

HON. MR. JUSTICE LATCHFORD.

FEBRUARY 22ND, 1913.

STUART v. BANK OF MONTREAL.

4 O. W. N. 846.

Deed—Absolute in Form—Alleged to have been by way of Security only—Evidence.

LATCHFORD, J., dismissed plaintiff's action to have it declared that a certain deed from his father to his grandfather, of certain lands in Hamilton, was, in reality, a mortgage, being by way of security for certain advances, and that the defendants, subsequent purchasers, had notice and knowledge of that fact, finding against both of plaintiff's contentions as above.

An action brought by a son of the late John Jacques Stuart, of Hamilton, for a declaration that a conveyance dated 30th October, 1900, of certain lands in Hamilton, known to the parties as "the north end property," for the expressed consideration of \$12,000, though absolute in form was given to the plaintiff's grandfather, John Stuart, by John Jacques Stuart, merely as security for the repayment of moneys advanced upon account of the said lands by the father to the son; and that the defendants, Braithwaite, Alexander Bruce, Wilgress, and R. R. Bruce, to whom the lands were subsequently transferred in trust for the defendant bank, took with notice that John Stuart was merely a trustee of the lands for his son, and not their absolute owner.

The plaintiff asked, therefore, that upon payment to the bank of what John Jacques Stuart owed to John Stuart upon the said lands, the plaintiff should be allowed in to redeem. Shortly, the plaintiff's contention was that the conveyance was in fact a mortgage and not a deed, and that the defendants, because aware of the fact, were in no better position than the assignees of a mortgage would be in the circumstances.

Douglas K.C., and Elliott, K.C., for the plaintiffs.

Hon. Wallace Nesbitt, K.C., and Burbidge, for the defendants.

HON. MR. JUSTICE LATCHFORD:—The questions for determination are: Was the deed taken as security only? If so, were the defendants aware that it was so taken? To entitle the plaintiff to succeed, both questions—if the defend-