(2) (1795) 2 Anst. 550; 145 E.R. 963.
(3) (1847) 6 Hare 110; 67 E.R. 1102.
(4) (1843) 13 Sim. 406; 60 E.R. 157.
(5) (1830) 3 Sim. 499; 57 E.R. 1085.
(6) (1808) 15 Ves. Jun., at p. 352; 33 E.R., at p. 787.
(7) (1870) L.R. 11 Eq. 164, at p. 179.
(8) (1869) L.R. 7 Eq. 409.
(9) (1828) 3 Russ. 488; 38 E.R. 658.

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work if the annual rent should fall into arrear. Hence, in my opinion, there is no lien in such a case for unpaid purchase-money" (1). In *In re Brentwood Brick and Coal Co.* (2) James L.J. said that the nature of the contract in that case "excludes vendor's lien." In *Barker v. Stickney* (3), Bankes L.J. relied upon the passage quoted by James V.C. in *Earl of Jersey v. Briton Ferry Floating Dock Co.* (4) from the judgment of Leach V.C. in *Winter v. Anson* (Lord) (5), as illustrating a case where a vendor has not a lien. Scrutton L.J. asserted that the question whether a contract operated to create a lien was to be determined by the following considerations:—"As I understand the doctrine of a vendor's lien it is this: If the instrument of transfer shows an intention that the property shall not be transferred absolutely, but subject to a charge in favour of the transferor to secure some benefit to himself, he has a vendor's lien—that is, not a possessory lien, with which the common law is familiar, but a right in equity, the enforcement of which seems to be a matter of difficulty and doubt. If that is the principle to be applied I protest against building up a conventional code of construction by which the intention of the parties is to be determined by the use of particular words. I repel the suggestion that the Court is guided towards the intention of the parties to one deed by the light of what was found to be the intention of the parties to another deed after consideration of the intention of the parties to a third deed. The difficulties in the construction of wills have, in my view, been greatly increased by the way in which cases upon wills used to be argued, and by the elaborate text-books classifying recorded decisions. The problem being to discover what the parties to one instrument intended, the Court ought not to be bound by the construction put upon a particular phrase in another document. As I read the rules proposed by McCardie J. they are attempts to fetter the Court by conventional rules of construction. Any such attempt is extremely undesirable, and for that reason I think the proposed rules should not be followed" (6).

The transaction evidenced by the documents in the present case excludes a vendor's lien. The appellant conveyed to the respondent

(1) (1869) L.R. 7 Eq., at p. 413.

(2) (1876) 4 Ch. D. 562.

(3) (1919) 1 K.B., at p. 125.

(4) (1869) L.R. 7 Eq. 409.

(5) (1828) 3 Russ. 488; 38 E.R. 658.

(6) (1919) 1 K.B., at pp. 132, 133.

all her estate and interest in the land in consideration of the respondent having by deed of covenant of even date covenanted with her to pay to her during her lifetime an annuity of £114. By the deed the respondent covenanted to pay her a sum of £100 upon delivery to him of certain personalty, and also the certificates of title of the land and an executed transfer of the land, and as consideration for the sale of the land the respondent, his heirs, executors and administrators covenanted to pay to her during her lifetime an annuity of £114 by equal calendar monthly payments.

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The reasons given by Lord *Eldon* in *Mackreth v. Symmons* (1) for denying the existence of a vendor's lien to secure payment of the annuities, as such, are applicable to the present case. Furthermore the handing over of the muniments of title for the consideration mentioned, and the acceptance of the annuity granted by the respondent in exchange for the land preclude any assumption that an absolute transfer, without any reservation of any right or interest in the land, was not intended. The transaction does not admit of the view that credit for unpaid purchase money was given "upon the confidence of the existence of such a lien" (*Nairn v. Prowse* (2)).

Appeal dismissed with costs.

Solicitors for the appellant, *Shierlaw, Frisby Smith & Romilly Harry.*

Solicitors for the respondents, *Finlayson, Mayo, Astley & Hayward.*

C. C. B.

(1) (1808) 15 Ves. Jun., at p. 351 ; (2) (1802) 6 Ves. Jun. 752, at p. 759 ;
33 E.R., at p. 786. 31 E.R. 1291, at p. 1295.