1893

*May 4.
*Nov. 20.

SAMUEL M. BROOKFIELD AND ALFRED B. SHERATON (DEFENDANTS) ..... } APPELLANTS ;

AND

CHARLES E. BROWN AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Practice—Parties to action—Trespass to mortgaged property—First and subsequent mortgages—Owner of equity of redemption—Transfer of interest before action.

Under the Nova Scotia Judicature Act the owner of the equity of redemption can maintain an action for trespass to mortgaged property and injury to the freehold though after the trespass and before action brought he has parted with his equity. Gwynne J. dissenting.

Mortgagees out of possession cannot, after their interest has ceased to exist, maintain an action for such trespass and injury committed while they held the title.

Per Gwynne J.—A mortgagee in possession at the time the trespass and injury is committed is the only person damnified thereby and can maintain an action therefor after he has parted with his interest, nor is he estopped therefrom by having consented to a sale to one of the trespassers of the personal property as to which the trespass was committed. The tort feasors could not set up such estoppel even though the amount recovered from them with the sum received by such mortgagee for his interest should exceed his mortgage debt.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming a judgment at the trial against the defendants.

The action in this case was for trespass to mortgaged property and injury to the freehold by removal of fixtures. The plaintiffs were Brown the first mortgagee,

* PRESENT :—Sir Henry Strong C.J. and Fournier, Taschereau, Gwynne and Sedgewick JJ.

(1) 24 N. S. Rep. 476.

1893

BROOKFIELD v. BROWN.

Horton the third mortgagee, Robinson the owner of the equity of redemption at the time of the trespass and Hesslein the assignee of such equity and of the third mortgage. The second mortgagee was Brookfield one of the defendants. The first mortgagee, Brown, had foreclosed his mortgage and the property was sold two days after the trespass, realizing sufficient to pay off the first two mortgages. The plaintiff Hesslein was the purchaser at said sale and on the same day that the property was conveyed to him by sheriff's deed the plaintiff Horton assigned to him the third mortgage and the equity of redemption was conveyed to him by Robinson.

There was no question at the trial that a trespass had been committed and the only matter in dispute was as to which, if any, of the plaintiffs could maintain the action. The defendants claimed that the right to sue was in Horton if in any one and that he was estopped by having, prior to the trespass, given his consent to a sale under chattel mortgage of the personal property in respect to which the trespass was committed to the defendant Brookfield.

The trial judge held that Brown, the first mortgagee, could maintain the action as he must be considered to be a trustee for subsequent incumbrancers. The majority of the court *in banc* differed from this view, but gave judgment against defendants in favour of Robinson the owner of the equity of redemption at the time of the trespass.

Ross Q.C. for the appellants. The plaintiff Robinson was not damnified to an extent that would entitle him to damages, *Hosking* v. *Phillips* (1); and see *Tucker* v. *Vowles* (2).

(1) 3 Ex. 168.

(2) [1893] 1 Ch. 195.

1893

BROOKFIELD v. BROWN.

Borden Q.C. for the respondents. As to the right of the mortgagees to sue see *King* v. *Bangs* (1); *Higginbotham* v. *Hawkins* (2); *Mann* v. *English* (3); and as to estoppel of Horton *Moore* v. *Spiegel* (4); *Smith* v. *Cropper* (5); *Maddison* v. *Alderson* (6); *Town of Clinton* v. *Haddam* (7).

THE CHIEF JUSTICE.—I entirely agree in the judgment of Mr. Justice Townshend. It is manifest that the appellants were guilty of an unjustifiable act of spoliation which caused injury and damage to the owner of the property.

It would be much to be lamented if for any technical difficulty regarding the proper person to sue for an indemnity in respect of this injury the appellants should evade liability. I am of opinion, however, that there is really no such difficulty. Under the Nova Scotia Judicature Act, which amalgamates the jurisdictions of law and equity formerly exercised separately, it is open to the owner of the equity of redemption to sue for this injury to his equitable and beneficial estate just as a reversioner though not in possession might at law have sued for an injury to his reversion. Had the old procedure been still in force by which law and equity were separately administered there can be no doubt that in favour of the plaintiff Robinson, the owner of the equity of redemption, a court of equity, even if it would not have given him full relief, would at least have restrained the appellants from setting up the outstanding mortgages and the want of possession as a defence, and thus have removed all impediments in the way of his right to recover.

(1) 120 Mass. 514.
(2) 7 Ch. App. 676.
(3) 38 U. C. Q. B. 240.
(4) 143 Mass. 413.
(5) 10 App. Cas. 249.
(6) 8 App. Cas. 467.
(7) 50 Conn. 84.

1893

BROOKFIELD v. BROWN.

The Chief Justice.

Now that the jurisdictions are combined that can be done in one action which would formerly have required two. The respondent, Robinson, was clearly an owner of the equity of redemption at the time of the wrongful acts complained of which were committed on the 12th June, 1890. The conveyance of the equity of redemption by Marr, the mortgagor, to Robinson was on the 24th March, 1890. No justification for the appellants' conduct has or could have been shown. The only question is. Who is entitled to sue them for it? Brown, the first mortgagee, could not sue as he has been paid off. Horton having transferred his mortgage for value is also without any *locus standi* as it appears to me. Hesslein could not sue as his purchase was not until the 14th June, 1890, after the wrongs had been committed and no right of action was or could have been assigned to him. There remains only Robinson and it is no answer to his action to say that he has conveyed away the estate. Presumably the estate was sold for so much less by reason of the removal of these fixtures and the consequent injury to the freehold. The quotation from Rolle's Ab. in the judgment of Mr. Justice Townshend clearly establishes the proposition that the owner of land upon which trespass has been committed may recover for the injury after having conveyed away his estate. All principle and reason point to a like conclusion.

The appeal must be dismissed with costs.

FOURNIER J.—I am of opinion that the appeal should be dismissed.

TASCHEREAU J.—I have some hesitation in agreeing to dismiss this appeal. I was at one time inclined to give judgment the other way but as the majority of the court are in favour of dismissal I will not dissent.

1893

BROOKFIELD v. BROWN.

Gwynne J.

GWYNNE J.—I am of opinion that this appeal should be dismissed with costs, and that the person entitled to recover the amount assessed by the jury for the very unjustifiable tort committed by the defendants, and as the value of the fixtures severed by them from the premises and taken away by them and disposed of to their own use, is the plaintiff Horton, who, although third mortgagee of the premises, was in actual possession thereof as mortgagee at the time of the commission by the defendants of the serious damage to the premises of which he was so in actual possession, and who alone appears to have been the person pecuniarily damnified by the defendant's outrageous act of wrong, and whose cause of action as the person in actual possession of the injured premises was complete the moment the tort was committed. The judgment should, in my opinion, be varied accordingly, so as to enable Horton to recover the amount assessed by the jury, with full costs. There seems to be no foundation whatever for the contention that Horton was estopped from suing for the tort committed to premises of which he was in actual possession, nor are the tort feasors persons who can be heard to urge any such objection, or any objection to his right to maintain this suit for such tort or to recover the damages awarded by the jury against the defendants as the tort feasors. If the amount recovered from the defendants for the gross wrong committed by them, together with the amount for which the mortgagee Horton afterwards, when his mortgage security was so reduced in value by the defendants' wrong, assigned and transferred his mortgage, would exceed the amount of his mortgage debt that is not a matter of which the tort feasors could claim the benefit; it would be a matter with which the mortgagor, or the person or persons entitled to his equity of redemption would be alone concerned, and they can be trusted

to look after their own interests in such a case, as being better able to do so than the defendants who have committed the wrong complained of, and whose sole object in resisting the present action is to endeavour to escape being made responsible to any one for the outrage they have committed.

1893

BROOKFIELD v. BROWN.

Gwynne J.

Appeal dismissed with costs.

Solicitor for appellant Brookfield: *Adams A. Mackay.*

Solicitor for appellant Sheraton: *Arthur Drysdale.*

Solicitor for respondents: *W. A. Lyons.*