1928

THE LONDON LOAN AND SAVINGS COMPANY OF CANADA (DEFENDANT) ..... APPELLANT;

*Mar. 5, 6.
*April 24.

AND

FRANK E. OSBORN, SARAH OSBORN AND CECIL A. OSBORN, AN INFANT UNDER THE AGE OF SIXTEEN YEARS, BY HIS FATHER AND NEXT FRIEND, FRANK E. OSBORN (PLAINTIFFS)..... RESPONDENTS.

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

Contract—Construction—Findings as to—Estoppel—Pledge of bonds—Dispute as to purpose and conditions of pledge—Effect on rights of present litigants of findings in other proceedings—Parties.

Plaintiffs sued for the return of certain bonds or their value, alleging that they had been pledged to defendant by plaintiff O. as collateral security for payment of moneys secured by a mortgage from I. T. Co. to defendant, and, by agreement, were to be returned on the mortgage debt being reduced to $31,000, and that the mortgage had been paid, or reduced to an amount less than $31,000. Defendant contended that the advance made when the bonds were pledged formed no part of the mortgage indebtedness but was an independent advance on pledge of the bonds, and that it was entitled to realize the amount of that advance by sale of the bonds. In certain mechanics' lien proceedings against I. T. Co. (the mortgagor), to which defendant was made a party, but to which O. was not a party, although as president of I. T. Co. he was cognizant of them, it had been held that the said advance was not made on the mortgage as part of the money secured thereby, but was an independent advance on the bonds.

Held, that the view taken in the courts below (25 Ont. W.N. 43; 29 Ont. W.N. 185) that the bonds were pledged by O. as collateral security upon an additional advance on the mortgage, and that O. was in respect thereof entitled to the rights of a surety, had not been successfully impugned; that the evidence disclosed that, with defendant's concurrence, the mortgaged land was subsequently sold for a sum more than sufficient to pay off the mortgage and all other claims entitled to priority over it; that defendant had agreed to return the bonds on the loan secured by the mortgage being reduced to $31,000, and it had been so reduced within the meaning of the agreement; that, as a result of above facts, as found, O. became entitled to return of the bonds, and defendant, who had since disposed of them, was accountable for their value.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Lamont JJ.

1928

LONDON LOAN & SAVINGS CO. OF CANADA v. OSBORN.

Held, further, that O. was not estopped by reason of said holding in the mechanics' lien proceedings from asserting that the advance was secured by the mortgage; he was not a party to those proceedings, he was present at them only as a representative of I. T. Co. (*In re Deeley's Patent,* [1895] 1 Ch. 687, referred to); neither personally nor as president of I. T. Co. did he derive any benefit from the judgment therein (cases such as *In re Lart* [1896] 2 Ch. 788, held inapplicable; *Leicester & Co.* v. *Cherryman* [1907] 2 K.B. 101, at p. 103, referred to); on the facts established, defendant was not misled to its prejudice by any conduct of O.; if O. as a person entitled to redeem the mortgage had a status to intervene, it did not follow that he was obliged to do so; if defendant desired to hold him bound by anything determined in those proceedings it should have taken steps to have him made a party.

Held, further, that, although the plaintiffs other than O., who claimed as owners of the bonds, had no independent right of action against defendant, and could claim only through O., yet, as O. was consenting, the fact of the judgment having been entered for his co-plaintiffs afforded no ground for objection.

Judgment of the Appellate Division, Ont. (29 Ont. W.N. 185), affirming Judgment of Mulock C.J. Ex. (25 Ont. W.N. 43), affirmed.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment of Mulock C.J. Ex. (2), in favour of the plaintiffs.

The action was to recover bearer bonds of the Dominion of Canada, of the par value of $10,000, and accumulated interest thereon, or the value thereof.

The plaintiff Frank E. Osborn was president of Independent Theatres of Ontario Ltd., which, for the purpose of raising money necessary for the building of a theatre, executed a mortgage on its land to the defendant. The building was being erected for the theatres company by Schultz Bros. Co. Ltd., contractors. During the progress of the work, as the theatres company required more money for payment to the contractors, Osborn on its behalf applied to the defendant for a further advance, which the defendant refused, claiming that the mortgagor was not entitled to any advances beyond those already made. Negotiations followed, which resulted in Osborn placing the $10,000 of bonds in question with the defendant and

(1) (1925) 29 Ont. W.N. 185. (2) (1923) 25 Ont. W.N. 43.

the defendant advancing the sum of $10,000. The defendant gave a receipt for the bonds in the following terms:

"Received from Mr. F. Osborn, ten thousand Dominion of Canada bonds [describing them] as collateral security for further advance of ten thousand dollars for Independent Theatres Loan No. I.4. Said bonds to be returnable to Mr. F. Osborn on the loan being reduced to $31,000.00."

In subsequent mechanics' lien proceedings against the theatres company, to which the present defendant was made a party defendant, but to which none of the present plaintiffs were parties (Osborn, however, as president of the theatres company, being present and knowing what was going on), it was held that the said advance of $10,000 was not made on the mortgage as part of the money secured thereby, but was in fact an advance on the bonds independent of the mortgage.

In the mechanics' lien proceedings a sale was effected of the property, and Schultz Bros. Co. Ltd., became the purchasers; and arrangements took place under which the defendant made a new loan on the security of a new mortgage on the property, this mortgage being executed by the Lyric Theatre Co. Ltd., a company formed for the purpose of taking over and operating the theatre. Schultz Bros. Co. Ltd., was a party to the mortgage, and therein covenanted with the mortgagee (the defendant) for payment of the moneys secured. Out of the new loan was deducted the amount owing to the defendant under the old mortgage (not including the $10,000 advanced at the time of deposit of the bonds), and the old mortgage was discharged. Schultz Bros. Co. Ltd., gave to the defendant a covenant of indemnity against any claim made against the defendant's title to the bonds now in question or its right to sell the same. The defendant sold the bonds and out of the proceeds paid off the $10,000 and interest upon it.

The plaintiffs then brought this action, claiming that the bonds in question had been deposited as collateral security for payment of the mortgage moneys, that the contract under which they were deposited provided that they were to be returned whenever the mortgage debt was reduced to $31,000, that the mortgage had been paid, or reduced to an amount less than $31,000, and claiming from

1928

LONDON LOAN & SAVINGS CO. OF CANADA v. OSBORN.

the defendant a return of the bonds or payment of their value. It was alleged that the plaintiffs Sarah Osborn and Cecil A. Osborn were in truth the owners of the bonds, which had been used by the plaintiff Frank E. Osborn as aforesaid with their consent.

The defendant contended that the payment of $10,000 was the outcome of a separate and distinct negotiation, and formed no part of the mortgage indebtedness; that in any case it had by a subsequent agreement become an independent debt; that its contentions were established by the evidence taken as a whole, and particularly by reason of certain correspondence; that the plaintiffs Sarah Osborn and Cecil A. Osborn had no rights whatever as against it, there being no evidence that it had any knowledge of any interest on their part; that the plaintiff Frank E. Osborn was estopped (as were also the other plaintiffs, whose rights, if any, could not be higher or other than his) by the finding in the mechanics' lien proceedings from enforcing now any claim to the bonds or their proceeds.

At the trial Mulock C.J. Ex., gave judgment for the plaintiffs (1), which was affirmed by the Appellate Division (2). The defendant appealed to this Court.

R. S. Cassels K.C. and *G. A. P. Brickenden* for the appellant.

R. S. Robertson K.C. for the respondents.

The judgment of Anglin C.J.C. and Mignault, Newcombe and Lamont JJ. was delivered by

ANGLIN C.J.C.—The defendant, The London Loan & Savings Company of Canada, appeals from a judgment of the Appellate Division of the Supreme Court of Ontario (2), affirming the judgment of Mulock C.J. Ex., in favour of the plaintiffs (1). The material facts sufficiently appear in these judgments.

On evidence which certainly supports that view, and probably admits of no other, the learned Chief Justice, who tried the action, found that the bonds in question had been pledged to the appellant Loan Company by Frank Osborn, one of the plaintiffs, as collateral security upon an addi-

(1) (1923) 25 Ont. W.N. 43. (2) (1925) 29 Ont. W.N. 185.

tional advance of $10,000 being made by it on a $50,000 mortgage which it held on the property of the Independent Theatres Company, and which then stood as security for $37,000 and some interest, and held that in respect of such bonds Osborn was in the position of and was entitled to the rights of a surety. That view, confirmed in the Appellate Division, has not been successfully impugned; and, subject to the question of estoppel, below adverted to, must form the basis of the disposal of the present appeal.

The evidence discloses that, with the concurrence of the appellant, the mortgaged property of the Theatres Company was subsequently sold for a sum considerably more than sufficient to pay off in full the appellant's mortgage and all other claims upon the property entitled to priority over it. As a result the plaintiff Frank Osborn became entitled to the return of the bonds, to recover which he sues, and, as they have since been disposed of by the appellant, wrongfully and without assent by him, that Company is accountable to him for their value.

But it is urged that Osborn is estopped from asserting that the $10,000 advance made by the appellant company when the bonds were pledged to it was secured by its mortgage on the Theatres Company's property, because, in certain mechanics' lien proceedings, to which the Theatres Company was a party, it was held that the $10,000 was advanced as an independent loan made to the Theatres Company by the appellant directly on the security of the bonds in question. Osborn was not a party to the mechanics' lien proceedings; but he was cognizant of them as president and general manager of the Theatres Company.

The immediate effect of the judgment holding that the $10,000 was not advanced on the $50,000 mortgage security was that, to the extent of that advance, and interest thereon, the amount of money available for the building contractors, The Schultz Brothers Company, as lien-holders subject to the appellant's mortgage, was augmented. The Theatres Company gained nothing thereby, since it remained liable to the appellant for the $10,000 advanced by it when the bonds were pledged. The sale of the mortgaged premises was made under the judgment in the me-

1928

LONDON LOAN & SAVINGS CO. OF CANADA v. OSBORN.

Anglin C.J.C.

chanics' lien proceedings, but the disposition of the proceeds became the subject of an extra-curial agreement between the appellant Loan Company and the contractors, The Schultz Brothers Company. Before, or as a term of, assenting to that transaction being put through, by which its $50,000 mortgage was extinguished, the appellant obtained from The Schultz Brothers Company a bond and agreement indemnifying it against loss in the event of its being held liable to account for the bonds in question to the plaintiff Osborn.

No estoppel can be established as against Osborn because he was not a party to the mechanics' lien proceedings. He was present at them only as a representative of the Theatres Company. *In re Deeley's Patent* (1). Neither personally, nor as president and general manager of the Theatres Company, did Osborn derive any benefit from the judgment in the mechanics' lien proceedings. Cases such as *In re Lart* (2), relied on by counsel for the appellant, are, therefore, inapplicable. The case at bar falls rather within the principle of the decision in *Leicester & Co.* v. *Cherryman* (3). Under the circumstances above disclosed estoppel in pais would seem to be out of the question. The appellant company was not misled to its prejudice by anything Osborn did or refrained from doing. The indemnity which it took from The Schultz Brothers Company is conclusive on this aspect of the matter. It is, however, suggested that, as a person entitled to redeem the appellant's mortgage, Osborn had a status to intervene. But it does not follow that he was under an obligation to do so. The appellant was fully apprised of all the material facts. If it desired to hold Osborn bound by anything determined in the mechanics' lien proceedings, it should have taken steps to have him made a party. On the other hand, whether or not the finding of the local judge, in the mechanics' lien proceedings, that the appellant had advanced the $10,000 not on the mortgage but as an independent loan to the Theatres Company, should be regarded as binding on Osborn, it certainly is so on the appellant. The result would be, as Mr. Justice Smith pointed

(1) [1895] 1 Ch. 687. (2) [1896] 2 Ch. 788.
(3) [1907] 2 K.B. 101, at p. 103.

out in the Divisional Court, that the appellant would have no right to hold the pledged bonds, since the debt for which they were pledged as collateral, i.e., a loan on the mortgage security, never came into existence.

We agree with the view, which prevailed in the trial court and on appeal, that the receipt given by the appellant for the bonds when they were pledged to it evidenced the terms of the pledge and that, within the meaning of that receipt, the loan secured by the $50,000 mortgage was reduced below $31,000—it was, in fact, wholly extinguished. The bonds were, therefore, returnable to Mr. Osborn, the receipt providing for their return " on the loan being reduced to $31,000."

The plaintiffs Sarah Osborn and Cecil A. Osborn have no independent right of action against the appellant. They can claim only through Frank Osborn, and their right can in no event be higher than his. But, as he was consenting and approving, the fact of the judgment having been entered for his co-plaintiffs, his wife and infant son, affords the appellant no ground for objecting to it.

The appeal fails and must be dismissed with costs.

Duff J. concurred in the result.

Appeal dismissed with costs.

Solicitors for the appellant: *G. A. P. Brickenden & Co.*

Solicitors for the respondents: *Jeffery, Weir, McElheran & Moorhouse.*