CHARLES LAWRENCE (PLAINTIFF).....APPELLANT ; 1890

AND

W. CHARLES ANDERSON (DEFENDANT) RESPONDENT. *Feb. 25, 26. *June 13.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Debtor and Creditor—Assignment in trust—Release by—Authority to sign —Ratification—Estoppel.

To an action by L. against A. the defence was release by deed. On the trial it was proved that A. had executed an assignment for benefit of creditors and received authority by telegram to sign the same for L. The deed was dated 8th October, 1881, and afterwards, with knowledge of it, L. continued to send goods to A., and on 5th November, 1881, he wrote to A. as follows : "I have done as you desired by telegraphing you to sign deed for me, and I feel confident that you will see that I am protected and not lose one cent by you. After you get matters adjusted I would like you to send me a cheque for $800" * * *. In April, 1885, A. wrote a letter to L., in which he said : "In one year more I will try again for myself and hope to pay you in full." In November, 1886, the account sued upon was stated.

Held, reversing the judgment of the court below, Taschereau and Patterson JJ. dissenting, that the execution of the deed on his behalf being made without sufficient authority L. was not bound by the release contained therein and never having subsequently assented to the deed, or recognized or acted under it, he was not estopped from denying that he had executed it.

Held, per Taschereau and Patterson JJ., that though A. had no sufficient authority to sign the deed yet there was an agreement to compound which was binding on L. and the understanding that L. was to be paid in full would be a fraud upon the other creditors of A., who could only receive the dividends realized by the estate.

APPEAL from a decision of the Supreme Court of Nova Scotia, reversing the judgment at the trial in favor of the plaintiff.

The action in this case was on an account stated and

PRESENT.—Sir W. J. Ritchie C. J., and Fournier, Taschereau Gwynne and Patterson JJ.

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the defence that plaintiff had released his claim by deed. On the trial it was shown that defendant executed an assignment for the benefit of his creditors on 8th October, 1881, the plaintiff being a creditor. With knowledge of the assignment plaintiff continued to supply defendant with goods, and on 11th October, 1881, he wrote the following letter :—

"MR. ANDERSON,

"DEAR SIR,—Your letter of the 7th received to-day. I have every confidence in you, and hope you will continue on in business, and I shall be ready to furnish you with all the goods you want in my line. I did not feel like pressing you for funds, although I have been short and hard pushed at times so that I had to hire. I was somewhat astonished to hear the news Saturday morning that you had suspended, but I felt so sure you would not allow me to be injured that I sent the goods last Saturday that I had marked for you just before I received the news. I cannot afford to lose a cent, for I have worked hard for 20 years and just got enough to live on. I shall leave my interest in your hands and know you will see me protected. Let me know what you want me to send on next steamer. If you could get a good lot of sound Early Rose it will be a good thing ; sold to-day at $2.80 per bbl., for fine stock bbls. well filled; Prolific, $2.50 per bbl. ; Damson Plums $3.50 per bushel."

The defendant was authorized by telegram to sign the deed for plaintiff, and on 5th November plaintiff wrote him as follows –

"W. C. ANDERSON, Esq.,

"DEAR SIR—Your letter duly to hand. I have done as you desired by telegraphing you to sign deed for me and I feel confident that you will see that I am protected and not lose one cent by you. After you get

matters adjusted I would like you to send me a check for $800, as there will be six months before you will have to pay any dividend, and think it will be easier to send me a cheque for that amount. I trust you will be all straight again before next summer, so we will be able to do a large business."

After this nothing appears to have been done in the matter until 1885. On 14th April of that year defendant wrote to plaintiff showing the condition of his affairs, and in that letter he said "in one more year I will try again for myself and hope to pay you in full * * * If the Lord helps me you shall receive every dollar."

In November, 1886, the account sued on was stated between the plaintiff and defendant, and the action was brought in the following year. In a letter to defendant under date of 24th September, 1887, plaintiff stated that he wished to get judgment before the six years' limitation expired and wished to have his claim secured by the judgment in case of accident.

On the trial before Mr. Justice Townshend judgment was given for the plaintiff, the learned judge holding that there was no authority for defendant to sign the deed of assignment in plaintiff's name, and that plaintiff had done nothing since amounting to an adoption or re-delivery of the deed. The full court reversed this decision, the majority being of opinion that there was a sufficient agreement by the plaintiff, *dehors* the assignment, to compromise his debt. The plaintiff then appealed to this court.

Eaton Q.C. for appellant referred to Taylor on Evidence (1); *Tupper* v. *Foulkes* (2); *Hunter* v. *Parker* (3); *Forbes* v. *Limond* (4).

Newcombe for the respondent cited *Field* v. *Lord*

(1) 8 Ed. s. 985.
(2) 9 C. B. N. S. 797.
(3) 7 M. & W. 343.
(4) 4 De G. M. & G. 298.

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Donoughmore (1); Winslow on Private Arrangements (2); *Tupper* v. *Foulkes* (3); *In re Baber's Trusts* (4).

SIR W. J. RITCHIE C.J.—As Mr. Justice Ritchie pertinently remarks in the court below: "The question is not whether the plaintiff executed the deed in accordance with the principles of the common law, but whether after it was executed for him by the defendant on the strength of the telegram from the plaintiff to the defendant, desiring the defendant to sign the deed for him, he so assented to it or recognised or acted under it as to be bound by the release it contained." I must confess the evidence of assenting to it or recognising it appears to me to be extremely slight, and I can discover no evidence whatever of any acting under it. The only evidence of any assent or recognition of the deed is in the letter of the 24th September, 1887, in which the appellant says, "I have written Seeton & Thompson a number of times and got no reply." So that it would appear that Seeton & Thompson did not recognise him as a party having a right to information in reference to the deed, if indeed the letter sought such information; but as these letters were not put in by either party I presume no inference can be drawn from them one way or the other.

It is to be observed, however, that the plaintiff from the first does not appear to have relied on the deed. The deed was dated on 8th October, 1881. On 11th October, 1881, the plaintiff writes this letter (5).

On 5th Nov., 1881, the plaintiff writes another letter, stating that he had done as defendant had desired by telegraphing him to sign the deed (5).

(1) 1 Dr. & War. 228.
(2) Pp. 14 & 15.
(3) 9 C. B. N. S. 797.
(4) L. R. 10 Eq. 554.
(5) See p. 350.

It will be observed in this letter that although he authorizes him to sign the deed he does not look to the deed for his protection, as he says: "I feel confident you will see I am protected and not lose one cent by you." And it is obvious he does not look to the deed or the assignees for payment of dividends under it, because he says: "After you get matters adjusted I would like you to send me a cheque for $800, as there will be six months before you will have to pay any dividend, and I think it will be easier to send me a cheque for that amount."

On 14th April, 1885, defendant writes plaintiff; after stating what he had given up, he says: "In one more year the engagements (which he had referred to) will be given up, and I will try again for myself, and hope to pay you in full;" and again: "If the Lord helps me you shall receive every dollar."

On the trial Joel Lawrence, a son of the plaintiff, gives this testimony:—

Joel Lawrence, sworn:—I am son of plaintiff. Reside in Boston. My father resides there, and I am in his employment. I knew defendant last year. Went to see him respecting matters in dispute last November. I saw him in his store. Showed him statement of account due to my father, and wished him to sign it, so that we might have a combined account of what was due to my father. Mr. Macdonald was there. This is the account I presented to him We looked it over, and he told his clerk, Macdonald, to examine it with his books, and if correct to sign it. We went in, compared it with his books, and Macdonald acknowledged this to be a correct statement, and signed it, "W. C. Anderson, per Macdonald," and I signed my name at the same time as a witness. Macdonald erased one item so as to make it agree with his books. The account as contained in this paper agrees with his books. I was looking over him while he checked it off. This was the first time I saw Anderson.

Cross-examined:—Macdonald and W. C. Anderson were both clerks of Willoughby Anderson at time. He took down Charles Anderson's ledgers. I saw this account in a ledger. Saw some items. In dealings after defendant's suspension, we had overdrawn on him $170, which is the item erased. I remember the time of defendant's suspension. My father knew he had assigned to Seeton & Thomson. I did not go to see Seeton & Thomson.

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The defendant was examined, and does not contradict or explain away in any respect this letter, or deny in any way his liability on this account so stated. Mr. Cathcart Thomson was examined; he merely states that he was one of the assignees with Seeton, and that he was not associated in any other way in business with Seeton; that this was the only transaction; but he does not say one word as to having recognized the plaintiff in any way as a party to the deed of assignment, or that the plaintiff in any way assented to it or recognized it as binding on him.

On the 24th September, 1887, plaintiff writes to defendant that he felt anxious to have defendant's account fixed up, so that in case he, plaintiff, should be taken away, his wife and children should have something to show in case defendant was fortunate and had means to pay in the course of the next ten years. He says: "I thought it would be more secure than the papers I now hold." He then says he has written letters to Seeton & Thomson a number of times and got no reply, and supposed he was doing right to get judgment before the six years limitation expired.

This certainly does not look like an assent to or recognition of the deed, or any idea that he had released the defendant from liability, and having stated the account with the plaintiff after this took place I think he should be bound by it.

I think the judgment appealed from should be reversed and the appeal allowed.

FOURNIER J.—Concurred.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed with costs. I adopt the reasoning of McDonald J. in the court below.

GWYNNE J.—I can not see in the evidence anything sufficient to estop the plaintiff from insisting that the deed of release pleaded to the action by the defendant

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is not his deed, and if he is not estopped from so insisting the judgment must, in my opinion, be in his favor. I am of opinion, therefore, that the appeal should be allowed with costs, and that judgment should be entered for the plaintiff in the court below for the amount of the account stated, with costs.

PATTERSON J.—The plaintiff, who is appellant, is not, in my opinion, entitled to have the judgment disturbed.

I agree that the release cannot be treated as the deed of the defendant, because it was not executed by him nor by any authority given by deed, nor was it afterwards ratified or re-delivered as his deed.

But the transaction evidenced by the instrument was an assignment by the debtor of property for distribution among his creditors or such of them as should become parties to the instrument within a specified time, and by which the parties to the instrument accepted their distributive shares in full satisfaction of their respective debts. That was the operation of the release clause and the transaction was, in effect, a composition between the debtor and the creditors who became parties to the instrument.

The agreement to compound was a binding agreement without deed, and the plaintiff gave express written authority to attach his name as a party to the instrument.

It does not seem to me to admit of doubt that he could have insisted on sharing with the other creditors the dividends under the arrangement. The fact that he did not do so is relied on on his behalf as telling against his being bound by the composition. His letter of the 5th of November, 1881, which repeats the authority to sign his name to the deed, seems to show pretty plainly that he did not claim dividends because he had an understanding that he was to be paid in full, partly before the dividends were, as he understood it, to become payable, and the rest eventually. That agreement strikes me as being a fraud upon

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the other creditors, and the effect now claimed for the forbearance to rank under the composition is very like another way of reaching the same result.

The argument, as I apprehend it, is to this effect: Sign the composition agreement; let the other creditors come in on the faith of your coming in; then don't ask for dividends and you will not be bound.

The defence as amended pleads the execution of the agreement by written authority. It goes on to make other allegations of subsequent acts which may not be borne out by the evidence, though I am not prepared to refuse a good deal of significance to the absence of any repudiation and to the standing by while the other creditors acted on the terms of the agreement which the plaintiff had signed, but I take the plea to be sufficient to admit proof of the agreement by the signature alone.

The view that I take has been so well and so fully expounded in the judgments delivered in the court below by Macdonald, Weatherbee and Ritchie JJ. that it is unnecessary for me to occupy time by going over the same ground, or by examining the authorities which those learned judges discussed and acted upon. But upon the question of the right of this defendant to urge against the plaintiff the fraud upon the creditors to which the defendant was himself a party, I refer to *Geere* v. *Mare* (1), as a case at law in which a security given in pursuance of an agreement in fraud of creditors, not unlike that indicated in the letter of the 5th November, 1881, was held void as founded on an illegal consideration, and to the remarks of Malins, V.C., in *McKewan* v. *Sanderson* (2), where the principle is stated and several decisions referred to.

In my opinion we should dismiss the appeal.

Appeal allowed with costs.

Solicitor for appellant: *Horace L. Beckwith.*

Solicitor for respondent: *E. L. Newcombe.*

(1) 2 H. & C. 339.

(2) L. R. 15 Eq. at p. 234.