

HIGH COURT DIVISION.

KELLY, J.

OCTOBER 5TH, 1914.

H. H. VIVIAN CO. LIMITED v. CLERGUE.

*Execution—Judgment for Part of Purchase-money of Land—
Inability to Convey Land if Money Realised by Execution
—Withdrawal of Execution except as to Costs.*

Motion by the defendant for an injunction restraining the plaintiffs from selling land under their execution.

H. S. White, for the defendant.

A. H. F. Lefroy, K.C., for the plaintiffs.

KELLY, J.:—Unless, as is contended for by the plaintiffs, this can be taken out of the authority of such cases as Cameron v. Bradbury, 9 Gr. 67, Fraser v. Ryan, 24 A.R. 441, Gibbons v. Cozens, 29 O.R. 356, and McPherson v. United States Fidelity and Guaranty Co., 6 O.W.N. 677, the plaintiffs cannot, except in respect of costs, enforce their judgment. The judgment was for instalments of purchase-money due to the plaintiffs on their sale of lands, the subject of an offer made on the plaintiffs' behalf to the defendant on the 20th June, 1903, and accepted by him on behalf of himself or assigns three days afterwards.

On the 10th March, 1905, an agreement was entered into between the plaintiffs and the Standard Mining Company of Algoma Limited and the defendant, whereby, after reciting that the defendant had assigned his contract to the mining company, the plaintiffs agreed to sell to that company the same lands—certain rights of the parties to the first agreement being expressly reserved. The plaintiffs now set up that by this latter agreement the defendant ceased to be a purchaser; that his indebtedness to the plaintiffs, for which they obtained the judgment, was not in respect of purchase-money: and that, though the plaintiffs, since the judgment was obtained, forfeited the lands to themselves for default in payment of purchase-money, and later on resold them to other persons, they have not lost their right to enforce the judgment against the defendant.

Reading these two agreements, and especially having in mind the terms of the latter of them, which expressly declares that it and anything done under it shall not affect or prejudice