

NOVEMBER 27TH, 1914

*H. H. VIVIAN CO. LIMITED v. CLERGUE.

Execution—Judgment for Part of Purchase-money of Land—Inability to Convey Land if Money Realised by Execution—Agreement—Construction—Assignment—Merger—Surety—Withdrawal of Execution except as to Costs.

Appeal by the plaintiffs from the order of KELLY, J., ante 109, declaring that the plaintiffs were not entitled to enforce their judgment and execution against the defendant except as to costs.

The appeal was heard by MEREDITH, C.J.O., FALCONBRIDGE, C.J.K.B., MAGEE and HODGINS, J.J.A.

A. H. F. Lefroy, K.C., for the appellants.

G. F. Shepley, K.C., and H. S. White, for the defendant, the respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—The circumstances under which this judgment was recovered are set out in *H. H. Vivian Co. Limited v. Clergue* (1908), 16 O. L.R. 372, and *Clergue v. H. H. Vivian & Co.* (1909), 41 S.C.R. 607, where the facts are all detailed. The additional feature is that, since judgment was pronounced in the Supreme Court of Canada, the appellants have sold the mining property for \$75,000, after having forfeited it under a power in that behalf contained in the agreement of the 10th March, 1905, the terms of which are discussed in the reports already referred to.

Undoubtedly, prior to the act of forfeiture mentioned, if the respondent had paid the amounts for which judgment has been recovered, he would have paid them as the person originally liable for the purchase-money as purchaser of the mining property. The assignment of that agreement, according to the previous judgment, did not release him; in fact, the right to assert that he remained liable is expressly preserved in the assignment. So long as the same situation existed as formed the foundation of the judgment mentioned, the respondent's position did not differ from that of a mortgagor who, being liable on covenant to the mortgagee, sells his lands to a third party. His conveyance does not prevent the mortgagee from holding him liable for the

*To be reported in the Ontario Law Reports.