1890

*Jan. 30, 31.

*Dec. 9.

A. WILLIAMS, JAMES A. VANWART AND P. SLAVEN (DEFENDANTS) ..... APPELLANTS.

AND

ARTHUR JAS. BALFOUR (PLAINTIFF) AND CHARLES S. DRUMMOND & OTHERS (DEFENDANTS) RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH MANITOBA.

Mortgagor and mortgagee—Mortgage by trustee—Personal liability—Right of mortgagee to enforce equities between trustee and cestui que trust.

Where lands held in trust are mortgaged by the trustee, the mortgagee is not entitled to the benefit of any equities and rights, arising either under express contract or upon equitable principles, entitling the trustee to indemnity from his *cestui que trust.* Fournier and Taschereau JJ. dissenting.

APPEAL from a decision of the Court of Queen's Bench, Manitoba, affirming the judgment of Dubuc J. at the hearing in favor of the plaintiff.

The original proceedings in this case were taken by the plaintiff against the defendant Drummond on a mortgage made by the latter for a sale of the mortgaged premises and a personal order against said defendant for payment of the amount secured. The defendant by his answer to the bill of complaint averred that at the time of the negotiation of the loan, it was distinctly understood and agreed between him and the plaintiff, that he was not to become personally responsible for the payment of the mortgage money, and he prayed for a reformation of the mortgage so as to make same conform with the intention of the parties. He also

*PRESENT :—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau and Patterson JJ.

1890

WILLIAMS v. BALFOUR.

set up that he was simply trustee for the members of a syndicate who were owners of the land mortgaged, and submitted that they were necessary parties to the suit. The plaintiff thereupon amended his bill with the evident intention of making the members of the syndicate or those representing them parties. By this amendment the appellants became defendants in the suit.

It appeared that after the syndicate purchased the land and appointed Drummond their trustee a mortgage was given to secure the payment of the purchase money, and a bond of indemnity was given by a number of the members of the syndicate to Drummond, and the amended bill charges that the members of the syndicate agreed with the trustee to share with him the responsibility of and incident to the purchase of the lands in question, and the execution of mortgages for $11,700 given or assumed for the balance of purchase money thereon, and that such last mentioned mortgages having become overdue, the trustee borrowed from the plaintiff $12,500 to pay same off, and gave as security the mortgage upon which the bill herein is filed. The bill prays that the members of the syndicate may be ordered to contribute to the payment of the said mortgage moneys for which the said trustee is liable, "as the said Charles S. Drummond may be entitled to require and to this honourable court shall seem proper."

The amended bill further charges that for the better securing of the payment of the mortgage money thirteen members of the syndicate executed a bond in favor of the plaintiff, whereby each of them bound himself to pay the plaintiff $390 for each and every undivided share to which they were entitled in said lands, and prays that the said members so signing may

1890

WILLIAMS v. BALFOUR.

be ordered to forthwith pay to the plaintiff the moneys so covenanted to be paid by them.

This bond is not taken into account in the following judgments as its execution by the appellants was not proved.

The cause was heard before Mr. Justice Dubuc, who found that the defendant, Drummond, was not entitled to a reformation of the mortgage, and that the plaintiff could properly claim the personal security of the other defendants in payment of this mortgage. On a re-hearing before Chief Justice Taylor and Mr. Justice Dubuc, the other two judges having been concerned in the cause while at the bar, the Chief Justice dissented from the decision at the hearing but Mr. Justice Dubuc adhering to his opinion his decision was affirmed. An appeal was then taken to the Supreme Court of Canada.

S. H. Blake Q. C. and *Wilson* for the appellants referred to *Nichols* v. *Watson* (1); *Clarkson* v. *Scott* (2); *Real Estate Loan Company* v. *Molesworth* (3); *Gandy* v. *Gandy* (4).

McCarthy Q. C. and *Howell* Q. C. for the respondents cited *Wenloch* v. *River Dee Co.* (5); *Blackburn Benefit Building Society* v. *Cunliffe* (6).

Sir W. J. RITCHIE C.J.—If the plaintiff cannot get at his right without trying and deciding a case between co-defendants the court will try and decide that case, and the co-defendants will be bound, but if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants the co-defendants will not be bound as between each other, by any proceeding which may be necessary only to the

(1) 23 Gr. 606.
(2) 25 Gr. 373.
(3) 3 Man. L.R. 116.
(4) 30 Ch. D. 57.
(5) 19 Q.B.D. 155.
(6) 29 Ch. D. 902.

1890

WILLIAMS v. BALFOUR.

Ritchie C.J.

decree the plaintiff obtains. *Cottingham* v. *Earl of Shrewsbury* (1).

There is no ground whatever shewn for reforming the mortgage. The plaintiff in this case lent his money on the security of the land, the personal security of the mortgagor, and the bond of the mortgagor and Ross, and not on the security of the parties for whose benefit the mortgagor held the property and therefore has no claim he can enforce against these latter parties, notwithstanding any claim the mortgagor may have against them should the property prove insufficient to meet the amount of the mortgage and interest. "The liability arises from the instrument only, and the extent of the obligation must be measured by the terms of the instrument only." Per Baggallay J. A. in *Beresford* v. *Browning* (2).

STRONG J.—In the early part of the year 1882 there were great speculations in real estate in the City of Winnipeg. Persons from all parts of Canada went there for the purpose of engaging in the purchase and sale of lands, among others the three appellants, Williams, who lived in Welland, Ontario; Vanwart, who lived in Fredericton, New Brunswick; and Slaven, who lived in Napanee, Ontario. These three and a number of others met together in February 1882, and formed themselves into a syndicate to purchase a large block of land fronting on the Assiniboine River in the residence portion of Winnipeg, with a view of laying the same out into 60 building lots, and offering them for sale at once. They purchased the block for $30,000 and paid $18,300 in cash, the balance $11,700 was to remain on mortgage bearing interest at 8 per cent per annum and payable one half in six months and the remainder in twelve months. Prior to the completion

(1) 3 Hare 638.

(2) 1 Ch. D. 37.

1890

WILLIAMS v. BALFOUR.

Strong J.

of the formation of the syndicate Williams and Slaven returned to their respective homes and shortly after such completion Vanwart left for Fredericton.

The respondent C. S. Drummond was appointed trustee for the syndicate and a conveyance of the land was made to him and he assumed a mortgage then existing upon the land in favor of one Wilson for $5,500 and executed a mortgage for $4,000 to A. W. Ross, the vendor of one portion of the property, and another to his brother H. M. Drummond, the vendor of the remainder, for $3,500, making in all $13,000.

The day before he executed the two mortgages last referred to the trustee had obtained from a number of the members of this syndicate a bond of indemnity which recited that he had executed a mortgage on behalf of the syndicate upon the lands purchased for the sum of $11,700 to secure the balance of purchase money thereon.

This bond was ostensibly executed by Vanwart by attorney, but the learned judge at the hearing, Mr. Justice Dubuc, found that it was not proved to have been executed by Slaven and Williams.

The intention of the members of the syndicate was that the property should be sold at once, and the proceeds applied first in payment of the expenses connected with the sale, and the trustee's commission, and then in discharge of the mortgage for $11,700, and the balance was to be distributed among the members of the syndicate. This appears from the declaration of trust given by the trustee to Vanwart. It appears, however, by the evidence of Mr. Vass, the trustee's book-keeper who had charge of the matter, that the first proceeding to his knowledge taken to obtain a sale of the property was about the 18th November, 1882.

The first instalment of the mortgage given to Ross and H. M. Drummond fell due without the trustee

having realized anything to meet the same. An arrangement was then come to with an agent of the plaintiff to make the loan to secure which the mortgage which is the subject of the present suit was given.

Considerable delay took place in completing the loan owing to the trustee declining to alter the mortgage as executed so as to make himself personally liable, both mortgagor and mortgagee being under the impression that as executed the trustee incurred no personal liability thereunder, but certain bonds having been obtained to make up for this the matter was finally concluded and the money advanced by the plaintiff.

The bill as originally framed was for a sale of the mortgaged premises, and for a personal order against the trustee for payment. The trustee answered that at the time of the negotiation of the loan it was distinctly understood and agreed between him and the plaintiff that he was not to become personally responsible for the payment of the mortgage money, and he prayed for a reformation of the mortgage so as to make the same conform to the intention of the parties. He also set up that he was simply trustee for the members of the syndicate, and submitted that they were necessary parties to the suit. The plaintiff thereupon amended his bill and made the members of the syndicate or those representing them parties to the suit.

The amended bill further charged that the members of the syndicate agreed with the trustee to share with him the responsibility of and incidental to the purchase of the lands in question, and of the execution of the mortgages for $11,700 given or assumed for the balance of purchase money thereon, and that such last mentioned mortgages having become overdue, the trustee, in November, 1882, borrowed from the plaintiff $12,500 to pay the same off and gave as security the mortgage upon which the bill in this suit is filed. The bill as to the

1890

WILLIAMS v. BALFOUR.

Strong J.

members of the syndicate prays that they may be ordered to contribute to the payment of the mortgage moneys for which the trustee is liable.

The amended bill further charged that for the better securing of the payment of the mortgage money thirteen members of the syndicate executed a bond in favor of the plaintiff, whereby each of them bound himself to pay the plaintiff $390 for each and every undivided share to which they were entitled in the lands, and prayed that the members so signing might be ordered forthwith to pay to the plaintiff the moneys so covenanted to be paid by them.

As neither of the appellants Williams or Slaven signed this bond its existence does not affect them. As to the appellant Vanwart, he not only did not sign the bond but never heard of it until after the commencement of this suit. One Deacon purported to sign the bond for him but, for the reasons set forth in the judgment of Taylor C. J., he had no authority so to do, and same was not binding upon Vanwart. So far, therefore, as the appellants are concerned this bond may be left out of consideration.

The cause came on for hearing before Mr. Justice Dubuc. The decree made by him directs a sale of the mortgaged premises, and that in case the proceeds, after deducting the plaintiff's costs, be insufficient to pay the amount due upon the plaintiff's mortgage all the defendants except Molesworth and Cruthers should severally contribute towards payment to the plaintiff of such deficiency in proportion to their respective shares according to the syndicate agreement of the schedule thereto annexed.

The bill was dismissed with costs as against Molesworth, who was a party to both of the agreements.

The three appellants caused the decree to be reheard before the court *in banc*, consisting of Chief

Justice Taylor and Mr. Justice Dubuc, the latter learned judge being obliged to sit owing to the two remaining judges of the court having been engaged in the case while at the bar. The Chief Justice pronounced a judgment in favor of the present appellant, but as Mr. Justice Dubuc adhered to his original judgment the court was equally divided and the rehearing was dismissed with costs. From this last judgment the appellants now appeal.

The learned Chief Justice of Manitoba has written a very full judgment in this case, and I so entirely agree with him that I do not feel called upon to do more than deal very briefly with the principal points which have been the subject of debate both here and in the court below.

There is no direct privity of contract between the respondent Balfour and the appellants. The appellants, Williams and Slaven did not execute the indemnity agreement and, of course, were not liable upon it in any way ; and, as the Chief Justice of Manitoba, has shewn, Vanwart is in exactly the same position, Deacon who assumed to execute it in his name having no authority whatever to do so. This being the state of facts I know of no principle which entitles the mortgagee to a personal decree against them. No case directly in point has been cited and the cases referred to are contradictory, and such of them as the plaintiff relies upon are of very doubtful authority, so much so that before I acted upon them I should require much stronger reasons for the practice they sanction than any I have heard advanced in argument or found stated in any reported decision. The weight of authority in Ontario is altogether against such an order ; the case of *Campbell* v. *Robinson* (1), as Chief Justice Taylor has pointed out,

(1) 27 Grant 634.

1890

WILLIAMS v. BALFOUR.

Strong J.

is clearly distinguishable, the personal order there made being for the benefit of the mortgagor who had become a mere surety for the purchasers of the equity of redemption, and was, therefore, considered on that distinct ground entitled to indemnity from them. I should not, however, be inclined to follow even that case, as I do not see how the question could, on the pleadings, have been properly raised between the co-defendants. The liability of a party defendant to a foreclosure suit to have a personal order made against him by the Court of Equity is to be ascertained by an inquiry as to what his liability would have been in a common law action before, by statute or by general orders made under statutory authority, jurisdiction to entertain the legal personal remedy was conferred on the equity court, the object of such statutes and orders having been merely to avoid circuity and multiplicity of suits, and not in any way to enlarge the liabilities of the mortgagor or owner of the equity of redemption.

Such cases as *Campbell* v. *Robinson* do not, however, apply at all. What the plaintiff seeks is to be placed in the position of Drummond, the trustee, as regards his right to indemnity from his *cestuis que trust* No authority is produced warranting such relief. But be that as it may, it appears that Drummond having deliberately taken an express formal indemnity from the other members of the syndicate in the shape of the covenant to which the appellants were not parties, he has thereby shown his intention to rely on that express indemnity, and is therefore restricted to it; see *Mathew* v. *Blackmore* (1). Therefore, even if we were to put the plaintiff in Drummond's shoes, that would not entitle him to a personal order against the appellants. Moreover, as Chief Justice Taylor has demonstrated,

(1) 1 H. & N. 762.

such an order as is sought here, giving a third party the benefit of equities and rights, arising either under express contract or upon equitable principles, entitling a trustee to indemnity from his *cestui que trust*, would be not only unsupported by authority but in direct opposition to numerous authorities, both at law and in equity, establishing that a third person is not entitled to enforce such rights and equities even in the very plain case of a covenant entered into between two to pay money into the hands of such third person, or to do some other act for his benefit. *Colyear* v. *Lady Mulgrave* (1). In the United States it may, as regards some of the States, be different for the doctrine that a stranger to the covenant, or to the consideration, cannot sue does not prevail there except in a few States, and the courts of the State of New York especially hold a contrary doctrine.

As regards the right of Drummond to enforce any equitable claim for relief against his co-defendants the present appellants, independently of the ground for refusing such relief already adverted to,(namely that by taking the express covenant he impliedly relinquished all claims upon the other *cestuis que trust)* it is very clear that he could have no such relief in this suit, in which the appellants have had no apportunity to answer his demand, and in which no issue has been raised as between them and Drummond.

For these reasons, I am of opinion that we have no alternative but to allow this appeal with costs. The appellants are also entitled to the costs of the court below on the re-hearing as well as on the original hearing.

The case for reformation of the mortgage on the ground of mistake set up by Drummond requires no observations ; it entirely fails on the evidence, as the

(1) 2 Keen 81.

1890

WILLIAMS v. BALFOUR.

Strong J.

Chief Justice in his judgment in the court below has conclusively shown.

FOURNIER J. – I am of opinion that the appeal should be dismissed.

TASCHEREAU J.—I would dismiss this appeal and hold the appellants personally liable on the grounds taken by Mr. Justice Dubuc in the court below.

PATTERSON J.—Concurred in the judgments allowing the appeal.

Appeal allowed with costs.

Solicitors for appellants : *Aikens, Culver & Co.*

Solicitors for respondent Balfour : *Vivian & Dodge.*

Solicitors for respondent Drummond : *Hough & Campbell.*