

the mortgage back, the title to the mines and minerals had been extinguished by the possession of Murphy, who had acquired as against Dodge a good title to both land and minerals. If the mines had been revested in Dodge, subsequent possession by Murphy of the surface would not extinguish Dodge's title to the mines: *Seaman v. Vawdrey*, 16 Ves. 390; *Smith v. Lloyd*, 9 Ex. 562. But there is nothing in the conveyance or circumstances which had the effect of revesting the mines in Dodge, or which can estop defendants, claiming under Murphy, from asserting his title down to 1884. When Dodge reserved the mines, he reserved something he had not got, and the reservation did not operate as a grant from Murphy. The statement in the mortgage that Murphy makes no claim to the mines, whatever its effect between the parties in an action between them and their privies, and upon the mortgage, can have no effect in this action. It is evidence merely for plaintiff, but has been shewn to incorrect: *Carpenter v. Buller*, 8 M. & W. 209; *Ex p. Morgan*, 2 Ch. D. 89.

Appeal is allowed with costs and judgment below reversed with costs.

McWhinney, Ridley, & Co., Toronto, solicitors for plaintiffs.

Watson, Smoke, & Smith, Toronto, solicitors for defendants.

JANUARY 17TH, 1902.

DIVISIONAL COURT.

MATTHEWS v. MOODY.

Evidence—Trial—Jury—Refusal of Trial Judge sua sponte to Admit Evidence—New Trial—Costs—Contract—Rescission of—Evidence in Support of—Rule 785.

Motion by defendants to set aside verdict and judgment for plaintiff for \$235 in an action for damages for breach of a warranty or return of money paid, tried by ROBERTSON, J., and a jury at Pembroke, and to dismiss the action or for a new trial. The warranty was upon the sale of a specific article, a hay press, by the defendants to the plaintiff for \$300. By the contract the property in the article was not to pass until payment in full. The defendants took on account of the purchase price a pair of horses valued at \$235 and gave credit for the \$65 balance. At the trial the defendants asked for a nonsuit because the property did not pass.

A. B. Aylesworth, K.C., for defendants.

W. R. White, K.C., for plaintiff.