1928
*May 1, 2.
*June 12.

THE COLONIAL INVESTMENT AND LOAN COMPANY (PLAINTIFF)..... } APPELLANT;

AND

HARRY JAMES MARTIN (DEFENDANT)..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA

Limitation of actions—Mortgage—Action in Manitoba to recover money secured by mortgage—Real Property Limitation Act, Man. (R.S.M. 1913, c. 116), s. 24 (1)—Application of s. 24 (1) in favour of person who joined with mortgagor in personal covenant—Surety—Mortgaged land situate outside of province.

The limitation of ten years imposed by s. 24 (1) of the Manitoba *Real Property Limitation Act* (R.S.M. 1913, c. 116) to an action to recover money secured by mortgage applies to the personal remedy on the covenant in the mortgage deed as well as to the remedy against the land (*Sutton* v. *Sutton*, 22 Ch. D. 511, followed); and it applies in favour of a person, not a surety, who has joined with the mortgagor in the personal covenant; (*Quaere*, whether or not it applies to the personal obligation entered into by a surety for the mortgagor. In the case in question it was held that, on construction of the mortgage agreement, the defendant had not entered into it as a surety but had assumed a personal obligation to the mortgagee to repay the loan); and it applies whether the land charged be within the province of Manitoba or elsewhere.

Judgment of the Court of Appeal of Manitoba (37 Man. R. 215) affirmed.

APPEAL by the plaintiff from the judgment of the Court of Appeal of Manitoba (1) affirming the judgment Curran J. (2) dismissing the plaintiff's action to recover from the defendant the amount alleged to be owing under

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Rinfret and Smith JJ.

(1) 37 Man. R. 215; [1928] 1 W.W.R. 245.

(2) [1927] 2 W.W.R. 94.

a mortgage agreement. The material facts of the case and the questions for consideration by the Court are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

A. C. McMaster K.C. for the appellant.

C. K. Guild for the respondent.

The judgment of Anglin C.J.C. and Mignault, Rinfret and Smith JJ. was delivered by

MIGNAULT J.—This is an appeal from a judgment of the Court of Appeal of Manitoba, which affirmed (Trueman J.A., dissenting) the judgment at the trial of the late Mr. Justice Curran. The litigation arose out of the following circumstances:

On May 9, 1911, at Sedley, Saskatchewan, The Sedley Rink Company, Limited, and Harry Marsden Paine, John O. Scott, John F. MacDonald and the respondent Martin entered into a mortgage agreement with the appellant in consideration of a loan by it to them of $1,000, payable by instalments, with interest at 8½ per cent. per annum. This mortgage is, I take it, in the usual form under the Saskatchewan Land Titles Act, and one of the questions is whether Paine, Scott, MacDonald and the respondent became parties to the mortgage as sureties for the Rink Company, or as principals with the latter. They were interested in the Rink Company, and no doubt it was considered more prudent to have them join in the mortgage.

The respondent Martin, at that time, resided in Sedley, but a year or so afterwards he removed to Grenfell, Saskatchewan. He joined the Canadian expeditionary forces shortly after the outbreak of the late war and was on active service in France. He was demobilized in 1919 at Edmonton, Alberta, where his family then resided. He subsequently moved to Dauphin, Manitoba, and when this action was brought resided in Winnipeg.

It appears that after the mortgage agreement some payments were made on account of instalments of principal and interest. The appellant obtained a final order of foreclosure in 1917, and caused itself to be registered as owner of the lands. Proceedings to collect the mortgage debt were unsuccessfully taken in Saskatchewan in 1919, but

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although the respondent, as well as Paine, Scott and MacDonald, were made defendants, their names were struck out for the reason, it is stated, that they were then protected by the moratorium legislation of Saskatchewan. In August, 1918, the rink building was destroyed by a cyclone and the appellant caused the ruins to be sold at public auction, the highest price obtainable being some $215, out of which the expenses of the sale had to be paid.

The present action was brought in Manitoba on the 13th of December, 1924. The amount claimed is $2,244.04, alleged to be the balance due for principal and interest on the mortgage, and the action is directed solely against the respondent, who is alleged to have signed the mortgage as a surety. The appellant avers that the principal debtor (meaning the Rink Company) defaulted on the 15th of December, 1914; the trial judge found that the default was on the 15th of November of that year.

The principal defence—in fact the one considered and given effect to in the courts below—is that the appellant's remedy against Martin is now barred by reason of the limitation period, ten years, under s. 24 of the Manitoba *Real Property Limitation Act* (R.S.M., 1913, c. 116, which originated in R.S.M. 1892, c. 89, and was subsequently re-enacted several times), having expired before this action was brought.

At the trial the appellant attempted to prove a part payment within the limitation period, to wit a payment alleged to have been received by it on December 15, 1914. An unsigned letter, with addressed envelope, purporting to have been sent to the appellant by its local agent at Selden, one John Auchmuty, was tendered in evidence. This letter, dated December 11, 1914, stated that a draft was enclosed for $80.50, being payment of principal due November 15 on loan no. 1038 on the Sedley Rink, and interest to date.

The letter with the draft was received apparently by the appellant on December 15, but so far as it could be evidence of a part payment on account of the mortgage loan, it would show a payment made to the appellant's agent not later than the 11th of December, and therefore outside of the limitation period.

John Auchmuty was not called at the trial, it was said that he had returned to Scotland, and there was no evidence showing from whom he received the money which he sent to his principals. The admissibility, to defeat the operation of the Statute of Limitations, of evidence of a part payment of that character, which emanates from the creditor or his agent, is very doubtful (Lightwood, Time Limit on Actions, p. 379). Here, however, it would not prove a payment within the limitation period and is therefore of no assistance to the appellant. Nor—unless it were established by competent evidence that on the 11th of December, 1914, everything that had fallen due under the mortgage agreement had been paid by the debtor—could it be said that the right to demand payment of money under the mortgage did not accrue to the appellant until the next instalment became due on the 15th of May, 1915, and that the limitation period started only then. The appellant makes no such contention here; it sought at the trial merely to prove a part payment within the limitation period, and in that it failed.

This brings me to consider the respondent's plea that the appellant's remedy against him under the personal covenant in the mortgage agreement is barred by reason of s. 24 of the Manitoba *Real Property Limitation Act*. This section—and, if it applies, no other provision of the Statute of Limitations need be looked at—is in the following terms:

> 24. 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 ten years next after the present right to receive the same 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 has been paid, or some acknowledgment of the right thereon has been given in writing signed by the person by whom the same is payable or his agent, to the person entitled thereto or his agent; and in such case no action, suit or proceeding shall be brought, but within ten years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was made or given.

Section 24 is taken from section 8 of the Imperial *Real Property Limitation Act*, 37-38 Vict. (1874) c. 57, (a re-enactment of section 40 of 3 & 4 Will. IV, c. 27 (1833), with a change of the prescriptive period), the language of which is in substance the same, except that the limitation

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period is twelve years under the Imperial statute and ten years under the Manitoba enactment.

The appellant meets the argument based on s. 24 by three contentions:

1. The respondent signed the mortgage agreement as a surety for the Sedley Rink Company, and even if s. 24 applies to the personal covenant of the mortgagor, it cannot be extended to the personal obligation entered into by a surety for the mortgagor;

2. Section 24, which enacts that no action or suit or other proceeding shall be brought to recover money secured by a mortgage charged upon or payable out of any land but within ten years after the present right to receive the same has accrued,—applies only to claims for money secured by a mortgage charged upon or payable out of land in Manitoba, and therefore, inasmuch as land in Saskatchewan was here charged, s. 24 does not defeat the appellant's action;

3. Even assuming that s. 24 could be applied to an action brought in Manitoba to recover money secured by a mortgage charged on land outside of Manitoba, it would not avail against an action brought against a person, other than the mortgagor, who in the mortgage agreement assumed liability for the payment of the mortgage debt, even although such person were not a surety for the mortgagor.

The first contention involves the construction of the mortgage agreement, and both courts have held that the respondent Martin did not enter into the agreement as a surety for the Sedley Rink Company, but assumed a primary and not an accessory obligation.

The appellant, in its statement of claim, treated the respondent as having been a surety for the Rink Company, and it now relies on the fact that the respondent (who had denied signing the agreement as surety or otherwise) in several paragraphs of his plea, containing, it is true, alternative contentions, expressly stated that if he had signed the agreement it was as a surety. This, however, inasmuch as it involves the construction of the instrument, is a question of law, and the courts below did not consider that the contention thus alternatively made in the respondent's plea precluded them from giving to the mortgage agreement its proper interpretation.

This agreement is not as clear as it might have been made. It is on a printed form of the appellant, and it begins by this statement:

We, the Sedley Rink Company, Limited, whose office is at the Village of Sedley, in the Province of Saskatchewan (hereinafter called the mortgagor), being registered as owner of an estate in fee simple in possession . . . in all that piece of land described as follows:—[description of three lots in the Village of Sedley.]

and

Harry Marsden Paine, merchant; John O. Scott, merchant; John F. MacDonald, merchant; and Harry James Martin, agent, all of Sedley aforesaid,

In consideration of the sum of one thousand dollars lent to *us* by the Colonial Investment and Loan Company (who and whose successors and assigns are hereinafter included in the expression "the mortgagees"), the receipt of which sum *we* do hereby acknowledge, covenant jointly and severally with the said mortgagees.

Firstly: That *we* will pay to them, the said mortgagees, the said principal money and interest thereon at 8½ per cent. per annum, as follows:—

Fifty dollars on the 15th day of November, 1911.

Fifty dollars on the 15th days of May and November in each of the years 1912, 1913, 1914 and 1915,

and the balance of the said principal sum $550 shall become due and payable on the 15th day of May, A.D. 1916 * * *.

There is an acceleration clause providing that on default of payment of any portion of the moneys hereby secured, the whole of the moneys shall become due and payable.

At the end of the agreement there is the following clause:

And for better securing to the said mortgagees the payment in manner aforesaid of the instalments hereinbefore provided for, and other charges and moneys hereby secured *we* hereby mortgage to the said mortgagees all our estate and interest in the lands above described.

In so far as the appellant is concerned—whatever may have been the relations of the parties *inter se*—it is impossible to construe the clauses which I have cited otherwise than as having created, on the part of the Sedley Rink Company, Limited, and of Messrs. Paine, Scott, MacDonald and the respondent, a personal obligation as principals to pay the money loaned, which is expressly stated to have been loaned to them. There is nothing to prevent several persons entering into a contract of loan as borrowers, one of whom gives a mortgage on his land to secure repayment of the loan. On the construction of the deed, I can discover naught that shows that it is anything else than what is expressly stated, i.e., a principal as well as a joint and

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several obligation assumed by the borrowers to repay the loan. The appellant's insistence that the respondent was merely a surety is prompted by its hope that it can thus exclude the application of s. 24. It relies on the decision of the English Court of Appeal in *In re Powers; Lindsell* v. *Phillips* (1), which, however, is an entirely different case. There a bond, separate from the mortgage agreement, had been given by third parties to secure in part the payment of the mortgage debt, and it was held that a claim on the bond did not come within section 8 of the English *Real Property Limitation Act*.

Four years later the same court decided the case of *In re Frisby; Allison* v. *Frisby* (2). In that case, the action was against a surety, who had joined with the mortgagor in covenanting to pay the mortgage debt, and the trial judge, Kay J., and Bowen L.J., in the Court of Appeal, were of the opinion that section 8 does not apply to an action on the covenant in a mortgage unless brought against the mortgagor or his representatives. Cotton L.J., expressed the contrary view, and Fry L.J., stated that he gave no opinion whether section 8 applies to an action against a surety. The ground of the decision was, however, that payment of interest by the mortgagor had prevented the statute from running in favour of the surety.

I cannot think that the appellant gets much assistance from these two cases. In both of them *Sutton* v. *Sutton* (3), with which I will presently deal, is referred to, but distinguished as not being in point.

However, the first contention of the appellant being predicated on the assumption that the respondent was a surety, whereas I find he was a principal, it is unnecessary to discuss further these two decisions, or to express any opinion on the question with which they deal.

The second and third contentions of the appellant may be taken together. They are that, in an action brought in Manitoba, s. 24 should be restricted to claims for money secured by a mortgage charged upon or payable out of land in Manitoba, and that, at all events, s. 24 cannot be applied to defeat an action brought, under the mortgage agreement, against a person other than the mortgagor.

(1) (1885) 30 Ch. D. 291. (2) (1889) 43 Ch. D. 106.
(3) (1882) 22 Ch. D. 511.

The appellant goes even further and asserts that an action against the mortgagor on the personal covenant does not come within s. 24.

The courts below decided this question against the appellant on the authority of the judgment of the English Court of Appeal in *Sutton* v. *Sutton* (1). It was there held that the limitation of twelve years (in Manitoba ten years) imposed by the *Real Property Limitation Act,* 1874, s. 8, to actions and suits for the recovery of money charged on land, applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land. The question there arose on a demurrer to the defendant's plea which had set up the statute to defeat an action by the plaintiff on the defendant's covenant in the mortgage deed.

Sutton v. *Sutton* (1) is cited in the two other cases which I have already referred to, and has always been considered in England as of binding authority. It was mentioned with approval in *In re England; Steward* v. *England* (2); distinguished, but considered binding, in *Barnes* v. *Glenton* (3); referred to in *London and Midland Bank* v. *Mitchell* (4); followed in *Kirkland* v. *Peatfield* (5); and applied in *In re Turner; Klaftenberger* v. *Groombridge* (6).

In Ontario, four years before *Sutton* v. *Sutton* (7) was decided, the Ontario Court of Appeal in *Allan* v. *McTavish* (8), had held that s. 11 of 38 Vict., c. 16 (Ontario), similar to s. 24 of the Manitoba statute, did not apply to an action on a covenant in a mortgage for the payment of the mortgage money. In his factum the respondent states, and I assume correctly, that *Allan* v. *McTavish* (8), was consistently followed in Ontario down to 1894, when the period for recovery on specialty contracts was cut down to ten years. In Ontario, by c. 34 of the Statutes of 1910 (10 Edw. VII), s. 24, subs. 1, it is enacted that no action shall be brought to recover *out of any land* or rent any sum of money secured by any mortgage charged upon or payable out of such land but within ten years after the right to receive the same has accrued. However, inasmuch as by s.

(1) (1882) 22 Ch. D. 511.
(2) [1895] 2 Ch. 820.
(3) [1899] 1 Q.B. 885.
(4) [1899] 2 Ch. 161.
(5) [1903] 1 K.B. 756.
(6) (1917) 86 L.J. Ch. 290.
(7) (1882) 22 Ch. D. 511.
(8) (1878) 2 Ont. A.R. 278.

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49, subs. *k*, of the same statute, the limitation period is ten years in an action upon a covenant contained in an indenture of mortgage made after the 1st of July, 1894, the question with which we are concerned can no longer arise in Ontario, the prescription being the same in both cases.

In Manitoba, *Sutton* v. *Sutton* (1) appears to have been followed. See *Lowery* v. *Lamont* (2), and also *Wilson* v. *Graham* (3), where the decision of Dubuc C.J., based on *Sutton* v. *Sutton* (1), was reversed, but on another point.

I recognize the authority of *Sutton* v. *Sutton* (1) with respect to the construction of an enactment such as the one here in question, which is derived from Imperial legislation. It certainly does no violence to the terms of the section.

Sutton v. *Sutton* (1) was the case of an action against the mortgagor on his personal covenant. I think, however, the same rule can be applied to the liability of a person, not a surety, who joins with the mortgagor in the personal covenant. And if we must admit that an action against the Rink Company, the mortgagor, on this very covenant, would be barred after ten years, I can discover no reason why a claim against the respondent, who bound himself with the Rink Company in the same terms, and jointly and severally, should last and be enforceable for a longer period.

But the appellant contends that when s. 24 speaks of money secured by a mortgage charged upon or payable out of any land, it must be taken to refer to land in Manitoba. If this reading of the statute be correct, then an action in Manitoba, on a covenant in a mortgage, would be subject to a different and shorter term of prescription, if the mortgaged land is in the province than if it were elsewhere. No doubt, when the legislature of a province enacts a statute concerning land, it should be assumed, as a general rule, that land within the territorial limits of the province alone is affected by the legislation. It may nevertheless be observed that this statute deals principally with the limitation of suits and actions, and, being a rule of procedure, it applies to all suits and actions in the Manitoba courts, no matter where the right of action accrued. And the re-

(1) (1882) 22 Ch. D. 511. (2) [1927] 1 W.W.R. 95.
(3) (1906) 16 Man. R. 101.

spondent relies here on an express decision of the late Chief Justice Dubuc (then Mr. Justice Dubuc), in 1892, which he states has never been questioned in Manitoba: *McLenaghan* v. *Hetherington* (1), where that learned judge held that s. 24 applies, whether the land charged be within the province or elsewhere. Section 24 has been re-enacted in the same terms in the different consolidations of Manitoba statutes (see R.S.M., 1902, c. 100, s. 24; R.S.M., 1913, c. 116, s. 24, subs. 1), and the construction placed on it in *McLenaghan* v. *Hetherington* (1), the respondent contends with much plausibility, has been tacitly accepted by the Legislature.

In his dissenting judgment in the court below, Mr. Justice Trueman refers to the expression "judgment" in s. 24, which is placed in collocation with, and between the words "mortgage" and "lien." The "judgment" within s. 24, he argues, is a judgment recovered in Manitoba. It is unnecessary to express any opinion on this point, but I may perhaps be permitted to say, with respect, that the authorities cited by the learned judge in support of his proposition—such as *Hebblethwaite* v. *Peever* (2); *Jay* v. *Johnstone* (3); and *Blanchard* v. *Muir* (4), which followed the first two cases,—are rather to the effect that the word "judgment" comprises judgments generally, and not merely those which operate as charges on land.

The learned judge also refers to what he terms the subsequent history of *Sutton* v. *Sutton* (5), as related by Chitty J., in *In re Turner; Turner* v. *Spencer* (6). This, of course, as Chitty J., himself observed, does not affect the authority of the decision of the Court of Appeal.

I cannot say that this case is free from difficulty, but on consideration of all the contentions—and I have mentioned only those which in my opinion really matter—I would not feel justified in disturbing the judgments of the experienced judges who have decided the case in the two courts below. If it is thought that their judgments misconstrue s. 24, it will be a matter for the consideration of the Legislature; but in my view that construction is a reasonable one.

(1) (1892) 8 Man. R. 357.
(2) [1892] 1 Q.B. 124.
(3) [1893] 1 Q.B. 25 and 189.
(4) (1900) 13 Man. R. 8.
(5) (1882) 22 Ch. D. 511.
(6) (1894) 43 W.R. 153.

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In its factum, among its reasons of appeal, the appellant takes the ground that in view of the moratorium legislation of Saskatchewan, and also of that of Manitoba, the limitation period under s. 24 was suspended. This point, however, was not pressed at the argument, nor is it mentioned in the judgments either of the majority or of the dissenting judge in the Court of Appeal. No moratorium legislation in Saskatchewan could operate as a stay of proceedings in an action brought in Manitoba, and no moratorium legislation of the province of Manitoba has been specially referred to. I do not therefore feel called upon to discuss the effect or operation in a proper case of legislation of this character.

At the hearing, the appellant made a motion for leave to introduce additional evidence which, it was argued, would show that the respondent obligated himself as a surety and not as a principal. The evidence tendered consists in: 1. An application for the loan by the Sedley Rink Company, Limited; 2. What purports to be a resolution of the Rink Company for the borrowing of $1,000; 3. A statement in the affidavit of the secretary-treasurer of the appellant that the appellant's inspector, Mr. Campbell, recommended the loan "if guaranteed by the four individual guarantors."

I am of opinion that evidence of that character could not prevail against the instrument signed by the parties, which must be construed according to its terms.

The motion therefore should be rejected with costs.

On the whole, I am of the opinion that the appeal fails and should be dismissed with costs.

DUFF J.—I concur in the result.

Appeal dismissed with costs.

Solicitors for the appellant: *Chapman & Thornton.*

Solicitors for the respondent: *Scarth, Guild & Thorson.*