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*plained of in the appeal, subject to the above-mentioned variation, affirmed with costs: Cause remitted to Chancery Division.*

*Lords' Journals*, 3rd August, 1881.

Solicitors for Appellant: *Bompas, Bischoff, & Dodgson*, for *E. & E. L. Waugh & Musgrave, Cockermouth.*

Solicitors for Respondents: *Waterhouse & Winterbotham*, for *Winterbotham, Bell, & Co., Cheltenham.*

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[HOUSE OF LORDS.]

1881
*June* 14.

THE LONDON AND COUNTY BANKING COMPANY (LIMITED) . . . . . } APPELLANTS;

AND

THOMAS RATCLIFFE . . . . . RESPONDENT.

*Mortgage—Deposit of Title Deeds with Bank—Banker's Lien—Loan by equitable Mortgagee after notice of Contract of Sale—Vendor and Purchaser—Lien of Unpaid Vendor.*

The owner of land, after depositing the title deeds with a bank as security for all sums then or thereafter to become due on the general balance of his account with the bank, contracted with the knowledge of the bank to sell the land to one who had notice of the terms of the deposit. The vendor afterwards paid into his own account at the bank sums which in the whole exceeded the debt due to the bank on his balance at the time of the contract of sale, so that on the principle of *Clayton's Case* (1 Mer. 585) that debt was discharged. The bank, without giving notice to the purchaser, continued the account and made fresh advances to the vendor, so that on the general balance there was always a debt to the bank. The purchaser, who never had notice of the fresh advances, paid the purchase-money by instalments to the vendor:—

*Held*, affirming the decision of the Court of Appeal, that on the principle of *Hopkinson* v. *Rolt* (9 H. L. C. 514) the bank had no charge on the land as against the purchaser for the fresh advances:

*Held*, also, that the bank had no charge upon the purchase-money:

*Per* LORD BLACKBURN:—A purchaser of land, with notice that the title deeds have been deposited with a bank as security for the general balance on the vendor's present and future account, is not bound to inquire whether the

bank has after notice of the purchase made fresh advances. The burden lies on the bank advancing on the security of the unpaid vendor's lien to give the purchaser notice that it has so done or intends so to do.

APPEAL from an order of the Court of Appeal (1).

The action was brought against the Respondent by the Appellants as equitable mortgagees of certain hereditaments at *Earleigh*, the conveyance of which to *J. W. Batten*, the vendor, who was a customer of the bank, had been deposited by him with the bank as a security for the payment of his then overdrawn account, and for all money which should at any time be due from him to the bank on the general balance of his account. *Batten*, with the knowledge of the bank, contracted to sell his property to the Respondent, who employed the vendor's solicitor to prepare his conveyance, and afterwards paid or accounted for the purchase-money to the vendor. The vendor continued to deal with the bank, but ultimately became bankrupt, with a large balance to the debit of his account. The facts were complicated, but will sufficiently appear, with the arguments, from the judgments of Lords *Selborne* and *Blackburn*. The action was tried before *Bacon*, V.-C., who held that the rule in *Clayton's Case* (2) had no application, and by his order, dated the 10th of May, 1879, declared that the security of the bank was paramount to the title of the Respondent, and that the Respondent was a trustee of the premises for the bank, and gave consequential relief founded upon such declaration.

The Court of Appeal on the 24th of March, 1880, reversed the Vice-Chancellor's decision, considering the case to be within *Hopkinson* v. *Rolt* (3), and the rule in *Clayton's Case* (2) to be applicable, and dismissed the action with costs.

May 19, 20, 23. *Benjamin*, Q.C., *Davey*, Q.C., and *Russell Roberts*, for the Appellants.

*John Pearson*, Q.C., and *Horton Smith*, Q.C. (*Ingle Joyce* with them), for the Respondent.

*Davey*, Q.C., replied.

(1) Not reported. (2) 1 Mer. 585.
(3) 9 H. L. C. 514.

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LONDON AND COUNTY BANKING COMPANY v. RATCLIFFE.

Their Lordships took time to consider.

June 14. THE LORD CHANCELLOR (Lord *Selborne*) :—

My Lords, the Appellants in this case claim under an equitable mortgage of certain real estate at *Earleigh*, near *Reading*, given to them by one of their customers named *Batten*, to secure the then present and future general balance of his banking account with them. The conveyance of that estate (from a vendor to him named *Spokes*) was deposited by *Batten* with the bank; the purpose of the deposit being declared by a memorandum in writing, dated the 17th of January, 1873, by which *Batten* engaged to give the bank, whenever required, legal mortgages of this (and, as I collect, of other properties, the deeds or documents relating to which were also at the same time deposited); and declared, that the security should not be considered satisfied by the payment or liquidation of any sums to be thereafter from time to time due on the balance of the account, but should extend to cover all future sums which should at any time be or become due. This memorandum was afterwards cancelled, and another security, in the same terms (except the date, and an unimportant variance in the description of part of the property), was signed in lieu of it, and was given by *Batten* to the bank, on the 17th of June, 1874. One of the questions in the case might be, whether this cancellation and substitution of 1874 did not put an end to the security of 1873, under which alone the Appellants could be entitled to make any claim against the Respondent. But I prefer to consider the case upon its merits, as if no such cancellation or substitution had taken place.

On the 28th of April, 1873, an agreement in writing was signed by *Batten*, and by the Respondent (his brother-in-law), for the sale by *Batten* to the Respondent of part of the real estate at *Earleigh*, comprised in the conveyance deposited with the bank. The purchase-money (£3200) was treated as divisible into three sums; £1500 for one part, called "*Canterbury Villas*;" £900 for another part, called "*Woodbine Villas*;" and £800 for the remaining part, called "*Twyford Villas*." A deposit of £25 was paid, and the 24th of May, 1873, was fixed for payment of the rest of the purchase-money, and for conveyance and completion of the

purchase, possession to be given to the purchaser as from that date. *Batten* agreed, in the ordinary way, to make a good title, which would, of course, be a title free from incumbrances, and he was to retain all deeds and documents in his possession relating to any property other than that sold to the Respondent, covenanting in the usual way for their production. The effect of this last stipulation was, that the Respondent, as purchaser, could not claim the possession of the deed of conveyance from *Spokes*, which had been deposited with the bank, and which related to other property, as well as to that sold to him. In addition to the terms embodied in this agreement of the 28th of April, 1873, it was also stipulated between *Batten* and the Respondent (by letters which passed between them) that two debts, then due from *Batten* to the Respondent and the Respondent's wife, for sums exceeding together £800, should be set off against the purchase-money of £3200.

The Appellants and the Respondent had respectively notice, the former of the contract of sale from *Batten* to the Respondent, the latter of the Appellants' security of the 17th of January, 1873. The contract and the notice of it to the Appellants were (or may for the present purpose be treated as having been) contemporaneous. The amount then due to the Appellants on the balance of their banking account with *Batten* was £1779 6*s.* 7*d.* and of this the Respondent must be deemed to have had notice. The contract, so far as relates to *Canterbury Villas*, was completed, by conveyance and payment of the £1500 apportioned to that part of the property, on the 28th of May, 1873, with the Appellants' knowledge, who received £1100 (part of this £1500) on the 6th of June from *Batten's* solicitor, the remaining £400 being received, without objection from the Appellants, by *Batten* himself. Another conveyance in fee simple of all the rest of the property agreed to be sold was also at the same time executed, and was left with *Batten's* solicitor until the rest of the purchase-money should have been paid (as it eventually was, in several instalments) by the Respondent to *Batten*. The latest of these payments was made on the 11th of March, 1876, after which the conveyance from *Batten* was delivered up to the Respondent. The Appellants had no notice of the execution of this conveyance,

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or of any of the payments made by the Respondent to *Batten* in respect of the property comprised in it, until some time after the last payment.

Under these circumstances it results from the decision of your Lordships' House, in *Hopkinson* v. *Rolt* (1), that, as against the title of the Respondent, the purchaser, under the contract of the 28th of April, 1873, no further charge on the real estate comprised in that contract could be created in addition to the balance of £1779 6*s.* 7*d.* at that time due by any subsequent advances which the bank might make to *Batten*. Nor can I discover anything in the nature or terms of the Appellants' security of the 17th of January, 1873, to prevent the extinction of that debt of £1779 6*s.* 7*d.* due on the 28th of April, 1873, by means of payments afterwards made by *Batten* to the general credit of his banking account, upon the principle of *Clayton's Case* (2). In point of fact those payments were, before the end of the same year 1873, more than sufficient to extinguish the whole of that debt; and although, in the continuation of the account, there was always a considerable balance due to the bank, the whole debt, subsequent to 1873, was for advances later than the 28th of April, 1873. The continued possession by the Appellants of the deed of conveyance from *Spokes* to *Batten* (relating, as it did, to other property besides that sold to the Respondent), makes, in my opinion, no difference in the case.

Upon the statement of claim in the action, the Appellants' case appears to me to be rested on grounds inconsistent with the decision in *Hopkinson* v. *Rolt* (1). But a different view was presented in the argument at your Lordships' bar, which it is now necessary to consider, and which I assume to be open to the Appellants, notwithstanding the form of their pleading. It was insisted that the security of the 17th of January, 1873, extended to every interest which *Batten*, the mortgagor, had, or at any time during its continuance might have, in any part of the land to which the deposited deed of conveyance related; that although by the contract of sale it necessarily became limited, as to the land itself, to the debt of £1779 6*s.* 7*d.* then due (and which was afterwards paid off), it continued operative against the

(1) 9 H. L. C. 514. (2) 1 Mer. at p. 585.

purchase-money payable under that contract to *Batten*, so as to bind that purchase-money (except the £400 paid with the Appellants' knowledge) by all the subsequent advances from time to time made; that the Respondent was bound to inquire, whether there were or were not any such subsequent advances, before he could be discharged from any part of the purchase-money by any payment to *Batten*; and that, having failed to make such inquiry, he is now liable to pay the money over again to the Appellants, to the full extent to which advances were actually made.

The result of the Appellants' contention is, to ascribe to the contract for sale of the 28th of April, 1873 (with the notice which they had of it) the effect of dividing what was before a single mortgage security, operating upon one subject and for one debt, into two distinct securities, operating upon different subjects,—upon one, for a present debt, and upon the other, for a merely possible future liability. The original security was the land, the debt secured was such balance as might happen to be due whenever the security should be put in force. But after the 28th of April, 1873, the real estate (according to this argument) continued to be a security only for the amount then due; and at the same time the personal debt from the Respondent to the mortgagor, which had then for the first time come into existence, and the vendor's lien for that debt, became a security for all those future advances by which the real estate could be no longer bound.

I agree with the Lords Justices in thinking that any such prospective division of the security, any such mortgage of a subject not then in existence for further advances which the Appellants were under no obligation to make, was not within the contemplation of the parties to the memorandum of the 17th of January, 1873, nor really within the scope of that instrument. When the mortgagor exercised, with notice to the mortgagee, the right which (according to *Hopkinson* v. *Rolt*) (1) he undoubtedly possessed of selling the mortgaged estate, subject to the then existing charge of the bank, and making his own bargain with the purchaser on his own terms, and in his own way, without any concurrence of the bank, a line was, in my opinion, drawn, which

(1) 9 H. L. C. 514.

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was applicable to the security as a whole; and the bank could not make further advances so as to prevent or intercept (without any new agreement with *Batten*, or any notice to the Respondent beyond that which he had of the original security) the fulfilment, in the ordinary course, of the terms of the contract between *Batten* as vendor and the Respondent as purchaser. If the Respondent had bought a mere equity of redemption, subject to the Appellants' charge, and had paid off that charge, it seems to me to be quite impossible to contend that he would not have been at liberty to pay the balance of the purchase-money to his vendor without making any inquiry as to subsequent advances by the Appellants. If it were otherwise, he could not be entitled, without the Appellants' consent, to stipulate (as he did) that pre-existing debts, due to himself and his wife from *Batten*, should be set off against the purchase-money. It makes (in my judgment) no difference, that, by the terms of this contract, it was *Batten's* duty, as between himself and the Respondent, to clear the estate sold from the Appellants' incumbrance. In point of fact, he did so; and, indeed, he did more: the sums paid by him from time to time into the bank, after the date of the contract, exceeded the whole amount of the purchase-money received by him, from first to last, from the Respondent. This would (no doubt) be immaterial to the present controversy, if the Appellants had the rights which they claim; for they received those moneys (except the £1100 paid on the 6th of June, 1873), from *Batten*, without knowing from what source they came. But, from the terms of the Respondent's contract, of which the bank had notice, the fair and reasonable inference was, that the settlement of the purchase-money was intended to, and would, take place, according to the ordinary course between vendor and purchaser, that is by payment to the vendor, subject to his obligation to clear the title from the then existing charge. Notice to the Respondent of the security of the 17th of January, 1873, was notice of the existing charge; but it was not notice that, after the amount of that charge had been fixed once for all, as against the land, by the sale of the estate, further advances, which the Appellants were under no contract or obligation to make, would voluntarily be made by them to *Batten*, much less that such advances would be made

upon the footing of an equitable assignment to the bank of the unpaid purchase-money. Until these advances were actually made there was not, and there could not be, any existing charge for them; and even if such a charge arose as between *Batten* and the bank, when they were in fact made, this was not a charge of which notice by anticipation can be imputed to the Respondent, or into the existence or non-existence of which he was bound to inquire. It was for the Appellants, when those facts happened which (in their view) resulted in such a charge, to give notice of it.

A question not dissimilar to this arose, and was decided by this House, in the case of *Shaw* v. *Foster* (1) to which Mr. *Davey* referred in his reply. There *Pooley* had contracted with *Foster* to purchase certain real estate, and had afterwards given a security by deposit of the contract, with an accompanying memorandum, to the *Birmingham Banking Company*. The memorandum contained (among other things) a stipulation that he would, on request, assign to them his contract with *Foster*. Of this security, and of the fact that it was regarded by the bank as a charge upon the property, *Foster* had express notice; but it was held by the Court of Appeal in Chancery, and by this House, that, not having notice that the bank had made the necessary request to *Pooley*, on which the assignment of the contract by way of security was made contingent by the terms of the memorandum, he was under no obligation to make any inquiry on that subject, though he would have learnt (if he had done so) that the request had, in fact, been made; and that he was at liberty to convey the estate to *Pooley* without communicating with the bank, when the time for completion arrived. The principle of that decision seems to me to be applicable to the present case.

I am, therefore, of opinion that the judgment under appeal is right, and ought to be affirmed; and I move your Lordships that the appeal be dismissed with costs.

LORD BLACKBURN:—

My Lords, *James William Batten*, a builder, was a customer of the *Reading* branch of the *London and County Bank*, and in June,

(1) Law Rep. 5 H. L. 321.

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1872, deposited with that branch of the bank a deed of conveyance in fee from Sir *Peter Spokes* subject to a fee farm rent, being the title deed of some property called *Canterbury Villas*, on the terms usual between bankers and their customers, and at the same time signed a memorandum of the terms of that deposit. No question now arises as to this property, but it is necessary to mention it in order to make intelligible the transactions on which the questions in this case arise.

*Batten* got a conveyance, dated the 9th of December, 1871, from Sir *Peter Spokes* in fee, subject to a fee farm rent, which was *Batten's* title deed to some other land on which he subsequently built some villas; it is as to part of this land on which villas called *Woodbine* and *Twyford Villas* were erected that the questions arise.

*Batten* deposited this deed of the 9th of December, 1871, with the *London and County Bank*, and on the 17th of January, 1873, signed a memorandum of deposit. The manager of the *Reading* branch of the bank at a later date, the 17th of June, 1874, apparently very unnecessarily, took from *Batten* a further memorandum of deposit differing from that of the 17th of January, 1873, only in the date, and in adding a statement that besides the *Woodbine* and *Twyford Villas* two other villas called 1 and 2, *Granby Gardens*, had been built on the same property; and he, still more unnecessarily, destroyed the memorandum of deposit of the 17th of January, 1873, thinking it now useless. That memorandum when destroyed was unstamped, and an objection was below raised on the ground that being unstamped no evidence of its contents could be given, and that without evidence of its contents no case could be made for the *London and County Bank*. The Lords Justices permitted a copy duly stamped as an original to be read. As, notwithstanding that they received this copy in evidence, their judgment was that the action should be dismissed with costs, the Respondents did not, before this House, raise any point as to the reception of this evidence; and I may say, speaking for myself alone, that it was never explained to me what the objection under the revenue laws was, nor how it was obviated by the reception of this copy. An objection was raised by Mr. *Horton Smith* that the destruction of the memorandum of 1873, on grounds of common law, was fatal to the case of the *London and County Bank*. In the view which I take

of the law and facts it is not necessary to form any opinion as to this objection, and as I am unwilling, in the existing state of the authorities, to say anything unnecessarily on such a point, I shall express no opinion on it either way. I merely mention it to shew that it has not been overlooked.

The Defendant *Ratcliffe* had married *Batten's* sister. He had, it appears, lent to *Batten* £400, and *Batten*, as executor of his father's will, had to pay to Mrs. *Ratcliffe* a sum of money, which was afterwards ascertained to be £424 11s. A letter from *Ratcliffe* to *Batten*, dated the 11th of April, 1873, was put in evidence. The earlier part shews that *Ratcliffe* had seen *Batten* at *Reading*, and had understood from him verbally that ready money would be very useful to *Batten*, and that he, *Ratcliffe*, had promised to see what he could do. The material parts—and I think them very material—of this letter are as follow:—"I mentioned to *Lucy*" (his wife) "our conversation as to the property in the *Avenue*. She falls in with everything save the terms of *payment mentioned by you*. Her wish is that the amount I lent you (£400) and the third of residue due to her on the death of grandma, together with the sum accumulated, and, I presume, invested by you on that third portion before and since December, 1871, constitute part payment. I should not think of borrowing on mortgage more than £1000, or, at the very most, £1100, and would not place myself in the position to be obliged to repeat the mortgage at the expiration of five years. That would make my bargain a *dear one indeed*. I understand your position, and will do my very best, with the assistance of the £1000 from Mr. *Graham*, to pay you the whole due to you (after deducting the £400 and *Lucy's* third of residue, &c., due to her) by the close of June next. When I get the agreement from Mr. *Graham*, and approve of it, I will sign and let you or Mr. *Graham* have (as I may be directed) a deposit of £25. You shall also have shortly after to put yourself right with the bank, besides the £1000 from Mr. *G.*, the sum of £800 at least. Do not forget to mention to Mr. *Graham* the subject of the wall. Let me have also your letter respecting the villas only very partially finished, and a full statement of grandma's affairs and suggested mode of distribution, *before the agreement is sent*. We wish that first settled."

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The inference I draw from this letter is that at that time *Ratcliffe* was quite aware that *Batten* wanted ready money for the purpose of improving his credit with his bankers, and that he was willing to sell the property in question to *Ratcliffe*, £1000 or £1100 of the price to be raised by mortgage which *Graham* (a solicitor at *Newbury*, who was certainly acting for *Batten*) had said he could find; and now *Ratcliffe* offered to buy on terms already verbally discussed; that the residue of the purchase-money "(*after deducting the £400 and Lucy's third of residue, &c.*)" should be paid as soon as possible, for the purpose of improving his position with the bank. *Ratcliffe* swears that he neither then nor at any time knew that the title-deeds had been deposited with the bank, and I see no reason to doubt his assertion. I also draw the conclusion from this letter that *Graham* was as yet acting as solicitor for the vendor (*Batten*) only, and was to draw up the agreement in that capacity and send it to *Ratcliffe* for his approval, he, as yet, acting for himself in this matter. It is not important whether *Graham* was at any earlier date acting for both parties, for *Ratcliffe*, when he did receive and approve of the agreement, sent it, on the 28th of April, in a letter which undoubtedly made *Graham* his solicitor in completing the sale.

Before this it appears that *Batten* (and perhaps *Graham*) had seen the manager of the *Reading* branch, and he, on the 19th of April, sent the title deeds to the manager of the *Newbury* branch, with a request to hold them, "and let Mr. *Graham* arrange for the completion of their sale for £3200." *Graham*, who at least after the 28th of April, was solicitor for *Ratcliffe* in this transaction, was perfectly aware that the deeds had been deposited with the bank on the ordinary terms that they should be a security for all moneys which should at any time be due on the general balance. *Batten's* account was overdrawn, and *Graham*, if he did not know the precise balance, could easily have ascertained it, and had at least constructive notice what was the amount.

I think, therefore, it must be taken that *Ratcliffe*, who had as yet only paid in cash the deposit of £25, had notice that the bank held a security for what turns out to have been on the 2nd of May, which I think the important date, between £1700 and £1900, it is

not necessary to be more precise; he had bargained that the debt of £400 and the third of Mrs. *Ratcliffe's* money, together £824 11s., should be taken as part payment of the £3200, but he ought to have known (though very possibly he personally did not) that the debt to the bank was a prior charge on the land, and that whatever moneys he might pay in future to *Batten* would be so far thrown away unless *Batten* discharged it in some way or other.

*Graham*, on the 2nd of May, 1873, wrote to the manager of the *Reading* branch of the *London and County Bank* the following letter:—"*Newbury*, 2nd May, 1873. *Batten* and *Ratcliffe*. Dear Sir,—I received this morning the contracts signed by Mr. *Batten* and Mr. *Ratcliffe* respectively, and the 24th instant is fixed for the completion of the purchase. I have seen Mr. *Gurney* to-day, and have told him I will write you.—Yours truly, *Charles A. Graham*. *J. A. Strachan*, Esq." The agreement was dated the 28th of April, 1873, and the material parts were as follows:—"The vendor agrees to sell unto the purchaser, who hereby agrees to purchase, firstly, all those two messuages or tenements with stables, outhouses, gardens, and appurtenances called '*Canterbury Villas*,' situate at *Erleigh*, near *Reading*, *Berks*, subject to a fee farm rent of £12 per year to Sir *Peter Spokes*, his heirs or assigns; and, secondly, also all those two villas with appurtenances called '*Woodbine Villas*,' also situate at *Erleigh*. And the two villas with appurtenances also situate at *Erleigh*, aforesaid, and called '*Twyford Villas*,' subject as to the premises secondly before described to the apportioned fee farm rent of £20 payable to the said Sir *Peter Spokes*, his heirs and assigns. The purchase-money is fixed at the sum of £1500 in respect of the premises firstly described, the sum of £900 for *Woodbine Villas* and appurtenances, and the sum of £800 for *Twyford Villas*, £25 part of the purchase money to be paid down on the signing of this contract by way of deposit, and the remainder to be paid on the 24th day of May next, at the office of Messrs. *Graham*, Solicitors, *Newbury*, at which time and place the purchase is to be completed, and the said *Thomas Ratcliffe* shall, as from that day, be entitled to possession or the rents and profits of the said premises respectively, all outgoings up to that time being discharged by the

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vendor. On payment of the remainder of the purchase-money the vendor shall execute a proper conveyance of the premises unto the purchaser, such conveyance to be prepared by and at the expense of the purchaser. If from any cause whatever the purchase is not completed on the said 24th day of May next, the purchaser shall pay interest on the residue of the purchase-money from that day until completion of the purchase at the rate of £5 per cent. per annum. It is hereby agreed that the vendor shall, at his own cost, complete and finish in a workmanlike manner with good and proper materials, the villas called '*Twyford Villas*,' now in course of building, and also the wall on the south side of the same villas." This last passage explains the reference to a wall in *Ratcliffe's* letter of the 11th of April.

The letter of the 2nd of May, 1873, gave the bank distinct notice that the agreements were signed, which was the fact. It did not give the bank any notice that it was part of the bargain that £824 11*s.* was to be paid by way of set-off, and that *Batten's* vendor's lien was only good for the balance, or a little more than £2400, which, however, was more than enough to discharge all that was then due to the bank. Even if those acting for the bank had seen the agreements (which I think it is not proved that they ever did) the bank would not have found in them any stipulation as to how the price was to be paid. I think it most likely that *Batten* had led the bank to believe that the whole £3200 was to be paid in cash, and would pass through their hands; and it is not unlikely that *Graham* was not at all anxious to disabuse them of an expectation that must have tended to make them more liberal to *Batten;* but I see nothing tending to shew that *Ratcliffe* at any time, or *Graham*, whilst acting as *Ratcliffe's* solicitor, did anything to foster this belief. The bank asked no questions; and I think they had no right to assume that the price was not to be paid in any way which *Batten* or *Ratcliffe* might find most convenient. But *Ratcliffe* had notice (through his solicitor) that the deeds were pledged, as is universally the case with deposits with banks, not only for the existing balance, which on this 2nd of May, 1873, appears from the pass-book to have been between £1700 and £1900, but also for the general balance that might at any time become due, which might be very

much larger. And the question arises what was the effect of this last notice?

The further facts necessary to raise it are briefly these. *Graham* procured some one to take a mortgage of the *Canterbury Villas* for £1100, and I suppose had in some way or other informed *Strachan* that he had done so, and that this £1100 would be forthcoming, for the three following letters passed:—"*London and County Bank, Reading,* 26th May, 1873. Dear Sir,—Upon Mr. *Graham* paying the sum of eleven hundred pounds account *J. W. Batten* with this branch, be pleased to deliver to him the deeds of *Canterbury Villas,* retaining the deeds of *Granby Gardens* estate.—I am, dear sir, yours truly, *John A. Strachan,* manager. *Thos. Gurney,* Esq., *London and County Bank, Newbury.*" "*Newbury,* 28th May, 1873. *Batten* and *Ratcliffe.* Dear Sir,—The £1100 is ready and will be paid to Mr. *Gurney* in a few days, the deeds having been sent to-day to *King's Lynn* for Mr. *Ratcliffe's* signature, preparatory to completing the purchase of *Canterbury Villas.* I understand that the *completion,* so far as *Woodbine* and *Twyford Villas* are concerned, will not take place until about the 24th of next month.—Yours truly, *Charles A. Graham. J. A. Strachan,* Esq." "*London and County Bank, Newbury,* 4th June, 1873. My dear Sir,—I beg to inform you that we credit your branch this day, by Mr. *Graham* on account of *J. W. Batten,* £1100, and have returned conveyance, *Spokes* to *Batten,* 9th December, 1871, receipt of which please acknowledge.—I am yours faithfully, *Thos. Gurney. J. A. Strachan,* Esq."

From that time the *Canterbury Villas* estate is out of the case. And by this payment of £1100 the balance of between £1700 and £1900, which was owing to the bank on the 2nd of May, 1873 (which I think is the day when the bank had notice that *Ratcliffe* had bought the property from *Batten*), was reduced to between £600 and £800.

I do not think that anything is proved that amounted to notice, either actual or constructive, to *Ratcliffe,* or to *Graham* when acting as *Ratcliffe's* solicitor, after that date of the 2nd of May, 1873; but in fact the bank continued their account with *Batten,* receiving payments from him and making advances to him, just as they might have done if there had been no notice of the sale

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to *Ratcliffe*. The balance on the account was never turned in *Batten's* favour. It is struck in the pass-book at the end of each three months. On the 1st of July, 1873, at £902 9*s*. 6*d*., that is after credit had been given for more than £1600 (including the £1100) paid between the 2nd of May and the 1st of July. It is again struck on the 30th of September at £1424 17*s*. 3*d*.; that is, after giving credit for £327 19*s*. 3*d*. for moneys paid in during the three months between the 30th of June and the 1st of October. It is again struck on the 31st of December at £1824 17*s*. 7*d*., that is, after giving credit for £957 2*s*. 1*d*. for moneys paid during those three months. It is not necessary to proceed further, for it is obvious that, if what is called the rule in *Clayton's Case* (1) is to be applied, the old balance due on the 1st of July was wholly paid off during the two quarters ending on the 31st of December, and the balance due on the 1st of January, 1874, consisted entirely of advances made after the 30th of June, which was some time after the bank had, on the 2nd of May, notice of the sale.

*Ratcliffe* paid to *Batten* at various times moneys, and gave him credit, which, in the whole, amounted to £3200, the last of these payments being on the 11th of March, 1876, when he took from *Batten* this receipt:—"11th March, 1876. Received from Rev. *Thomas Ratcliffe* the sum of four hundred and forty pounds and seven shillings and fourpence, being balance on completion of purchase of six villas (named in the conveyance deeds, *Canterbury*, *Woodbine*, and *Twyford Villas*), and also of all claims on account of ground rent for the aforesaid six villas up to March the 25th, 1876. *J. W. Batten*. £440 7*s*. 4*d*."

He made these various payments without any inquiry as to whether *Batten* had paid off the charge the bank had on the property, which was not imprudent on his part, as he did not personally know that such charges existed, *Batten* and *Graham* not having informed him of that fact. But it is not and could not be disputed that, notice having been given to *Graham* while acting as his solicitor that the charge to this amount existed at the time when notice of his purchase was given on his behalf to the bank, no subsequent payments to *Batten* could avail against that charge. He must shew that the amount was paid to the bank. £1100 was

(1) 1 Mer. 585.

in every sense paid to the bank on the 4th of June, 1873. The balance between £600 and £800 is only accounted for if the rule in *Clayton's Case* (1) applies. The Vice-Chancellor thought it did not. He says,—"In my opinion no such principle is applicable to the case of deposit made with a banker. It has no application, because, as has been truly said, a banker's lien upon all matters deposited with him, or which come into his possession, extends over the whole of the account. When the relation of debtor and creditor subsists between the parties the lien is operative and active."

The Lords Justices were of a different opinion. Lord Justice *James* briefly says, "It is clear, from the bank accounts, that all that was due at that time was long since paid off." I agree with the Lords Justices. I think that the Vice-Chancellor is quite right in saying that, as between the banker and his customer, the lien is operative whenever the relation of debtor and creditor exists. If the payments made to the bank had been at any time, say during the three months from June to October, so great as for a time to turn the balance in favour of *Batten*, so that his account had been a solvent one, and the balance on the 1st of October in his favour, and afterwards advances had been made by the bank so great as to turn the balance the other way, it would be quite accurate to say that the lien for this new balance, as between the bank and *Batten*, was as effective as if the balance had never been turned; but could it then be contended that the old balance had not been discharged, or that, though *Ratcliffe* never had been told that the balance had for a time been turned, his property could have been held liable to make good part of the new balance, because it had been subject to a charge for that which was paid off? I take it such a contention would have been obviously untenable. And I do not see why the discharge by the application of the rule in *Clayton's Case* (1) should have less effect. The bank might, if they pleased, have taken the payments on such terms as to prevent the application of that rule, but, not having done so, it seems to me that the old balance was, before the end of the year, 1873, paid off.

But this leaves the question to be determined whether, as

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against the purchaser *Ratcliffe*, he having had notice (though I think only constructive notice) that the title deeds had been pledged to the bank on the usual terms, that they should be a security for all moneys which should at any time be due upon the general balance, the bank had a security on the property, after it had become *Ratcliffe's*, for advances made in the ordinary way, but after they had notice that the property had become *Ratcliffe's*. The Vice-Chancellor, by his decree, makes *Ratcliffe* a trustee for all these sums. I do not think that in his judgment he clearly indicates why he so thought, but I conjecture that he recollected what at one time was believed by many practitioners to have been the law settled by *Gordon* v. *Graham* (1), and thought it applied to this case, and that it was not brought to his notice that a majority of this House had in *Hopkinson* v. *Rolt* (2) determined, contrary to the opinion of Lord *Cranworth* who dissented, that *Gordon* v. *Graham* (1) had been misunderstood, and that a mortgage to secure future advances not exceeding a certain amount, though perfectly good as against the mortgagor, gave the mortgagee no equity to postpone advances made by a second mortgagee with notice of the first, to advances made by the first mortgagee after notice of the second mortgage. I do not inquire whether if the doctrine for which Lord *Cranworth* contended had been adopted by the House, and was the law as to advances by a second mortgagee, it would have applied to payments by a purchaser. I doubt it; but it being decided by this House that it was not law as to a second mortgagee, it follows, *à multo fortiori*, that it was not law as to a purchaser. In this I agree with the Lords Justices.

One more point was made at your Lordships' bar, which I think was not suggested before the Lords Justices, and, at all events, was not dealt with by them. It was said that *Batten*, not having been paid the whole price when he sold, still held the land as an unpaid vendor, with an unpaid vendor's lien against *Ratcliffe* for this unpaid amount; the sum could be afterwards ascertained, but it certainly was considerable. And *Batten* could pledge this unpaid vendor's lien to the bank, and if he did so, and notice was

(1) 2 Eq. Cas. Abr. 598, pl. 16; 7 Vin. Abr. 52, pl. 3.
(2) 9 H. L. C. 514.

given to the purchaser of such a pledge, the purchaser could no longer safely pay *Batten*, who could not give him a discharge without the concurrence of the pledgee; and in all this I agree. It was further argued that, the deeds having been deposited with the bank as a security for future advances, that did, *ipso facto*, pledge as a security for those future advances *Batten's* interest as an unpaid vendor which arose on the sale; and that *Ratcliffe*, having constructive notice of the terms of the deposit, was in the same position exactly as if he had actual notice that *Batten* had agreed to pledge his unpaid vendor's lien for future advances; and, in paying *Batten*, took the risk, not only of whether the previous advances had been paid off, but also of whether there had been any subsequent advances. This, in effect, raises the question whether any one purchasing land, with notice that the title deeds have been deposited with a bank, is bound to inquire whether the bank has, after receiving notice of this purchase, made fresh advances on the security of the unpaid vendor's lien; or whether the burden does not lie on the bank, advancing on the security of the unpaid vendor's lien, to give notice to the purchaser, that it has so done, or intends so to do. No case was cited in which any such point had been discussed; but I think both convenience and principle strongly point to the burden of giving notice lying on the bank, and not on the purchaser, whose inquiries might often be annoying and impertinent.

I am, therefore, of opinion that the appeal should be dismissed with costs.

LORD WATSON:—

My Lords, I concur—I have had the advantage of considering, in print, the judgments which have just been delivered by my noble and learned friends; and I have nothing to add.

*Order affirmed, and appeal dismissed with costs.*

*Lords' Journals*, 14th June, 1881.

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