SARKIS ALEXANIAN (*Defendant by Writ*) ..... APPELLANT;

AND

JOHN DOLINSKI (*Defendant by Order of Local Master*) ..... RESPONDENT.

1968
*Jan. 23, 24
Apr. 1

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgages—Final order of foreclosure—Subsequent sale of property—Order of Local Master conditionally setting aside and vacating final order of foreclosure and extending time for redemption—Whether in the circumstances foreclosure should have been reopened.

The appellant (A) was the mortgagor of certain lands and premises in St. Catharines. The mortgagee (N) started foreclosure proceedings against the said property because of arrears, and judgment directing a reference was given on June 15, 1962. The report of the Local Master, issued on November 30, 1962, fixed the date for redemption at May 23, 1963. A did not redeem on or before that date and on June 17, 1963, N obtained a final order of foreclosure. The property was advertised for sale on June 28, July 3 and July 10. On August 6, 1963, N accepted an offer to purchase from one P and his wife, who were nominees for the respondent (D). The sale was to be completed on September 6, 1963. On that date, before the transaction was completed at the Registry Office, the Local Master made an order reopening the foreclosure on the following terms: (a) Payment in full on September 13, 1963, during banking hours. In default of such payment the application was to be dismissed. (b) That A provide a sufficient and appropriate bond, guarantee and indemnity to N in

* PRESENT: Cartwright C.J. and Martland, Judson, Hall and Spence JJ.

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reference to any loss or claim which might arise against N as a result of the sale made of the property on August 6, 1963. The parties attended before the Local Master on September 13, 1963, when the mortgage account was fixed at $27,577.62. A certified cheque for $27,400 was delivered to N's solicitors and the balance of $177.62 was sent by letter dated September 16, 1963. No bond, however, was delivered.

In the meantime D had taken steps to set aside the order of the Local Master. On September 13, 1963, he took out a *praecipe* order to have himself made a party plaintiff in the action. On September 20, 1963, the Local Master set aside this *praecipe* order but made another order adding D as a party defendant. D then appealed. On October 16, 1963, Hughes J. set aside the order of the Local Master. After the time for appeal from the order of Hughes J. had expired, the firm of solicitors which had acted throughout for both N and D sent a cheque for $27,577.62 to A's solicitor. On November 9, 1963, N's sale to D was completed. Thereafter A made an application to extend the time for serving notice of appeal from the order of Hughes J., and such time for appeal was extended to December 17, 1963. The appeal was heard by the Court of Appeal on January 23, 1964, and was unanimously dismissed. The members of the Court agreed with the opinion of Hughes J. that the foreclosure should not have been reopened after the final order had been made where the mortgagor had made no serious effort to raise the money before the expiry of the time for redemption and that there were no special circumstances in the case that would require a Court of equity to interfere. The final order of foreclosure having been made, a sale had now been made to a *bona fide* purchaser who had paid his money.

Subsequently, an appeal from the judgment of the Court of Appeal was brought to this Court.

Held (Spence J. dissenting): The appeal should be dismissed.

Per Cartwright C.J. and Martland, Judson and Hall JJ.: The review of this case before Hughes J. and the Court of Appeal was thorough and complete and in accordance with principle. There was no ground for interference by this Court.

Per Spence J., *dissenting:* Had the purchaser (respondent) been a stranger to the whole transaction and represented independently throughout the appellant could not have advanced a sufficiently strong reason to persuade the Court to take the most unusual step of vacating the final order of foreclosure after the owner, by virtue of that final order of foreclosure, had made a *bona fide* sale to such third party. However, the purchaser, a former employee of the appellant, was no stranger and had chosen to employ the same firm of solicitors, who were acting for the mortgagee. The knowledge of the firm, in the circumstances, was the knowledge of both their clients, the mortgagee and the respondent.

When the appeal proceeded before Hughes J., the order under appeal had been acted on by both parties—by the mortgagor's payment of the exact amount required and the mortgagee's acceptance of that amount, and the mortgagee's demand for and definition of the indemnity bond required in that order. The respondent was so affected by the knowledge of these circumstances that he could not succeed in separating his position from that of the mortgagee.

[*Boulton v. Don & Danforth Road Co.* (1865), 1 Ch. Chrs. 335, applied.]

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APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Hughes J., reversing an order of the Local Master which conditionally set aside and vacated a final order of foreclosure and extended the time for redemption of a certain mortgage. Appeal dismissed, Spence J. dissenting.

Sarkis Alexanian, appellant, in person.

Ross A. Wilson, Q.C., for the respondent.

The judgment of the Chief Justice and Martland, Judson and Hall JJ. was delivered by

JUDSON J.:—This litigation results from the reopening of a final order of foreclosure by the Local Master at St. Catharines, Ontario. On October 16, 1963, on appeal to a judge of the High Court, this order was set aside by Hughes J. On January 23, 1964, the Court of Appeal[1] dismissed the appeal from the order of Hughes J. Notice of appeal was given to this Court on March 3, 1964. The appeal came on for hearing in December of 1967 and January of this year. It is necessary to set out step by step what happened in this action.

The action was between William C. Nickerson, as mortgagee, and Sarkis Alexanian, as mortgagor, to foreclose a mortgage given by Alexanian to Nickerson. There was serious default under the mortgage. Judgment directing a reference was given on June 15, 1962. The report of the Local Master was issued on November 30, 1962. In December of 1962, the mortgagee paid the 1959 taxes to save the property from a tax sale. May 23, 1963, was the last day for redemption and on June 27, 1963, the final order of foreclosure was granted and it was registered a few days later. Alexanian had served notice, early in the action, as required by the Rules of Court, that he desired an opportunity to redeem. He was personally present on the reference before the Local Master and thus had knowledge of the amount found due on the mortgage and the last day for redemption.

The property was advertised for sale on June 28, 1963, and two subsequent days, one week apart. On August 6,

[1] [1964] 1 O.R. 360, 42 D.L.R. (2d) 219, *Sub nom. Nickerson v. Alexanian.*

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1963, Nickerson accepted an offer to purchase from William and Shirley Patriquin. These people were nominees for the respondent John Dolinski. The sale was to be completed on September 6, 1963. On that date, before the transaction was actually closed at the Registry Office, the Local Master made the order in question reopening the foreclosure on terms. The terms were:

(a) Payment in full on Friday, September 13, 1963, during banking hours. In default of such payment the application was to be dismissed.

(b) That Alexanian provide a sufficient and appropriate bond, guarantee and indemnity to the plaintiff in reference to any loss or claim which might arise against the plaintiff as a result of a certain sale made of this property to William and Shirley Patriquin.

The evidence is that these possible claims were twofold:

(1) from the real estate agent who had brought in the offer for 5 per cent on the purchase price of $40,200—$2,010; and

(2) from the purchaser John Dolinski for approximately $1,000 for legal fees and costs in connection with a mortgage that he negotiated with the British Mortgage Company, and for his legal costs on the purchase.

The same firm of solicitors acted throughout for Nickerson and Dolinski. Originally, when Dolinski's offer was accepted, both Nickerson and he had the same interest in completing the sale. When the Local Master reopened the foreclosure on September 6, Nickerson took no strong stand. He was concerned with getting back his money and with the indemnity against the costs of the real estate agent and Dolinski. Dolinski, however, was interested in completing the sale.

On September 13, 1963, the parties attended before the Local Master when the mortgage account was fixed at $27,577.62. A certified cheque for $27,400 was delivered to Nickerson's solicitors and the balance of $177.62 was sent by letter dated September 16, 1963. Nothing turns on this and no one suggests that the sending of the balance of $177.62 on September 16 was not compliance with the Master's order as to payment in full by September 13. No

bond, however, was ever delivered. I will come back to this matter later. Nickerson did not appeal against the Local Master's order.

In the meantime, Dolinski had taken steps to set aside the order of the Local Master. On September 13, 1963, he took out a *praecipe* order to have himself made a party plaintiff in the action. On September 20, 1963, the Local Master set aside this *praecipe* order but made another order adding Dolinski as a party defendant. Dolinski then appealed. On October 16, 1963, Mr. Justice Hughes set aside the order of the Local Master. On November 4, 1963, Messrs. Miller, Fullerton and Martin, solicitors for both Nickerson and Dolinski, sent a cheque for $27,577.62 to Harold M. Smith of Toronto. Mr. Smith was the solicitor who had negotiated for the money to enable Alexanian to redeem. He was acting for the new proposed lender and for Alexanian. The time for appeal from the order of Hughes J. had expired. On November 9, 1963, Nickerson's sale to Dolinski was closed, tax arrears for the years 1960, 1961, 1962 and 1963 were allowed to the purchaser. These amounted to approximately $8,000. Nickerson paid the real estate agent's commission of $2,010, and the Sheriff's costs of obtaining possession of the premises—$1,847.97. On January 23, 1964, the Court of Appeal gave judgment dismissing the appeal from the order of Hughes J., and the notice of appeal to this Court followed on March 3, 1964. Then a period of almost four years elapsed before the appeal was heard.

I wish to make it clear at this point that this delay was entirely the fault of the parties. It was Alexanian's duty, as appellant, to proceed with despatch according to the rules. The respondent had the right to move for dismissal for delay if Alexanian did not proceed with due despatch to complete the appeal. This action was not taken until some time in 1967. The result was that the appeal was then completed and heard.

I will deal next with the terms of the contract of sale. The vendor, when he accepted the offer, had a final order of foreclosure. The price was $40,200, which, according to the real estate agent, was a good price at the time. Alexanian had different ideas of the value of the property but there is no evidence that could justify a Court in holding that this was a sale at an undervaluation. It realized in

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cash $32,274.44. The mortgage account at the time of closing was approximately $27,750. The surplus was approximately $4,500. From this has to be deducted the $2,010 payable to the real estate agent and the costs of obtaining possession. Mr. Justice Roach was right when he said in the Court of Appeal that there was, in fact, little or no surplus.

If this appeal is to succeed it must be on the ground that there was a redemption of this mortgage on September 13, 1963, pursuant to the Local Master's order. It is argued that there was such a redemption by the deposit of the two cheques in the trust account of Messrs. Miller, Fullerton and Martin, and the retention of the money in the trust account until November 4, 1963. There could be no redemption when the money was never turned over to Nickerson and when it was returned on November 4, 1963, to the solicitors for Alexanian, who were apparently glad to get it back although they did complain about a non-allowance of interest. Further, the requirement of the bond was never waived. Alexanian could not insist on an assignment of the mortgage to his nominee on the mere payment of the money. He had to produce this bond in addition. Alexanian made no attempt to comply with the order of the Local Master at this point.

It is suggested that the correspondence between the solicitors constitutes such a waiver. I now set out the correspondence in full and to me it is quite apparent that there was no such waiver:

September 16, 1963.

Messrs. Miller, Fullerton & Martin,
Barristers and Solicitors,
Box 176, 71 King St.,
ST. CATHARINES, Ontario.

Attn. F. L. Miller, Esq.

Re: Nickerson vs. Alexanian et al.

Dear Sirs:

In accordance with the writer's arrangement with your Mr. Miller on Friday last, I am pleased to enclose herewith the trust account cheque of Harold M. Smith, in the sum of $177.62, in favour of your firm. This amount represents the balance due to the plaintiff, in accordance with the findings of the local Master on Friday last; the sum of $27,400.00 having been delivered to you at the time of the reference.

It is understood and agreed that you will hold the enclosed funds, together with the funds delivered at the time of the reference in escrow

pending delivery to this office of duly executed documents assigning the plaintiff's mortgage and the judgment herein from the plaintiff to Caroline M. Stafford, of the Township of North York, Trustee.

I understand further that from the funds delivered to you, you will pay off the claim of William C. Nickerson in full and will attend payment of the Sheriff's account and the fire insurance premium referred to in your Statement of Account dated September 13th.

When delivering the required documents, will you also let me have the original order of His Honour Judge Darby dated September 6th.

Please let me also have a memorandum of your disbursements respecting the registration of the certificate of order re-opening the foreclosure proceedings and setting aside the final order of foreclosure and for any other disbursements you may have incurred on my behalf.

Your courtesy in attending these matters on the writer's behalf is very much appreciated.

Yours very truly,

(sgd) George E. Bell
GEORGE E. BELL.

GEB: J
Enclosure

September 18, 1963.

Harold M. Smith Esq.,
Barrister etc.,
80 Richmond Street West,
Toronto 1, Ontario.

Attention: George E. Bell Esq.,

Re: Nickerson vs. Alexanian et al.

Dear Mr. Bell:

I acknowledge and thank you for your letter of September 16th enclosing cheque in the sum of $177.62 representing the balance due to the Plaintiff in accordance with the findings of the Local Master at St. Catharines.

We agree that the total of the funds which you have delivered to us will be held in escrow pending delivery to you of the executed documents assigning the mortgage and judgment. These documents were prepared on Monday for execution by Mr. Nickerson but unfortunately due to the pressure of business the writer did not have them ready when Mr. Nickerson came into the office. Therefore we have made an appointment with Mr. Nickerson for this afternoon to have them executed and if he is able to get in in time to catch the afternoon mail we will forward them to you under separate cover.

We have obtained from the Registrar of the Supreme Court a Certificate of the original order made by the Local Master and will have it registered and return the duplicate original of the Certificate together with the original order to you.

We understand, of course, that out of the funds which were delivered to us we are to pay the Sheriff's account and the fire insurance premium.

There is one other matter which has not been mentioned and that is of course the bond to be provided to indemnify Mr. Nickerson against any claims which may be brought against him arising out of the agree-

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ment of purchase and sale which was entered into on August 6th, 1963. Would you please advise us as to what is proposed in this connection in accordance with the Judge's Order, and it seems to us that under the circumstances that if the bond is to be given by Alexanian it should be with at least two sureties. As far as I am able to estimate the total amount involved would be a maximum of $3,000.00 assuming that we were compelled to pay everybody in full. Please let me hear from you in connection with this as soon as possible.

Yours very truly,
MILLER, FULLERTON & MARTIN,
Per:
(F. L. Miller)

FLM: id

November 4th, 1963.

Harold M. Smith Esq.,
Barrister etc.,
Suite 2005,
80 Richmond Street West,
Toronto 1, Ontario.

Attention: George E. Bell Esq.

Re: Nickerson vs. Alexanian et al

Dear Sirs:

We enclose herewith our cheque in the sum of $27,577.62 being the funds which you paid to us pursuant to the Order made by His Honour Judge Darby. The other requirement of the said Order, namely that a bond be provided to indemnify Mr. Nickerson against any claims which may be brought against him arising out of the agreement of purchase and sale, was never complied with as referred to in our letter of September 18th and we therefore have no documents in that connection to return.

The Order of His Honour Judge Darby having been set aside and the time for appeal having expired we are returning the funds to you.

Yours very truly,
MILLER, FULLERTON & MARTIN,
Per:
(F. L. Miller)

FLM: id
Encl.

November 16th, 1963.

Messrs. Miller, Fullerton & Martin,
Barristers & Solicitors,
71 King Street,
ST. CATHARINES, Ontario.

Dear Sirs: Re: Alexanian

This will acknowledge your letter of November 13th.

When you returned to me the money which I paid to you for an Assignment of your client's original mortgage on the property, you did not include the accrued interest.

We feel that during the interval in question our client was entitled to the interest accruing on the mortgage, which I calculate at $245.88.

Upon receipt of this amount, I will obtain the Discharge for which you ask.

Yours truly,

(sgd) H. M. Smith

HMS: cs

The suggestion of waiver arises from the following sentence in the letter of Messrs. Miller, Fullerton & Martin:

> Therefore we have made an appointment with Mr. Nickerson to have them executed and if he is able to get in in time to catch the afternoon mail, we will forward them to you under separate cover.

Later in the letter the question of the bond was raised. The solicitors did not send the assignment of the mortgage; they did not turn over the money to their client. Dolinski was proceeding with his efforts to get himself joined in the action for the purpose of appeal. This was known to the other side. They appeared on the appeal to Hughes J. to oppose the appeal. Then after the time for appeal from the order of Hughes J. had expired, the money was returned and accepted.

Part of the trouble arises from the action of the Local Master in reopening the foreclosure without first making Dolinski a party defendant. He had a right to be heard on the motion to reopen and to be joined in the action: *Boulton v. Don & Danforth Road Co.*[2]

Messrs. Miller, Fullerton & Martin, solicitors for Nickerson, could not deliver an assignment of this mortgage without being assured of costs that Nickerson would have to meet amounting to nearly $3,000. They had the order of the Master requiring this and no waiver can be spelled out from the correspondence and the conduct of the parties. If they had delivered the assignment of the mortgage without the bond, they would undoubtedly have been liable to their client for the amount of his loss.

It was argued before us that if Hughes J. had known of the settlement of the mortgage account before the Local Master on September 13, 1963, and the delivery of the certified cheque for $27,400, and the subsequent delivery of the balance of $177.62, and the retention of these moneys

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[2] (1865), 1 Ch. Chrs. 335.

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until November 6, he would not have made the order that he did and reverse the Local Master. I do not agree with this submission for two reasons:

(a) Hughes J. was not trying a theoretical question. The order of the Local Master directed payment in full "by Friday, September 13, 1963, during banking hours" and that on default the application be dismissed with costs to be taxed. If payment had not been made in full, there would have been nothing to litigate before Hughes J.

(b) Both parties were represented on the motion before Hughes J., Dolinski by Mr. Fullerton and Alexanian by Mr. Bell, who was an associate of Harold M. Smith. It was he who had come to St. Catharines to attend the settlement of the account on September 13, 1963, and had personally delivered the certified cheque for $27,400.

Counsel for Alexanian now submits that what happened on September 13 and 16 was payment of the mortgage and that he is now entitled to a vesting order vesting the property in Alexanian free and clear of the mortgage without further payment.

I am therefore going to proceed on the assumption that Hughes J. knew that he was dealing with actualities and not theory and that there had been compliance with para. 3 of the Local Master's order. His reasons for judgment make it clear that he was of the opinion that in this case there had been an erroneous exercise of the Local Master's discretion in reopening this foreclosure. His opinion was that the foreclosure should not have been reopened after the final order had been made where the mortgagor had made no serious effort to raise the money before the expiry of the time for redemption and that there were no special circumstances in the case that would require a Court of equity to interfere.

The Court of Appeal was of the same opinion. Roach J.A. said:

> In this case there is no evidence of what has been referred to in a number of decisions as intrigue between the mortgagee plaintiff and the purchaser. There is no evidence of any effort or scheme by the mortgagee to freeze out the appellant from this property and to acquire the appellant's equity if there was one. The attitude of the plaintiff mortgagee

as disclosed in the material before us was not one in which he was attempting to overreach or take undue advantage of his position as a mortgagee. The mortgage was in arrears, taxes remained unpaid and the plaintiff mortgagee was required to pay some of those taxes in order to protect his mortgage interest. He offered to the mortgagor, who was then in possession, to accept the arrears of interest and the taxes which he, the mortgagee, had been required to pay, and enable the mortgagor to put the mortgage in good standing to that extent and permit him to remain in possession. The mortgagor did not comply with the offer that the mortgagee had thereby made.

Certain dates are significant. The interim judgment of foreclosure was dated June 15, 1962, and fixed the date for redemption as May 23, 1963. The final order of foreclosure was dated June 17, 1963. Now it is pertinent to enquire, having regard to the factors that are important in deciding this case, what efforts, if any, the mortgagor made, prior to the final order of foreclosure, to put this mortgage in good standing. He did not have the cash, apparently, with which to do it. He said he did two things; one, he had a claim of some sort against an employee based on an allegation of fraud and the farthest he is willing to go, apparently, in the material presented to us, in so far as that claim is concerned, is to say that he was hopeful that he might be able to recover something on that claim and use the amount that he thereby recovered to put this mortgage in good standing. He did not at any time seek the assistance of the Court in recovering on that allegation of fraud against that unnamed employee.

* * *

The final order of foreclosure having been made in the circumstances that I have only briefly outlined, we are not satisfied that there are any special circumstances that would require this Court as a Court of equity to interfere with the title acquired by Dolinski who in our opinion on the material before us was a *bona fide* purchaser who had not been guilty of any intrigue or conduct unworthy of a purchaser attempting to acquire a property in an open market. The equities, as it seems to us, are all in favour of the respondent. We agree with the Honourable Mr. Justice Hughes that the appellant did not show the diligence that was required of him in an effort, and I am now speaking particularly of the period before the final order of foreclosure was made, to obtain the money with which to redeem. The final order of foreclosure having been made, a sale has now been made to a *bona fide* purchaser who has paid his money.

In my respectful opinion the review of this case before Hughes J. and the Court of Appeal has been thorough and complete and in accordance with principle.

I can see no ground for interference by this Court and I would dismiss the appeal with costs.

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal for Ontario[3] pronounced on January 23, 1964, which dismissed the appeal from the

[3] [1964] 1 O.R. 360, 42 D.L.R. (2d) 219, *sub nom. Nickerson v. Alexanian.*

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judgment of Hughes J. pronounced on October 16, 1963. By the latter judgment, Hughes J. had allowed an appeal from the decision of the Local Master at St. Catharines of September 6, 1963. The Local Master had by that judgment conditionally set aside and vacated a final order of foreclosure dated June 17, 1963, and extended the time for redemption of the mortgage to September 13, 1963.

The said final order of foreclosure although pronounced on June 17, 1963, is erroneously referred to in the said order of Hughes J. as having been dated June 24, 1963, which was the date of the certificate thereof and the registration of that certificate.

The appellant had entered into a mortgage with William Nickerson as mortgagee on November 28, 1956, in the principal sum of $20,000. This mortgage having fallen very considerably into arrears, the said William Nickerson as mortgagee issued a writ of foreclosure and obtained a judgment in the action on June 15, 1962. That judgment in the ordinary form of mortgage action was for reference to the Local Master at St. Catharines. The report of the said Local Master at St. Catharines upon such reference was settled on November 30, 1962, and in that report the time for redemption was fixed as May 23, 1963. The mortgage was not redeemed on or before that date and no redeption had taken place thereafter so that the said William C. Nickerson as plaintiff in the mortgage action as I have said caused a final order of foreclosure to be issued on June 17, 1963. The said William C. Nickerson then proceeded to advertise the property for sale, advertisements being inserted in the St. Catharines Standard on June 28 and July 3 and 10, 1963. By this advertisement, the said William C. Nickerson called for sealed tenders for the sale of the mortgaged premises. The advertisement stated that further particulars might be obtained at the office of the solicitors who had acted for Mr. Nickerson in issuing the writ of foreclosure. One tender was received. The tenderers were William and Shirley Patriquin and the tender was for $40,200 of which sum $30,000 was to be paid by the vendor accepting a mortgage back. Mr. Nickerson refused this tender. Shortly thereafter, one Walker, a real estate agent in St. Catharines, delivered to Mr. Nickerson an offer to purchase in which the proposed purchasers, the same persons William and Shirley Patriquin, offered to purchase the

premises in question at the same price of $40,200 payable $4,000 upon acceptance of the offer and the balance in cash on the closing date subject to normal adjustments. This offer dated July 30, 1963, was accepted by Mr. Nickerson on August 6, 1963, and in his acceptance in the usual form he agreed to pay to the said Walker a commission of 5 per cent on the sale price. The offer originally required the transaction to be closed on August 30, 1963, but Mr. Nickerson and the proposed purchasers agreed to postpone the date for closing of the sale to September 6, 1963.

Mr. Nickerson has sworn that he instructed Walker to change the date of the closing of the transaction to September 6, 1963, in order to give the appellant an opportunity to vacate the premises. The respondent John Dolinski, a former employee of the appellant in his rug business, has sworn that the said offer to purchase made by William and Shirley Patriquin and accepted by Mr. Nickerson was made by them as his undisclosed agents, and the respondent's solicitor Charles William Fullerton in his affidavit sworn on January 22, 1968, has deposed that the respondent and his wife Ruby Dolinski brought to him the said agreement of purchase and sale.

On September 3, 1963, that is, only three days before the sale from Mr. Nickerson to the respondent was to be carried out, the appellant served upon the solicitor for Mr. Nickerson a notice of motion returnable on September 6, 1963, for an order vacating the final order of foreclosure together with the appellant's affidavit sworn on said September 3, 1963.

The ground upon which the order was sought was that the appellant has been able to obtain mortgage financing in an amount sufficient to pay off all the encumbrances and that the proceeds of the mortgage were to be available on September 13, 1963. On September 6, 1963, the Local Master considered the appellant's application in the presence of counsel for the plaintiff, *i.e.*, Mr. Nickerson, and for the appellant. The Local Master gave judgment that day setting aside the final order of foreclosure and extending the time for redemption to September 13, 1963. The Local Master gave reasons for this disposition in long and detailed form.

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It was quite evident that the Local Master had been informed of the offer to purchase by the Patriquins as agents for Dolinski accepted by Mr. Nickerson and that the transaction was to be closed on that same day. The Local Master said in part:

> I am advised by counsel for the respondent, that the sale which was to have been concluded has not, to this moment, as yet been concluded. I understand that a member of the same firm is also acting for the purchasers. I think, however, that this has no bearing on the matter, being a matter of choice. However, it is of interest, whether it is conceivable or not, that the counsel for the applicant produces an abstract from the Sheriff's Office showing that two people with the same names are also judgment creditors in the amount of over $1300 under a writ filed on January 27, 1963. Again this, of course, may not affect the purchasers' ability to conclude this purchase.
>
> I do not know what particular rights or obligations the purchasers have otherwise acquired or assumed, but exercising my discretion, and distinguishing this case from those cited, namely, that there has been a very short time since the issue of the final order of foreclosure, that the defendant is still in possession, that he has his job and his home in the premises, that he appears to have made every effort and to have finally succeeded in obtaining sufficient funds to more than pay off and redeem his property, I shall make an order setting aside the final order of foreclosure and reopening the reference and fixing Friday, September 13 at 2:00 o'clock to resume the reference. The applicant must be prepared to pay the plaintiff in full including all proper expenses, also including costs of $100 in connection with this application and to make other and suitable arrangements concerning the present circumstances having regard to whatever rights the purchasers may have as outlined in Marriott's textbook dealing with practice in mortgage actions in Ontario, second edition. I may say, however, in connection with this, it appears to me that the purchasers went into this transaction with their eyes wide open, undoubtedly Mr. Walker as their agent, no doubt explained to them the mortgage situation. In any event, the purchasers' solicitor knew of the mortgage situation and the knowledge of the solicitor must be imputed to the purchasers. The purchasers knew the mortgage had been but only recently foreclosed and it is hard to understand or believe that the purchasers would not have an accurate knowledge of the situation as it existed here. I also note there is a very substantial excess value alleged to be in the premises and there, for example, would appear to be no information as to the fact that the purchasers have even inspected the property as purchasers before making their offer.

As the Local Master points out, the solicitor for the respondent was throughout the partner of the solicitor for Mr. Nickerson and one must assume that the knowledge of one partner was the knowledge of both and the knowledge of each was the knowledge of the respective clients. Therefore, although the respondent Dolinski was not represented by counsel before the Local Master on September 6, 1963,

his solicitor's partner was present and was arguing strongly against the vacating of the final order of foreclosure and any extension of time for redemption.

The respondent's solicitor in his affidavit sworn only two weeks later has deposed that:

> Before I could register the deed to John Dolinski, I was advised by my office that the Vendor's solicitor had called and left a message that His Honour Thomas J. Darby had expressed the opinion that the deed to my client should not be registered if that had not already been done and that I was not to register the said deed if that was the case.

The formal order of the Master made on September 6, 1963, is in six paragraphs which I think should be repeated verbatim:

> 1. IT IS ORDERED that the Final Order of Foreclosure made hereon and dated the 17th day of June, 1963, and the Certificate hereof issued on the 24th day of June, 1963, and registered in the Registry Office for the Registry Division of the County of Lincoln as No. 92958 be and the same are hereby vacated and set aside.
>
> 2. AND IT IS FURTHER ORDERED that the time for redemption in the action herein on behalf of the Defendant, Sarkis Alexanian, be and it is hereby extended to Friday, September 13th, 1963, during banking hours.
>
> 3. AND IT IS FURTHER ORDERED that the Defendant, Sarkis Alexanian do pay in full the Claim of the plaintiff in the action on Friday, September 13th, 1963, during banking hours and that on default the application to be dismissed with costs to be taxed.
>
> 4. AND IT IS FURTHER ORDERED that the Defendant Sarkis Alexanian and the Plaintiff William C. Nickerson or their counsel do attend on September 13th, 1963, at the hour of 2 o'clock in the afternoon before the Local Master of the Supreme Court of Ontario at the Court House in the City of St. Catharines, in the County of Lincoln to determine the Plaintiff's claim.
>
> 5. AND IT IS FURTHER ORDERED that the costs of this application be and they are hereby fixed at $100.00 and to be paid to the Plaintiff as part of the Plaintiff's account on the 13th day of September, 1963.
>
> 6. AND IT IS FURTHER ORDERED that the Defendant, Sarkis Alexanian provide sufficient and appropriate bond guarantee and indemnity to the Plaintiff in reference to any loss of claim which may arise against the Plaintiff as a result of a certain sale made on this property to one William and Shirley Patriquin.

Thereafter, on September 13, 1963, the same solicitor for Mr. Nickerson, and the then solicitor for the appellant again attended the office of the Local Master and the mortgage account was settled at the sum of $27,577.62. The said solicitor for the appellant delivered at once to the solicitor for Mr. Nickerson a certified cheque payable to

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the solicitors' firm for $27,400. That cheque was dated September 13, 1963, and certified in Toronto on that day. It is quite evident that it was for an amount as closely as could be calculated beforehand to pay the mortgage account in full. As a matter of fact, it proved to be $177.62 too small an amount, and the then solicitor for the appellant promised to forward to the solicitor for Mr. Nickerson by mail the balance of the said moneys.

By a letter dated September 16, 1963, and addressed to the firm of solicitors who, as I have said, were then acting for both Mr. Nickerson and the respondent, the then solicitor for the appellant forwarded his firm cheque for $177.62. Paragraph 2 of that letter reads as follows:

> It is understood and agreed that you will hold the enclosed funds, together with the funds delivered at the time of the reference in escrow pending delivery to this office of duly executed documents assigning the plaintiff's mortgage and the judgment herein from the plaintiff to Caroline M. Stafford, of the Township of North York, Trustee.

There was no mention in that letter of any bond as referred to in para. 6 of the Local Master's order quoted above.

On September 18, the said firm of solicitors who had received the letter of the 16th replied to the then solicitor for the appellant as follows:

Harold M. Smith, Esq.,
Barrister, etc.,
80 Richmond St. West,
Toronto 1, Ontario.

Attention: George E. Bell Esq.

Re: Nickerson vs. Alexanian et al.

Dear Mr. Bell:

I acknowledge and thank you for your letter of September 16th enclosing cheque in the sum of $177.62 representing the balance due to the Plaintiff in accordance with the findings of the Local Master at St. Catharines.

We agree that the total of the funds which you have delivered to us will be held in escrow pending delivery to you of the executed documents assigning the mortgage and judgment. These documents were prepared on Monday for execution by Mr. Nickerson but unfortunately due to the pressure of business the writer did not have them ready when Mr. Nickerson came into the office. Therefore we have made an appointment with Mr. Nickerson for this afternoon to have them executed and if he is able to get in in time to catch the afternoon mail we will forward them to you under separate cover.

We have obtained from the Registrar of the Supreme Court a Certificate of the original order made by the Local Master and will have it registered and return the duplicate original of the Certificate together with the original order to you.

We understand, of course, that out of the funds which were delivered to us we are to pay the Sheriff's account and the fire insurance premium.

There is one other matter which has not been mentioned and that is of course the bond to be provided to indemnify Mr. Nickerson against any claims which may be brought against him arising out of the agreement of purchase and sale which was entered into on August 6th, 1963. Would you please advise us as to what is proposed in this connection in accordance with the Judge's Order, and it seems to us that under the circumstances that if the bond is to be given by Alexanian it should be with at least two sureties. As far as I am able to estimate the total amount involved would be a maximum of $3,000.00 assuming that we were compelled to pay everybody in full. Please let me hear from you in connection with this as soon as possible.

Yours very truly,
MILLER, FULLERTON & MARTIN
Per:
(G. L. Miller)

No reply was received by the solicitors who had forwarded that letter. However, on September 13, 1963, that same firm of solicitors acting for the respondent had filed a *praecipe* for "an order pursuant to Rule 300 joining John Dolinski as party plaintiff" and on the same day, the Local Registrar at St. Catharines acting on that *praecipe* made an order so adding the respondent as party plaintiff. On September 16, 1963, the respondent swore his affidavit in which he outlined the offer to purchase the premises to which I have referred and alleged that he had incurred certain liabilities in reference thereto.

By an order dated, in error, Friday, September 19, 1963, quite evidently made on Friday, September 20, 1963, the Local Master set aside the order of the Local Registrar adding the respondent as a party plaintiff and by another order of the same day designated the respondent as a party defendant.

I find some significance in the fact that there was an affidavit by the then solicitor for the appellant sworn on September 17, 1963, served upon the solicitors for the respondent together with a notice of application to set aside the aforesaid *praecipe* order and then filed in which the then solicitor for the appellant swore in part "payment of the plaintiff's claim has been made in full to the solicitors

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for the plaintiff and the plaintiff has been ordered and authorized to assign the mortgage to Caroline M. Stafford of the Township of North York, and the solicitors for the said plaintiff William C. Nickerson have undertaken to deliver a duly executed assignment of mortgage and an assignment of judgment prepared in accordance with a direction and authorization received by them". This affidavit was before the Local Master when he made the two orders on September 20, and should have been available at the time of the subsequent consideration of that order on appeal.

By the notice of appeal dated September 13, 1963, John Dolinski as plaintiff (on that day and until September 20, 1963, he was a plaintiff in the action by virtue of the *praecipe* order which was vacated on the latter date) appealed to the presiding judge in chambers at Osgoode Hall from the order pronounced by the Local Master at St. Catharines vacating the final order of foreclosure and extending the time for redemption to September 13, 1963. This is quite evidently a notice of appeal from the Local Master's order of September 6 which has been set out above. That notice of appeal was served on the then solicitors for the appellant herein on September 13, 1963, and service was admitted. The said appeal was to be heard on September 17, 1963, but there is an endorsement that on that day it was adjourned for one week.

By virtue of Rule 514 of the Ontario Rules of Practice an appeal may be taken by "a person affected by an order of the Master" on notice served within four days and returnable within ten days after the decision complained of. The appeal came on for hearing before Hughes J. on September 24, 1963, and in his reasons the learned judge noted that he had extended the time for service of the notice of appeal to September 21 and the time for return of the motion to September 27.

Hughes J. reserved judgment and gave carefully detailed reasons therefor on October 16, 1963. By his order, Hughes J. allowed the appeal and set aside the order of the Local Master made on September 6, 1963. The appellant here appealed from that order of Hughes J. and on January 23, 1964, the Court of Appeal for Ontario dismissed that appeal.

Although, as I have pointed out, the fact of the payment on September 13, 1963, by the then solicitors for the appellant to the firm of solicitors here acting for both Mr. Nickerson and the respondent was known to the Local Master at St. Catharines and was referred to by him in his disposition of the application which came before him on September 20, there seems to have been no mention of these circumstances to the Court of Appeal when that Court considered the appeal from the order of Hughes J. Although the members of this Court sought enlightenment on that astounding circumstance, we received no explanation from any counsel. In my view, it is the important circumstance which must be considered on this appeal. As the argument developed in this Court, no real attack was made on the reasoning of Hughes J. on which he based his reversal of the order of the Local Master nor upon the reasoning of the Court of Appeal when that judgment was confirmed. Nor, in my opinion, could any criticism be made of those reasons.

Had the purchaser been a stranger to the whole transaction and represented independently throughout then I am of the opinion that the appellant could not have advanced a sufficiently strong reason to persuade the Court to take the most unusual step of vacating the final order of foreclosure after the owner, by virtue of that final order of foreclosure, had made a *bona fide* sale to such third party. There may be circumstances in which a Court would not be justified in doing so on any circumstances which have been shown. The situation, however, is not that situation. As the appellant has sworn without contradiction, the respondent, the purchaser, was no stranger. Although he and his wife had been employees of the appellant and resulting from their employment there have been strenuous controversies as yet unsettled, the respondent chose not to reveal his identity until after he had made, through the use of an agent's name, first a tender and then when that was refused, an offer to purchase, and the latter had been accepted. The respondent chose to employ the same firm of solicitors who were acting for the mortgagee, Mr. Nickerson, and, as I have said, there can be no significance that one member of that firm conducted the business for Mr. Nickerson while another member of the firm conducted the business for the respondent, both doing so in the firm

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name. Under such circumstances, the knowledge of one member of the firm, as I have said, was the knowledge of the other, and the knowledge of the firm was the knowledge of both their clients, Mr. Nickerson and the respondent.

The Local Master made an order on September 6 which in exact terms required that the appellant "do pay in full the claim of the plaintiff in the action on Friday, September 13th, 1963, during banking hours . . ." and made a further order that the appellant and the plaintiff Nickerson or their counsel do attend on September 13 at two o'clock in the afternoon before him to determine the amount of the plaintiff's claim. When the parties acted on that order attending with their solicitors at that time and determining the exact amount due and then the appellant paying the exact amount in the fashion which I have outlined, both parties had complied with the order.

It is true that by para. 6 of the Master's order of September 6, 1963, "it is further ordered that the defendant Sarkis Alexanian provide sufficient and appropriate bond guarantee and indemnity to the Plaintiff in reference to any loss or claim which may arise against the plaintiff as a result of a certain sale made on this property to one William and Shirley Patriquin", but the provision of that bond was not required to be made on September 13. The solicitor for Mr. Nickerson realized this and in his letter to the then solicitor for the appellant dated September 18, 1963, which I have quoted above, he undertook to forward the assignment of the mortgage and judgment required by the solicitor for the appellant so soon as his client Mr. Nickerson could attend him to execute the same, and then merely asked for a bond in the amount of $3,000 with two sureties, without in any way making it a term of the escrow upon which he had received the sums totalling $27,577.62. By that date the same firm of solicitors were proceeding as solicitors for the respondent Dolinski to appeal from the decision of the Local Master which had directed the payment and required the bond. The payment had been made and for the first time the amount and terms of the bond, previously never defined, were suggested by the solicitors for Mr. Nickerson.

When the appeal proceeded before Hughes J., the order under appeal had been acted on by both parties—by the

appellant's payment of the exact amount required and the respondent's acceptance of that amount, and the respondent's demand for and definition of a bond required in that order.

Subsequently, when the appellant was evicted from the premises, the appellant and his family resisted and as a result were charged with obstructing the peace officer. They were convicted and appealed to the Court of Appeal for Ontario which Court composed of the same members who had dismissed the appellant's appeal against the order of Hughes J., with this additional information, remarked:

> In our opinion, in the circumstances as they then stood, Alexanian was entitled to resist the execution by the Sheriff and his assistants of the writ of possession on the strength of which the Sheriff and his assistants were purporting to act. It was as of that date a trespass upon the premises of Alexanian. It was more than a trespass, it was an effort to evict him from the mortgaged premises whereas of that date he was entitled to remain in peaceful possession *he having paid the mortgage in full.*

(The italicizing is my own.) With that comment I agree.

If Hughes J. were aware of these most important circumstances, and the material is utterly silent upon the point nor is there any reference thereto in the learned judge's reasons, then he failed to appreciate that when he considered the appeal the order from which the appeal had been taken had already been acted upon by this appellant and by Mr. Nickerson. I am of the opinion that the respondent was so affected by the knowledge of these circumstances that he could not succeed in separating his position from that of Mr. Nickerson. Therefore, I would allow the appeal.

The problem which the Court then faces is to determine a proper disposition of the appeal.

The respondent went into possession of the premises. The Registrar's abstract shows that he placed thereon three mortgages, the first two of which have been discharged but the third of which in favour of a company known as Bentex Limited is for the principal amount of $40,000 and that he has subsequently conveyed the lands for $1 and other valuable consideration (the details of which have not been revealed) to one Anthony Benedek who is said without denial to be "interested in Bentex Limited". This mortgage to Bentex and the conveyance to Anthony Benedek were both dated and both registered

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long after the registration on September 19, 1966, of a certificate of the appellant's appeal to this Court from the judgment of the Court of Appeal and therefore such transactions as they represent must have been carried out with notice of this appeal.

The said notice of appeal to this Court was dated March 3, 1964. That appeal was not completed for a very long time and no proceeding was taken on behalf of the respondent to cause the appeal to be dismissed for want of prosecution until 1967. The appeal first came on for argument in this Court at the end of the term in 1967 and for the first occasion after the appeal from the learned Local Master to Hughes J. an application was made to introduce the evidence as to payment on September 13, 1963. The Court considered such application, permitted the introduction of that evidence, and evidence in reply thereto, and put the appeal over until the month of January 1968. When the appeal was called at that time, the Court permitted additional evidence in the form of affidavits to be filed by both parties and also permitted the filing of the correspondence between the said solicitor for the appellant and the solicitor for the respondent during the months of September and November 1963 which in the latter consisted of a letter from the solicitor for the respondent speaking therein as solicitors for Mr. Nickerson dated November 4, 1963, enclosing the solicitor's cheque for $27,577.62, "being the funds which you paid to us pursuant to the order made by His Honour Judge Darby". The solicitor continued:

> The other requirement of the said order, namely, that a bond be provided to indemnify Mr. Nickerson against any claims which may be brought against him arising out of the agreement of purchase and sale was never complied with as referred to in our letter of September 18th and we therefore have no documents in that connection to return ...
>
> The order of His Honour Judge Darby having been set aside and the time for appeal having expired we are returning the funds to you.

To that letter, the then solicitor purporting to act for the appellant replied requesting interest on the said sum during the interval in which it was held by the solicitors for the respondent. In his affidavit, the said solicitor for the appellant has stated that he returned the sum to his client, that is, not the appellant but the proposed mortgagee.

It is, in my view, significant that the firm of solicitors acting for both Mr. Nickerson and for the respondent held

these funds from September 13, 1963, to November 4, 1963, and only returned them after the time for appeal from the order of Hughes J. had expired. In other words, on one hand they were still acting under the order of the learned Local Master and on the other hand they were attempting to have that order vacated.

Under all of these circumstances, I am of the opinion that the reference must be continued. I can see no part that Mr. Nickerson should be required to play upon such reference. I am of the opinion that the respondent when he purchased from Mr. Nickerson with all the knowledge which must be attributed to him has simply stepped into the shoes of Mr. Nickerson and that therefore there must be an accounting between the appellant and the respondent proceeding from September 13, 1963, to the date of the reference, and that on the reference a new date of redemption must be set for the payment of the amount due on such reference. Upon the reference, of course, the respondent must be credited with any disbursements properly made in the acquiring and maintenance of the property including payments for such matters as taxes, and he must be debited with the rents received and other income from the property including some amount attributable to his own occupation. I would, therefore, so order.

Under the order of the Court of Appeal, the appellant is to pay the costs in that Court and the order of Hughes J. requiring the appellant to pay the costs of the appeal before him was confirmed. I believe that a proper disposition would be to leave those orders as to costs in effect but provide that the respondent should pay the costs of the appeal to this Court.

Appeal dismissed with costs, SPENCE J. *dissenting.*

Solicitors for the appellant: O'Driscoll, Kelly & McRae, Toronto.

Solicitors for the respondent: Wilson, Miller, Fullerton, Wilson & Partington, St. Catharines.