

LATCHFORD, J., in a written judgment, said that before the 9th February, 1917, Wilson was the owner of two lots of land, which on that day he sold and conveyed to the defendants. Lot 1349 was subject to a mortgage in favour of the plaintiffs; lot 1351 was subject to two mortgages in favour of other mortgagees. The defendants covenanted with Wilson that they would assume and pay off the several mortgages to which the lots were subject. On the 24th June, 1918, the defendants sold and conveyed the two lots to one Hackett, for an entire consideration, subject to the three mortgages, which Hackett covenanted that he would assume and discharge. The buildings on lot 1349 were afterwards substantially damaged by fire, and Hackett released to one of the two mortgagees his equity of redemption in that lot. Neither the plaintiffs nor the defendants were parties to the transaction. In March, 1919, the plaintiffs obtained from Wilson an assignment of the covenant of the defendants, assuming the mortgage in favour of the plaintiffs expressed in the conveyance from Wilson to the defendants of lots 1349 and 1351.

In April, 1919, the plaintiffs, in a foreclosure action, recovered judgment against Wilson on the covenant in the mortgage which he had given them on lot 1351. The defendants were not parties to the action, nor were they added in the Master's office. A final order of foreclosure was obtained on the 29th November, 1919. The judgment against Wilson upon his covenant had not been satisfied in whole or in part. It was said that he had no assets out of which the judgment could be realised.

The plaintiffs were in a position to reconvey lot 1351 to the defendants, but not lot 1349.

Under the assignment from Wilson of the defendants' covenant with him, the plaintiffs claimed, in this action, from the defendants, \$4,138.13, the amount of the judgment obtained against Wilson on the 1st April, 1919, with interest and costs.

The defence set up was that, as Wilson could not be compelled to pay the judgment against him, there was no amount in respect of which he was entitled to claim against the defendants. Another defence was that the lots were dealt with as a whole, and that lot 1349 was, in its depreciated condition, no longer under the control of the plaintiffs.

Reference to *Mendels v. Gibson* (1905), 9 O.L.R. 94, 98; *Brown v. Brown* (1912), 3 O.W.N. 543, 20 O.W.R. 986; *Roberts v. Bury Commissioners* (1870), L.R. 5 C.P. 310; *Beatty v. Bailey* (1912), 26 O.L.R. 145; *British Union and National Insurance Co. v. Rawson*, [1916] 2 Ch. 476, 487.

The mortgagors themselves had put it out of the plaintiffs' power to reconvey one of the lots—they were in a position to convey the other.