HENRY PIERCE (PLAINTIFF).....APPELLANT; 1939

AND * Jan. 18, 19.

CLARA EMPEY (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Mortgage—Sale of land—Option—Quit claim deed given by mortgagor to mortgagee and right given to mortgagor to purchase within three months by paying amount of mortgage—No payment or tender within said period—True nature and effect of the transaction—Evidence—Mortgagor's contention that relationship of mortgagor and mortgagee still subsisted—Onus in seeking to enforce option—Claim that existing lease made by owner relieved option-holder from strict fulfilment of conditions.

Plaintiff, a mortgagor in default, executed a quit claim deed of the mortgaged land to defendant, the mortgagee, who was then in possession under proceedings taken in a foreclosure action. A letter from defendant's solicitors to plaintiff's solicitor agreed that plaintiff was to have the right for a period of three months to purchase the land upon payment of the mortgage, including all interest, taxes and costs up to date. There was no payment or tender within said period. In an action for redemption, plaintiff attempted to show that by the true arrangement the mortgage debt remained undischarged and the period for redemption was extended for three months; that the relation of mortgagor and mortgagee still subsisted.

Held: On the evidence, plaintiff's said attempt must fail; the true arrangement must be held to be that disclosed by the documents, namely, that the land became vested in defendant in fee simple in possession free from the equity of redemption, but that plaintiff had the option of re-purchase according to the terms in said letter.

It is true, in principle, that a conveyance absolute in form may be shown even by parol evidence to have been, according to the real agreement between the parties, accepted as security only, and the *Statute of Frauds* will not prevent the proof of this by parol evidence (*Flynn* v. *Flynn,* 70 D.L.R. 462; *Wilson* v. *Ward,* [1930] S.C.R. 212); but for this purpose convincing evidence is always required; and in the circumstances of the present case it behooved plaintiff to adduce evidence of the most cogent character (*Barton* v. *Bank of New South Wales,* 15 App. Cas. 379, at 381).

A plaintiff invoking the aid of the court for the enforcement of an option for the sale of land to him must show that the terms of the option as to time and otherwise have been strictly observed; the owner incurs no obligation to sell unless the conditions precedent are fulfilled or as the result of the owner's conduct the holder of the option is on some equitable ground relieved from the strict fulfilment of them (*Cushing* v. *Knight,* 46 Can. S.C.R. 555; *Hughes* v. *Metropolitan Ry. Co.,* 2 App. Cas. 439; *Bruner* v. *Moore,* [1904] 1 Ch. 305). In the present case, plaintiff relied upon the existence of a lease made

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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by defendant while mortgagee in possession and before the date of the quit claim deed and creation of the option. Whatever the relevancy of this lease on a question of title if an obligation on defendant's part to sell had arisen, it could not affect the conditions of the option, because until these conditions were fulfilled no obligation to sell could arise and the relation of vendor and purchaser did not come into existence (*Cushing* v. *Knight, supra*). Moreover, it was highly probable, in view of the terms of the lease, that, had the conditions of the option been complied with, this objection would have been removed.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario which allowed the defendant's appeal from the judgment of McFarland J. dismissing the defendant's appeal from the Report of the Local Master.

The plaintiff claimed the right to redeem certain land. He had, on March 17, 1925, mortgaged the land to defendant to secure the sum of $5,500 and interest. On May 5, 1933, there being interest in arrear upon the mortgage, defendant issued a writ for foreclosure, and on June 23, 1933, entered judgment in the action against plaintiff, for default of appearance, for foreclosure and immediate possession. At this time there was due to defendant for principal, interest and taxed costs the sum of $5,142.37. On July 12, 1933, defendant issued a writ of possession in said foreclosure action and under its terms took possession on July 14, 1933, and has remained in possession of the land.

On September 28, 1933, defendant made a lease of the land to one Bentley for three years from October 1, 1933. The lease contained a provision that,

> In the case of a sale to a purchaser other than the Lessee before the completion of the term of this Lease the said Lessee shall receive at least one month's notice prior to the end of the terms year and the sum of One Hundred Dollars ($100).

By quit claim deed bearing date January 8, 1934 (executed, according to plaintiff, on January 11, 1934), the plaintiff granted, released and quit claimed all his estate, interest, etc., in said land to the defendant. Its recitals stated that plaintiff was indebted to defendant under the mortgage, and that plaintiff was unable to pay the mortgage and had requested defendant to accept a quit claim deed and to release plaintiff from all actions, claims and demands up to the date of the deed, which the defendant had agreed to do by her acceptance of the deed. By a

letter dated January 8, 1934, from defendant's solicitors to plaintiff's solicitor, it was stated that it was understood that plaintiff was to have the right for a period of three months from the date of the quit claim deed to purchase the property from defendant upon payment of the full amount of the mortgage, including all interest, taxes and costs up to date, upon sending defendant reasonable notice in writing of his intention to do so before the expiration of said period of three months. There was raised in the present action the question as to what was the real nature and effect of this transaction or of the arrangement between the parties.

On April 26, 1934, plaintiff issued a writ in the Supreme Court of Ontario claiming for redemption and damages.

On the action coming on for trial, it was by consent referred to the Local Master at Goderich to decide all questions involved in the action. He found in favour of the plaintiff and that upon payment to defendant of the sum found by him as due on the mortgage account, less the costs of the action, there should be a re-conveyance by defendant to plaintiff of the premises freed from the claim of any person claiming under or through defendant. Defendant's appeal from the Local Master's report was dismissed, and the report confirmed, by McFarland J. Defendant appealed to the Court of Appeal for Ontario. That Court allowed the appeal, set aside the judgment of McFarland J. and the Master's report, and dismissed the action. The plaintiff appealed to this Court. By the judgment of this Court, now reported, the appeal was dismissed with costs.

P. J. Bolsby and *J. D. W. Cumberland* for the appellant.

G. T. Walsh K.C. and *J. A. E. Braden K.C.* for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—The grounds on which counsel for the appellant based his appeal were:

First, the Court of Appeal was wrong in holding that, by virtue of the documents of the 8th day of January, 1934, the relation of mortgagor and mortgagee had been brought to an end and the respondent had become the

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owner of the property subject to an option to purchase under the terms of the letter of that date addressed by Braden & McAlister to Mr. Dancey; and,

Second, in the alternative, that the appellant was ready and willing to exercise the option and was relieved on equitable grounds from the strictness of its terms as to notice and payment by the conduct of the respondent.

At the conclusion of the argument, the Court being satisfied that neither of these grounds of appeal was established, the appeal was dismissed. The parties were then informed that reasons in writing would be handed down.

As regards the first ground of appeal, the deed of the 8th of January, 1934, is absolute in terms and contains this recital:

> And whereas the said Party of the First Part is unable to pay the said mortgage and the arrears of interest due thereon, and has requested the said Party of the Second Part to accept a quit claim deed of the said lands and to release the Party of the First Part of and from all actions, claims and demands up to this date, which the said Party of the Second Part has agreed to do by her acceptance of these presents.

This deed was drawn by the solicitors for the mortgagee and was sent by them to the solicitor for the mortgagor for execution by him. It was duly executed and returned. The letter of the solicitors for the mortgagee forwarding the document to the solicitor for the mortgagor for execution contained this clause:

> It is also understood that your client, Mr. Pierce, is to have the right for a period of three months from the date of the quit claim deed to purchase the property from our client upon payment of the full amount of the mortgage, including all interest, taxes and costs up to date, upon sending our client reasonable notice in writing of his intention to do so before the expiration of the said period of three months.

We do not doubt that this undertaking formed part of the arrangement by which the equity of redemption was released and the mortgage debt discharged and that it was binding upon the mortgagee as part of that arrangement. These documents by themselves, the deed and the letter, evidence in the plainest way the intention of both parties that the land was to be vested in the mortgagee in fee simple in possession free from the equity of redemption, but that the mortgagor was to have an option of repurchase according to the terms set forth as quoted above. It is important to observe also that the documents passed

through the hands of the solicitors of the respective parties. Some loose expressions in subsequent letters are of no importance.

In these circumstances, the attempt on the part of the mortgagor to show that the relation of mortgagor and mortgagee still subsisted would appear to have been a hopeless one. True it is, in principle, a conveyance absolute in form may be shown even by parol evidence to have been, according to the real agreement between the parties, accepted as security only and the *Statute of Frauds* will not prevent the proof of this by parol evidence (*Flynn* v. *Flynn* (1); *Wilson* v. *Ward* (2)); but for this purpose convincing evidence is always required, and in the circumstances mentioned it behooved the appellant to adduce evidence of the most cogent character (*Barton* v. *Bank of New South Wales* (3)).

The second ground is not suggested in the pleadings and was not really put forward at the trial. Mr. Dancey, the solicitor for the appellant, insisted in his evidence that the arrangement was not that appearing on the face of the documents by which the equity of redemption was released and the mortgage debt discharged and by which the appellant was to have an option to purchase; but that by the true arrangement the mortgage debt remained undischarged and the period for redemption was extended for three months. The learned County Judge, to whom the action was referred for trial, found that such was the arrangement and granted the relief claimed in the statement of claim. His report was affirmed by Mr. Justice McFarland. The Court of Appeal held that the true arrangement was that disclosed by the documents and in this we agree.

In the circumstances, it is at least doubtful whether the appellant was entitled to put forward his alternative claim based on the option in the Court of Appeal. Having regard to the course of the case in the courts below, it is at least incumbent upon the appellant, assuming the alternative claim to be open to him here, to show that all the available evidence is before us and that it establishes the essential facts in a convincing way.

(1) (1922) 70 D.L.R. 462. (2) [1930] S.C.R. 212.
(3) (1890) 15 App. Cas. 379, at 381.

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It is well settled that a plaintiff invoking the aid of the court for the enforcement of an option for the sale of land must show that the terms of the option as to time and otherwise have been strictly observed. The owner incurs no obligation to sell unless the conditions precedent are fulfilled or, as the result of his conduct, the holder of the option is on some equitable ground relieved from the strict fulfilment of them (*Cushing* v. *Knight* (1); *Hughes* v. *Metropolitan Rly. Co.* (2); *Bruner* v. *Moore* (3)).

The appellant relies upon the existence of a lease for three years executed by the respondent while mortgagee in possession and before the date of the release of the equity of redemption and the creation of the option. Whatever the relevancy of this lease on a question of title, once an obligation to sell on the part of the mortgagee had arisen, it could not affect the conditions of the option, because until these conditions were fulfilled no obligation to sell could arise and the relation of vendor and purchaser did not come into existence (*Cushing* v. *Knight* (1)). Moreover, it is highly probable, in view of the terms of the lease, that, had the conditions of the option been complied with, this objection would have been removed.

The condition as to notice was not observed, but there was evidence of waiver and that condition need not be considered.

Admittedly, the condition as to payment was not fulfilled either strictly or in substance. There was no payment and no tender. The respondent had good reason to believe at the time the documents of the 8th of January went into effect that the appellant would be unable to get the necessary funds. She was expressly so informed by a letter from the appellant's solicitor of the 15th of December. Another letter from the appellant's solicitor of the 15th of March was calculated to confirm the impression that the appellant was hoping for a still further postponement of the date of payment. There is no evidence that the appellant was led by the respondent to believe that such indulgence would be granted, and, as already observed, the case put forward at the trial on the part

(1) (1912) 46 Can. S.C.R. 555.
(2) (1877) 2 App. Cas. 439.
(3) [1904] 1 Ch. 305.

of the appellant was not that he had an option and that the respondent had waived strict fulfilment of the conditions, but that his equity of redemption was still subsisting.

The evidence adduced all points to the conclusion, and on that evidence the proper conclusion is, that the appellant was not in a position to pay or to tender the amount due under the mortgage, either on the date agreed upon or afterwards. The date agreed upon in January, 1934, was, as contended by the appellant, the 11th of April of that year and the appellant down to this moment has neither paid nor tendered any part of the option price nor manifested in any tangible way his ability to do so.

The appeal is, therefore, dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Dancey & Bolsby.*
Solicitors for the respondent: *Braden & McAlister.*