W. F. LINGLE AND OTHER (PLAINTIFFS) .... APPELLANTS; 1925

AND *June 4. *Oct. 6.

KNOX BROTHERS LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE PROVINCE OF QUEBEC

Practice and procedure—Judgment from other province—Suit for declaratory judgment—Absence of plea—Cross-demand—Principal action and cross demand to be heard at same time—Arts. 211, 212, 217 C.C.P.

A suit was instituted in the province of Quebec by the appellants for the purpose of having declared executory a judgment from British Columbia awarding them $12,476.07 for timber sold and delivered under contract. The respondent did not deliver any plea (Arts. 211, 212 C.C.P.), but filed a cross-demand claiming $38,788.52 for breach of the terms of the contract and asking that the amount of the judgment be compensated *pro tanto*. The appellants inscribed the case *ex parte* for judgment on the principal demand and the trial judge gave judgment accordingly.

Held, affirming the judgment of the Court of King's Bench (Q.R. 38 K.B. 325), that, as the claim under the terms of the cross-demand arises "out of the same causes as the principal demand," article 217 C.C.P. prescribes the procedure to be followed and that adjudication must be made at the same time upon the original demand and the cross-demand.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, at Montreal, which had maintained the appellants' action and sending the parties back to the Superior Court in order that adjudication should be made at the same time upon the principal action and the cross-demand.

Lafleur K.C. and *Maclaire* for the appellants. This case must be decided according to arts. 211 and 212 C.C.P. and the appellants have the right to rely on the principle of intenational comity and public policy which those articles express.

These articles are absolute and should not be gratified by and read together with art. 217 C.C.P.

A cross-demand based on a contract between the parties do not arise "out of the same cause" as an action

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

(1) [1924] Q.R. 38 K.B. 325.

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based on an exemplification of a final judgment obtained in another province.

Chipman K.C. for the respondent. The cross-demand set up a claim arising out of the same causes as the principal demand which the respondent could not plead by defence; and accordingly, art. 217 C.C.P. applies.

The cross-demand should have been adjudicated upon by the trial judge concurrently with the appellants' claim.

The judgment of the court was delivered by

DUFF J.—This appeal turns upon the effect of art. 217 of the Code of Civil Procedure of Quebec, which is in these words:—

> Art. 217. The defendant may set up by cross-demand any claim arising out of the same causes as the principal demand, and which he cannot plead by defence.
>
> When the principal demand is for the payment of a sum of money, the defendant may also make a cross-demand for any claim for money arising out of other causes; but such cross-demand is distinct from and cannot retard the principal action.
>
> The court, whenever it renders judgment upon both demands at the same time, may declare that there is compensation.

The question arises in this way: The appellants, as plaintiffs, declared upon a judgment of the Supreme Court of British Columbia of the 26th of November, 1923, awarding to the plaintiffs judgment against the defendant for the sum of twelve thousand odd dollars. The defendant, by cross-demand upon the allegation that the judgment was based upon a contract for the sale of lumber between the plaintiffs and the defendant, under which certain quantities of lumber were delivered, claimed certain sums by way of damages for breach of the terms of the contract. One of these claims is embodied in pars. 6 and 7 of the cross-demand, which read as follows:—

> 6. That of the entire quantity of lumber purchased under the said contract, the cross defendants were short in their deliveries to the extent of 1,985,901 feet, which lumber they actually disposed of according to their own admission in their statement of claim in the British Columbia action filed in this case by the cross defendants.
>
> 7. That the cross plaintiffs suffered a loss on this head of at least $15 per thousand, being the difference between the contract price and the market price, amounting in all to the sum of twenty-nine thousand, seven hundred and eighty-eight dollars and fifty-two cents ($29,788.52), for which sum cross plaintiffs also counter-claim in this action.

The claim, thus stated, could not have been set up as a defence in the original action: it could only have been

put forward in a separate action or by way of counter-claim. It would appear, therefore, that to it, art. 212 of the Code of Civil Procedure has no application; and the question arises whether it falls within the scope of the rule laid down by art. 217. The Court of King's Bench has taken the view that the claim under these paragraphs arises out of the same "causes" as the principal demand, and that art. 217 therefore prescribes the procedure to be followed. The language of that article might be more precise, but it seems clearly to be open to the interpretation adopted by the Court of King's Bench; and on the whole there appears to be no very solid ground for differing from this view.

This is sufficient to dispose of the appeal. A question may arise whether the claim under par. 5 of the cross-demand is not one which, in substance (as a claim in respect of diminution in value resulting from breach of the contract of sale), might, on the principle of *Mondel* v. *Steele* (1), have been set up, in whole or in part, as a defence to the British Columbia action; see *Bow McLachlan & Co.* v. *The Ship "Camosun,"* (2). From this point of view, the relevancy of art. 212, as respects this claim, may have to be considered; but it seems more convenient that any such question should be reserved for the trial.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Lafleur, MacDougall, Macfarlane & Barclay.*

Solicitors for the respondent: *Brown, Montgomery & McMichael.*

(1) [1841] 8 M. & W. 858. (2) [1909] A.C. 597, at pp. 610-611.

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*Mar. 10.
*May. 13.

MARY NUTSON AND ANOTHER (PLAINTIFFS) . . . . . } APPELLANTS.

AND

WILLIAM A. HANRAHAN AND OTHERS (DEFENDANTS) . . . . . } RESPONDENTS.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF ONTARIO

Statute of Limitations—Mortgaged lands—Possession by first mortgagee—Acknowledgment of title—Lease by party in possession—Joinder by second mortgagee—R.S.O. [1914] c. 75, ss. 20 and 24.

Lands in Ontario were twice mortgaged and the first mortgagee entered into possession occupying the lands and receiving the rents and profits for sufficient time to acquire title under the Statute of Limitations. During this period leases were executed by the mortgagee in possession and by the second mortgagee as third party. The leases contained no express acknowledgment by the lessors of title in the second mortgagee but contained this clause: "The parties of the third part hereby consent and agree to the within lease."

Held, affirming the judgment of the Appellate Division (53 Ont. L.R. 99) that this clause acknowledged the authority of the lessors to execute the lease but did not imply an acknowledgment by them of any title in the second mortgagee.

Held also that the second mortgagee had no status to maintain the action; all her rights under her mortgage and her interest in the lands having become extinguished at the expiration of the statutory period.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the trial in favour of the respondents.

The facts are stated in the above head-note.

J. A. Ritchie, K.C. for the appellant.

H. J. Scott, K.C. for the respondent.

IDINGTON, J.—Accepting, as this court is accustomed to do, the finding of fact by two concurrent courts below, unless some strong reason put forward for doubting the accuracy thereof, I have considered the relevant law applicable thereto, and see no reason for doubting the accurate apprehension thereof as presented by the learned trial judge and the learned judges in the Court of Appeal, with whom

*PRESENT:—Idington, Duff and Mignault JJ. and McLean J. *ad hoc.*

*Sir Louis Davies C.J. was present at the hearing but died before judgment was pronounced.

(1) 53 Ont. L.R. 99.

I fully agree, I think this appeal should be dismissed with costs.

They seem to me to have covered the entire ground and I see no useful purpose to be served by repeating same here.

DUFF, J.—The appellants as the second mortgagees and purchaser under an alleged mortgage sale respectively brought the action out of which the appeal arises, asserting a right of redemption against the respondents, who are respectively first mortgagees and purchaser from them.

In 1894, one H. W. Wherry was the owner of the lands the subject of the action, and in that year executed a mortgage in favour of Victoria Taylor, of Montreal, under the Short Forms Act, to secure the sum of $5,500, payable in five years. The land was, on 26th April, 1897, conveyed, subject to the mortgage, to Annie Odette, and on the same day she and her husband executed the mortgage which is the second mortgage above mentioned, to the appellant Mary Nutson, for $1,700, payable 26th April, 1902. Victoria Taylor having died, her estate is represented by the respondents Hanrahan, Hardie and Elliott.

In March, 1898, by conveyance from Annie Odette, one Frederick John Holton became the owner of the equity of redemption, subject to the above mentioned mortgages. Default having occurred under both mortgages, Victoria Taylor, by her agent Dougall, took possession of the mortgaged property and remained in possession or in receipt of the rents and profits until the death of Dougall, in 1910. From that time Messrs. Bartlett & Bartlett were in possession or in receipt of the rents and profits for the Taylor trustees until the sale to the Raymonds, in 1920.

The property was leased from time to time by Dougall, and afterwards by Messrs. Bartlett & Bartlett, as agents of the Taylor estate, and as such they received the rents and accounted for them to the estate.

In 1920, the Taylor estate having agreed to sell to the Raymonds, a question of title arose as to the interest purchased by Holton, and that was bought in by the Raymonds in that year.

The appellants contend that when Dougall took possession (as above mentioned), he did so under the terms of

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a proposed agreement set out in a document produced in evidence, which, it is argued, constituted him trustee for all parties interested in the property—mortgagees under both mortgages, as well as the owner of the equity of redemption. Dougall actually received all the rents from 1897 until his death, and since then they have been received by Messrs. Bartlett and Bartlett.

The appellant Mary Nutson received nothing on account of the moneys due under her mortgage after the years 1901.

In 1908 a lease of the premises was executed by the trustees of the Taylor estate in favour of the Peabody Company, which Mary Nutson also executed as a party of the third part; and in 1912 the premises were leased by the trustees to McNee & Sons, and as in the preceding lease, Mary Nutson joined as party of the third part. The rents under both these leases were collected by the agent of the trustees, and no part of them was paid to Mary Nutson.

The Appellate Division held that, first, the respondents had been in possession for sufficient time to give them a title under s. 20 of the Limitations Act; and that by s. 24, any right of Mary Nutson in the property has become extinguished, and with it all right and status to maintain an action of redemption.

As to the first point, the judgment is attacked on two grounds: The leases of 1908 and 1912 are said to constitute an acknowledgment of the respondents' title within the meaning of the statute; and further that by the agreement above mentioned, under which Dougall first took possession, a trust was constituted which affects the Taylor estate and precludes the estate from setting up the statute as against the appellants.

The leases relied upon as constituting an acknowledgment contain no express acknowledgment; the demise and the covenants are by the trustees of the Taylor estate, and a clause is added in these terms:

"The parties of the third part hereby consent and agree to the within lease."

There seems to be an acknowledgment of the authority of the trustees to execute a lease, but I see no implication

of an acknowledgment by them of any title in the second mortgages.

As to the alleged agreement with Dougall, the trial judge has found against it, and his finding has been affirmed unanimously by the Court of Appeal. I think these findings are supported by the evidence.

I agree also that the respondents are entitled to succeed upon the ground that the appellants have no status to maintain this action. By s. 24, R.S.O. c. 75, the right of Mary Nutson to enforce her mortgage and with it her interest in the land became extinguished after the expiration of ten years after the last payment on account of the mortgage having been received by her, which was in the year 1901. *In re Hazeltine's Trusts* (1); *In re Fox* (2).

I agree also that the claim based upon the alleged sale of the equity of redemption in 1902 under the second mortgage fails. I concur in the findings of the courts below that this alleged sale was never legally operative.

The appeal should be dismissed with costs.

MIGNAULT, J.—I would dismiss the appeal with costs for the reasons stated by my brother Duff.

MACLEAN, J.—I agree that the appeal should be dismissed.

I am of the opinion, that the finding of the trial judge affirmed by the Appeal Division, in respect of the pleaded agreement with Dougall was warranted by the evidence and should not be disturbed. I also agree that the respondents' contention, that any claim the plaintiffs, Mary Nutson and Annie M. Murphy, ever had in the lands mortgaged to Mary Nutson, has been barred by the Limitations Act, c. 75, s. 24 R.S.O. must prevail.

Appeal dismissed with costs.

Solicitors for the appellants: *Sheppard & Sheppard.*

Solicitors for respondents: *Hanrahan, Hardie and Elliott, Bartlet, Bartlet & Barnes.*

Solicitors for other respondents: *Kenning & Cleary.*

(1) [1908] 1 Ch. 24.

(2) [1913] 2 Ch. 75.