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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. SEPTEMBER 27TH, 1916.

WAY v. SHAW.

Evidence—Action by Personal Representative to Set aside Mortgage Made by Deceased Person—Denial of Signature of Subscribing Witness—Conflict of Evidence—Finding of Fact of Trial Judge—Appeal—Mortgage Account.

Appeal by the plaintiffs from the judgment of BRITTON, J., 10 O.L.R. 124.

The appeal was heard by GARROW*, MACLAREN, MAGEE, and HODGINS, JJ.A.

H. J. Scott, K.C., and E. G. Porter, K.C., for the appellants.

W. C. Mikel, K.C., and A. B. Collins, for the defendant, respondent.

HODGINS, J.A., read the judgment of the Court. He said that it was impossible to finish the consideration of the case, assisted by the able arguments of counsel, without being impressed by the want, in almost every specific instance where doubt arose, of those corroborative surroundings which it would be natural to expect.

Were it not that the matters in question had been passed upon by an experienced Judge, and that to reverse his opinion would be in fact to pronounce the respondent guilty of forgery and perjury, without the opportunity of judging him by his demeanour and bearing, there would have been considerable doubt as to

*Mr. Justice Garrow died on the 31st August, 1916, while the appeal was standing for judgment; he had, however, expressed his concurrence in the judgment as about to be delivered.

whether the conclusion arrived at was one which this Court should adopt.

But suspicion was not proof, and it was almost impossible, where the issues raised involved the moral character of the actors in the transaction, and where they had given essential evidence which the Judge had accepted, to refuse to give effect to his view.

These considerations did not go far enough, however, to require the Court to hold that, in giving judgment for the defendant, the trial Judge took the mortgage account. There were in it four items which were necessarily discussed in the endeavour to discredit the respondent's whole story. One was an advance made when the mortgage was said to be executed, and as to it there was only the evidence of the respondent. The three others were, in a measure, corroborated, if the receipt was proved, because it shewed that notes for these sums were then given up. But one of them depended in the end on the sole evidence of the respondent, who alleged a payment to an estate on behalf of the deceased mortgagor, which was not shewn to have been made. The third payment was money advanced, it was said, for the specific purpose of removing an incumbrance, which was not paid off.

While, therefore, the judgment should stand affirmed, the respondent must prove his mortgage account; and, for that purpose, the judgment must be varied so as to provide a reference to ascertain the amount advanced upon and due under the mortgages, to the Master at Belleville, and to take the mortgage account. In this respect, the judgment appealed from was not to be regarded either as prima facie or conclusive evidence.

No costs of appeal.

FIRST DIVISIONAL COURT. SEPTEMBER 28TH, 1916.

SEAGRAM v. HALBERSTADT.

Trusts and Trustees—Conveyance of Land—Alleged Trust for Execution Debtor—Action by Execution Creditors for Declaration—Evidence—Bona Fide Sale for Value—Findings of Fact of Trial Judge—Appeal.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., 10 O.W.N. 308.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

W. S. MacBrayne, for the appellants.
J. L. Counsell, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

SUTHERLAND, J., IN CHAMBERS. SEPTEMBER 25TH, 1916.

TORONTO GENERAL TRUSTS CORPORATION v. KINZIE.

Costs—Security for Costs—Præcipe Order—Claim of Defendant against Third Party—Service of Notice—Place of Residence of Defendant not Stated in Notice—Writ of Summons Served along with Notice—Residence of Defendant Stated to be out of Jurisdiction—"Plaintiff"—Judicature Act, R.S.O. 1914 ch. 56, sec. 2 (r)—Rules 165 (2), 169, 375.

An appeal by one Lippert, a third party, from an order of a Local Judge setting aside a præcipe order for security of costs, issued by the third party against the defendant, upon the ground that the issue of the order was an abuse of the process of the Court.

In the writ of summons the plaintiffs stated the address of the defendant as the village of Success, in the Province of Saskatchewan. The defendant served a third party notice on Lippert, claiming to be indemnified by him against liability to the plaintiffs under the mortgage sued upon. In the third party notice, the address of the defendant was not given or indicated. A copy of the writ was served by the defendant with the third party notice, pursuant to Rule 165 (2). The third party, treating himself as defendant, in so far as the defendant was concerned, and the latter as plaintiff, and assuming that, because the plaintiffs in the writ had stated the defendant's address as being without the Province, he could assume it to be so for that purpose, took out the præcipe order which was set aside by the Local Judge.

J. A. Scellen, for Lippert, contended that the term "plaintiff." according to the Judicature Act, R.S.O. 1914 ch. 56, sec. 2 (*r*), applies to a defendant who serves a third party notice, as between him and the third party, and also that Rule 375 applies, and that, as the defendant served, with the third party notice, a copy of the

writ in which his address was given as without the Province, the third party could treat that as an admission of foreign residence in the same way as the defendant could in the case of the plaintiff who issued the writ.

J. E. Jones, for the defendant.

SUTHERLAND, J., in a written judgment, said that he was not at all clear that the word "plaintiff" could be said to apply in such a case as this to a defendant serving a third party notice.

Under Rule 169, a defendant notifying a third party may apply for directions, and the Court may order the question of liability as between the third party and the defendant giving the notice to be tried in such a manner, at or after the trial of the action, as may seem proper, and may give the third party liberty to defend the action upon such terms as may be just, or to appear at the trial and take part therein, etc.

On such an application, a question such as that of security for costs might well be brought up and dealt with.

But, if the word "plaintiff" were to be construed to cover the case of a defendant serving a third party notice, then the writ of summons, issued by the plaintiff, and not by the defendant, and in which the plaintiff stated the address of the defendant, could not be considered, as between the defendant and the third party, as the writ or initiating proceeding; the third party notice must be considered as such. This notice did not shew the defendant's address as without the Province, and no admission such as the statement in the writ would imply in the case of a plaintiff could properly be inferred by a third party as against a defendant.

The order appealed from was rightly made and should be affirmed, and the appeal dismissed with costs.

SUTHERLAND, J. SEPTEMBER 25TH, 1916.

RE BRASS AND WALL.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Application under Vendors and Purchasers Act—Title Derived under Conveyance Made in Exercise of Power of Sale in Mortgage—Statutory Declarations—Sufficiency.

An application by the purchaser named in an agreement for the sale and purchase of land, under the Vendors and Purchasers Act, for an order in regard to an objection made to the title.

The vendor's title was derived through one Pasternak, to whom the land was conveyed in 1903, by the mortgagee in a mortgage made in 1889, in the exercise of a power of sale contained in the mortgage-deed. In the power of sale it was provided that, if default in payment of any moneys secured by the mortgage continued for two months, the power might be exercised without notice; and also that no want of notice should invalidate a sale thereunder—the vendor alone should be responsible.

The mortgagee made a statutory declaration that he was in possession of the land and collected the rents thereof for at least five years before making the conveyance under the power, and that, at the date of that conveyance, default in payment of the moneys secured by the mortgage had continued for more than one year. This declaration was produced by the vendor; and a further declaration was offered to the effect that moneys had been paid on the mortgage within ten years of the date of the conveyance.

The motion was heard in the Weekly Court at Toronto.

A. Cohen, for the purchaser.

L. Davis, for the vendor.

SUTHERLAND, J., in a written judgment, said that the clause in the mortgage authorising the mortgagee to sell without notice if default in payment of the money secured by the mortgage continued for two months, and that, in case of sale without notice, such sale could not be invalidated, but the remedy should be against the vendor alone, precluded the necessity of any notice to the persons appearing in the registry office as interested in the property subsequent to the date of the mortgage. The purchaser could safely accept the title offered by the vendor, in so far as those persons were concerned. The objection to the title was sufficiently answered by the declaration produced and the declaration offered, when produced.

FOSTER v. MACLEAN—SUTHERLAND, J., IN CHAMBERS—SEPT. 25.

Appeal—Leave to Appeal from Order of Judge in Chambers—Rule 507—Discovery—Particulars.] Motion by the defendants, under Rule 507, for leave to appeal from an order of BRITTON, J., in Chambers, 10 O.W.N. 457, allowing an appeal from an order of the Master in Chambers directing that the plaintiff should attend

for further examination for discovery, and extending the time for delivery by the defendants of particulars until after the attendance of the plaintiff for further examination for discovery. SUTHERLAND, J., in a written judgment, said that during the argument of the motion he expressed the view that the matters in question were somewhat important, and the propriety of the order made was not free from doubt. Further consideration had confirmed his view as to this, and the leave asked should be granted. Costs of this motion to be in the appeal. K. F. Mackenzie, for the defendants. W. E. Raney, K.C., for the plaintiff.

HALSTED v. PRIESTMAN—SUTHERLAND, J., IN CHAMBERS—SEPT. 25.

Mortgage—Action upon—Motion for Summary Judgment—Dispute as to Amount Due—Judgment Directing Account to be Taken—Notice of Assignment of Mortgage—Stay of Proceedings—Mortgagors and Purchasers Relief Act, 1915.]—Appeal by the defendants from an order of the Master in Ordinary, sitting for the Master in Chambers, upon a motion for summary judgment, in a mortgage action, directing that the affidavit of the defendant Margaret Priestman, filed with her appearance, be struck out, and an account taken of the amount owing for principal and interest under the mortgage sued upon as if no "affidavit of merits had been filed," and that, if it were ascertained that any principal or interest were in arrear at the date of the issue of the writ, the plaintiffs should be allowed to enter judgment therefor with costs. The appeal was on a number of points urged before the Master, and on the ground particularly that no notice of the assignment of the mortgage in question had been given to the defendants; and alternatively relief was asked under the Mortgagors and Purchasers Relief Act, 1915. SUTHERLAND, J., in a written judgment, said that it was plain from the material before the Master that no substantial defence to the motion for judgment had been shewn, and that the defendants were in reality only disputing the amount due. On this appeal the further affidavit filed on behalf of the defendants themselves made it plain they had notice of the assignment to the plaintiffs, and had been treating them as the proper assignees of the mortgage, by making payment to them on account of interest. The further facts set out in the second affidavit were not sufficient, in the circum-

stances of the case, to entitle the defendants to a stay of proceedings under the Act. The order of the Master was substantially right, and the appeal must be dismissed; costs thereof to be costs in the cause. Harcourt Ferguson, for the defendants. F. J. Hughes, for the plaintiff.

RE WEST NISSOURI CONTINUATION SCHOOL—SUTHERLAND, J., IN CHAMBERS—SEPT. 25.

Public Schools—Continuation School—Vacancies in Board—Duty of Township Council—Mandamus.]—An application by Walter C. Bryan, Joseph Cunningham, and W. B. Harding, for an order for a mandamus to compel the Municipal Council of the Township of West Nissouri, in the County of Middlesex, to fill existing vacancies in the West Nissouri School Board. SUTHERLAND, J., in a written judgment, said that, without canvassing in detail the somewhat complicated facts in this much litigated matter, he was compelled to the conclusion that the township council should forthwith appoint new trustees so as to enable the Board, when thus completed, to deal with the present urgent situation existing as to the continuation school. Unless, on or before the 2nd October next, the township council shall fill the vacancies in the Board by the election of new trustees, an order will be made for a mandamus. No disposition of the costs of the motion will be made until after the date named. W. R. Meredith, for the applicants. George S. Gibbons, for the School Board.

CITY ESTATES OF CANADA LIMITED v. BIRNBAUM—SUTHERLAND, J., IN CHAMBERS— SEPT. 25.

Judgment—Motion for Summary Judgment—Amount Due under Agreement for Purchase of Land—Assignment by Purchaser—Covenant of Assignee to Pay Vendor—Defences—Want of Privity and Consideration—Seal.]—Appeal by the defendant from an order of the Master in Chambers granting an application by the plaintiffs for summary judgment for $515.57, the balance of principal and interest unpaid upon an agreement for the purchase of land from the plaintiffs, entered into by one Mooster, who assigned to the defendant. SUTHERLAND, J., in a written judg-

ment, set forth the facts, and said that, in his opinion, the defences set up by the defendant were such that summary judgment should not have been granted. In the assignment to the defendant, he covenanted to pay the moneys called for by the agreement; this covenant was stated to be made with the plaintiffs, but they were not parties to the agreement; and the learned Judge said that he could not see how they could enforce it. The agreement was under seal, but the defendant was not thereby precluded from raising the question of want of consideration against the plaintiffs, who were not parties to it. Appeal allowed; costs of the motion for judgment and of the appeal to be costs in the cause. Grayson Smith, for the defendant. Shirley Denison, K.C., for the plaintiffs.

EVANS v. EVANS—SUTHERLAND, J.—SEPT. 25.

Husband and Wife—Alimony—Undertaking of Husband to Receive Wife back—Unconditional Offer to Return—Refusal except on Condition—Contempt of Court—Order to Commit—Locus Pœnitentiæ.]—Motion by the plaintiff for an order for the attachment or committal of the defendant for neglect or refusal to carry out an undertaking given by him. The action was for alimony. A former action for the same cause was settled, the defendant paying the plaintiff $3,000. The present action was tried by BRITTON, J., who gave judgment for the defendant: Evans v. Evans (1916), 9 O.W.N. 493. The plaintiff appealed; and, upon the hearing of the appeal, counsel for the defendant undertook that the defendant would receive the plaintiff if she would return to him. The Court dismissed the appeal without costs. The defendant's undertaking was recited in the order dismissing the appeal. Upon the present motion, the plaintiff asserted that she had offered to return, and that the defendant refused to receive her unless she paid him back the $3,000. The motion was heard in the Weekly Court at Toronto. SUTHERLAND, J., in a written judgment, said that the affidavits were somewhat contradictory; but on the whole it plainly appeared that the offers to return were definitely made by the plaintiff and that the defendant refused to receive her; and counsel for the defendant stated that the defendant was not prepared to receive his wife unless she should restore the $3,000. An order to commit should be made; but the issue of it should be delayed for two weeks to enable the defendant to consider the matter

further. If, within that time, he expresses his readiness to receive his wife back or consents to a judgment for alimony (the amount to be determined having regard to the payment of $3,000), the motion may be spoken to; otherwise the order for committal may go with costs. J. E. Jones, for the plaintiff. G. Lynch-Staunton, K.C., for the defendant.

COOPER v. ABRAMOVITZ—LATCHFORD, J., IN CHAMBERS—SEPT. 30.

Mortgage—Action for Foreclosure—Motion for Summary Judgment—Defence—Oral Agreement to Take no Proceedings, not Binding on Mortgagee.]—An appeal by the defendant Gussie Gross from an order of the Master in Chambers, in a foreclosure action, directing that judgment be entered in favour of the plaintiff. The appellant alleged that, before the writ of summons was issued, the plaintiff orally agreed with her that, so long as he received certain monthly payments from her by way of rent, he would take no proceedings against her under the mortgage. The fact that such an agreement was made, and the terms of it, if made, were in question before the learned Master; and he decided that, if such an agreement was made, it was not binding upon the plaintiff, because, as it varied the terms of the mortgage, it was required to be in writing. LATCHFORD, J., in a brief written judgment, said that he agreed with this determination, and referred to Vezey v. Rashleigh, [1904] 1 Ch. 634. Appeal dismissed with costs. L. F. Heyd, K.C., for the appellant. S. M. Mehr, for the plaintiff.