

## WILKINSON v. HARWOOD AND COOPER

1930  
\*May 5.ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME  
COURT OF ONTARIO

*Contract—Evidence—Action to recover on mortgage covenants—Defence that the moneys were advanced by mortgagee for illegal purpose—No connection shewn between claims sued upon and alleged illegal transactions—Refusal to answer questions on discovery as ground for dismissal of action at trial.*

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1) allowing the plaintiffs' appeal from the judgment of Raney J. (2) dismissing the action, which was brought upon the covenants for payment contained in two mortgages executed by the defendant to the plaintiff Cooper. The trial judge's grounds for dismissal of the action were that the moneys advanced by Cooper to the defendant and sought to be recovered in the action were advanced for an illegal purpose; and also that plaintiff Cooper had refused to answer certain relevant questions put to him on his examination for discovery. The Appellate Division reversed the judgment on the grounds that there was no evidence of any illegality in connection with the mortgage transactions; that in any case the plaintiff's cause of action was established without relying on any illegal transaction; and that the refusal to answer questions on the examination for discovery, no substantive motion grounded on such refusal having been launched by defendant before the trial, could not be a ground for dismissal of the action at the trial.

On the appeal to this Court, on the conclusion of the argument of counsel for the appellant, and without calling on counsel for the respondents, the Court delivered judgment dismissing the appeal with costs, the Chief Justice stating that the members of the Court were in accord with the views expressed by the Appellate Division and in agreement with the judgment delivered therein by Orde J.A.; with that learned judge they were of the view that defendant failed to adduce any evidence in support of his plea of illegality; he was bound to prove, not only the illegal-

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\*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

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ity (as to the existence of which the Court passed no opinion), but also its connection with the transactions in question; the signatures of defendant to the mortgages being admitted and the advance of the money not being contested, the plaintiff established a *prima facie* case by showing non-payment; he was not obliged to invoke in any wise the alleged illegal transactions in support of his claim; the burden of establishing these and their connection with the claim sued upon remained upon defendant, and that burden he failed to discharge.

*Appeal dismissed with costs.*

*F. D. Davis K.C.* for the appellant.

*Bernard Furlong* for the respondents.

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\*PRESENT:—Duff, Newcombe, Lamont, Smith and Cannon JJ.