

W. E. Raney, K.C., for the defendants.

A. W. Langmuir, for the plaintiff.

SUTHERLAND, J., in a written judgment, said that on the 8th February, 1911, one Davenport bought the lands in respect of which the action was brought, and executed a mortgage in favour of the vendor to secure the unpaid purchase-money, \$28,000, payable in 5 years from the day mentioned, with interest half-yearly at 6 per cent. per annum. On the 18th June, 1913, the vendor assigned the mortgage to the plaintiff. Later in 1913, Davenport sold the lands to McBain, who assumed the mortgage, and afterwards transferred the lands, subject to the mortgage, to the defendants. On the 8th February, 1915, the defendants executed a mortgage in favour of the plaintiff for \$28,025, payable at the expiration of 2 years, with interest half-yearly at 7 per cent. per annum.

This action was brought in August, 1917, upon the last-mentioned mortgage, for foreclosure; at that time neither interest nor taxes was in arrear—the principal money was all overdue.

Section 2 (1) of the Act provides that no person shall (a) take or continue proceedings by way of foreclosure for the recovery of principal money secured by any mortgage of land made or executed before the 4th August, 1914, except by leave of a Judge.

By sec. 4 of the Act (as amended by 6 Geo. V. ch. 27, sec. 1), secs. 2 and 3 of the principal Act shall not apply to any mortgage made or entered into after the 4th August, 1914, or to any extension or renewal made or entered into after the 4th August, 1914, of a mortgage made or entered into prior to that date, where such extension or renewal is for not less than 3 years, and the rate of interest provided for in the original mortgage is not increased by such extension or renewal.

Upon the evidence it seemed plain to the learned Judge that, though in form a new one, the mortgage sought to be enforced was in substance and fact an extension or renewal of the pre-existing mortgage, and, being made for a term of less than 3 years and at a higher rate of interest than that provided for by the original mortgage, it was not covered by the exception in sec. 4 as amended, and was therefore subject to the necessity, imposed by the original Act sec. 2 (1), on the mortgagee, taxes and interest not being in arrear, of obtaining the leave of a Judge before beginning the action.

Upon the material as a whole, if there was power or discretion to grant the leave in this action, nunc pro tunc, it should not be exercised.

*Order dismissing the action with costs.*