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*Mar. 11.

*Nov. 21.

C. J. McCUAIG (DEFENDANT)............APPELLANT;

AND

ELIZA BARBER (PLAINTIFF).............RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Assignment of equity—Covenant of indemnity—Assignment of covenant—Right of mortgagee on covenant in mortgage.

C. executed a mortgage on his lands in favour of B., with the usual covenant for payment. He afterwards sold the equity of redemption to D. who covenanted to pay off the mortgage and indemnify C. against all costs and damages in connection therewith. This covenant of D. was assigned to the mortgagee. D. then sold the lands, subject to the mortgage, in three parcels, each of the purchasers assuming payment of his proportion of the mortgage debt, and he assigned the three respective covenants to the mortgagee who agreed not to make any claim for the said mortgage money against D. until he had exhausted his remedies against the said three purchasers and against the lands. The mortgagee having brought an action against C. on his covenant in the mortgage.

Held, reversing the judgment of the Court of Appeal (24 Ont. App. R. 492), that the mortgagee being the sole owner of the covenant of D. with the mortgagor assigned to him as collateral security, had so dealt with it as to divest himself of power to restore it to the mortgagor unimpaired, and the extent to which it was impaired could only be determined by exhaustion of the remedies provided for in the agreement between the mortgagee and D. The mortgagee, therefore, had no present right of action on the covenant in the mortgage.

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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APPEAL from the decision of the Court of Appeal for Ontario (1), reversing the judgment of Mr. Justice Rose at the trial in favour of the defendant.

The facts of the case are sufficiently set out in the above head-note and in the judgment of the court.

Aylesworth Q.C. for the appellant. The trial judge finds as a fact that when McCuaig assigned DuVernet's covenant to the plaintiff he was giving her a collateral security. If so she cannot enforce payment of the debt, unless prepared upon payment to restore the collateral security, and she has, by her subsequent agreement with DuVernet, put it out of her power to re-convey this covenant unimpaired and in the same condition as when she acquired it, and defendant has thereby become absolutely discharged of all liability in respect of the original debt. *Campbell* v. *Rothwell* (2); *Allison* v. *McDonald* (3); *Newton* v. *Chorlton*, (4); *Mayhew* v. *Crickett* (5). The defendant contends that upon the conveyance of the mortgaged land to DuVernet "subject to the mortgage," he became, as between himself and defendant, the principal debtor in respect of this mortgage debt, and defendant merely DuVernet's surety for payment of it. From the time notice of this change of relationship between the parties was acquired by the mortgagee she could no longer treat the original mortgagor as a principal debtor, but the obligation was imposed upon her to concede to him the right of a surety for DuVernet. *Mathers* v. *Helliwell* (6); *Blackley* v. *Kenney* [No. 2] (7); *Muttlebury* v. *Taylor* (8). After notice she was bound to do nothing to prejudice the interests of the surety. *Rouse* v. *Bradford Banking Co.* (9); *Oakeley* v. *Pasheller* (10);

(1) 24 Ont. App. R. 492.
(2) 38 L. T. N. S. 33.
(3) 23 Can. S. C. R. 635.
(4) 10 Hare, 646.
(5) 2 Swans, 185.
(6) 10 Gr. 172.
(7) 29 C. L. J. 108.
(8) 22 O. R. 312.
(9) [1894] A. C. 586.
(10) 10 Bligh N. S. 548.

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Overend, Gurney & Co. v. *Oriental Financial Corporation* (1). We rely also upon *Small* v. *Thompson* (2) and *Maloney* v *Campbell* (3).

W. H. Irving for the respondent. The appellant continued liable upon his covenant as a full debtor, and did not become a mere surety; even if he did become a surety, the dealings with DuVernet did not work his release. If the right transferred to respondent by the appellant became in her hands a security, it was a collateral security only. The original mortgaged estate in the hands of the respondent unimpaired was and remained always the mortgage security, and if that right constituted a security when placed in the respondent's hands, it was only to the extent to which the appellant shewed himself injured by the respondent's dealing with it that he would be entitled to relief. See *Smith* v. *Pears* (4) and cases there cited. *Rouse* v *Bradford Banking Co.* (5) is distinguished from the present case on account of the higher class of obligation constituted by the appellant's covenant. The right against DuVernet was not, before its assignment to the respondent, the appellant's property in the full sense of the word; such a right has been held not to be the property of the mortgagor. *Ball* v. *Tennant* (6). Even before the assignment any money payable by DuVernet under his obligation would have been payable to the respondent.

It is clear that the right assigned did not form part of the mortgaged estate, and for the reason given in *Chambersburg Ins. Co.* v. *Smith* (7) it would not seem to be a security at all. The fact that a creditor cannot return a collateral security to his debtor does not

(1) L. R. 7 H. L. 348.
(2) 28 Can. S. C. R. 219.
(3) 28 Can. S. C. R. 228.
(4) 24 Ont. App. R. 82.
(5) [1894] 2 Ch. 32; [1894] A. C. 586.
(6) 21 Ont. App. R. 602.
(7) 11 Pa., St. 120.

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release the debtor, nor does it release a surety for that debtor. Colebrook, on Collateral Securities secs. 63, 87; Story, Equity Jurisprudence sec. 328; 1 Sutherland, Damages p. 382. The respondent can only be liable for actual loss and the onus is on the debtor to shew the extent of the injury. *Wiltiams* v. *Price* (1) at page 587, per Leach, V. C. *Synod* v. *De Blacquière* (2); *Capel* v. *Butler* (3); *Ex parte Mure* (4). There was no suretyship. *Baynton* v. *Morgan* (5); Baylies, Sureties, p. 259; *Trust and Loan Co.* v. *McKenzie* (6) at page 170; *Trusts Corporation of Ontario* v. *Hood* (7) at pages 591-593. The alteration necessary to release a surety must be an alteration in the original contract. *Wilson* v. *Land Security Co.* (8) at page 157. We contend that DuVernet's obligation is only an obligation to indemnify McCuaig; *Barham* v. *Earl of Thanet* (9) at page 624; and that it is not a "covenant." See *Credit Foncier Franco-Canadien* v. *Lawrie* (10), and authorities there cited. Barber had implied authority to deal with the assigned right as fully as McCuaig himself could have done if he had retained it. *Taylor* v. *Bank of New South Wales* (11); *Carter* v. *White* (12); *Polak* v. *Everett* (13). McCuaig having assigned away his right of indemnity cannot complain if time was given in respect of it by his assignee; DeColyar on Guarantees (3 ed.) pp. 423, 429, 430; and his right, if any is to prove and recover for any injury done him or loss suffered by him. *O'Gara* v. *Union Bank* (14) and authorities there collected; *Rainbow* v. *Juggins* (15). McCuaig must shew,

(1) 1 Sim. & Stu. 581.
(2) 27 Gr. 536.
(3) 2 Sim. &. Stu. 457.
(4) 2 Cox 63.
(5) 22 Q. B. D. 74.
(6) 23 Ont. App. R. 167.
(7) 23 Ont. App. R. 589.
(8) 26 Can. S. C. R. 149.
(9) 3 Mylne & K. 607.
(10) 27 O. R. 498.
(11) 11 App. Cas. 596.
(12) 25 Ch. D. 666.
(13) 1 Q. B. D. 669.
(14) 22 Can. S. C. R. 404.
(15) 5 Q. B. D. 138.

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in order to escape liability, that he is damnified to the extent of $4,400 by Barber's act, even after he has received back the assigned right in its present shape, and also the additional rights against DuVernet's purchasers procured by Barber; Brandt, Suretyship, (1 ed.) para. 373; Sutherland, Damages, (2 ed.) para. 229; *Bradford* v. *Fox* (1); and Barber can not be responsible for more than the reinstating of the right against DuVernet, or the expense of doing this and any damage to McCuaig, consequent on his act; *Strange* v. *Fooks* (2); *Ryan* v. *McConnell* (3); *Molsons Bank* v *Heilig* (4) and authorities there cited. These cases authorize reference as to damages, and if the provision in the judgment directing reference is not sufficient to fully protect McCuaig, the judgment of this court can direct any necessary variations under section sixty of "The Supreme and Exchequer Courts Act."

The judgment of the court was delivered by

GWYNNE J.—By an indenture of mortgage bearing date the 18th day of March, 1889, the defendant mortgaged certain lands therein mentioned to the plaintiff in security for the payment to the plaintiff of the sum of three thousand two hundred and fifty-six dollars with interest thereon, and covenanted with the plaintiff to pay the said mortgage money thereby secured with interest in accordance with the proviso of said indenture of mortgage; afterwards the defendant sold the said lands and premises subject to the said indenture of mortgage and to the payment of the monies thereby secured to one DuVernet who thereby covenanted with the defendant his executors, administrators and assigns, that the said DuVernet would assume the said mortgage and pay

(1) 38 N. Y. 289.
(2) 4 Giff. 408.
(3) 18 O. R. 409.
(4) 26 O. R. 276.

the monies thereby secured and indemnify and save harmless the defendant from all loss, costs and damages in connection therewith. Afterwards the said defendant at the request of the plaintiff did by a deed under his hand and seal assign, transfer and set over to the plaintiff, her executors, administrators and assigns, the said covenant of the said DuVernet made to the defendant to pay off and satisfy the said indenture of mortgage and all the rights which the defendant had to compel the said DuVernet to pay off the said mortgage monies and interest, either under a sale or conveyance of the said lands or otherwise, and all benefit and advantages to be derived therefrom, together with full power and authority to enforce the said covenant or right against the said DuVernet. Afterwards the said DuVernet by deed of bargain and sale sold and transferred the same lands and premises subject to the said indenture of mortgage made by the defendant to the plaintiff in three several parcels as follows:

1. One part to one Davidson subject to the payment by the said Davidson of the sum of $1,650.00 parcel of the principal sum of $3,256.00 secured by the said mortgage executed by the defendant to the plaintiff, which sum of $1,650.00 with interest thereon the said Davidson assumed and covenanted to pay with interest thereon.

2. One other parcel to one Maddsford subject to the payment by the said Maddsford of the sum of $525, other parcel of the said principal sum of $3,256.00 secured by the defendant's mortgage to the plaintiff, which sum of $525 with the interest thereon the said Maddsford assumed and covenanted to pay with the interest thereon.

3. Another parcel to one Bell subject to the payment by the said Bell of the sum of $1.081.00,

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other parcel of the said principal sum of $3,256.00 secured by the mortgage executed by the defendant to the plaintiff, which sum of $1,081, with the interest thereon the said Bell assumed and covenanted to pay. Afterwards the said DuVernet, at the request of the plaintiff, by an indenture duly made and executed by and between the said plaintiff and the said DuVernet, after reciting that it had been agreed between the said parties that the said DuVernet should assign to the plaintiff the said respective covenants made by the said Davidson, Maddsford and Bell respectively for payment of the said respective parcels of said mortgage money and interest, and that the plaintiff, her executors, administrators or assigns, should not nor should any of them make or cause to be made any claim for the said mortgage money or interest or any part thereof, or any claim relating thereto, against the said DuVernet, his heirs, executors or administrators or his or their real or personal property *unless and until she should have exhausted her remedies against the persons aforesaid and against the said lands*; and after reciting further that by assignment of even date the said DuVernet had assigned to the said plaintiff the said covenants of the said respective parties and all his the said DuVernet's rights thereunder it was witnessed that in consideration of the premises the said plaintiff did for herself, her heirs, executors, administrators and assigns, covenant and agree with the said DuVernet that she, the plaintiff, would not make or cause to be made any claim whatever upon the said mortgage or in relation thereto or against the said DuVernet, his heirs, executors or administrators or against his or their real or personal property *unless and until she should have exhausted her remedies* by all reasonable and proper proceedings against the said Davidson, Maddsford and Bell re-

spectively their and each of their executors, administrators and assigns and *against the said lands*, and that she would make no claim against the said DuVernet for any costs of such proceedings.

The plaintiff has now sued the defendant upon the covenant in his mortgage and the defendant insists that the plaintiff by the above agreement with DuVernet, upon the faith of which she obtained from him an assignment of the covenants of Davidson and the others, has deprived herself of the right of asserting the present cause of action until she shall have exhausted all her remedies against the lands and under the covenants of Davidson and the other purchasers from DuVernet as provided in the agreement. Of this opinion was the learned trial judge, Mr. Justice Rose, who accordingly dismissed the action. This judgment, however, was reversed by the Court of Appeal which gave judgment for the plaintiff for the full amount of the money secured by defendant's mortgage and interest subject to a reference to the master as to what amount, if any, the defendant's remedy against DuVernet upon the latter's covenant with the plaintiff has been prejudiced by the agreement between the plaintiff and DuVernet, or rather it would seem by the plaintiff not pursuing her remedies under the provisions of that agreement.

It requires, I think, no reference to the master to see that as the plaintiff is assignee of DuVernet's covenant with the plaintiff she and the defendant are bound by that agreement which in effect provides that no remedy shall be sought under DuVernet's covenant with the plaintiff until all remedies against the lands themselves and under the covenants of the purchasers from DuVernet shall be exhausted. In effect, therefore, Du Vernet's covenant to the defendant can be enforced solely for the recovery from DuVernet of so much as upon a sale of the lands themselves and the exhaust-

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ing of the remedies against the other covenantors with DuVernet, the amounts so realised shall be insufficient to pay the defendant's mortgage in full.

The plaintiff has therefore prejudiced the defendant's remedy against DuVernet to this extent that until the remedies pointed to in the deed between the plaintiff and DuVernet shall be exhausted it cannot be ascertained whether any amount, and if any, how much, can be recovered in an action upon DuVernet's covenant with the defendant whether such action be brought by the plaintiff as assignee of the defendant or by the defendant who never can bring such an action unless under an assignment from and as assignee of the plaintiff who is possessed of all interest in DuVernet's covenant with the defendant. The plaintiff's assigns are bound by her covenant with DuVernet not to make any claim against him on his covenant until all the remedies against the lands and against the covenantors with DuVernet are exhausted by due process of law, by which alone can be determined the amount, if any, to which DuVernet is liable under his covenant with the defendant of which the plaintiff is at present sole and absolute owner. The plaintiff has so dealt with the collateral security placed in her hands at her request by the defendant that she has by her agreement with DuVernet divested herself of all power to restore it to the defendant unimpaired, and the extent to which it has been impaired can only be determined by an exhaustion of the remedies as provided in the agreement between the plaintiff and DuVernet. We are of opinion therefore that the appeal must be allowed with costs and the judgment of Mr. Justice Rose restored.

Appeal allowed with costs.

Solicitor for the appellant: *Hubert H. Macrae.*

Solicitors for the respondent: *Kilmer & Irving.*