1944

*May 11, 12.
*Oct. 3.

ANDREW J. FLEMING AND WILLIAM E. ADAMS (PLAINTIFFS) ..... APPELLANTS;

AND

WALTER WATTS AND OTHERS, EXECUTORS OF THE LAST WILL AND TESTAMENT OF ROBERT MILNER (DEFENDANTS).... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of Land—Mortgage—Agreement, in form one for sale of land, held to be in reality a mortgage—Time declared "to be the very essence" of the agreement—Right to redeem after default.

In an action claiming a right to redeem and for relief against forfeiture for default, in respect of an agreement which was in form an agreement of sale of land and which, *inter alia*, provided that on any breach of covenant by the purchaser he was to give up possession and the agreement was to be (at the vendor's option) void, and declared that time was "to be the very essence of this agreement", it was *held*, on the facts and circumstances (discussed in the judgment), that at the time of the agreement the purchaser had an equitable interest in the land which was not extinguished or surrendered, that the agreement was in its true nature and effect a mortgage from the purchaser to the vendor, and there was a right to redeem. (Judgment of the Court of Appeal for Ontario, [1943] O.W.N. 463, affirming judgment of McFarland J., [1943] O.W.N. 116, dismissing the action, reversed.)

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1) dismissing their appeal from the judgment of McFarland J. (2) dismissing their action and allowing the defendants' counterclaim.

On June 16, 1941, Robert Milner (now deceased, of whose will the defendants are executors) and the plaintiff Fleming entered into an agreement by the terms of which Milner agreed to sell to Fleming certain land in Chatham, Ontario. The agreement, *inter alia,* provided that on any breach of covenant by the purchaser he was to give up possession and the agreement was to be (at the vendor's option) void, and declared that time was "to be the very essence of this agreement".

At various times prior to the said agreement there had been transactions between one and another or among all, of Milner, Fleming and Adams (co-plaintiff of Fleming), which, as well as the circumstances of the agreement in question, are set out in the reasons for judgment in this Court *infra.*

The plaintiffs alleged that the said agreement was entered into by way of securing Milner for a loan to Fleming, that by inadvertence Fleming failed to make a certain payment when it was due under the agreement but later tendered it with interest and had always been and was still ready, able and willing to make it.

The plaintiff Fleming claimed an order directing the defendants to receive payment, an order relieving against forfeiture and allowing redemption. The plaintiff Adams, to whom Fleming had assigned the said agreement (which assignment the defendants claimed was in breach of the agreement), claimed an order allowing him to redeem the property and for relief against forfeiture.

The defendants counterclaimed for judgment declaring the agreement void and declaring the defendants entitled to possession, freed and discharged from every claim whatsoever of the plaintiffs or either of them in and to the land.

(1) [1943] O.W.N. 463. (2) [1943] O.W.N. 116.

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McFarland J. dismissed the action and gave judgment for the defendants on their counterclaim (1). An appeal by the plaintiffs to the Court of Appeal for Ontario was dismissed (2). The plaintiffs appealed to this Court.

J. R. Cartwright K.C. and *J. A. McNevin K.C.* for the appellants.

C. F. H. Carson K.C. for the respondents.

The judgment of the Chief Justice and Kerwin, Hudson and Taschereau JJ. was delivered by

HUDSON J.—The late Robert Milner became the legal owner in fee simple of a parcel of land in the City of Chatham on the 3rd day of March, 1936. On the following day, he entered into an agreement to sell this land to the appellant Fleming, who was then in occupation thereof.

On the 4th of August, 1938, there was a readjustment of the subsisting arrangement between Milner and Fleming and a new agreement was entered into by which Milner agreed to sell the land to Fleming for $11,000, payable, $1,000 on the 15th of December, 1938, and the balance in instalments, the last of which was $5,000 to be paid on the 15th of June, 1941. There was also a provision for the payment of interest on the amount of principal remaining due from time to time at the rate of 6 per cent. per annum, not payable, however, until the 15th of June, 1941.

Within a few months after the last agreement was entered into, Fleming fell into financial difficulties and sought the assistance of his co-plaintiff, Adams, who made him some advances. On the 8th of December, 1938, Fleming, with the consent of Milner, assigned all his interest under the last-mentioned agreement to Adams. Shortly thereafter, Fleming ceased to occupy the premises and they were let by Adams to a man named Todgham who continued in occupation at least until the commencement of this suit.

In the month of June, 1941, there was owing to Milner under the agreement of the 4th of August, 1938, a principal sum of $5,000 and interest amounting to $1,440. Milner advanced $5,000 for the purpose of paying off Adams and

(1) [1943] O.W.N. 116. (2) [1943] O.W.N. 463.

received from the latter a quit claim deed. Further sums were advanced to pay taxes, etc. At this point the agreement now in question was entered into. It is dated the 16th of June, 1941, between Milner and Fleming. It recites that Milner is the owner and provides that he, as vendor, agrees to sell to Fleming, as purchaser, the land in question for the sum of $12,000, to be paid as follows: $1,000 on the principal on the 16th of June, 1942; $1,000 on the principal on the 16th of June, 1943, and the balance of the principal in the amount of $10,000 and interest on the 16th of June, 1944. The money advanced in the sum of $12,000 was to bear interest at the rate of 5 per cent. per annum.

There are covenants by Fleming, (1) to pay taxes; (2) not to assign without leave; (3) that in case of the breach of any covenant the whole purchase money should become due; (4) that in case of any such breach the agreement should at the option of the vendor be void. Time was made of the essence of the agreement.

On the 16th of August, 1941, Mr. Milner died at the advanced age of 92 years.

On the 16th of June, 1942, the payment of $1,000 fell due and was not paid. On the 6th of July, 1942, the solicitor for the respondents wrote to the appellant Fleming notifying him that by reason of breaches of covenants the executors were treating the agreement as void under the terms of the default clause.

The breaches assigned were that the instalment of $1,000 had not been paid, that taxes were not paid as they became due and that there was a violation of the covenant not to assign without leave.

The plaintiffs thereupon commenced this action, which was dismissed at the trial and the decision of the trial Judge affirmed by the Court of Appeal.

Briefly stated, the appellants' contentions are, firstly, that the agreement in question was in the nature of a mortgage and that they were entitled to redeem, and secondly, that if not a mortgage, yet the circumstances were such as to entitle them to relief from any forfeiture.

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In form the transaction is a sale by Milner of the land which he owned to Fleming for $12,000 to be paid in the future, but it is necessary for the court to determine its true nature and effect.

Unfortunately, Mr. Milner was dead long before the trial and we are without knowledge of what his attitude would have been. It appears that when the agreement was under negotiation Mr. Milner insisted on the form which was adopted. There is no suggestion of fraud or deceit on his part.

At the time the agreement was entered into, Milner held the legal title but Fleming had an equitable interest which had not been extinguished or surrendered. Adams' position was analogous to that of a second mortgagee and his quit claim deed to Milner to a discharge of that mortgage. Fleming had been in possession of the land directly or through a tenant for many years. Substantial improvements had been added by him and the value of the property at this time was placed at from $20,000 to $25,000, as against $12,000 named as the purchase price in the agreement.

There is in the agreement no direct surrender by Fleming of his existing interest. Upon these facts, I find it difficult to believe that there was any intention on Milner's part to purchase Fleming's existing interest, or on the latter's part to sell. The facts are more consistent with a further advance to enable Fleming to clear off his debts and make a new start in life. It was in essence a borrowing transaction.

Having come to this conclusion on the facts, the right to redeem is clear. The law is succinctly stated in Falconbridge on Mortgages (3rd Ed.) at page 36:—

> When the right of redemption after default became established, the Court of Chancery, in order to prevent its evasion, was obliged to hold that a mortgagor could not, by any agreement entered into at the time of the mortgage and as part of the mortgage transaction, contract away his right of redemption or fetter it in any way by confining it to a particular time or to a particular class of persons * * *. The equity judges looked not at what was technically the form, but at what was really the substance of transactions, and confined the application of their rules to cases in which they thought that in its substance the transaction was oppressive.

and again at page 54 as follows:—

> Furthermore a mortgagor may, by a separate and independent transaction subsequent to the making of the mortgage, sell or release his equity of redemption to the mortgagee, or give the mortgagee the option of purchasing the mortgaged property and thus in effect deprive himself of his right to redeem * * *. The relation of the parties is that of vendor and purchaser and the onus of justifying the transaction is not upon the mortgagee.

Milner had a right to buy Fleming's equity, but the fact that here all was done in what was essentially one transaction leads to an inference of a further loan rather than of a purchase.

The appeal should be allowed and the judgment at the trial reversed. The appellants having declared their readiness and ability to pay the total amount due, the judgment should run to the following effect: It should declare that the agreement of sale between Robert Milner and Andrew J. Fleming, dated June 16th, 1941, is in reality a mortgage from Fleming to Milner, and that all necessary inquiries be made, accounts taken, costs taxed and proceedings had for the redemption of the premises in question, and that for this purpose the cause be referred to the Local Master of the Supreme Court of Ontario at Chatham. The judgment should contain the usual clauses in a judgment for redemption. Since the respondents failed on the main issue requiring a trial, they should only be entitled to their costs of the action down to the close of the pleadings but must pay the costs thereafter. The costs of the reference will be dealt with by the Local Master in the usual way. The counterclaim is dismissed with costs and the appellants are entitled to their costs in the Court of Appeal and this Court.

RAND J.—The facts in this controversy will be better appreciated by setting them forth chronologically. In the year 1934 the appellant Fleming entered into a contract to buy, for the sum of $7,000, a lot on the east side of William Street in Chatham, Ontario. It was contiguous on the south to a lot on the corner of William and Wellington Streets, then owned by the deceased, Robert Milner, represented by the respondents. It will be convenient to call the former the Watts lot and the latter the Milner lot. By

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1936 Fleming had paid something in the neighbourhood of $3,500 on the purchase price. There was on the land at this time a mortgage to a loan company apparently for $3,500 or thereabouts. This contract, if in writing, was not placed in evidence.

In 1936 Milner, an elderly man who had been a friend of Fleming's father, agreed to sell to Fleming the Milner lot for $6,000. At least $1,500 was paid at the time on account of this price. At the same time or shortly afterwards, he agreed to assist Fleming in financing by paying off the balance of the purchase price owing on the Watts lot, taking a conveyance from the owner to himself and consolidating the two transactions. Under date of March 4th, 1936, there was executed what purports to be a contract of sale to Fleming of the Watts lot for the sum of $8,000, payable in four annual instalments of $1,000 each and the balance of $4,000 on June 10th, 1940. The agreement contains a statement to the effect that

> part of the consideration for this agreement is the balance of the purchase price owing by the Purchaser herein to the Vendor herein on the purchase of the property adjoining immediately to the south of the property herein described, and that payments on this agreement shall be also payments on the sale agreement between the above parties covering the lands immediately to the south of the above described property.

Fleming was now in possession of both lots. The building on the Milner lot was torn down and a new one erected which, with the remodelled structure on the Watts lot, made a garage running across the back portions of both lots and fronting on Wellington Street. On December 16th, 1938, the premises were leased by the appellant Adams to one Todgham at a rent of $2,580 per annum.

In 1938 Milner made a further advance of $4,050 to assist Fleming in financing the garage business he was then carrying on. The arrangement is evidenced by an agreement dated July 30th, 1938, and its recital is to this effect:—

> Whereas the Vendor has agreed to sell and the Purchaser has agreed to purchase, upon the terms and conditions hereinafter mentioned all and singular that certain parcel or tract of land and premises [etc., describing the Watts lot].

That land was, of course, already the subject-matter of the written document of the 4th of March, 1936, by which the

purchase price was expressed to be $8,000. In the later agreement also it is stated that Fleming was in default in his payments under the agreement of March 4th, 1936, and that the principal sum at that time outstanding was $6,500. Provision was then made to pay this latter sum in four instalments as set forth. It was declared also that part of the consideration for the agreement was

> the balance of the purchase price owing by the Purchaser herein to the Vendor herein on the purchase of the property adjoining immediately to the south of the property herein described, and that payments on this agreement shall also be payments on the sale agreement between the above parties covering the lands immediately to the south of the above described property.

A like provision, it will be recalled, was contained in the document of March 4th, 1936.

On the 4th of August, 1938, a further document was executed by Milner and Fleming. It purported to provide for the sale by Milner as vendor to Fleming as purchaser of the Watts lot for the sum of $11,000, payable by instalments, the last of which for the sum of $5,000 was to become due on June 15th, 1941. It was agreed

> that this agreement is in lieu of and substituted for the hereinbefore agreements dated the 4th day of March, 1936, and the 30th day of July, 1938, and that this agreement dated the 4th day of August, 1938, shall be the only agreement affecting the hereinafter described property.

There is no reference in this document, as there was in those it superseded, to the purchase of the corner or Milner lot.

When the final instalment under this arrangement became due in June, 1941, Adams, the assignee of the interest of Fleming, was ready to pay the $5,000 with interest to Milner but the latter "said he would like to put more money into the garage"; the reply to Milner was: "If you want to put money in it at 5 per cent. it is all right with me. You can do whatever you wish. Otherwise your money is there for you." At this time the only sum outstanding between Milner and Fleming was the $5,000 instalment and the interest. By a document dated June 16th, 1941, Milner purported to sell anew to Fleming the same land, the Watts lot, for the sum of $12,000. The preamble recited:—

> Whereas the party of the first part, Robert Milner, is the owner of the hereinafter described premises in the City of Chatham in the County of Kent.

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> And whereas the party of the first part, Robert Milner, is desirous of selling the said hereinafter described premises to Andrew J. Fleming, upon the terms and conditions hereinafter set out in this agreement.

A clause provided that "the money advanced in the sum of $12,000 is to bear interest at the rate of 5 per cent. per annum". There were terms covering adjustments of taxes, insurance premiums and rentals to the 16th day of June, 1941; exempting the vendor from furnishing an abstract of title; providing that on any breach the purchaser was to give up possession, the agreement to be void and the purchaser to have no recourse to recover any monies paid thereunder. As in the previous instruments it stipulated that time was "to be the very essence of this agreement". On August 16th, 1941, Milner died.

It is on the last agreement that this action has been brought by Fleming and Adams for relief from forfeiture and to redeem. They are ready to pay the balance of the monies owing with all interest and other charges, and on those terms the relief is asked.

The grounds upon which the claim is contested are the breach by Fleming of a covenant against assignment without leave and the failure to pay the first instalment of $1,000 when it became due on June 16th, 1942. The questions raised for decision are whether the real arrangement between the parties was a mortgage or a sale, and whether, in either case, the appellants have lost their rights by reason of default in the respects mentioned.

The point of assignment, as a matter of fact, can be dealt with shortly. In December, 1938, with Milner's consent, Fleming had assigned his interest in the agreement of August 4th, 1938, to Adams as security for money owed. Before the agreement of June 16th, 1941, was executed Milner required a quit claim from Adams but his purpose is clear: he was entering into a new arrangement with Fleming to cover a new advance of approximately $5,600 for which he wanted an unencumbered title to the security. On June 17th, following the agreement, a new assignment was executed by Fleming, but this was not registered until after the death of Milner. In the month of September, 1941, the respondents became aware of it and through their solicitor notified Adams they would not recognize him in

the transaction. By a letter on May 27th, 1942, likewise through the solicitor, they requested the city Tax Collector to collect the taxes from the tenant of the property, basing their action on the term of the agreement by which the taxes were to be paid by Fleming. This communication unequivocally recognized the agreement as then subsisting. On July 6th, 1942, a formal repudiation by letter was sent to Fleming based on the breaches of the covenants against assignment, to pay taxes, and to pay the instalment of $1,000 on June 16th, 1942. This letter confirms the inference from the conduct of the respondents from the autumn of 1941 until after June 16th, 1942, that they did not intend to act upon the breach to which the assignment is said to have given rise. The fact that the formal notification asserts the failure of payment of the instalment of June 16th, 1942, as a default, is conclusive of that waiver.

What, then, was the real nature of the agreement between the parties and what the effect of the default in payment on June 16th, 1942? When the 1936 agreement between Milner and Fleming was entered into, the latter was already the equitable owner of the land; there was nothing in the agreement which destroyed that interest; nor has that interest, in any of the succeeding transactions, been released or surrendered. The contract failed in the essential function of executing in the purchaser the equitable estate: on the contrary, the purchaser agreed to encumber his existing estate with a consolidated charge, which involved a discharge of the contractual obligation to pay the balance of price for the Milner lot. I find no difficulty in the circumstance that Mrs. Watts conveyed the land direct to Milner. Milner was advancing to Fleming the balance of the purchase price. The usual step would have been a conveyance from Mrs. Watts to Fleming and a mortgage from Fleming to Milner. But Milner evidently desired to combine his dealings with Fleming under a single arrangement, and the mode adopted was one, though a somewhat clumsy, way of doing that.

When we come to the transaction of July 30th, 1938, the real nature of these documents is put beyond doubt. There was made at this time an advance by Milner to Fleming of $4,050. It was pure loan, and yet, for the purpose of

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securing it, what purports to be a formal contract for the sale of land already covered by the 1936 agreement and in terms expressly maintaining both is drawn up. This form, according to the solicitor, was the "idea" of Milner; and that circumstance confirms Fleming's statement that the various transactions took the same form because "he (Milner) wanted it that way".

The instrument of 1941 carried similar stigmata. By that transaction he agreed to advance as a loan to Fleming about $5,600 which, with the interest and the balance owing, brought the total to $12,000; and it is that amount which purports and is claimed to be the price of the lot originally sold for $7,000, all of which had long since been paid to the real vendor.

It is significant, too, that that instrument should carry the language, "the money advanced in the sum of $12,000 is to bear interest". A vendor does not stipulate for interest on money advanced. That language unconsciously reveals the mind of Milner and it confirms the inference from the documents and the underlying facts that the money had not the character of sale price.

The transaction being, then, a mortgage, the case is the ordinary one of relief from forfeiture through default in payment of the money secured, and the right to redeem claimed should, in my opinion, have been granted to the appellants.

In this view it is unnecessary to consider the ground upon which the judgments below proceeded, that is, that the clause as of an agreement for the sale of land declaring time to be of the essence was conclusive and excluded relief from the resulting forfeiture. In the light of the decision in the case of *In re Dagenham (Thames) Dock Co.* (1), followed in *Kilmer* v. *British Columbia Orchard Lands Limited* (2), the point would appear to present more aspects for consideration than were apparently dealt with either on the trial or the appeal: and I do not express any opinion upon it.

(1) (1873) L.R. 8 Ch. App. 1022. (2) [1913] A.C. 319.

I would, therefore, allow the appeal on the terms proposed by my brother Hudson.

Appeal allowed with costs.

Solicitors for the appellants: *Kerr, McNevin, Gee & O'Connor.*

Solicitor for the respondents: *A. L. Hanna.*

HIS MAJESTY THE KING (PLAINTIFF). APPELLANT;

AND

DOMINION ENGINEERING COMPANY LIMITED (DEFENDANT)..... RESPONDENT.

1944
*May 22.
*Oct. 3.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Sales tax—Contract of sale of machinery—Purchase price to be paid by monthly progress instalments during period of construction—Purchaser becoming insolvent before completion and delivery of machine—Claim by the Crown for sales tax on remaining instalments then not collected—The Special War Revenue Act, R.S.C., 1927, c. 179, s. 86

The respondent company entered into a contract, on June 5th, 1937, for the sale of a pulp-drying machine to the Lake Sulphite Pulp Company for the price of $488,335 payable in nine monthly progress instalments of $48,800 each commencing July 5th, 1937, and the balance of $49,135 when the machine would be in operation, title to pass on payment in full of the price. Six instalments were paid to the respondent and the sales tax on them was paid by the latter to the appellant. On February 5th, 1938, a petition in bankruptcy was filed against the Pulp Company; and on the 11th of February, all work on the machine was stopped. On February 22nd, an order was made for winding up under the Dominion *Winding Up Act* and a liquidator was appointed. The Crown brought an action for the recovery from the respondent of the sum of $10,844.46 for sales tax and penalties on the instalments payable on the 5th days of January, February and March, 1938, the tax being claimed under section 86 of the *Special War Revenue Act*, R.S.C., 1927, c. 179. The first proviso of that section enacts *inter alia* that "the tax shall be payable *pro tanto* at the time each of such instalments falls due and becomes payable in accordance with the terms of the contract, and all such transactions shall, for the purpose of the section, be regarded as sales and deliveries"; and the second proviso further enacts that "in any case where there is no physical delivery of the goods by the manufacturer or producer, the said tax shall be payable when the property in the said goods

*PRESENTS—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.