1944

*Mar. 16, 17
*April 25.

THOMAS PETRIE (DEFENDANT)..... APPELLANT;

AND

MARY ISABELLE PETRIE, ADMINISTRATRIX OF THE ESTATE OF JAMES COBEN PETRIE, DECEASED (PLAINTIFF). } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Mortgage—Liability of mortgagors as between themselves—Mortgagors each owning a parcel of land included in the mortgage—Dispute as to who was primarily liable—Facts and circumstances in evidence—Onus of proof.

APPEAL by the defendant Thomas Petrie from the judgment of the Court of Appeal for Ontario (1) dismissing (without written reasons) his appeal from the judgment of Urquhart J. (2) holding that the moneys secured by a certain mortgage made by the defendant Thomas Petrie and two of his sons, namely, the defendant William Kenneth Raymond Petrie, and James Coben Petrie (now deceased, of whose estate the plaintiff is the administratrix), on certain land which consisted of the farm of the said Thomas Petrie, the farm of the said William Kenneth Raymond Petrie and the farm of the said James Coben Petrie, deceased, should, as among the said parties, be paid, one-half thereof by the defendant Thomas Petrie (appellant) and one-half thereof by the plaintiff (respondent), administratrix of the estate of the said James Coben Petrie, deceased; that the said William Kenneth Raymond Petrie was liable for the moneys secured by the said mortgage only as surety and not as a principal debtor (from this latter holding there was no appeal). The appellant claimed that, as between him and the respondent, all of the moneys secured by the said mortgage should be paid by the latter, as administratrix of the estate of the said James Coben Petrie, deceased.

W. J. Arthur Fair for the appellant.

J. W. Pickup K.C. for the respondent.

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

(1) Noted in [1943] O.W.N. 317; [1943] 3 D.L.R. 812.

(2) [1943] O.W.N. 25; [1943] 1 D.L.R. 501.

On conclusion of the argument the Court reserved judgment and on a subsequent day delivered judgment dismissing the appeal with costs, Taschereau and Rand JJ. dissenting.

Kerwin J., with whom the Chief Justice concurred, after referring to matters and proceedings in the course of litigation between the parties, including proceedings prior to the judgments now in appeal (1), and after remarking that there was nothing in the mortgage document to indicate the manner in which, as among the mortgagors themselves, the payment was to be made, or whether any one, or more, of them, under any circumstances, would have a right of contribution or indemnity as against any of the others, pointed out as follows:

> The onus was on the appellant to rebut the presumption that the respondent was entitled to contribution from him. In *Boulter* v. *Peplow* (2) Maule J., with whom Williams J. and Talfourd J. agreed, stated that "prima facie, where one of three joint-contractors who are jointly sued, pays the whole debt, he is entitled to receive contribution from the other two"; and later: "There is nothing that I can discover here, to show that these parties did not intend that the ordinary implication should arise in this case". In the present case, if nothing appeared beyond the fact that Thomas, James and Kenneth executed a mortgage on their respective farms, in which mortgage they jointly and severally covenanted to pay the mortgage moneys, each of the mortgagors should pay one-third. It is true that it is difficult to conceive such a simple case being presented and we find evidence adduced on behalf of the parties to show the relations that existed between them and the circumstances surrounding the giving of the mortgage.

After reviewing and discussing the evidence, he concluded that it had been shown "that it was never contemplated that James should alone satisfy the mortgage debt but, on the contrary, that as between Thomas and James, the two of them were to pay" and the appeal should be dismissed.

Hudson J. stated that no question of law was involved; the controversy was upon the facts and the proper inference to be drawn therefrom; the evidence was in some respects inconclusive; the judgments in the two courts below, from which this appeal was taken, had done substantial justice between the parties and the appeal should be dismissed.

(1) See [1942] 1 D.L.R. 70 (Makins J.); [1942] O.W.N. 170 and 298, [1942] 2 D.L.R. 573 and [1942] 3 D.L.R. 528 (Court of Appeal).
(2) (1850) 9 C.B. 493; 137 E.R. 984.

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Rand J., dissenting, with whom Taschereau J. concurred, was of opinion that, on the evidence, a finding that appellant and James, between themselves, actually had in mind that each should bear one-half of the obligation, was quite incompatible with the governing features of the transaction; that an equal distribution of the burden between the two was warranted only on the basis that on the narrow issue of fact there was no preponderance of proof one way or the other; that the trial judge was unduly influenced in his findings by considerations of onus and presumption, and it should not be gathered from his reasons that, if he had taken the question as one purely of fact to be decided as between the deceased James and appellant, he would not have concluded that it was understood that the indebtedness created was, as between them, to be the debt of James only; that, under the circumstances "that presumption of joint and equal liability, which arises when the weight of fact inclines toward neither of two joint obligors, does not arise, and there was no right in the plaintiff as representing the estate of James to be exonerated from any part of the mortgage"; and therefore the appeal should be allowed and judgment entered declaring the lands of the defendants to be secondarily liable for the debt secured by the mortgage.

Appeal dismissed with costs.

Solicitor for the appellant: *W. J. Arthur Fair.*

Solicitors for the respondent: *Fasken, Robertson, Aitchison, Pickup & Calvin.*