

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lewin and another v. Wilson and others from the Supreme Court of Canada; delivered 25th June 1886.*

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Present :

LORD WATSON.

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

On the 27th September 1850 John Howe and James White gave a joint and several bond to secure the payment of 1,000*l.* to Margaret Cunningham on the 27th September 1855, with interest quarterly until payment of the principal. As between Howe and White the latter was a surety, but they were both principal debtors to the obligee.

On the same day each of them mortgaged some property to the obligee to secure the bond debt. White's mortgage is made upon the express condition that if he and Howe or either of them their or either of their heirs executors or administrators shall pay to Miss Cunningham or her representatives the sum of 1,000*l.* on the 27th September 1855, with interest in the meantime according to the conditions of the bond of even date, the mortgage deed is to be void, otherwise to remain in full force and virtue. A similar proviso for defeazance is contained in Howe's mortgage, the only difference being that Mary the wife of Howe is introduced as a party entitled to pay the debt.

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The interest on the debt was paid regularly by Howe up to the 27th March 1879, after which his payments ceased. On the 20th January 1881 Miss Cunningham's representatives commenced the present suit for foreclosure and sale of the property comprised in both the mortgages. The right of entry accrued to the mortgagee on the 27th September 1850. Five years afterwards the mortgages became indefeasible at law and redeemable only in equity. White and his successors in title remained in possession of his mortgaged property from the date of the mortgage to that of the suit, and nothing has ever been done by them to give any fresh starting-point to the lapse of time. The successors in title are Defendants in the suit, and they plead the statutes of limitation. The sole question is whether the payments of interest made by Howe prevent time from running in favour of White. No question arises on Howe's mortgage.

The cause was heard before Mr. Justice Palmer, Judge in Equity, who considered that White's property was protected by lapse of time, and dismissed the bill with costs as against the Defendants claiming under him. As regards Howe's mortgage he made a decree for sale.

The Plaintiffs then appealed to the Supreme Court of Canada against the dismissal of their bill, and as the majority of that Court agreed with Mr. Justice Palmer upon the point of limitation, the appeal was dismissed with costs. The present appeal is brought from the order of the Supreme Court of Canada. For the purpose of the hearing before that Court Mr. Justice Palmer reduced the facts into the form of a special case.

The enactment which governs the case is Sect. 30 of Cap. 84 of the Consolidated Statutes of New Brunswick, being the chapter headed

“Limitation of Real Actions,” and it runs as follows:—

“It shall and may be lawful for any person entitled to or claiming under any mortgage of land to make an entry, or bring an action at law, or suit in equity to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, such payment being made within twenty years after the right of entry first accrued, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in this chapter to the contrary notwithstanding.”

This section is, excepting an addition which does not affect the present question, the same with the English Statute 7 Gul. IV., and 1 Vict., cap. 28.

The question must turn on the relations between Howe, White, and Miss Cunningham, which, as it seems to their Lordships, have not been quite accurately appreciated. The three deeds are parts of a single transaction. There is no need to resort to extrinsic evidence for this conclusion, because in each mortgage the bond is imported into the proviso for redemption, or rather defeazance, for the mortgages are made in the older form of conveyances to become void on payment. Therefore by the express contract of the three Howe is bound to pay, and Miss Cunningham to receive, the money due on the bond. And by the same contract a tender by Howe of money according to the conditions of the bond is a good tender to defeat and avoid White's conveyance. It is true that after the 27th September 1855 there is no express contract. But that is the common case with both bonds and mortgages; a short time, usually a much shorter time than five years, is fixed for payment, but in fact the parties contemplate the continuance of the security till it suits one of them to put an end to it. That is the justification of the way in which Courts of

Equity have dealt with such transactions. Therefore in the view of a Court of Equity all the terms of the contract which was expressly made to continue up to 27th September 1855 remained unaltered after that date, and Miss Cunningham was just as much bound to receive money from Howe for the purpose of redeeming White's mortgaged property in equity, as she had before been bound to receive it for the purpose of avoiding his conveyance at law. The circumstance that, as between White and Howe, Howe was the principal and bound to exonerate White, does not alter their legal position as regards Miss Cunningham, but it fully accounts for the fact that Howe alone paid the interest.

The Respondents, who claim under White, contend that the payment spoken of in Sect. 30 is payment by the party sought to be charged in the suit or by his agent; and that no other payment will give a fresh starting-point of time. For this purpose they refer to the preceding Sect. 29, and contend that according to the authority of decided cases the word "payment" in Sect. 30 means payment by way of admission or acknowledgment, and must be limited as acknowledgment is limited in Sect. 29, which they again say has been decided to mean acknowledgment by the party sought to be charged or by his agent.

The view of Mr. Justice Strong, who dissented from his brother Judges in the Supreme Court of Canada, is that, under the circumstances of this case, Howe was the agent of White, so that under any construction of the statutes his payments would fall within the meaning of Sect. 30. Their Lordships do not express any opinion to the contrary, but the appeal has been rested entirely on a plainer and broader ground, also relied on by Mr. Justice Strong, and to that ground their Lordships will confine themselves.

any further assertion of his rights ; but not so if he only receives acknowledgment. If therefore we find that the Legislature has used different language about the two cases, we must not readily conclude that it has done so by accident or without meaning it.

It is indeed agreed on all hands that the mortgagee may receive money, and money which when received he is bound to bring into account, which yet will not constitute payment within Sect. 30. How the word "payment" should be construed has been the subject of discussion more than once, and the mode has been differently expressed by different Judges, though probably with no essential difference of meaning. In *Harlock v. Ashberry* the Judges considered that the principle which underlies the statutes is that payment must be an admission of right, but they do not discuss the question how far a payment by *A* may be an admission of right against *B*. Their conclusion is that statutory payment must be by a person bound, or at least entitled, to pay ; and that was quite sufficient for their decision. In *Chinnery v. Evans* a more direct and simple criticism is applied both by Lord Westbury and Lord Cranworth to the word "payment." They consider that money brought in by a stranger to the mortgage contract would not have the characteristics or legal quality of payment ; it would be a gift from a person not entitled to tender it to a person not entitled to demand it. Both learned Lords treat the supposed case as almost beyond the bounds of practical matters. But in *Harlock v. Ashberry* payment by a stranger to the contract was found to have come about in a very natural way. A tenant of the mortgaged land, to whom it was wholly indifferent whether he paid to mortgagor or mortgagee as long as he got a receipt for his rent, paid to the mortgagee. And Sir George Jessel took the view that such a payment was

not a payment of principal or interest under the Statute of 1837. Without discussing which of these modes of exposition is the more satisfactory, their Lordships say that neither of them approaches a decision that the word "payment" in Sect. 30 is to be construed as if it was actually followed by the words which in Sect. 29 and in the English Act of 1833 are clearly attached to the word "acknowledgment." A wider range of exposition is allowable and has been taken. In expounding the word "payment" learned Judges have used such expressions as were calculated to show in the case before them that the payment relied on was or was not the payment meant by the statute. In this case their Lordships think it sufficient to say that payments made by a person who under the terms of the contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the defeazance or redemption of the mortgage, are payments which by Sect. 30 give a new starting-point for the lapse of time. And Howe was clearly such a person.

In the Supreme Court, Mr. Justice Henry rested his decision entirely on the 6th section of Cap. 85 of the Consolidated Statutes. That Chapter is headed "Limitation of Personal Actions," and the 6th section is that which says that a joint contractor shall not be answerable for payments by his co-contractor. It is sufficient to say that this case does not fall under that section nor under that chapter.

The judgement of the three other Judges who constituted the majority was delivered by Mr. Justice Gwynne. That learned Judge relies partly on the enactment mentioned by Mr. Justice Henry, and more on the language of Sect. 29 of Cap. 84, which, he says, is the statute directly bearing upon the point. He does not quote or discuss, or except in a casual way refer to, Sect. 30, which is the governing enactment. His argument

mainly goes to show that acknowledgments and payments are put on precisely the same footing by Sect. 29. He relies on the decision in *Bolding v. Lane*, where the question related to acknowledgment under the English Act of 1833, corresponding with Sect. 29, and on the dictum in *Toft v. Stephenson*, which Lord Cranworth carefully confines to a case falling under the same enactment. The principle he finds to be established by authority is, that the only person by whom a payment can be made to stay the currency of the statute, is the mortgagor, or some person in privity of estate with him, or the agent of one of them. It will have been seen that their Lordships think it necessary to qualify that doctrine. But the learned Judge, having laid down that principle, goes on to find that the payments made by Howe were not made in the discharge of any contract of White contained in the mortgage; and that, in making those payments, he was as much a stranger to White's mortgage and the liability incurred thereby as any other person could have been. Their Lordships think that this view is quite inconsistent with the terms of a contract by which Howe was bound to pay the debt, and was expressly named as a person entitled to come in and work a defeazance of White's conveyance.

The special case raises a second question, with respect to a parcel described as lot No. 18. On this it is sufficient to say that it appears to their Lordships that, as regards that parcel, the mortgage of it was made subject to a lease dated 30th November 1846 and certain covenants therein contained. It does not appear what interest is now subsisting in respect of that lease. Whatever it is, the mortgagee's rights are, according to the statements in the case, postponed to it; but, subject to such interest, the right of foreclosure and sale exists with respect to this parcel.

Their Lordships are of opinion that the Supreme Court of Canada should have reversed the decision which was appealed from, and have granted to the Appellants the relief prayed by them in respect of the property included in White's mortgage, subject to the outstanding interests in lot 18, and have given to the Appellants the costs of their appeal against the Respondents. They will now humbly advise Her Majesty to make such an order in lieu of the decree of the Supreme Court. The Respondents must pay the costs of this appeal.

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