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*Mar. 1, 2
*Nov. 1

WALTER G. HUNT (*Defendant*) .....APPELLANT;

AND

ETHEL HUNT (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Judgment—Pleading—Practice—Mutually inconsistent remedies—Judgment on covenant to pay in a mortgage bar to judgment for money had and received thereon.

The respondent sued her husband, the appellant, and the mortgagor in a mortgage of which she was the mortgagee, to secure an accounting of moneys she alleged had been paid by the mortgagor to her husband on account of the mortgage, the purported discharge of which she alleged was a forgery. She also claimed a judgment for the amount of the mortgage and accrued interest against the defendants or such as should be found liable. The appellant pleaded that he himself had advanced the moneys and that the respondent had signed the discharge and received the proceeds which she had invested in a rooming house. By way of counter-claim he alleged that in consideration of the discharge of the mortgage by the respondent he had advanced her the money to purchase an interest in the rooming house and, in the alternative, that if he owed her anything on account of the mortgage then she held such interest subject to a resulting trust in his favour. The mortgagor pleaded that the mortgage was a building mortgage that had been obtained from the appellant and that all dealings with respect to it had been with the appellant and all monies advanced had been repaid to him and that the discharge of the mortgage had been delivered by him. The trial judge found that it was the intention of the appellant to make a gift of the mortgage and the moneys thereby secured to the respondent and that her purported signature to the discharge was a forgery. He directed that the respondent recover from the appellant and the mortgagor the amount advanced on the mortgage and interest; that the mortgagor be entitled to recover by way of indemnity from the appellant any amount the mortgagor might be called to pay upon the judgment, and that the counter-claim be dismissed. In an appeal to the Court of Appeal for Ontario the appellant raised no question as to the judgment for indemnity in favour of the mortgagor and on appeal to this Court did not make the mortgagor a party to the appeal.

Held: That under the circumstances this Court has no jurisdiction to interfere with the respondent's judgment against the mortgagor, or with mortgagor's judgment for indemnity against the appellant, but that the respondent could not have judgment against both the mortgagor and the appellant. By taking judgment against the mortgagor she had of necessity asserted as against him that the moneys paid by him to the appellant were not paid on account of the mortgage, and she could not be heard to assert as against the appellant that they were so paid. *Allegans contraria non est audiendus. M. Brennen & Sons Mfg. Co.* v. *Thompson* 33 O.L.R. 465 at 469 approved.

*PRESENT: Kerwin C.J. and Rand, Estey, Locke and Cartwright JJ.

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APPEAL from the judgment of the Court of Appeal for Ontario affirming the judgment of the trial judge, LeBel J., maintaining the respondent's action and dismissing the appellant's counter-claim.

O. J. D. Ross for the appellant.

R. E. Holland and *E. B. Lawson* for the respondent.

The judgment of the Court was delivered by:

CARTWRIGHT J.:—This action was brought by the respondent against the appellant, who is her husband, George C. Hunt, who is her son, Charles Rich and Ethel Rich. By an indenture of mortgage, dated 1st of September, 1942, Charles Rich and Ethel Rich mortgaged a property in Toronto, of which they are joint owners, to the respondent. This mortgage is expressed to be made in consideration of $4600 and bears interest at 5 per cent.

The making of the mortgage was arranged between the appellant and Charles Rich and there is a conflict in the evidence as to what amount was actually advanced on the mortgage. The learned trial judge found that a total of $3147 was advanced and this finding was affirmed in the Court of Appeal. Counsel for the appellant contended that this finding is so clearly contrary to the evidence that it should be set aside notwithstanding that there are concurrent findings of fact against the appellant, but for reasons which will appear I do not find it necessary to determine this question.

All the moneys that were advanced on the mortgage were admittedly those of the appellant, but, on conflicting evidence, the learned trial judge has found that it was the intention of the appellant to make a gift of the mortgage and the moneys thereby secured to the respondent. This finding was affirmed in the Court of Appeal and, in my opinion, it cannot be disturbed.

It is established that whatever amount was advanced on the mortgage was repaid in full by Charles Rich to the appellant. While Charles Rich must be taken to have known that the respondent was the mortgagee named in the mortgage he had no dealings with her personally. He dealt only with the appellant. Some time after these repayments had been completed a document, purporting to be a

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discharge of the mortgage signed by the respondent, was delivered to Charles Rich, and was registered. On conflicting evidence the learned trial judge has found that the respondent did not sign this document and that the signature to it is forged. This finding was affirmed in the Court of Appeal and on the evidence it cannot be interfered with.

After discovering that the document purporting to be a discharge had been registered the respondent brought this action. In her Statement of Claim she alleges that Charles Rich and Ethel Rich made the mortgage to her, that she had never executed a discharge, that the appellant and George C. Hunt had conspired to defraud her of the proceeds of the mortgage and to forge her name to the discharge, and that she had at no time received any part of the money secured by the mortgage of which she had always been the owner. In her prayer for relief she claims:

(*a*) An accounting of the monies paid by the Defendants Charles Rich and Ethel Rich or either of them on account of the Mortgage referred to in paragraph 3 above.

(*b*) An accounting of the monies received by the Defendants Walter G. Hunt and George C. Hunt or either of them on account of the Mortgage referred to in paragraph 3 above.

(*c*) For a declaration that the signature purporting to be the signature of the Plaintiff on the Discharge of Mortgage referred to in paragraph 4 above is not the signature of the Plaintiff.

(*d*) For a declaration that the Defendants Walter G. Hunt and George C. Hunt combined, conspired, confederated and agreed each with the other to defraud the Plaintiff of the proceeds of the said Mortgage and to forge the name of the Plaintiff to the Discharge referred to in paragraph 4 above.

(*e*) For Judgment for the amount of the said Mortgage and for all interest accrued thereon from the date thereof to Judgment against the Defendants or such of them as are found liable, by this Honourable Court, to the Plaintiff for payment of the amount of the said Mortgage and the said interest as aforesaid.

(*f*) The costs of this action.

(*g*) Such further and other relief as to this Honourable Court may seem just and meet.

The appellant and George C. Hunt joined in their defence, pleading that all money advanced on the mortgage was the property of the appellant, that the discharge was in fact signed by the respondent, that the respondent in fact received the proceeds of the mortgage for her own use and invested them in a rooming house at 57 Glen Road,

Toronto, and that the action should be dismissed. The appellant counter-claimed alleging in part:

8. In or about the month of December 1946 the plaintiff applied to this defendant for sufficient money to pay for her interest in said rooming house and in consideration of the discharge of mortgage No. 46109EO this defendant gave her the money.

9. In the alternative the plaintiff used the proceeds of said mortgage and other money given to her by this defendant to purchase her interest in said rooming house, and this defendant did not intend to and did not in fact give her a separate gift of the purchase price for her interest in said rooming house.

10. As a matter of law this defendant says that it is not equitable for the plaintiff to have the proceeds of said mortgage and to retain her interest in said rooming house and that if he owes the plaintiff anything on account of said mortgage then the plaintiff holds and has held her interest in said rooming house subject to a resulting trust in favour of this defendant.

11. In event that it is held that this defendant owes the plaintiff anything upon or with regard to said mortgage, then this defendant claims:

(1) A declaration that the plaintiff holds and has held her interest in 57 Glen Road in trust for him.

(2) An accounting of the rents and profits from the plaintiff's interest in 57 Glen Road from the date when the plaintiff acquired same.

The defendants, Charles Rich and Ethel Rich joined in their defence, pleading that the mortgage was obtained from the appellant, that it was a building mortgage and that all dealings with respect to it were had with the appellant, that all moneys advanced had been repaid to the appellant and that a discharge had been delivered to them by the appellant. Paragraphs 5 and 6 of their Statement of Defence are as follows:

5. In the event that this court should hold that the Defendant Walter G. Hunt was not a proper person to be paid or entitled to receive the monies to obtain the Discharge of the said Mortgage, then these Defendants claim over against the Defendant Walter G. Hunt for the monies so paid.

6. However, in the event that this Court hold that the Discharge of the said Mortgage is for any reason defective, then these Defendants ask that proper Discharge of the said Mortgage should be given to them since the Mortgage monies have been paid in full.

Issue was joined on these pleadings. The record does not indicate that any notice of the claim for indemnity, set out in paragraph 5 quoted above, was issued pursuant to rule 170 of the Ontario Rules of Practice or that any motion was made for directions as to how the question of the appellant's

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liability to indemnify Rich was to be determined; but presumably the proper practice was followed, as no objection seems to have been raised at any stage of the proceedings to this claim being dealt with by the learned trial judge.

At the conclusion of the trial the learned trial judge delivered his judgment directing that the plaintiff recover from the appellant and Charles Rich the sum of $3147 with interest thereon at 5 per cent from the 1st of September, 1942, until the date of the judgment making a total of $4729.98 and costs.

Paragraph 3 of the formal judgment reads as follows:

3. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that if the defendant Charles Rich do pay to the Plaintiff any portion of the plaintiff's judgment for $4,729.98 as aforesaid, or for costs as aforesaid, then the said defendant Charles Rich shall recover by way of indemnity from the defendant Walter G. Hunt any such amount that he has so paid.

The action as against George C. Hunt and Ethel Rich was dismissed without costs and the counter-claim of the appellant was dismissed with costs.

From this judgment the appellant appealed to the Court of Appeal for Ontario. No other party appealed. The notice of appeal was directed to Charles Rich and Ethel Rich as well as to the respondent but it raised no question as to the judgment for indemnity given in favour of the defendant Charles Rich. The appeal was dismissed with costs. The appellant then appealed to this Court but did not make Charles Rich a party to the appeal.

Under these circumstances it would appear that this Court has no jurisdiction to interfere in any way with the respondent's judgment against Rich or with the judgment for indemnity which Rich holds against the appellant. It is for this reason that I do not think that any useful purpose would be served by examining the evidence with a view to determining whether it supports the finding of fact as to the amount of money advanced on the mortgage; and it becomes equally purposeless to consider the propriety of the award of interest. The liability of Rich to pay the $4729.98 to the respondent and that of the appellant to indemnify Rich have become *res judicata* by a judgment from which no appeal has been taken.

We were informed by counsel that the question whether the respondent could hold at the same time a judgment against Rich for payment of all the moneys secured by the mortgage and a judgment against the appellant for the same amount was raised for the first time in this Court. It is dealt with in the following terms in the appellant's factum:

> It is not clear how Walter G. Hunt and Charles Rich can be liable in the same degree. If the husband was the agent of the wife to receive the money then payment to him was good payment. If the husband was not the agent of the wife then payment to him was no payment and the mortgagor is liable to pay again. But if he was not the agent for the wife then the husband has done her no wrong.

This point was argued before us and counsel were given permission to file supplementary memoranda dealing with it. These have now been filed and it is clear that the respondent is maintaining and relying upon her judgment against Rich as she is entitled to do. In the result her mortgage remains a valid charge and she will be entitled to collect the amount of the judgment from Rich who, in turn, will be entitled to collect indemnity from the appellant. While the formal judgment at the trial did not so provide, the respondent will, of course, be bound to give a discharge of the mortgage upon receiving payment in full of her judgment against Rich.

In my view the respondent cannot have judgment against both Rich and the appellant. This is not on the theory that all her rights of action are merged in her judgment against Rich. Her cause of action (if any) against the appellant is not the same as her cause of action against Rich. Her cause of action against the latter is, as set out in paragraph (*e*) of her prayer for relief quoted above, for payment pursuant to the covenant in the mortgage. This she has successfully maintained for the full amount of the moneys advanced on the mortgage and interest. Having done so, I find it difficult to discern any cause of action remaining in her against the appellant.

In his supplementary memorandum counsel for the respondent submits that she has a right of action against the appellant for conversion of the mortgage. Leaving aside the question whether a mortgage is capable of being converted, this submission fails on the facts. The respondent

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holds the mortgage as security on the lands of Rich and has judgment against him for all the moneys thereby secured. She has suffered no damage by the alleged conversion. Alternatively, it is suggested that she has a right of action against the appellant to recover the moneys paid to him by Rich in purported payment of the moneys secured by the mortgage as money had and received. In my view it was open to the respondent to assert such a cause of action against the appellant upon the facts, as they have been found, that she was the owner of the mortgage, that the appellant received from Rich moneys intended by the latter to be payments on the mortgage and retained such moneys. But the respondent by taking the judgment in this action which she holds against Rich has of necessity asserted as against him that the moneys which Rich paid to the appellant were not paid on account of the mortgage, and she cannot be heard to assert as against the appellant that they were so paid. *Allegans contraria non est audiendus.* The respondent having taken and maintained the position that no moneys have been paid on account of the mortgage cannot maintain an action against the appellant for having had and received such moneys. It is only if the moneys paid by Rich are regarded as paid on account of the mortgage that the appellant can be said to have received them to the use of the respondent. If they are treated, as the respondent treats them, as not being paid on account of the mortgage, then the appellant has received them, not to her use, but to that of Rich, and it is Rich who has the right of action against the appellant for the moneys so had and received by him. This right of action Rich asserted in his claim for indemnity and he has been granted judgment on it.

An alternative way of expressing the matter is that, on learning the facts, the respondent was entitled to affirm or deny that the appellant had received the moneys from Rich as her agent; if she so affirmed then the payments extinguished the mortgage; if she denied the agency then the mortgage remained unaffected. By taking her judgment against Rich she adopted the latter course.

The principle which, in the circumstances of this case, prevents a court allowing a judgment against both Rich and Hunt is stated by Riddell J.A., giving the unanimous judgment of the Court of Appeal of Ontario, in *M. Brennen & Sons Mfg. Co* v. *Thompson* (1):

> . . . As they (i.e., the causes of action) are different, the judgment on one does not merge the other; if and when the one *transit in rem judicatam,* the other is wholly unaffected. It is not on the principle of merger that the Court would not allow a judgment against both, but on the principle that the Court could not allow a plaintiff to have two judgments based on two contradictory and inconsistent sets of facts.

In my view the respondent's judgment against the appellant in the action cannot stand.

As to the counter-claim I do not find it possible, on the evidence, to interfere with the concurrent findings of fact below that the moneys paid by the appellant to the respondent to be used by her in connection with her rooming house venture were gifts to her; and consequently the appeal so far as it relates to the counter-claim fails.

There remains the question of costs. In my view the respondent was entitled to proceed against both the appellant and Charles Rich as the latter took the position that the payments made by him to the appellant were, in the circumstances, payment to the respondent. She had alternative claims, one against Rich and one against the appellant, and was entitled under the rules to join them in one action. When, however, the litigation reached the point of judgment I think that the respondent was bound to choose against which of the two she would take judgment and it is now plain that, if she cannot have judgment against both, she has decided to maintain her judgment against Rich. In my view, the Court should, of its own motion, have refused to give a judgment against both of these parties and there is no doubt that the point should have been raised by the appellant at an earlier stage. On the whole, I think the proper course is to allow the respondent her costs of the action up to the conclusion of the trial and that otherwise the costs should follow the event.

The appeal in so far as it relates to the judgment in the action should be allowed and the action, as against the appellant, dismissed. The respondent is entitled to recover

(1) (1915) 33 O.L.R. 465 at 469.

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from the appellant her costs of the action up to the conclusion of the trial in so far as they were increased by the appellant being made a defendant. The appellant is entitled to recover his costs in the Court of Appeal and in this Court, so far as they relate to the action, from the respondent. The dismissal of the counter-claim is affirmed and the respondent is entitled to her costs in the Court of Appeal and in this Court in relation thereto.

Appeal allowed and action as against appellant dismissed.

Counter-claim dismissed.

Solicitors for the appellant: *Kennedy & Ross.*

Solicitors for the respondent: *Hughes, Agar, Amys & Steen.*

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*PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock, Estey, Locke, Cartwright, Fauteux and Abbott JJ.