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 * Mar. 15, 17. ARCHIBALD GEORGE McLEAN, } APPELLANT ;
 (DEFENDANT)..... }
 * June 20. AND
 — FREDERIC SHIRLEY WILKINS }
 (BY BILL) AND HUMPHREY }
 LLOYD HIME (MADE A PARTY } RESPONDENTS.
 PLAINTIFF BY ORDER OF COURT)
 (PLAINTIFFS).....)

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgagor and Mortgagee—Assignment of Mortgage—Purchase of equity of redemption by sub-mortgagee—Sale of same by him—Liability to account.

The assignee of a mortgage obtained a release of the equity of redemption which he sold for a sum considerably in excess of his claim against the assignor. In a suit to foreclose the latter's interest,—

Held, reversing the judgment of the Court of Appeal and restoring that of the Common Pleas Division, that he was bound to account for the proceeds of such sale.

APPEAL from the decision of the Court of Appeal for Ontario (1) reversing the judgment of the Common Pleas Division (2), whereby the plaintiff's action was dismissed and he was ordered to pay certain monies to the defendant.

The defendant, McLean, was the surviving executor of one Cameron, to whom the land in question in this suit had been mortgaged in 1856 by one Romaine.

In 1864 the mortgage was assigned to the respondent Hime, and in 1880 a second assignment was made to Selina Cameron who brought a suit to obtain possession of the mortgage from Hime. This suit was settled by Hime paying Mrs. Cameron \$500.00 and her interest in the mortgage was assigned to him.

* PRESENT—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

(1) 13 Ont. App. R. 467. (2) 10 O. R. 58.

The equity of redemption, in 1877, was in the executors of one Zimmerman to whom it had been assigned by Romainè. Hime, by representing that he was the holder of the mortgage which had originally been made to secure £550.00 and that the amount due on it was more than the value of the land, obtained from these executors, for the nominal consideration of \$4.00, a release or quit claim to a trustee for himself of their equity of redemption and afterwards sold it for \$6000.

A suit was then brought by Frederic Shirley Wilkins, as trustee for Hime, to foreclose the interest of McLean, surviving executor of the original mortgage, and by a subsequent order in the suit Hime was added as a plaintiff.

At the hearing before Ferguson J. in the Chancery Division judgment was given in favor of the plaintiff and an order for foreclosure was made in default of the sum due on the mortgage being paid within a time specified. The case was afterwards transferred to the Common Pleas Division where the judgment of Ferguson J. was reversed, the action was dismissed, and the plaintiff ordered to pay the difference between the amount realised from the sale of the equity of redemption and the sum due on the assignments to himself and to Selina Cameron.

The Court of Appeal reversed the judgment of the Common Pleas Division and restored that of the court of first instance. The defendant then appealed to the Supreme Court of Canada.

S. H. Blake Q.C. and *W. Cassels* Q.C. for the appellant, argued that Hime could not take advantage of his position as mortgagee to secure the equity of redemption and make money by it. The following authorities were cited. *Grace v. MacDermott* (1); *Synod v. DeBlaquiere* (2); *Dalton v. Smith* (3); *Stee v*

(1) 13 Gr. 247.

(2) 27 Gr. 536.

(3) 86 N. Y. 176.

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Manhattan Co. (1); *MacLean v. Hime* (2); *Lees v. Fisher* (3)
 Moss Q.C. for the respondents referred to Williams on Executors (4).

The judgment of the court was delivered by:—

STRONG J.—On the 23rd of January, 1856, Charles Edward Romaine mortgaged certain lands in the city of Toronto described as lots 20, 21, 22 and 23, on the south side of Adelaide street, to one John D. Cameron, to secure £550 and interest. In 1857 Cameron died, having first made his will, duly executed, whereby he appointed the late Hon. Archibald McLean and the present appellant, Archibald George McLean, his executors and residuary legatees and devisees. The Hon. Archibald McLean and the appellant duly proved the will, and took upon themselves the duties of executors thereof. The Hon. Archibald McLean died in 1865. The appellant, through the agency of his brother Thomas McLean, on the 26th of April, 1864, deposited the mortgage deed before mentioned with the respondent, Humphrey Lloyd Hime, as security by way of a derivative or sub-mortgage to secure \$401 and interest, being the amount of a loan then made by the respondent Hime to the appellant through the intervention of Thomas McLean. On the 8th of May, 1880, the appellant, Archibald McLean, then the surviving executor and residuary legatee under the will of Cameron, the original mortgagee, made an assignment of the same mortgage—also by way of derivative or sub-mortgage—to one Selina Cameron, as a security collateral to a covenant of even date for the payment of the sum of \$2050 and interest.

Subsequently, and on the 9th of October, 1880, Selina Cameron assigned this last mortgage and the

(1) 1 Paige Ch. 47.

(3) 22 Ch. D. 283.

(2) 27 U. C. C. P. 195.

(4) P. 941.

debt which it was given to secure to the respondent, Frederic Shirley Wilkins, who was, as is admitted, a mere trustee for the respondent, Hime.

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On the 31st of December, 1856, the original mortgagor, Charles Edward Romaine, conveyed the equity of redemption in the mortgaged lands to Samuel Zimmerman. In March, 1857, Zimmerman died, having first duly executed his will, whereby he appointed Richard Miller, Richard Woodruff, Joseph A. Woodruff and John L. Ranney his executors, and whereby he also devised all his real and personal estate to his executors in trust. In 1877 Hime, being then a sub-mortgagee of the property under the derivative mortgage of the 26th April, 1864, applied to the executors of Zimmerman for a release to him of the equity of redemption, representing to them that he "controlled" the original mortgage and that the equity of redemption belonging to the estate of Zimmerman was worthless; and thereupon, on the 10 December, 1877, the executors of Zimmerman, for the nominal consideration of \$4.00, executed a release of the equity of redemption in favor of one Arthur B. Harris, who, it is admitted, was a mere trustee for the respondent Hime.

On the 15th day of January, 1879, Harris, by the direction of Hime, conveyed to one Robert Quinn, who, it is admitted, was also a trustee for Hime. Subsequently to the execution of this last deed Hime contracted to sell the mortgaged lands to Ann Mackay for the price of \$5,500, which was to be paid and satisfied by the conveyance by Mrs. Mackay to Hime of other property valued at that amount, and accordingly on the 6th day of May, 1879, Quinn, by the direction of Hime, conveyed the property to one William Hope, who, it is admitted, was a trustee for the purchaser, Mrs. Mackay; and Hope afterwards, on the 8th of January, 1880,

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conveyed the same lands absolutely to his *cestui que trust* Ann Mackay. The property, the conveyance of which was to form the consideration for the sale by Hime to Mrs. Mackay, was duly conveyed by the latter to Hime and was by him afterwards sold for the price of \$6500 as I gather from Hime's own evidence. The conveyances were all duly registered and Mrs. McKay, so far as any equitable right of the present appellant is concerned, appears to have been a purchaser for valuable consideration without notice of the equity now asserted by the appellant and which will be hereafter explained. Previously to the assignment by Selina Cameron to the respondent Wilkins (as a trustee for Hime) of the 9th October 1880 already stated, Mrs. Cameron had filed her bill against Mrs. McKay, Romaine the original mortgagor, and the respondent Hime, alleging that she was an assignee of the mortgage of the 23rd of January 1856, and praying that the mortgaged lands might be sold for the satisfaction of her debt. To this bill Hime filed his answer put in under oath in which he swore as follows:—

2. I say that I have a lien upon the said mortgage in the bill mentioned and that the same was deposited with me on behalf of the late Chief Justice McLean, and of the said Archibald G. McLean, both in the bill mentioned, to secure the payment to me of the sum of four hundred and one dollars and twenty three cents, and interest thereon from the 26th day of April, in the year of Our Lord one thousand eight hundred and sixty four, the whole of which is still due to me.

3. The said mortgage was so deposited with me and pledged as aforesaid, on or about the said twenty sixth day of April one thousand eight hundred and sixty four.

4. The plaintiff had actual notice of such deposit and of my said claim and lien before the assignment to her of the said mortgage in the bill mentioned.

5. I submit that I am entitled to be paid the said sum and interest and the costs of this suit before I am called upon to deliver up the said mortgage to the plaintiff.

This suit was never brought to a hearing but was compromised by Hime who paid off Mrs. Cameron and

thereupon took the assignment of the 8th October, 1880, to the respondent Wilkins already stated. On the 5th of December, 1859, the Bank of Upper Canada having recovered a judgment against the executors of Zimmerman the sheriff, under a writ of *fi. fa.* issued thereon, assumed to sell the mortgaged lands, and the bank assumed to purchase the same and took from the sheriff a deed poll to carry out the sale, but such sale being wholly void and abortive according to the decisions of the Ontario courts, inasmuch as in the state of the statute law then existing an equity of redemption could not be sold under an execution against executors, the crown in whom all the estate and assets of the Bank of Upper Canada had become vested by statute, in order to waive any rights under the sheriff's deed on the 9th March, 1878, for the nominal consideration of one dollar, released the lands to Arthur B. Harris, as a trustee for the respondent Hime.

On the 28th of December, 1877, Catherine C. Heward, who it was supposed had some title to the mortgaged lands paramount to the mortgage by Romaine to Cameron, also by a deed of release of that date for the nominal consideration of one dollar released the same lands to Arthur B. Harris as a trustee for the respondent Hime.

In this state of facts and title the respondent Hime in the year 1881 commenced the present suit at first in the sole name of his trustee the respondent Wilkins (though Hime himself was afterward added as a plaintiff by amendment), as the assignee of the derivative mortgage made by the appellant to Mrs. Cameron on the 8th of May, 1880, already stated, praying a foreclosure in default of payment of the amount of the debt thereby secured and interest accrued thereon. The appellant filed an answer and supplemental answer in which he set up

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in substance the facts hereinbefore stated so far as the same are material, and claimed to be paid the sum produced by the sale of the property acquired by Hime from Mrs. Mackay. A replication having been filed, the cause came on to be heard before Mr. Justice Ferguson, when the fact that the release of the equity of redemption was obtained from the executors of Zimmerman in the manner hereinbefore mentioned was proved, and the other facts, deeds and documents before stated having also been clearly established, the learned judge, on the 9th December, 1882, pronounced the usual foreclosure judgment on the footing of the derivative mortgage of the 8th of May, 1880, made by the appellant to Selina Cameron, viz: that in default of payment within the usual period of the principal debt and interest originally due to Selina Cameron and assigned to respondent Hime, the appellant should be foreclosed as regarded his interest in the original mortgage and that in the event of redemption the respondents should re-assign to the appellant the original mortgage made by Romaine. The cause having been transferred from the Chancery to the Common Pleas Division, the appellant appealed to the latter Division sitting in banc, and on the 27th of June, 1883, a judgment was pronounced in that appeal allowing the same, and referring it to the official referee to take an account and ascertain how much of the value of the land received by Hime from Mrs. Mackay was to be attributed to the equity of redemption in these mortgaged lands, and that after deducting from such amount the sums due upon the mortgage by deposit made by the appellant to Hime in April, 1864, and that due upon the mortgage to Mrs. Cameron of the 8th of May, 1880, Hime should pay the balance to the appellant together with his costs.

From this judgment the respondent appealed to the

Court of Appeal, which court on the 4th of November, 1886, pronounced an order whereby the appeal was allowed, the judgment of the Common Pleas Division reversed and that of Mr. Justice Ferguson restored with costs. The appellant has now appealed to this court.

There can be no doubt or question that Hime, when in 1877 he obtained the release of the equity of redemption from Zimmerman's executors, was a derivative mortgagee by deposit of the original mortgage made by Romaine. Hime's own evidence at the trial is amply sufficient to establish this,—moreover in the extract from his answer filed in the suit brought by Mrs. Cameron, before set out, he distinctly swears that the mortgage was deposited with him as a security for the money lent by him to Thomas McLean for the use of the present appellant. Further, in an action of detinue brought by the appellant against Hime in the Court of Common Pleas, *McLean v. Hime* (1), as far back as 1876, to recover the mortgage deed, it was determined by that court in banc, upon a motion to enter a verdict for the defendant in the action, that Hime was a mortgagee of the principal mortgage under the transaction with Thomas McLean and entitled to retain the mortgage deed against the present appellant as a security for the amount of his advance of \$401 and interest from the 26th of April, 1864, the court holding that Thomas McLean acted in the transaction with the privity and assent and as the agent of the appellant.

The question is then resolved into a pure question of equity, namely, was the appellant, in addition to his clear right to redeem Hime in respect to both the two sub-mortgages, viz ; that originally made to Hime himself by deposit, and that of the 8th of May, 1880, made to Mrs. Cameron and assigned by her to Hime,



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entitled to an account of the money which had come to his hands as the proceeds of the sale of the property received by him from Mrs. MacKay as the consideration for the sale to her of the mortgaged property. In consequence of the sale to Mrs. MacKay, a purchaser for value without notice, the recovery of the specific property obtained by the release of the equity of redemption by Zimmerman's executors had become impossible and the appellant was therefore, on well established principles, entitled to enforce any equity which he had against the monies which had come to the hands of Hime as its produce or rather to the money into which the property received from Mrs Mackay had been further converted by sale.

The Common Pleas Division based their judgment entirely upon the ground that Hime had obtained the release of the equity of redemption by asserting himself to have the control of the original mortgage, and by alleging that the equity of redemption was worthless. Although these representations no doubt greatly strengthened the case of the appellant and now constitute a good ground for giving him costs he might not otherwise have been entitled to, they were not, I think, essential to the relief which the judgment of the Common Pleas Division gave him, for irrespective of these representations his character of a derivative mortgagee was by itself sufficient to disentitle him to retain for his own benefit as against the appellant asking to redeem, any estate in the mortgaged lands which he had acquired whilst he held the mortgage made by deposit in April, 1864.

In order to entitle the appellant to redeem any acquisition in respect of the same land as that comprised in the mortgage as well as the mortgage itself, it was not incumbent on him to prove that Hime had made use of the advantage which his position of deriv-

ative mortgagee gave him to obtain such acquisitions or additions, for however innocent he may have been in his dealings with the owner of the equity of redemption his character of sub-mortgagee disabled him from obtaining by purchase or otherwise any interest in the equity of redemption which he could withhold from his mortgagor. A sub-mortgagee stands in a quasi fiduciary position as regards his mortgagor and the broad principle of equity first established in the leading case of *Keech v. Sandford* (1) applies to him in all its fulness. It is well established that a mortgagee of leaseholds who is not bound to renew, who may, after the right to renew has lapsed by effluxion of time, obtain with his own money and in his own name a renewal of the lease, holds it nevertheless subject to redemption by the mortgagor. As Lord Nottingham says in *Rushworth's Case* (2):

The mortgagee here doth but graft upon his stock and it shall be for the mortgagor's benefit.

And see in notes to *Keech v. Sandford* (3) and cases there cited (4).

The converse of the same principle also applies, and if the mortgagor obtains a renewal that in like manner enures to the benefit of the mortgagee irrespective of any agreement to that effect (5). The case of a mortgagee of leaseholds obtaining a renewal is manifestly a stronger case than the present, though the principle on which it proceeds is the same, viz: that the mortgagee shall not intercept any advantage which the mortgagor might possibly have derived as the owner of the property mortgaged. In a case like the present it is obvious that the release of the equity of redemption by the executors of Zimmerman in order to avoid the

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(1) 1 W. & T. L. C. 46.

(2) Free. Ch. 12.

(3) 1 W. & T. L. C. ed. 5 p. 54.

(4) See also Coote's Mortgages, ed. 1884, vol. 1, p. 267.

(5) *Smith v. Chichester*, 1. C. & L. 486.

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trouble and annoyance of a suit for foreclosure was an advantage which might have been obtained by the appellant had he retained the mortgage in his own hands. Not merely the original mortgage itself but everything incidental to it was taken by Hime subject to redemption, and if he chose to speculate with the owners of the equity of redemption on the strength of his position as mortgagee he must be considered as doing so for the benefit of his mortgagor and be held accountable to him for the profits he may have made.

I find no English case in which the doctrine of *Keech v. Sandford* has been applied in the actual case now before us of a derivative mortgagee obtaining a release of the equity of redemption, but in the American case of *Slee v. Manhattan Co.* (1) an equity judge of the highest eminence, Chancellor Walworth, unhesitatingly applied the doctrine to a case precisely similar to the present that of a derivative mortgagee purchasing the equity of redemption. The learned judge in that case says :

Again the purchase of *Frear & Hallowell's* equity of redemption accrued to the benefit of *Slee* on the well known principle of equity that where the mortgagee has gotten the renewal of a lease or obtained any other advantage in consequence of his situation as such mortgagee the mortgagor coming to redeem is entitled to have the benefit thereof.

Nothing can be clearer or more apposite than this ; it exactly applies to the facts of the present case, and confirms me in the conclusion which I should otherwise certainly have arrived at on the general principles enunciated in *Keech v. Sandford* and the numerous cases which have followed that authority.

I am of opinion that the appellant is entitled to a reversal of the order of the Court of Appeal and to have a judgment entered in the original court declaring him entitled to redeem Hime in respect of the purchase

(1) 1 Paige Ch. 80.

of the equity of redemption, and directing an account of how much of the money derived by Hime on the sale or conversion of the land obtained by him from Mrs. Mackay is to be attributed to the sale by him of lands comprised in the mortgage from Romaine to Cameron with interest from the date of the receipt of such amount, and that from the amount so found due there be deducted what upon the proper accounts being taken may appear to be due to Hime for principal and interest upon the foot of his two mortgages, namely, the mortgage by deposit of the 26th April 1864, and that by the appellant to Mrs. Cameron of the 8th of May 1880, and that any residue which may remain after such deduction be paid to the appellant and that the appellant be paid his costs in this court and in all the courts below.

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*Appeal allowed with costs.*

Solicitors for appellant: *Blake, Lash, Cassels & Holman.*

Solicitors for respondents: *Edgar & Malone.*

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