CATHERINE FRANCES SMALL (PLAINTIFF) ..... } APPELLANT;

AND

MARY CALLENDAR THOMPSON (DEFENDANT) ..... } RESPONDENT.

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*Oct. 27, 28.

*Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Married women—Implied covenant—Disclaimer.

Where a deed of lands to a married woman, but which she did not sign, contained a recital that as part of the consideration the grantee should assume and pay off a mortgage debt thereon and a covenant to the same effect with the vendor his executors, administrators and assigns, and she took possession of the lands and enjoyed the same and the benefits thereunder without disclaiming or taking steps to free herself from the burthen of the title, it must be considered that in assenting to take under the deed she bound herself to the performance of the obligations therein stated to have been undertaken upon her behalf and an assignee of the covenant could enforce it against her separate estate.

APPEAL from the judgment of the Court of Appeal for Ontario reversing the judgment of Armour C.J. in the High Court of Justice which ordered and adjudged that the plaintiff should recover $4,891.96 out of the separate property of the defendant Mary Calendar Thompson, with costs.

The action was brought against the respondent, a married woman, and Robert Cameron Sinclair, for the purpose of enforcing against her and her separate estate a covenant contained in a deed of lands by him to her made under the following circumstances. The plaintiff had conveyed the lands to Sinclair by deed, whereby the said Sinclair assumed a

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

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mortgage thereon and covenanted with the plaintiff that he would pay the same. Sinclair afterwards conveyed the lands to the respondent by a deed made in consideration of the assumption by her of the said mortgage and a sum of money (the receipt whereof was by him acknowledged), and in the said deed there was contained a covenant with the vendor therein and his assigns by the said respondent that she would assume and pay off the said above mentioned mortgage when it fell due and to indemnify him and his assigns from all payments on account thereof. The respondent did not sign the deed which contained her covenant in favour of Sinclair, but she took possession and enjoyed the lands thereunder until the mortgagees took possession in default. The plaintiff obtained from Sinclair, before action, an assignment of all his rights against the defendant under the covenant in question. Subsequently Sinclair executed a release of the covenant by an instrument in writing which declared that there had been no intention at the time of the conveyance that the defendant should assume any personal liability to pay the mortgage although according o the deed she appeared to be liable therefor. The plaintiff appeals from the judgment of the Court of Appeal reversing the decision of the trial judge and directing judgment to be entered for the defendant Thompson. The issues raised on the appeal are set out in the judgment of His Lordship Mr. Justice King.

Armour Q.C. for the appellant. The defendant was clearly liable on the documents, and parol evidence is inadmissible to contradict them, and inadmissible and insufficient to reform the deed, and the Court of Appeal was wrong in giving effect to such evidence. The defendant must now, retaining, as she does, the land, pay the balance of the consideration for which it

was purchased. *Cherry* v. *Heming* (1); *Willson* v. *Leonard* (2); *Webb* v. *Spicer* (3); *Rex* v. *Houghton-le-Spring* (4). The conditions on which the deed was delivered are binding on the grantee as an essential part of the contract and germane thereto; *Mackenzie* v. *Coulson* (5), per James V. C. at page 375. She knew of the obligations charged upon her title; *Eaton* v. *Bennett* (6), and there was no error as to the agreement; *McNeill* v. *Haines* (7) per Ferguson J. at page 485. See also *Hart* v. *Hart* (8). There has been no disclaimer either by deed or matter of record although she took possession as grantee and for years received the rents, issues and profits. *Fraser* v. *Fairbanks* (9) per Gwynne J. at page 87, and per Sedgewick J. at page 89; *Smith* v. *Cooke* (10); *Blair* v. *Assets Company* (11) at page 418; also *re Dunham* (12); and *re Defoe* (13). This is not a case of dealing between husband and wife and *McMichael* v. *Wilkie* (14) cannot apply. See also *Williams* v. *Balfour* (15).

Aylesworth Q.C. for the respondent.—The uncontradicted testimony shows that respondent's purchase of the property was upon the express condition and stipulation that she was not to assume or become liable for the mortgage thereon, but that Sinclair alone was to be liable for the mortgage without any right of indemnity, and that, by inadvertence and mistake, the alleged convenant sued on was inserted in the deed. The parol evidence was admissible to prove these facts; and, therefore, neither Sinclair nor any assignee from him could maintain an action on the supposed covenant.

(1) 4 Ex. 631.
(2) 3 Beav. 373.
(3) 13 Q. B. 886.
(4) 2 B. & Ald. 375.
(5) L. R. 8 Eq. 368.
(6) 34 Beav. 196.
(7) 17 O. R. 479.
(8) 18 Ch. D. 670.
(9) 23 Can. S. C. R. 79.
(10) [1891] A. C. 297.
(11) [1896] A. C. 409.
(12) 29 Gr. 258.
(13) 2 O. R. 623.
(14) 18 Ont. App. R. 464.
(15) 18 Can. S. C. R. 472.

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Story's Eq. Juris, sects. 153 and 155. *Price* v. *Ley* (1); *Wake* v. *Harrop* (2); *Fraser* v. *Fairbanks* (3); *British Canadian Loan Co.* v. *Tear* (4); *Beatty* v. *Fitzsimmons* (5); *Corby* v. *Grey* (6).

The appellant, as assignee of the alleged covenant, stands in no better position that the assignor Sinclair, for the covenant is merely a chose in action, and the assignee takes it subject to the equities existing between the parties. *Patterson* v. *McLean* (7); *Davis* v. *Hawke* (8); *In re Natal Investment Co.* (9). The respondent is not bound by the deed from Sinclair to her, or by the covenant therein, as she did not execute the deed nor assent to it, and was never at any time in receipt of the rents and profits of the property conveyed by the deed. See Shep. Touchstone, 177; Com. Dig. tit. "Fait" A2; Co. Litt 231*a*; 2 Roll Rep. 63. See also *Webb* v. *Spicer* (10); *Rex* v. *Houghton-le-Spring* (11); *Burnett* v. *Lynch* (12); a party to a deed, who does not execute it, assent to it or take the benefit of it, is not bound by the deed or the covenant contained in it. Even though she had accepted the benefit of this deed, she would not be liable to the appellant in an action of covenant, for such an action cannot be maintained on a deed conveying land, executed by the grantor, and purporting to contain a covenant by the grantee to pay a mortgage on the property, but which deed has not been executed by the grantee. *Credit Foncier Franco-Canadien* v. *Lawrie* (13), and cases therein cited. The land in question was conveyed to the wife as the husband's nominee by deed

(1) 4 Giff. 235.
(2) 6 H. & N. 768.
(3) 23 Can. S. C. R. 79.
(4) 23 O. R. 664.
(5) 23 O. R. 245.
(6) 15 O. R. 1.
(7) 21 O. R. 221.
(8) 4 Gr. 394.
(9) 3 Ch. App. 355.
(10) 13 Q. B. 886.
(11) 2 B. & Ald. 375.
(12) 5 B. & C. 589.
(13) 27 O. R. 498.

absolute in form, but for the purpose of security only, and consequently she is not liable to indemnify the vendor. *Walker* v. *Dickson* (1); *Gordon* v. *Warren* (2); *Fraser* v. *Fairbanks* (3). Sinclair acted as agent for the purchase of the property, and the respondent is not bound to pay off the mortgage or idemnify him, as this equitable obligation arises only between vendor and purchaser, and not between an agent and his principal. Even if she was under any implied obligation to Sinclair, such obligation was not one which could be assigned, and therefore, nothing passed to the plaintiff. *Campbell* v. *Robinson* (4); *Oliver* v. *McLaughlin* (5). See the language of the Lord Chancellor in *Jones* v. *Kearney* (6), at p. 155. See also *Campbell* v. *Morrison* (7).

The respondent being a married woman, the obligation to pay off the mortgage is not enforceable against her, as such obligation cannot be said to be a contract made by her in respect of her separate property; *McMichael* v. *Wilkie* (8); especially as the liability, if any, arises wholly by implication of law and in the absence of contract, It can no more operate now than before the "Married Women's Property Act, 1884 (9)." We refer also to *Wright* v. *Chard* (10), A plaintiff who seeks to charge the separate estate of a married woman must make out at least some contract or engagement with him on her part. *Jones* v. *Harris* (11); *Johnson* v. *Gallagher* at page 514 (12); *Aguilar* v. *Aguilar* (13); *Ambrose* v. *Fraser* (14).

The judgment of the court was delivered by:

(1) 20 Ont. App. R. 96.
(2) 24 Ont. App. 44.
(3) 23 Can. S. C. R. 79.
(4) 27 Gr. 634.
(5) 24 O. R. 41.
(6) 1 Dr. & War. 134.
(7) 24 Ont. App. R. 224.
(8) 18 Ont. App. R. 464.
(9) R. S. O. [1887] ch. 132.
(10) 4 Drew. 673.
(11) 9 Ves. 486.
(12) 3 DeG. F. & J. 494.
(13) 5 Madd. 414.
(14) 14 O. R. 551.

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KING J.—Sinclair entered into a written contract to purchase, and expressly agreed to indemnify his vendor, Mrs. Small, against personal liability for the mortgage debt charged on the property and which formed part of the purchase money, but was suffered to be retained by the purchaser to protect him against the mortgage charge. It is claimed that he purchased for and on account of Thompson, the husband of the female defendant. In such case the principal on taking over the property would ordinarily be bound to the agent to assume any obligations for the purchase money which the agent had entered into with the consent of the principal.

But it is claimed that Sinclair, in consideration of $50 agreed with his principal to take upon himself the obligation to the vendor to assume payment of the mortgage debt without recourse against his principal.

Both Sinclair and Thompson swear to this, but the learned Chief Justice who tried the case did not give credit to their statements. First, as to Sinclair. Against his statement there is to be placed the clear statements of the deed to the contrary effect. And the deed was written by him, copied, he says, from the deed given to him by Mrs. Small. But is it not well nigh incredible that a person should make an express bargain to assume the responsibility for the mortgage debt himself, and then, having made such an agreement for a purpose which he swears was well known to him, viz., that his transferee should be free from all liability in respect of it, should immediately afterwards, in the course of carrying out the transfer, state in plain English what was palpably inconsistent with such agreement, viz., that Mrs. Thompson was to assume responsibility for the mortgage debt and to indemnify Sinclair against liability therefor?

The explanation put forward, that the deed was copied by him from the original deed to him, is no explanation at all. In view of this and of Sinclair's assignment to Mrs. Small of his claim for indemnity against Mrs. Thompson, and then of his still later attempt to release the same to Mrs. Thompson, it is little wonder that the learned Chief Justice preferred to give effect to the terms of the deed as against Sinclair's attempt to cut it down.

Then as to Thompson: There is the fact that he had the deed from 1890 to 1895 in his possession. He says that he never read it, but kept it in his safe all the time. But it seems to me (as it probably seemed to the learned Chief Justice) that one who contrives a plan of hiring a man of straw to place between the vendor and himself, so that in certain events he may not have to pay what they all suppose is the fair value of the property, and who then trusts so implicitly to the man of straw as to take a transfer from him without looking at it, ought not to be surprised if there is found some difficulty in acting upon his view of the transaction.

The action is, however, against Mrs. Thompson, who is sought to be made liable in respect of her separate estate, and this can only be done upon a contract by her. That she had separate estate is manifest upon the evidence. The question then is: Did she contract?

It is contended for the plaintiff that she was the real principal for whom Sinclair was acting, and that this was unknown to Mrs. Small at the time of the agreement. I think, however, the proper conclusion upon the evidence is that the consideration was paid by Thompson out of his own moneys.

Then as to making out the deed to Mrs. Thompson. His account of it is that he did this in order to keep the property free from execution in a suit that he anti-

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cipated relative to the Princess Theatre. But Mrs. Thompson speaks of this theatre as being her separate property. As it appears that Thompson fell himself under a pre-nuptial obligation to transfer to his wife all property that he should become entitled to, and in pursuance of this did in fact transfer to her a number of properties, the more reasonable view is that in this case he was acting in the like manner, and so the transfer was in the nature of an advancement by Thompson to his wife. But in either case, and equally, the question is: Was there in fact a contract by her?

The indenture contained what purports to be an express covenant that she shall pay the amount of the mortgage debt and idemnify Sinclair against liability therefor.

It is also stated in the recital as part of the consideration that the grantee is to assume the obligation to pay the mortgage debt. Mrs. Thompson did not execute the deed, and the question is whether she has taken the benefit of it and adopted it. Upon execution of a deed the estate is divested out of the grantor and put in the party to whom the conveyance is made, although made in his absence and without his knowledge, until some disagreement to take the estate appears (1). While, *primâ facie*, every estate is supposed to be beneficial to the party to whom it is given, the party himself is the best judge of whether it is so or not, and he cannot be forced to take an estate against his will; accordingly he may renounce or refuse the gift. *Townson* v. *Tickell* (2). "He is supposed to assent until he does some act to show his dissent," per Holroyd J.

Mrs. Thompson appears not to have known of the deed until action brought. However, there came a time when she did know of it; and so far (as appears

(1) 4 Cruise Dig. 9.

(2) 3 B. & Ald. 31.

to me), she has done no act since and down to the present time, to free herself from the burden of the title. She does indeed seek to free herself from obligations, whether express or implied, contained in the deed, contending that she did not execute it, and that she never authorized Sinclair or her husband to enter into any contract for the purchase, or to bind her in any way to pay the amount of the original consideration, or to accept the deed; and she claims that she cannot be held liable in respect of her separate estate upon any implied agreement to indemnify or save Sinclair harmless from payment of the mortgage. A person may indeed set up inconsistent defences in his pleading, but while some of the defences here imply an intention to hold to the transfer, there is, so far as I observe, nowhere a sufficiently distinct, or in fact any, disclaimer of all benefit and advantage under the deed, and no act or disclaimer proved in evidence. On the contrary, by pleading Sinclair's release of her covenant she adopts the conveyance of the property to her. This being so, and the deed upon the face of it showing a clear expression of intention that the grantee is to assume the obligation of the grantor to pay the mortgage debt as part of the original consideration, it would seem that Mrs. Thompson, in assenting to take under the deed, binds herself to the undertakings expressed in it on her part to be performed and fulfilled. She has therefore contracted in a way that binds her separate estate. Unfortunately owing to the speculative values placed upon the property at the time of purchase, the amount of the mortgage debt exceeds the present value of the property. Were it not so, this suit would not have reached this stage.

Another objection to plaintiff's claim is that it was not competent for Sinclair to assign, or for plaintiff to take an assignment of a liability of the nature of that

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alleged. This point comes specially up in an appea argued next after this, (1) and is decided adversely to the objection here taken.

Upon the whole case therefore, the appeal is to be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Henderson & Small.*

Solicitors for the respondent: *Canniff & Canniff.*

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(1) *Maloney* v. *Campbell*, 28 Can. S. C. R. 228.