KENNETH H. SHOOK, EXECUTOR OF THE WILL OF SARAH CATHERINE SHOOK, DECEASED.....(PLAINTIFF) — APPELLANT;

AND

GORDON H. MUNRO and LAURA JANE DAVIDSON, EXECUTORS OF THE ESTATE OF CHARLOTTE DICKSON, DECEASED .....(DEFENDANTS) — RESPONDENTS.

*1947 Nov. 26

*1948 April 27

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Limitation of Actions—Mortgage—Whether in the absence of a written agreement, a voluntary forbearance by a mortgagee to enforce payment of principal and interest and mortgagor's acceptance of extension of time, prevents the running of the Statute of Limitations, R.S.O., 1937, c. 118, s. 23—Statute of Frauds, R.S.O., 1937, c. 146, s. 4.

Held: Voluntary forbearance by a mortgagee to enforce payment of a mortgage will not, in the absence of anything done or promised by the mortgagor to bind the mortgagee to forbear, prevent the running of the *Statute of Limitations*, R.S.O., 1937, c. 118, s. 23.

Per Kellock J.:—Assuming that the parties to the mortgage verbally agree to extend the time of payment until the mortgagor should be able to pay, the agreement cannot, by reason of the *Statute of Frauds*, be permitted to be proved for the purpose of varying the terms of the mortgage.

APPEAL from a decision of the Court of Appeal for Ontario, reversing, Hogg J.A. dissenting (1) the judgment of Kelly J. at the trial in favour of the Plaintiff.

The judgment of the Chief Justice, Taschereau, Rand and Estey, JJ. was delivered by:

RAND J.:—The facts in this appeal show that in 1923 the deceased, Sarah Catherine Shook, then a widow, of whose will the appellant, her son, is the executor and trustee, mortgaged her home property to three persons to secure the sum of $2,000 as to one and $1,000 as to each of the others with interest payable half-yearly. The principal sums were to be repaid in 1928. The mortgagor died in October, 1943. Nothing was ever paid on account of either principal or interest of the debt. The deceased

(1) [1947] O.R. 73; [1947] 3 O.L.R. 271.

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lived on the property until her death. In 1942 it had been purchased at a tax sale by the solicitor for the respondents, but in the following year the son redeemed it. During that time, rents of tenants were paid to the respondents and insurance for a small fire likewise. From March until July, 1944 the respondents collected rents from a tenant of part of the house and in July of that year the property was again sold for taxes. Following the death of his mother, the son who had then been staying with her for some months continued to live on the premises.

In May, 1944, after considerable negotiation with the solicitor of the respondents over the mortgage, indebtedness on which was not disputed, the appellant consented to an order purporting to be made under *The Landlord and Tenant Act* which was to issue if possession had not been surrendered by June 15th following. On that day, he notified the solicitor that he would not vacate and the order issued. In his absence, the sheriff, under a writ of possession, removed the furniture and effects from the house and on behalf of the respondents took possession. This action was then brought.

At the trial Kelly J. found that there had been some understanding between the parties that the deceased would not be pressed for the money during her lifetime, or would be left until she was able to pay it without embarrassment; but when it arose or what precisely were its terms did not appear. The son claimed the mortgagees had given their "word of honour" that his mother would not be disturbed during her lifetime. As his father, who had died in 1919, had been the general manager for many years of a lumber business carried on by the father of the mortgagees, that statement of the understanding is probably as accurate as can be given.

The trial judge held the respondents to have lost their rights in the land by force of the *Limitations Act* and that the procedure under *The Landlord and Tenant Act* was a nullity. He, therefore, maintained the claim, ordered possession to be delivered to the appellant and an account taken of rent and profits received, and awarded damages. The Court of Appeal reversed that holding. In the view of Henderson J.A., "agreements extending the time for

payment of indebtedness, whether payable under mortgage or otherwise, are of every-day occurrence and the effect of such agreement is to prevent the *Statute of Limitations* from running against the creditor or in favour of the debtor. This constitutes the consideration on both sides, for the agreement. Here, the agreement was fully performed by the creditor, and the benefit of it was received and accepted by the debtor, who, in my opinion, cannot now be heard to repudiate it * * * In my opinion, further, the *Statute of Limitations* did not commence to run upon the mortgage until the date of Mrs. Shook's death and the result is that the defendants have a good, valid and subsisting mortgage, and are entitled to enforce the same." Hope J.A. took the same view and was concerned only to find a consideration for the promise to forbear which he did in a variation of the terms of the mortgage as to the time for repayment binding on both the mortgagor and the mortgagees. Hogg J.A. dissented. He could discover no consideration, and agreed with the trial judge that the mortgagees had lost their interest in the land by the operation of the statute. He likewise agreed that the order under *The Landlord and Tenant Act* was made without jurisdiction.

No doubt a mortgagor and a mortgagee can bind themselves to new times for the payment of the moneys, to be substituted for those provided in the mortgage. The effect would be to postpone the mortgagee's right to payment, extend the mortgagor's obligation to pay interest, and affect the times of both redemption and foreclosure. But the question here is not whether forbearance or a promise of it is good consideration: it is rather whether anything had been done or promised by the mortgagor to bind the mortgagees to forbear. If, for instance, the latter had in 1930 brought foreclosure proceedings, could they have been restrained on the ground that the mortgagor was not in default? Hope J.A. says yes, but I am forced to the conclusion that nothing had taken place that could have supported that plea: the forbearance was at most a voluntary abstention from exercising rights by the mortgagees which of itself could not affect the running of the statute.

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Voluntary forbearance may too in appropriate circumstances be sufficient when performed to bind the person requesting it to a new obligation arising at that time: i.e. if you forbear for a year, I will then pay you: but at any time during the year action could be taken on the existing default. In such case, it is not whether, by reason of the performance of the requested forbearance, the estate has become liable then as on a new promise to pay, but whether, by operation of the statute the right of entry and the title to the property in the mortgagees have not in the meantime been extinguished, whether the mortgagees have not in fact forborne themselves into the statute. It may be that the personal obligation would in effect be preserved, but that is not the point here.

On that view of the evidence, the question of the application of the *Statute of Frauds* does not arise.

There remains the fact that two of the mortgagees, Martha Dickson, who died on June 2, 1931 and Charlotte Dickson, who died on June 11, 1934 mentioned indebtedness to them of the mortgagor in their wills. The former reference was:

> And I direct and instruct my executors to use the same consideration in respect of any indebtedness due me by Sarah Catherine Shook as I have done in the past.

and the latter:

> And I direct and instruct my said executors and trustees to use the same consideration in dealing with Mrs. S. C. Shook as my sister and myself have done in the past and to postpone any action in respect of any indebtedness due by the said Mrs. S. C. Shook to myself until after her death.

The third, Mary A. Hazlitt, who died on April 10, 1926, and whose will contained no such reference, appointed her sisters, Charlotte Dickson and Martha Dickson executrices of her will; Martha Dickson had nominated her sister, Charlotte Dickson and the respondent Laura Jane Davidson to be executrices and trustees; and Charlotte Dickson, the respondents.

It is contended that by these provisions an effective restraint was placed upon any action against the mortgagor and that it constituted an extension of the time at the end of which the right of entry now asserted arose. But the act was voluntary and unilateral on the part of the mortgagees. If there was a binding injunction on the executors

it was self-imposed, and I cannot consider it any more significant to the questions raised than the self-imposed restraint by the mortgagees during their lifetime. But the intention to preserve the mortgages is clear and just as the latter, if it had been brought to their notice that some act or writing was essential to do that, could have either insisted upon that act or writing from the mortgagor or taken such steps as would otherwise have maintained them, so under the testamentary directions, the representatives of the mortgagees could I think act in a similar manner. Even assuming a property interest to pass to the mortgagor, such liberty of action is necessarily entailed. The default remained: it was a decision not to act for a certain time on the default. No obligation binding the mortgagor could on what is before us be inferred as on an implied acceptance by her of its benefit, nor could the mortgagees by such provisions affect the interest of the mortgagor detrimentally. Taking it, then, that at least as to two portions of the debt the testamentary provisions can be deemed to be referable to the mortgage and to involve some degree of restriction of proceedings, I am unable to attribute to them the effect for which Mr. Walsh argued.

I would allow the appeal with costs here and below and restore the judgment at trial.

KELLOCK J.:—Assuming that the parties to the mortgage verbally agreed to extend the time of payment until the mortgagor should be able to pay, that agreement cannot, by reason of the *Statute of Frauds,* be permitted to be proved for the purpose of varying the terms of the mortgage; *Goss* v. *Nugent* (1); *Marshall* v. *Lynn* (2) at 117. That being so, there is nothing to interfere with the operation of section 23 of the *Limitations Act,* R.S.O., 1937, *cap.* 118, as none of the requirements of that section for interrupting the running of the statute exist.

The only other question is with respect to the order made under the Overholding Tenants' provisions of the *Landlord and Tenant Act* on the 16th of June, 1944. The County Court judge had, it is clear, no jurisdiction to make such an order; *Re Premier Trust Co.* and *Haxwell* (3);

(1) (1833) 5 B. & Ad. 58.
(2) (1840) 6 M. & W. 109.
(3) [1937] O.R. 497.

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Jones v. *Owen,* (1). The order is therefore a nullity; *MacFarlane* v. *Leclair* (2) at 185; *McLeod* v. *Noble* (3); *Dunn* v. *Board of Education* (4) at 459; *Perkin* v. *Proctor et al* (5) at 383. Nor is it possible to treat it as binding because made on consent. The parties did not intend to have their rights determined outside of the ordinary jurisdiction of the court; *Pickard* v. *Allen and Dewar* (6).

I would therefore allow the appeal with costs here and below.

Appeal allowed and judgment at trial restored with costs.

Solicitor for the appellant: *W. J. Arthur Fair.*

Solicitor for the respondent: *J. C. N. Currelly.*

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(1) (1848) D. & L. 669.
(2) (1862) 15 Moo. P.C. 181.
(3) (1897) 28 O.R. 528.
(4) (1904) 7 O.L.R. 451.
(5) (1768) 2 Wils. 382.
(6) (1932) 41 O.W.N. 399.