

Privy Council Appeal No. 94 of 1933.

H. A. Morine - - - - - *Appellant*

v.

London Loan Assets, Limited, and others - - - - - *Respondents*

London Loan Assets, Limited, and others - - - - - *Appellants*

v.

G. A. P. Brickenden and others - - - - - *Respondents*

(Consolidated Appeals)

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 17TH APRIL, 1934.

Present at the Hearing :

LORD MERRIVALE.

LORD THANKERTON.

LORD RUSSELL OF KILLOWEN.

LORD WRIGHT.

LORD ALNESS.

[Delivered by LORD RUSSELL OF KILLOWEN.]

In this case one Morine appeals from a judgment of the Appellate Division of the Supreme Court of Ontario, which dismissed his appeal from a judgment of Wright, J.

The relevant facts out of which the litigation originated may be stated briefly.

On the 8th June, 1923, there were in existence three mortgages affecting a property in Toronto, subsequently known as "Buckingham Apartments," viz.—(1) a mortgage dated the 7th February, 1923, and made between one Green and Morine as mortgagors (their wives joining to bar dower) and the Huron and Erie Mortgage Corporation (hereinafter called the

Huron Corporation) as mortgagees, to secure a principal sum of \$150,000 and interest; (2) a mortgage dated the 13th February, 1923, and made between the said Green and Morine as mortgagors (their wives joining to bar dower) and the London Loan and Savings Company of Canada (hereinafter called the Loan Company) as mortgagees, to secure a principal sum of \$35,000 and interest; and (3) a mortgage dated the 23rd May, 1923, and made between the said Green and Morine as mortgagors (their wives joining to bar dower) and the Loan Company as mortgagees, to secure a principal sum of \$20,000 and interest. Under or by virtue of each of these mortgages Morine was personally liable for the payment of the principal moneys and interest thereby secured. On the 8th June, 1923, Green conveyed and released to Morine all his interest in the property. Morine, as sole owner, subsequently negotiated a further loan on the property from one Renton, who represented a group of Scottish investors. For the purpose of carrying this transaction through, Morine assigned his equity of redemption in the property to his son-in-law, Dyas, who created a fourth mortgage (dated the 10th August, 1923) on the property in favour of Renton to secure a principal sum of \$46,000 and interest.

In the month of June, 1925, the Loan Company, after an attempted sale by public auction, sold the property to one Durno, in exercise of their powers under the mortgage of the 23rd May, 1923. The price stated in the conveyance to him (dated the 1st June, 1925) to have been paid by Durno is the sum of \$227,500. No moneys were, in fact, paid by Durno, the price being satisfied or accounted for as follows:—Durno took his conveyance subject to the Huron Corporation's mortgage upon the security of which the sum of \$147,000 and no more was then due. Durno executed a mortgage (dated the 1st June, 1925) in favour of the Loan Company to secure a principal sum of \$77,000, which represented the amounts due to the Loan Company in respect of the mortgages for \$35,000 and \$20,000 and other items; the balance of \$3,500, payable in cash, was never in fact paid.

Durno then executed a conveyance of the property (dated the 26th June, 1925) to the Consolidated Trusts Corporation in trust, his wife joining to bar dower; but by an indenture dated the 8th July, 1925, Durno granted and released to the Consolidated Trusts Corporation (nearly all the stock of which was owned by the Loan Company) all his right title and interest at law or in equity in the property. In the meantime, by a document dated the 3rd July, 1925, and purporting to be under the seal of the Loan Company, it was certified that all money due under the said mortgage of the 13th February, 1923, had been satisfied.

The conveyance to Durno, the mortgage by him to the Loan Company, the conveyance by Durno to the Consolidated Trust Corporation of the 26th June, 1925, and the document of

the 3rd July, 1925, were all registered on the 8th July, 1925. The indenture of the 8th July, 1925, was never registered.

By an indenture dated the 7th February, 1928, the Loan Company paid off the Huron Corporation, and the Huron Corporation assigned to the Loan Company all moneys due or to become due in respect of the said mortgage of the 7th February, 1923, and the security for the same.

The result of the transactions with Durno, if those dealings were binding on the Loan Company, would be to put an end to the mortgages for \$35,000 and \$20,000, and to Morine's personal liability thereunder. Whether the transaction bound the Loan Company was, indeed, the crucial question in the litigation which subsequently ensued.

By an agreement dated the 3rd July, 1929, the Loan Company sold, and the Huron Corporation purchased, the entire assets and undertaking of the Loan Company, and by the same agreement the Huron Corporation sold, and the London Loan Assets Company, Limited (hereinafter called the Assets Company) purchased, the assets acquired by the Huron Corporation from the Loan Company which were listed in the schedule thereto, and all rights of action arising out of or incidental or appurtenant to the assets so acquired. The schedule included the said mortgage of the 7th February, 1923, and the said mortgage by Durno for \$77,000. It did not include the said mortgages of \$35,000 and \$20,000.

In November, 1930, the Assets Company and the Loan Company, as co-plaintiffs, instituted proceedings against Morine, one Brickenden (the Loan Company's solicitor), Durno, one McCormick (the Loan Company's ex-President) and the Consolidated Trusts Corporation. Durno did not appear or defend the action, and the Consolidated Trusts Corporation at the trial expressed its willingness to carry out any order of the Court so far as applicable to it.

The relief claimed in the action included the following claims:—(a) damages against Morine, Brickenden and McCormick; (b) judgment against Morine for the amount owing under the mortgage of the 7th February, 1923; (c) a declaration that the document of the 3rd July, 1925, was invalid, and that the mortgage of the 13th February, 1923, had not been paid or discharged, and judgment against Morine for the amount due thereunder; (d) a declaration that the sale of the mortgaged property was fictitious and fraudulent, an order setting aside the conveyance to Durno and the subsequent documents, and judgment against Morine for the amount due under the mortgage of the 23rd May, 1923.

The action failed as against Brickenden and McCormick. Brickenden, indeed, was ordered to pay costs; but as against McCormick, the action was dismissed without costs.

Morine's case was that he was freed from liability under the mortgage of the 13th February, 1923, by reason of the document of the 3rd July, 1925, and from liability under the mortgage of the 23rd May, 1923, by reason of the sale to Durno in exercise of the power of sale under that mortgage. He further contended that he was freed from liability under all three mortgages by reason of their all being vested in the Loan Company, while the equity of redemption had been conveyed by Durno to the Consolidated Trusts Corporation, who held it on trust for the Loan Company. In this way, so he contended, the Loan Company's claims as mortgagee had by merger become extinguished. It is obvious, however, that his claim, founded on merger, could only succeed if the sale to Durno had been held to be genuine, and not made for the purpose of relieving Morine from liability.

Upon the crucial question, viz., whether Durno, in regard to the sale of the property to him, was merely a nominee for Morine, the Trial Judge felt no doubt. In the absence of Durno, the most important witness was obviously Morine. He gave evidence, but it is rare, in their Lordships' experience, to find a witness so crushingly discredited by the Judge, who saw and heard him. This is the Judge's view of Morine:—"From his demeanour in the witness box, his unsatisfactory answers and his fraudulent conduct throughout, I am unable to place any reliance whatever upon his evidence, even when it is uncontradicted by other witnesses."

The Trial Judge found, as a fact, that the sale to Durno was fictitious, Durno being the nominee of Morine, and that the whole transaction with Durno was a scheme or contrivance to relieve Morine from liability. He also held that the document of the 3rd July, 1925, was invalid and inoperative, not having been authorised by the Loan Company, or executed by any official of that company who had power to execute documents. He further held that there was no merger, and that Morine was liable under all three mortgages. The formal judgment was drawn up in accordance with his findings and in such a form as to ascertain the amounts due under the three mortgages, and to provide for redemption or foreclosure, as the case might be.

Morine appealed, as also did Brickenden. The plaintiffs served notice of cross-appeal against Brickenden. The plaintiffs also appealed as against McCormick. Morine's appeal was dismissed. The plaintiffs' cross-appeal and appeal were dismissed. Brickenden's appeal was allowed, and the judgment was varied so as to exempt Brickenden from payment of any costs, and so as to order the plaintiffs to pay Brickenden's costs of action. In all other respects the judgment of the Court below stood unaltered.

The Court, on appeal, held that the findings of fact were fully justified by the evidence, and that the following findings of the Trial Judge were "inexpugnable," viz. :—

" 1. That the Durno transaction was not a real or genuine transaction, but that the defendant Durno acted as the nominee or agent of the defendant Morine throughout.

" 2. That the discharge of mortgage from the London Loan and Savings Company to the defendant Morine and S. B. Green is inoperative and void, and the registration thereof ought to be vacated.

" 3. That the defendant Morine is liable upon the covenants contained in the three mortgages sued upon for the arrears of principal."

A litigant who seeks before a second appellate tribunal to reverse findings of fact which have been arrived at by the Trial Judge and have, after consideration, been confirmed on appeal, comes always with a very heavy burden upon his shoulders. But when, as here, he is the principal witness in regard to the crucial facts, and has been described by the Trial Judge in the terms which have been applied to Morine in the present case, the weight of his burden is so great that few, if any, could survive under it.

In regard to this appeal their Lordships deem it sufficient to say that they see no reason for doubting that the conclusions of fact and law come to by the Trial Judge, and approved by the Appellate Division of the Supreme Court of Ontario, are well founded and correct.

In the course of the argument before the Board the appellant's counsel sought to raise defences founded upon alleged laches, and upon alleged absence of notice to Morine of assignment of the mortgages. Even if any foundation in fact or law existed for such defences, as to which their Lordships need say nothing, they are not open to the appellant at this stage of this case. The one was never argued in the Courts below. The other was neither argued nor pleaded.

Their Lordships are accordingly of opinion that this appeal fails and should be dismissed. An appeal was lodged by the Loan Company and the Assets Company seeking relief against Morine, Brickenden and McCormick jointly. The two appeals were consolidated. Their Lordships did not think it necessary to hear counsel for the Loan Company and Assets Company upon the appeal of Morine; thereupon counsel for the two companies stated that he did not desire to open their appeal. In these circumstances their Lordships think that some adjustment as to costs should be made; and while they are of opinion that the appeal of the companies should be dismissed without costs, they think that Morine should only be ordered to pay two-thirds of the companies' costs of the consolidated appeal. They will humbly advise His Majesty accordingly.

In the Privy Council.

H. A. MORINE

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LONDON LOAN ASSETS, LIMITED,
AND OTHERS.

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(Consolidated Appeals.)

DELIVERED BY LORD RUSSELL
OF KILLOWEN.

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