

half of the land; and the defendant had utterly failed in her effort to prove that the \$800 was repaid or that Robert Peel in his lifetime released the defendant from her obligation to execute the new mortgage.

The question upon which judgment was reserved was the question whether the equitable mortgage created by the defendant's promise to execute a legal mortgage was enforceable notwithstanding the provisions of the Statute of Frauds, or whether the case was taken out of the statute by Robert Peel's performance of his part of the contract (see Halsbury's Laws of England, vol. 21, p. 74), or by the rule that the statute is not to be used as an instrument of fraud.

This question is answered in favour of the plaintiff by the Court of Chancery in *Clarke v. Eby* (1867), 13 Gr. 371.

The lender of the \$1,200, one Dixon, subsequently advanced an additional \$700, and the mortgage for \$1,200 upon the north half of the land was discharged and a new one, for \$1,900, executed, covering the whole of the land. So far as Dixon was concerned, this mortgage took priority over Robert Peel's equitable mortgage, and the declaration of the rights of the plaintiff in his capacity as executor must be expressly subject to the present registered incumbrances.

The evidence was that the interest on the \$800 had been paid by F. J. Peel. He was under equal obligation with the defendant to pay it; and he could not, either as executor or individually, have it made a charge upon the land; but interest from the date of the judgment should be a charge.

There should be judgment declaring that the defendant's interest in the land is charged with the payment to the executor of Robert Peel of \$800 and interest at 5 per cent. from the date of the judgment until payment, and that the charge may be enforced by foreclosure or sale; but, if the note for \$800 given by F. J. Peel, either to Robert Peel in his lifetime or to his widow after his decease, is now current, the charge cannot be enforced until such note matures and is dishonoured.

The plaintiff's success was only partial; he failed upon the issue presented by the pleadings as originally framed, and succeeded only upon his claim as executor, which was added by amendment. An accurate adjustment of the rights as to costs would be impracticable; and there should be no order as to costs.