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THE TRUSTS AND GUARANTEE COMPANY LIMITED (PLAINTIFF).. } APPELLANT; *May 1. *June 13.

AND

GEORGE HENRY McLEOD.....(DEFENDANT);

AND

WILLIAM BUXTON (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Limitation of actions—Mortgage—Transfer of land subject to mortgage—Liability of transferee to mortgagee under implied covenant under Land Titles Act, Alta., R.S.A., 1922, c. 133, s. 54—Period of limitation for bringing action—Limitation of Action Act, R.S.A., 1922, c. 90, s. 3; Real Property Limitation Act, 1874 (Imp.), c. 57, s. 8.

M., by mortgage under seal and registered, mortgaged land in the province of Alberta to plaintiff, and subsequently, by transfer, not under seal, made pursuant to the Alberta *Land Titles Act*, and registered, transferred the land to B., who thereby became liable to plaintiff, under the covenant implied by virtue of s. 54 (1) of said Act, to pay the mortgage money. More than six years (the period of limitation applicable to a simple contract debt) but less than 12 years after registration of the transfer or any payment on account or written acknowledgment of liability by B., the plaintiff sued B. in Alberta for payment.

Held (reversing judgment of the Appellate Division, Alta., 23 Alta. L.R. 565) that B.'s liability to plaintiff was not statute barred. The period of limitation in Alberta for bringing action to recover money secured by mortgage made under the Alberta *Land Titles Act* is 12 years. (*Limitation of Action Act*, R.S.A. 1922, c. 90, s. 3; *Real Property*

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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Limitation Act, 1874 (Imp.), c. 57, s. 8; and other statutes, considered); and that was the period applicable to the implied covenant in question.

Per Duff, Newcombe, Rinfret and Smith JJ.: The covenant implied under s. 54 is, not a simple contract, but a covenant in its ordinary and primary sense, that is, an agreement under seal.

Per Lamont J.: Whether or not the implied covenant is a covenant in the sense of an agreement under seal, in view of the language in which it is couched (in s. 54) the transferee's liability upon it is co-extensive with the mortgagor's liability on the mortgage; and an action thereon may be brought within the same period of limitation as applies to the mortgagor's liability.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) holding that the liability in question of the respondent to the appellant was statute barred. The material facts of the case are sufficiently stated in the judgments now reported, and are indicated in the above head-note. The matter came before the Supreme Court of Alberta by way of stated case, which was referred by Walsh J. to the Appellate Division. The stated case is set out in full in the judgment of Smith J. The appeal was allowed with costs.

M. M. Porter for the appellant.

A. Macleod Sinclair, K.C. for the respondent.

The judgment of Duff, Necombe, Rinfret and Smith J. J. was delivered by

SMITH J.—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta (1) in a case stated upon consent by the Trial Division.

The stated case is as follows:

"1. By an Instrument of Transfer in writing, made pursuant to the provisions of the Land Titles Act and Amendments thereto, not under seal, executed by the Defendant, George Henry McLeod, dated the 24th day of November, 1917, and registered in the Land Titles Office for the South Alberta Land Registration District on the 23rd day of January, 1918, as No. 522 C.A., the Defendant, William Buxton, the transferee therein named, became the registered owner of the following lands situate in the Province of Alberta, and being composed of the East Half of Section Fourteen (14), in

(1) 23 Alta. L. R. 565; [1928] 3 W.W.R. 205.

Township eleven (11), Range Twenty-two (22), West of the Fourth (4th) Meridian, containing 320 acres more or less, reserving unto the Crown all mines and minerals.

2. At the time of registration of said transfer the said lands were subject to a mortgage in favour of the Plaintiff, duly executed under seal by the Defendant, George Henry McLeod, dated the 3rd day of April, 1917, and duly registered on the 17th day of April, 1917, as No. 2546 B.S.

3. The Defendant, William Buxton, does not deny but admits that by virtue of the registration of said transfer he became liable to the Plaintiff under and by virtue of the provisions of Sections 54 and 55 of the said Land Titles Act.

4. A period of over six years has elapsed since the date of registration of said transfer and since the date of any payment on account or of any written acknowledgment of the said liability by the said Defendant, William Buxton.

Question for the Consideration of the Court:

Was the said liability of the Defendant, William Buxton, statute barred at the time of the commencement of this action, i.e., the 31st day of January, 1928?

The Plaintiff and the Defendant, William Buxton, hereby agree to the submission of the Special case, as above stated, to a Judge of the Supreme Court of Alberta, subject to the usual right of appeal, or of a reference to the Appellate Division, given by the Rules of the Supreme Court, and further agree that if the question of law hereby submitted is answered in the affirmative the action of the Plaintiff shall be dismissed with costs, and in the event that the said question shall be answered in the negative, Judgment shall be given against the Defendant, William Buxton, for the amount of the Plaintiff's claim with interest and costs, including the costs of and incidental to the disposition of this special case.

Costs in either case to be taxed on column 4 of Schedule C of the Tariff of Costs.

DATED at the City of Calgary, in the Province of Alberta, this 13th day of September, 1928."

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Section 54 of the *Land Titles Act* provides as follows:

54. (1) In every instrument transferring land, for which a certificate of title has been granted, subject to Mortgage or encumbrance, there shall be implied the following covenant by the transferee both with the transferor and the mortgagee, that is to say: That the Transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or encumbrance, after the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the Transferor from and against the principal sum or other moneys secured by such instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied, on the part of the transferor.

The word "covenant" in English law, in its ordinary and primary signification, means an agreement or promise under seal. Wharton's Law Lexicon, 11th ed., 240; Stroud's Judicial Dictionary, 168. It may, like many other words, by reason of circumstances or context have a different meaning in particular instances, but I am unable to discover any ground for supposing that in the section quoted above the Legislature intended to use the word otherwise than in its ordinary and primary sense. On the contrary, I should think it remarkable if it was used with the intention that it should be given any other meaning. If the intention was that only a simple contract was to be implied, there was no difficulty about using a word that would make that intention absolutely clear, such as "agreement". The use of the technical word "covenant", in dealing with conveyancing, indicates, in my opinion, that the deliberate intention was to provide for a real covenant; that is, an agreement under seal, the equivalent of what would be used in such a transaction in ordinary conveyancing if there were no such Act.

We are therefore to imply by the express words of s. 54 that the transferee Buxton, by the transfer in question, entered into a covenant, that is, an agreement under seal, with both the transferor and the mortgagee, in the terms set out in the section.

I agree with my brother Lamont, for the reasons stated by him, that the period of limitation in Alberta for bringing an action to recover money secured by mortgage in statutory form is twelve years, and it may follow, as he holds, that the same period applies to an action on the covenant to be implied under s. 54, even if it be regarded as a simple contract. Whether this be so or not, I think

it clear that the period of limitation under the implied covenant is twelve years for the reasons I have stated.

The appeal is allowed with costs here and below.

The question submitted is answered in the negative, and there will be judgment against the (defendant) respondent, as provided in the stated case.

LAMONT J.—This is an appeal from the Appellate Division of the Supreme Court of Alberta (1). The facts are all admitted and are as follows:—

Prior to November 24, 1917, the defendant McLeod was the registered owner of the E. ½ 14 — 11 — 22 — W. 4. That land was subject to a mortgage in favour of the appellant company made by McLeod, on April 3rd, 1917, and duly registered during that month. On November 24th, 1917, McLeod executed a transfer of the land, subject to the mortgage, to the respondent Buxton, which transfer was registered January 18, 1918. That transfer was not under seal. After the registration of the transfer a period of more than six years elapsed without any payment by Buxton on account of the mortgage, or any written acknowledgment of any liability on his part thereunder.

On January 31, 1928, the appellant brought action to compel payment of the mortgage by Buxton by virtue of the implied covenant contained in s. 54 of the *Land Titles Act*. Buxton claimed that the liability imposed on him by that section was merely a simple contract debt and that it was statute barred when the action was brought. There being no dispute as to the facts, a stated case was agreed upon and the following question was submitted to the court:

Was the liability of Buxton statute barred at the time of the commencement of this action, i.e. 31st day of January, 1928?

The Appellate Division, applying its own previous decision in *Societe Belge D'Enterprises Industrielles et Immobilieres* v. *Webster and Mill* (2), answered the question in the affirmative. From that decision this appeal is brought.

(1) 23 Alta. L.R. 565; [1928] 3 W.W.R. 205.
(2) 23 Alta. L. R. 129; [1928] 1 D.L.R. 465; [1927] 3 W.W.R. 817.

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The relevant sections of the *Land Titles Act* are sections 50, 54 and 55.

50. After a certificate of title has been granted for any land, no instrument shall be effectual to pass any estate or interest in such land (except a leasehold interest for three years or for a less period) or render such land liable as security for the payment of money, unless such instrument is executed in accordance with the provisions of this Act and is duly registered thereunder; but upon the registration of any such instrument in the manner hereinbefore prescribed the estate or interest specified therein shall pass, or, as the case may be, the land shall become liable as security in manner and subject to the covenants, conditions and contingencies set forth and specified in such instrument or by this Act declared to be implied in instruments of a like nature.

54. (1) In every instrument transferring land, for which a certificate of title has been granted, subject to mortgage or incumbrance, there shall be implied the following covenant by the transferee both with the transferor and the mortgagee, that is to say: That the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or incumbrance, after the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied, on the part of the transferor.

55. Every covenant and power declared to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument; and in any action for a supposed breach of any such covenant the covenant alleged to be broken may be set forth and it shall be lawful to allege that the party against whom the action is brought did so covenant, precisely in the same manner as if the covenant had been expressed in words in the transfer or other instrument, any law or practice to the contrary notwithstanding; and every such implied covenant shall have the same force and effect and be enforced in the same manner as if it had been set out at length in the transfer or other instrument.

For the appellant it was contended that, as the obligation of the transferee was, in s. 54, stated to be a "covenant", the employment of that word indicated a legislative intention that the liability of the transferee should be the same as though the covenant were under seal.

In the view I take of the case it is not necessary to determine this question, for I find in the obligation which s. 54 expressly imposes, and in the statutory enactments relating to limitation of actions, sufficient to enable me to answer the question submitted to the court.

The obligation imposed upon Buxton by the implied covenant is that he will pay the principal money and interest secured by the mortgage and will indemnify and

keep harmless the transferor from and against his obligations under the mortgage. This means that Buxton must idemnify McLeod and keep him harmless from any payments which McLeod, as mortgagor, may be called upon to make by reason of his covenants in the mortgage.

In view of the language in which the covenant is couched, Buxton's obligation to indemnify McLeod must be held to be co-extensive with McLeod's obligation to pay. The argument advanced in the respondent's factum that even if the mortgage debt be a specialty, Buxton's liability was only a simple contract debt, seems to me so inconsistent with the plain language of the covenant as not to merit serious consideration. When the mortagor's liability in respect of the mortgage is at an end the transferee's liability will cease. The important question, therefore, is: Within what period can an action be brought to enforce a mortgage debt in the Province of Alberta?

Before September 1, 1905, the territory now forming the Province of Alberta was part of the North West Territories. By s. 3 of c. 25 of the Statutes of 1886, the Parliament of Canada enacted that the laws of England relating to civil and criminal matters, as the same existed on the 15th day of July, 1870, shall be in force in the Territories in so far as the same are applicable and in so far as the same have not been, or may not hereafter be, repealed or modified. In the same year Parliament enacted the *Territories Real Property Act,* which introduced into the Territories the Torrens System of registration of land titles, which, with some slight variations, became the *Land Titles Act* of Alberta, after the creation of that province.

Among the laws of England in force on July 15, 1870, were those relating to limitation of actions.

By 21 Jac. I., cap. 16, all actions arising out of simple contracts or torts had to be brought within six years after the cause of action arose.

By 3 and 4 Wm. IV., cap. 42, s. 3 (Imp.) (1833) it was enacted that the time within which actions upon specialties must be brought was twenty years after the cause of action arose.

By 3 and 4 Wm. IV., cap. 27, the time within which an action could be brought to recover any sum of money

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secured by any mortgage, or otherwise charged upon or payable out of land, was fixed at twenty years.

These were the periods of limitation according to English law in force on July 15th, 1870, which were introduced into the Territories.

In 1874, however, another alteration was made. The *Real Property Limitation Act, 1874* (Imp.), cap. 57, s. 8, enacted as follows:—

> No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable * * *.

By an ordinance (No. 28 of 1893) the Legislative Assembly of the North West Territories declared the provisions of the Imperial Act of 1874 to be in force in the Territories. In 1905 the Province of Alberta was carved out of the North West Territories and the laws of the Territories were made applicable thereto, until repealed or altered by the Alberta Legislature. By c. 24 of 1906 the provincial legislature enacted the *Land Titles Act* under which a mortgage, to become a security on land, must be in the form prescribed by the Act and duly registered. Then in 1922 the Legislature enacted the *Limitation of Action Act* (R.S.A. 1922, c. 90), sections 2 and 3 of which are as follows:—

> 2. All actions for recovery of merchants' accounts, bills, notes, and all actions of debt grounded upon any lending or other contract without specialty shall be commenced within six years after the cause of such action arose and not afterwards.
>
> 3. The provisions of *The Real Property Limitation Act*, 1874, being chapter 57 of the Statutes of the Imperial Parliament, passed in the thirty-seventh and thirty-eighth years of Her Majesty's reign, are hereby declared to be in force in the Province and shall be deemed to have been in force in the Province and in the North-West Territories since the passing thereof.

By s. 3, above quoted the legislature, by reference, enacted that no action shall be brought to recover any sum of money, secured by any mortgage or otherwise charged upon or payable out of land, but within twelve years from the time the cause of action arose. The only mortgages in Alberta to which that provision could be applied were

those provided for in the *Land Titles Act*. By no other means could money be secured by mortgage on Alberta lands. The legislature, therefore, in enacting the section must have contemplated its application, so far as actions on mortgages are concerned, to the statutory mortgage of the *Land Titles Act*. The legislature, having jurisdiction to fix the period within which a mortgage debt shall become statute barred and having fixed it at twelve years, reference to other considerations is rendered unnecessary. As an action on the mortgage in question may be brought against the mortgagor, McLeod, within twelve years from payment or acknowledgment in writing, an action, in my opinion, may be brought on the implied covenant in s. 54 within the same time.

I would allow the appeal with costs; set aside the judgment below, and enter judgment for the plaintiff, with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Brownlee, Porter & Rankine.*

Solicitors for the respondent: *Mann, Dawson & Co.*