

No. 81.

QUEEN'S BENCH,

APPEAL SIDE.

*On Appeal from Montreal.*

BETWEEN

WILLIAM G. GREENSHIELDS,

*(Defendant in the Court below),*

*Appellant;*

AND

GREGOR McGREGOR,

*(Plaintiff in the Court below),*

*Respondent.*

RESPONDENT'S CASE.

FILED,

June, 1859.

CROSS & BANCROFT,

*For Respondent.*

PROVINCE OF CANADA,  
District of Montreal.

# IN THE QUEEN'S BENCH.

APPEAL SIDE.

WILLIAM G. GREENSHIELDS,

(Defendant in the Court below),

No. 81.

Appellant;

AND

GREGOR M'GREGOR,

(Plaintiff in the Court below),

Respondent.

## RESPONDENT'S CASE.

THIS action was brought for the recovery of an instalment of capital, and for the arrears of rent or interest due under a promise of sale made by Respondent to Appellant, in March, 1855.

This document recited in Respondent's Declaration, is as follows:—

"I, Gregor McGregor, of the Parish of Montreal, in the District of Montreal, Esquire, do hereby promise to sell and good and sufficient title give to William G. Greenshields, of the City and District of Montreal, aforesaid, merchant, those two certain lots of land lying behind the lots at present occupied by him, being numbers one and four on a certain plan of my farm made by McFarlane, said two lots being supposed to contain three hundred feet front, and two hundred and forty feet in depth; I hereby binding myself to make up said lots to that amount in case of any deficiency being found, under the following conditions, to wit, that the said Title-deed shall be made and executed by me as soon as a certain cause now pending in the Court of Appeals, wherein William Clarke is the Appellant and I am Respondent, shall be decided in my favour, and in the meantime the said William G. Greenshields shall have the right to take immediate possession of the said two lots of land to fence and cultivate, and build upon the same, as to him shall seem good. That the said sale shall be made for and in consideration of the sum of six hundred pounds, of which the sum of two hundred pounds shall be paid upon the execution of the said Title-deed, and the balance of four hundred pounds by three equal annual instalments of one hundred and thirty-three pounds six shillings and eight pence each, with interest at six per cent per annum, and until such time the said William G. Greenshields shall pay to me the sum of twenty pounds currency per annum, for and in consideration of the use and occupation of the said two lots of land.

"And I, the said William G. Greenshields, do hereby accept of the said promise of sale, under the terms and subject to the conditions aforesaid.

"IN WITNESS WHEREOF, we have hereunto set and subscribed our names at Montreal, this second day of March, eighteen hundred and fifty-five."

(Signed,)

GREGOR M'GREGOR.  
W. G. GREENSHIELDS.

Signed in the presence of  
(Sd.) JOHN KAY.  
" A. BLACK.

MONTREAL, 7th March, 1855.

The Appellant pleaded:—

1st.—*Defense en fait.*

2ndly.—That the Respondent was not proprietor of the land and had not executed a deed.

3rdly.—That Elizabeth Clarke, then proprietress, had in 1846 caused a plan of her farm to be made dividing it into lots, including those in question, which lots she sold to different persons; that he, the Appellant had acquired lots from several holders, according to said

plan, his boundary on the lower or South-East side being made up partly by one of the lots so purchased by him, and partly by a piece of land also purchased by him, coming originally from one Decary, the boundary of which was not at right angles with the other boundaries of the lots he purchased from the Respondent, in consequence of which his said lots Nos. 1 and 3, although of sufficient width in front, were too narrow in the rear, giving him less land than he had purchased; that the lots he so acquired from Respondent, were the same as had been previously sold to one Easton, and by him retroceded to Elizabeth Clarke; that she was to have purchased part of the Decary lot to make up a supposed deficiency to Easton; that Easton's opposite side boundary line had been moved further up during his time to make good said deficiency; that the Respondent had not executed a deed as he was bound to do, and had not made good the deficiency of the land. That Elizabeth Clarke, by a codicil to her Will dated 9th January, 1849, made certain changes in her Will and Testament of the 8th September, 1847. By the codicil the legacy bequeathed to Respondent was only given him in trust as Fiduciary Legatee for testatrix's grand-children, the children of the marriage of her son Patrick with Maria Wait, who were of age, and had an interest as proprietors; that the Appellant had made a tender of the money due, viz: the £200 on the 9th January, 1858, and called on the Appellant to execute a deed.

This Plea concluded with prayer for the dismissal of the Action, and the condemnation of the Respondent to execute a deed, jointly with the Grandchildren.

*Fourthly.*—The same in substance with the last Plea, concluding with prayer for acts of Appellant's willingness to pay £200, and that Respondent be condemned to execute a Deed, Appellant reserving his recourse for deficiency of measurement, if any.

The Respondent answered that the promise of sale had been executed by the vendor by the delivery of the land, and the purchaser was bound to pay the price; that the Appellant had never objected to the title until he filed his plea, and that the title was good and sufficient, and had been so acknowledged by the Appellant himself, who was well aware of the nature of Respondent's title, and had purchased all his other lots anterior to the promise of sale and with a perfect knowledge of the existing boundaries. Appellant was well aware that he, the Respondent, had always been, and still was, ready and willing to execute a title deed to the Appellant, which Appellant could have whenever he chose to accept of it. Respondent had formally tendered such deed by Easton, Notary, 29th December, 1857, and that the non-execution of it was Appellant's own fault, that he never had had any real intention of executing such deed and his pretended tender was a delusion, yet he kept possession of the land and refused to pay; that to Appellant's pretended tender of the 9th January, 1858, Respondent offered immediate compliance with the promise of sale, yet Appellant had himself failed and refused to carry out his pretended offer and treated it as nugatory; it had not been repeated by his plea, nor the promise of sale asked to be rescinded; that as to the pretext of a deficiency, none had ever been ascertained, and there was none; but it could be remedied if so ascertained, and the Appellant thereby put in a position to claim for a deficiency, and if there were a deficiency it was no reason for Appellant refusing to pay. The Respondent in his conclusions prayed acts of his willingness to execute such title deed.

The Respondent produced 1st, copy of the promise of sale; 2nd, copy of Judgment in the Queen's Bench, 2nd October, 1857, dismissing action of Clarke *vs.* McGregor; 3rd, tender of title, demand and protest, Easton, Notary, 29th December, 1857, and subsequently at *Enquête* copy of the Will of Elizabeth Clarke, 8th December, 1847, Jobin, Notary.

He further proved at *Enquête* Appellant's possession of the lots under the promise of sale and that to an extent of at least 321 feet in width in front as fenced in, also that Appellant had removed the fence constituting the boundary between the lots in question, and the others he had purchased. The Appellant produced his title to the other lots, of dates long anterior to the promise of sale, (all originally derived from Elizabeth Clarke, save the portion of land purchased from Decary); the former sale of lots Nos. 1 and 2 to Easton and his retrocession; a plan of the lots, and a codicil to E. Clarke's Will, dated 9th January, 1849, and copy of an act of pretended tender to McGregor of 9th January, 1858.

The following are extracts of the important parts of the documents of record:—

E. Clarke's Will and Testament of the 8th September, 1847.

*Fifthly.*—And as to the remainder of all and every my property, real or personal, moveable or immoveable, debts due me and other wherever and whenever the same may be found due, owing, belonging or in anywise to me, belonging or payable, and to whatever amount or extent the same shall come or amount to, without any exception, restriction or reserve, excepting always the before mentioned legacies and bequests, I give, devise and hereby bequeath the same to the said Gregor McGregor, my beloved husband, hereby and for that purpose in the most ample manner instituting him, my universal and residuary legatee.”

Codicil of 9th January, 1849.

*Firstly,* I declare that the legacy by me in and by said last Will and Testament of date the said eighth day of September, one thousand eight hundred and forty-seven, made to my said husband, that is to say, all that is thereby bequeathed to him is in trust for my grand children, issue of the marriage of my son Patrick Stevenson with the late Maria

“Wait, viz: Elizabeth Borrowman, Julia Emmeline and William Brongest Fuller, who are to be the proprietors of the residue of my estate and property, as by the aforesaid Will bequeathed to my said husband, who is, viz, my said husband, to hold the same as fiduciary legatee, only in trust for my said grand children.

“Secondly, my said husband is to have the power and authority to sell and dispose of the whole or any part of my said property, either in his own name or in the name of his said grand children, and this without the intervention or authorization of any Judge or Court being necessary; and to have during his life-time the sole, entire and exclusive management of my said property, subject only to the accountability of my said husband, or representatives to my said grand children.”

Tender of 29th December, 1857, after reciting promise of sale, stating the decision had in the suit in the Queen's Bench, and Appellants continued possession under the promise of sale, and the fact of his having removed boundaries, by which the quantity could be ascertained and his refusal to accept a conveyance, goes on to say:

“Notify the said William G. Greenshields that the said Gregor McGregor has always been since the decision of the said cause, and is now, ready and willing to execute and deliver a good and sufficient *acte* of conveyance of the said hereinbefore described property to the said William G. Greenshields, in express conformity with the said promise of sale, and doth hereby through, us said Notaries, offer to execute the same; and we the said Notaries do further, at the request aforesaid, and speaking as aforesaid, demand and require, as by these presents we do demand and require, the said William G. Greenshields, speaking as aforesaid, forthwith to well and truly pay, or cause to pay to him, the said Gregor McGregor, the sum of two hundred pounds currency, with legal interest thereon from the time the said Gregor McGregor has been willing and offered to execute the said title deed.”

Answer of Respondent to pretended tender of 9th January, 1858, produced by Appellant.

“Mr. Greenshields took possession of my land as fenced in, knowing its relative position to the Décairy lot, he has held it without objection for nearly three years, no deficiency has ever been ascertained or was ever pretended until I asked him for the instalment payable on the execution of a deed. I wish to be paid what is now due me, and am now and always have been ready and willing and offered to give him a deed of three hundred feet front, and two hundred and forty feet in depth, and in every other respect in conformity with the promise of sale.”

After unsuccessful attempts made by the Appellant to delay the cause by motions for setting aside the *Enquête*, it was heard on the merits, the Appellant at the time again moving to have the *Enquête* set aside and the hearing on the merits delayed, and on the 31st March last the Court below rendered the following Judgment:—

“The Court having heard the parties by their counsel, as well upon the merits of this cause as upon the two motions of the Defendant of the nineteenth instant, that the inscription of this cause upon the *Role de Droit* for hearing on the merits be postponed until a decision on the above 1st recited motion, having examined the proceedings, proof of record and deliberated, considering the said Plaintiff under and by virtue of the Codicil of the late Dame Elizabeth Clarke, his wife, made and executed before Gibb and Colleague Notaries, on the ninth day of January, 1849, had trust, power and authority to sell and dispose of the said lots of land, numbers 1 and 3 in his declaration in this cause first mentioned, in his own name and to receive and take the purchase money thereof, as well as the rents, revenues, profits and interests thereof, and considering that under and by virtue of the promise of sale between the parties in this cause, bearing date 7th March, 1855, in the said declaration referred to, and established of record in this cause, the Plaintiff sold to the Defendant, and promised thereby to give the Defendant a good and sufficient title for the said two lots, numbers 1 and 3, the latter by error in the said promise set down as number 4, as in said promise described and being of the supposed extent of 350 feet in front by 240 in depth, the said Plaintiff binding himself to make up the said lots to that amount in quantity in case of any deficiency being found, the said title to be given as aforesaid upon the subsequent rendering of a Judgment of the Court of Appeals in Plaintiff's favor, which said Judgment was so rendered on the 2nd day of October, 1857; considering that the consideration of which said sale was to be the sum of £600, whereof £200 to be paid on the execution of the said title deed and the balance as in the said promise stated, with interest at 6 per centum per annum, and further, at the rate of £20 per annum for the use and occupation of said lots until such deed was executed; and considering that the said Defendant did at and from the time of the date of the execution of the said promise of sale enter into the possession of the said lots of land, and did use and occupy the same without objection of any deficiency aforesaid, and was and continued to be and was in such possession, use and occupation of the said lots until and at the time of the institution of this action; and considering that on the 29th day of December, 1857, a tender and offer was duly made to the Defendant by the Plaintiff to make and execute such title in conformity with the said promise of sale and the stipulations and conditions thereof, and considering that the tender and offer by the Defendant, previous to the institution of this action, were insufficient and not effective for the purpose of payment of the sums of money then due to the Plaintiff by reason of the said promise of sale, doth condemn the Defendant to pay and satisfy to the Plaintiff the sum of £248 current money of the Province of Canada, to wit, the sum of £48 for portion of upwards of 2 years use and occupation of the said two lots of land to 29th day of December, 1857, and two hundred pounds due as stipulated in and by the said promise of sale to be paid upon the execution of the said title deed; and the said Court

"doth further order and adjudge the said Plaintiff to make and execute to and in favour of the Defendant, on his demand therefor, a good and sufficient title of the said two lots of land, upon the terms and conditions and with the stipulations in the said promise of sale mentioned and contained; the whole with interest on the said sum of £48 from the 7th day of September, 1858, date of service of process in this cause, and on £200 from the 29th day of December, 1857, with costs *destrais* to Messrs. Cross & Bancroft, Attornies for the Plaintiff, and the Court considering the Defendant's motions of the 19th March instant are unfounded, doth reject the same."

(Signed)

MONK, COFFIN & PAPINEAU,  
*P. S. C.*

The Appellant neither repudiates the sale, nor asks for any specific diminution in price for pretended deficiency.

The Appellant has no reasonable ground of complaint against the Judgment, and as against him it ought to be confirmed.

CROSS & BANCROFT,  
*For Respondent.*

MONTREAL, 1st June, 1859.