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*June 2.

*Oct. 24.

PHILIP JAMIESON (PLAINTIFF).....APPELLANT;

AND

THE LONDON AND CANADIAN LOAN AND AGENCY COMPANY (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Assignment of lease—Discharge—Abandonment of security.

The mortgagee of a lease may relieve himself from liability to the lessor on the assignment by way of mortgage with the latter's consent, by releasing his debt and reconveying the security.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of Mr. Justice Falconbridge at the trial.

The material facts of this case will be found in the judgment. The appeal involves only a question of law which is indicated in the above note of the decision.

S. H. Blake Q.C. and *Irving* for the appellant. If the mortgagee had power to surrender the mortgage without the lessor's consent it could only be for the *bonâ fide* purpose of carrying out its object and not to get rid of liability.

There could be no further dealing with the lease without the lessor's consent though there might be with the residue of the term. See *Treloar* v. *Bigge* (2); *Williams* v. *Bosanquet* (3); *Eaton* v. *Jacques* (4). *In re Gee* (5).

*Present :—Sir Henry Strong C.J. and Taschereau, Gwynne, King and Girouard JJ.

(1) 26 Ont. App. R. 116.
(2) 22 W. R. 843.
(3) 1 Brod. & B. 238.
(4) 2 Doug. 455.
(5) 24 Q. B. D. 65.

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

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—The appellant by indenture bearing date the first day of January, 1889, demised the property in question (land and buildings situate in the City of Toronto) to one James Rogers Armstrong, since deceased, for a term of twenty-one years at an annual rental of $1,400. The lease contained a covenant on the part of the lessee that he would not assign the term without the consent in writing of the lessor "*first had and received.*"

Armstrong, the lessee, borrowed money ($4,000), from the respondents to secure which he gave them a mortgage by way of assignment of the residue of the term in the leasehold premises in question. This mortgage bearing date the 22nd of March, 1889, was by indenture and contained the usual proviso for its defeasance, on payment of the mortgage money and interest at the times specified. The consent of the appellant was indorsed on the mortgage and was in the following words :

I Philip Jamieson, the lessor named in the within mortgage do hereby consent to the within mortgage by way of assignment by James Rogers Armstrong to the London and Canadian Loan and Agency Company, Limited.

This memorandum was signed and sealed by the appellant.

Subsequently on the 27th of February, 1891, Armstrong made another mortgage to the respondents in the same terms as the first to secure another loan of $1,600, and a written consent signed and sealed by the appellant in the same terms as the first was also indorsed on this latter instrument.

The respondents having been adjudged liable as assignees of the lease in the covenants contained in

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the lease for the payment of rent and taxes, and Armstrong having died insolvent, were desirous of escaping from the liability imposed upon them by the assignment, and for that purpose were prepared to release their debt and abandon the security, and with that view were about to register the usual statutory discharge in the form prescribed by the Registry Act when the appellant instituted this action claiming a declaration that the respondents could not effectually create such a discharge without the consent of the appellant, and also an injunction restraining them from doing so.

The respondents did not dispute any of the facts alleged by the appellant but in their defence claimed to have the legal right to release the debt and reconvey or revest the estate.

The action was tried before Mr. Justice Falconbridge who decided for the appellant. This judgment was however reversed by a unanimous judgment of the Court of Appeal from which the present appeal has been brought.

No authority in point has been produced, and I have been unable to find any. After some hesitation I have come to the conclusion that the judgment under appeal was right, for the reasons assigned in the judgment of the Chief Justice and of those of Mr. Justice Maclennan and Mr. Justice Moss.

A mortgage was formerly viewed very differently in a court of common law and in a court of equity. The first regarded it as a conveyance of an estate defeasible on the due performance of the condition by payment at the day specified; a court of equity on the other hand considered it to be a mere security for the debt upon payment of which the estate was redeemable at any time before foreclosure though forfeited at law by reason of non-payment according

to the tenor of the proviso. Further, the latter courts considered the estate mortgaged as a mere accessory which upon the payment or release of the debt the mortgagee was bound to reconvey to the mortgagor.

Under the present system of judicature all courts are bound to deal with a mortgage as courts of equity always have dealt with it, as a mere accessory to the debt. So far has this been carried that it has been held that a mere parol assignment of the debt, no mention being made of the mortgage, entitles the assignee to the benefit of the mortgage though that might be a security on lands.

It is to be observed here that the consent of the appellant authorising the assignment of the term indorsed upon the mortgage is not in general terms but refers to the specific mortgage upon which it is indorsed, and must therefore be considered as an assent not only to the expressed covenants and provisions contained in the instrument itself but also to all such incidents as the law attaches to the covenants and agreements between the parties set forth in the deed itself. Now it cannot be denied that one of these was that on the payment of the debt, whether *ad diem* or *post diem*, the mortgagee would be bound to reconvey the leaseholds held in security to the mortgagor or as he might appoint. The appellant must therefore be taken to have assented to this. Further just as the estate would have revested by the operation of the condition itself declaring the deed defeasible upon payment at the day, so likewise the mortgage would have been avoided if before the day the mortgagee had released the debt to the mortgagor, or at least a court of equity would in that event have enforced a reconveyance. So in equity, though not in law, would such release after the day fixed for payment have given the mortgagor the right

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to call for a re-assignment of the mortgaged lands Such were beyond all doubt the rights as between mortgagor and mortgagee at all times in courts of equity, and since the Judicature Act in all courts having jurisdiction of the subject matter. These then being the rights between the parties, and the appellant having no right to prescribe to them what their dealings should be respecting the debt as to which they could not be in any way fettered, the respondents were free if they chose to do so to release the debt upon which the mortgagor would have a right to call for a reconveyance. This being so, could it be said that the mortgagee could not reconvey without a new license from the appellant? I think not. It appears rather that the proper construction to put upon the memorandum indorsed upon the deed and signed by the appellant is this; he must be taken to say, I assent to the mortgage being made and to such further dealings with the estate as the law imposes as a consequence of the extinguishment of the mortgage debt. This if correct in point of reasoning must be conclusive.

As to authority the cases which determine that an equitable mortgagee of leaseholds by deposit will not be compelled to take a legal assignment in order to make him liable upon the covenants have little to do with this case. The dictum of Dallas C. J. in *Williams* v. *Bosanquet* (1), so far as it goes is favourable to the respondents. The old cases in Vernon appears to me to be beside the point. The omission in the later editions of Woodfall of the passage supposed to bear upon this question is significant of a change of opinion in the editor which to some extent helps the respondents, but all these authorities bear upon the question of the liability of the mortgagee on the

(1) 1 Brod. & B. 238.

covenants and his right to relief therefrom, and not upon the construction to be given to the lessor's license to assign and the extent to which that license is to be carried which is the point before us on this appeal. I quite admit that equity had no jurisdiction to control the legal right of the lessor to hold a mortgagee bound by covenants running with the land in a lease of which he had taken an assignment. But that is not the point here. What we have to do is to consider and determine not whether acquired legal rights can be controlled or interfered with in equity, but what are the legal and equitable rights of a lessor who has given such a license to assign as that which the appellant signed in the present instance. As to that there can, in my opinion, be only one answer, that given by the Court of Appeal.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Kilmer & Irving.*

Solicitors for the respondent: *Arnoldi & Johnston.*