Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ebenezer Vickery v. *Charles Wentworth Bucknell, from the Supreme Court of New South Wales; delivered July the* 26*th*, 1877.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR HENRY SINGER KEATING.

THIS is an appeal from the Supreme Court of New South Wales in a suit which was brought by the Respondent Bucknell, claiming, as mortgagor, to redeem valuable properties consisting mainly of cattle runs and stock thereon. The Appellant Vickery was the assignee of the original mortgagees, and was, it is alleged, mortgagee in possession. The answer of Vickery alleges that Bucknell had released the equity of redemption to him; and the principal question to be decided is whether upon the true construction of a somewhat obscure agreement there was such a release.

The original mortgages were, first, a mortgage dated the 2nd of September 1867, by Bucknell to one Neale, of 10,000 head of cattle and 50 horses, branded as described, and all other cattle, horses, and stock on certain stations or runs, and also the stations and runs and the rights belonging to them, subject to redemption on payment of 10,000*l.* on the 2nd of September 1870, and interest in the meantime at the rate of 12*l.* 10*s.* per cent., payable quarterly in advance. Powers are given to the mortgagee, in case of default of payment of principal or interest, to enter into possession and also to sell

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the property; second, a mortgage dated the 26th of March 1868, by Bucknell to one Glass, which contained a second mortgage on the property mortgaged to Neale, and a first mortgage on other runs and stock, subject to redemption on payment by the mortgagor of his promissory note for 15,500*l.* at six months date at maturity, and of such further advances as might be made to him, with power to the mortgagee to enter into possession and sell the property in default of payment or in case of the non-performance by the mortgagor of any of his engagements.

On the 13th of July 1868 Vickery became the assignee of Neale's mortgage, and on the 1st of August 1868 he became sub-mortgagee of Glass's mortgage, and, after the date of the agreement in question, (on the 10th of January 1870,) obtained an assignment of all Glass's interest from his official assignee.

In 1869 Vickery, for a short time, left the colony, having appointed one Richardson as his agent, whose partner, Wrench, appears to have principally acted in the matter of these mortgages.

On the 17th of March 1869, Bucknell having made default in the stipulated payments, possession was taken for Vickery under the mortgages, and a man called Hill placed on the runs to hold possession for him. After possession had been so taken Bucknell went to Sydney and saw Mr. Wrench, and in the discussions which then took place the amount due on the two mortgages was made up and agreed at the sum of 33,000*l.*; an account showing this balance in Vickery's ledger was signed by Bucknell.

Negotiations which led to the agreement in question then took place between Bucknell and Wrench, and afterwards between Bucknell and Vickery himself, but before adverting further

to them it will be convenient to refer to the bill to see what are the issues raised by it, and also to the agreement itself.

The bill is in a simple form. It sets out the mortgages and the transfer of them, and, without any preface, the agreement in question. It then acknowledges and alleges that Bucknell did not muster the agreed number of cattle within the agreed time. It then charges that Vickery was mortgagee in possession; that the property was worth considerably more than the amount due upon the mortgages, and that Vickery had advertised it for sale; it alleges a request for an account, and notice that the mortgagor was prepared to redeem, and concludes with the usual prayer for an account. It also prays for an injunction to restrain the sale. The bill also claims the benefit of certain purchases and profits made by the mortgagee whilst in possession. It contains no charge that the agreement was obtained by fraud or undue means, and although in his answer Vickery relies on the agreement, and asserts that under it he has become and is absolute owner of the property, the Plaintiff in his amended bill does not impeach the agreement on the ground of fraud.

The agreement, then, cannot be impugned on the ground of actual fraud. This, indeed, was admitted by the Respondent's counsel. The rights of the parties therefore must depend on what should be held to be the proper construction of it.

The agreement, which is under seal, bears date the 31st July 1869, and was executed by both parties in duplicate, one on the 10th and the other on the 25th of August of that year.

The contention of the Appellant is, that the agreement contains an actual and present transfer and release of the equity of redemption by way of sale, subject to defeasance and to a revival of the right to redeem, if Bucknell mustered the agreed number of cattle.

There was little difference at the bar as to the law.

It was not and could not be contended that a mortgagee stands in such a fiduciary relation to the mortgagor that he may not contract with him for the purchase of his equity of redemption. Again, it was not denied that where the sale of an equity of redemption in consideration of the debt is established, the mortgage debt will be held to be extinguished, although there may be no express release of it.

The carefully expressed judgment of Vice-Chancellor Kindersley in *Wright* v. *Gossip*, 32 Law Journal, Chancery, 653, was referred to by the learned counsel on both sides as correctly stating the principles by which the Courts are guided in cases of this kind. He says: "Now " I have considered the several cases which have " been cited, and it appears to me that this, at " all events, is clearly established, and was " established at a time when there existed (what " can hardly be said now practically to exist) a " class of persons called money scriveners." Then he says: "The Court then determined " this: that if the transaction between the parties, " whatever be its form, whatever the language " in which it is couched, or the machinery which " was to carry it into effect, designed a loan of " money, and security for that loan, or a debt " existing, and a security for that debt,—if that " were the design of the parties, the transaction " must be redeemable like any mortgage, even " although it be expressed otherwise. In other " words, in that which is to be a mortgage " transaction that is a security, the Court will " not allow the right of redemption to be " crippled and hampered by any arrangement " between the parties at the time." Again, he says: "However, there is no doubt that the " broad rule is this, the Court will not allow the " right of redemption in any way to be hampered

" or crippled in that which the parties intended " to be a security, either by any contemporaneous " instrument with the deed in question or by " anything which this Court would regard as a " simultaneous arrangement or part of the same " transaction. That the Court will allow the " parties by a subsequent arrangement to enter " into a transaction by which the mortgagor " sells, or releases, or conveys, or gives up (call " it what you will) his equity of redemption, and " makes the estate out and out the estate of the " mortgagee, is clear; and the only question now " remaining is this: it being clear that it may " be done *simpliciter*, can it be done, coupling " with it still, not a right of redemption, but a " right of re-emption in whatever terms and within " a given fixed time? Now, there is not one single " case cited in which it has been decided that " that cannot be done, or that there is anything " illegal in it." Now, does the agreement in question disclose a release of the equity with a right of resumption, as distinguished from a right to redeem—a present sale operating as an extinguishment of the debt and of the right to redeem, to be defeasible in the event of the agreed muster being made? Their Lordships, on consideration of the agreement, think it falls short of establishing such a release or sale.

The agreement contains three recitals. They are these: "And whereas default was made " by the said Charles Wentworth Bucknell in " the observance and performance of the cove- " nants and conditions contained in the said " mortgages respectively, and the said Ebenezer " Vickery entered into and took possession of " the said real and personal estate comprised in " the said mortgages, with the exception of an " undivided interest of the said Charles Went- " worth Bucknell in certain stations under " mortgage to the Bank of New South Wales,

" and the said Ebenezer Vickery is now in " possession thereof, as the said Charles Went- " worth Bucknell doth hereby acknowledge; " and whereas certain differences and disputes " have existed between the said Ebenezer Vickery " and the said Charles Wentworth Bucknell with " reference to the amounts due on the aforesaid " mortgages, and it has been arranged and " agreed between them that the amount due " from the said Charles Wentworth Bucknell " upon the said securities was 33,000*l.* on the " 1st day of March last, and that the sum should " form the basis of account between them from " that date." There is not a word in this recital to indicate that this sum is to be the consideration of the purchase of the equity. It is to be the basis of a continuing account. The next recital, and the only remaining one, is: " And whereas " the said Charles Wentworth Bucknell, having " been duly required, in accordance with the " terms of the said mortgages, to pay the said " sum, he has acknowledged his inability to pay " the same, and has requested the said Ebenezer " Vickery to allow payment thereof, with interest " and charges, to stand over until such time not " exceeding six months from this date, as will " allow him, the said Charles Wentworth Buck- " nell, an opportunity of making a muster of " the whole or nearly the whole of the herd of " cattle estimated in number by the said Charles " Wentworth Bucknell at 15,000 head, belonging " to the Mungyer and other stations bearing " the hat brand." Now in this recital, where the object of the agreement is alone stated, no intimation is given that the purpose of it was a sale or relinquishment of the equity of redemption. There is absolutely nothing to intimate that there was to be such a sale or relinquishment, and the debt released. The recital contains only the statement of a request that the

payment of the debt should stand over to allow Bucknell to make a muster of the cattle. The whole of the recitals, as observed by Mr. Davey, point only to arrangements between mortgagor and mortgagee; and it may be observed here, that a great part of the previous discussions had relation to Bucknell's desire to be restored to the management of the station.

Then comes the first clause of the agreement on which the case of the Appellant rests: "That the said Charles Wentworth Bucknell "shall and does hereby transfer and relin- "quish to the said Ebenezer Vickery all his "remaining right, title, and interest in and to, "and also full and complete possession of, the "stations or runs,"—describing them,—"and "all the cattle and sheep belonging thereto, and "generally all other station property, sheep, and "cattle directly or indirectly belonging to him "the said Charles Wentworth Bucknell, and "together with all brands and rights of brand, "and all horses, stores, and other effects, goods, "and chattels of every description in, upon, "about, or belonging to any of the stations or "runs comprised in the mortgages above referred "to, or either of them, save and except the "household furniture, wearing apparel, beds, "and bedding of the said Charles Wentworth "Bucknell, and five horses and one buggy."

Undoubtedly this clause contains words large enough to transfer the equity of redemption, but it is a comprehensive clause sweeping in all the property possessed by the mortgagor (except his household furniture, wearing apparel, &c.), including generally all station property and rights of brand, which latter rights had not been specifically transferred before.

This clause would operate to transfer all the property under both mortgages as security for the consolidated debt; and although it

may be that by the application of the doctrine of tacking the Appellant might have established a charge on the property comprised in each mortgage for the debt due on the other, there was great convenience, to say the least, in having this express charge. Again, this clause transferred to the mortgagee the legal right of property in all the cattle and implements which had been produced or brought on the runs since the date of the mortgages, and which, in after-acquired chattels, would not pass to him at law under those deeds. The effect of this new transfer was undoubtedly beneficial and valuable to the mortgagee, and he may well have desired its insertion in consenting to an arrangement for giving time to the mortgagor. But, however that may be, there is certainly nothing in the clause which indicates that a sale of the equity was intended, except what may be inferred from the words of transfer and relinquishment themselves.

The second clause relates to the employment of Bucknell by Vickery, and his making a muster of the cattle. It is: "That the said Charles "Wentworth Bucknell shall and does hereby "enter into the service of the said Ebenezer "Vickery, at the rate of two hundred pounds "for the period of six months aforesaid, payable "monthly, such salary to commence from "the first day of August next." The third clause is: "That the said Charles Wentworth "Bucknell shall at once proceed to last-named "station, and commence a general muster of "the cattle belonging thereto, for which pur-"pose he, the said Charles Wentworth Bucknell, "shall be allowed the services of two stockmen "at a rate of not over one pound a week each, "and three boys at a rate not exceeding seven "shillings per week each, with usual station "rations for the party, and also the use of

" such of the station horses as he may reason-
" ably require for the purpose of such mus-
" ter, the before-mentioned wages and ex-
" penses being advanced and charged to the
" account by the said Ebenezer Vickery."
These wages, therefore, are to be charged to the account, which is evidently treated as an open account.

The fourth clause is: "That such agree-
" ment shall continue in force for the period
" of six months aforesaid, provided only, that the
" said Charles Wentworth Bucknell shall deliver
" to the said Ebenezer Vickery's manager in
" charge of the station cattle bearing the ⊓ or
" ⌒ (hat) brand, and other brands belonging
" to the said station, and assist in having the same
" marked or branded with a distinguishing mark
" or brand before the same are again turned out,
" such delivery to be made at the following rates,
" that is to say, six thousand head (6,000) over
" six months old at this date within the first
" three months, and at least one thousand two
" hundred and fifty (1,250) over the like age for
" each of the three succeeding months."

The fifth and sixth clauses provide for what is to happen upon the muster being made, namely, the further employment of Bucknell for two years, and the carrying on of the station for the like period by Vickery, and carrying it on clearly as mortgagee in possession. The fifth is: " It
" is further agreed between the parties hereto,
" that upon the said Charles Wentworth Buck-
" nell making the muster and delivery of cattle
" as aforesaid, he the said Ebenezer Vickery,
" subject to and without prejudicing any of his
" rights, powers, or authorities under his said
" securities"——therefore, there is an express reservation and saving of all those securities,——" will, upon its being shown to his
" satisfaction that the said Charles Wentworth

" Bucknell can work the station property, so as " to pay the debts due and to accrue thereon, " for principal, interest, expenses, and further " advances within a reasonable period, not " exceeding two years, he the said Ebenezer " Vickery will engage the said Charles Went- " worth Bucknell to assist in the management of " the property at the like salary as herein- " before mentioned, but subject to such provisions " and terms as he the said Ebenezer Vickery " may think reasonable." The sixth clause says: " And further that the said Ebenezer " Vickery will, for the like period, unless a suit- " able opportunity for selling shall offer, as " herein-before mentioned, carry on the said " stations, provided that the said mortgage debt, " including growing interest and further advances, " can and shall be steadily and regularly reduced " without lessening the number of the cattle over " six months old below ten thousand head " (10,000), at the rate of two thousand pounds " (2,000*l.*) in each six months." Then the last clause is by way of proviso: " Provided lastly, " that notwithstanding anything herein-before " contained the said Ebenezer Vickery, his " executors, administrators, or assigns, shall be " at liberty at any time, should a favourable " opportunity offer, to sell the said stock and " stations or any part thereof, for such price or " prices as to him or them shall seem adequate, " and after reimbursement of principal, interest, " costs, charges, and expenses advanced or " incurred or to be advanced or incurred by the " said Ebenezer Vickery in connection with the " said stock and stations, the surplus if any, shall " be paid to the said Charles Wentworth Buck- " nell." This clause provides that Vickery may sell the property, notwithstanding the agreement to give time, and that in case of his so selling, the surplus shall be paid to Bucknell. This surplus

would, as it seems to their Lordships, belong to Bucknell, even if the sale took place within the first six months after the date of the instrument.

Can it be said that upon the execution of this agreement the parties no longer stood in the relation of debtor and creditor, and that the relation of mortgagor and mortgagee was at once changed to that of vendor and purchaser? It was argued that this change did take place, and continued during the six months allowed for the muster, the parties being remitted to their former position if the muster was duly made. But it cannot be disputed that Vickery might have sold the property during the six months if a favourable opportunity had offered. In that event he was bound to pay the surplus, if any, to Bucknell. Surely under an arrangement of this kind Bucknell would have been entitled to stop a threatened sale, and to redeem the property by paying the money due on the mortgage securities, and such payment would evidently be the payment of an existing debt by an existing debtor.

Their Lordships, therefore, think it is not established that the agreement operated to extinguish either the debt or the right to redeem during the probationary period of six months.

It is nowhere stated in the agreement what is to happen if the cattle should not be mustered.

If the parties meant that the mortgage debt should stand over, and be, as it were, in abeyance for six months, and that, if the muster were not made within that time, the mortgage should then be converted into a sale of the equity of redemption, and the debt thereupon extinguished, their Lordships are not prepared to say there would be any objection to such an agreement. But this agreement is certainly not expressed in the written instrument, nor can it in their view be clearly implied from it.

The recitals of the instrument certainly do not

state any agreement of that character, nor are the terms usually employed in such cases to be found in the body of it. There is no release of the mortgage debt or covenant not to sue; no consideration for a sale is stated, nor do the words "equity" or "right of redemption" anywhere occur, nor indeed is any language employed descriptive of a sale. The agreement in effect provides that Vickery shall not enforce the debt for six months, and if the agreed muster takes place, then that a further time shall be allowed Bucknell to pay it off, and provision is in that case made for the further employment of Bucknell at the station. What would happen if the muster was not made appears to be that Vickery's full rights under the mortgages and the charge in the agreement would remain, and he would befreed from the obligations to give further time to Bucknell, and to allow him to remain in his service at the stations.

It is admitted on both sides that the question mainly turns on the construction of the agreement. The oral evidence of what took place during the discussions which preceded the agreement is contradictory, although, according to the view of Mr. Justice Faucett, it is more favourable to the Appellant's than to the Respondent's case. The fact probably is that the import of these arrangements was not fully present to the minds of the parties. This seems to be the view which Mr. Justice Faucett formed of the agreement itself. He says: "It appears to me "that the Defendant, in preparing the agree-"ment, was trying to accomplish two things. "He was trying to obtain a release of the "equity of redemption, and at the same time "to secure all his rights and powers under "the mortgage deeds. Now it appears to "me that these two objects are utterly incon-"sistent. If by any instrument the equity of

" redemption is released by the mortgagor, " the relation of mortgagor and mortgagee " ceases to exist. The releasee is no longer " the mortgagee; he is the owner. And *a* " *converso*, if the mortgagee retains his rights, " powers, and authority under the mortgage " deed, the mortgage must be still existing, " and in such case it seems very like a contra- " diction in terms to say that the equity of " redemption has been released."

Much reliance was placed by the Appellant's counsel on the letter of Messrs. Deane and Deane, Bucknell's solicitors, of the 31st July 1868. That letter is written to Messrs Allen, Bowden, and Allen, who are Mr. Vickery's solicitors, and is as follows: " Dear Sirs,—Bucknell v. Vickery. " We return you herewith draft agreement and " one prepared by ourselves which we think is " nearer what such an agreement ought to be. " With reference to the agreement prepared by " you, there seems little more in it than a confir- " mation of powers your client already has, beyond " asking to do what in his present circumstances " it would be very imprudent for him, to release " his equity of redemption; at the same time, " if there is anything that he can safely do to " help Mr. Vickery we have his assurance that " he will do it."

In some sense no doubt the agreement may be said to release the equity of redemption, and the solicitors may have been apprehensive that greater effect might be given to the words than was intended in the substance of the agreement.

Letters afterwards passed between the Appellant and the Respondent themselves. It seems to their Lordships that no safe inference can be drawn from them, that it was understood that all right to redeem the mortgages should be extinguished, even if a contrary intention is not to be gathered from them.

The first of these letters is one of the 4th August 1869, from Vickery to Bucknell. It says: "Dear Sir,—As you have not chosen to "accept the proposals I made to you in refer- "ence to Mungyer, I now, acting under advice, "decline all further negotiations, and renew my "demand for payment of the mortgage debt. "I regret this out turn after so much time and "trouble taken to serve you, but the interests I "have at stake are too serious to be trifled "with any longer. On coming to Sydney, you "represented that my security was ample and "sufficient; that there were over 15,000 cattle; "that you could put 12,000 on the run as soon "as rain came. You stated that unless you "could put that number on the run and deliver "them, you would not attempt to work it out, "but say so at once and abandon the whole. "You agreed to the amount of indebtedness, "also to muster, at least, 10,000 cattle, and fail- "ing this, to retire from the property." These passages undoubtedly look as if a total giving up of the property had been referred to in their negotiations; but with reference to what subsequently occurs in this letter it seems that this, if so, was subject to modification.

The letter thus continues: "To avoid any "future trouble or misunderstanding, it was "agreed to put the whole in writing; while this "is being done you make unreasonable demands "for money. You again endeavour to throw "doubts upon your indebtedness. You throw "out threats of looking after yourself in an- "tagonism to me. You manifest a very un- "friendly temper and spirit, and when an "agreement is prepared by Mr. Wrench (acting "as an intermediate party) to meet (and in view "of) all circumstances, you refuse to sign it, and "propose, what my advisers say, must put an "end to all negotiations. It is my intention to "work the station with all due economy with

" the view of reducing the debt, unless a good " opportunity offers of selling." Now this and the subsequent passages clearly acknowledge a continuing debt, and therefore a right to redeem the property under some circumstances. It may be that these passages were pointed only to the case of the agreement not being signed, and the cattle mustered in the way agreed, but this can scarcely be so looking to the first part of the letter, which assumes that the negociations were at an end, and the probability that the agreement would not be signed. The language is general, and may have been used as an inducement to Bucknell to sign the agreement. I will read this passage again. "It is my intention to work the " station with all due economy with the view of " reducing the debt, unless a good opportunity " offers of selling. I shall only be too glad if " at any time you are in a position to repay me " and take to the property again." The next passage is still stronger to show that the door was not to be condsiered as closed against the right to redeem. "I am quite uncertain whether " I shall purchase the adjoining runs from you " and your brothers; but if that purchase should " be completed, it will be done with a view to " the more profitable working of the account, " and you will have the option of taking over " these runs at cost price and charges should " you redeem the property. If you will send me " a list of your personal property, five horses " and one buggy, they shall be sent wherever " you desire; but it is not desirable for you " at present to return to the station." It could scarcely have been meant to give Bucknell this option (which, it is to be observed, assumes him to possess the power to redeem), if he refused to sign the agreement, and to withhold if he did sign it.

These passages certainly seem open to the

construction, and the not unreasonable construction, that they were written with a view to the agreement itself, and to induce Bucknell to sign it. Vickery appears in effect to say, Whatever may happen, if the station proves profitable, nay more, if I purchase the property of your brother, you shall still have the whole on payment of the debt and of the cost price of the purchase,—you shall redeem the property.

The answer of Bucknell is on the 9th of August. He says: "Dear Sir,—I have been "favoured with the receipt of yours of 4th "instant; I hope you will still admit of negotia- "tions for the arrangement of my mortgage "debt and the future management of Mungyer "Station, with the view of more perfectly "securing your interests, as well as affording "me a fair chance of securing some ultimate "benefit to myself. I will feel it my duty to "have this further explained to you. Mean- "while I ask permission to reply to some "of the observations in your letter." Then follow some passages which are not material. Then he says: "You make allusions to my "having made use of threats and displayed a "very unfriendly temper; just suppose our "position to be reversed, and think what you "would do and say. I have already given some "of my reasons for not signing the agreement "proposed, and cannot help regretting that "intermediate parties and advisers should have "sufficient influence with you to interfere so "materially with our mutual interests. You "must not forget that although you have a "large sum of money at stake, I have greater, in "the shape of all I have worked for all my "life. I note what you say about working "the station with all due economy. This I have "no doubt of, and thank you for your assurance "of repossession on repayment of your claim.

" I also appreciate your kindness in promising " me the adjacent runs belonging to my brothers, " should you complete the purchase, at cost price " with charges." It would certainly seem as if Bucknell had understood Vickery's letter to which he was replying as an intimation that at any time, if the station proved profitable, he should be permitted to redeem upon repayment of the mortgage debt, and to take the adjacent runs, if purchased of his brothers, at cost price. After having before objected to sign the agreement, he is apparently satisfied by the assurances in Vickery's letter to which he here refers, and on the next day, the 10th August, he signed it.

A letter of Vickery, written after the execution of the agreement, was relied on, and perhaps too strongly relied on, by the learned Judges below in support of the case of the Respondent, but it is not without significance. That letter is dated the 26th August 1869, and was written by Mr. Vickery to Mr. Hill, his agent at the station. He says: " Dear Sir,—Mr. C. W. " Bucknell returns to Mungyer with his family, " you will let him occupy his former apartments. " Mr. Bucknell is under engagement to muster " and deliver to you, as my representative, 6,000 " cattle within three months, and at the rate of " 1,200 per month for the following three " months. In doing this please afford him " reasonable assistance. Of course I am still " the mortgagee in possession, but it is my " wish that Mr. B. should have an opportunity " afforded him of working the property out of " debt, if he can, and then assume ownership. " While, therefore, you continue to represent " my interests as before, and to supervise all " expenditure and make the payments, please " aim in an amicable way to work with Mr. " Bucknell, so as to improve the position of the " account, and fall in with his propositions

" whenever you are convinced they will ensure " to that end."

Too much importance ought not to be attached to the phrase " mortgagee in possession," for in some sense Vickery might consider himself to be so even if the agreement bore the construction now placed upon it on his behalf; but the substance of the letter conveys the impression that he did not suppose he had become the purchaser of the estate.

The subsequent acts and conduct of Bucknell are certainly more consistent with the view that he had parted with his interest in the property than with his present contention, but they cannot have the effect of altering the character of the agreement; and it is to be observed that upon his failure to muster the cattle, Bucknell had been entirely deprived of the possession and management of the property, and must have known that under any circumstances it would be a long time, if ever, before he could be in a condition to redeem it.

The learned Judges who differed in opinion (the Chief Justice dissenting from his two colleagues) have delivered able judgments in support of their views. That of the Chief Justice is entitled to great consideration; but for the reasons above given, though not without some hesitation, their Lordships think the decree of the Court below should be sustained.

No alteration in the terms of the original decree has been asked for, except as regards the omission of costs, in the direction that if Bucknell should make default in payment of what should be found due to the Defendant, the bill should stand dismissed. In that event Vickery would no doubt be entitled to his costs, and the proper direction would seem to be that the bill should stand dismissed with costs to be paid by the Plaintiff, excepting the costs of so much

of the suit of which the costs are by the said decree directed to be paid by the Defendant to the Plaintiff; but as subsequent costs are reserved by the decree, with liberty to either of the parties to apply to the Court, it was probably intended that these costs should be subsequently given. After this intimation of their Lordships' opinion it will not be necessary to order any alteration in the decree.

In the result their Lordships will humbly advise Her Majesty to affirm the decree of the Court below, and to dismiss this Appeal with costs.