JOHN ROBERTSON (PLAINTIFF).....APPELLANT; 1897

AND

WILLIAM H. DAVIS (DEFENDANT).....RESPONDENT.

*May 14.
*June 7.

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

Action—Suretyship—Promissory note—Qualified indorsement.

D. indorsed two promissory notes, *pour aval*, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide-books which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment and, A. having died, R. as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action some of the books were still in the possession of R. and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm.

Held, that the action was not based upon the real contract between the parties and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes.

Held further, per Sedgewick J., that neither the payee of a promissory note nor the drawer of a bill of exchange can maintain an action against an indorser, where the action is founded upon the instrument itself.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), reversing the judgment of the Superior Court, District of Montreal, which maintained the plaintiff's action with costs.

The plaintiff by his declaration claimed from one McConniff and the present respondent jointly and severally:

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1897

ROBERTSON v. DAVIS.

1.	The amount of a promissory note dated 7 Nov., 1891, by McConniff to Austin & Robertson, indorsed by the appellant, *pour aval*, payable in four years	$1,750 00
2.	Costs of protest thereof	3 59
3.	The amount of a promissory note dated 6 Oct., 1895, from the same party to the same firm, indorsed by the appellant, *pour aval*, payable thirty days after date (this note having been given in renewal of another of the same amount, dated 6 Oct., 1891, payable in four years)	3,500 00
4.	Costs of protest thereof	3 59
	Total amount of claim	$5,257 18

He also alleged that the firm of Austin & Robertson was dissolved by the death of Austin and that he took over the business of the firm and was vested with its rights.

McConniff did not contest, but on the contestation by the respondent it appeared that both the notes sued on had written across their faces the words "not negotiable and given as security"; that the respondent had agreed in this manner to become security for advances the firm made to McConniff for the publication of several editions of guide-books, the whole of which were to be left in the hands of the firm as further security, the proceeds of sales to be credited to McConniff, in deduction of the amount of the advances. A number of sales were made, the moneys received placed to McConniff's credit and in the meantime further advances made as the editions were published. At the time of the action some of the books were still in the hands of the firm, and it appeared that no statement of the accounts between McConniff and the firm had been furnished to respondent.

Greenshields Q.C. and *Lafleur* for the appellant. The notes were accommodation paper, indorsed by respondent without consideration, for the purpose of accommodating, by a loan of his credit, McConniff

1897

ROBERTSON v. DAVIS.

who was to provide for the notes when they fell due (1). Although as between the party accommodated and accommodating party the relations are those of principal and surety, yet the accommodation indorser is not entitled to be credited with the amount of any securities in the hands of the holder taken by the latter from the principal debtor, until the accommodation indorser has himself paid the principal debt (2); so we were not obliged to account or to tender the books. The security was continuing and survived the dissolution of the firm by Austin's death.

The cases cited and remarks of Sir William Ritchie C.J. in *Starrs* v. *Cosgrave* (3), show the distinctions between that case and the present one. See also remarks by Fournier J. in the same case, p. 587, and Gwynne J. at p. 593.

Macmaster Q.C. for the respondent. The conditions of the contract show that there was not to be a continuing security, but one which lasted only until the amount of the notes was reached, and the advances of that amount were fully reimbursed by receipts from sales before action; *Gerson* v. *Hamilton* (4); subsequent advances were upon McConniff's own credit; art. 1935 C. C.

The retention of the books in his possession would bar this action, and plaintiff was also bound to render a full statement of the financial situation of the principal debtor before acting on the security; arts. 1931, 1941 C. C.

The essential character of promissory notes was taken away from the instruments sued upon by the indorsement of a condition. Art. 2344 C. C.; 53 Vict. (D.) ch. 33, s. 82. The instruments constituted a contract of

(1) Randolph Com. Paper, Art. 472; Daniel, 189, Byles, 138, 412.
(2) Am. and Eng. Cycl. Vol. 2, p. 372.
(3) 12 Can. S. C. R. 571.
(4) 30 La. Ann. 737.

1897

ROBERTSON v. DAVIS.

suretyship, which terminated either upon the repayment of the first moneys to that amount, or at any rate, upon the death of Austin. *Starrs* v. *Cosgrave* (1); *Haffield* v. *Meadows* (2); *Leathley et al.* v. *Spyer* (3).

TASCHEREAU J.—This appeal must be dismissed. I would myself have done so after having heard the appellant, without calling upon the respondent.

The appellant cannot get over the objection that his action is not based on the real contract that he has proved between the firm of Austin & Robertson and the respondent. He has alleged a certain cause of action, and he has proved another. That is fatal to him. Upon that ground, taken by the Court of Appeal, the appeal is dismissed with costs.

Though we adopt this reason for disposing of the appeal, the appellant must not be led to understand that he would have succeeded, had he taken the proper action, on the question of the respondent's payment in full of all his liabilities under the agreement in question.

GWYNNE, KING and GIROUARD JJ. concurred.

SEDGEWICK J.—I agree, but with this further statement. Upon the authority of *Steele* v. *McKinlay* (4), in the House of Lords, this action is not maintainable. Under no circumstances can the payee of a promissory note or the drawer of a bill of exchange maintain an action against an indorser, where the action is founded upon the instrument itself.

Appeal dismissed with costs.

Solicitors for the appellant: *Greenshields, Greenshields, Laflamme & Glass.*

Solicitors for the respondent: *Macmaster & Maclennan.*

(1) 12 Can. S C. R. 571.
(2) L. R 4 C. P. 595.
(3) L. R. 5 C. P. 595.
(4) 5 App. Cas. 754.