

C. J. Holman, K.C., for the appellant.

D. L. McCarthy, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., read a judgment in which he said that he agreed with the conclusions, both of fact and law, of the trial Judge, and had little to add.

It was argued for the appellant that sufficient weight was not given to the testimony of the solicitor in whose office the agreement was prepared; but there was a categorical denial by the respondent (evidence, p. 158) of a statement attributed to him by the solicitor.

It was suggested upon the argument that the action was not properly constituted; but, in the opinion of the Chief Justice, neither Foster, the mortgagee, nor Mountjoy, to whom he conveyed, was a necessary party to the action. Foster, unless the final order of foreclosure in a previous action stands, is only a prior mortgagee; and, if it stands, he is the absolute owner of the land. In the latter case, upon a reference as to title, the result will be that it must be reported that the appellant cannot make title, and this action will be fruitless as to the claim for specific performance. Mountjoy took by his conveyance whatever interest Foster had, and stands in his position. If the final order of foreclosure is set aside, his position will be that of prior mortgagee; and, if the foreclosure stands, it may be that he will be the owner of the land, and the judgment for specific performance fruitless. He has no interest in the land except that which he acquired by the conveyance from Foster, no conveyance having been made to him by the appellant. If he has any agreement with the appellant for the purchase of the land from him, of which there is no evidence, it must have been entered into after the registration of the *lis pendens*; and, as he acquired that interest *pendente lite*, he is not a necessary party to the action.

The appeal should be dismissed with costs.

MACLAREN, J.A., concurred.

MAGEE, J.A., said that the agreement was one which should be specifically performed. As the judgment to that effect would enable the respondent to make application to open up the final order in the foreclosure action, the learned Judge expressed no opinion as to the necessity or propriety of having Foster or Mountjoy before the Court as a party to this action, as having acquired, before this action was begun, the vendor's title.

HODGINS, J.A., concurred.

*Appeal dismissed with costs.*