court should think proper, or to enter a verdict for the defendant.

In Michaelmas term *Nanton* obtained a rule to reduce the verdict to one shilling, or to such sum as the court should see fit, or to enter a verdict for the defendant on the plea of payment into court.

In the same term *J. D. Armour* obtained a cross rule to increase the verdict to £450.

In this term both rules were argued

J. D. Armour for the plaintiff cited *Lethbridge* v. *Mytton*, 2 B. & Ad. 772; *Gibson* v. *Boulton*, 3 U. C. C. P. 407; *Carlisle* v. *Orde*, 7 U. C. C. P. 456; *Raymond* v. *Coopar*, 8 U. C. C. P. 388; *Kennedy* v. *Solomon*, 14 U.C. Q B. 623; *McDonell* v. *Thompson*, 16 U. C. Q. B. 154; *Stuart* v. *Mackison*, 23 U. C. Q. B. 135; *Randall* v. *Raper*, 1 E B. & E. 84; *Vane* v. *Lord Barnard*, Gilb. Eq Rep 7; Mayne on Damages, 101; Dart. V. & P. 507, 3rd ed.; Sug. V. & P. 610, 14th ed.

J H. Cameron, Q C., for the defendants, cited *Kennedy* v. *Solomon*, 14 U.C. Q. B. 623; *Graham* v. *Baker*, 10 U. C. C. P. 426; *Sikes* v. *Wild*, 4 B. & S. 421; Mayne on Damages, 89.

Draper. C. J.—It appears to me that *Lethbridge* v. *Mytton*, 2 B. & Ad. 772, governs this case. Sir William Follett, in argument for the defendant in that case, put the question in the most favorable light for his client. But Lord Tenderten remarked, "If the plaintiffs are only to recover a shilling damages, the covenant becomes of no value at law." In this case there are other lands on which the defendant's mortgage is a charge, but the plaintiff's land is nevertheless charged with the whole sum due on the mortgage. I think the plaintiff's rule to increase the verdict must be made absolute. This will most probably drive the defendant into equity, but in a court of law I do not see my way to another conclusion.

In my opinion the rule to increase the verdict to £450 should be made absolute, the other rule discharged.

Hagarty, J.—There is a dearth of authority in our books as to the damages on covenants for title.

Mr. Mayne gives it as his opinion that there is no difference of principle between a covenant against encumbrances and a covenant to pay off encumbrances, and that if so the law is settled by *Lethbridge* v. *Mytton*.

If the point were unaffected by authority, it would not be easy to understand why the plaintiff here, who has bought a property with a covenant that his vendor had done no act to encumber, should not recover such damages for a breach of that covenant as would put him in the same position as if his vendor had truly performed his part of the contract. We have no power to apportion the money over the various properties affected; the only complete relief we can give is to award the full amount to pay off the encumbrance. The parties would then have to adjust their equities elsewhere.

Lethbridge v. *Mytton*, would, we may assume, have been decided in the same way, if the encumbrance which the defendant covenanted to pay off had extended over other properties than those included in the settlement.

It is of course to be noticed that the mortgage money here considerably exceeds the purchase money and interest. It has been usually held that in the absence of fraud, the latter amount was the measure of damages for breach of covenant of seizen or right to convey. The well-know case of *McKinnon* v. *Burrowes*, 3 O. S. 593, discusses the point at large. An analogy is there sought to be established with the sale of chattels. It is put somewhat as the case of a consideration wholly failing, and the purchaser recovers back his purchase money and interest.

In Mayne, p. 95 *et seq.*, the question is discussed. "The conveyance may, notwithstanding the defect of title, pass something to the covenantee, or it may in effect pass nothing at all." He cites a Massachusetts case, in which it was said, "No land passing by the defendant's deed to the plaintiff, he has lost no land by the breach of the covenant: he has lost only the consideration paid for it. This he is entitled to recover back, with interest to this time."

The other case is also put, and an old case of *Gray* v. *Briscoe* (Noy 142) is cited. "B. covenants that he has seized of Blackacre in fee simple, when in truth it was copyhold land in fee, according to the custom. By the court The covenant is broken. And the jury shall give damages in their consciences, according to that rate, that the country values fee simple land more than copyhold land."

In the case before us the plaintiff at all events acquired the equity of redemption in the estate, with right to pay off the encumbrance. The evidence shews that he has largely improved the property, trebling its value since he acquired it. He contracted for an estate free from encumbrance, and defendant contracted that he had not encumbered. Had he covenanted to pay off the existing mortgage he would, on the authorities, be liable to damages for the whole amount thereof. I am unable to recognize any substantial distinction between the cases. American authority seems opposed to the English doctrine. Mr. Sedgwick, in his work on Damages, questions the correctness of *Lethbridge* v. *Mytton*.

It is said that on a reference as to title in equity, an outstanding mortgage is treated not as a matter of title but as of conveyancing. I presume that on a contract of sale in terms similar to those of the covenant before us, the vendor would be forced to relieve the property of the encumbrance by payment or otherwise. After conveyance executed a court of equity would probably compel the specific performance of a covenant to pay off an encumbrance by an appointed time. Where, as here, it is merely a covenant that the vendor has done no act to encumber, the only remedy is by action for damages, and I cannot see why such remedy should not be complete, and not merely illusory, as it would be if defendant's argument prevailed. As *Parke*, J., says, in *Lethbridge* v. *Mytton*: "At law the trustees were entitled to have the estate unencumbered at the end of a year from the marriage. How could that be enforced unless they could recover the whole amount of the encumbrances in an action on the covenant."

Morrison, J., concurred.

Rule absolute to increase verdict.