WILLIAM D. WILSON (DEFENDANT).....APPELLANT; 1895

AND *Oct. 17, 18, 19.

THE LAND SECURITY COMPANY (PLAINTIFFS)..... } RESPONDENTS. 1896

*Mar. 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Vendor and purchaser—Agreement for sale of land—Assignment by vendee—Principal and surety—Deviation from terms of agreement—Giving time—Creditor depriving surety of rights—Secret dealings with principal—Release of lands—Arrears of interest—Novation—Discharge of surety.

An agreement for the purchase and sale of certain specified lots of land in consideration of a price payable partly in cash and partly by deferred instalments on dates therein specified was subject to payments being made in advance of those dates under a proviso that—"the company will discharge any of said lots on payment of the proportion of the purchase price applicable on each."

The vendee assigned all his interest in the agreement to a third party by a written assignment registered in the vendors' office and at the time there were several conversations between the three parties as to the substitution of the assignee as purchaser of the lots in the place of the original vendee. The vendors afterwards accepted from the assignee several payments upon interest and upon account of the principal remaining due from time to time as lots and parts of lots were sold by him, and without the knowledge of the vendee arranged a schedule apportioning the amounts of payments to be made for releases of lots sold based on their supposed values, and in fact released lots and parts of lots so sold and conveyed them to sub-purchasers upon payments according to this schedule and not in the ratio of the full number of lots to the unpaid balance of the price and without payment of all interest owing at the time sales were made. The vendors charged the assignee with and accepted from him compound interest and also allowed the assignee an extension of time for the payment of certain interest overdue and thus dealt with him in respect to the property in a manner different from the provisions of the agreement in reference to the conveyance of lots to sub-purchasers.

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*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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Held, that the dealings between the vendors and the assignee did not effect a novation by the substitution of him as debtor in the place of the original vendee, or release the vendee from liability under the original agreement.

Held also, that though the course of dealing did not change the relation of the parties to that of that principal creditor, debtor and surety, notice to the vendors of the assignment and their knowledge that the vendee held the land as security for the performance of the assignee's obligations towards him, bound the vendors so to deal with the property as not to affect its value injuriously or impede him in having recourse to it as a security.

In a suit taken by the vendors against the vendee to recover interest overdue equitable considerations would seem to be satisfied by treating the company as having got from the third party on every release of a part of a lot the full amount that they ought to have got from him on a release for an entire lot and as having received on each transfer all arrears of interest.

In the absence of any sure indication in the agreement the ratio of apportionment of payments for the release of lots sold should be established by adopting the simple arithmetical rule of dividing the amount of the deferred instalments stated in the agreement by the total number of lots mentioned therein.

APPEAL from the decision of the Court of Appeal for Ontario (1), reversing the decision of the Divisional Court in favour of the defendant.

The agreement between the parties for the sale of specified lots of land to the defendant was made on the 20th March, 1889, and the defendant paid the cash payment and the first instalment falling due six months thereafter, and on the 2nd December, 1889, took a bond of indemnity from and gave an assignment to one Henderson, who was added in action as a third party, of "all his interest in the agreement and the lands therein described." The assignment was drawn by the plaintiffs and registered in their books but there was no written consent by the plaintiffs to the assignment, although in their ledger account with the defendant they added the words "now Elmes Hender-

(1) 22 Ont. App. R. 151.

son." The plaintiffs and the third party then made a schedule of payments for the release of lots, without communicating with the defendant, basing the amounts on the supposed value of the lots respectively. The plaintiffs used this schedule as the rule of apportionment in the release of lots or half lots by the third party, and did not insist upon the payment of interest in arrear in some cases. Plaintiffs also received interest on account from the third party from time to time and in some instances allowed interest to remain in arrear, the third party being charged with and paying interest upon such interest, and later an extension of time was granted for the payment of other overdue interest. On 26th May, 1892, the plaintiffs demanded payment of interest then in arrear from the defendant, and brought the present action against him in March, 1893, for arrears of interest due under the agreement from 20th March, 1891, to the date of suit. The defendant sought to establish that the dealings between the plaintiffs and the third party had extinguished his original liability by novation, and obtained an order making the assignee a third party to the suit as having been substituted in his place as the plaintiffs' debtor. The defendant also claimed that the effect of the transactions which had taken place was to establish the relations of creditor, debtor and surety respectively as between the plaintiffs the third party and himself, and that he had been released as surety by the giving of time, the alteration of the terms of payment, the sales of portions of lots and the acceptance of redemption money according to the schedule instead of in proportion to the number of the lots mentioned in the agreement. The plaintiffs' action was dismissed by the trial judge on the ground that the defendant had become a surety and been released. On appeal the court held that even if the defendant had

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become a surety he was not wholly released through the plaintiffs' conveyances of parts of lots and extension of the time for payment of interest in arrear, but that he was merely released as to the interest in arrear when the lots were conveyed and the extension of time given, and was entitled to credit for the full proportion of purchase money of the lots of which parts only had been conveyed.

Kerr and *Rowell* for the appellant. The company agreed to accept Henderson as their debtor and Wilson was discharged. *Hart* v. *Alexander* (1); Lindley on Partnership (2); *Bank of Australasia* v. *Flower* (3); *Holden* v. *Hayne* (4).

If there was not a novation Henderson by the assignment became primarily liable to the company and Wilson his surety. *Shaw* v. *Foster* (5); *Muttlebury* v. *Taylor* (6); *Allison* v. *McDonald* (7); and being a surety he was discharged by the giving of time to his principal. *Oriental Financial Corporation* v. *Overend, Gurney & Co.* (8); *O'Gara* v. *The Union Bank* (9).

Kerr Q.C. for the respondents: There was no agreement by the three parties that Henderson should take Wilson's place and be liable instead of him to the company. See *Harris* v. *Farwell* (10); *In re Head* (11); *Aldous* v. *Hicks* (12).

The relation of principal and surety could not be established without the assent of the company. *Swire* v. *Redman* (13); *Birkett* v. *McGuire* (14).

(1) 7 C. & P. 746.
(2) 6 ed. p. 255.
(3) L.R. 1 P.C. 27.
(4) 1 Mer. 47.
(5) L.R. 5 H.L. 321.
(6) 22 O.R. 312.
(7) 23 Can. S.C.R. 635.
(8) 7 Ch. App. 142.
(9) 22 Can. S.C.R. 404.
(10) 15 Beav. 31.
(11) [1893] 3 Ch. 426.
(12) 21 O.R. 95.
(13) 1 Q.B.D. 536.
(14) 7 Ont. App. R. 53.

Even if it did exist there was no such giving of time to Henderson as would discharge Wilson, the alleged surety. See *Davis* v. *White* (1).

TASCHEREAU J.—I am of opinion that this appeal should be dismissed with costs for the reasons stated by Mr. Justice Osler in the Court of Appeal.

GWYNNE J.—The cases relating to the release of a surety by reason of the dealings of a creditor with the principal debtor have no application in the present case. The cases cited and relied upon do not, in my opinion, warrant the conclusion that upon the assignment by Wilson and Rankin to Henderson of their rights and interest in the contract between Wilson and the Land Security Co. for the purchase and sale of the lands therein mentioned, and in the said lands under that contract, Henderson became a principal debtor to the Land Security Company for the amount due to them under Wilson's covenant, and that Wilson became thenceforth surety only for the payment by Henderson as such principal debtor. The only question which remains, is whether, upon any other principle than that affecting the relationship of principal debtor, surety and creditor, the mode in which the land was dealt with by the Land Security Company and Henderson under the clause in the original contract with Wilson as to releasing parts of the land, discharges Wilson from all liability under his covenant now sued upon, and I am of opinion that it does not. If the dealings between Henderson and the Land Company as to releasing parts constituted any excess of the authority purported to be given in that matter by Wilson's contract with the Land Company, such excess, if any, in the absence of

(1) 16 Gr. 312.

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the relationship of principal and surety could affect Wilson's liability under his contract only to the extent of the damage, if any, which was sustained by Wilson by reason of the dealings of Henderson and the Land Company in the matter being in excess of the authority in that behalf contained in Wilson's contract with the Land Company.

There is nothing in those dealings, nor in the evidence, to justify the inference contended for by the appellant that a novation had taken place, and that the Land Company had accepted Henderson as their debtor in the place of Wilson.

While I entertain doubt whether the mode of dealing which Henderson and the Land Company adopted as to the release of parts of the land was not authorized by the terms of the contract with Wilson, I concur in the view taken by my brother King on that point, and that the appeal must be dismissed with costs.

SEDGEWICK J.—I consider that this appeal should be dismissed for reasons stated in the written notes prepared by Mr. Justice King.

KING J.—I think that the appeal should be dismissed, and for the reasons given in the opinions of Mr. Justice Osler and Mr. Justice Maclennan. As to the alleged novation by substitution of Henderson as debtor in Wilson's place, it would be very mischievous if loose conversations such as those relied on to prove a novation were to displace the obligations of a formal contract of purchase. The evidence wholly fails to establish an assent of the three parties to the extinguishment of Wilson's liability, and the substitution therefor of Henderson's. The alleged contract for the giving of time by the Company to Henderson, the assignee of Wilson, has also not been proved, and so

the contention on this point fails apart from any question as to the effect of it if there had been the contract in fact.

The learned counsel for the appellant directed his principal attack upon the judgment upon the point as to the effect of the Land Company dealing with Henderson in respect of the land in a way not directly in accordance with the terms of their contract with Wilson, and without his knowledge or consent.

The learned judges were of opinion that there was a variation from the terms of the contract, but thought that its effect was not to discharge Wilson entirely but merely to entitle him to certain relief.

It is claimed for the appellant that upon the assignment of the benefit of the contract to Henderson, and notice to the company, then the company, Henderson and Wilson stood to each other in the relation of creditor, principal debtor and surety.

The class of cases of which *Rouse* v. *Bradford Banking Co.* (1), is a most recent example, holds that:

> When two or more persons bound as full debtors arrange, either at the time when the debt was contracted or subsequently, that *inter se* one of them shall only be liable as a surety, the creditor after he has notice of the arrangement must do nothing to prejudice the interests of the surety in any question with his co-debtors.

In terms this is not applicable to the case of a vendor and vendee of land and an assignee of the vendee. Ordinarily there is no obligation of the assignee to the vendor to pay the purchase money. The vendor has a right to say to the purchaser or to any one in under him: "Either pay me the purchase money or lose the estate (2)." And this is what is done in a suit for specific performance, and what was done in *Holden* v. *Hayn* (3), cited by the appellant, and all that was

(1) [1894] 2 Ch. 32.

(2) *Lysaght* v. *Edwards* 2 Ch. D. 499.

(3) 1 Mer. 47.

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directly decided there was that under the circumstances and upon the allegations of the bill the original purchaser was an unnecessary party to the suit.

Still when the Company were informed that Wilson had assigned the benefit of the contract, and knew (as it is clear they did know) that as between the purchaser and the assignee the latter was to pay the purchase money, and that the land was their purchaser's security for the performance of the assignee's obligation to him, they became bound in any dealings that they might have with the assignee in reference to the contract behind the back of the vendee, to respect the known rights of their purchaser and not to affect his security or prejudice his interests in any question with his assignee.

Clearly they would have no right to do anything that might affect the value of the land as a security to him, or impede him in having recourse to it. He was entitled, as a plain matter of contract, to get the land as it was agreed to be given, subject to any dealings with Henderson respecting it that might have taken place in accordance with the terms of the original contract.

Now Henderson, as assignee, was entitled (as Wilson would have been) to a release of a whole lot or of half a lot on payment of the proper proportionate amount for the whole of a lot. But he was not entitled to claim a release of half a lot on payment merely of a proportionate amount for such half lot. Such an arrangement carried out as to all the lots might result in leaving one-half the purchase money charged upon an aggregation of half lots, which to the original vendee would manifestly be an inferior, and certainly would be a different, security from that contemplated, because a security upon different property.

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But the agreement contemplated the apportioning of the charge upon the land and so a dealing with any lot differently from the terms of the original contract does not affect the rest of the lots.

Now the release of a half lot cannot be complained of. What is properly to be complained of is the attempt to enforce a charge greater than it should be under the provisions of the contract. Equitable considerations would seem to be satisfied by treating the company as having got from Henderson the full amount that they ought to have got from him on a release of an entire lot.

The result would be the same if the land were treated as a pledge in the vendors' hands and they were being charged for defaults in respect of it. Having regard to the provision for severing the charge the default would lie in releasing single lots at too small a sum.

The cases respecting the effect of an alteration of the original contract between a creditor and principal debtor without consent of a surety are not applicable, if for no other reason, because in point of fact there was no original contract between the Company and Henderson.

I agree with the direction that the Company is bound to treat the interest in arrear at the time of the transfers as having been paid. The purchaser could not claim the release of any portion of the property while in default in respect of interest.

Then as to the ratio of apportionment for the release of lots, clearly what was called for was a rule admitting of prompt and ready application. Market value would entirely fail in affording such a rule. In the absence of any sure indication in the instrument, the simple arithmetical rule is to be adopted as being upon the whole less objectionable than any other.

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I think, therefore, that the judgment should be affirmed, and the appeal dismissed.

GIROUARD J. concurred.

Appeal dismissed with costs.

Solicitors for appellant: *Kerr, Bull & Rowell.*

Solicitors for respondent: *Kerr, Macdonald, Davidson & Paterson.*

Solicitor for third party (by order): *N. Farrar Davidson.*