

Chan. Cham.]

STREET V. HALLETT.

[Ontario.]

prevent surprise, and to bring home to the party called on to obey the order of the Court the penalty he will incur by his disobedience; the verbal intimation the defendant received from the plaintiff's solicitor, I do not think can suffice.

The motion to commit, therefore, must be refused, and I think the application to take the bill *pro confesso* must also fail, because it is only in cases where the Court finds that a defendant is in contempt, that that remedy can properly be granted to the plaintiff. Although I am of opinion that the defendant has not brought upon himself the penalties of contempt, I nevertheless think he has acted very unreasonably, and I refuse to give him any costs of this application.

I think the proper order to make under the circumstances would be to extend the time for taking the cross-examination, and provide, by the order I now make, that service of it upon the defendant's solicitor shall be sufficient.

STREET V. HALLETT.

Vendor and Purchaser—Incumbrance created pendente lite—Consent decree.

A defendant who claimed to be sole owner of the land in question in the suit, had *pendente lite* sold to one H. the right to cut timber on the land and the purchaser at the sale under decree refused to carry out his purchase until this right was released, which H. refused to do.

Held, that the decree having been made by consent, H. was not bound by it; and that, therefore, the existence of H.'s incumbrance was a valid objection to the title, and had not been waived by the purchaser's merely taking a consent to obtain, without having actually obtained a vesting order, nor by his having under the circumstances had the conveyance settled by the Master, without making H. a party to it.

The party having the conduct of the sale represents, for the purposes of the sale so far as the purchaser is concerned, all the other parties to the suit, and it is his duty to remove, or procure to be removed, any objection which may properly be made to the title.

[January, 1876—*REPERE*.]

This was an application by the plaintiff to compel the purchaser, Mr. J. D. Woodruff, to pay that part of his purchase money payable at the time of the application, into court, and to execute a mortgage to secure the balance, in accordance with the conditions of sale. The motion was resisted on the ground that, pending the suit, the defendant, Luke Hallett, who claimed to be sole owner of the land, had sold to one Harris a right to cut timber on the land,

which right Harris refused to release, and it was contended that Harris was not bound by the decree, because it was made by consent and because he was no party to the suit.

The sale took place on the 17th May, 1875, when it was expressly stated that Harris had no claim, notwithstanding his assertion to the contrary. The purchase money was payable as follows: 20 per cent. on the day of sale, 80 per cent. in one month thereafter, and the balance to be secured by mortgage, payable in three annual instalments, with interest at 6 per cent. The deposit at the sale was paid to the vendor's solicitors, but no further sum was paid. By mutual agreement between the parties it was subsequently agreed that the purchase money, instead of being paid into court or secured by mortgage, should be paid directly to the parties entitled. According to the affidavit of the purchaser's solicitor, it appeared that he searched the Registry office and found Harris's agreement on record, on 29th July, 1875. On the 30th August he obtained from the solicitors of the plaintiff and defendants a consent to his obtaining a vesting order. Subsequently, on the advice of his solicitor, he decided not to act upon it and required a conveyance, and a conveyance was accordingly carried into the Master's office by the purchaser, and settled by the Master on the 18th September, 1875. The purchaser's solicitor subsequently prepared a release for Harris to execute, and sent it to him for execution; but Harris refused to execute it, and the purchaser's solicitor, on the 21st October, 1875, notified the vendor's solicitor of the fact. Since that time nothing was done to procure the release.

Casels for the plaintiff.

Ewart for the purchaser.

MR. HOLMESTED.—I think the objection made by the purchaser to the title is well founded.

It was contended that the purchaser had waived the right to take this objection by reason of the great delay, and also by taking a consent to his obtaining a vesting order, and also by having the conveyance settled by the Master without having Harris made a party to it. I am of opinion that none of these circumstances can deprive the purchaser of his right to insist on the removal of the objection.

If he had actually accepted a vesting order or conveyance, the case of *Kincaid v. Kincaid*, 6 Prac. R. 93, and *Bull v. Harper*, ib. 36, would have been applicable. The mere fact that the parties to the suit consented that he should get a vesting order is a very different thing. With