ALEXANDER BLACK (DEFENDANT) . . APPELLANT;

AND

KATE HIEBERT (PLAINTIFF) . . . . . RESPONDENT.

1907

*April 5.
*May 7.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Mortgage—Money advanced to construct buildings—Lien for materials supplied—Payment to contractor—Transactions in fraud of mortgagor's rights—Redemption—Costs.

A building and loan company advanced money to an illiterate woman for the purpose of aiding in the construction of a house to be erected upon lands mortgaged to it to secure the loan. The mortgage contained no provision for advances to contractors, etc., as the work progressed, beyond the following:

"And it is hereby agreed between the parties hereto, that the mortgagees, their successors and assigns, may pay any taxes, rates, levies, assessments, charges, moneys for insurance, liens, costs of suit, or matters relating to liens or incumbrances on the said lands, and solicitors' charges in connection with this mortgage, and valuator's fees, together with all costs and charges which may be incurred by taking proceedings of any nature in case of default by the mortgagor, her heirs, executors, administrators or assigns, and shall be payable with interest, at the rate aforesaid, until paid and, in default, the power of sale hereby given shall be forthwith exerciseable. And it is further agreed that monthly instalments in arrear shall bear interest at the rate aforesaid until paid."

In a suit for redemption,

Held, first, that the clause in the mortgage did not justify the mortgagees in making advances to contractors and persons supplying material, without the express order of the mortgagor.

Secondly, that the mortgagees ought not to have recognized an order in favour of the contractor for the total amount of the loan when they knew that the contractor had not completed his contract and was, therefore, not entitled to the money when the order contained no name of a witness, and shewed that the mortgagor was unable to sign her name.

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*PRESENT:—Fitzpatrick C.J. and Girouard, Idington, Maclennan and Duff JJJ.

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The payment having been made by the loan company to a lumber company supplying material to the contractors for the building, without the express authority of the mortgagor, and the lumber company having taken an assignment of the mortgage, and attempted to enforce it against the mortgagor the transaction was declared fraudulent as against the mortgagor, and the payment to the lumber company disallowed.

Held, also, that the only costs the assignees of the mortgage were entitled to add to the mortgage debt were the costs of an ordinary redemption suit consented to by a mortgagee.

Judgment appealed from varied, and appeal dismissed with costs.

APPEAL from the judgment of the Court of King's Bench for Manitoba reversing the judgment of Perdue J. at the trial, whereby the plaintiff's action for redemption was dismissed with costs, and ordering that the plaintiff should be let in to redeem.

The circumstances of the case and the questions at issue on the present appeal are stated in the judgment now reported.

Hellmuth K.C. for the appellant.
Ewart K.C. for the respondent.

The judgment of the court was delivered by

IDINGTON J.—This is a redemption action in which the first question to be solved is whether or not the mortgagee advanced the moneys agreed to be advanced to an amount greater than fairly covered by the terms of a tender made the appellant, who is the assignee of the mortgage.

If these questions are, or either is, resolved in favour of respondent, many others raised need not trouble us.

The learned trial judge disposed of the questions raised before him on a ground, I think, untenable in law.

The respondent appealed from his judgment to the Court of King's Bench for Manitoba. That appeal was allowed by the court and usual redemption judgment pronounced with some variation as to costs.

The circumstances raising these questions are as follows:

The respondent's husband on the 21st October, 1903, applied to the Great Western Permanent Loan and Savings Co., carrying on business in Winnipeg, for a loan of $1,500 upon property in Winnipeg, stated in the application to be owned by him and upon which were being erected buildings which it was expected, when completed, would be worth $2,400. Part of the money, it was stated, would be needed when the roof was on the building. This application was not complied with, but a mortgage was arranged for on the same property for $1,000 which was to be secured by first mortgage, to be given by the respondent.

I do not find that she signed any application. On the 28th November, 1903, she executed the mortgage which is now in question to secure the $1,000. It was apparently intended to carry out what is appropriately described as a building loan. The mortgage, however, does not represent what one would expect to find in such a security. There is no appropriate provision enabling the mortgagees to advance to contractors and material men, what might be required for the purposes of paying them, so far as the loan would extend.

The mortgagees had absolutely no authority to advance without instructions from the mortgagor, save that which is contained in the following provision of the mortgage:

> And it is hereby agreed between the parties hereto, that the mortgagees, their successors and assigns, may pay any taxes, rates,

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levies, assessments, charges, moneys for insurance, liens, costs of suit, or matters relating to liens or incumbrances on the said lands, and solicitors' charges in connection with this mortgage, and valuator's fees, together with all costs and charges which may be incurred by taking proceedings of any nature in case of default by the mortgagor, her heirs, executors, administrators or assigns, and shall be payable with interest, at the rate aforesaid, until paid and in default the power of sale hereby given shall be forthwith exerciseable. And it is further agreed that monthly instalments in arrear shall bear interest at the rate aforesaid until paid.

The difference between the parties has arisen out of the combined want of some provision of a more extensive kind than this; and a want of business methods in making such advances as were made.

The following copied from appellant's factum is a statement of the advances claimed to have been made by the mortgagees upon the mortgage:

A.	Dec. 9	To cheque, G. West dues and valuation....		33.00	
B.	" 23	To cheque, W. Higginson.....		8.30	
C.	" 23	To cheque, Wiebe and Jardine.....		57.00	
D.	" 23	To cheque, Standard Sash and Door Factory.		50.00	
E.	" 24	To cheque, 1 mos. dues.....		13.00	
F.	" 24	To cheque, Ins. premium.....		45.00	
G.	" 29	To cheque, Wiebe & Hebert.....		40.00	signed
H.	" 30	To cheque, Frederick Arnot.....		22.00	signed
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J.	Dec. 18	To cheque, 1 mos. dues.....	13.00		balance)
K.	" 30	To cheque, 2 mos. dues 2nd loan..	13.00		705.70
					(500 new loan
L.	Feb. 2	To cheque, F. Wiebe and Jno. Sharpe.....		20.00	signed 1,185.00
M.	" 2	To cheque, F. Wiebe & Rat Portage Sash Co.....		37.00	signed 1,148.70
N.	" 2	To cheque, F. Wiebe & Geo. Black.		30.00	signed 1,118.70
O.	May 6	To cheque, Gt. West, 4 mos. dues 1st loan.....	52.00		1,066.70
P.	" 6	To cheque, Gt. West, 4 mos. dues 2nd loan.....	26.00		1,040.70
Q.	"	To cheque, the Beehive Stores...	35.00		
R.	" 17	To cheque, John Robertson.....	35.00		970.70
S.	" 17	To cheque, 1903 taxes.....	2.25		968.45
T.	Nov. 2	To cheque, Alex. Black Lumber Co.	414.78		553.67
U.	" 2	To cheque, costs of loans.....	41.25		512.42

Were such advances, or any of them, and which, ever properly made on this mortgage? Such are the issues raised here.

It becomes necessary to examine the evidence bearing on each item or class.

Part (*i.e.* $7.00) of A. and all of H.J.M.N. and S. amounting to $158.25 are admitted to have been properly paid.

Items B.C. and D. are disputed and we have to determine whether in fact they were authorized.

To satisfy my mind on this point I have found it necessary to read nearly all the evidence in the case. It is conflicting.

A bias appears in each one of the witnesses (except Mr. Crichton, a solicitor employed by respondent) on either side of this question.

Interest and hate are both represented.

The only authority for these payments is the following order:

EXHIBIT 7.

Messrs. Taylor and Laidlaw.

Please pay to Wiebe and Jardine the proceeds of my loan in the Great West Permanent Loan & Savings Company, amounting to $1,000, less costs.

Witness. (Signed)
her
KATE X HIEBERT.
mark.

On the face of this order it is executed, if at all, by a mark, and there is no attesting witness, though it evidently was intended there should have been one. It was drawn up by a clerk in the office of the Loan Company's solicitors and it is addressed to them. The Loan Company had then deposited with them $400 of the loan to pay over as needed. They knew respond-

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ent to be illiterate, as she had executed the mortgage by her mark.

The firm of Wiebe and Jardine named in Ex. 7 had the contract to build the house which the respondent was having built on the mortgaged land, when the mortgage was executed.

They had got some cash from respondent to begin with and were entitled to $470 when the roof was on, but no more until their contract was completed. The contract never was fulfilled and no other payment ever fell due. I assume, though it is not clear, that the roof was on and this $470 due and payable when this order was written.

The least inquiry then would have disclosed the fact that not only was $470.00 all that they could be entitled to but also that material supplied by the lumber company of which appellant was then president remained unpaid to an amount exceeding this sum.

Evidently an order to pay the sum of $1,000.00 over to Wiebe & Jardine was a thing that should not have been countenanced by the solicitors under such circumstances.

Whoever in the solicitor's office drew it and gave it to Jardine ought in any case to have made clear to Jardine that he should in dealing with this illiterate person get a witness to see that before she made her mark she understood what she was doing.

None of these things that ought to have been done were done, and thus Exhibit 7 must therefore be supported by clear extraneous evidence before it can be relied upon by appellant.

Have we got that?

Upon the best consideration I can give the conflicting evidence on the point I cannot find that what is

given in support of appellant's contention outweighs that presented by the respondent.

Exhibit 7 was taken by Jardine to respondent's house about (I infer) four or five p.m. of 23rd December, 1904, and he says was there executed, by respondent in his presence.

He says, of course, that he "explained it to her," but when he tells, as he does, that when she had signed it by making her mark thereto she folded it up and was putting it away in her cupboard to keep, we can realize how little his explanation was worth.

She swears she did not understand what she signed, that she understood it related to a trifling matter of eight dollars and that on reflection she became doubtful and alarmed and told her husband the same evening.

The story of Jardine rather confirms hers of want of understanding. The action of herself and husband going at the earliest practicable moment to a solicitor to complain and with him to Taylor, the company's solicitor, and the result shewn below presents further confirmation. The inherent improvidence of the alleged order also tends to confirm an entire want of understanding it, when we bear in mind the state of facts above related.

The witnesses for the appellant swear that she referred the same evening to having signed an order, but they each gave varying shades of meaning as to her understanding of it from that of an order such as Exhibit 7 is, to an order for some money, or to one for some part of the loan.

These witnesses belong to one household and are contradicted by respondent and her husband who were present on the same occasion.

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They were all at the time friendly. They supped together that night, immediately after Jardine got Exhibit 7 out of her hands.

The statement, respecting which such diverse stories are told, was made on the said occasion of supping together.

These witnesses for appellant have quarrelled since, rather bitterly, with respondent and her husband.

Wiebe, who is the only one of them swearing to a definite admission of Mrs. Hiebert, was not bold enough to maintain such contention, before them, next morning in Mr. Taylor's office. He seems to have then assented to their story. Why does he now change?

However all this may be the onus of establishing "Exhibit 7" as a valid authority rested upon those setting it up and they have failed to satisfy me of its validity.

Respondent and her husband accompanied by a solicitor called next day (24th Dec.) upon Mr. Taylor to complain of what had taken place.

Wiebe, the partner of Jardine, was also there, and took part in what followed.

Mr. Taylor on hearing the story very properly cancelled Exhibit 7.

He then wrote out what is Exhibit 8 in the case, and had it executed in presence of all parties I have named as present at this meeting.

This Exhibit 8 is as follows:

EXHIBIT 8.

To the Great West Permanent Loan and Savings Company, pay the proceeds of current loan from you to me to Cornelius Hiebert and Franzes Wiebe.

(Signed)

her

KATE X HIEBERT.

mark.

Witness,
W. Madely Crichton,
C. Hiebert.

It is to be observed that this does not in terms cover or in any way ratify what had been done under Exhibit 7 and cannot in any way be used to justify the payments of items B. C. D. The cheques for C. and D. were only paid on the 24th and 26th December respectively.

It is also to be observed that Taylor, without any explanation for doing so, retained Exhibit 7 though cancelled.

In justice to Mr. Taylor, I think he never acted upon it. I would infer that he gave the cheques anticipating the signature and that somebody in his office blundered.

I know he puts it in one place as if he were positive that Exhibit 7 was got before cheques issued. Other places shew he had no recollection. On such evidence I would prefer finding that a solicitor or some one he was responsible for, committed an error, rather than impute to him deliberately acting on such a document as this Exhibit 7 presents on its face, without inquiry and evidence to establish it.

It seems to me that the substituted authority of Exhibit 8 under the circumstances must be taken as an agreement between all concerned that unless in the case of some inevitable necessity such as payment of taxes or expenses the company would not attempt to deal with the moneys for which they had taken the mortgage unless by the joint direction of the parties named in the order Exhibit 8.

I am unable to comprehend why so simple a method should ever have been departed from, but it was.

It seems as if suggestions of Jardine or of Wiebe without any reference to Cornelius Hiebert or his sanction were followed by the Loan Company through Mr. Taylor.

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Items Q. and R. were paid without complying with Exhibit 8 and Mr. Taylor in regard to these and similar items falls back upon the alleged right he had to pay out sums he saw fit for work or material that "had gone into the building."

The following evidence given by Mr. Taylor shews what mistaken notions he had of the law and facts that should have controlled him:

Q. And beyond what Wiebe told you you don't know whether that had any relation to the building or not?

A. It is likely I relied on his statement that it was stuff supplied to him.

Q. You got no authority whatever from Hiebert?

A. No.

Cheque referred to marked as Exhibit No. 14.

Q. Now, if it should happen—that cheque (14) was given, I believe, for material?

A. Yes, he hauled in stone and lime, John Sharpe did, and it was given for material of some kind.

Q. Now, if it should happen that the contractor would fail in the construction of his work so that this material man would not be entitled to the loan (amount) you would still advance the mortgage money without the authority of the mortgagee, would you?

A. No, Wiebe and Jardine had an order.

Q. No, their order was cancelled and substituted by Hiebert and Wiebe?

A. I don't think that they could cancel it, and I didn't think so at the time.

Q. You would not think so, and you did not think so?

A. No, not without Jardine's consent.

Q. And you still acted under the order, Exhibit No. 7, and the authority therein contained, did you?

A. The thing was a little mixed and we did the best we could to put the material in to the building.

Q. You still acted under the authority contained in Exhibit 7?

A. Yes, still regarded that.

Q. And still acted on the strength of that?

A. Yes.

Q. Don't you recollect both Mrs. and Mr. Hiebert tell you that she hadn't seen or authorized the order, Exhibit 7?

A. No, I don't recollect of him telling me that.

Q. Would you say that they did not do so?

A. Oh, I couldn't say that they didn't do that. They were in a good many times, and had a good deal of conversation.

Q. Don't you recollect Mr. Crichton telling you that Mrs. Hiebert had not seen or authorized her mark to be affixed to the first order, Exhibit 7?

A. *I think I heard something about it in some way, but I didn't think there was much in it, though I think she authorized it all right.*

Q. You didn't think there was much in it?

A. No.

Q. Your wisdom dictated to you that Mr. Crichton, a solicitor, and Kate Hiebert the mortgagor, and Cornelius Hiebert her agent, came to you often and told you that she had neither signed or authorized the signature to Exhibit No. 7, that still you would rise superior to that, and recognize the orders for the payment of the mortgage moneys?

A. *I considered it a good order.*

Q. Notwithstanding what they told you?

A. *Yes, but I tried to keep the money going into the building notwithstanding the difficulties.*

* * * * * * * * * * *

Q. You had known that the building was tied up because there was not sufficient money to complete it?

A. Yes, we got a message that this lien was filed, and of course, we stopped them.

Q. In respect of the Jardine order, Exhibit No. 7, do I understand from you that you acted on that, notwithstanding that you had written "cancelled" over the front of it?

A. We continued to put the money into the building at the request of either *Wiebe or Jardine.*

Q. Who was really doing the business?

A. *Which business?*

Q. All, the building.

A. *Well, Mr. Wiebe appeared to have the most to do with it, although Jardine continued to take some interest in it, I don't know how much.*

This attitude of Taylor towards the business in hand is shewn in other parts of his evidence and has a bearing on nearly all he did including his later dealings with Black and the lumber company, to which I will presently refer.

His allegation that Jardine did not assent to the cancellation of Exhibit 7, and substitution therefor of Exhibit 8, is remarkable. A solicitor should not

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have assumed that the act of one partner could not bind the other in a matter of that kind, and should not have presumed without inquiry, if tempted to so assume, that the other partner had complained or had a right to complain.

I have not overlooked the clause relative to repairs, etc., pleaded but not relied on before us.

Needless to say, the facts do not permit of its application here.

Item F. is a claim set up of an advance of $45 for an insurance premium. I infer from the evidence that this was in respect of an insurance of $3,000. The application for the loan provided for an insurance of $1,500. The buildings were expected to be, when finished, of $2,400 in value. If any such insurance were procured as $3,000 and this $45 as premium is to be taken as paid in respect of that insurance, and no other is shewn, then I have no difficulty in saying that it was entirely unauthorized. Whatever rights such insurance may have created between the mortgagees and the insurance company it is inconceivable that any such insurance could have enured to the benefit of the mortgagor.

It was an over-insurance. It was unnecessary, as the land was worth $400 for the protection of the mortgagees at the time that it was effected. I do not think it was warranted as coming within the authority I have quoted. There had been no advance whatsoever made on the faith of this mortgage unless we are to treat the expenses incidental to the loan as such.

The item for the reasons I have stated must be disallowed.

There is now item "T." of November 2nd, 1904,

which is claimed to have been paid by cheque to the Alex. Black Lumber Co. for $414.78, to be considered.

The appellant's company had advanced material to the contractors. On their default liens were registered by the lumber company and others.

The respondent attempted to arrange matters by means of a second mortgage for $500.00 to the loan company.

There never was anything advanced on this mortgage though Mr. Taylor saw fit to blend it with the account of the first, and thereby made it appear in the statement as if an advance had been made.

The lumber company on the 2nd February, 1904, took steps to enforce their lien.

The respondent denied that so much lumber as claimed had gone into her buildings.

It was the 2nd February, 1905, before judgment was given, and when credit was given for what respondent, independently of mortgagees, had paid, there was only $270.00 due by respondent to the contractors.

The mechanics' liens against the property could not in law exceed what the contractors were entitled to recover from the owner. This Mr. Taylor admits was the legal position as he understood it. The respondent had nothing to do with the lumber company or its claim except in this way.

There might be claims of thousands of dollars registered. That did not make these claims such liens as a mortgagee could pay off within the meaning of above clause I quote.

In October, 1905, the appellant seemed to conceive that if he could induce the loan company to advance him on account of his company's claim for lumber they could charge it up to the loan and then he could buy

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the mortgage; and he accomplished all this, in order, as he says, to protect his company. Perhaps he might have safely added, by fraud, or force, or both, if need be.

The very essence of the scheme was a fraud. It was designed thus to improperly over-reach the respondent and defeat her right to resist the claims of her defaulting contractors, by so juggling with figures and facts as to make the contractors' claim neither due nor accruing due, wear the appearance of a mortgage or part of a mortgage in Black's hands. The rest of the plan was to rank as a lien holder also, at least for the balance, to continue this lien suit and rank with other lien holders, and recover against respondent the $270.00 out of her property.

All the lien holders were entitled to be treated equally. This appellant and loan company decided to ignore law and facts.

The October arrangement between the loan company and the lumber company was unique.

An assignment is made from the loan company to the appellant of the mortgage and is dated 28th October, 1904. The cheque by which the consideration for the transfer to Black was paid, is dated 13th October, 1904, by the lumber company for the sum of $1,032, though no such sum due.

Then a cheque is given to the loan company by Taylor on behalf of the company. It is dated 2nd November, 1904, for $414.78.

It is pretended now, despite the facts I have referred to, that this was an advance to pay off a lien held by the lumber company.

It is pretended further, and the evidence of some gentlemen concerned in carrying the arrangement out

is, if not expressly so stated, clearly intended to leave the impression on the mind of the court that the one transaction was quite independent of the other; that there was no understanding that one would depend on the other; and that the appellant was making an independent investment of his own. For a time during the course of this suit the respondent's claim that he was merely the trustee of the company of which he was president was denied. I am glad to say that this position of denying such trusteeship was not taken before us. I regret the other as untenable was not clearly abandoned and these transactions allowed to stand as they really were.

The whole was simply a dealing between the two companies whereby the loan company got rid of a troublesome affair on such profitable terms as it never could expect otherwise, for no such sum as $1,032 was due, and the lumber company acquired an instrument that it was so ill-advised as to suppose would enable it to crush or squeeze the respondent, and others concerned in the property in question in such a manner as to promote the recovery, by indirect methods, of what it claimed to be, but was not, entitled to receive out of the property.

In pursuit of such purpose, the notice (which bears date the 4th of November, 1904), of exercising power of sale was immediately set in motion, and served on respondent on 11th November, 1904. All these proceedings, it must be observed, were as needless as oppressive.

If there really existed a lien to be enforced the lumber company could have relied upon that to enforce their rights and had no necessity to adopt the circuitous method I have outlined.

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If there was no lien then there was not the slightest ground for the loan company's pretending to pay on account of an advance on the mortgage the cheque for $414.78.

I do not find that steps were taken by the loan company to try to verify the question of lien or no lien or how much it amounted to or if any of it was due or accruing due. I do not find that anything was done to find out the relation of the lien holders to each other or how or in what proportion they might be entitled to rank or claim; or in any way in short to determine whether it would be prudent to exercise their alleged rights as mortgagees under the clause above quoted.

The payment to the lumber company cannot rest therefore on the right given to pay off liens. It was not acted upon. It paid off no lien. The $270.00 lien, part of which appellant's company was entitled to, remained and yet remains.

It was not so intended to pay this $270.00 when they made the payment. The attempt to set it up now as discharging a lien is unfounded and is to support a tainted dealing no mortgagee can maintain.

In some way, I cannot understand how, under an instrument in the form of this mortgage Mr. Taylor, the solicitor in acting for the company seemed to imagine, or desire the court to suppose he imagined, that the company had a right to pay out of the loan for anything going into the building, as he phrases it, regardless of what Exhibit 8 meant, and of whether a lien existed therefor or not.

It is entirely needless to refute such crude notions of this loan company's rights under this mortgage and on the facts surrounding it.

Yet to shew that Mr. Taylor had this view, we have

only to read his evidence above in which he avows that he acted under Exhibit 7 and felt he had a right to rely upon it to justify payments of the kind I refer to, long after it had been cancelled by his own hand.

I conclude that the alleged advance of $414.78 was a mere idle form, indeed a sham, gone through between Taylor and Black for the respective purposes I have indicated and, for that and other reasons I have just given, cannot be treated as an advance on this mortgage.

If the facts already recited do not establish this, I may add that I have failed to find any application beyond the idle form in the way of liquidating the lien which the lumber company alleged it had.

I have searched in vain for relief respondent got or any trace of any application of the cheque till after the appellant had gone through the form of sale under the power of sale, or before respondent had made her tender and instituted this action.

It was urged before us that inasmuch as the learned judge had in the lien action credited this sum of $414.78 plus something more on the 2nd February, 1905, it must be taken into account in governing this case launched in 1904.

All I can see in this point is that the appellant instead of awaiting the results of his company's pending action on the lien, he claims his company had, he tried by the form I am dealing with to forestall those who would probably share with him in and for anything the liens attached to.

It is quite impossible to uphold the contention that the respondent gained, or had reduced for her, any liability she was under by the application of this cheque in reduction of the lumber company's lien.

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She was not concerned beyond seeing that the $270.00 which was the total amount charged on her property was not exceeded, and incidentally that the court was advised of all she had paid amongst or to the lien holders. If any one like the lumber company for purposes of their own saw fit to reduce their claim that was none of her business. It only enured to the benefit of other lien holders, creditors of the contractors, and not to her in any way. Her property was only subject to a lien if at all for $270 when this $414.78 cheque was handed over *and it remains so yet.*

If the appellant got hurt in the results it neither adds to nor subtracts from the proper amount due under her mortgage.

The result is that the claim of this item "T." must be disallowed entirely.

The items (as to $26.00) of A. and all of E. J. K. O. and P. are without any foundation in law and ought never to have been claimed, and must be dissallowed.

The notion of a right to charge such an item as the $26.00 of A. when a mortgage loan has gone through may be maintainable, yet I think doubtful unless more expressly provided for than here, but the charging it up, when a mortgage is executed, and continuing it there when the whole transaction has fallen through as here is quite unjustifiable.

The items admitted and tendered are all I can find due. There is nothing of accounting left to refer but the computation of interest and fixing the charges proper to allow in connection with the loan. If the parties cannot agree the computation must be made by the officer to whom the matters in question were referred by the court below, who will have to deal with subsequent encumbrances and tax costs as dealt with in the court below.

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As to the absence of the alleged purchaser as a party there is no difficulty. The purchase was never completed by registration, so as to entitle the purchaser to make any claim that he took anything.

The Manitoba Real Property Act makes this plain. If he has any right it is as against the vendor only. The title is in the vendor and he is bound to submit to redemption.

The *lis pendens* bound all taking under him. From *Bishop of Winchester* v. *Paine*(1); to *Robson* v. *Argue*(2), where the authorities are reviewed and thence down, the law has been so. I asked for authority to shew how or why that was not so in Manitoba. I have not been furnished with any.

I had occasion to review in *Syndicat Lyonnais du Klondyke* v. *McGrade*(3), the authorities preceding the earlier of those cases, and consider the principles upon which the proposition I put forward rests.

I have no doubt that these principles are applicable here especially as the *lis pendens* is registered in compliance with the local law.

In the case of a completed sale where it could be argued that by the exercise of a power paramount to all such considerations, the title had passed, (if as I conceive such a case be possible), I would reserve to myself further consideration of the rule to be applied.

I am disposed to think the court below overlooked some matters of costs, such as proceedings for sale up to tender, and imposing on respondent the costs she has to pay although in result I find of tender being enough she ought perhaps not to bear the costs.

(1) 11 Ves. 194. (2) 25 Gr. 407.

(3) 36 Can. S.C.R. 251.

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Idington J.

There has been and could be no appeal and I refer to these questions only to make clear that no costs of power of sale be now allowed.

The appeal should be dismissed with costs to be taxed to and payable to the respondent forthwith after taxation; and the judgment below varied to declare that such costs and all costs of the appellant herein or heretofore incurred, beyond the costs of an ordinary suit for redemption form no part of the costs of the mortgagee, or which the appellant is entitled to add to the sum due under the mortgage; that the sum due under the mortgage is only the sum of $180.00 and interest from the 22nd of December, 1904, together with such reasonable sum not to exceed the sum of $41.00 as may be due in respect of expenses of the loan, exclusive of the $7.00 for valuations included in the above fixed amount; that none of the costs of the proceedings under power of sale be allowed; and that the formal judgment of the court below be so varied as to give effect to these declarations and directions.

Appeal dismissed with costs.

Solicitor for the appellant: *J. R. Haney.*

Solicitors for the respondent: *Elliott & MacNeil.*