JAMES THOMSON (DEFENDANT) .....APPELLANT; 1915

AND *March 1, 2. *March 15.

PRISCILLA WILLSON (PLAINTIFF) ..RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Mortgage—Payment by instalments—Acceleration clause—Payment of part postponed—Right of foreclosure.

A mortgage provided for payment in three annual sums of $2,500 each. There was a special provision that out of the last instalment the mortgagor could retain $1,000 until he received a conveyance of the interest of an infant who, with the mortgagee, executed an agreement to convey when he became of age. There was also the acceleration clause making the whole amount due on default in paying any part. In an action to foreclose default having been made in payment of the first annual instalment.

Held, affirming the decision of the Appellate Division (31 Ont. L.R. 471), which maintained the judgment at the trial (30 Ont. L.R. 502), that the postponement of the time for payment of the $1,000, part of the last instalment, did not disentitle the mortgagee to his remedy of foreclosing; but

Held, varying the judgment below, that the acceleration clause in the mortgage did not apply to the $1,000, payment of which was postponed; that the personal recovery against the mortgagor should not include this sum; and that the judgment below should be amended by providing that the proceedings should be stayed by payment into court of the balance.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming the judgment at the trial(2), in favour of the plaintiff.

The material facts are stated in the above head-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 31 Ont. L.R. 471. (2) 30 Ont. L.R. 502.

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note. The only question in dispute was the effect of the provision postponing payment of the $1,000 on the mortgagee's right to foreclose.

Hislop for the appellant referred to *Cameron* v. *McRae*(1), and *Bonham* v. *Newcomb*(2), as authorities for his contention that the mortgagee could not foreclose while any portion of the principal monies was not due.

Choppin, for the respondent.

THE CHIEF JUSTICE.—The judgment should be varied by protecting the mortgagor in regard to the deferred payment of $1,000, the whole in accordance with the note made when judgment was delivered. I agree with Mr. Justice Anglin.

DAVIES J.—I am to allow this appeal, but only to the extent and for the purpose of varying and reducing the judgment appealed from in regard to the one thousand dollars payable on the coming of age of the minor; costs of mortgagor to be allowed except as they have been increased on grounds on which he has failed.

I agree in the opinion of Mr. Justice Anglin.

IDINGTON J.—This is a forclosure suit of a mortgage given for part of the purchase money of the land covered by the mortgage. It seems from the mortgage and affidavit verifying the statement of defence that in order to make a complete title as intended by the parties to the sale and purchase it was necessary that an interest of a minor should be conveyed when

(1) 3 Gr. 311. (2) 1 Vern. 232.

he attained the age of twenty-one years or an order be got from the court.

To avoid the expense of such an order the parties hereto agreed that the appellant should be indemnified against the contingency of failure to procure such infant's conveyance on his attaining his majority.

This was provided for in two ways. A bond was given appellant that said infant would, on attaining his majority, execute the necessary conveyance, and it was further provided by inserting in the mortgage in question immediately after the proviso fixing the terms of payment of the mortgage moneys, the following:—

> Provided always and it is hereby agreed by and between the parties hereto that notwithstanding the times, dates and manner herein fixed for payment of the principal money hereby secured the said mortgagor, his heirs, executors, administrators, or assigns may retain to his or their use the sum of one thousand dollars out of the last instalment of two thousand five hundred dollars payable on the first day of October, 1815, until such time as the said mortgagee, her heirs, executors and administrators shall have performed the terms and conditions of a certain agreement between the parties hereto, which agreement bears date the 30th day of January, 1913, entitling her or them to the due payment of the said sum of one thousand dollars under such agreement.

Instead of protecting the mortgagor in regard thereto, the formal judgment includes the said sum of $1,000 in the sum found due upon the said mortgage and fixes as usual the time for payment thereof and provides for foreclosure unless such sum paid on said date.

That date would seem to be about a year and three months before said infant, if surviving, would attain his majority.

The judgment might by the terms become so oppressive as to work a forfeiture of appellant's rights. He might find it impossible to raise on the security of

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such a defective title the money needed to redeem. He could only offer security on that to which he had got a title. That security might not enable him to raise more thereon than the judgment debt less the $1,000, whereas if he could offer the security he had and the chance of a complete title he might provide, by a mortgage conditional on getting the complete title, for the $1,000 also.

In the court of appeal upholding the said judgment reliance is placed upon the acceleration clause which in an ordinary case might be held to so bind a mortgagor that he must either pay up in full or be foreclosed if making default in a single payment and thus lose the advantage of the terms originally stipulated for unless, as I think, the court could relieve him. It habitually did so.

I cannot think that the parties ever intended to deprive by virtue of the use of the acceleration clause in that way the benefit of the above proviso. And if the respondent mortgagee or any one else ever so intended I think there are several answers thereto. It is not the correct construction of the document, especially when read in light of the collateral agreements. Besides it is not infrequently the case that the consideration for the mortgage fails to be advanced and in such cases no matter what the terms of the mortgage may read the amount spoken of therein is duly cut down to the actual sum advanced. Such seems to me the nature of this interest estimated by those concerned to be worth a thousand dollars for the purpose of this mortgage and to become payable at a date when the infant would have attained his majority and as a charge on the land to be dependent upon his executing a release or other necessary conveyance, or said inter-

est being otherwise, in possible contingencies, conveyed to the mortgagor or his assigns.

In the meantime for convenience sake the agreed upon price of $1,000 is included in the mortgage.

If the mortgagee is determined to foreclose it must for the purpose of this suit meantime be treated as money not advanced and deducted from the main consideration.

Then again, if the general principles upon which courts of equity proceed in foreclosure are involved and the cases relied upon by appellant are reasonably applied, there would be no difficulty in the matter. If the mortgagor fails to pay the sum found due less this $1,000, the mortgagee gets the property that she conveyed and so ends the matter so far as this mortgage is concerned.

If, on the other hand, the mortgagor redeems it can be provided in such case that it shall stand as security for the $1,000 (till such time as she has had the opportunity contemplated by the parties of procuring the conveyance contracted for) with interest in the meantime thereupon.

Then again to do otherwise seems to me to contravene the policy or jurisprudence of the courts of equity relative to the relief to be given against penalties and forfeitures.

I think it is quite possible that the extremely unreasonable contention set up by appellant that no proceedings could be had herein till said interest was got in, caused the courts below to overlook the need for giving the relief indicated above by modifying the judgment accordingly.

The authorities relied upon do not justify the pretension set up by the appellant. The principle some

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of them proceed upon I repeat does justify the application thereof to this sum of $1,000.

If the judgment is amended by the deduction of $1,000 from the sum found due it will be necessary to name a new day for payment.

That need not be the original length of time given, but say a month after the formal judgment issue herein.

If the security is ample, or a payment made so to reduce the amount as to make it ample, the parties would be well advised I imagine to fix the new date at a time that would enable the conveyance to be got and agree to add a term to the judgment anticipating such conveyance and making the whole sum as it now stands be payable in such event on the new date.

In any event the appeal should be allowed and the judgment varied.

The appeal should be allowed with costs but without costs to either party of the appeal to the court of appeal and the original judgment be varied by deducting $1,000 from the amount found due and also by providing as already suggested for the contingency of redemption and the security standing to secure the $1,000 and interest thereon to abide the result of the title being completed within a reasonable time to be agreed upon or, in default thereof, fixed by the registrar, and failing that, the discharge or reassignment to appellant of the mortgage.

I had an impression on the opening of the argument herein that all this might have been easily obtained by an application to the Supreme Court of Ontario, but the judgment of the Appellate Division rather indicates otherwise. Hence I would allow costs of appeal here, because I still think by some such

reasonable course as I suggest the present relief might have been sought for and possibly obtained without coming here if the claim to deprive the respondent of all relief had not been so unreasonably persisted in.

Since writing the foregoing a reading of the full text (from copy since handed in) of the statutory meaning to be given said acceleration clause as it stands in the mortgage, confirms the impression I had relative to the power of the Ontario courts in the premises. An explanation of that by counsel or in the judgment appealed from might have saved some labour. I still prefer that the parties should be left to work out an amendment protecting them both in the way indicated above and in other opinions delivered herein, and possibly save needless expense rather than forcing them to accept the amendment proposed; should they fail, of course, the registrar would have to settle the minutes relative to amendment, etc. The $1,000 in question forms such an unusual part of the consideration and is subject to so many contingencies that it seems to me the usual form of judgment in foreclosure is not quite appropriate. That form by no means bounds the equitable jurisdiction of the court.

The appellant is told he can have a sale if he so elect and I presume pay for. But what a tangle would ensue unless exceptional provision made for such an event. And I do not know whether or not desired and if it is worth while to provide therefor. Leaving it to the parties first to try and frame what would suit is for that as well as many other reasons desirable.

In argument here it was quite clear to my mind neither counsel had anticipated the view we have

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taken and hence we are without their aid in this regard. The case is not one to call for re-argument. It is not desirable to have the whole $1,000 eaten up in costs.

DUFF J.—I agree with Mr. Justice Anglin.

ANGLIN J.—The appellant's contention that his default in payment of interest and of certain principal moneys due upon his mortgage to the respondent did not entitle the latter to the remedy of foreclosure, because, as to $1,000 of the final instalment of $2,500 of principal, the mortgagee had agreed that it should not be payable until a deed of a supposedly outstanding interest in the property in question held by an infant had been furnished to the mortgagor, seems to me to be most unreasonable. *Burrowes* v. *Molloy*(1), on which the appellant relies, was not at all such a case. There the mortgagor had covenanted that the whole principal should not be called in before a certain time, and that time had not arrived. In *Cameron* v. *McRae* (2) there is, no doubt, a passage in the judgment of the Chancellor, at page 314, quoted in *Parker* v. *Vinegrowers' Association*(3), at page 186, which lends some support to the proposition for which Mr. Hislop cites it, that is to say, that when a mortgagee has disabled himself from calling in any part of the principal he is not entitled to the relief of foreclosure in respect of the balance. But the passage relied upon is merely a dictum, and I cannot regard these cases as authorities which require an extension of the rule stated in

(1) 2 Jones & La T. 521. (2) 3 Gr. 311.
(3) 23 Gr. 179.

Burrowes v. *Molloy*(1) to a case where part only of the principal is postponed, as it is here. Indeed, in *Parker's Case*(2), at page 182, Blake, V.-C., says:—

> There is no doubt that the right to redeem implies the right to foreclosure and *vice versâ*, but because these rights are reciprocal it does not follow that the identical conditions attached to the one right are to be attached to the other. * * * Holding as I do that all the terms on which the alternative right of foreclosing or redeeming may be exercised, need not be identical, it is not necessary to consider on what exact conditions under this instrument the defendants could redeem. It is only incumbent on me to decide whether there has been such default on the part of the defendants, as that, *in invitum*, they can be compelled through a foreclosure suit to pay any, and if so what, portion of the money secured by the mortgage.

By the default in payment of interest and of an instalment of principal the mortgagor broke the condition on which the mortgage was to become void and at law forfeited all his rights in the land, thus entitling the mortgagee to bring foreclosure proceedings to extinguish the equity of redemption which the mortgagor still retained. Except as to the $1,000 there was no agreement to defer payment or to postpone the right to foreclosure for default. As put by Meredith, C.J.C.P.:—

> So the case is a simple one of default in payment of the first instalment due on the mortgage, a default which, at law, forfeited all the mortgagor's rights in the land, but in equity left in him a right to redeem.
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> * * * * *
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> Nor does foreclosure create any difficulty or work unjustly against any one. If foreclosure takes place, the mortgagee merely gets back that which she conveyed and the mortgagor loses only that which she has paid — the usual case.

The mortgagee by foreclosure will not obtain and cannot make title to the outstanding interest which was not vested in her mortgagor and was not mort-

(1) 2 Jones & La T. 521. (2) 23 Gr. 179.

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gaged to her. She forecloses only on the mortgagor's equity to redeem that which he conveyed as security, *i.e.*, the interest which he had in the lands.

But I am, with respect, unable to accept the view which prevailed in the Appellate Division that the acceleration clause in the mortgage overrides the special provision by which the payment of the final $1,000 of principal moneys was deferred, or that, reading the mortgage as a whole with the incorporated agreement, the right to the postponement of the payment of that sum was "conditional on there being no default in payment of interest." In the first place the agreement to postpone the payment of the $1,000 is not made subject to any such condition. It is an absolute undertaking that the mortgagor may retain this part of the principal until delivery to him of a conveyance of the infant's outstanding interest. Although it will usually be implied without express stipulation that postponement of the payment of principal is conditional on punctual payment of interest; *Seaton* v. *Twyford* (1); *Edwards* v. *Martin*(2); the form in which the stipulation in the present case is couched, I think, prevents any such implication arising as to the $1,000 in question upon default either in payment of interest or in payment of instalments of principal as they fall due. We cannot ignore the fact evidenced by the agreement incorporated in the mortgage that the $1,000, of which payment is deferred, was a part of the purchase money for which the purchaser-mortgagor has not yet received the consideration, and which it was clearly intended should not become payable until the infant's interest in the lands, which it

(1) L.R. 11 Eq. 591. (2) 25 L.J. Ch. 284.

represents, should be vested in him. Having regard to all the circumstances and to the intent of the parties as manifested by the terms of the mortgage and agreement it seems reasonably clear that the acceleration clause in the mortgage cannot have been intended to apply to this $1,000, of which payment was thus specially postponed, but only to other portions of the principal moneys which might not be overdue when default occurred.

It follows that, without affecting any right of the mortgagor under the provisions of Rule No. 485 of the Ontario Supreme Court Rules of 1913, the judgment pronounced in this action should be modified by excluding from the amount for which the mortgagee is given the right of immediate personal recovery against the mortgagor the postponed $1,000. While redemption can only be awarded on payment of the whole sum secured by the mortgage, which includes the $1,000 deferred, the mortgagor is entitled to have this action stayed on payment of the sum secured less that $1,000. This can be accomplished by inserting in the decree, as paragraph 2*a*, the following:—

> And upon the defendants paying into the said head office of the Canadian Bank of Commerce to the joint credit aforesaid and at the time aforesaid the sum of $6,287.15 this court doth order and adjudge that all further proceedings in this action, except an application for payment of said moneys over to the plaintiff, be stayed;

by inserting in clause 3 after the word "payment" the words,

> either under paragraph 2 or under paragraph 2*a* hereof,

and by substituting in clause 4 for the figures "$7,080.90" the figures $6,080.90" — all this, of course, as of the date of the judgment as originally pronounced. In view of the delay occasioned by the ap-

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peals to the Appellate Division and to this court the figures and dates in that judgment will require to be altered. That can be done by the registrar in settling the minutes of judgment.

The appellant having succeeded, though only on a minor point, should have his costs in this court, except in so far as they have been increased by his having taken grounds on which he has failed.

BRODEUR J.—I concur with Mr. Justice Anglin.

Appeal allowed with costs.

Solicitor for the appellant: *Thomas Hislop.*

Solicitor for the respondent: *H. E. Choppin.*