

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

J. P. MacGregor, for plaintiff, appellant.

G. H. Watson, K.C., contra.

HON. SIR WM. MULOCK, C.J.Ex.:—The facts established by the evidence are as follows:—

The lands in question had been vested in fee simple in Simmons, but on a secret trust for Thomas McConnell, the beneficial owner, and at McConnell's request and for his benefit were mortgaged to certain parties, one of them being Samuel C. Smoke, who on the 15th of August, 1905, became mortgagee thereof for \$500 subject to the prior mortgages.

At this time, Thomas McConnell was erecting buildings on the land, intending in the near future to effect a larger loan wherewith to pay for the buildings.

In October, 1905, he applied to Mr. Smoke for a further advance which was refused unless McConnell gave further security, McConnell then applied to his son, the defendant, for assistance, and the latter, for his father's accommodation, on numerous occasions, gave to him his promissory notes for sums amounting to between \$3,000 and \$4,000, and these notes Thomas McConnell discounted with Mr. Smoke.

Thomas McConnell having made default in payment for the buildings, mechanics' liens were registered against the land and proceedings were taken to realise on these liens, Mr. Smoke being a party defendant in those proceedings. On their culminating in a judgment he, with the consent of Simmons and Thomas McConnell, paid the amounts owing and obtained a further mortgage to secure the amount then due to him, being something over \$8,000, John E. McConnell still remaining liable to Mr. Smoke in respect to the notes above mentioned. Subsequently interest on this mortgage falling into arrear, Mr. Smoke, in October, 1906, began power of sale proceedings when Thomas McConnell applied to the defendant for his assistance towards obtaining their discontinuance.

It was then agreed, between Thomas McConnell and the defendant, that if the defendant would secure a discontinuance of the proceedings by becoming liable to Mr. Smoke for the amount of his mortgage claim, Thomas McConnell