WILLIAM MACKENZIE (DEFENDANT)...APPELLANT; 1898

AND *Mar. 7, 8.
*May 6.

THE BUILDING & LOAN ASSOCIATION (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Leasehold estate—Assignment of equity of redemption—Aquisition of reversion by assignee—Priority.—Merger.

The assignee of a term, who takes the assignment subject to a mortgage and afterwards acquires the reversion, cannot levy out of the mortgaged premises, to the prejudice of the mortgagees, the ground rent reserved by the lease which he was himself under an obligation to pay before becoming owner of the fee. *Emmett* v. *Quinn* (7 Ont. App. R. 306) distinguished.

Judgment of the Court of Appeal (24 Ont. App. R. 599) affirmed.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Meredith C. J. at the trial (2).

A lease of land for a term of twenty-one years with right of renewal and purchase of the fee was mortgaged to the plaintiffs. The equity of redemption was afterwards assigned to the defendant Mackenzie, who eventually purchased the fee. The plaintiffs by their action claimed that their mortgage became a charge upon the fee, while the defendant claimed that as owner of the reversion he had priority of lien over the mortgagees and a right to collect the ground rents from the mortgagees in possession and the sub-tenants. Both courts below held against the latter contention.

The facts are fully set out in the judgment of the court.

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

(1) 24 Ont. App. R. 599. (2) 28 O. R. 316.

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Armour Q.C. and *Saunders* for the appellant. If the equitable owner of the term had purchased the reversion there might have been a merger, but not where it has been acquired by a second mortgagee, the owner of the term still being a tenant.

Merger is entirely a question of intention. *North of Scotland Mortgage Co.* v. *German* (1). And see *Snow* v. *Boycott* (2) as to the doctrine of merger under the Judicature Act.

As between the first and second mortgagees the acquisition of the reversion is not subject to the mortgage. *Nesbitt* v. *Tredennick* (3); *Aberdeen Town Council* v. *Aberdeen University* (4); *Randall* v. *Russell* (5); *Rawe* v. *Chichester* (6).

The right to purchase in the lease could only be enforced against the original lessors and not their assignees; *Emmett* v. *Quinn* (7); so that the purchase from the assignee was not under the lease. If it was, the usual terms of repayment of money paid out should have been imposed. See *Keech* v. *Sandford* (8); *In Re Lord Ranelagh's Will* (9); *Phillips* v. *Phillips* (10).

Scott Q.C. and *Allan Cassels* for the respondents. McKenzie acquired the fee as assignee of the equity of redemption and thus enlarged the estate for the benefit of the mortgagee. *Doe d. Gibbons* v. *Pott* (11); *Doe d. Ogle* v. *Vickers* (12).

In the following cases it was held that a mortgage of a term was a charge upon the fee acquired subsequently. *Moody* v. *Matthews* (13); *Trumper* v. *Trumper* (14); *Leigh* v. *Burnett* (15); *Phillips* v. *Phillips* (10);

(1) 31 U. C. C. P. 349.
(2) 1892, 3 Ch. 110.
(3) 1 Ball & B. 29.
(4) 2 App. Cas. 544.
(5) 3 Mer. 190.
(6) Amb. 715.
(7) 7 Ont. App. R. 306.
(8) 1 White & Tudor L. C. 53.
(9) 26 Ch. D. 590.
(10) 29 Ch. D. 673.
(11) 2 Doug. 709.
(12) 4 A. & E. 782.
(13) 7 Ves. 174.
(14) L. R. 14 Eq. 295.
(15) 29 Ch. D. 231.

and see Coote on Mortgages, 4 ed. p. 268; Fisher on Mortgages, 5 ed. p. 333.

The judgment of the court was delivered by

GWYNNE J.—By an indenture of lease bearing date the first day of July, 1885, James Austin and William Arthurs did demise and let unto one William Snowden Thompson certain lands and tenements situate in the city of Toronto, particularly described in the said indenture, whereof they, the said James Austin and William Arthurs were then seized in fee simple, to have and to hold to the said Thompson, his executors, administrators and assigns, for the term of twenty-one years from the said first of July, and recoverable at the expiration of the said term in the manner in the said indenture of lease provided. The said lessee in the said indenture did thereby for himself, his executors, administrators and assigns, covenant with the said lessors, their heirs, executors, administrators and assigns, to pay rent and taxes and to keep the buildings to be erected thereon insured to an amount not less than five thousand dollars. And the said lessors, for themselves, their heirs, executors, administrators and assigns, did by the said indenture covenant and agree with the said lessee, his executors, administrators and assigns, among other things as follows:

> That the lessee, his executors, administrators and assigns may at any time during the first ten years of the term hereby granted, purchase (and the lessors agree to sell to him or them at any time within the said term of ten years) the fee simple in said lands for fourteen thousand dollars to be paid in cash at time of purchase and ground rent paid to such date.

By an indenture of demise by way of mortgage made upon the 10th day of November, 1885, the said William Snowden Thompson did assign and transfer unto the Building and Loan Association (the plaintiffs in

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this action), their successors and assigns, the lands and tenements in the said indenture of lease mentioned, to have and to hold the same together with the said lease and the term thereby granted subject however to redemption upon payment of the sum of six thousand dollars by the instalments and at the times in the said indenture by way of mortgage mentioned, and subject also to the proviso that until default in such payment the mortgagor, his heirs and assigns, should have and retain possession of the said lands and of the rents, issues and profits thereof.

Between the day of the date of the last mentioned indenture and the month of January, eighteen hundred and ninety-one, the said demised premises and the said indenture of lease and the residue of the term thereby granted, and all the estate and interest of the said lessee, his heirs, executors, administrators and assigns, and all the benefit of the covenants therein contained upon the part of the said lessors therein, their heirs, executors, administrators and assigns, to be observed and kept, became by mesne assignment vested in one Charles Joseph Smith, his heirs, executors, administrators and assigns, subject to the said indenture of assignment by way of mortgage to the plaintiffs, and being so vested in the said Charles Joseph Smith, he by an indenture bearing date the 31st day of January, 1891, in consideration of the sum of forty thousand dollars therein acknowledged to have been paid to him by William McKenzie (the above appellant), did grant, bargain, sell and assign unto the said William McKenzie to have and to hold unto him, his executors, administrators and assigns, the tract of land and premises comprised in and demised by the said indenture of lease, together with the said indenture, for the residue of the term thereby granted, and for all other the estate, term, right of renewal and

other the interest of him the said Charles Joseph Smith therein subject to the payment of the rent and the observance of the lessee's covenants and agreements in the said lease reserved and contained, and the said Charles Joseph Smith did thereby for the consideration aforesaid, further assign, transfer and set over unto the said William McKenzie, his heirs, executors, administrators and assigns, the right to purchase the freehold in the said premises in the said indenture of lease contained, and all benefit and advantage to be derived therefrom.

By the said indenture, the said Charles Joseph Smith for himself, his heirs, executors and administrators, covenanted with the said William McKenzie, his executors, administrators and assigns, that he and they *subject to the said rent and the lessee's covenants and agreements in the said lease contained should* enjoy the said demised premises for the residue of the said term by the said lease thereof granted, and any renewal thereof (if any) for their own use and benefit without the let, suit or hindrance of the said Charles Joseph Smith or any other person whomsoever free from all incumbrances whatsover *excepting only the mortgage* made by the said William Snowden Thompson to the said Building & Loan Association. This indenture was duly registered in the registry office of the division in which the demised lands were situate, on the third day of February, 1891, and upon the thirteenth of that month the appellant caused his solicitors, by a letter of that date, to notify the respondents that he had purchased the said leasehold premises whereon they held their mortgage.

In the month of June, 1895, the appellant being and claiming to be owner of the equity of redemption in the said leasehold term and premises, and to be entitled to purchase the reversion in the said premises in fee in

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virtue of the assignment to him contained in the said indenture bearing date the 31st day of January, 1891, of the benefit of the covenant in the said indenture of lease to the said Thompson in relation to the purchase of said reversion, caused a deed to be prepared by one A. J. Sinclair, as his solicitor, and to be presented to a Mr. Britton who was then seized of the said reversion in fee for execution; and thereupon the said Mr. Britton executed the said deed so prepared and presented to him. This deed bears date the 21st day of June, 1895, and thereby after reciting therein the said indenture of lease of the 1st of July, 1885, and the privilege thereby granted to the lessee therein and to his heirs, executors, administrators or assigns, to purchase the fee simple in the said lands upon the terms and conditions and within the time therein reserved and contained, and that the said lease and the benefits and all the conditions therein contained had become vested in the said William McKenzie (the now appellant), and that he desired to purchase the fee simple in said lands, the said Mr. Britton did, in consideration of fourteen thousand dollars, then paid by the said McKenzie to him, the said Mr. Britton, grant the said lands and premises unto and to the use of the said William McKenzie, his heirs and assigns for ever.

Now by the terms of the said indenture of the 31st of January, 1891, it is apparent that the equity of redemption in the said term and the whole of the estate and interest of the said Charles J. Smith in the premises so as aforesaid mortgaged to the respondents, did become absolutely vested in the appellant, and that as the assignee of such the estate and interest of the said Charles J. Smith, he became entitled also to the benefit of the covenant in the lease contained in relation to the purchase of the fee simple in the said lands at and for the sum of fourteen thousand dollars, and he

became by the said indenture liable, as such assignee, for the payment (to the ground landlord for the time being) of the rent reserved by the lease of the 1st of July, 1885.

Now, the time within which the right to purchase the fee simple at the price named in the lease must be exercised, being about to expire on the 1st of July, 1895, the position of the appellant in the month of June when he procured the deed above stated to be executed by Mr. Britton was this: the rent which as owner of the equity of redemption he was then by force of the indenture of the 31st of January, 1891, bound to pay to the ground landlord, then being Mr. Britton, was $840 per annum, or 6 per cent upon the $14,000 settled as the price to be paid for the purchase of the fee; when, therefore, the appellant procured the execution by Mr. Britton of the deed of the 21st June, 1895, he was very probably making an advantageous bargain for himself by reason of the depreciation of the interest obtained for the use of moneys. By paying the $14,000 the effect of his operation was that he became thereby for the whole residue of the term granted by the lease relieved from his liability to pay $840 per annum, ground rent.

Shortly after the execution of the deed of the 21st June, 1895, that is to say, upon the 28th of the said month, the gentleman who had acted as solicitor of the appellant in preparing and procuring to be executed by Mr. Britton the deed of the 21st June, 1895, sent in writing to the respondents' manager the following notice:

Take notice that on behalf of the owner of the equity of redemption in the leasehold property known as Nos. 37, 39, 41 and 43 Wellington Street East, Toronto, and more particularly described in a certain mortgage of the said leasehold property made by one W. S. Thompson, to the said Building and Loan Association, that I will, at the expiration of six months from the 30th day of June, 1895, pay off the

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principal money remaining unpaid and owing to the said Company on account of the said mortgage together with any accrued interest there may be due thereon. Yours, truly,

A. J. SINCLAIR,
Solicitor for the said owner.

Nothing having been done in pursuance of this notice the respondents commenced the present action on the 25th day of February, 1896.

Upon the 30th March, 1896, the appellant wrote to the manager of the respondents informing him that he, the appellant, had become owner of the freehold of the mortgaged property, and demanding payment of $210 ground rent coming due upon the 1st of April under the provisions of the lease to Thompson. This sum the respondents' manager paid under protest and specially without prejudice to their claims in the present action which had then been commenced, and was subsequently proceeded with to judgment. The appellant's defence to the action is that notwithstanding the terms of the indenture of the 31st January, 1891, he is only a second mortgagee of the leasehold term of which the respondents are first mortgagees, and that he is, in his own independent right, seized of the fee simple estate in the mortgaged premises, and as being so seized he is entitled to demand and receive from Smith, and failing him, from the respondents, as mortgagees, and from the subtenants of the said mortgaged premises, to the prejudice of the respondents, as mortgagees, the ground rent reserved in the lease to Thompson during the residue of the term thereby granted, and finally that there is no privity between the appellant and the respondents to give the latter any action against the former. In support of this contention the appellant produced at the trial a letter written by himself to Smith, and another, dated the 6th of February, 1891. This contention does not appear to be made by the desire of nor

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in the interest of Smith, who, from anything in evidence, does not appear to claim to have any estate or interest in the said leasehold premises in virtue of anything contained in this letter which is produced from his own possession by the appellant himself, who seeks by it to change and subvert the whole intent of the indenture of the 31st of January, 1891, as expressed therein, and as the evidence shows, it was understood and acted upon by the appellant until the defence set up in this action. The letter, however, was received at the trial and is before us on this appeal. It is as follows:

TORONTO, 6th February, 1891.

Messrs. C. J. SMITH and J. F. COLEMAN, Toronto:

DEAR SIRS,—I beg to say that it is my understanding of our agreement with reference to the $30,000 loan that the several deeds respectively dated the 31st day of January, 1891, and executed by C. J. Smith to me, the particulars whereof are as follows:

1. Deed of Conveyance of lots 9 and 10 on King Street, and lots 11 and 12 on Brock Street, Plan D 253, registered as number 2458R.

2. Deed of Assignment of lease part of the triangular block between Wellington and Front Streets, Toronto, and known as the "Bowes property," registered as number 2459R;

3. Transfer under the Land Titles Act of the part of the aforesaid triangular block known as the "Watson property"; are to be considered merely as a mortgage to me upon those properties to secure the sum of $30,000 which I have advanced upon the security of a note dated the 2nd February, 1891, signed by C. J. Smith, and indorsed by J. F. Coleman, payable one year after date for $30,000 with eight per cent interest payable half yearly, and that upon payment of the said note at maturity I am to execute all proper deeds for the reconveyance of these properties as you direct. If the said note is not paid at maturity it is to bear interest at eight per cent per annum until paid, and upon default being made in payment of the said note or the first half year's interest thereon I am to be entitled forthwith to all the rights and remedies of a mortgagee.

(Signed) Yours truly,
WM. McKENZIE.

We agree to the above.

(Signed), C. J. SMITH,
J. F. COLEMAN, *Attorney.*

J. F. COLEMAN.

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Mr. Sinclair who prepared the deed for the conveyance to the appellant of the fee simple in the leasehold premises, was called as a witness for the appellant. He stated that he had no instructions from the appellant in relation to the notice of the 28th June, 1895; he said that a short time previously he had gone to see Mr. Gillespie, the respondents' manager, to see if he would take the money due on the mortgage, and he said he would not receive it without six months interest or six months notice, and so that he gave the notice of his own accord without any authority from Mr. McKenzie. Being asked on cross-examination who was the "owner of the equity of redemption," referred to in the notice he said that he himself was, that it had been conveyed to him by Mr. McKenzie for the purpose of endeavouring to effect a loan upon the property and therewith to pay off the respondents' mortgage, and that having failed to effect the loan he had reconveyed the equity of redemption to Mr. McKenzie. By the evidence of this witness, it also appeared that about January, 1892, he had been employed to act as solicitor in the interest of McKenzie, Smith (and one Coleman who also then claimed to have had some interest in the premises) to collect the rents from the tenants of the houses on the demised premises, and after payment thereout of the ground rent, taxes, and the sums coming due on the respondents' mortgage to pay the residue to Mr. McKenzie. It also in like manner appeared that Mr. McKenzie dealt with the other properties mentioned in the letter of the 6th of February, 1891, as the absolute owner of the estate and interest expressed in the deed conveying them to him and that Mr. Sinclair acted as his solicitor in those cases. It is thus apparent that whether Mr. Sinclair had or had not instructions or

authority from Mr. McKenzie in relation to the notice of the 28th June, 1895, he was acting in the interest of the latter and in virtue of the authority vested in him, Mr. Sinclair, by the assignment to him by Mr. McKenzie, of the equity of redemption for the express purpose of enabling a loan to be effected thereby out of which the respondents' mortgage was to be paid. That Mr. McKenzie quite understood himself to be absolute owner of all of Smith's interest in the mortgaged premises is thus apparent; indeed on his examination in this case he admitted that from the time of the execution of that deed he supposed he was owner of the equity of redemption in the mortgaged premises. The learned counsel for the appellant also in his argument before us admitted the intention of the transaction to be, (as he said was a common practice with conveyancers in Toronto) to vest the absolute estate of Smith as expressed in the deed of the 31st January, 1891, in Mr. McKenzie so as to enable him to deal with the property as the owner thereof, and in such manner as should seem to him best to raise funds to be applied in paying off all charges on the property including his own advances.

To that extent it may be admitted without any prejudice to the respondents' claim in this action, that the appellant holds the estate in the term conveyed to him by the indenture of the 31st January, 1891, and also the right to acquire the fee simple upon the terms mentioned in the indenture of lease to Thompson as security for his, the appellant's advances; but whatever may have been the secret understanding between Smith and the appellant as to the intention of the indenture of the 31st January, 1891, it is certain that under that indenture the appellant acquired the only interest he ever had in the leasehold term, and that such interest was as assignee of the term and the

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premises subject to the respondents' mortgage, and that thereby he became liable as assignee of the term subject to the respondents' mortgage, to pay the ground rent reserved by the lease. In the discharge of this obligation by the appellant the respondents, as holders of the mortgage, subject to which the appellant became possessed of all Smith's interest in the term, have a very material interest which no secret arrangement between Smith and McKenzie could avail to impair.

Now the appellant having in virtue of such the estate and rights so vested in him by the indenture of the 31st January, 1891, acquired the fee simple in the mortgaged lands and premises the sole material question upon this appeal really is: Can he in the character of owner in fee of the reversion in the leasehold premises, levy from the respondents or from the subtenants of the leasehold premises, the rent reserved in the lease of the term which by the effect of the indenture of the 31st January, 1891, he became himself under the obligation to pay, and thus impair the value of the respondents' mortgage subject to which he became possessed of the term? And the answer we think both upon principle and upon the authority of all the cases is, that he cannot. It was urged by the learned counsel for the appellant that the Court of Appeal for Ontario overlooked a decision of their own in a case of *Emmett* v. *Quinn* (1), and upon the authority of that case, and of *Rawe* v. *Chichester* (2), he contended that the appeal should be allowed. As to the decision of *Emmett* v. *Quinn*, whether well or ill decided we need express no opinion, for we think that, as no doubt the Court of Appeal for Ontario also thought, it has no application in the present case. Neither has *Rawe* v. *Chichester*, and for a like reason.

(1) 7 Ont. App. R. 306. (2) Amb. 715.

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The ground of the contention was, that the frame of the covenant in the lease as to the purchase of the reversion in fee was such that the lessors only, personally, and not their assigns, were under any obligation to convey and that therefore Britton was under no obligation to convey the fee to the appellant, and it was contended that therefore Britton is to be regarded as having conveyed under a mistake as to his being under an obligation to do so, and that thus the case comes within the principle of *Rawe* v. *Chichester*, and that the appellant, by reason of this alleged mistake, whether it be of Britton or of the appellant, is now entitled to hold the fee simple in the reversion as a purchase made by himself wholly independently of the assignment to him made by the indenture of the 31st of January, 1891, but the covenant in the lease which is the covenant of the lessors for themselves and their heirs, executors, administrators and assigns, is express that the lessee, his executors, administrators or assigns may at any time during the first ten years of the term purchase the fee simple in the said lands for fourteen thousand dollars. Now, in the deed prepared by the appellant and presented to Mr. Britton for execution, the original indenture of lease and the covenant therein contained, in the form I have just stated (leaving out the words "and the lessors agree to sell",) is quite correctly stated, and the deed further recited that the said lease and the benefits and all the conditions therein contained had become vested in the appellant, and that he desired to purchase the fee simple. Now this recital contains correctly both in point of fact and of law the right in virtue of which the appellant was calling upon Mr. Britton to convey the reversion whereof he was seized as assignee of the original lessors, to him, and he without any objection whatever or suggestion

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that he was not bound by the covenant in the lease and in consideration of the payment by the appellant of the price named in that covenant, executed the deed so presented to him and thereby conveyed the fee simple to the appellant. It is impossible under these circumstances to say that there was here any mistake of fact or of law, and if of the latter only, *Rawe* v. *Chichester* has no application. The right in which the appellant was desiring and claiming to have the fee conveyed to him, is very plainly and quite correctly stated, and Mr. Britton, whether under any obligation or not matters not, recognized the appellant's claim and in acknowledgement of it complied with it.

Then, again, the learned counsel contended that *Leigh* v. *Burnett* (1) upon which among other cases the learned Chief Justice Meredith rested his judgment is in favour of, and not adverse to, the contention of the appellant, his contention being that the appellant's position in the present case is precisely analogous to the position in which Mrs. Leigh would have been in that case if the reversion had been conveyed to herself, but in truth the appellant having been the owner of the equity of redemption in the mortgaged premises, and the assignee of the right to purchase the reversion in the terms of the indenture of the 31st January, 1891, and having in that character applied for and obtained the reversion to be conveyed to him he occupies rather, as the learned Chief Justice Meredith held, a position analogous to that held by Newton in *Leigh* v. *Burnett*. The case in fact is simply resolved to this: Can the appellant, who acquired the reversion in virtue of the estate and interest assigned and transferred to him by the indenture of the 31st January, 1891, levy to his own use out of the mortgaged premises to the prejudice of the mortgagees, the ground rent reserved by the lease

(1) 29 Ch. D. 231.

which by force of the terms of the indenture of the 31st of January, 1891, he was himself under an obligation to pay? That he cannot is the effect of the judgment now in appeal, and the like result would have followed whether he purchased the reversion in virtue of the covenant in the lease or otherwise. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Kingsmill, Saunders & Torrence.*

Solicitors for the respondents: *Cassels & Standish.*