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*June 9.
*Oct. 10.

DONALD LLOYD CAMPBELL (PLAINTIFF) ..... } APPELLANT;

AND

ANNIE ELIZABETH DOUGLAS AND ANOTHER (DEFENDANTS) ..... } RESPONDENTS.

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

Sale of land—Consideration—Exchange of properties—Mortgage—Indemnity to vendor—Evidence.

In 1912 D. advanced money to P., who conveyed to him certain properties, in Ottawa, Ont., including one on LeBreton Street. In 1913, P. entered into an agreement with C. to exchange the LeBreton Street property for lots on Lisgar Street, which was carried out by conveyances between C. and D. In his deed C. stated that the consideration was "an exchange of lands and $1.00," and conveyed the lots on Lisgar Street, subject to certain mortgages, the description being followed by the words, "the assumption of which mortgages is part of the consideration herein." C. was obliged to pay these mortgages, and brought suit against D. to recover the amount so paid.

Held, affirming the judgment of the Appellate Division (34 Ont. L.R. 580), that the case was not within the rule of equity whereby the purchaser of an equity of redemption may be obliged to indemnify his vendor against liability for the mortgage. *Small* v. *Thompson* (28 Can. S.C.R. 219) distinguished.

Held, also, that parol evidence was properly received to shew the relations between P. and D.; that D. received the conveyance from C. merely as P.'s nominee, and held it afterwards only as security for his advances to P.; that he never claimed to be owner and never went into possession except as P.'s agent; and that he was not a purchaser of the property, but only a mortgagee.

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

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

(1) 34 Ont. L.R. 580.

The facts are sufficiently stated in the above headnote.

J. R. Osborne for the appellant. Douglas was a purchaser of Power's land, not a mortgagee. *Perry* v. *Meddowcroft*(1).

Whichever he was, he assumed the mortgages as part of the consideration, a d, therefore, is liable in this action. *Small* v. *Thompson*(2), *Waring* v. *Ward*(3), and *Adair* v. *Carden*(4) are not applicable, in view of such assumption.

The assumption of the mor gages amounted to an express covenant to pay them. Even if it did not, as appellant would not have conveyed without this clause for assumption such a covenant should be read into the contract. *Pioneer Bank* v. *Canadian Bank of Commerce*(5).

Hogg K.C. for the respondents referred to *Corby* v. *Gray*(6), *Mills* v. *United Counties Bank*(7), and *Walker* v. *Dickson*(8).

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed.

In stating the nature of the claim, I cannot do better than quote the words of the Master of the Rolls in the comparatively recent case of *Mills* v. *United Counties Bank, Ltd.*(9):—

> The claim is based on this ground. It is said that, according to the settled law of the court, a purchaser of an equity of redemption is bound under an implied obligation, or, as it is sometimes put, an obligation of conscience, to indemnify the vendor against the liability

(1) 4 Beav. 197.
(2) 28 Can. S.C.R. 219.
(3) 7 Ves. 332.
(4) 29 L.R. Ir. 469.
(5) 34 Ont. L.R. 531.
(6) 15 O.R. 1.
(7) 81 L.J. Ch. 210.
(8) 20 Ont. App. R. 93
(9) [1912] 1 Ch. 231, at p. 236.

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on the mortgage debt; and, in an ordinary case, that is, I think, obviously according to justice and common sense. If a property is worth £10,000 and is subject to a mortgage of £5,000, and the purchaser only pays the vendor £5,000 and gets the property, it would be almost shocking to say that in that case the vendor would be liable on the covenant to pay the full sum of £5,000 to the first mortgagee, and that the purchaser was under no obligation to indemnify him.

Now, I doubt whether the proposition is of so general and unqualified a character as contended for. It is to be noticed that, in the example given by the Master of the Rolls, he is speaking of a case where the property in the hands of the purchaser is sufficient to answer the mortgage debt. The same assumption is made in other cases where the doctrine has been discussed. But, if we remember that, as the courts hold, the obligation is one of conscience alone, can it be said that the obligation holds equally good where the pledge has proved worthless or indeed to be worth no more than the purchaser paid?

Again, Lord Justice Fletcher Moulton, in the case above referred to, speaking of the doctrine of *Waring* v. *Ward*(1), that there is an implied covenant, says:—

> It relates, I think, to every case where you can reasonably imply that it was the intention of the parties that that should be done, but I doubt whether it applies to any other case.

Now, can we reasonably imply that it was the intention of the respondent, who was not in reality the purchaser, to indemnify the appellant against the mortgages?

This perhaps brings us to the point of the case on which the judgment appealed from proceeds, viz., that this is not a simple case as between the appellant and respondent of the relation of vendor and purchaser. I agree with the court that the circumstances and nature of the transaction are such as to rebut the implication of an unqualified personal liability on the part of the respondent.

(1) 7 Ves. 332.

The courts are not, in my opinion, called upon in such cases to inquire too particularly into transactions often of a complicated nature and to consider whether they establish a case in which the expressed agreements between the parties ought to be supplemented by implied ones.

It is, of course, always open to a vendor to secure himself properly on a sale of the property, and, though there may be cases in which it is so clearly a matter of conscience for the purchaser to indemnify him that the court will imply a covenant where none was expressed, yet I do not think such implication of liability is to be lightly made.

The transactions out of which the claim arises seem to have been of the usual character of speculation in inflated values during a land boom. In these there are purchases, mortgages, exchanges, resales, shuffling of every description, until the speculation collapses, when disputes arise over the damages, which the courts are called on to unravel. Whilst the parties are entitled to the protection of any legal rights they may have, these are not cases in which the law need be strained for their relief.

DAVIES J.—I am of opinion that this appeal should be dismissed for the reasons given by Mr. Justice Hodgins J.A., speaking for the majority of that court, in which reasons I concur.

IDINGTON J.—The appellant conveyed certain lands to the late C. A. Douglas, and claims that he is entitled to recover from his grantee's representatives, now respondents, the amount of certain mortgages which existed upon the property conveyed at the time when the grant was made, because the conveyances described

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the property as subject to these mortgages, and then added,

the assumption of which mortgages is part of the consideration herein.

The grantee never executed the conveyance, and, therefore, his representatives cannot be held liable at common law.

The definition of a covenant in Comyn's Digest, A. 2, vol. 3, p. 263, deals with what may amount to a covenant on the assumption that the covenantor had executed the deed.

This is not the deed of an alleged covenantor. Any relief, therefore, that the appellant, whose deed it is, can have must rest upon equity.

To understand what that equity may be, we find the following in the deed in question:—

> Witnesseth that, in consideration of an exchange of lands and the sum of one dollar of lawful money of Canada, now paid by the said party of the second part to the said party of the first part (the receipt whereof is hereby by him acknowledged), he the said party of the first part doth grant unto the said party of the second part in fee simple all and singular, * * * .

and then follows the description of the lands and mortgages ending as already stated.

When we try to get the meaning out of this, in order to do equity, we find there never was any exchange of lands between the grantor and grantee, and we are told that the transaction referred to was one between one Power and the grantor in this deed.

How can that found any equity entitling appellant to the relief claimed as against this grantee or his representatives?

And when the relation of the parties is further investigated, the matter becomes, if possible, more hopeless, for it turns out that all the grantee had to do with the matter was that Power, who seems to have

been a speculator who had resorted to this grantee for advances on more than one occasion, and had, in the result, transferred to him, obviously as security, a number of properties on such terms as, if possible, to give their transaction the form of a sale or a conditional sale.

It is one of these properties which the grantee was asked to release and substitute therefor the lands now in question.

To accommodate appellant and Power he assented. Hence this conveyance to him.

At the time when this conveyance was made the time limited for Power to redeem had not expired.

I need not follow the remarkable complications that existed beyond all this, for I am unable to find any equity upon which appellant can rest and establish a claim to recover from a man who never was either a purchaser from him or covenantor bound to him.

Whether appellant might have found other equities of which something could have been made by bringing all the parties, including deceased, before the court, we need not trouble ourselves to consider, for no such claim is made.

On the case made, the appeal seems to me hopeless.

The contention that we must presume Power would make, and made default, does not seem to render the appellant's case any better.

The many cases where courts of equity have enforced obligations resting upon a purchaser as against those claiming under him, where obviously the prospective or subordinate purchaser (which shall we call this man?) has claimed, to enjoy the property, and been held bound in such case to implement the obligations of the purchaser, do not seem to me to furnish as a precedent anything like this case. Here the

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property evidently was not worth holding on to or asserting any claim to.

The whole of the dealings between Power and the deceased Douglas seem to have been in equities, and no obligation is shewn binding Douglas to Power to assume and pay the mortgages.

I think the appeal should be dismissed with costs.

ANGLIN J.—Notwithstanding Mr. Osborne's forceful argument in support of the contrary view taken by Magee J.A., who dissented in the Appellate Division, I agree with the learned judges who formed the majority of that court that, read in the light of the circumstances as disclosed by the evidence, in my opinion properly received, the recital in the description of the property in the deed from Campbell to Douglas, that the assumption of mortgages upon the property conveyed was part of the consideration for the transfer, does not amount o a covenant by the grantee to indemnify the grantor against such mortgages. That consideration is stated elsewhere in the deed to be "an exchange of lands and the sum of $1.00." The portion of it of which the assumption of the mortgages formed part, *i.e.*, the exchange of lands, was made between Campbell and Power. Douglas was not a party to it. He took the conveyance of the property given in exchange by Campbell merely as Power's nominee, and not as purchaser, or beneficial owner, but as security and as a mortgagee. As is pointed out by Hodgins J.A., *Small* v. *Thompson*(1), cited by the learned trial judge, was a clear case of express covenant.

Having "regard to all the circumstances of the case and to all the relations subsisting between the

(1) 28 Can. S.C.R. 219.

parties," as we must, it is, I think, clear that they had no intention that Douglas should assume liability to indemnify Campbell. No reasonable implication of such an intention can arise. In its absence, the essential basis of the equitable obligation alternatively relied on by the appellant is lacking. *Mills* v. *United Counties Bank*(1). Resembling it very closely in its facts, the case at bar seems to me to be not distinguishable in principle from *Walker* v. *Dickson*(2), which, I may be permitted to say with respect, was, in my opinion, well decided.

During the argument it occurred to me that the appellant might invoke the doctrine of estoppel. But, on further consideration, I am satisfied that two essential elements of an estoppel are not present. The respondent neither uttered any word nor did any act inconsistent with his true position in regard to the property, or which would justify the appellant in assuming that he took the conveyance instead of Power, with whom Campbell had made the agreement for exchange, otherwise than as Power's nominee and for security. The appellant did not change his position to his prejudice in consequence of the deed being made to Douglas. He still retains any rights against Power which the agreement for exchange gave him.

I would dismiss the appeal with costs.

BRODEUR J.—I am of opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Osborne & Broadfoot.*
Solicitors for the respondents: *Hogg & Hogg.*

(1) 81 L. J. Ch. 210, at p. 215. (2) 20 Ont. App. R. 96.