GEORGE CRAIN (PLAINTIFF)..... APPELLANT;

AND

J. H. HOFFMAN (DEFENDANT)..... RESPONDENT.

1917

*March 21.
*June 22.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Surety—Sale of goods—Guarantee of payment—Repossession and use by vendor—Impairment of surety's rights.

C. sold a brick-making plant to a company, the contract providing that on default in payment of any portion of the price he could cancel the agreement and retake possession of the property. He afterwards sold them a brick press, for the price of which a note was given and payment guaranteed by H., the contract with H. providing that if the note was not paid C. could take possession of the press and sell it, applying the proceeds on the note. The company made default in payments on the plant and on the note, and C. re-entered into possession of the property and used the press in manufacturing bricks. In an action against H. on his guarantee,

Held, affirming the judgment of the Appellate Division (35 Ont. L.R. 412,) Duff J. dissenting, that C., by electing to use the press instead of selling it to help pay the note, as provided by the contract, had so interfered with the right of H. to have the security of the machine that the latter was discharged from his liability as guarantor.

Per Duff J.—H. was not discharged from liability, but C. should account to him for the value of the press at the date on which he retook possession of it.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), affirming, by an equal division of opinion, the judgment at the trial in favour of the defendant.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 35 Ont. L.R. 412.

1917

CRAIN v. HOFFMAN.

The facts are sufficiently stated in the above headnote.

Chrysler K.C. and *McClemont* for the appellant.

Bradford K.C. for the respondent.

THE CHIEF JUSTICE.—I take no part in this judgment having been absent from court during part of the argument.

DAVIES J.—I think this appeal must be dismissed. The defendant was a surety for the payment of a note to the plaintiff by the Excelsior Brick Co. (now being wound up) for the price of a four mould Boyd brick press sold by plaintiff to that company.

The defendant's guarantee was expressly limited to the payment of the note upon maturity "in accordance with the terms thereof." Those terms were as follows:—

> This note is given in payment of four mould Boyd brick press, being number . The title of the above property for which this note is given is not to pass, but to remain in the payee of this note until the note is paid, and in case of default in payment the payee shall be at liberty, without process of law, to take possession of and sell the said property and apply the proceeds upon this note, after deducting all costs of taking possession and sale.

The respondent had agreed to sell a brickyard plant, machinery, &c., to the Excelsior Company on certain terms and under those terms had some months after the company had taken possession and operated the brick works under the agreement, dispossessed them for default in payment of some of the instalments of the purchase money and re-entered into possession.

The brick press for which the note in question was given had been installed by the company as part of its plant and was at the time of plaintiff's re-entry being

used by the company on the premises as part of its plant in the manufacture of brick.

The plaintiff having dispossessed the company and entered into possession continued operating the brick works and the brick press for which the note in question was given as part of his plant and property. The title or property in this "press" had never passed from him.

He then, having both the title and the possession of the press, sued the surety as guarantor of the note claiming to have entered and possessed himself of the brick press not by virtue of the terms of sale under which he had sold it to the Excelsior Brick Company but under and by virtue of the terms of the agreement of sale of the brick works and premises made to that company, and having done so continued to use the four mould Boyd brick press in operating the brickyard.

His claim, as I understand it, is that having so re-entered and repossessed himself of the brickyard and plant including the brick press he became its possessor, not by virtue of any act by him under the terms of the sale of the brick press, but by virtue of the terms of the sale of the brickyard and plant to the company and that the terms of the sale of the brick press had no application to the property which he took possession of under his agreement with the Excelsior Company. In this way he seeks to avoid the terms of the defendant's guarantee which was expressly limited to the terms of the sale of the brick press.

By one of such terms plaintiff was entitled without process of law to "take possession of and sell" the brick press in case of default in payment and apply the proceeds upon the note.

The defendant's contention is shortly that the plaintiff Crain has, by his conduct, after repossessing himself of the brick press, released him as surety from his

1917
CRAIN
v.
HOFFMAN.
Davies J.

liability on his guarantee and that Crain cannot under the circumstances hold the title and possession of the brick press and use and dispose of it as he pleases, while at the same time enforcing from him as surety the payment of its price.

He contends that, when Crain dispossessed the Excelsior Company and assumed the exclusive possession of the brick works, including the press, it became his duty under his contract with the defendant surety, not to continue the user of the brick press as part of the plant of the brick works, but as between him as vendor and defendant as guarantor to comply with the specific terms of the sale of the brick press as guaranteed and having repossessed himself either to hold it intact for the surety on payment of his obligation as surety or to sell it and apply the proceeds upon the note guaranteed.

In other words, that if Crain intended to look to the surety for the payment of the price of the press which he had guaranteed, he was bound to conform to the terms of the surety's contract guaranteeing the payment of the price and so bound to give the surety the "press" which he had repossessed or to sell it and apply the proceeds upon the note.

I do not see how Crain can successfully deprive the surety of one of the most important terms on which he became surety by saying: I did not repossess myself of the press the price of which you guaranteed by virtue of any of the terms of that guarantee but under my rights under another contract I had with the Excelsior Company to whom I had sold the press.

When he had repossessed himself of the machine it does seem to me that before he can successfully sue the surety for the price he must shew compliance with the

express terms of the surety's contract, which was a conditional one.

Instead of doing so, he continued to use the press machine as part of his plant and thus while repossessing and enjoying the machine at the same time seeks to compel the surety to pay the price for which he sold it and payment of which the surety had conditionally guaranteed.

His conduct in continuing to use the press machine after he had repossessed himself of it instead of either holding it ready to hand over to the surety on payment of the price he had guaranteed or reselling it and crediting the proceeds upon the note guaranteed, operated as a substantial impairment of the sureties' rights, and being, as it seems to me, against equity and good conscience, discharged the surety from further liability.

Costs should, of course, follow the result.

IDINGTON J.—This case presents some novel features in its relevant facts, but it seems to me that having due regard to well recognized principles governing the rights of a surety and the relations between him and the creditor to whom he has guaranteed payment, the problem presented is not difficult of solution.

It is elementary law that one guaranteed is bound in law upon payment of the debt to transfer to the surety all the securities he may have ever held for the payment of the debt. If he has lost through neglect, or destroyed, any such security, he has lost thereby, *pro tanto* at least, his right to look to the surety.

The appellant here sold, conditionally, to a company of which the respondent was a director, a machine which he was, upon default of the terms of sale being complied with, entitled to repossess himself of and resell.

1917

CRAIN
v.
HOFFMAN.

Idington J.

Instead of holding himself in readiness to transfer this right to the surety and deliver up the machine to him on payment, he stoutly refuses to recognize this plain right of subrogation and insists upon the surety paying the debt and foregoing his right of subrogation.

That right of subrogation would carry with it the right of respondent on payment to remove the machine.

The matter would perhaps have been made clearer if the surety had tendered the money and demanded the delivery of the machine which had been in possession of the appellant for ten months before this action, and continued so thereafter.

The appellant's action in using the machine and attitude of claiming throughout that he had become the owner thereof by virtue of some bargain he had made with a company cognizant of all the facts, I must hold to constitute a waiver of his right to a tender of the money.

The respondent pleads this conduct and assertion of ownership, and appellant takes issue thereon. The learned trial judge has found these facts against him.

Had appellant replied and proved that he was ready and willing to hand over the machine in as good state as it was at the time he became repossessed of it and insisted by such reply upon payment, I think he might have been entitled to succeed.

He neither pleaded nor proved such a state of facts; indeed proof had become impossible by reason of the continuous use of the machine by appellant meantime.

The respondent was not entitled to complain of the result of the company's use of the machine, or even its impairment by such use, for the respondent had full knowledge of the purpose for which it was bought and must have contemplated the probable consequences attendant upon such use.

Had it even been accidentally destroyed by fire for example, in course of such use by the company, the respondent probably could not have been heard to complain or set up such fact in defence. It is only in relation to such use and its consequences that the fact of the respondent having been a director of the company is of the slighest importance in the case.

The questions involved herein have been needlessly confused by introducing the obligation of the company to the appellant as if the respondent and the company were identical parties, which in law they were not.

If the appellant had called upon the respondent at any time during the use of the machine by the company and he had chosen to pay them he would have been fully entitled to insist upon the transfer of the appellant's rights to remove it and getting that would have been entitled to remove the machine and have it sold as agreed.

No bargain between the corporate company and appellant could have been set up in answer to the exercise of such right.

The same result would have flowed from such a conditional bargain at common law when all concerned had full knowledge as here of the whole business and all relating thereto.

The only bearing of the "Conditional Sales Act" in such matters is to make clear that such rights existed whether those affixing such a machine to the real estate had such notice and knowledge or not as that Act imputes to parties so acting under such circumstances as attendant upon a sale within the meaning and operation of the Act.

The appellant claims he had in his agreement which passed to the company a provision for the premises

1917
CRAIN
v.
HOFFMAN.
Idington J.

being kept up and if default made to be so returned in good condition and hence as it needs this machine to complete that condition and fulfil the terms nominated in the bond it must be held by him on the premises so as to preserve him from suffering, no matter who is hurt.

If that was his purpose he should not have made a conditional, but an absolute, sale of the machine and then there might have ensued in law exactly what he contends for.

But, if he had tried that, the respondent, who is described as being a barrister, probably would have had enough knowledge of law to have refused to guarantee the notes in question under any such circumstances.

The appellant cannot have everything his own way and hope to succeed by binding separate parties by means of conflicting agreements or what in law applicable to the resultant facts should constitute them conflicting agreements.

Other people must be supposed to have some rights as well as those who want to have everything work out only their way.

I think the appeal must be dismissed with costs.

DUFF J. (dissenting)—It will simplify the explanation of my view of this appeal to state, first, my opinion that the appellant had by force of the agreement of March, 1913, the right in taking possession of the plant and premises of the Excelsior Brick Co. Ltd. to take and retain as against the company the brick press for the price of which the promissory notes sued upon were given. Nor can there be any doubt that Crain, in retaining possession of this machine did so in professed and intended exercise of his rights under that agree-

ment and not in professed or intended exercise of any rights given by the agreement under which the brick press was sold and delivered to the Excelsior Company.

The next point to be emphasized is this: In putting into effect his rights under the agreement of March, by retaining and using the machine as part of the plant of which he entered into possession, Crain was doing nothing inconsistent with any rights of the Excelsior Company created by the agreement under which the machine was sold or with the continued subsistence of the obligations of the company under that agreement.

All the parties to the last mentioned agreement including the sureties were, of course, aware of the agreement of March, and the provisions of it. Hoffman and Vane were both directors of the company. Crain had stipulated according to a common practice for the personal guarantee of these two directors and it was, of course, quite well understood that the machine was to be affixed to the premises in substitution for another machine, part of the plant which had become delapidated. The obligation of the company under the agreement of March, to maintain the plant and the right of Crain to take over the plant on default in its condition when default should occur were well understood by everybody. In these circumstances the machine was delivered by Crain to the company, under an agreement that the property was to remain his, until full payment of the purchase price, and that in default in payment of any instalment, he was to be entitled to resume possession and to sell the machine and to apply the proceeds on the unpaid balance. In all this there is implied a right on the part of the purchaser to retain possession of the machine until Crain takes possession pursuant to right expressly stipulated for in the contract or until the contract is, for some

1917
CRAIN
v.
HOFFMAN.
Duff J.

just cause, rescinded: so long as the contract remains on foot the company continues to be liable for the purchase price and has a right to retain possession until the contractual power of sale is put into operation. That, I think, is the effect of the contract: it is enough for our present purpose, however, to notice that, at all events, the contract contemplates possession of the machine on part of the purchaser and the right to use it so long as it remains in his possession and I am inclined to think there is nothing in the contract inconsistent with the transfer by the purchaser to a sub-purchaser of possession, subject to the rights of the seller and that such sub-purchaser would, so long as he remained in undisturbed possession, be acting within his rights in making use of the machine in the ordinary way. It is clear, at all events, that all parties intended that this machine should become part of the plant and that, as such, it should be affected by the agreement of March subject to any special rights of the sureties. The user by Crain, therefore, after taking over the plant in no way infringed as between himself and the company the rights of the company under the agreement for the sale of the machine, or impaired his own right to payment by the company of the price of it.

This being so, the respondent Hoffman, is not entitled to relief from the obligation of his contract of suretyship on the ground that the principal contract has been altered either explicitly or by the conduct of the parties or that it has ceased to be operative; and my conclusion is therefore that the judgment of the court below, by which the action was dismissed, cannot be sustained.

It does not follow, however, that the respondent surety is not entitled to some relief. I think it is very clear that he is entitled to relief on the principle of

Pearl v. *Deacon* (1), as stated in the judgment of Turner L.J. at p. 463. The surety was, of course, *primâ facie*, entitled to the benefit of the security provided by the contractual right of sale which Crain had reserved and that being so "it is clear" to use the language of Turner L.J. that the appellant

> could not have released the property comprised in that security without losing his remedy against the surety, and if he could not have released it, could he by the exercise of a paramount right destroy the benefit of it?

There is nothing in the circumstances above mentioned in view of which all the parties must be supposed to have contracted and no doubt, in fact, did contract implying any abandonment on the part of the surety of his right to the benefit of the seller's power of sale or implying any subordination of the surety's rights (as distinguished from the company's) to Crain's rights under the agreement of March. The result is that Crain is under an obligation to account to the surety for the value of the machine (*Taylor* v. *Bank of New South Wales*(2)), at pp. 602-603, in the condition in which it was at the time he first asserted his right to appropriate it as part of his plant freed from the rights created by the agreement of sale; the date, that is to say, when possession of the plant was taken under the agreement of March.

ANGLIN J.—When the plaintiff took possession of the Boyd press machine for the payment of the price of which the defendant was a guarantor, he merely exercised an undoubted right either under his contract with the Excelsior Brick Company in respect of the machine itself or under his contract with Major Vane (transferred to that company) for the sale of the brick-

(1) 1 DeG. & J. 461. (2) 11 App. Cas. 596.

1917
CRAIN
v.
HOFFMAN.
Anglin J.

yard, plant and premises. Had he done nothing more the defendant would have remained liable on his guarantee. Neither do I think it material under which contract possession was taken, because the liability of the defendant must in either case be determined by the terms of the only contract to which he was a party—the contract of guarantee itself.

The defendant guaranteed payment of the sale note "in accordance with the terms thereof," which I deem the equivalent of "on the faith of" the principal contract or an express embodiment of its terms in the contract of suretyship. Where a surety so contracts all the terms of the principal contract become material as between him and the creditor, and any departure therefrom will discharge the surety without proof that his position has been thereby materially prejudiced or impaired, unless indeed it be self-evident without inquiry that the departure has been actually beneficial to him or at least immaterial. *Holme* v. *Bronskill* (1), at pages 504-5. Now a term of the contract guaranteed was that on default the vendor (plaintiff) should have the right

> to take possession of and sell the said property and apply the proceeds upon this note.

He could undoubtedly have done so and looked to the surety to pay any balance unsatisfied by such application. But when he proceeded instead of selling to make use of the machine as part of his own plant, he probably elected to disaffirm the contract of sale, and he certainly did something inconsistent with the rights of the defendant as a surety. Either because he should be deemed to have then intentionally elected to abandon his claim against the defendant for pay-

(1) 3 Q.B.D. 495.

ment of the price of the machine, or because, though not so intending, he unwarrantably interfered with the right of the defendant as surety, the latter, in my opinion, has been released. His right was to have the machine sold and the proceeds applied in reduction of the amount due on the guaranteed note. He was entitled to insist that the course prescribed by the contract should not be departed from without his consent. It cannot be suggested that the departure was to his advantage and it is not self-evident that it in nowise impaired his position. On the contrary, use of the machine would probably entail deterioration in its saleable value.

Moreover, I am by no means satisfied that the user of the machine by the plaintiff and the assumption of the rights of unqualified ownership involved therein did not release the Excelsior Brick Company from liability on the note and preclude the plaintiff from ranking on its estate in liquidation,—a right to which the defendant on payment would be entitled to be subrogated. If that was its effect the release of the surety would follow as a matter of course. *Hewison* v. *Ricketts* (1).

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. M. McClemont.*
Solicitors for the respondent: *Mercer & Bradford.*

(1) 63 L.J.Q.B. 711.