

the name of "preferential assignment" to a favored creditor.

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McGRAE
v.
WHITE.

Appeal dismissed with costs.

Solicitors for appellant: *Rose, Macdonald, Merritt & Coatsworth.*

Solicitor for respondent: *G. C. Gibbons.*

JAMES DEWOLFE SPURR & JOHN }
N. MOORE..... } APPELLANTS;

1883
*Feb'y. 23, 24,
*June 18.

AND

THE ALBERT MINING COMPANY.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Contract—Sale of goods—Payment—Appropriation—Non-suit.

The *Albert Mining Co.* (respondent) brought this action to recover for coal sold and delivered to appellants during the years 1866, 1867 and 1868.

S. and *M.*, and one *McG.* were partners carrying on business under the name of the *Albertine Oil Company*, the defendant *S.* furnishing the capital. The contract for the coal was made by *S.* who was a large stockholder in the plaintiff company and entitled to yearly dividends on his stock. The agreement, as proved by plaintiffs, was that *S.* purchased the coal for the *Albertine Oil Company*, the members of which he named, that the president of the plaintiff company told *S.* they would look to him for payment, as the other partners were poor; that the terms of sale were cash on delivery on board the vessels; and that *S.* agreed that the dividends payable to him on his stock should be applied in payment for the coal; that in consequence of this arrangement the plaintiffs credited the *Albertine Oil Company*, with the amount of *S.*'s dividends as they were declared from time to time down to August, 1866, leaving a balance of \$912 due to *S.* It also appeared that the coal deliv-

*PRESENT—Sir W. J. Ritchie, Kt., C.J.; and Strong, Fournier, Henry and Taschereau, JJ.

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ered was charged in the plaintiffs' books to the *Albertine Oil Company*, and that the bills of lading on the shipments of the coal were also made out in their name, and that some time afterwards a notice signed by *S.* and *M.*, was given to the plaintiffs, complaining of the inferior quality of the coal, and claiming damages in consequence. In the latter part of the year 1868, *S.* repudiated the agreement to appropriate his dividends to the payment of coal, and refused to sign the receipts therefor in the plaintiffs' books. He had signed the receipt for the dividend of 1866. The present action was then brought (in 1873) against *S.* and *M.*, the surviving partners of the *Albertine Oil Company*, *McG.* having died, to recover the value of the coal. *S.* shortly afterwards brought an action against the plaintiffs for the dividends; the claim was referred to arbitration and an award was made in favour of *S.* for upwards of \$15,000, which the plaintiffs paid in July, 1874. The receipt given for the payment stated that it was in full satisfaction of the judgment in the suit of *S.* against the *Albert Mining Company*, and it appeared (though evidence of this was objected to in the present action) that it included the dividends for the years 1867 and 1868.

The learned judge before whom the action was tried, non-suited the plaintiffs, but the Supreme Court of *Nova Scotia* set aside the non-suit.

*Held*,—(Reversing the judgment of the court below) *Strong, J.*, dissenting, that there being clear evidence of the appropriation of *S.*'s dividends in pursuance of agreement made with him, and therefore of the plaintiffs having been paid for the coal in the manner and on the terms agreed on, the plaintiffs were properly non-suited.

**APPEAL** from a judgment of the Supreme Court of *New Brunswick*, by which a rule to set aside a nonsuit was made absolute.

The facts of the case, as proved on the trial, appear in the judgment of the learned Chief Justice hereinafter given, and in the report of the case in the court below (1).

Mr. *Weldon*, Q.C., and Dr. *Barker*, Q.C., for appellants, referred to the following cases :

*Eyles v. Ellis* (1); *Bodenham v. Purchas* (2); *Hills v. Meynard* (3); *Henderson v. Stobart* (4); *Lyth v. Ault et al* (5); *Cochrane v. Green* (6); *Walter v. James* (7).

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Mr. *Gilbert*, Q.C., for respondents, referred to the following cases :

*Graves v. Key* (8); *Lee v. Lancashire and Yorkshire Railway Co.* (9); *Farrar v. Hutchinson* (10); *Skaipe v. Jackson* (11); *Wallace v. Kelsall* (12).

RITCHIE, C.J.:

This is an action for goods sold and delivered, tried before his honor Mr. Justice *Weldon* at the Circuit Court, *St. John*, May, 1881, when a nonsuit was ordered by the learned judge, and which nonsuit was subsequently set aside by the Supreme Court.

The facts of the case, as proved on the trial, are as follows :

The respondent company were the proprietors of coal mines near *Hillsborough*, *Albert* county. The appellant *Spurr* was a large stockholder in the company, and the company in 1866, and for several years afterwards, was paying large dividends.

In the early part of the year 1866 the appellants and one *John McGrath*, since deceased, formed an incorporated company which they called *The Albertine Oil Company*, to make oil from the coal mined by the respondents.

Mr. *Henry Gilbert*, the President of the *Albert Mining Co.*, in his evidence, says :

I am President of the *Albert Mining*; was so in 1866-7. I know

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| (1) 4 Bing. 112.         | (7) L. R. 6 Exch. 124. |
| (2) 2 B. & A. 39.        | (8) 5 App. Cases 190.  |
| (3) 10 Q. B. 266.        | (8) 3 B. & Ad. 318.    |
| (4) 5 Exch. 99.          | (9) L. R. 6 Ch. 534.   |
| (5) L. J. N. S. Ex. 217. | (10) 9 A. & E. 641.    |
| (6) 9 C. B. (N. S.) 448. | (11) 3 B. & C. 421.    |
| (12) 7 M. & W. 273.      |                        |

1883 *Spurr, Moore and McGrath*. The latter was living in 1866. *Spurr, Moore and McGrath* composed the *Albertine Oil Co.* Q. Had you in 1866, in March or April, conversation about coal in your office, and he (*Spurr*) wanted 3,000 for the *Albertine Oil Co.*? A. I asked who they were. He said he, *McGrath* and *Moore* in *Spurr's Cove* (or above the falls). He furnished capital and mill, and they did the work; *Moore* did the work, and *McGrath* sold the oil; he wanted that quantity for that year. We made up the order for coal. I agreed with him he should get it at \$11 per ton; he agreed to that. In 1866, that it should be paid by the Oil Co. The next year the same. He wanted the same quantity for 1867. In August, 1867, the price of oil fell off. I went to *Spurr's* house at *Chipman's Hill*. The quantity was to be reduced to 2,000 tons; he had received some coal before that. I proposed to cancel. He would take 2,000, and the balance was cancelled. Nothing more said. Nothing said about price the second year. We sent him the bill of lading and an invoice; he was directed to do this. This was in 1866 and 1867. I directed *Ketchum* to ship on *Spurr's* order.

#### Cross-examined by Mr. *Weldon*—

He was to pay cash on delivery—put on board at *Hillsboro'*; free on board, and cash on delivery. I sold to *Spurr* on these terms. I told *Spurr* the others were poor, and I looked to him. He was to turn the dividend in his stock. He was a large stockholder, and his dividend was to go pay for the coal. That was the arrangement of the Oil Company. A dividend in 1864. He (*Spurr*) got his dividend, 7th August, 1864. Credited to Oil Company by Mr. *Ellman*. *Spurr* signed 4th Oct., 1866. Credited to Oil Co., 29th Nov., 1866, \$5,760; 5th April, 1867, \$3,040. Credited by *Ellman* to the *Albertine Oil Company*. Credited to the *Albertine Oil Company*, 26th Dec., 1867, \$4,800, all carried to the Oil Company account. 10th August, 1868, credited to *Albertine Oil Co.* The Oil Co. paid. There would be \$6,770 on this, leaving \$900 due to *Spurr*.

#### Re-examined, *Tuck*—

*Spurr* repudiated the dividend in 1868. He was off fishing in 1867. After 16th October, 1868, he disputed; I agreed to credit the dividends in June, 1866 and 1867, and he agreed to do so. After this, suit was commenced. That it was before this suit was commenced he repudiated; between 1868 and 1869 he repudiated, and would not sign the books for the dividend after that.

I think the evidence shows clearly that the sale was to the *Albertine Oil Company* composed of *Spurr, Moore*

& *McGarth*, and not to *Spurr* individually, though the fair inference is that this sale would not have been made had not the President of the *Albert Mining Company* considered *Spurr* a responsible party, and the partner on whose credit he especially relied for payment, though I can discover no indication whatever of any intention of relieving the other partners from liability. There is clear evidence that *Spurr* agreed that he would allow his dividends in the *Albert Mining Company* to be appropriated by that company in payment of the coal, and unless *Spurr* had made this arrangement, the fair inference is, I think, the coal, which appears to have been a cash article and the sale a cash transaction, that is, the dividends were to be appropriated and to be accepted as cash by the *Albert Mining Company*, would not have been furnished by the *Albert Mining Company* to the *Albertine Oil Company*.

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The contract of sale having been made by *Spurr* on behalf of the *Albertine Oil Company*, it can hardly be presumed that *Spurr* did not communicate the terms of so all important a contract to his co-partners, and the liability of such co-partners would continue only until the coal was paid for in the manner and at the time stipulated by the agreement by virtue of which the purchase was made and the coal supplied.

The coal having been furnished and the dividends having been so appropriated in payment therefor, in my opinion, on such appropriation, the transaction between the *Albert Mining Company* and the *Albertine Oil Company* was closed in accordance with the terms of the arrangement on which the coal was bought and sold.

The agreement amounts to this, that for the coal supplied to and received by the *Albertine Oil Company* the appropriation of the dividends should be con-

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sidered as payment, and places the parties in the same situation as if the dividends had been actually paid in money to *Spurr* by the *Albert Mining Company* and then returned by him to that company in payment for the coal therefore so soon as the *Albert Mining Company* under this agreement appropriated, by the authority of *Spurr*, the dividends to the payment of the coal, their claim against the oil company ceased in like manner. This is doing no more than treating that as a payment which the parties themselves have agreed should be so regarded.

In *Spargo's* case (1) *James*, L.J., said :

If there was on the one side a *bonâ fide* debt payable in money at once for the purchase of property, and on the other side a *bonâ fide* liability to pay money at once in shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, there is no necessity that the formality should be gone through of the money being handed over and taken back ; but that if the two demands are set off against each other the shares have been paid for in cash.

*Mellish*, L. J., said :

It is a general rule of law that in every case where the transaction resolves itself into the payment of money by *A.* to *B.*, and then handing it back again by *B.* to *A.*, if the parties meet together and agree to set the one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards.

If *Spurr*, after the coal was supplied and the dividends appropriated in payment thereof, attempted as a stockholder to claim payment of the dividends from the *Albert Mining Company*, the evidence in this case shows he would have been trying to obtain such payment after he had received satisfaction for the same, and no such claim could be successfully sustained, and any such claim, if made, should have been resisted by the *Albert*

(1) L. R. 8 Ch. App. 412.

*Mining Company.* If Mr. *Spurr* has received the benefit of his dividends in paying for the coal and has since been paid the same dividends in cash, it is clear he has been twice paid. Whatever suspicions the evidence in this case may raise on this point, the record of the suit and award under which it is contended they were paid *Spurr* not being in evidence, and no evidence of the matter submitted to the arbitrators or of the proceedings before them, we have no sufficient legal evidence to show it unless from the items on which the award and judgment for \$15,279.98 was based on the receipt given by *Weldon* in the evidence of *Schofield* on this point objected to, and which should have been rejected. But even if this was shown by satisfactory legal evidence, I do not see how it could affect this case, for the question we are now trying is not one between *Spurr* and the *Albert Mining Company*, as to whether he has or has not been paid twice over for his dividends; but the question is between the surviving partners of the *Albertine Oil Company* and the *Albert Mining Company*, and that is whether the *Albert Mining Company* have been paid for the coal supplied the *Albertine Oil Company* in the manner and on the terms agreed on.

I cannot discover that there was any question to be submitted to the jury, such as the court below assumes, because there was clear uncontradicted evidence of an actual appropriation of the dividends, after the receipt of the coal by *Spurr* and his co-partners, whereby the co-partnership debt was paid and which payment, as against either the *Albert Mining Company* or his co-partners, he could not legally repudiate.

STRONG, J. :--

I have come to the conclusion that the judgment appealed from setting aside the non-suit and granting a new trial was right and ought not to be disturbed.

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Granting that the evidence objected to, shewing of what items the sum recovered by the judgment in favor of *Spurr* against the company was made up, was inadmissible, as it undoubtedly was, being a mere admission by Mr. *Weldon*, *Spurr's* attorney in the action, and therefore not binding on the other parties, or even on *Spurr* himself, it still appears to me that there was evidence to go to the jury.

There were two questions of fact to be tried--the first being, who were the vendors under the contract made by *Spurr* with Mr. *Gilbert*, acting on behalf of the *Albert Mining Company*--*Spurr* alone, or the partnership firm trading under the designation of the *Albertine Oil Company*; and secondly, in the event of the first issue being found for the plaintiff, payment, for although there does not appear to be any plea of payment in the record, the parties at the trial and the court below also seem to assume that the defence was admissible under the general issue.

As to the first issue--it can scarcely be doubted that there was evidence for the jury, for although Mr. *Gilbert* says he told *Spurr* he should look to him for payment, yet this is not incompatible with the sale being to the firm, and the claim for damages, in respect of the inferior quality of the coal, afterwards put in by the Company, was at least an admission of their having been the purchasers, sufficient to entitle the plaintiff to have the case sent to the jury.

Then, as regards payment, the burden of that issue was of course on the defendants, and they, no doubt, gave some evidence in support of it when they established by Mr. *Gilbert*, the president of the company, that *Spurr* "was to turn the dividend on his stock; that he was a large stockholder, and his dividend was to go to pay for the coal." This, coupled with the further proof given by Mr. *Schofield*, that the dividends payable



to *Spurr* were actually credited in the company's book to the Oil Company, made a *prima facie* case of payment. But, at most, these were facts for the consideration of the jury, and should not have been treated as conclusively showing payment for the following reasons:

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First, it was not proved by Mr. *Gilbert* that *Spurr* ever actually assented to the appropriation of his dividends which the company assumed to make. All that Mr. *Gilbert* says is, that he "was to turn the dividends on his stock," thus rather implying that, though *Spurr* agreed to pay in this way, there was to be some further act or assent on his part, upon the application of the dividends to the debt for the coal was to be made. At all events the evidence was susceptible of such a construction, and that is sufficient for the purpose of shewing that the question was one of fact for the jury, and not one which the judge should have taken into his own hands to decide as he did by non-suiting. I need not say that the entry in the books of the company was not conclusive against the plaintiffs, it was quite open to explanation just as a receipt may be explained and shown to have been given under a misapprehension and without any actual payment. Further, it cannot possibly make any difference that the dividends were not paid over to *Spurr* until after this action was brought; the question is, had there been a payment at that date, and it is quite consistent with the facts that there had been no payment, that the dividends were still retained by the company, for if the jury, as judges of fact, should find that the plaintiffs were never authorized to apply the dividends in the way they had assumed to do without a further reference to *Spurr*, it was clear there was no payment, and that the dividends, although standing in the plaintiffs' books credited to the Oil Company, were still in

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 MINING Co. Company, they could not even set off against the  
 amount due to them for the price of the coal.  
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The question was of course wholly one for the jury, but my own conclusion from the evidence would be that there never was any actual and completed appropriation of the dividends by *Spurr*, that there never was anything more than a promise by him to apply the dividends on the debt for the coal, some further authority being contemplated by him, before the company were to be entitled to charge him and credit the Oil Company with the profits payable to *Spurr*. I merely mention this, however, to show that there was a real substantial question of fact on the evidence which should have been left to the jury to try, and not of course with the view of now assuming to decide that question.

For these grounds, which are precisely the same as those assigned by the learned Chief Justice of New Brunswick, for the judgment of the majority of the court below, I think the appeal should be dismissed with costs.

FOURNIER, J., concurred with *Ritchie*, C. J.

HENRY, J. :

The bargain for this coal was made by the one company with the other. The evidence abundantly shows it. It was given under the express undertaking of *Spurr* to allow his dividends, as they arose, to go in payment of the coal. The terms of the company were cash, and it is not unreasonable to suppose they would not have accepted that arrangement as cash unless they made this stipulation originally. The first question is, "Was this an undertaking of *Spurr's* for the *Albertine Oil*

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TASCHEREAU, J. :

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I have come to the same conclusion.

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MINING Co.*Appeal allowed with costs.*Solicitors for appellants : *Delaney & Ostrom.*Solicitors for respondents : *Blake, Kerr, Lash & Cassels.*

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