

either the plaintiffs or the defendant in respect of certain parts of the purchase-money therein specified, being the very moneys for which judgment was later on obtained against the defendant, I cannot reach any other conclusion than that the judgment was in respect of part of the purchase-money, I am, therefore, unable to admit the position contended for by the plaintiffs.

In the judgment of the Court of Appeal in this same action, 16 O.L.R. 372 (affirmed by the Supreme Court of Canada, *Clergue v. Vivian & Co.*, 41 S.C.R. 607), this aspect of the case was considered and disposed of. The Chief Justice in his judgment, at p. 379, says: "It is no hardship upon him" (defendant) "to require him to perform the terms of his agreement. With his assent, the benefit of the agreement is now vested in the Standard Mining Company, subject to the question which has been determined in this action. If he now pays the amount he is found liable for, and is not repaid by the Standard Mining Company, he is not without remedy, for he acquires a lien upon the company's interest in the land to the extent of his payment." The Court there unhesitatingly treated the defendant as a purchaser and the moneys now sought to be realised as purchase-money. The plaintiffs, by retaking the lands and then disposing of them to third persons, have deprived the defendant of the benefit and the protection that should be his in the event of his being called upon to make payment; and they have, therefore, lost the right to enforce their judgment so far as it applies to the debt. To that extent the defendant's application succeeds.

The execution, so far as it is for costs, is in a different position. Following what was laid down by my brother Middleton in *McPherson v. United States Fidelity and Guaranty Co.*, supra, the plaintiffs are entitled to proceed on the execution with respect to these costs. On the 23rd September, 1914, the defendant tendered to the sheriff the full amount of the costs claimed under the execution, and interest thereon, acceptance of which was refused. The execution will, therefore, be withdrawn except in respect of these costs (including the costs of the issue and removal of the execution) and interest thereon down to the date of the tender. The defendant is entitled to his costs of this application.