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*May 26.

*Oct. 9.

A. HENDERSON (PLAINTIFF) ....APPELLANT;

AND

THE BANK OF HAMILTON (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Jurisdiction—Action for redemption—Foreign lands—Lex rei sitæ—Action in personam.

An Ontario Court will not grant a decree for redemption of a mortgage on lands in Ontario at suit of a judgment creditor of the mortgagor whose judgment being registered is, by statute in Manitoba, a charge upon the lands, the judgment creditor and mortgagee both having domicile in Ontario.

The only *locus standi* the judgment creditor would have in an Ontario court would be to have direct relief against the land by means of a sale to which relief he would be restricted in such a case in a suit in the courts of Manitoba and a decree for a sale would have been unenforceable in the latter Province.

A court of equity will, where personal equities exist between two parties over whom it has jurisdiction though such equities may refer to foreign lands, give relief by a decree operating not directly upon the lands but strictly *in personam;* but such relief will never be extended so far as decreeing a sale in the nature of an equitable execution.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court (2) in favour of the plaintiff.

The material facts of the case are set out in the judgment of the court, and the question for decision on the appeal was as follows:—

Is the plaintiff Henderson, domiciled in Ontario, who has obtained a judgment in a Manitoba Court against one Lillico and registered such judgment

*PRESENT:—Sir Henry Strong C.J., and Fournier, Taschereau, Sedgewick and King JJ.

(1) 20 Ont. App. R. 646. (2) 23 O. R. 327.

which, by the Manitoba Registry Act became a charge upon the lands of Lillico in that province, entitled to a decree from a court in Ontario for redemption of a mortgage on said lands in an action for redemption against the defendant the Bank of Hamilton.

Mabee for the appellant referred to *Bradley* v. *McLeish* (1); *Campbell* v. *McGregor* (2).

Robinson Q.C. and *Aylesworth* Q.C. for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The appellant brings this action in the character of a judgment creditor of the defendant Peter Lillico in respect of a judgment recovered in the Court of Queen's Bench in the Province of Manitoba, having obtained a charge upon certain lands of the judgment debtor situate in that province by registering his judgment pursuant to the provisions of a provincial statute. The appellant alleges that the respondents, the Bank of Hamilton, are mortgagees of Lillico of the same lands under a registered mortgage in respect of which they are entitled to priority over the appellant and he accordingly seeks to redeem the bank. In the last aspect of the case there was no dispute as to the facts. The cause was tried before the learned Chief Justice of the Queen's Bench Division who dismissed the action. From this judgment there was an appeal to the Divisional Court of Queen's Bench by which court the original judgment was reversed and a judgment was pronounced whereby the appellant was declared to be entitled to redeem the respondents, the Bank of Hamilton, and an account was directed to be taken by the master of what was due on the mortgages to the bank, upon payment of

(1) 1 Man. L. R. 103. (2) 29 N. B. Rep. 644.

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which the bank was directed to convey the mortgaged lands to the appellant. No provision was, however, made by this judgment for the event of the appellant failing to redeem, the usual direction that in such event the action should be dismissed not being contained in the judgment but being, as it would appear, advisedly omitted. Neither was any provision made for raising the appellant's charge by a sale of the lands in the case of redemption by him.

The statute of Manitoba under which the judgment was registered provides that the effect of registering a judgment upon the lands within the limits of the registry office in which the registration takes place shall be as follows:—

> From the time of the recording of the same the said judgment shall bind and form a lien and charge on all the estate and interest aforesaid in the lands of the judgment defendant in the several registration divisions in the registry offices of which such certificate is recorded, the same as though charged in writing by the defendant under his hand and seal.

This enactment is manifestly copied from the English statute 1 & 2 Vict. chap. 110, sec. 13.

The question presented for the decision of the Court of Appeal was whether the appellant, having no *locus standi in curiâ* except such as this statutory charge conferred, was entitled to enforce it against the Manitoba lands in the Ontario courts, and this question the Court of Appeal have answered in the negative.

It is important to distinguish between the judgment and the charge or lien created by the statute. This is not an action upon the judgment but one to enforce the statutory charge. The appellant's claim does not in any respect involve relief in respect of any personal obligation, either against the bank or against Lillico, the judgment debtor. The charge created by the statute is exclusively a real right affecting the

lands, unaccompanied by any personal liability, and it creates no equity enforceable *in personam* against any one. When law and equity were administered by separate courts, courts of equity held that where personal equities existed between parties over whom they had jurisdiction, though such equities might have reference to lands situate without the jurisdiction, they would give relief by a decree operating not directly upon the lands but strictly *in personam*. The well known case of *Penn* v. *Lord Baltimore* (1) was a case of this kind, and on a similar principle relief was given against a defendant within the jurisdiction by decreeing foreclosure in default of redemption of mortgages of foreign lands. But in all such cases there was some personal obligation in the nature of a trust or other equity which the court enforced, as it was said, by affecting the conscience of the party against whom it decreed relief. This indirect mode of affecting lands over which the court could not properly have any direct judicial authority was, however, confined to the class of cases. mentioned, and was never extended so far as to give direct relief in respect of charges on lands by decreeing a sale in the nature of an equitable execution, or the raising of a bare charge such as the statute has conferred on the appellant in the present case. Such decrees would have been unenforceable in the foreign jurisdiction and might have brought the courts decreeing them into collision with the forum within whose local jurisdiction the lands were situated.

The only *locus standi* which the appellant in this appeal has is to have direct relief against the land by means of a sale, for we know that in such cases as these the courts of the Province of Manitoba restrict the relief which they give to a sale of the lands. All

(1) 2 White & Tudor's L.C. 6 ed. 1047.

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analogy is therefore against the appellant's contention and although no case precisely in point can be produced yet the case of *Norris* v. *Chambres* (1), referred to by Mr. Justice Osler in delivering the judgment of the Court of Appeal, is so like the present in the principles involved that without disregarding that authority, decided in the first instance by Lord Romilly, M.R., and affirmed on re-hearing by Lord Campbell, Chancellor, we could not do otherwise than dismiss this appeal. *Norris* v. *Chambres* (1) was a case in which it was sought to enforce a vendor's lien against real property out of the jurisdiction, and the observations of the Master of the Rolls apply *a fortiori* to such a case as the present. I also refer to the cases of *Re Hawthorne* (2); and *Harrison* v. *Harrison* (3). In *Norris* v. *Chambres* (4) Lord Campbell in giving judgment says:

> I think that, upon the authority of *Penn* v. *Lord Baltimore* (5), which has often been acted upon, the plaintiff would have been entitled to succeed if he could have proved that the claim for a declaration of the proposed lien or charge on the mine was founded on any contract or privity between him or the deceased John Sadlier and the defendants, the purchasers of the mine. * * * But I agree in thinking, with the Master of the Rolls, that the plaintiff has failed to show any such contract or privity. Upon the evidence adduced the purchasers of the mine whom he sues, are to be considered as mere strangers, and any notice which they may have had of transactions between Sadlier and the Company (which has now ceased to exist) cannot give this court jurisdiction to declare the proposed lien or charge on lands in a foreign country. An English court ought not to pronounce a decree even *in personam* which can have no specific operation without the intervention of a foreign court, and which, in the country where the lands to be charged by it lie, would probably be treated as *brutum fulmen*.

Wharton in his treatise on the Conflict of Laws (6) says:—

(1) 29 Beav. 246; 3 DeG. F. & J. 583.
(2) 23 Ch. D. 743.
(3) 8 Ch. App. 346.
(4) 3 DeG. F. & J. 583.
(5) 2 White & Tudor's L. C. 6 ed. 1047.
(6) 2 ed. sec. 291.

It has already been stated that all interests in land, whether consisting of equitable interests, charges, trusts, or servitudes, all interests, in other words, that may fall under the term *lien* in its most general sense, are controlled by the *lex rei sitæ* even in the opinion of those who would confine that law within the narrowest limit. * * * The only way by which title can be made to such *liens*, or the only process by which such *liens* can be enforced, is that of the *situs*.

Mr. Justice Story, who was more liberal than other commentators in relaxing the strict rule of the *lex rei sitæ*, thus states his views (1) :

Not only lands and houses, but servitudes and easements, and other charges on lands, as mortgages and rents, and trust estates are deemed to be, in the sense of law, immovables and governed by the *lex rei sitæ*.

What I take to be the result of these and other cases is well summarised by a modern text writer as follows : (2)

All questions as to the burdens and liabilities of immoveable estate situate in a foreign country depend, in the absence of any trust or contractual obligation, simply upon the law of the country where the real estate exists ; wherefore if the contested claim is based upon the right to land, and must be determined by the *lex loci rei sitæ*, and the only ground for instituting proceedings in this country is that the defendants are resident here, the courts of this country have no jurisdiction.

It may be said that the relief which the appellant seeks, and that which has been accorded to him by the judgment of the Queen's Bench Division, is a mere decree or judgment *in personam* against the Bank of Hamilton. The answer to this is, however, that the right of the appellant is one limited to enforcing a direct charge on the lands, and that the redemption of the bank is merely ancillary to this, for even if we hold the appellant entitled to judgment we could not allow that pronounced by the Court of Queen's Bench to stand unaltered. That is a mere partial and fragmentary judgment, which, if it related to property within

(1) Conflict of laws, 8 ed. sec. 447.

(2) Nelson's cases on Private International Law p. 148.

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the jurisdiction, would for that reason alone be defective for not having gone on to direct ulterior relief by a sale of the land. That a judgment if one were pronounced for the sale of the lands could not be fully carried out without the aid of the courts of the *situs* is apparent, if we bear in mind that Lillico, the judgment debtor, is without both jurisdictions, and that the title of a purchaser could not be perfected without either a conveyance from him or a vesting order which the Manitoba courts alone would have jurisdiction to grant and enforce.

The tendency of modern decisions has been to decline jurisdiction with reference to foreign land, and when we consider that if the arguments invoked for the present appellant were to prevail we might be asked to uphold a judgment of a Quebec court in an hypothecary action respecting lands in Ontario, or *vice versâ* a judgment in an action in the Ontario courts directing a sale of hypothecated immovables in the Province of Quebec, the convenience, good sense and sound jurisprudence of the rules laid down in the later English authorities, which have now culminated in the decision of the House of Lords in the case of the *British South Africa Co.* v. *The Companhia de Moçambique* (1), become at once apparent. It is unnecessary to write more fully, as Mr. Justice Osler in his very able judgment delivered in the Court of Appeal, and which proceeds on the same *ratio decidendi* as the judgment of this court, has fully expounded the principles upon which it must be held that the Ontario courts have no jurisdiction to entertain this action.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Mabee & Gearing.*

Solicitors for respondents: *Scott, Lees & Hobson.*

(1) [1893] A. C. 602.