1922

*Feb. 10, 13.
*Mar. 29.

THE DOMINION BANK AND THE LONDON & CANADIAN INVESTMENT CO. ..... APPELLANTS;

AND

DAVID G. MARSHALL ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Sale of land—Public auction—Mistake—Parcel intended to be sold and bought—Not included in particulars—Rights of purchaser.

The receiver of the C. P. Lumber Co. was, by order of the court, authorized to borrow from the appellant bank a certain sum which should be a first charge on the whole assets of the company and the order provided for a sale of those assets in default of repayment. Such default having occurred, the bank sold the property to the Investment company appellant by public auction, the conduct of the sale being in the hands of the bank's solicitor under the supervision of the court. Owing to this solicitor being under the impression that a certain parcel of land did not belong to the Lumber Company, it was omitted from the particulars of sale. The solicitor for the receiver and the bank approved the particulars in the belief that they covered the omitted parcel and the purchasers bought under the same erroneous belief. One condition of the sale provided that "any error of description * * * shall not annul the sale nor shall any compensation be allowed in respect thereof." There was evidence that the omitted parcel had a very substantial value but no evidence was adduced that a greater price might have been obtained for the assets, if the omitted parcel had been included. Upon the discovery of the mistake, the appellants applied for an order by the court that the receiver execute and deliver to the purchaser a conveyance of the said parcel omitted in the particulars of the sale; this application was resisted by the respondent acting as trustee for the bondholders of the Lumber Company.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

Held that the appellants' application should not be granted; and that, although the purchaser may have been entitled to rescission of the sale on the ground of mistake, the order prayed for should not be granted, as the appellants had failed to shew anything which would raise an equity against the bondholders such as might have enabled the court to direct that the deficiency in the land should be made good by the receiver at the bondholders' expense.

Judgment of the Court of Appeal ([1921] 3 W.W.R. 209) affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Morrison J. and dismissing an application by the appellants for an order as above stated.

In an action brought on behalf of bondholders a receiver and manager of the assets of the Canadian Pacific Lumber Company was appointed by order of the Supreme Court of British Columbia and was authorized to borrow from the Dominion Bank a sum not exceeding $310,000, which should become a first charge on the assets of the company. The order provided for a sale of the assets of the company to satisfy the bank's charge in the event of default in re-payment on the date specified. Such default having occurred, a sale of the company's assets took place under the supervision of the court, whose officer approved the advertisement, conditions and particulars of sale. The conduct of the sale was in the hands of the bank's solicitor. The purchasers were the London and Canadian Investment Company, co-appellants with the bank. Owing to the bank's solicitor being under the impression that a certain parcel of land did not belong to the Lumber Company, it was omitted from the particulars of sale. The solicitor for the receiver, who was aware that the

(1) [1921] 3 W.W.R. 209 sub nom. *Marshall* v. *Canadian Pacific Lumber Company.*

1922

THE DOMINION BANK AND THE LONDON AND CANADIAN INVESTMENT CO. v. MARSHAL

omitted parcel belonged to the Lumber Company, approved the particulars in the belief that they covered the omitted parcel; and the purchasers at the sale bought under the same erroneous belief. For the omitted parcel it is said on behalf of the bondholders that $75,000 can now be obtained, and their trustee resists an application made on behalf of the bank and the purchasers that the receiver should be directed to execute a conveyance of this parcel to the purchasers. The bondholders do not appear to have participated in the sale or to have been in any way responsible for the omission of the parcel in question from the particulars or for the mistaken impression of the purchasers that it had been included in the sale.

Mr. Justice Morrison made the order asked for by the bank and the purchasers; but, on appeal by the trustee for the bondholders, the Court of Appeal set this order aside and dismissed the application, Martin J.A. dissenting. The applicants now seek the restoration of Mr. Justice Morrison's order.

Greer K.C. and *Shepley* for the appellants.

F. Congdon K.C. for the respondent.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin, with which I fully concur, I would dismiss this appeal with costs.

IDINGTON J.—The attempt to include in the sale a parcel of land which is alleged by the receiver to have a very considerable value and which was not only deliberately omitted from the particulars but also by no fair reading of the advertisement could be supposed to have been offered for sale is rather surprising.

The motion made about six months after the vesting order of the court carrying out the result of the sale as it actually took place, to have that additional property given the purchaser is something for which I venture to think no precedent can be found, and especially so in face of the conditions of sale, amongst which was the following:—

12.—The description of the property in the particulars is believed and shall be deemed to be correct, but if any error of description as to quantity or measurements or otherwise be found therein, it shall not annul the sale, nor shall any compensation be allowed in respect thereof.

There was much said in argument here about the intention of the parties concerned to sell the properties of the company in question and it was argued as if that had been advertised, which it was not.

I cannot see that the advertisement suggested any such thing or could convey to the minds of any bidders that such was the intention especially in face of such a condition of sale as I quote above.

The party who was the successful bidder indeed took the trouble to go to the solicitor in charge of the sale to learn from him if the intention was to sell the entire properties of the company and was answered affirmatively that such was the intention.

The solicitor was quite honest in giving such a reply for he laboured then, no doubt as he had in framing the advertisement, under a mistake of fact, relative to some expropriation proceeding which had been taken at one time but later abandoned.

The fault, so far as I can see, if any, was on the part of the bidder whose bid was successful, but who does not seem to have taken any pains to enlighten another bidder, or any one at the sale, of the mistake in the advertisement.

1922

THE DOMINION BANK AND THE LONDON AND CANADIAN INVESTMENT CO. v. MARSHAL

Idington J.

I do not think such a bidder, or his principals, should profit by any such a course of dealing, or try to shift on to an innocent solicitor the entire burden of blame for what happened.

If the bidder imagined he was getting this property now in question he should have warned both the solicitor and others of the mistake which was being made.

And if he did not, then neither he nor his principal has any right to gather to themselves the property in question.

The case of *In re Thellusson* (1) so much pressed upon us by counsel for appellant, if read aright, I submit, requires the dictum cited therefrom to be applied in this case conversely to his client instead of to the receiver; and the decision therein indicates that the receiver herein pursued the right course when after learning of the mistake as happened, instead of yielding, as he might have done, to please others at the expense of the parties whose rights it was his duty to guard.

In light of the consideration I have given the evidence and the argument presented the foregoing is all I need add to the reasons of Mr. Justice Galliher, speaking for the majority of the court below, in which, subject thereto, I agree.

I am of the opinion that this appeal should be dismissed with costs.

DUFF J.—It does not admit of doubt, I think, that the Supreme Court of British Columbia possessed authority to set aside the sale in question in this appeal; and that on a proper application by the purchaser he would, with the consent of the bank, have been relieved from his purchase on the ground that in the circumstances disclosed a refusal to do so would not have been consistent with fair dealing.

(1) [1919] 2 K. B. 735.

But the present application for an order rectifying the deed raises considerations of a different order.

The plaintiffs in the bondholder's action in whose application the receiver was appointed were entitled to insist upon the terms of the order of the 20th July 1917 (under which the advances were made and by which the charge was created securing those advances) being observed; and that the sale should be proceeded by a proper public notice of the nature of the property offered. They were entitled to require that this term of the order framed for their protection should be carried out. The notice actually given was not intended to indicate the particular property in question as one of the parcels offered and it is hardly argued that it did so. It seems to follow that in the absence of some conduct on the part of the respondents precluding them from insisting upon their rights under the order the appellant is not entitled either technically, or as a matter of substantial justice, to have this parcel conveyed to him.

It is conceivable of course that evidence might have been offered shewing that the selling price could not have been affected by the fact of the parcel in question not being nominated in the advertisement as one of the subjects of the sale. If this were demonstrated and the opposition of the respondents shown to be merely vexatious a different question would have arisen. There is no such evidence nor are there any facts in proof giving rise to an equity precluding the respondents from insisting upon the protection which the order provides for.

The appeal must be dismissed with costs.

1922

THE DOMINION BANK AND THE LONDON AND CANADIAN INVESTMENT CO. v. MARSHAL.

Anglin J.

ANGLIN J.—The appellants have clearly made out a case of mistake on the part of both vendor and purchasers. They may even have established that the receiver was in some measure responsible for that mistake. They have not shewn, however, that a greater price might not have been obtained for the assets of the Lumber Company, had the omitted parcel of land been included in the particulars of sale. That that parcel had a very substantial value admits of no doubt on the material before us. It may well be that the purchasers would have been entitled to rescission on the ground of mistake had they sought that relief. But they appear not to have desired rescission—possibly because they feared that on a re-sale they might not secure such an advantageous purchase. However that may be, what the appellants seek is rectification of their mistake. That can be effected only at the expense of the bondholders, represented by the respondent Marshall. The appellants have utterly failed to shew anything which raises an equity against the bondholders such as might have enabled the court to direct that the deficiency in the land which the purchasers believed they were acquiring should be made good by the receiver at the bondholders' expense.

I would dismiss the appeal with costs.

BRODEUR J.—This is a bondholder's action brought by the respondents under a deed of trust and mortgage made in 1911 in their favour against the Canadian Pacific Lumber Company. A receiver was appointed. The company went into liquidation and, by order of the court, in 1917, the receiver was empowered to borrow money from the Dominion Bank, the appellant, for the purpose of carrying on business;

and it was provided in the order of the court that the receiver should issue certificates which were constituted a first charge upon the whole of the property and assets of the company and that in default of repayment the bank should be at liberty to sell the whole property at public auction.

The loan was made by the bank, certificates were issued. The loan not having been repaid, the property was offered for sale by public auction in one lot. Conditions and particulars of sale were prepared by the solicitors of the receiver and of the Dominion Bank. In the particulars of sale, however, lot 14 was not included because the solicitor for the bank then acting for the government had taken certain expropriation proceedings of this lot some years ago. Being under the impression that this lot was no more the property of the liquidated company and not being aware that these expropriation proceedings had been later on abandoned by the government, he failed to insert this lot, no. 14, in the particulars of sale amongst the assets to be sold.

This omission having been discovered after the date at which the sale was made to the London and Canadian Investment Company, a motion was made to the court for an order directing the receiver to convey the said lot 14 to the purchaser. This order was granted by the Supreme Court but was refused by the Court of Appeal.

There is no doubt that there was an intention on the part of the solicitor who drafted the particulars of the sale to include all the properties belonging to the liquidated company. But as he was under the impression that this lot did no more form part of the

1922

THE DOMINION BANK AND THE LONDON AND CANADIAN INVESTMENT CO. v. MARSHAL

Brodeur J.

assets, it was not included. We have no means to find out whether the lot in question would have produced a larger price or not. The only evidence we have with regard to its value is that it is considerable.

It may be also, as is asserted by the manager of the purchasing company, that he was under the impression when he made his bid that he was purchasing the property in dispute, but we do not know whether the other interested persons had the same impression. It is a question of error and mistake; and it seems to me that the particulars of the sale are conclusive as to what properties were offered for sale.

The deed might be set aside for error; but I do not think it would be within the power and the duty of the court to give the to purchaser the lot which was not included in these particulars.

The appeal should be dismissed with costs.

MIGNAULT J.—I concur with Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitors for the appellants, The Dominion Bank: *Tiffin & Alexander.*

Solicitors for the appellant, The London & Canadian Investment Company: *Wilson, Whealler & Symes.*

Solicitors for the respondent: *Davis & Company.*