1923
*May 30.
*Oct. 9.

DOROTHY L. DENT (DEFENDANT).....APPELLANT;

AND

HEBER C. HUTTON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Vendor and purchaser—Agreement for sale—Assignment—Covenant by assignor—Foreign action by assignee—Consent judgment—Order for sale of land—Liberty to assignee to bid—Purchase by assignee—Action on foreign judgment—Alternative claim for original debt.

D. sold land in Saskatchewan by agreement of sale, the purchaser paying cash, assuming a mortgage on the land and undertaking to pay the balance of the price by instalments. D. assigned this agreement to H. and entered into a covenant to pay, on demand, any moneys as to which the purchaser made default. D. did not pay an amount as to which there was such default and H. brought action in Saskatchewan claiming the whole amount due him under the assignment, a declaration that he had a lien on the land and an order for sale in case the debt was not paid. D. filed a consent to judgment in these terms being entered and as entered it provided that on sale of the land H. should have leave to bid and the purchaser should receive a certificate of title "free from all right, title and equity of redemption" on the part of D. The judicial sale took place and H. became the purchaser. Later the land was sold to satisfy the mortgage against it and the title passed from H. who had taken an action in the Supreme Court of Ontario on the Saskatchewan judgment and also claiming on D's. covenant the amount due on said judgment.

Held, affirming the judgment of the Appellate Division (53 Ont. L.R. 105) that such action could be maintained and H. was entitled to recover the amount claimed less the full amount of the purchase money at the judicial sale.

Held also that D. could not claim that the leave to H. to bid at the sale was beyond the consent to the Saskatchewan judgment; that the consent to the order for sale covered all that could follow in the ordinary course of practice.

Per Mignault J.—H. was estopped from raising this question by failing to appeal from the Saskatchewan judgment.

Held further that the finality of the foreign judgment could not be raised by D. in this action.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the trial (2) in favour of the respondent.

The facts are fully stated in the above head-note.

Day K.C. and *Walsh* for the appellant. The respondent cannot have both the land and the personal remedy. See

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) 53 Ont. L.R. 105. (2) 52 Ont. L.R. 378.

Sanderson v. *Burdett* (1) at page 129. *Mutual Life Assur. Co.* v. *Douglas* (2) at page 247.

Thompson K.C. for the respondent.

THE CHIEF JUSTICE.—For the reasons stated by Mr. Justice Duff, in which I concur, I am of the opinion that this appeal must be dismissed with costs.

IDINGTON J.—The appellant being possessed of a quarter section of land in Saskatchewan, subject to a mortgage upon which there remained to accrue due a balance of $1,000, sold, on the 5th February, 1915, by articles of agreement of that date, said quarter section to one Boles for the price of $5,635, of which he paid $900 in cash, and assumed the balance of the said mortgage to be paid off by him.

On the 21st of May following she, in consideration of the sum of $3,035, by indenture of that date to which said Boles was a party, assigned said articles of agreement to the respondent; and assigned thereby also the said land to the respondent.

A long covenant therein by her with respondent assuring him of her right to so assign is followed by the following:—

> And the said assignor doth further, for himself, his heirs, executors, administrators and assigns, covenant, promise and agree to and with the said assignee, his heirs, executors, administrators and assigns, that in case of default by the purchaser in payment of any sum or sums of money which shall become due or owing under the articles of agreement, that he will forthwith on demand, well and truly pay or cause to be paid to the said assignee, his heirs, executors, administrators or assigns any sum or sums so in default.

The use of the masculine instead of the feminine terms properly applicable to appellant is covered by a general provision at the end of the document.

After this covenant on the part of the appellant just quoted in full, Boles, the purchaser, acknowledges notice of the said assignment and admits the amount owing by him is as thereinbefore set out.

Then he covenants as follows:—

> And the said purchaser doth further covenant, promise and agree to and with the said assignee that he will pay or cause to be paid to the assignee, the said sum of money still owing and unpaid under the said articles of agreement, on the days and times and in the manner therein set

(1) 16 Gr. 119. (2) 57 Can. S.C.R. 243.

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forth, and that he will keep, observe and perform all covenants, provisos and agreements in said agreement contained.

The following November the respondent's solicitor wrote the appellant about an over-due instalment of principal and interest on the said mortgage which was answered by her husband contending that she should not be thus called upon, as respondent had agreed to look to the land. That correspondence lasted many weeks and will be referred to later.

On the 27th January, 1914, respondent sued the appellant and Boles.

I need not recite the story of that litigation further than to say that part of it resulted in an order for the leave to sign judgment against the defendants therein for the sums named, and a direction for the sale of the land allowing respondent to bid, and is called an "Order nisi."

I am far from being convinced that everything done relative thereto was done in due order. I assume, however, that the respondent became the purchaser at the sheriff's sale, which, if previous values in question to be taken seriously, and not a mere myth, was a sale that should not have taken place, especially to the respondent conducting said proceedings; and in any event did not entitle him to hold same as against the appellant in the event of his resorting to her covenant sued on herein.

However all that may be, to which I will advert later, the sequel to said proceedings, so far as evidenced herein, seems to me far from what I should expect in a final judgment of a foreign country or province seeking recognition in a suit alleged to be founded thereon.

I am, however, presented, at some angles of the argument of this appeal, with a reminder of the case of *Davidson* v. *Sharpe* (1), wherein I proceeded upon the theory that the exemplification therein presented and received in evidence, being the final word of the British Columbia court issuing same, must be held conclusively in favour of the plaintiff appellant.

The majority having taken another view I am not quite sure, but think I had better adhere to the principles I there had in mind as to the necessity for finality of the

(1) [1920] 60 Can. S.C.R. 72.

proceedings had in a foreign jurisdiction which must be had in mind when a suit is brought on a foreign judgment.

I agree with the learned judges below in that regard and think with those taking that view that this action so far as founded upon said alleged final judgment, should be dismissed from the consideration of this case.

The fact that for half a century or so it has been by force of a statutory amendment possible to re-try, as it were, in Ontario the original causes of action and any proper defences existing in relation thereto, renders that aspect of this appeal of little consequence, for the respondent has presented his case alternatively and sued upon the appellant's covenant set forth above.

Upon that aspect of the case the appellant has met with little encouragement in the courts below, for the unanimous opinion seems to have been against her.

As to the grounds taken by her counsel herein, and apparently below also, that she is a mere guarantor, the cases they refer to as relevant thereto are cases of principal and surety, pure and simple.

And there is, I respectfully submit, not the slightest ground for contending that such a legal relationship existed between appellant and Boles. To use the word "guarantor" (which is one of wide import covering a suretyship, or a case of warranting a machine) as descriptive of appellant herein, does not help in argument of such a case as presented. We must look at the actual facts and realize, if we can, what the parties are about.

As to the suggested election by the respondent bidding and buying at the Saskatchewan sale barring his right here to resort to the covenant, the case of *Mutual Life* v. *Douglas* (1) seems irrelevant and, so far as not so, the decision is against appellant's argument.

The ground taken that the respondent by purchasing has lost any right, is to me quite untenable. He clearly had a right to bid, according to the local law, and we cannot impose upon the courts there our views as to the desirability, or otherwise, of his having such a right.

In my personal view as to the desirability of sanction-

(1) [1918] 57 Can. S.C.R. 243.

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ing such a system, without the most stringent provisions relative to upset or reserved bids, and the appearance at all of a party concerned appearing on the scene as an actor therein, is quite repugnant to what I hold as desirable. Perhaps we could not have a better illustration of the undesirability of having that done, than is to be got by looking at the results presented herein.

The respondent gets thereby the equity in a property he had, a year or so before, evidently deemed worth at least six or seven times what he bid for it.

It is, however, entirely another question that is raised as to the legality thereof. I cannot say it is entirely illegal.

Then where does that leave appellant? Her counsel argues stoutly that said suit having been to enforce a vendor's lien, the result, as between these parties, must be the same in law as if the case had been for foreclosure between a mortgagee and mortgagor, and the mortgagee, after obtaining his final order, had sold the property.

I have tried anxiously to find the foundation for such a proposition of law. I can find no case of enforcing a vendor's lien in any other way than by directing a sale of the land or interest bound by the lien. I venture to think no case exists of a proceeding by way of foreclosure, and hence the law relevant thereto is not applicable to the case of a lien.

The cases relied upon are either cases of foreclosure, or nothing akin to what we have to deal with herein.

But in another aspect of this case I am about to present, the legal situation may produce in my view analogous results.

There are some aspects of the transaction between the appellant and the respondent which are not unlike the case of a mortgagor and mortgagee; but when duly considered and analyzed, that transaction, in question herein, to my mind, is clearly not the creation of a mortgage, but an absolute sale of a security.

It is a case of bargain and sale, and that accompanied by a common business assurance that the quality of the thing the vendee is getting will be found such as her covenant imperatively requires it shall turn out to be.

That has failed. And though the statutory law of England changed in various ways, for the past three quarters of a century, some of the conditions relative to sales by those in the position of mortgagees, or the courts on their behalf, I have not been able to find a single decision that puts a vendee, in course of such sales, in the same position as a mortgagee is in relation to foreclosure.

The appellant's counsel seemed to me to assume that the mortgagee acquiring, by virtue of modern statutory legislation relative to sales of the mortgaged property, a title thereto must stand in every respect in the same position as a mortgagee who has obtained a final order of foreclosure, that is, that if he sues upon the covenant he opens up the whole matter and the mortgagor is entitled to redeem.

Not a single case of the many cited touches this point and supports such an assumption.

The correspondence which I adverted to above clearly offers the appellant, indeed assures her, that the basis of the deal between her and respondent was that upon repayment of the money advanced, with interest and costs of course, she should have all that the respondent had been assigned by her.

That, however, was not acted upon when available and is now no more than evidence of what in respondent's mind fair dealing required.

It seems difficult to believe that the quarter section, passing through different hands, and which the evidence herein discloses as being worth, at all events, from $3,000 to $5,600, should be sold by the prior mortgagee for apparently less than $1,000. The chances are any such sale is liable to be impeached and the prior mortgage redeemed.

The correspondence I have referred to presents on behalf of respondent exactly the legal implication existent by virtue of the assignment, and binds him to return all he got thereby including the resultant sale to himself. I infer it was that aspect of the correspondence that induced the consent to the order nisi. Respondent has not, according to his evidence, resold the equity he got thereby.

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I incline to the opinion that the judgment should have provided for the assignment by the respondent to appellant, upon payment to him of the amount found due herein, of any interest he may have acquired in said lands.

The evidence of what was done under the first mortgage is most unsatisfactory and there may yet be some means of redeeming same.

Again this action in any event is but for damages for breach of appellant's covenant.

It is the general principle of law that the party claiming damages for breach of contract is in duty bound to minimize the damages where he can reasonably be expected to do so.

The respondent seems to have dealt with the property he acquired in such a manner that if lost, as now pretended it was, there is strong ground for suspecting him of reckless neglect, including possibly a disregard of obligation under section 64 of the Saskatchewan Land Titles Act, and that it was through such neglect a valuable asset has been lost, to the detriment of appellant.

I should have preferred to see the reference directed cover this ground and, if what I suspect turned out correct, allowance duly made appellant in reduction of the judgment awarded against her.

I am bound to say, however, that no such contentions, thus limited, were presented in argument and must assume counsel had good reasons, not appearing in the case, for not so contending.

I must therefore assent to the formal judgment upon which the majority of this court has agreed.

DUFF J.—I have come to the conclusion that this appeal should be dismissed, but before explaining the grounds upon which I think the respondent Hutton is entitled, with a modification to be stated presently, to maintain the judgment in his favour in the courts below, it is important to make it quite clear that this conclusion does not involve any decision upon either of two points, one of great general importance and the other of some difficulty, which were rather elaborately argued. The first of these is the question whether an unpaid vendor who has, in proceedings to enforce his lien for the purchase money,

obtained leave to bid and, pursuant to that leave, purchased the property, can after the property has passed out of his possession and power proceed to enforce the judgment for the unpaid residue. Whether the vendor in such circumstances is in the same position as a mortgagee is a question of general importance, and before deciding it adversely to the view advanced on behalf of the appellant, the weighty considerations which were urged and might be urged in support of that view would require the most careful examination. The other question is whether, the respondent having lost his title to the property in consequence of proceedings taken by the holder of a paramount security, he is in any view of the law, in consequence of the provisions of the agreement between him and the appellant, free from the operation of the principle which the appellant invokes. Upon neither of these questions, it must be understood, is any opinion now expressed.

The grounds upon which I think the appeal fails are as follows: The respondent took proceedings in the courts of Saskatchewan for the recovery from Boles and Mrs. Dent, under the agreement of the 5th February, 1913, and the assignment of the same agreement of the 21st May, 1913, of the moneys due under the agreement, an alternative claim being for judgment against the defendants for the full balance of the purchase money and a declaration that the plaintiff, the respondent Hutton, had a lien on the lands for the same and for the sale of the property under the direction of the court to satisfy the plaintiff's claim. Boles, upon whom the writ of summons was served by special leave, did not appear. Mrs. Dent appeared and delivered a defence disputing liability, and subsequently the respondent moved for judgment for the moneys due under the agreement, for a declaration of the respondent's lien and for an order for the sale of the land under the direction of the court to satisfy the claim. On the return of this motion a judgment was given which, as appears from the formal judgment, included a direction that the respondent Hutton should have leave to bid and, further, that the purchaser should receive a new certificate of title of the land in question

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"free from all right, title and equity of redemption" on the part of the defendants or either of them.

It is plain, I think, that the effect of the judgment is that the respondent is to recover from Boles and Mrs. Dent the moneys due on the agreement subject to a deduction of the amount received for the sale of the lands, and that the respondent is to have leave to bid, and that if he becomes the purchaser he is to receive a title free from any equity of redemption just as any other purchaser would, and that the amount of the purchase money, just as in the case of a purchase by a stranger, is to be deducted from the amount of the judgment.

It is argued on behalf of the appellant that this judgment is inoperative as an estoppel, for several reasons; first, it is said that it is not a final judgment because there is no judgment of the court determining in figures the amount of the deficiency after crediting the amount of the purchase money; secondly, it is said that the judgment was a consent judgment, and that the direction by which the respondent had leave to bid and consequently the right to acquire the lands by purchase free from any equity of redemption or other equity went beyond the limits of the consent, and that it is therefore in no way binding upon the appellant.

Dealing first with the second of these objections, in the absence of evidence to the contrary it must be assumed, I think, that the formal judgment correctly expresses the view of the local master as to the judgment he intended to give. The formal consent which is in evidence was a consent to judgment in terms of the notice of motion, that is to say, to a judgment providing for a sale under the direction of the court. The consent, therefore, was clearly in terms a consent to judgment ordering a sale under such directions. If one is to assume that the formal consent was the only consent given it would not, I think, be fair to construe it as a consent in advance to a direction which could not properly be given or a direction which would not be *intra cursum curiae;* but it was nevertheless a consent to a sale subject to any direction which, according to the practice of the court, should be or become a binding direction. It would not preclude the appellant

from objecting to a particular direction, but it was nevertheless a submission to the jurisdiction in the fullest sense, and therefore a submission to any direction which, though wrong in point of law or practice, should be given in the ordinary course, and should be allowed to remain without challenge in accordance with the procedure of the court.

As to the first objection, although difficulty might have arisen if the respondent's action had been based upon the judgment alone, the appellant's acceptance of the judgment precludes her from setting up any equity inconsistent with the terms of it. On the other hand it seems to be clear that the respondent is bound to credit the appellant with the full amount of the purchase money payable under the sale by which the respondent acquired title to the property. By the terms of the judgment, it is true, the respondent was entitled to deduct his costs, but that must be taken to mean the costs as ascertained in the usual way by proceedings in the Saskatchewan court. No such proceedings are in evidence, and so far as we are informed the costs have not been ascertained in such a way as to enable the Supreme Court of Ontario to measure the extent of the deduction. The judgment should be modified accordingly. Success on this minor point, however, should not affect the matter of the costs in this appeal. Subject as above, the appeal should be dismissed with costs.

ANGLIN J.—I concur with Mr. Justice Duff.

MIGNAULT J.—So far as the respondent's action in the Supreme Court of Ontario is based on the judgment he obtained in the Supreme Court of Saskatchewan against the appellant, I think the latter, not having appealed from the judgment, is not entitled to set up that this judgment went beyond the consent she had given to the motion of the respondent for judgment and the particulars of the judgment to be rendered mentioned therein. The judgment as rendered stands against the appellant and is binding on her, and she cannot attack it upon the ground for which I was of opinion that the master's order

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in the case of *Sayre* v. *Security Trust Company* (1) should be set aside as containing contradictory and irreconcilable provisions.

It is, therefore, conclusively determined against the appellant that the respondent could bid at the sale ordered by the judgment, and that if he became the purchaser the registrar should issue to him a certificate of title

free from all right, title and equity of redemption on the part of the defendants or either of them.

The respondent also holds a personal judgment against the appellant and her co-defendant for $4,563.52, with interest and costs to be taxed, and the sale was ordered in the event of the defendants failing, as they did, to pay into court the amount of the personal judgment against them, the proceeds of the sale to be applied in satisfaction of this judgment. No matter who became the purchaser at the sale so ordered, the respondent remained a judgment creditor of the appellant and her co-defendant for the balance outstanding of the judgment after deducting the proceeds of the sale.

The doubt I felt upon my first consideration of the case was whether the respondent, having, after the judgment and the sale ordered by it, suffered the property to be sold at the suit of the first mortgagee, could now recover from the appellant the balance outstanding of his personal judgment against her, not being in a position to reconvey the property on which he held a vendor's lien on payment of the balance due him. But there again it is conclusively determined against the appellant that the title of the purchaser at the judicial sale is to be free from all right, title and equity of redemption on the part of the appellant. In other words, by the effect of the judgment from which she has not appealed, the appellant loses her right of redemption and remains personally liable for the balance of the personal judgment against her. Upon this ground my opinion is that in an action in Ontario upon the Saskatchewan judgment, which I consider a final judgment, it is not open to the appellant to raise this objection, assuming that it could be urged in the case of a vendor's lien. Of course, it is unnecessary and would

(1) [1920] 61 Can. S.C.R. 109.

not be proper to express any opinion upon the merits of such a judgment, but I must not be taken as departing from the view I expressed in *Sayre* v. *Security Trust Co.* (1), where the merits of a somewhat similar judgment were in question.

Having said this, I may perhaps express my general concurrence in the judgment of my brother Duff which I have had the advantage of fully considering and which, I take it, is based upon the conclusiveness of the Saskatchewan judgment.

Appeal dismissed with costs.

Solicitors for the appellant: *Day, Ferguson & Walsh.*
Solicitors for the respondent: *Thompson & Proudlove.*

(1) 61 Can. S.C.R. 109.