

CARTWRIGHT, MASTER

MAY 26TH, 1903.

CHAMBERS.

FARMERS' LOAN AND SAVINGS CO. v. EARHEART.

Summary Judgment — Mortgage — Defence — Release — Conveyance—Question to be Tried.

Motion by plaintiffs for summary judgment under Rule 603.

F. J. Dunbar, for plaintiffs.

H. R. Frost, for defendant.

THE MASTER.—By deed dated 1st June, 1893, defendant mortgaged to plaintiffs certain real estate securing \$700 and interest. On 19th June, 1902, interest was in arrear, amounting to \$166.89. On 26th May, 1902, defendant signed an offer to purchase the land from the liquidator of plaintiffs for \$600. The offer is now before me. Annexed to it is the recommendation of the acceptance of such offer by the liquidator . . . stating that the claim of the company is \$1,015; that the land is valued . . . at \$600; and that Mr. Earheart now offers \$600 cash. It is admitted that the offer was accepted and the land was conveyed to a nominee of defendant, who had advanced the \$600, which was duly paid to the liquidator. . . . On 21st October last an action was commenced in a County Court to recover from defendant the balance still alleged by plaintiffs to be due on the mortgage. An appearance being entered, a motion was made for summary judgment. On consent of all parties on 7th March last an order was made transferring the action to the High Court; and on 19th May this motion was made for summary judgment. . . .

Defendant's solicitor states as his ground of defence that when the sale of the lands was made to him, he fully understood that upon payment of \$600 plaintiffs would have no further claims upon him in reference to the mortgage.

If this proves to have been a mistake on his part, it was certainly a very natural mistake.

In *Jacobs v. Booth's Distillery Co.*, 85 T. L. R. 262, the true principle was declared to be this: "Judgment should only be ordered where, assuming all the facts in favour of defendant, they do not amount to a defence in law."

Applying this test to the facts of the present case, it is clear that the motion must be refused. Looking at the whole transaction and the documentary evidence, it may yet be held that plaintiffs have no further claim on defendant. . . .