1897

*Oct. 28.

*Dec. 9.

JOHN MALONEY (DEFENDANT).....APPELLANT;

AND

ELIZABETH PRUDENCE CAMPBELL (PLAINTIFF) .... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Action, right of—Conveyance subject to mortgage—Obligation to indemnify—Assignment of—Principal and surety—Implied contract.

The obligation of a purchaser of mortgaged lands to indemnify his grantor against the personal covenant for payment may be assigned even before the institution of an action for the recovery of the mortgage debt and, if assigned to a person entitled to recover the debt, it gives the assignee a direct right of action against the person liable to pay the same.

APPEAL from the judgment of the Court of Appeal for Ontario (2) affirming the decision of the Common Pleas Division of the High Court of Justice which maintained the plaintiff's action with costs.

A sufficient statement of the case appears in the judgment of the court delivered by His Lordship Mr. Justice King.

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

(2) *Campbell* v. *Morrison*, 24 Ont. App. R. 224.

C. H. Ritchie Q.C. (*Boland* with him) for the appellant. The appellant did not execute the deed conveying the mortgaged property to him; *Credit Foncier* v. *Lawrie* (1), but he had a right to protect the property as he did by payments of interest on the mortgage during the time he considered he had a right to deal with it; *Re Errington* (2). There was an understanding collateral to the agreement that he should not be liable for the mortgage; *British Canadian Loan Co.* v. *Tear* (3); *Beatty* v. *Fitzsimmons* (4). An implied obligation cannot be assigned so as to give a right of action; see *Fraser* v. *Fairbanks* (5) at page 87 per Sedgewick J. No right of action could arise against the appellant until the mortgagor was damnified; *Jacoby* v. *Whitmore* (6); *Campbell* v. *Robinson* (7); *Eddowes* v. *Argentine Loan and Mercantile Co.* (8); *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (9). A purely personal right of this kind cannot be assigned; *Canham* v. *Rust* (10); *Milnes* v. *Branch* (11); *Haywood* v. *Brunswick Permanent Benefit Building Society* (12); *In re Law Courts Chambers Co.* (13); *Aldous* v. *Hicks* (14).

This is not a case of a covenant to the covenantee *or his assigns*, and as such is distinguishable from *Werderman* v. *Société Générale d'Electricité* (15). A mere possibility is not asssignable. *Robinson* v. *Macdonell* (16), at page 236. A mere naked right to be indemnified is not assignable. *Smith* v. *Teer* (17); as to the effect of the assignment of the implied covenant, see *Sutherland* v.

(1) 27 O. R. 498.
(2) [1894] 1 Q. B. 11.
(3) 23 O. R. 664.
(4) 23 O. R. 245.
(5) 23 Can. S. C. R. 79.
(6) 49 L. T. 335.
(7) 27 Gr. 634.
(8) 63 L. T. 364.
(9) 22 Ch. D. 561.
(10) 8 Taunt 227.
(11) 5 M. & S. 411.
(12) 8 Q. B. D. 403.
(13) 61 L. T. 669.
(14) 21 O. R. 95.
(15) 19 Ch. D. 246.
(16) 5 M. & S. 228.
(17) 21 U. C. Q. B. 412.

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Webster (1), at page 227. The appellant refers to *Walker* v. *Dickson* (2); *Canada Landed and National Investment Co.* v. *Shaver* (3); *Williams* v. *Balfour* (4), per Strong J. at pp. 479–481, refering to *Campbell* v. *Robinson* (5).

McPherson and *Clark* for the respondent. The cases of *Eddowes* v. *Argentine Loan and Mercantile Co.* (6); and *Hughes-Hallet* v. *The Indian Mammoth Gold Mines Co.* (7) are clearly distinguishable when read in the light of *Hobbs* v. *Wayet* (8); *Irving* v. *Boyd* (9); *British Canadian Loan Co.* v. *Tear* (10); *Davidson* v. *Gurd* (11), and *Ball* v. *Tennant* (12). The right of action is complete against the purchaser of the equity of redemption who must be treated as a surety See *Wooldridge* v. *Norris* (13); *Cruse* v. *Paine* (14); *Leith* v. *Freeland* (15); *Boyd* v. *Robinson* (16); *Smith* v. *Pears* (17) at p. 86; *Brig* v. *Dame*, and *Mathers* v. *Helliwell* (18). The appellant was bound to indemnify the mortgagor, *Waring* v. *Ward* (19). He was liable both under the agreement and as purchaser of the equity of redemption, *Thompson* v. *Wilkes* (20); *Boyd* v. *Johnston* (21); *Fraser* v. *Fairbanks* (22); *Canavan* v. *Meek* (23). The right amounted to a chose in action and is assignable. See R. S. O. (1887) c. 122, s. 7; *Walker* v. *Dixon* (2). The amount of the mortgage debt having been withheld as part of the consideration gave plaintiff a right of action; *Re Cozier, Parker* v. *Glover* (24);

(1) 21 Ont. App. R. 228.
(2) 20 Ont. App. R. 96.
(3) 22 Ont. App. R. 377.
(4) 18 Can. S. C. R. 472.
(5) 27 Gr. 634.
(6) 63 L. T. 364.
(7) 22 Ch. D. 561.
(8) 36 Ch. D. 256.
(9) 15 Gr. 157.
(10) 23 O. R. 664.
(11) 15 Ont. P. R. 31.
(12) 25 O. R. 50; 21 Ont. App. R. 602.
(13) L. R. 6 Eq. 410.
(14) L. R. 6 Eq. 641.
(15) 24 U. C. Q. B. 132.
(16) 20 O. R. 404.
(17) 24 Ont. App. R. 82.
(18) 10 Gr. 172.
(19) 7 Ves. 332.
(20) 5 Gr. 594.
(21) 19 O. R. 598.
(22) 23 Can. S. C. R. 79.
(23) 2 O. R. 636.
(24) 24 Gr. 537.

Canavan v. *Meek* (1), per Haggarty C.J. at pages 745–746. See also *Wolmershausen* v. *Gullick* (2).

The judgment of the court was delivered by:

KING J.—Upon an agreement for exchange of properties, Morrison conveyed certain premises in Toronto to Maloney subject to a mortgage for $2,500 given by Morrison to Campbell, the assumption of which mortgage was expressed in the deed from Morrison to Maloney to be in part consideration of the conveyance.

Subsequently Morrison assigned to Campbell all liability or obligation of Maloney to him in respect of the mortgage debt. And in the present suit for foreclosure Campbell seeks as well a personal judgment against Maloney as against Morrison for the amount due on the mortgage. This was allowed by Robertson J., and affirmed by the Court of Appeal for Ontario, per Osler and Maclennan JJ.A. Burton C.J.O., dissenting.

The main contention by the present appellant in the court of first instance was that there were circumstances connected with the carrying out of the contract of exchange which rendered it inequitable for Morrison (and also for Campbell his assignee) to seek to enforce the alleged obligation to indemnify Morrison against the payment of the mortgage debt.

This was found against Maloney both by Mr. Justice Robertson and by the Court of Appeal, and we see no reason for reversing the conclusion come to upon the point.

In the Court of Appeal a re-argument was, however, directed upon the question whether such an obligation on the part of Maloney to indemnify Morrison was assignable either at all or before suit had been brought by Campbell against him for recovery of the

(1) 2 O. R. 636. (2) [1893] 2 Ch. 514.

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amount of the mortgage debt. Upon this point the court decided in the affirmative, per Osler and Maclennan JJ.A. Burton C.J.O. dissenting.

It is admitted by the learned counsel for the appellant that the decisions in Ontario have been uniformly to this effect. Chief Justice Burton refers also to his agreement therewith in *Ball* v. *Tennant* (1). But having occasion to dig around the foundations, he now finds them too weak to bear the superstructure.

The earliest expression of opinion noted on the point is that of Vice Chancellor Spragge in *Irving* v. *Boyd* (2), who says:

> I have no doubt that the equity of the mortgagor to compel his assignee to pay would pass by express assignment to the mortgagee * * It would simplify the remedy for the recovery of the mortgage money, giving a direct right of suit between the party to receive and the proper party to pay. It would create a privity which alone was wanting to make such a suit sustainable.

In *British Canadian Loan Co.* v. *Tear* (3) Mr. Chancellor Boyd says of this dictum:

> It is intrinsically weighty and in my opinion correctly sets forth the law on this head.

And in *Ball* v. *Tennant* (1) already referred to, the present learned Chief Justice of Ontario says:

> It has always appeared to me that an assignment to any one but the person for whose benefit it could be enforced was an idle proceeding, but that the equity of the mortgagor to compel his assignee to pay would pass by express assignment to the mortgagee. It would, as in this case, simplify the remedy for the recovery of the mortgage money and create the privity which alone was wanting to make such an action maintainable.

The ground upon which the same learned judge now comes to an opposite conclusion, is that the obligation which is raised by the transaction to indemnify the vendor against his personal obligation to pay the

(1) 21 Ont. App. R. 602. (2) 15 Gr. 157.
(3) 23 O. R. 664.

money due upon the vendor's mortgage, is an obligation which is personal in its nature, and that until the vendor is himself damnified by payment, or at least by action brought against him for the amount, there is nothing assignable.

Agreements are said to be personal in this sense when they are based on confidences, or considerations applicable to special personal characteristics, and so cannot be usefully performed to or by another. An agreement to indemnify against payment of a possible money demand is no more personal in this sense than is one to indemnify against payment of a definite and matured liability or an agreement to pay a sum of money for another.

Then as to there being nothing to assign until the vendor is himself damnified by payment or action brought to recover payment; supposing it to be the case that there is nothing for the assignment to operate on until then, it would still leave the formal assignment good as an agreement to assign, which would become operative and effectual as an assignment immediately upon the circumstances arising which create the occasion for the indemnity being made. The assignability of the obligation and the existence of circumstances necessary to support an action upon it are distinct things. The cases cited in appellant's factum, *Eddowes* v. *The Argentine Loan and Mercantile Agency Co.* (1), and *Hughes-Hallett* v. *The Indian Mammoth Gold Mines Co.* (2), relate to the latter matter.

As to the suggested distinction between an assignment to the mortgagee and to one not interested in the payment of the mortgage debt, suppose the mortagor to have paid such debt, it would be competent for him to assign to any one his claim over against his vendee. And this being so, there would

(1) 63 L. T. 364. (2) 22 Ch. D. 561.

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seem to be no good reason for any such distinction in case of assignment prior to his discharge of the mortgage debt, assuming such to be a good assignment if made to the mortgagee. An assignment to a stranger to the mortgage debt in such case could, however, scarcely be conceived because he would get but a barren title.

The vendee is entitled to have his obligation enure to the discharge of the mortgage debt, so as to free the land from the charge, and consequently the assignee, if not interested therein, could derive no benefit, and the case is therefore one that would be little likely to arise.

The authorities referred to by Mr. Justice Maclennan also show that the vendor, becoming, as between himself and his vendee, a surety for the payment of the mortgage debt, is entitled, upon the debt becoming due and payable, to call upon the vendee to appropriate the balance of the consideration money suffered to remain in his hands to the relief of the vendor as surety.

As to settling the several rights in the one action, this is a matter of procedure, and certainly (as already observed), it simplifies the remedy and avoids circuity of action, and at the same time appears consistent with legal principle.

The appeal should therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Macdonell & Bland.*

Solicitors for the respondent: *McPherson, Clark, Campbell & Jarvis.*