

SECOND DIVISIONAL COURT.

MARCH 25TH, 1918.

*WALSH v. WILLAUGHAN.

Mortgage—Amount of Principal Due—Mortgage Given to Vendor by Purchaser of Land, upon other Land, for Amount of Down-payment, and Money Lent—Default of Purchaser under Contract of Purchase and Sale—Rescission of Contract—Effect as to Part of Mortgage-money Representing Down-payment.

Appeal by the defendant Willaughan from an order made by the Senior Judge of the County Court of the County of York dismissing the appellant's appeal from the report of a Referee finding the defendant Stephens entitled to the principal sum of \$700 on his mortgage-security.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

H. T. Beck, for the appellant and for the plaintiff.

Gideon Grant, for the defendant Stephens, respondent.

MULOCK, C.J. Ex., in a written judgment, said that the action was upon a first mortgage and a third mortgage made by the defendant Willaughan. The second mortgage was to the defendant Stephens, to secure payment of \$700 and interest; and Stephens was added as a defendant, in the position of a subsequent incumbrancer.

Before the Referee, Willaughan contended that only \$200 principal was recoverable upon the Stephens mortgage. The Referee found that \$700 principal was owing; and his finding was affirmed by the County Court Judge.

Stephens sold land to Willaughan. The \$700 mortgage was given (on other land) for \$500, the down payment on the contract of purchase, and \$200 advanced to Willaughan by Stephens. By virtue of provisions contained in the agreement for sale, the agreement became, on Willaughan's default, null and void.

Willaughan contended that the mortgage to the extent of \$500 was security only for \$500, part of the purchase-price; and that, the contract having been rescinded, the mortgagee was not entitled to payment of the \$500; also, that, the contract having been rescinded by the vendor, the purchaser was entitled to repayment of the \$500 paid by giving the mortgage.

The learned Chief Justice, after a careful review of the facts