

plan, his boundary on the lower or South-East side being made up partly by one of the lots so purchased by him, and partly by a piece of land also purchased by him, coming originally from one Decary, the boundary of which was not at right angles with the other boundaries of the lots he purchased from the Respondent, in consequence of which his said lots Nos. 1 and 3, although of sufficient width in front, were too narrow in the rear, giving him less land than he had purchased; that the lots he so acquired from Respondent, were the same as had been previously sold to one Easton, and by him retroceded to Elizabeth Clarke; that she was to have purchased part of the Decary lot to make up a supposed deficiency to Easton; that Easton's opposite side boundary line had been moved further up during his time to make good said deficiency; that the Respondent had not executed a deed as he was bound to do, and had not made good the deficiency of the land. That Elizabeth Clarke, by a codicil to her Will dated 9th January, 1849, made certain changes in her Will and Testament of the 8th September, 1847. By the codicil the legacy bequeathed to Respondent was only given him in trust as Fiduciary Legatee for testatrix's grand-children, the children of the marriage of her son Patrick with Maria Wait, who were of age, and had an interest as proprietors; that the Appellant had made a tender of the money due, viz: the £200 on the 9th January, 1858, and called on the Appellant to execute a deed.

This Plea concluded with prayer for the dismissal of the Action, and the condemnation of the Respondent to execute a deed, jointly with the Grandchildren.

*Fourthly.*—The same in substance with the last Plea, concluding with prayer for acts of Appellant's willingness to pay £200, and that Respondent be condemned to execute a Deed, Appellant reserving his recourse for deficiency of measurement, if any.

The Respondent answered that the promise of sale had been executed by the vendor by the delivery of the land, and the purchaser was bound to pay the price; that the Appellant had never objected to the title until he filed his plea, and that the title was good and sufficient, and had been so acknowledged by the Appellant himself, who was well aware of the nature of Respondent's title, and had purchased all his other lots anterior to the promise of sale and with a perfect knowledge of the existing boundaries. Appellant was well aware that he, the Respondent, had always been, and still was, ready and willing to execute a title deed to the Appellant, which Appellant could have whenever he chose to accept of it. Respondent had formally tendered such deed by Easton, Notary, 29th December, 1857, and that the non-execution of it was Appellant's own fault, that he never had had any real intention of executing such deed and his pretended tender was a delusion, yet he kept possession of the land and refused to pay; that to Appellant's pretended tender of the 9th January, 1858, Respondent offered immediate compliance with the promise of sale, yet Appellant had himself failed and refused to carry out his pretended offer and treated it as nugatory; it had not been repeated by his plea, nor the promise of sale asked to be rescinded; that as to the pretext of a deficiency, none had ever been ascertained, and there was none; but it could be remedied if so ascertained, and the Appellant thereby put in a position to claim for a deficiency, and if there were a deficiency it was no reason for Appellant refusing to pay. The Respondent in his conclusions prayed acts of his willingness to execute such title deed.

The Respondent produced 1st, copy of the promise of sale; 2nd, copy of Judgment in the Queen's Bench, 2nd October, 1857, dismissing action of Clarke *vs.* McGregor; 3rd, tender of title, demand and protest, Easton, Notary, 29th December, 1857, and subsequently at *Enquête* copy of the Will of Elizabeth Clarke, 8th December, 1847, Jobin, Notary.

He further proved at *Enquête* Appellant's possession of the lots under the promise of sale and that to an extent of at least 321 feet in width in front as fenced in, also that Appellant had removed the fence constituting the boundary between the lots in question, and the others he had purchased. The Appellant produced his title to the other lots, of dates long anterior to the promise of sale, (all originally derived from Elizabeth Clarke, save the portion of land purchased from Decary); the former sale of lots Nos. 1 and 2 to Easton and his retrocession; a plan of the lots, and a codicil to E. Clarke's Will, dated 9th January, 1849, and copy of an act of pretended tender to McGregor of 9th January, 1858.

The following are extracts of the important parts of the documents of record:—

E. Clarke's Will and Testament of the 8th September, 1847.

*Fifthly.*—And as to the remainder of all and every my property, real or personal, moveable or immoveable, debts due me and other wherever and whenever the same may be found due, owing, belonging or in anywise to me, belonging or payable, and to whatever amount or extent the same shall come or amount to, without any exception, restriction or reserve, excepting always the before mentioned legacies and bequests, I give, devise and hereby bequeath the same to the said Gregor McGregor, my beloved husband, hereby and for that purpose in the most ample manner instituting him, my universal and residuary legatee.”

Codicil of 9th January, 1849.

*Firstly,* I declare that the legacy by me in and by said last Will and Testament of date the said eighth day of September, one thousand eight hundred and forty-seven, made to my said husband, that is to say, all that is thereby bequeathed to him is in trust for my grand children, issue of the marriage of my son Patrick Stevenson with the late Maria