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JUKES v. FISHER.

Oct. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Bills and notes—Mortgage—Collateral security—Recovery on mortgage—New evidence discovered after reference to take accounts—Appeal to Supreme Court—Lapse of time.

APPEAL from the judgment of the Court of Appeal for Manitoba, affirming the judgment at the trial, Perdue J. dissenting, by which the defendant was declared liable for some part of the plaintiff's claim and a reference was made to the master to take accounts.

The action was to recover on a covenant in a mortgage for the payment of money and interest alleged to be due to the plaintiff under the mortgage which purported to secure \$2,800 with interest. As to the mortgage the question involved was whether or not the plaintiff could claim re-payment of \$1,000 paid, some time after the mortgage was executed, to retire a promissory note, made by the defendant and indorsed by the plaintiff, and which was in part renewal of a similar note which had been so made and indorsed prior to the mortgage. The defence was that the note was given for the purpose of raising funds for the use of a partnership which the trial judge found existed between the plaintiff and the defendant. The defendant contended that not only was the mortgage given to secure the note, but also that he was not personally liable to re-pay the \$1,000 to the plaintiff. By the plaintiff it was contended that the mortgage was given, amongst other things, to secure him against liability on the note in question.

The trial judge held that the note had been indorsed by the plaintiff for the accommodation of the defendant and that the mortgage had been given to secure the plaintiff in respect of the note, and he directed a reference to the master to take accounts. This decision was affirmed by the Court of Appeal, Perdue J. dissenting.

During the taking of accounts the defendant discovered a statutory declaration by the plaintiff to the effect, amongst other things, that the full amount of the mortgage had been advanced by him to the defendant and that it had been taken for the purpose of securing the advance so made and not as collateral security. In these circumstances the court appealed from, in pursuance of section 71 of the "Supreme Court Act," granted special leave for the present appeal, although it had not been brought within the time prescribed by the Act(1).

After hearing counsel on behalf of the appellant, and without calling upon counsel for the respondent for any argument, the appeal was dismissed with costs, the court not being satisfied that the judgment appealed from was so clearly wrong that it should be reversed.

Appeal dismissed with costs

Hugh Phillips for the appellant.

J. B. Coyne for the respondent.

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(1) 20 Man. R. 331.