

CHARLES F. FRASER (THIRD PARTY)..APPELLANT ;

1893

AND

*Nov. 27. 28.

LEWIS P. FAIRBANKS (DEFENDANT)...RESPONDENT ;

1894

AND

Feb. 20.

WILLIAMS G. COOMBS.. PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of land—Sale subject to mortgage—Indemnity of vendor—Special agreement—Purchaser trustee for third party.

L. F. agreed in writing to sell land to C. F. and others subject to mortgages thereon, C. F. to hold same in trust to pay half the proceeds to L. F. and the other half to himself and associates. When the agreement was made it was understood that a company was to be formed to take the property, and before the transaction was completed such company was incorporated and L. F. became a member receiving stock as part of the consideration for his transfer. C. F. filed a declaration that he held the property in trust for the company but gave no formal conveyance. An action having been brought against L. F. to recover interest due on a mortgage against the property C. F. was brought in as third party to indemnify L. F., his vendor, against a judgment in said action.

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau and King JJ. dissenting, that the evidence showed that the sale was not to C. F. as a purchaser on his own behalf but for the company and the company and not C. F. was liable to indemnify the vendor.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of defendant against the third party.

The material facts of the case are stated by Mr. Justice Sedgewick in his judgment as follows :

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

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On the 1st December, 1882, the defendant L. P. Fairbanks mortgaged certain property known as the Shubenacadie Canal property to the plaintiff William G. Coombs for the sum of four thousand dollars (\$4,000) and on the 30th March, 1892, the mortgagee commenced an action in the Supreme Court of Nova Scotia to recover the interest then due. After the mortgagor was served with a writ he gave notice under the Judicature Act to Messrs. C. F. Fraser (the appellant), B. F. Pearson and A. M. Fraser, claiming that as they were then the owners of the equity of redemption, and the lands in question were conveyed to them subject to the mortgage, they were under obligation to indemnify the defendant against all claims under the mortgage. This liability was disputed and the claim came on for hearing before Mr Justice Ritchie who gave judgment in favour of the defendant Fairbanks against C. F. Fraser (the appellant) for the amount of interest claimed, but dismissed the claim as against A. M. Fraser and B. F. Pearson—the formal judgment as respects Fraser being as follows:—

“It is ordered that judgment be entered herein for the said Lewis P. Fairbanks against the said Charles F. Fraser for the amount of the judgment debt and costs recovered in this suit against said Fairbanks by said John M. Chisholm, together with his costs of defence herein against the plaintiff, John M. Chisholm, and of the proceedings against said third parties.”

The circumstances under which the appellant Fraser's liability has arisen would appear to be as follows:—On the 17th April, 1889, an act of the Nova Scotia Legislature was passed incorporating R. L. Borden, B. F. Pearson and Alfred Whitman, and their associates, a body corporate under the name of the Halifax Land Improvement Company for the purpose generally of dealing in real estate, the capital to be one

hundred thousand dollars (\$100,000), the company being at liberty to issue paid-up stock in exchange for or in payment of the price of any property, real or personal, which it might acquire or hold, and having the right to commence active operations whenever twenty-five per cent of the capital stock was subscribed and twenty per cent paid up.

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The company was organized and a general meeting held in August following. Previous, however, to the organization of the company, and before the 26th of July, the appellant, C. F. Fraser, and L. P. Fairbanks had several conversations relating to the transfer of the Shubenacadie Canal property to the company Fairbanks having first made himself acquainted with the provisions of the charter, the company not then being organized. The following agreement was thereafter entered into between Fairbanks and the third parties sought to be made liable in the case.

“Memorandum of agreement made and entered into this twenty-sixth day of July, A.D. 1889, between Lewis P. Fairbanks, of Dartmouth, in the county of Halifax, and province of Nova Scotia, merchant, the party hereto of the first part, and C. F. Fraser, of Halifax, in the county of Halifax, publisher, B. F. Pearson, of Halifax aforesaid, barrister-at-law, and A. Milne Fraser, of Halifax aforesaid, publisher, the parties hereto of the second part.”

“Witnesseth, that the party hereto of the first part, for and in consideration of the sum of one dollar paid to him, and divers other consideration, agrees to give a good and sufficient deed with the usual full covenants of the canal property, waters, water-courses and privileges appertaining thereto, from himself and his son within thirty days to C. F. Fraser aforesaid, subject to mortgages amounting to not more than \$15,000.”

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“ 2. He agrees to assign all options and interests in the said property held by him from W. J. Fraser and others to said property or any part thereof; also, all interest of himself or son or the canal company in all claims for damages, or for use of water privilege, or for mines and mining rights against any and all persons whomsoever, unto C. F. Fraser.”

“ 3. Parties of the second part agree to pay \$2,500 in 3, 6 and 9 months, to be secured by joint notes in three equal instalments—proceeds of notes to go towards payment of certain judgments against property to be conveyed—and all taxes thereon, as far as necessary to pay the same.”

“ 4. C. F. Fraser agrees to hold said property in trust in the following proportions : One-half of all proceeds of property and damages to be paid to L. P. Fairbanks. and one-half to A. M. Fraser, C. F. Fraser and B. F. Pearson in equal proportions, after payment of all encumbrances on said property.”

“ In witness whereof the said parties hereto have hereunto set and subscribed their seals and hands this 26th day of July, A. D. 1889.”

“(Signed), LEWIS P. FAIRBANKS, [L.S.]
 C. F. FRASER, [L.S.]
 B. F. PEARSON, [L.S.]
 A. MILNE FRASER, [L.S.]

Signed, sealed and delivered in)
 the presence of)
 (Signed), F. G. FORBES.”)

B. F. Pearson, one of the parties to this agreement, was one of the corporators named in the company's act of incorporation, and the appellant A. M. Fraser had in the meantime also become interested in the company. In accordance with and in part performance of this agreement the notes for two thousand five hundred dollars were given to Fairbanks and were paid at maturity, and on the 26th of August following Fairbanks

conveyed to C. F. Fraser the lands and rights referred to in the agreement by an absolute deed in fee simple, subject, however, to the mortgage sued on in this case. By this time the company had been organized and on the 23rd of November, the appellant, Fraser, executed and registered a declaration of trust declaring in effect that he held the lands conveyed to him by Fairbanks, in trust for and on behalf of the company. On November 21st, the defendant, Fairbanks, gave the following order to the company:—

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“HALIFAX, November 21, 1889.

To the Halifax Land Improvement Company, Limited.

SIRS,—Please pay and deliver to C. F. Fraser or order \$25,000 cash and 1,500 fully paid up and non-assessable shares and stock of a par value of ten dollars each of the capital stock in the said Halifax Land Improvement Company, Limited, which said sum of \$25,000 and said shares are payable to me as the consideration or purchase price of the lands and privileges known as the “Shubenacadie Canal Company,” sold by me to the said Halifax Land Improvement Company, Limited, by deeds to C. F. Fraser as the president and trustee of the said company for that purpose.

Yours truly,
(Sgd) LEWIS P. FAIRBANKS.

Witness,

L. FAIRBANKS.”

The stock in this order referred to was transferred and the following receipts were taken from Fraser and Fairbanks:

“HALIFAX, N.S., November 21, 1889.

Received of the Halifax Land Improvement Company, (Limited), the sum of twenty-five thousand dollars cash, and fifteen hundred shares, fully paid up and non-assessable, of the capital stock of said company,

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payable to me under an order of this date from Lew i
 P. Fairbanks, Esq., to said Halifax Land Improvement
 Company, (Limited) in satisfaction of said order.

Yours truly,

(Sgd) C. F. FRASER.

Witness,

C. FAIRBANKS."

" HALIFAX, N.S., November 21st, 1889.

Received of C. F. Fraser, Esq., the sum of twenty-five thousand dollars cash, and also fifteen hundred shares of fully paid-up and non-assessable stock of the Halifax Land Improvement Company, Limited, in full consideration, satisfaction and payment of the sale by me to the said Halifax Land Improvement Company, per C. F. Fraser, trustee, of all the property, real and personal, waters, water-courses, rights, privileges and easements, of the property known as the "Shubenacadie Canal Company," and in full satisfaction and discharge of all demands and claims against said C. F. Fraser and the Halifax Land Improvement Company, Limited, to date.

Yours truly,

(Sgd) LEWIS P. FAIRBANKS.

Witness,

(Sgd.) C. FAIRBANKS."

Fairbanks at the same time gave another receipt for the moneys referred to in the agreement of the 26th July, as follows:—

" HALIFAX, N.S., November 21, 1889.

Received of C. F. Fraser, B. F. Pearson and A. Milne Fraser, all of Halifax, the sum of two thousand five hundred dollars in full satisfaction of the transfer and sale by me to them of the lands and privileges mentioned in the memorandum of agreement between said parties and myself, and dated the 26th day of July,

A.D. 1889, and I acknowledge full satisfaction of the conditions named in said agreement on their part to be performed. And I do hereby covenant and agree on my part to fully carry out and execute all conditions in said agreement to be by me performed when and wherever required so to do by said parties or by the Halifax Land Improvement (Limited), or its assigns, and to execute all documents, deeds and assurances at my own cost, in accordance with the terms of said agreement of the 26th day of July, A.D. 1889.

Yours truly,

(Sgd.) LEWIS P. FAIRBANKS.

To C. F. FRASER, Esq., Halifax, N.S.

Witness :

(Sgd.) C. FAIRBANKS."

Upon the foregoing facts the trial judge found that under the agreement of the 26th July, C. F. Fraser was legally liable to indemnify Fairbanks against the mortgage upon the property.

His judgment was affirmed by the full court, from whose decision the defendant, Fraser, appealed.

Borden Q.C. for the appellant, cited *Wolveridge v. Steward* (1).

Harris Q.C. for the respondent, referred on the merits to *Jones v. Kearney* (2); *Re Cozier* (3); and claimed that a new trial should be ordered if the judgment was not sustained, citing *British Canadian Loan Co. v. Tear* (4).

Borden Q.C. in reply, argued that a new trial could not be granted, not having been asked for in the court below and being inconsistent with the relief claimed by the action.

(1) 1 C. & M. 644.

(2) 1 Dr. & War. 134.

(3) 24 Gr. 537.

(4) 23 O.R. 664.

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 Taschereau
 J.

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

TASCHEREAU J.—I would dismiss this appeal. I adopt the findings of Ritchie J. at the trial, and the reasoning of Meagher J. in the court below.

GWYNNE J.—The plain conclusion from the evidence is that the intention of all the parties to the agreement of the 26th of July, 188J, was that the appellant C. F. Fraser should hold the lands and premises mentioned therein when conveyed by Fairbanks to him subject to the mortgages for \$15,000 which was the only estate Fairbanks had it in his power to convey, upon trust for sale and upon sale upon trust to pay to Fairbanks himself one-half of the money to accrue from such sale over and above all incumbrances, and the other half in three equal proportions to himself and to A. M. Fraser and B. F. Pearson respectively.

Upon the transfer by Fairbanks to the appellant under that agreement the latter became no more liable to pay off the mortgage or to indemnify Fairbanks therefrom than did A. M. Fraser or Pearson or Fairbanks himself. The appellant was not an actual vendor of the property at a price agreed upon of which the mortgage itself constituted a part so as to subject him to the equitable obligation to pay off the mortgage and to indemnify his vendor therefrom. He held the property so transferred to him solely as a trustee to sell and upon effecting a sale to divide the purchase money as above stated. There was no sale of the property whatever until the sale to the Halifax Land Improvement Company which sale, and the consideration therefor given by the company for the property, Fairbanks himself most unequivocally concurred in by becoming, as part of the terms of the sale, a member of the com-

pany and the owner of paid up shares therein as constituting part of the purchase money agreed upon. Until that sale was effected there was no person who could have been called upon by Fairbanks to indemnify him against the mortgage and the only persons who could be so called upon were the company who were the actual *bonâ fide* vendors of the property subject to the \$15,000 mortgages. The fact that the transfer of the property was effected by C. F. Fraser executing a declaration of trust to hold the land for the company who paid the consideration could not have the effect of imposing upon Fraser personally an equitable obligation incurred only by the company as the actual vendees of the property and sole beneficiaries therein. The appeal must, therefore, be allowed with costs.

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SEDGEWICK J.—It may, I suppose, be taken for granted upon the authority of *Waring v. Ward* (1), *Joice v. Duffy* (2), and *Williston v. Lawson* (3), that in the ordinary case of a sale of an equity of redemption, or in other words, a sale of land in mortgage upon the promise that the purchaser is to take a conveyance of the mere equity of redemption paying the vendor the specified price for that, a court of equity assumes, unless there is some agreement to the contrary, that the purchaser is to indemnify the vendor against the mortgage if there is any personal liability on his part in respect of it. This liability, however, does not arise from any contractual relationship between the original mortgagee and the purchaser, or between the vendor and the purchaser. Independently of an agreement between himself and the purchaser the mortgagee cannot recover at law or in equity against the purchaser. The right of indemnity which the vendor of the

(1) 7 Ves. 332.

(2) 5 U. C. L. J. (O.S.) 141.

(3) 19 Can. S. C. R. 673.

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equity of redemption has is a mere equity against the purchaser arising in his favour when he has paid or has been called upon to pay the amount of the mortgage debt for which he is responsible under his original covenant. The question now is: How far is this principle applicable to the present case? I have come to the conclusion that it does not apply at all as against the appellant, Fraser, much less does it apply to the full extent stated in the judgment of the trial judge and of the majority of the court below. Fairbanks being the owner of the property in question, subject to the mortgages, entered into the agreement of the 26th of July above set out. As regards the parties now before the court the effect of that agreement, coupled with the conveyance following upon it, viewed apart from the general intention of all the parties, was to transfer to the appellant, Fraser, one-half only of Fairbanks' interest, and to create Fraser in respect to the remaining half interest a trustee for Fairbanks, or in other words, Fraser became the owner of a moiety of the property and the agent of Fairbanks for the purpose of selling the other moiety. I do not understand upon what principle Fraser has been found liable to indemnify Fairbanks in respect of that moiety. It is not pretended that he violated the conditions under which he held the property or that he in any way acted in excess of his authority as Fairbanks' agent and trustee. There is nothing whatever in the agreement to justify the contention that Fraser was precluded from selling the property until he had first paid off the mortgage. It was agreed that any profits derived from the disposal of the property after the incumbrances were paid off were to be divided equally between Fairbanks and the other parties to the agreement, but that stipulation in no way necessitated the getting in of the incumbrances before the sale. The order upon

the Improvement Company given by Fairbanks and his receipt for the stock and his share of the purchase money show an absolute acquiescence and ratification on his part of Fraser's conduct in dealing with the property. The trial judge seeks to destroy altogether the effect of these documents upon the ground that they were signed by Fairbanks at the request of Fraser. I am not aware of any principle by which a person may seek to relieve himself from the effect of instruments which he has signed by stating merely that they were signed at the request of other parties interested in them. The whole evidence which these documents confirm points, I think unmistakably, to the conclusion that the dealings between Fairbanks on the one part, and Fraser and his associates on the other, in reference to the mortgaged premises had relation to an eventual transfer to the Land Improvement Company, and that the appellant, Fraser, was a mere conduit pipe by which that end was to be attained. It was not, I think, ever contemplated that Fraser should assume any obligation whatever beyond that expressly stated in the agreement, nor was it contemplated, even at the commencement of the negotiations, that Fraser himself, either on his own behalf or on behalf of himself and those associated with him, should be the actual purchaser of the property. He undoubtedly was desirous of securing the property, just as Fairbanks was desirous of transferring it to him, the lands, as Fairbanks himself says, being of no use to him as he could not operate them. At the time of the agreement the company, though incorporated, had not been organized; it had no officers to make contracts or take titles on its behalf. All transactions, therefore, the benefit of which was to be for the eventual interest of the company, had necessarily to be entered into in the name of the promoters, corporators or other persons controlling it;

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besides, it was evidently necessary that the corporators should have control of this very land in order that the company might organize, having reference to the special provision in the charter in relation to the purchase of property in exchange for an issue of paid-up stock. It was not explained to us at the argument why the appellant Fraser did not make an absolute conveyance to the company of the lands in question but simply declared himself a trustee for the property in respect of them. This fact, however, does not, I think, make any difference either in regard to Fraser's liability or to that of the company. The right to indemnify, which as a general rule a mortgagor who has sold his equity of redemption has against the purchaser, is an equity only; it is in no sense a legal liability; if enforceable at all it cannot be enforced except against one who in equity is a real purchaser. Fraser, in my view, never was, and Fairbanks knew he never intended to be, a purchaser on his own behalf; he was dealing from first to last on behalf of the company, and his declaration of trust in favour of the company, accepted as it was by the company through its recognized officers, created the company in equity its absolute owner he being a bare trustee only. In my judgment, under the special circumstances of this case, the company, and the company alone, can be called upon by Fairbanks to indemnify him in respect of this mortgage; the land is still there; it is under the control of the company; they receive all rents and profits from it; besides, Fairbanks knew from the very first that the company held it; in his letter to the company of the 21st November, 1891, he refers to the property "as property sold by him to the said Halifax Land Improvement Company (Limited), by deeds to C. F. Fraser as president and trustee of said company, for that purpose;" he therefore cannot set up that the transfers in

question were behind his back or that he had no knowledge of them.

For these reasons I am of opinion that the appeal should be allowed, and that all proceedings in this suit against the appellant should be dismissed, and that he is entitled to his costs of all proceedings in the court below and of this appeal.

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KING J.—I am of opinion that this appeal should be dismissed.

Appeal allowed with costs.

Solicitor for appellant: *F. G. Forbes.*

Solicitor for respondent: *W. A. Henry.*