

REDEMPTION.

ing the foreclosure of his lessor—the mortgagor. The defendant offered to confirm the plaintiff's lease, and contended that under the circumstances the plaintiff could not insist on the right to redeem. The case was tried before Wilson, C. J. C. P., who gave effect to the defendant's contention, considering that the equity of redemption was an equitable right which the court was at liberty to enforce, or refuse to enforce, according to the circumstances of each case. The Divisional Court, however, were unanimously of opinion that the judgment of Wilson, C. J., should be reversed, Boyd, C., laying it down that "an equity of redemption is an estate in the land, and in all cases where the right to redeem has not been barred by the Statute of Limitations, it exists as a right and an estate over which the court has no discretionary power."

No doubt there is very high authority for the law as thus laid down in Lord Hardwicke's judgment in *Casborne v. Scarfe*, 1 Atk. 603, which may be well considered the leading case in favor of the theory that the equity of redemption is "an estate in the land" and not a mere equitable right. There are, however, other authorities to be found both in the English courts and our own, some of quite recent date, in which the view is maintained that the equity of redemption is an equitable right only, and not an estate in its proper legal acceptation, although confessedly subject to many of the incidents of an estate. For instance, Sir John Leach, in *Lloyd v. Lander*, 5 Mad. 290, when discussing whether the equity of a redemption of a bankrupt mortgagor could vest in his assignees without an actual conveyance, said, "after a mortgage in fee no estate is in form left in the bankrupt. The equity of redemption is not an estate, but an interest, and may well be considered as substantially vested in the assignees before a bargain and sale. Whatever therefore might be the case with respect to real estate generally, it would be difficult to establish that it is necessary to give the as-

signee a title to redeem against the mortgagee, that there should be a bargain and sale of the equity of redemption." And again, Sir James Bacon, V. C., in *Paget v. Ede*, 18 L. R. Eq. 125, speaking of an equity of redemption, says: "It is said that is an estate. But it is by a figure of speech only that it can be called an estate. It may be in some instances that a husband may have a title by courtesy, and that gavelkind and borough English may apply to it. All these are necessary consequences of the law which recognises the interest of a mortgagor in his equity of redemption, but they do not alter the nature of the interest or create an estate; and in my opinion it is a misapplication of terms to call an equity of redemption an estate in the proper, technical, legal sense. That it is a right is beyond all doubt." In the Court of Chancery, of this Province, the court has also acted on this view, notably in the well-known case of *Skae v. Chapman*, 21 Gr. 534; and also in *Kay v. Wilson*, 24 Gr. 212. In these cases treating the equity of redemption as an equitable right over which the court might exercise a discretionary power redemption was refused, although the claim of the plaintiff in neither case appears to have been barred under the Statute of Limitations.

In the former case Spragge, C., quoted with approval from Powell on Mortgages, where it is said that an "equity of redemption is defined by Sir Matthew Hale to be an equitable right inherent in the land," and again where he says: "But although the power of redemption be an ancient right which the mortgagor and all claiming under him, whether by voluntary conveyance or otherwise, are entitled unto, yet being a right originating in, and in fact created by, a court of equity, it is made subservient to their rules," and treating the case as one to be governed by the same rules as are applicable to any other case where the court is asked to relieve against a forfeiture, he refused redemption, not because the plaintiff's right was barred by the Statute of Limitations, but be-