

bargain or agreement for a loan, recover back the corpus of her separate estate, even after it gets into the husband's possession.

Bill dismissed with costs.

Howell, Q.C., and Darby for the plaintiffs.

Bradshaw and Chaffey for the defendant, the wife.

Baker for the defendant Didion.

TAYLOR C.J.]

[Aug. 14.

FULLERTON *v.* BRYDGES.

Conveyance of land subject to mortgage—Implied undertaking to indemnify grantor—Taking deed as security for debt—Evidence—Recital in deed not always an estoppel.

This was a suit in equity, in which the plaintiff sought to compel the defendants to indemnify him in respect to a mortgage upon certain land, which he had conveyed to two of the defendants, subject to the mortgage, under the following circumstances :

Plaintiff being indebted to the three defendants in the sum of about \$16,000, in November, 1893, executed a bill of sale to them of a large amount of personal property, and assigned all book accounts, debts, or sums of money owing to him.

This bill of sale contained a recital that the plaintiff had contracted and agreed with the defendants for the absolute sale to them of the same, and of the equity of redemption in the land in question granted by him to them, by deed of even date, in consideration of the release by the defendants of the plaintiff from his indebtedness to them. The conveyance of the equity of redemption in the lands was made to the defendants, Brydges and W. R. Allan, the name of the defendant Andrew Allan having been struck out of the conveyance before execution. Plaintiff contended that this had been fraudulently done for the purpose of preventing him from resorting to his remedy against Andrew Allan on the implied covenant to pay off the mortgage. Plaintiff also gave some evidence to show that the defendants, or one of them, had verbally agreed to indemnify him against the mortgage.

The learned judge, however, dismissed the charges of fraud, finding no evidence to support them, and he also found upon the evidence against the alleged verbal agreement to indemnify, and that the defendants had not "purchased" the land in the ordinary sense of that word, but had merely taken the conveyance of the equity of redemption as security, intending to make good to plaintiff any surplus which they might realize out to the property transferred to them, and at the same time to release the plaintiff from all his liability to them.

Plaintiff's counsel then contended, on the authority, of *Waring v. Ward*, 7 Ves. 332, and *Dart on Vendors and Purchasers*, 6th ed., p. 628, that the defendants were bound to indemnify him against the mortgage, even without any express stipulation to that effect.

Held, that the right of indemnity under such circumstances, there being no express stipulation on the subject, arises from the sale of the incumbered land,