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CHARLES SUMNER SCOTT (DEFENDANT) ..... } APPELLANT;

*June 5.
*June 24.

AND

WILLIAM JAMES SWANSON (DEFENDANT) ..... } RESPONDENT.

AND

THE FEDERAL LIFE ASSURANCE COMPANY OF CANADA } PLAINTIFFS;

AND

JAMES STINSON AND OTHERS ..... DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Assignment by mortgagor for benefit of creditors — Priorities — Assignment of claims of execution creditors — Redemption — Assignments and Preferences Act, s. 11 *(Ont.).*

After judgment for foreclosure of mortgage or redemption judgment creditors of the mortgagor with executions in the sheriff's hands were added as parties in the Master's office and proved their claims. The Master's report found that they were the only incumbrancers and fixed a date for payment by them of the amount due to the mortgagees. After confirmation of the report S. obtained assignments of these judgments and was added as a party. He then paid the amount due the mortgagees and the Master took a new account and appointed a day for payment by the mortgagor of the amount due S. on the judgments as well as the mortgage. This report was confirmed and the mortgagor having made an assignment for benefit of creditors before the day fixed for redemption an order was made by a judge in chambers adding the assignee as a party, extending the time for redemption and referring the case back to the Master to take a new account and appoint a new day.

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

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Held, affirming the judgment of the court of appeal (13 Ont. L.R. 127) that under the provisions of sec. 11 of the Assignments and Preferences Act the assignee of the mortgagor could only redeem on payment of the total sum due to S. under the mortgage and the judgments assigned to him.

APPEAL from a decision of the court of appeal for Ontario(1), affirming the judgment of a divisional court in favour of the defendant Swanson.

The question raised for decision on the appeal was whether the appellant, assignee of the defendant Stinson, mortgagor, under an assignment for benefit of creditors, could redeem on payment of the mortgage debt alone or had to pay as well the amount due on the judgments assigned to Swanson by judgment creditors who had proved their claims in the Master's office. The Master ruled that he need only pay the mortgage debt but his ruling was reversed on appeal to the Chief Justice of the King's Bench Division whose decision was affirmed by a divisional court and the court of appeal.

D. L. McCarthy for the appellant.

Hamilton Cassels K.C. and *R. S. Cassels* for the respondent.

THE CHIEF JUSTICE.—I concur in the reasons given by Mr. Justice Maclennan for dismissing this appeal.

GIROUARD J.—I am of opinion that the appeal should be dismissed.

(1) 13 Ont. L.R. 127, *sub nom. Federal Life Assurance Co.* v. *Stinson.*

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DAVIES J. having heard a portion only of the argument took no part in the judgment.

Idington J.

IDINGTON J.—I think this appeal should be looked at as raising only the question of the right the appellant would have after Swanson had redeemed the prior mortgagee and been thereafter found by the consequent report of the Master to be redeemable only upon payment of the entire sum of mortgage and executions.

The appellant as assignee can have no higher right than the mortgagor, unless when representing his creditors, and seeking to set aside some act his creditors might, but which he could not attack.

An application of the mortgagor, at the same stage in the proceedings as that in which the assignee made his application, could have been rested only upon an appeal to the equitable consideration of the court.

The only right the mortgagor had as such, at the date of the assignment, was to apply to the court to allow him to redeem Swanson, and I fear the answer to such an application on the mortgagor's part would have been; you can redeem only on paying all the Master's report has found him entitled to. Else when might the process end? The mortgagor had imposed upon the judgment creditors by his neglect and default the burthen and expense as well as hazard of redeeming the mortgagee. I do not think he should be heard without excuse and as of course to ask to set all that aside.

The assignee was liable to have been, and should have been, met by this same answer upon the motion before Mr. Justice Mabee and had his status fixed

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then and there. Respondents, I infer, did not insist upon that there.

At all events the result in the divisional court, of which the same learned judge was a member, seems to reduce the position to that I have indicated as what ought to have been, and possibly was intended; save the election given conditionally to have a sale of the property in question.

I agree with Mr. Justice Meredith that neither tacking, nor consolidation, technically and properly, so called, have, or at least, should have anything to do with the matter.

I cannot say that the discretion, if open to the court, was ill exercised in refusing to the appellant more than it has given.

I am unable, however, as at present advised, to follow beyond this the reasoning upon which the courts below have proceeded. An execution such as those here in question against a mere equitable interest in lands and unenforceable without some proceeding in court constitutes a lien and nothing but a lien. I am unable to appreciate the mental process by which it is transformed into another kind of claim or lien, as it were in the twinkling of an eye, by the Master signing a report *to settle priorities*. I reserve to myself, should the occasion ever call for it, the right to reconsider the authorities relied upon in the court below, resting upon such as I, with the greatest respect, consider rather metaphysical reasoning.

I would prefer giving the fullest effect that possibly can be given to a beneficent statute that is intended to administer the debtor's estates upon an equitable basis as between all the creditors. The distinction between this case and such others as I

refer to, may not be quite clear, but appear to me substantial. For example, a judgment creditor holding more than one judgment as the respondent Swanson did, might have chosen after redemption of a mortgagee to have said he was doing it by virtue of No. 1 of his judgments. He might thus have reserved his other judgments, to enforce them against other parts of the debtor's estate. I do not see why he should not. I do not understand why any hard and fast rule should be applied to bind him against his will.

I take it for granted that in this case having elected to consolidate (I use the term in no technical sense but as expressing the fact) his judgment debts with the mortgage debt he could not escape, when applying for his final order for foreclosure, the consequence of being held to have taken the land in satisfaction of the mortgage and the four judgments. He thus elected to be cut out of resorting to the possible rest of the estate.

Had he elected otherwise, I am unable to understand how he could have been held bound to have done so. He need not have proven for more than the one by virtue of which he elected to redeem. I put this to counsel on the argument and have no reply backed by authority.

I think the appeal should be dismissed with costs.

MACLENNAN J.—The question in this appeal is whether an assignment for the benefit of creditors, made by an insolvent mortgagor, in pursuance of the "Assignments and Preferences Act," R.S.O. (1897) ch. 147, as amended by 3 Edw. VII. ch. 7, sec. 29, has the effect of practically undoing and vacating the

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proceedings in an action for the foreclosure of the mortgage, after redemption of the mortgage, by one or more judgment creditors duly made parties to the foreclosure proceedings, and after final account taken, and a day appointed for final redemption or foreclosure.

I agree with the judgment of the court of appeal, affirming a judgment of a divisional court, that the assignment had no such effect.

The Act provides that an assignment for creditors shall take precedence of attachments, garnishee orders, judgments and executions not completely executed by payment, etc.

When the foreclosure proceedings were commenced, there were four executions against the mortgagor in the hands of the sheriff. In the course of those proceedings the execution creditors were made parties, and they and the mortgagee proved their respective claims, and a day was appointed for redemption by the mortgagor.

Afterwards the respondent acquired the judgment debts proved in the action, and redeemed and obtained an assignment of the mortgage.

A further account was then taken both of the mortgage and judgment debts, and a day was appointed for redemption, or foreclosure in default of payment by the debtor of the aggregate sum of the mortgage and judgment debts, and interest and costs; and it was a few days before the expiration of the time for redemption that the assignment for the benefit of creditors was made.

Now, I think that under those circumstances the defendant had become something more than a mere judgment or execution creditor. He had become a

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mortgagee of the lands in question, not merely to secure the original mortgage debt, but also the judgment debts. The judgment debts had become a charge upon the mortgage lands in due course of law, and that charge was as valid, and as much binding upon the mortgagor, as if he had made the charge by deed. The moment the judgment debts had been proved, the executions in the sheriff's hands might have been allowed to expire without affecting the charge on the mortgage lands.

That being so, I am clearly of opinion that the defendant's rights in the foreclosure proceedings were not affected by the assignment, and that the appeal should be dismissed with costs.

DUFF J.—I concur in the opinion of Mr. Justice Idington.

Appeal dismissed with costs.

Solicitors for the appellant: *Carscallen & Cahill.*

Solicitors for the respondent: *Farmer & Gould.*