*Privy Council Appeal No. 89 of 1925.*

**Gordon Grant and Company, Limited** - - - - - *Appellants*

*v.*

**Fritz Luis Boos** - - - - - - - - *Respondent*

FROM

## THE WEST INDIAN COURT OF APPEAL.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH JULY, 1926.

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*Present at the Hearing:*

LORD ATKINSON.
LORD PHILLIMORE.
LORD MERRIVALE.

[*Delivered by* LORD PHILLIMORE.]

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The appellant Company held a deed of further charge dated 4th May, 1921, whereby the respondent charged certain estates in the island of Trinidad for securing several sums of money due from him to the appellant Company. This deed also contained a personal covenant by the defendant to pay the sums due. There had been previous transactions between the parties, and encumbrances on the estates had been already created, all which were covered by this deed of further charge. The debts not having been paid, the appellant Company brought an action in the Supreme Court of Trinidad and Tobago to enforce their security by sale of the mortgaged property, and the appellant Company also claimed against the respondent on his personal covenant to pay.

The action came on for trial on the 27th March, 1922, when it was ordered by consent of parties that accounts should be taken and a day fixed for payment of the sum due, and that in default of the respondent or one Mackenzie who was a puisne encumbrancer redeeming the property, it should be sold by the Court, and the proceeds applied towards satisfying the appellant Company's

claim. The appellant Company was given leave to bid at the auction.

On the accounts being taken, it was found that there was due to the appellant Company the sum of $565388·95 and, as neither the respondent nor Mackenzie redeemed the property, it was put up for sale in the usual manner according to the practice of the Court in two lots. Apparently however there was no bidder other than the appellant Company who bought the two lots for the total sum of £350, subject to a prior mortgage for £50,000, and the properties were in due course conveyed to the appellant Company by deed executed by the registrar of the Court.

On the 19th February, 1923, the appellant Company agreed to sell the estates to another Company called the Sainte Madeleine Sugar Co. Ltd. at a great increase of price.

Although when the action was launched there had been a claim on the respondent's personal covenant to pay the debt, no personal judgment appears to have been taken against him. But on the 17th October, 1923, the appellant Company brought an action in the Supreme Court of the State of New York against the respondent, who was then residing in New York, for the recovery of the balance found due from him less the sum realised by the judicial sale.

Thereupon he began the present action, claiming that his right to redeem the mortgaged property had been revived and reopened by this suit, and that he should be at liberty to redeem accordingly and that enquiries should be made and accounts taken for this purpose.

In the alternative, he claimed an injunction restraining the appellant Company from proceeding with its action in the New York Court. As a third alternative he claimed damages.

This, the present action, came on for trial before Mr. Justice Clark. He decided that it was too late for the respondent to seek to redeem the property, but that he might have an injunction staying the action against him on the personal covenant.

In so deciding, he followed what he considered to be a precedent, viz., a decision in the same court by Mr. Justice Swan in the case of *Sampson* v. *Thompson* ((1906) Trinidad Local Reports, vol. 1, p. 194.)

The appellant Company appealed to the West Indian Court of Appeal; but the majority of the Court, consisting of the Chief Justice of Trinidad and the Chief Justice of British Guiana, decided against him, the Chief Justice of Grenada dissenting. Hence the present appeal.

It is unfortunate that the respondent has not instructed counsel to appear in support of the judgments which have been rendered in his favour: and their Lordships have therefore had the task of scrutinising the arguments against his case with special care. But they have had the advantage of perusing the reasoned judgments in his favour which have been rendered in the Courts of the West Indies; and the authorities on the subject have been brought

to their notice by counsel for the appellant Company in a very careful and candid argument, while the subject-matter of the appeal is one which has been treated of in the text-books.

As a general rule the mortgagee is entitled to pursue all the remedies which are given to him by his contract. He can recover upon the personal covenant of his debtor and he can enforce his charge upon the mortgaged property. But care has to be taken that he is not overpaid.

If he has recovered part of his debt in a personal action, he can only enforce his charge upon the mortgaged property in respect of the balance remaining due. This being so, if he reverses the process and starts by enforcing his claim against the property and procures a decree of foreclosure, which bars his debtor from redeeming the property and makes it the mortgagee's own, and then seeks to enforce his personal remedy against the debtor, the debtor can say that any money which he pays under the personal judgment relieves *pro tanto* the mortgaged property, and that he is entitled to have the foreclosure decree set aside and to have another chance of redeeming his property on paying only the balance—if any—which is left over and above what he has paid under the judgment.

If, however, the mortgagee has in the interval sold the estate, so that he cannot offer it for redemption and the mortgagor has no chance to redeem, some other course must be taken to prevent the mortgagor from having to pay twice over. It might be possible to put a value upon the foreclosed property and to allow the mortgagee to sue the debtor for the balance—if any—and no more. Or the course might be taken of simply stopping the mortgagee from suing, on the assumption that he must be held to have taken the property, which cannot now be valued, as the complete satisfaction of his debt.

There was for some time some doubt which of these two courses should be pursued in practice. In *Perry* v. *Barker* (8 Vesey Jun., p. 527) in 1803, when the property had been foreclosed and sold, and an action was then brought on the personal covenant, Lord Chancellor Eldon while granting on an interlocutory application an injunction to restrain the action at law, referred to the doubt which had been expressed by his predecessor Lord Thurlow as to which was the proper course.

In 1806 when the case came to a final hearing before Lord Eldon's successor, Lord Loughborough, he stated his doubts upon the subject and that he had conferred with that great master of equity, Lord Redesdale, Lord Chancellor of Ireland; but he came finally to the conclusion that if a mortgagee has parted with the foreclosed property, he must be restrained by a perpetual injunction from suing upon the covenant.

The matter, however, was not apparently deemed to be settled by this decision; because in *Lockhart* v. *Hardy* (9 Beavan, p. 349, decided in 1846) the then Master of the Rolls treated the

matter as one of some doubt. In that case, the mortgagee had sold the property fairly and had by the sale realised less than the debt. However, in the long run, the Judge came to the same conclusion and held that the estate of the deceased mortgagor was not liable.

But, if the mortgagee does not use the remedy of foreclosure but sells under a power of sale given to him by the mortgage deed and brings into account the whole sum thus received and then proceeds to sue his debtor for the balance and the balance only, there is no question of double payment, and there would seem to be no reason in principle why he should not recover the balance.

When he has foreclosed the estate, no one can tell what it is really worth; and it is for this reason that he is precluded from suing at law, because it cannot be ascertained that there is any residue due to him. The estate which he has taken under his foreclosure may be equal in value to or even greater in value than his debt. But when he sells, if he receives more than his debt, he pays the balance to the mortgagor; if he has just received the value of his debt, he cries quits. Why, then, should he not, if he has received less than the value of his debt, pursue his other remedies for the balance?

This conclusion, which seems sound, is stated by Fisher in his Law of Mortgages (section 1969) and by Halsbury in the Laws of England (vol. 21, pp. 271 and 308), and is supported by the authority of the case of *Rudge* v. *Richens* (L.R. 8 Common Pleas, p. 358) and must be taken to be established.

Now, if instead of the mortgagee exercising a power of sale given to him in the deed, he, when he brings an action to enforce his security, asks the court for a sale instead of a foreclosure, why should not the same principle apply? The sale ascertains the value of the property, the mortgagee gets no more from the property than what the sale brings to him. If the property realises more than what is due to him, the mortgagor gets the balance. If the property realises less, the mortgagee is *pro tanto* unpaid and should be allowed to sue on the personal covenant.

In this connection it is interesting to note that when in the case of *Perry* v. *Barker*, Lord Loughborough said that he had consulted Lord Redesdale, he added that he was told that the practice in Ireland was to grant a decree for sale instead of a decree for foreclosure, and that if the sale produced more than the debt, the surplus went to the mortgagor, but if less the mortgagee had the remedy of an action for the difference. This seems consonant to reason.

It may be that the general practice in Trinidad is to grant a decree for sale instead of a decree for foreclosure. But whether this be so or not as a rule, in the present case the decree for sale was made by consent. No doubt the sale realised very little, and the mortgagee, who had leave to bid, apparently bought a valuable property for a small sum; and their Lordships can understand that the Courts in the West Indies may have felt

some aversion to granting the mortgagee further advantages. But it was a judicial sale which is not impeached, and the mortgagor, who could have made a bid or procured a bid, must take the consequences.

It is fair to Clark J. to say that the West Indian case on which he relied, though not precisely in point, does show that the view which Clark J. took of the law, was one which Swan J. would have taken. But for the reasons which have been given, their Lordships are of opinion that it was unsound, and they will humbly recommend His Majesty that this appeal should be allowed, and that the action should be dismissed with costs both here and in the Courts below.

In the Privy Council.

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GORDON GRANT AND COMPANY, LIMITED

*v.*

FRITZ LUIS BOOS.

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JUDGMENT BY LORD PHILLIMORE.

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