

The appeal was heard by MULOCK, C.J., MAGEE, J., CLUTE, J.

Walter Mills, Ridgetown, for plaintiff.

E. F. B. Johnston, K.C., and J. M. Pike, Chatham, for defendant.

CLUTE, J.:— . . . The two questions for decision on this appeal are: First, is plaintiff barred of the right to redeem by the Statute of Limitations? Second, if not, did plaintiff effectually release his equity of redemption to defendant by the agreement of 27th April, 1895.

In the prior action Armour, C.J., had declared the deed of 28th March, 1893, to be in fact a mortgage, and plaintiff entitled to redeem on payment of the amount found due in respect thereof, and in default to a sale of the lands, with a reference . . . to take the accounts. Instead of proceeding under this decree, the parties entered into a new agreement on 27th April, 1895; and this case turns largely on the legal effect of this agreement, having regard to what was done and left undone by the parties to it.

The trial Judge disposed of the case upon the ground that defendant had been in possession since 27th April, 1895, and any claim plaintiff may have had was barred by the statute at the time the writ was issued on 29th June, 1905. I am unable to reach this conclusion. In the first place plaintiff did not enter as mortgagee. He claimed under an absolute deed. It is true that the judgment in the former case declared him to be a mortgagee, but down to the date of the judgment, at all events, he had no right to avail himself of that position, as he claimed adversely to it: *Faulds v. Harper*, 11 S. C. R. 639. From November, 1894, he continued in possession, and was in possession when the agreement of 27th April, 1895, was made. Under that agreement the parties expressly fix the day for redemption as 1st July, 1895, and for payment of the amount due. But what amount? What is to be ascertained as provided in the agreement . . . by taking the amount of the advances made by defendant up to 1st February, 1895, therein fixed at \$3,076.01. The receipts are fixed at \$1,679.29, and the estimated receipts to 1st July at \$412.50, and estimated expenditure for taxes \$161.50 and interest on the same \$195. It then states the prior mortgage to be \$6,000. Then follows this important clause: "The amount of the judgment