containing about 4 acres. In 1838, he cleared and fenced it as part of lot 22. In 1868, defendant's son purchased lot 23, and in 1875, sold it to defendant, the land in question still continuing, and for a long time thereafter, within the plaintiff's fence.

Held, Gwynne, J., doubting, that there was nothing in the evidence, as set out in the case, to shew that plaintiff by his acts or conduct had ever led to the belief that he did not intend to assert his possessory title to the land in question or that he had abandoned it so as to estop him in equity from afterwards claiming it.

M. C. Cameron, Q. C., for the plaintiff,

Hector Cameron, Q. C., and *J. Barron* for the defendant.

THE MERCHANTS' BANK v. BOSTWICK.

Promissory notes—Mortgage as collateral security for mortgagor's indebtedness—Liability.

In May, 1873, a firm of H. & B. being indebted to plaintiffs' bank to $60,000, and requiring security therefor, B. executed a mortgage on his real estate for that amount, the mortgage reciting that it was for money lent on notes made by B., and endorsed by defendant and Mrs. P. In October, the indebtedness having increased to $90,000, the bank required further security, and notified defendant and Mrs. P. of the fact, valuing B.'s mortgage at $40,000. It appeared that B. had been signing defendant's and Mrs. P.'s name as endorsers to the notes, as he stated, with their consent, which defendant denied, stating that the notice from the bank was his first intimation of it. The bank required a mortgage from defendant for $25,000, as also from Mrs. P. for the same amount, which they agreed to give. The defendant's mortgage was dated 8th October, reciting that the firm were indebted to the bank in a sum exceeding $25,000 for moneys theretofore lent and advanced by the bank to them on promissory notes made by B. and endorsed by the firm, and by defendant and Mrs. P., and that defendant had agreed to give the mortgage as a collateral security for said sum of $25,000, part of said indebtedness, whether represented by the notes then discounted or by renewals or substitutions therefor, and similarly made and endorsed. There was a covenant by the defendant that he or B., or the firm or Mrs. P., would pay, &c., all the said indebtedness represented by said notes when due, or by any renewals or substituted notes. To prevent the bank noticing the difference in the signatures, B. signed the defendant's name to the mortgage, which defendant afterwards acknowledged to be his signature. At the same time, a mortgage for a like sum from Mrs. P. was drawn up, B. likewise signing her name, and she acknowledging it to be her signature. After the mortgage was executed, the notes were from time to time renewed, down to the firm's insolvency, in 1877, by notes similarly endorsed—namely, by B. writing defendant's and Mrs. P.'s names as endorsers, with, as he stated, their consent, which defendant denied. The defendant stated that when the mortgage was executed he believed, and was so told by B., that the indebtedness was only $60,000, but evidence was given to shew that defendant knew, or must be presumed to know, that it was the larger sum. The plaintiffs sued defendant in the first seven counts of the declaration as endorser of their notes, and in the eighth count on the covenant in the mortgage. After action commenced the bank realized on B.'s mortgage $35,000, and received from the the firm's estate $6,300. The jury found for the defendant on the first seven counts, but for the plaintiffs on the eighth.

The Court refused to interfere with the plaintiffs' verdict on the eighth count, holding that there was no evidence of payment thereto; that the defendant knew, or must be presumed to know, that when the mortgage was paid there was still an existing indebtedness of $50,000 to which the covenant would apply; that defendant's and Mrs. P.'s mortgages were for the several sums of $25,000 each, and not joint securities for that amount. The Court granted the plaintiffs a new trial on the first seven counts, with a direction to be given to the jury that the bank, under the circumstances, might be warranted in accepting paper similarly endorsed, &c., but if the new trial was accepted the whole case was to be reopened.

There was a similar action against defendant as executor of Mrs. P., who had since died, and a like verdict. The Court, on the same grounds as above, sustained verdict on the 8th count, but held that there could be no liability on the other counts, for he could not be assumed as executor to have authorized the use of his name as executor so as to bind Mrs. P.'s estate.

M. C. Cameron, Q.C., and *Robinson*, Q.C., for the plaintiffs.

Richards, Q.C., and *Bethune*, Q.C., for the defendant.