

Co. Ct.]

SOMERS v. KENNY.

[Co. Ct.]

have issued execution on the judgment without taking the present steps.

As to the first objection: there is no doubt that if the judgments of the Court of Appeal in this Province, are to govern, the judgment in question is still in full force, notwithstanding the lapse of more than ten years since it was entered up.

It will help to have before us the decisions that have been given on this point, both in this country and in England, that we may see how the former are affected by the latter.

And first I may say that section 8 of the English Act (37-38 Vict., c. 57), corresponds in every material point, with sect. 23 of our own Act (R. S. O. chap. 108), excepting, of course, that "twelve years" in the former is "ten years" in our Act.

The latter reads: "No action or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for or release of the same, unless," &c.

It will be borne in mind, too, that by the Act 24 Vict., c. 41, s. 10, it was enacted that "no judgment, rule, order, or decree for the payment of money of any Court of Upper Canada, shall create or operate as a lien or charge upon lands or any interest therein."

We come now to the cases decided in our own Courts.

(1). *Allan v. McTavish*, 41 U. C. R., 567, (June 1877) in which it was held by Morrison, J., that a covenant in a mortgage was good for ten years only.

This case was reversed on appeal (see below).

(2). *Caspar v. Keachie*, 41 U. C. R., 601 (Oct. 1877) in which it was held by Wilson, J., that a judgment is to be considered as "charged upon or payable out of land"; that a writ of revivor or suggestion is a "proceeding" under the Act, and that a judgment is valid for ten years only. *Watson v. Birch*, 15 Sim. 523, quoted.

(3). *Allan v. McTavish*, 2 App. R. 278, Jan. 3rd, 1878, (see above) in which the judgment of Court below was reversed; and held that a covenant in a mortgage was valid for 20 years. *Hunter v. Nockolds*, 1 Mac. & G. 640, followed.

(4). *Boice v. O'Loane*, 28 U. C. C. P. 506 (12th Feb., 1878), where Gwynne, J., held that the statute applied to all judgments, and that ten years was a bar. *Watson v. Birch*, (*supra*) approved of. *Hunter v. Nockolds*, (*supra*) not cited.

This case was also reversed on appeal, by (4) *Boice v. O'Loane*, 3 App. R. 167 (June 1878). Moss, C. J., approved of the reasoning of Gwynne, J., in the Court below, but said it was not consistent with *Hunter v. Nockolds*; which case was approved of and followed.

The only English cases I refer to, are,

(1). *Watson v. Birch*, 11 Jur. 195, S. C. 15 Sim. 523 (1874), deciding that all judgments came within the Act then in force, and not only such as affected land only. Followed by Gwynne, J., in *Boice v. O'Loane*.

(2). *Hunter v. Nockolds*, 1 Mac. & G. 640: which decided that in actions upon covenant, or debt upon specialty, the limitation is 20 years. Approved of and followed in *Allan v. McTavish* and *Boice v. O'Loane*, both in appeal, (*supra*).

Since the decision in *Boice v. O'Loane* in our own Court of Appeal, two other cases have been decided in England:

(3). *Sutton v. Sutton*, L. R. 22 Ch. D. 511 (1882), in which it was held that the limitation of 12 years applied to the personal remedy on the covenant in a mortgage deed, as well as to the remedy against the land; and that the action (one on a covenant in a mortgage) was barred as well as regards the covenant, as the right to sue.

(4). *Fearnside v. Flint*, L. R. 22 Ch. D. 579, (1883). Here the mortgage debt was secured by a collateral bond, and it was held by Fry, J., following *Sutton v. Sutton* (*supra*) that no distinction existed between the covenant in the mortgage and the bond, and that the remedy on both was barred after twelve years.

The point raised in all these cases seems to be simply this: do the words "or otherwise charged upon, or payable out of any land," relate back to, and are they to be read in connection with, the previous words, "secured by any mortgage, judgment" (R. S. O. chap. 108, sec. 23).

If then it has been expressly decided that the personal remedy on the covenant in a mortgage is barred after the lapse of twelve (i.e. *ten*, in