

of land without leave as required by Rule 251 of The Queen's Bench Act, 1895, if in fact no such leave had been given.

(2) The plaintiff was entitled to meet the defendant Lawlor's allegation of a title paramount under the tax deed and its statutory effect as evidence by showing omissions or informalities which would invalidate the proceedings, and to have an adjudication upon the question of title without any specific prayer for relief against the deed.

(3) When the tax sale took place, the wife of the mortgagor was as free as any stranger to acquire for her own benefit any title to or interest in the land paramount to that of the mortgagee, either by using money of her own, if she had any, or by inducing a third party to advance it on her separate account, provided the transaction was not merely colorable and really carried out on behalf of the mortgagor.

(4) There was not sufficient evidence of any trust as between the defendant Lawlor and the Rutledges, and for all that appeared in the evidence there was an actual sale of the tax sale certificate and the rights conferred by it to Lawlor for valuable consideration, and the onus was not thrown upon him to prove that Mrs. Rutledge acted on her own account and not as agent for her husband in making the tax purchase.

(5) Although Mrs. Rutledge by her conduct after she had

purchased, in concealing the fact from the mortgagee at a time when in the opinion of the Court she ought to have disclosed it, had disentitled herself to proceed with her purchase and acquire a valid title as against the mortgagee; yet it did not follow that a person purchasing her apparent rights under the tax sale certificate for value, and without notice or knowledge of her special incapacity, might not have acquired a title under a tax deed which would have cut out the plaintiff's mortgage.

(6) To entitle Lawlor to claim protection as a purchaser for value without notice of Mrs. Rutledge's fraudulent conduct he should have pleaded this as a defence and given evidence of it, although the plaintiff had not in his pleading alleged notice to Lawlor of the concealment by Mrs. Rutledge.

*McAlister v. Forsyth*, (1885) 12 S. C. R. 1; *Attorney-General v. Wilkins*, (1853) 17 Beav. 285, followed.

(7) As Lawlor had neither pleaded nor proved such want of knowledge or notice, the plaintiff was entitled to judgment without being called upon to prove any notice to Lawlor, the Court not having been asked for relief on the ground that such defence had been omitted through any error or slip and that it could be successfully raised, and there being nothing to suggest that the defendant had been taken by surprise or misled in any way.

(8) The case did not come