

secure the defendant in respect of his suretyship for his father, or an actual sale with a right of repurchase, is the real issue here. If the latter, then the condition that, on failure to exercise the option within the stipulated time, Thomas McConnell should lose his right to repurchase, is not a penalty or forfeiture, but a privilege, and its terms must be strictly complied with: *Barrell v. Sabine*, 1 Vern. 268; *Perry v. Meadowcroft*, 4 Beav. 202; *Gossip v. Wright*, 9 Jur. (part 1) 592; *Shaw v. Jeffrey*, 13 Moo. P.C. 432.

Mr. MacGregor seemed to attach much weight to *Samuel v. Jarrah Timber and Wood Paving Corporation*, [1904] A.C. 323, and other cases of that nature, but they can have no application to this case. Those are all cases in which, as part of the original transaction, the borrower conveyed to the lender the estate as security, by instrument absolute in form, and where, at the same time and as part of the original transaction, it was agreed between the parties that the grantor might repurchase within a named period, failing which the right should cease. In those cases, in each of which the grant was in fact a security, it was not competent for the parties by any contemporaneous contract to override the equitable doctrine "once a mortgage always a mortgage," and those cases simply affirm that well-established equitable doctrine.

But a mortgagor may, by subsequent independent transaction, extinguish in favour of his mortgagee his equity of redemption, at the same time acquiring the option to repurchase; and, if such be the real agreement, the equity of redemption ceases to exist, and the former mortgagor has only an option or privilege.

In the present case, the mortgage to Mr. Smoke for some \$8,000 had been made some months previously, and it was competent for Thomas McConnell on the 20th December, 1906, to extinguish his equity of redemption in favour of his mortgagee or the defendant, his surety, acquiring as part of that arrangement an option to repurchase. If such was the real agreement between the parties, Thomas McConnell thereafter had no rights incident to the right to redeem, but only such as the option gave him; thus, the question resolves itself into one of fact, what was the real nature of the agreement between the parties?

The written agreement of the 29th December, 1906, purports to set forth the terms in plain, unmistakable language, and I see no reason for thinking that it does not contain the real agreement.