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*Oct. 5.

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*Jan. 15.

WILLIAM ANGUS AND FRANK B. HOWARD (DEFENDANTS) ..... APPELLANTS;

AND

THE UNION GAS AND OIL STOVE CO. (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Patent of invention—Business agreement to manufacture under—Letter of guarantee—Failure of scheme—Liability of guarantor.

The chief object of an agreement between A. and B. was the profitable manufacture and sale of wares under a patent of invention issued to A., and in consideration of advances by B. to an amount not exceeding $6,000, C. by a letter of guarantee "agreed to become a surety to B. for the repayment of the $6,000 within 12 months from the date of the agreement if it should transpire that, for the reasons incorporated in said agreement, it should not be carried out." On an action brought by B. against C. for $6,000 it was proved at the trial that the manufacturing scheme broke down through defects of the invention.

Held, affirming the judgment of the court below, that C. was liable for the amount guaranteed by his letter.

APPEAL from a judgment of the Court of Queen's Bench for the province of Quebec, confirming a judgment of the Superior Court under which judgment the appellant William Angus was condemned to pay a sum of $6,000 jointly with the appellant Frank B. Howard, and the appellant Frank B. Howard condemned for the further sum of $2,264, and interest, individually.

The causes of action as set up in the declaration, and the pleas, are fully stated in the judgments hereinafter given.

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

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Martin and Gilman for appellants.

Greenshields Q.C. for respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dismissed with costs.

TASCHEREAU J.—The respondents, a New York company, the plaintiffs in this case, claim from the appellants, Angus & Howard, a sum of $8,864 upon the following state of facts. Howard, on the 18th of April, 1889, being the owner of a United States patent for improvements in apparatus for manufacturing hollow ware from pulp, entered into an agreement with the company, respondent, by which he agreed to assign and execute to the company an exclusive license to manufacture and sell in the United States cans for holding kerosene oil under the said patent. This agreement, which is contained in a writing *sous seing privé*, is a clumsily drawn document, and one that requires a close examination before being perfectly understood. However, the parties themselves do not substantially differ about the conditions of their contract. The controversy is as to what happened subsequently and as to the legal result of the failure of what I may term their joint enterprise.

Howard, by a separate instrument of the same date, duly executed a license or transfer of his patent to the company, as he had agreed to do, but the company claim that this patent was worthless, and that a merchantable and useful can for holding kerosene oil could not be manufactured under it, as he had covenanted to do; that the article he manufactured was worthless and rejected by the trade; that Howard, under a subsequent agreement, dated the 24th April, 1889, was obliged to refund to the company the sums they advanced to him at different times, amounting to $18,000, of which

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$8,864 are due; that Angus, the other defendant, agreed on the 24th April, to become surety to the company for the repayment of those advances up to $6,000.

The defendants pleaded separately, alleging that Howard had duly fulfilled all his part of the agreement, and that, if the article manufactured is worthless, he is not responsible for it. It results from the evidence, as found by the Superior Court and the Court of Appeal, that the company's allegations of fact are fully borne out. It would be useless for me here to give the details of an *enquête*, a great part of which is itself utterly useless. Of the one hundred and twelve documents filed and the nineteen witnesses examined, more than half might well have been left out. One fact is clear. It is that the cans manufactured by Howard are altogether unsalable, and why he should not refund to the company the advances they made to him under their agreement is what he has, to my mind, altogether failed to establish.

The company has certainly disbursed these sums, and has as certainly received no consideration whatever for them. The judgment in their favour against Howard for $8,864 is, in my opinion, unassailable.

As to Angus, he was not Howard's partner in this matter, as found in the court below, and consequently the judgment against him can only be, as it is, for the amount of his guarantee, $6,000.

It was argued by the appellants that the respondents should have exercised the option given them under the contract, to have taken out a license for the manufacture of other pulp ware goods, under other patents owned by Howard, and that, had they done so, they might have saved the loss that they are now seeking to recover. This point, however, is not in any way raised by the pleadings, and cannot avail the appellants. The respondents would perhaps have been able to

prove that these other patents were as valueless as the one in question, had they had the opportunity. The appellants' contention that the judgment of the Superior Court does not set aside the contract, as prayed for by the declaration, though founded in fact, does not help them in law. If any one can complain that the judgment does not grant all the relief demanded by the declaration it is not the appellants. They also argued that, under this judgment, the company will get back their money, and still retain Howard's patent for the whole of the United States. Here again, there is no issue of the kind raised by the pleadings. Had the appellants asked for it the company would undoubtedly have filed immediately a re-transfer of the patent. The appellants are entitled to it, however, and an order will be added to the judgment, if desired, that the patent is to be re-transferred to them, and all the company's rights to it under the agreement in question put an end to, said re-transfer, however, to operate and have effect only upon payment of the amount of the judgment.

GWYNNE and SEDGEWICK JJ. concurred.

KING J.—This is an appeal from a judgment of the Queen's Bench of Quebec, affirming a judgment of Mr. Justice Mathieu condemning the appellants, *inter alia*, to pay to the respondents the sum of $6,000, with interest from 13th May, 1891.

On 18th April, 1889, an agreement was entered into between the company and Howard, by which Howard agreed to execute an exclusive license to the company (subject to conditions of agreement) to manufacture and sell in the United States cans for holding kerosene oil to replace those then sold in the market, which were made from glass, tin and other materials, also all arti-

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cles then manufactured by the company that could be made from pulp under a patent owned by Howard.

Howard also agreed to do all acts, to the best of his ability, necessary to maintain and protect the validity of the patent, to furnish drawings and specifications necessary to build and erect machinery and fixtures for the manufacturing of said articles, to give his time and all necessary information for the building and erecting and starting of said machinery and fixtures free of charge, upon expenses paid, to discount drafts in certain banks, and to grant to the company a new license to manufacture and sell in the United States some other lines of goods that could be manufactured from pulp under his patents, in case it should be found that within two months from the company receiving cans then being made by the Howard Pulp Co., that the trade would not accept and buy them.

The company, on their part, agreed to proceed with due diligence to build and erect buildings, machinery and fixtures necessary and suitable to manufacture at least 1,500 one gallon oil cans (or its equivalent in large cans) per day and thereafter to manufacture all the said cans or goods that could be sold in the United States at a fair business profit, provided that the trade accept and buy the cans then being made for the company by the Howard Pulp Ware Company.

There were other agreements by the company, relating to the mode of making up accounts, keeping books, opening the factories to Howard, &c., and for the manufacturing near Chicago if a larger profit could be realized.

Then there follows this agreement:

Said party of second part further agrees to advance from time to time in amounts as may be needed by said party of first part, any amounts, the total of which shall not exceed $6,000 by accepting time drafts drawn by said party of 1st part on said party of 2nd part, and

by accepting renewal time drafts drawn, &c., from time to time as may be needed to carry said advance of $6,000 or any part thereof until such time as the profit accruing to the party of the first part under this agreement shall be sufficient to pay said drafts.

It was also agreed that Howard's share of the net profits should be retained by the company and applied to the payment of the advance and renewal drafts until same are paid in full.

By another agreement of same date referring to that already mentioned it was agreed that in case "Angus will not sign an agreement to repay the company any amount that may be advanced Howard (under said agreement) within 12 months from this date, then the said agreement shall be null and void and a new agreement shall be entered into between Howard and the company."

On the 24th April, 1889, Howard addressed to the company a letter saying:

I hereby agree that if from the cause set forth in my agreement with you, dated April 18th, 1889, it should occur that you were unable to carry out your part of said agreement, that then, and in such case I will repay you on or before the 18th day of April, 1890, the total amount that you may have advanced to me under said agreement of 18th April, 1889.

It is understood that this agreement shall form a part of said agreement of 18th April, 1889.

On the same day, viz., April 24th, 1889, Angus signed the following guarantee:

Whereas F. B. Howard has entered into an agreement dated April 18th, 1889, with Union Gas and Oil Stove Company of New York, for the manufacture and sale of articles from pulp under Howard's Patent by the conditions of said agreement Howard is to obtain from said company an advance loan up to the amount of $6,000 by his drafts on them on time. The undersigned being fully aware of all the conditions of the agreement between the said Howard and the company above referred to, hereby agrees to become surety to the said company for the repayment of said drafts within 12 months from date of said agreement, in case it should transpire that if (*sic*) from the reasons incorporated in said agreement, it should not be carried out.

(Signed) WM. ANGUS.

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The advance of $6,000 was duly made by drafts which after certain renewals the company were obliged to pay.

The cans made for the company by the Howard Pulp Ware Company were supplied to the respondent company between the date of the agreement and August of the same year, and were sold by the company to their customers, wholesale jobbers, by whom they were sold to the retail dealer, through whom they got into the hands of the consumers. Presently large numbers of them came back to the respondent company, being returned by the buyers who found that they would not hold oil. In the process of making them the pulp can was subjected to an indurating or hardening process by a coating of oxydized linseed oil. But it was found that after a while the kerosene oil stored in them found its way through the indurated surface and soaking into the pulpy substance destroyed their efficiency. The consequence was that the goods were thrown back upon the hands of the company and became worthless. In the meantime the company having proceeded to build and having built and filled a factory for the manufacture of the cans in Connecticut, and having manufactured a large number of the cans found themselves with a useless factory and useless stock on their hands. The evidence clearly shows that the venture was a business failure entirely through the inutility of Howard's patent for the induration of pulp oil cans.

The want of mercantile value in the oil cans manufactured under Howard's patent and license disabled the company in a mercantile sense from carrying out their undertaking to manufacture and sell the goods, and this is from "a cause set forth in the agreement" within the meaning of those words as used in Howard's letter to the company of April 24th, 1889. Consequently

under the terms of that letter Howard became bound to repay to the company on or before 18th April, 1890, the total amount advanced to him under the agreement of 18th April, 1889. The amount so advanced to Howard exceeded the $6,000 named in the agreement. It was in fact $8,000 and upwards and for that sum he is indebted to the company and liable to make to them payment in accordance with the terms of his letter.

Then as to the guarantee of Angus. It recites the fact of the agreement of April 18th, 1889, for the manufacture and sale of articles made from pulp under Howard's patent, and Angus, having knowledge of all the conditions of the agreement "agrees to become surety to the said company for the repayment of said drafts within 12 months from date of said agreement in case it should transpire that (if) from the reasons incorporated in said agreement it should not be carried out."

Was the agreement not "carried out," and if so, was this "from the reasons incorporated in it?"

What was the contemplated failure of the agreement? and what were the reasons incorporated in the agreement as being likely to cause the contemplated failure to carry out the agreement. Manifestly the profitable manufacture and sale of the wares was the chief object of the agreement. It was through this that both parties sought the business advantage they contemplated, and it was through this that Howard was able to obtain the advance, and that the company was willing to make the advance, relying upon Howard's share of the profits as a further security.

The contingency of the cans not being acceptable to the trade was in terms expressed, and is made the subject of certain stipulations. I think therefore that the only thing intended by the clause referred to in Angus's

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guarantee was a possible failure to manufacture and sell the wares by reason of the trade not taking to them. The object of the guarantee apparently was to protect the company in case the manufacturing scheme broke down from the inutility of Howard's patent or invention.

This result has happened, and therefore Angus as surety is bound to indemnify the company against the advance.

It was argued that under clause 13 the only recourse of the company was to apply for another license to manufacture other pulp goods under Howard's patent. But this clause is one giving an option to the company and binding Howard to performance if the option is exercised, but it in no way deprives the company of the right to repayment of the advance.

Then it was argued that under clause 20 the debt was to be paid out of a fund viz., the profits. The answer is twofold. 1st, that the fund is not made in exclusion of personal liability and responsibility, but is an additional security, and 2ndly, if the fund is prevented from being formed by reason of Howard's patent turning out worthless, for the purpose intended, it is not for him or his surety to say that the fund is the only way through which the advance is to be repaid. Then it is said that as within two months next after the company received the cans from the Howard Co., the cans had been purchased and had not been returned, therefore the plaintiff could not insist upon the guarantee. But the 20th clause only seems to apply to the exercise of the option referred to.

Upon a broad and useful reading of the agreement I think that the facts of the case as proved and as found by the court below are within its terms and that "from the reasons incorporated in the agreement it was not

carried out." The scheme of manufacturing failed through the defects of Howard's invention.

I therefore think that the company are entitled to recover.

Appeal dismissed with costs.

Solicitors for the appellants: *Girouard, Foster, Martin & Girouard.*

Solicitors for respondent: *Greenshields & Greenshields.*

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