

CANADA / JUDGMENT

Collins v. Cunningham / Cunningham v. Drysdale

(1892) 21 SCR 139

COURT

Supreme Court of Canada

DECIDED

28 June 1892

Source: decisions.scc-csc.ca · Research copy typeset by Esheria. Not court-issued or certified.

Collins v. Cunningham / Cunningham v. Drysdale Collection Supreme Court Judgments Date
1892-06-28 Report

(1892) 21 SCR 139 Judges Ritchie, William Johnstone; Strong, Samuel Henry; Taschereau, Henri-Elzéar; Gwynne, John Wellington; Patterson, Christopher Salmon On appeal from Nova Scotia Subjects Priorities and hypothecs Decision Content Supreme Court of Canada Collins v. Cunningham And Cunningham v. Drysdale (1892) 21 SCR 139 Date: 1892-06-28 Brenton H. Collins, Executor of Enos Collins Deceased, Donald Keith and Arthur Drysdale and Arthur B. Mitchell, Executors of Joseph Seeton, Deceased (Plaintiffs) Appellants And Francis W. Cunningham. Administrator, Etc., and Others, (Defendants) Respondents Francis W. Cunningham, Administrator, Etc., and Others, (Defendants) Appellants And Arthur Drysdale and Arthur B. Mitchell, Executors of Joseph B. Seeton and Donald Keith (Plaintiffs), and Mary I. Sheraton (Defendant) Respondents 1892: Feb. 24, 25; 1892: June 28. Present:—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ. ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA. Mortgagor and mortgagee—Foreclosure of mortgage—Practice—Addition of parties—Lessee of mortgagor—Protection of interest of—Staying proceedings—Order for sale of mortgaged lands. In an action for foreclosure of mortgage defendants were the administrator and heirs at law of the mortgagor and certain devisees in trust of deceased heirs. Subsequent incumbrancers, judgment creditors of some of the heirs, and the lessee of the Queen Hotel, part of the mortgaged property, under lease from some of the heirs, were not made parties. None of the defendants appeared and the equity of redemption of the mortgagor and those claiming under him was barred and foreclosed and the lands ordered to be sold on a day named. On that day, on application of the lessee of the Queen Hotel, an ex parte order was made by the Chief Justice directing that on payment into court of \$37,019 by S. & K., further proceedings by plaintiff should be stayed until, further order and that plaintiff should convey the mortgaged lands and the suit and benefit of proceedings therein to S. & K. which direction was complied with. On Dec. 26th, 1889, defendants moved to rescind this order. The motion was refused and the order amended by a direction that the lessee

should be made a defendant to the action and S. & K. joined as plaintiffs, and that the stay of proceedings be removed. On Jan. 4th, 1890, a further order was made directing that the Queen Hotel property be sold subject to the rights of the lessee. From the two last mentioned orders defendants appealed to the full court which affirmed that of Dec. 26th and set aside that of Jan. 4th. Both parties appealed to this court. Held, that the order of 26th Dec., 1889, was rightly affirmed. The stay of proceedings under the order affirmed by it was no more objectionable than if effected by injunction to stay a sale under a writ of *fifa*, and being made at the instance of a lessee, and as such a purchaser pro tanto, of the mortgaged lands who had a right to redeem it was in the discretion of the Chief Justice so to order. To the direction that plaintiff should convey the lands to S. & K. defendants had no *locus standi* to object, and they were not prejudiced by the addition of parties made by the order. Nor had defendants a right to object to the removal of the stay of proceedings and any right subsequent incumbrancers not before the court might have to complain would not be affected by the order made in their absence. Moreover, between the date of the order and the appeal to the full court the property having been sold under the decree the purchaser not being before the court was a sufficient ground for dismissing the appeal. Held further, that the order of Jan. 4th, 1890, should also have been affirmed by the full court. In selling the mortgaged property the court had a right to endeavor to preserve the rights of the lessee by selling first the portions in which she had no interest. Appeal from a decision of the Supreme Court of Nova Scotia[1] affirming an order of the Chief Justice made on December 26th, 1889 in an action for foreclosure of mortgage and rescinding another order made on January 4th, 1890. The material facts are fully stated in the judgment of the court delivered by Mr. Justice Strong. Ross Q.C. for the appellants in *Collins v. Cunningham* appeals from the judgment rescinding the order of January 4th, 1890. W. B. Ritchie for the respondents. W. B. Ritchie for the appellants in *Cunningham v. Drysdale* argues that the order of December 26th, 1889, should also have been rescinded. Ross Q.C. for the respondents. The judgment of the court was delivered by:— STRONG J.— These are appeals from two orders made by the Supreme Court of Nova Scotia on the 10th of July, 1891, by one of which an appeal from an order made by the Chief Justice of that court on the 26th of December, 1889, was dismissed, and by the other, an appeal from another order of the same judge, made on the 4th January, 1890, was allowed and the order last mentioned was reversed, rescinded and set aside. The first mentioned order was made with the concurrence of the three learned judges, Weatherbe, Ritchie and Townshend JJ., who heard the appeals; from the judgment on the secondly mentioned appeal Mr. Justice Townshend dissented. The action was originally instituted by Brenton Collins as the surviving executor of the Honourable Enos Collins for the foreclosure and realization of certain mortgages which had been made by one Bernard O'Neil to secure a large sum of money and interest to Enos Collins. The defendants in the action were Francis Cunningham, the administrator of the mortgagor, Bernard O'Neil, who had died intestate, and the heirs at law of O'Neil, and certain devisees in trust of some of the heirs who had died. None of the subsequent incumbrancers claiming charges against the estate as judgment creditors in respect of judgments recovered against the heirs of the

mortgagor were originally made parties to the action, nor was Mrs. Sheraton, who claims to be a lessee of part of the property known as the Queen Hotel in Halifax, under a lease to her made upon the 15th of April, 1886, by Ellen O'Neil, Ellen Cunningham and Rose Cunningham, three of the heirs of O'Neil the mortgagor. The writ, which was specially endorsed, was issued on the 18th of July, 1888, and the statement of claim was filed on the 30th July, 1888. None of the defendants having appeared, on the 31st of July, 1888, an order in the nature of a decree was made whereby, after ascertaining and settling the amount due to the mortgagee for principal and interest, it was ordered that the equity of redemption of Bernard O'Neil, and of all persons claiming title under him or under the defendants, should be barred and foreclosed; that the mortgaged lands and premises should be advertized for sale in a newspaper published at Halifax for at least 30 days and by hand bills posted in the County of Halifax for at least 10 days before the day appointed for the sale, and that "a copy of said hand bills be mailed to each of the subsequent incumbrancers of said lands and premises at least ten days before such sale." And by the same order it was also ordered that "unless before the day appointed for such sale the amount due to the plaintiff with his costs be paid to him or his solicitor the said lands and premises be sold at public auction by the sheriff of the County of Halifax to the highest or best bidder. And that upon payment of the purchase money the sheriff do make a good and sufficient deed to the purchaser thereof." And it was further ordered "that the said sheriff, out of the proceeds of such sale, do pay to the plaintiff or his solicitor the amount due him for principal and interest on the mortgages sought to be foreclosed with his costs to be taxed, and the balance, if any, to the accountant general to abide any further order that may be made herein." On the 9th of August, 1888, Mr. Justice Townshend made an order that William McGibbon and David McGibbon, who were mortgage incumbrancers claiming as such under mortgages made by the heirs of Bernard O'Neil, or by some of them, should have leave to enter an appearance and becomes parties defendant in the action. On the 16th of August, 1888, the Chief Justice in chambers made an order that the mortgaged lands should be sold in two separate lots, that the Queen Hotel property should be sold first, and that the order of foreclosure and sale should be amended by engrafting thereon the order then made. On the 15th September, 1888, which was the day fixed by the sheriff and advertised for the sale, another order was made by the Chief Justice ex parte, on the application of Mary I. Sheraton, whereby it was ordered that upon payment into court in the cause by Joseph Seeton and Donald Keith of \$37,019, all further proceedings on the part of the plaintiff should be stayed until further order, and it was also thereby ordered that within twenty days from the date of the order the plaintiff should assign, transfer and re-convey to the said Joseph Seeton and Donald Keith the mortgages sought to be foreclosed therein, and the lands and premises therein mentioned and described free and clear of all incumbrance by plaintiff or any person claiming through or under him, and also the above named suit and the benefit and advantage of all proceedings had and taken therein; and that upon compliance with this order by the plaintiff he should be entitled to be paid out of the said monies the full amount of his claim for debt, interest and costs. Pursuant to this order Messrs. Seeton and Keith paid into court the amount

mentioned in the order. Subsequently, and on the 22nd of October, 1888, the Chief Justice made another order whereby it was ordered that the prothonotary should pay, to the plaintiff's solicitor upon his written receipt the sum of \$36,923.98 being the amount due the plaintiff herein, out of the monies paid into court under the order of September the 15th, 1888. And pursuant to this order the plaintiff was paid the amount specified, whereupon he assigned his mortgages and conveyed the mortgaged lands and premises to Messrs. Seeton and Keith. Upon the 26th of December, 1889, a motion was made by the defendants other than the defendants the McGibbons to rescind the order of the 15th September, 1888, whereupon the Chief Justice refused the motion and further ordered that the order of the 15th September, 1888, should be and the same was thereby amended by adding a clause thereto directing that Mary I. Sheraton be made a party defendant in the action, and it was declared that the said Mary I. Sheraton was thereby made a party defendant accordingly. And after reciting that the order of the 15th of September, 1888, had been complied with by the plaintiff and that the mortgages sought to be foreclosed together with the benefit of the proceedings in the action had been assigned to Messrs. Seeton and Keith upon their application, and with their consent, it was ordered that they should be and they were thereby joined as plaintiffs and made parties plaintiffs in the action, and further that the stay of proceedings directed by the order of the 15th September, 1888, be removed. Mrs. Sheraton, having thus been made a party defendant, on the 31st December, 1889, filed her statement of defence whereby she set up that she was entitled under a lease made by Ellen O'Neil, Rose Cunningham and Ellen Cunningham, dated the 15th of April, 1886, to a term of five years from the 6th of May, 1886, in the Queen Hotel property at the yearly rent of \$2,400 payable in monthly payments of \$200 each, with a right of renewal for a further term of five years; that she had entered into possession under the lease and made large repairs and improvements on the property, and that she had procured Messrs. Seeton and Keith to pay off the original plaintiff and take an assignment of the mortgages. Subsequently, and on the 4th of January, 1890, the Chief Justice made an order whereby it was ordered that the Queen Hotel property should be sold, subject to the rights of Mary I. Sheraton under the terms of the lease mentioned and set out in her answer, and subject to said lease, and that the order of sale granted on the 31st of July, 1888, as varied by the order of the 16th August, 1888, should be amended accordingly and by engrafting thereon the order now being stated, and that the said lands and premises in said mortgages described be sold as directed and provided in and by the order of sale of 31st July, 1888, and as the same is varied by the order of the 16th August, 1888, and by the order thus made, and that any amount received from the sale of the premises over and above the amount settled by the decree of 31st July, 1888, should be paid into the hands of the accountant general to abide the further order of the court. From these two orders of the 26th December, 1889, and the 4th January, 1890, the defendants other than the defendants McGibbons appealed to the full court, which court as before mentioned on the 10th July, 1891, gave the judgments already stated dismissing the appeal from the first mentioned order and allowing that from the order secondly mentioned. From these orders of the full court the present appeals have been

brought. As regards the whole of these proceedings I must take leave to remark that they appear to be somewhat out of the usual course of the proceedings in a simple foreclosure suit. It is, however, necessary to examine them separately and ascertain if there were any substantial grounds for displacing the orders made by the Chief Justice. First as to the order of the 26th December, 1889. That order in the first place refused to rescind, and thus indirectly confirmed, the order of the 15th September, 1888, which was made at the instance of Mrs. Sheraton, who, although having under the lease mentioned a very substantial interest in the equity of redemption of part of the lands in mortgage, being in fact a lessee, and as such a purchaser pro tanto, and having thus a clear and indisputable right to redeem, had not up to that time been made a party to the action. It was made ex parte on the very day of the sale. The first provision it contained was to stay the sale. I can see no greater objection to this than would have existed had the proposed sale been under a writ of fieri facias, and had the Chief Justice granted an ex parte injunction to restrain it, a proceeding which would clearly have been unobjectionable on the score of regularity. It was made at the instance of a person having a right to redeem and whose property was about to be sold behind her back as it were, and it being in the discretion of the Chief Justice to stop the sale we might well assume that it was in the interest of justice that it should be stayed, if it did not appear, as in fact it does, that such was the case. Moreover, the stay of proceedings was not to take effect until the redemption money should be paid into court, and the sale directed by the decree of the 31st July 1888, was expressly contingent upon there being no redemption. The defendants, parties interested in the equity of redemption, could therefore have no absolute right to insist that that order was irregular, whatever right the original plaintiff in the action might have had to do so. No such objection is, however, made by the plaintiff. Further the proceedings were only to be stayed upon payment into court, by parties who intervened at the instance of Mrs. Sheraton, of a sum sufficient to cover the full amount of the mortgage debt and interest. I can see no objection to this part of the order. As regards its latter provision, that upon payment of the sum received into court the original plaintiff should assign the mortgages and convey the premises to the parties paying in the money, the defendants have no locus standi to raise any objection to this branch of it, whatever right the plaintiff might have had to do so. The plaintiff did not, however, so object, but acquiesced in it and took the benefit of it by receiving payment of his debt and interest out of the monies obtained by means of its provisions. Therefore, so far as the order of the 26th December, 1889, confirmed this order of September, 1888, by refusing to rescind it it appears to have been unobjectionable. The other directions contained in the order of the 26th December, 1889, relate to the addition of parties. It is provided that Messrs. Seeton and Keith, who had furnished and paid into court the funds to pay off the original mortgagee, should be substituted or added as plaintiffs, and further that Mrs. Sheraton should be made a party defendant. No prejudice whatever could possibly accrue to the present appellants from these directions. It was surely right that Mrs. Sheraton, a party having such an important interest in the equity of redemption as she appears to have had under the lease before referred to, should be a defendant in order to enable her to assert her rights. And as

regards the substitution or addition of plaintiffs that must have been a matter of indifference to the present appellants who could not in any way be prejudiced by any transfer or assignment of his rights which the original plaintiff might think fit to make and the substitution of his assignees as parties, plaintiffs, in his stead. It could make no difference to them to whom the proceeds of any sale which might result from the proceedings should be paid to the extent of the mortgage debt and interest. This order of the 26th December, 1889, also discharged so much of the order of the 15th September, 1888, as stayed the proceedings. This left the plaintiffs at liberty to proceed with the sale under the decree of the 31st of July, 1888, which they appear to have done. I can see no objection to this part of the order so far as the present appellants are concerned. Whatever rights persons not parties to the action, viz., subsequent incumbrancers who are judgment creditors, not of the mortgagor O'Neil but of his heirs, may have to object was a question not before the court. The rights of such persons cannot be prejudiced by what was done in their absence, nor by what is now done, and they are still at liberty to raise any objection to the proceedings which may be open to them. Further, inasmuch as it appears from the judgment of Mr. Justice Townshend that in the interval between the date of this order and the appeal to the full court the property was sold under the decree, the purchaser under that sale, which was warranted by the decree of the 31st of July, 1888, which itself was not impeached, ought to have been before the court, and on this ground alone the appeal should have been dismissed. It is true that the facts of this sale, and of the execution of a conveyance by the sheriff carrying it out, do not appear from the affidavits, yet inasmuch as Mr. Justice Townshend refers to it as a fact before the court it is right to presume that it was brought in some way to its judicial notice, and at all events it is a fact before this court inasmuch as it was alleged and admitted by counsel on the argument of the present appeal. The appeal from the order of the 26th December, 1889, was therefore, in my opinion, rightly held by the full court to be unfounded and was properly dismissed. The principal objection to the order of the 4th of January, 1890, was that it directed the Queen Hotel property to be sold subject to Mrs. Sheraton's rights, whatever they were, under the lease made to her in April, 1886, of that property. Whatever her rights under that lease were is a point we are not called upon to consider, but whether she merely obtained a lease from three of the heirs at law of their undivided interests, or whether these lessors were entitled under some partition to that property in severalty, or whether the lease had been confirmed by the other heirs by receipt of rent, are matters all beside the present question. Whatever rights Mrs. Sheraton had acquired under the lease she had so acquired as a purchaser for valuable consideration of the equity of redemption pro tanto and as such it was entirely in the discretion of the court in selling, and quite right that they should endeavour to preserve these rights by selling, the other properties in which she had no interest in priority to the property demised to her. In my experience it was always the practice of the master's office in selling different parcels of land embraced in the same mortgage, in some of which the equity of redemption had been sold by the mortgagor to a bonâ fide purchaser, to sell in such order of priority as if possible to conserve the rights of the purchaser. And this was done without any special direction in the decree. The

soundness of such a mode of procedure is obvious if we consider that it is an established rule of equity that when some of several parcels of land subject to a common charge have been sold by the owner of the equity of redemption to purchasers for value, as between such purchasers and the mortgagor, and subject, of course, to the rights of the mortgagee which remain unaffected by such a sale, the different parcels are liable to the charge of the mortgage debt in the inverse order of their alienation. I am of opinion therefore, that the order of the 4th of January, 1890, was warranted—the mortgagees not objecting—by this consideration. I must therefore agree with Mr. Justice Townshend in holding that the appeal from the order last mentioned ought also to have been dismissed by the full court. It is to be observed that the disposition we now make of this appeal cannot in any way affect the rights of subsequent incumbrancers not before the court. The decree of the 31st of July, 1888, by which an immediate sale was ordered was not impugned. It may still be open to those incumbrancers to object that such a decree ought not to have been made in their absence, and if they are able to do so in other respects the orders pronounced on these appeals cannot prejudice their right to impugn not only that decree but also the sale made under it. Further, I would repeat what has been already said, that it is not now assumed to define what Mrs. Sheraton's rights under the lease may be. This uncertainty may no doubt have prejudiced the sale and have had a depreciating effect upon it, if indeed anything could be considered depreciatory under a system in which mortgage sales are conducted by the sheriff like a sale under an execution without, as far as can be seen, any conditions of sale being settled by the court or its officers, or any investigation of the title had. No objection on this score has been raised by the appellants. As regards subsequent incumbrancers it must, I repeat, be distinctly borne in mind that the orders now made are entirely without prejudice to their rights to impugn either the decree or the sale under it, or to ask satisfaction out of Mrs. Sheraton's interest if they can shew that their rights are paramount to hers, if they prefer doing this instead of having recourse to the fund remaining in court derived from the proceeds of the sale for the satisfaction of their judgments. The appeal from the order of the Supreme Court of Nova Scotia dismissing the appeal from the order of 26th December, 1889, must be dismissed, and that from the order allowing the appeal against the order of the 4th January, 1890 must be allowed; both with costs. Appeal dismissed with costs as to order of December 26th, 1889, and allowed with costs as to order of January 4th, 1890. Solicitors for appellants, plaintiffs: Ross, Sedgewick McKay. Solicitors for respondents, defendants: Borden, Ritchie, Parker & Chisholm.

[1] 23 N. S. Rep. 350.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/14952/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/collins-v-cunningham-cunningham-v-drysdale-1892>

Prepared on 28 October 2026 · Esheria