Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Lindsay Petroleum Company v. *Hurd and others, from the Court of Error and Appeal of Ontario in Canada; delivered 20th January* 1874.

Present:

THE LORD CHANCELLOR.
SIR BARNES PEACOCK.
SIR MONTAGU E. SMITH.
SIR ROBERT P. COLLIER.

THE Court of Error and Appeal of Ontario does not appear to have differed from the two Courts below so far as the substantial merits of this case were concerned. The point on which three judges of the Court of Appeal, who had not been concerned in the earlier stages of the case, differed from two other judges who had taken part in those earlier stages, and on which they founded their alteration of the judgment of the Vice-Chancellor and the Chancellor, was this, that they thought the Plaintiffs had lost their option to rescind the entire contract by the delay which had taken place in the assertion of their right, accompanied, as we must suppose they considered themselves entitled to presume, with knowledge sufficient to make that delay material.

Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded

as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay is most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy. In this case, the delay was at all events not of very long duration, because the conveyance to the Company was dated about fifteen months before the filing of the bill; the whole purchase money was not paid before that time; and there is nothing which would justify us in reckoning the currency of time from an earlier period than that conveyance. Neither were any acts done in the interval, as it appears to us, at all material to the equity between the parties. There was possession taken, no doubt, but it would be a very novel proposition that mere possession is to be a bar, so as to raise a counter equity in cases of this description. Nothing appears to have been done beyond the sinking of a single well, by way of trial, upon the ground. The sinking of that well, if the land is restored, can in no substantial way operate to the prejudice of the Respondents; and, if any profit had been derived from it, the Court of first instance offered an account of that profit; but it manifestly was known that there was none,

for that account was not accepted. The situation of the parties having, therefore, in no substantial way been altered, either by the delay or by anything done during the interval, there is in these circumstances nothing to give special importance to the defence founded on time, even had there been such an allegation of facts in the pleadings as would have been proper, if it was meant seriously to rely upon this as a substantial defence to the suit. There is a submission at the end of the answer; but the substance and body of the answer contains no allegation by which that submission can be supported; and it does not seem to us that the parties went to issue upon any statement of facts, one way or the other, which fairly raised a question of laches or delay. In order that the remedy should be lost by laches or delay, it is, if not universally, at all events, ordinarily,—and certainly when the delay has been only such as in the present case—necessary that there should be sufficient knowledge of the facts constituting the title to relief. What knowledge is there allegation or proof of here? Allegation there is none. The answer does not suggest that the statement in the bill, of recent discovery, is, in point of fact, incorrect; and the absence of any such suggestion in the answer is, at least, an excuse to the Plaintiffs for not having gone into particular evidence as to the time at which and the manner in which the Company made the discovery.

But this matter does not remain upon the mere absence of averment in the pleading; for there is evidence given by the Defendants themselves, that is, by Mr. Hurd, who distinctly states, and all the statements of the other parties are consistent with it, that he never informed the Plaintiffs or any of the people interested in the Company of the fact that the price named in the

written documents was not the real price paid to the vendors. The way in which he expresses it is, he never informed them of the discount which he was to receive. Therefore, it is admitted that the transaction was carried through, the material fact on which the equity depends being at the time suppressed; and that being admitted, it clearly was for the Defendants and not for the Plaintiffs to show when that which was concealed at the beginning became known afterwards. Also Mr. Farewell distinctly admits that in his communications with the parties he did not mention the fact of his interest; and it was for him again, admitting that the existence of that interest was not mentioned in the first instance, to shew when and by what means the Company became aware of it, if that was material to his defence. It is said indeed, in one of the Judgments of the Court below, that one of the Appellant's witnesses, Mr. Orde, stated something to have taken place in the month of July 1866, from which the Company ought to have either derived the requisite knowledge, or at least to have been put upon enquiry. We think it is not possible for us to take that view of Mr. Orde's evidence. All he says is this, that in July he began to lose faith in the oil wells and in the Company, and that a Mr. Melville Parker told him, about that time, that the transaction was a swindle, and that the 12½ acres could have been got for a third of the money. But mere inadequacy of value would have been no ground for rescinding the purchase. It is not because the purchasers have given more money than the thing was worth, or because a stranger calls it a swindle, only suggesting that the consideration is excessive, that an equity would arise upon which such a bill as this could be filed; nor is this bill filed upon any such ground. It is impossible for their Lordships to

infer from that statement that anything was said by Mr. Melville Parker, from which the Plaintiffs could understand that he meant to say or to suggest that the money which they had paid, or any part of it, had found its way back into the pocket of their president, Mr. Hurd, or that Mr. Farewell, upon whose opinion they had relied as a disinterested adviser as to value, was not disinterested in his advice. No such things are said to have been suggested by Mr. Melville Parker, and we cannot infer or imply them.

There is, therefore, as it appears to us, no evidence whatever of any knowledge on the part of the Company, or of those who could bind the Company. There is evidence of the original concealment and suppression of the material facts constituting the title to relief, and there is nothing against the averment in the bill, not really contradicted by the answer, that those facts were recently discovered when the bill was filed.

It appears therefore to their Lordships that the objection of delay entirely fails; and, further, we have some difficulty in reconciling the decree actually pronounced by the judges in the Court of Error, not against Hurd alone, but also as against the other parties, with the force and the weight which that Court has attributed to delay. It is undoubtedly true that a delay, which might be available by way of defence to persons not under any fiduciary relation or obligation, might not be available by way of defence to those who are affected by a fiduciary relation or obligation; but the Court below, in holding Mr. Kemp and Mr. Farewell responsible for the repayment of the money which found its way to Mr. Hurd's pocket, have held Mr. Farewell and Mr Kemp to be affected by knowledge of and participation in the fiduciary obligation which lay upon Mr. Hurd; and the fiduciary

obligation extending to them for that purpose, it is difficult to see how the Court could stop there, and refuse to extend it to them for every purpose connected with the whole transaction, which was one entire transaction, and, as their Lordships are of opinion, cannot be severed as to its parts.

An argument has been addressed to us, not with very great confidence, against the unanimous opinion of all the Judges in all the Courts, to the effect that, so far as Mr. Farewell was concerned, there was here no fraud. But it is difficult to conceive anything more clearly fraudulent than for the owners of property to arm a person, whom they knew to be about to endeavour to find others to take up a purchase, whether as a company or otherwise, with a document purporting to be an offer made by themselves as owners to sell at a fictitious price, at which price he is to propose to other people to take up and to accept that offer, as if it were the real one. If that be not the real price which the owners of the property expect to get, and if they are parties to an arrangement that the intermediate agent who is to induce others to accept the offer is himself to put a considerable part of the nominal price into his own pocket, without any communication of the facts, the document is a dishonest and false document upon the face of it, representing no real transaction, but evidently representing a false transaction, only in order to deceive somebody. It was used to deceive, and so used with the knowledge of Mr. Farewell throughout, as much as with the knowledge of any other of the parties; he having, as he admits, in order to make the transaction one, placed his interest for the purpose of that offer, and for no other reason, in the hands of Mr. Kemp, and, through him, of Mr. Hurd. Mr. Hurd takes the offer to the company; the company are

formed to take up the offer, but not without something to fortify Mr. Hurd's recommendation. And from whom does that come? From Mr. Farewell, whose own interest is not disclosed, who is known to be a person of special experience, and whose opinion has a special value in the province, with regard to this particular description of property. He writes a letter, in which he says that, according to his judgment, it will be a good bargain at that price, and that if he had known that those properties or some of them had been to be sold at that price—that fictitious and false price so with his participation introduced into the document to deceive—he would himself have been willing to be a purchaser. He writes that to be shown; and it is admitted, not indeed by him, but by one of the other witnesses, that the real price was purposely kept back, because it was known that the bargain would not have been obtained if that had been communicated. It is the language of Mr. Kemp, the person in whose hands Mr. Farewell placed himself and his own interests: "I "did not tell them nor did Farewell in my "presence tell them that the price was a sham "price. I believe if the real price had been "mentioned it would likely have defeated the "object with which the offer was made. It is "not likely it would have been revealed." And Farewell admits that he knew his opinion had a special value. He says, "I expected it"—the letter—"would be shown, and that it would "influence the opinion of such parties, as I was "pretty generally known through that part of "the country, and also known to have acquired "knowledge respecting oil lands." He says, that he not only wrote that letter, but he personally communicated with a Mr. Martin and a Mr. Neads, recommending them to invest in the Company, and repeated to one of them,

Martin, what he had said in the letter. "I told "him that if I had known a certain piece "of the property had been in the market at the "price offered, I would have purchased myself." And when Brown and Sadler, two gentlemen who are not shown to know anything about the value of oil property themselves, go down to look at the land, an inspection on which so much reliance is placed, when they come to look at the land, Farewell contrives to meet them, and says this:—"I went to see them "because I was interested in Kemp's succeeding "in selling the lands, of which I gave him the "option. I did not tell the parties that I was "interested in any of the lands." But he talked to them and helped to persuade them to be satisfied; and he says, distinctly, "I did not tell "Brown and Sadler I was so interested. To all "appearance I was a disinterested party to "those that did not know it. I did not think "it necessary to tell them." More abundant evidence of what a Court of Equity calls fraud it would be very difficult to conceive, and their Lordships have no hesitation in saying that, in their judgment, the decree made by the Vice-Chancellor was perfectly and entirely right.

The sole difficulty which their Lordships have felt or now feel arises from the suggestion, which they do not think themselves at liberty altogether to disregard, though it ought not in their judgment to stop the appeal, that the Company may now have been dissolved, and may not be in a position to make the necessary reconveyance. Undoubtedly, if they are not in that position, they have come here by the appeal asking for that to which they must know they are not entitled except upon conditions, which if that be so, they cannot fulfil; and justice would not be done if provision were not made in the form of the order for the possible contingency of their inability to make

a reconveyance. What therefore their Lordships propose to recommend to Her Majesty is this :— To reverse the decree appealed from and to substitute for it a decree to this effect: Declare that subject to the right of the Respondents to a reconveyance of the lands in the pleadings mentioned, the Appellants are entitled to have the sale and the conveyance of such lands cancelled and rescinded; and that on such reconveyance being made to the satisfaction of the Court of Chancery for the province of Ontario, in the manner directed by the Decree of the 15th December 1868, the Defendants do repay to the Plaintiffs the sum of 13,750 dollars, with interest from the date of the payment of the said purchase money to the date of such reconveyance, together with the costs of the suit to be taxed by the master, including all the costs in the several courts below. But if such reconveyance be not made, then the bill ought to be dismissed as against the Defendants other than Hurd, without costs, so far as it asks relief beyond that given by the Court of Error and Appeal in Ontario. Declare the Appellants entitled to the costs of this Appeal if such reconveyance is made; but the Respondents entitled to the costs of the Appeal if it be not made; and reserve any order as to such costs until after it shall be known whether the reconveyance is made or not, with liberty to apply, and then an affidavit of course can be made.

Credit must be given to the Respondents, as against the sum to be repaid by them if a reconveyance is made, for the amount paid under the order appealed from; the sum carrying interest being reduced, by that payment, as at the date when it was made. If it should appear that, although a reconveyance can be made, some persons other than the company are now entitled

to receive the money to be repaid, the form of the order may be expressed so as to meet that case, by directing repayment to the Appellants, or to such other persons, if any, as are now entitled in their right. The rate of interest will be the same as that allowed by the decree of the 15th December 1868. Their Lordships will advise Her Majesty to remit the case to the Court below, with these declarations.