

and the terms under which the Sheriff was to withdraw from possession; and the condition is, then, that if, upon the trial or determination of the said issue, the finding is in favour of McPherson and Booth, the company shall pay to them \$10,000 or a less amount according to the direction of any order to be made in the matter of the interpleader.

The interpleader issue was finally determined in favour of the execution creditor, upon an appeal to the Privy Council, on the 19th November, 1912: *McPherson v. Temiskaming Lumber Co.*, [1913] A.C. 145.

The first contention now made arises from the fact that, after the recovery of the judgments for the two instalments of the purchase-price of the mill, McPherson sold not only the land upon which the mill was, but the mill itself. McPherson asserts that he did this with the knowledge and approval of McGuire. I do not think that he has established any agreement with McGuire authorising the sale. The mill stood upon the land, unused and deteriorating. Insurance and taxes had accumulated against it, amounting to \$1,200. It was sold for \$1,780. McPherson is ready to allow this sale to wipe out any balance due to him by McGuire, without prejudice to his claim against the defendant company. What is contended is, that this resale by the vendor operates, as a matter of law, to wipe out the judgments obtained for the past due instalments.

Some difficulty exists in determining whether or not any land should pass to McGuire under the purchase of the mill. I think that it is clear that the mill was purchased with the idea of removing it from the property and taking it to the timber limits which were sold contemporaneously, and that it was not the intention of the parties that any land should pass.

The contention of Mr. Kilmer is that, notwithstanding this, the contract is a contract for the sale of land, and that the resale by the plaintiff prevents the further enforcement of the judgment.

In *Lavery v. Pursell* (1888), 39 Ch.D. 508, it was held by Mr. Justice Chitty that the sale of the building materials of a house, with the condition that such building should be taken down and the building materials removed from the land, was a contract for sale of an interest in land. I think I should follow this case. It purports to distinguish the sale of materials in an existing building from a case of the sale of growing timber. The distinction is by no means easy to follow. I do not think that Mr. Justice Chitty is to be taken as dissenting from the view ex-