1888

*Mar. 19.

*Dec. 14.

THOMAS PURDOM (PLAINTIFF).....APPELLANT;

AND

DAVID NICHOL AND ZAVIER BAECHLER (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Partnership—Liability of one partner for prior debt of co-partner —Promissory note—Collateral for partnership debt—Release of maker.

P. lent N. an accommodation note which N. deposited with R. as collateral security for a mortgage debt. N. and B. afterwards went into partnership and a new mortgage on partnership property was given to R. for N.'s debt, the note being still left with R. The partnership being dissolved, B. agreed to pay all debts of the firm, including the mortgage, and in settling the accounts between himself and the mortgagees B. was given credit for the amount of the note which P. had paid to the mortgagees. P. sought to recover from B. the amount so paid.

Held, reversing the judgment of the court below, Ritchie C.J. and Fournier J. dissenting, that N. having authority to deal with the note as he pleased, and having given it as collateral security for the joint debt of himself and B., on such security being realized by the mortgagees and the amount credited on the joint debt P., the surety, could recover it from either of the debtors.

Semble,—Assuming P. not to have been liable to pay the note to the mortgagees and that it was a voluntary payment, it having been credited on the mortgage debt, and B. having adopted the payment in the settlement of the accounts between him and the mortgagee, he was liable to repay it.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Queen's Bench Division and restoring that of the trial judge who dismissed the plaintiff's action.

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

(Mr. Justice Henry heard the argument in this case but died before judgment was delivered).

(1) 15 Ont. App. R. 244.

The facts of the case may be stated as follows : The plaintiff lent to the defendant Nichol an accommodation note which the latter gave to certain creditors as collateral security for his indebtedness. Nichol and the defendant Baechler afterwards entered into partnership and a mortgage on partnership property was given to secure the above debt of Nichol the creditors still holding the plaintiff's note. The partnership only existed a few months and on its dissolution Baechler assumed the payment of all liabilities of the firm including said mortgage. An account was settled between Baechler and the mortgagees and the plaintiff having paid the note the amount was credited to Baechler on such settlement, and on the foot of the accounts he covenanted with the mortgagee to pay the balance due after crediting plaintiff's payment.

The plaintiff having brought an action to recover the amount of the note from Baechler, the latter pleaded ignorance of the dealings between the plaintiff and Nichol and claimed that Nichol had received, out of partnership funds, an amount larger than plaintiff's claim, and that plaintiff could have no higher right than Nichol.

The Chief Justice of the Queen's Bench Division, before whom the case was tried, dismissed the plaintiff's action, holding that the evidence did not establish the allegations in the statement of claim that the note was deposited as collateral security for the debt of Nichol. The Divisional Court reversed this judgment and ordered Baechler to pay the amount of the note to the plaintiff. The Court of Appeal restored the judgment of the Chief Justice. The plaintiff then appealed to the Supreme Court of Canada.

Mills for the appellant cited Coke on Littleton (1); *Belshaw* v. *Bush* (2); *Moule* v. *Garrett* (3); *Sanderson* v. *Aston* (4); *Henderson* v. *Killey* (5).

(1) 206 b.
(2) 11 C. B. 191.
(3) L. R. 7 Ex. 101.
(4) L. R. 8 Ex. 73.
(5) 14 O. R. 137.

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Idington Q.C. for the respondent referred to Lindley on Partnership (1); DeColyar on Guarantees (2).

Mills in reply cited *Jones* v. *Broadhurst* (3).

Ritchie C.J.

Sir W. J. RITCHIE CJ.—I think the evidence shows that the note was not held as collateral security for the new mortgage debt, nor was the plaintiff, that I can discover from the evidence, ever in the position of a surety for the payment of the joint mortgage. That there is nothing whatever to show the plaintiff's liability on the note was to continue as security for the new debt the evidence of McPherson would seem to be conclusive. It is as follows :—

George McPherson sworn. Examined by Mr. Purdom.

Q. You are a solicitor practicing at Stratford? A. Yes sir.

Q. For whom did you act in the matter of this bill? A. I acted for both Mr. Redford and Mr. Barton.

Q. I believe the note sued on in this action is in your handwriting, the body of it was filled up by you? A. That is my handwriting except the "Thomas Purdom," except the name of the endorser.

Q. And you witnessed the execution of that by Baechler? A. Yes sir.

Q. And some of the others? A. By all except Caroline Baechler.

Q. Can you explain to us how the amount of that mortgage was made up, what the consideration for the giving of the mortgage was? A. Yes, I gave you some statements to show how I made it up and what it was for.

His Lordship.—What mortgage are you speaking of now? A. The mortgage of the 4th April, '76. Mr. Baechler and Nichol to Redford and Barton. I have a statement which I prepared of the 4th April, '76, showing a total of $7,323.00 made up of a

Claim of Barton's amounting to.....	$3,803 00
A claim of Redford amounting to.....	3,377 00
And paid insurance and advertising.....	142 60
Making a total of.....	$7,322 60

When that mortgage was made, before that mortgage was made, on this day this was the indebtedness of Nichol alone, not the indebtedness of Baechler and Nichol, and to induce Baechler to purchase the property along with Nichol, my recollection is that a

(1) 5 ed. pp. 80–89. (2) Pp. 276, 287.

(1) 9 C. B. 173.

thousand dollars was thrown off the indebtedness by Redford and Barton, and a mortgage taken for $6,323.00, being this amount less the $1,000.00.

Mr. Purdom resuming:

Q. What mortgage was signed by Nichol—by both defendants? A. That is the mortgage that was signed by both defendants.

Q. Did that mortgage include the whole indebtedness of Nichol and Baechler to Redford? A. It included all the indebtedness of Nichol up to that time, less the thousand dollars that was thrown off.

Mr. Purdom.—We will examine Mr. McPherson further.

Q. Did the mortgage that was taken for $6,323.00 include the total indebtedness of Baechler and Nichol to Barton and Redford? A. No, it became an indebtedness of Baechler and Nichol the moment Baechler signed the agreement, previous to this it was the indebtedness of Nichol alone.

His Lordship.—Then there is a mortgage? A. On the 4th April, '76, Nichol owed Redford and Barton $7,323.00. On this day a sale of the property was made to Baechler and Nichol, who formed the partnership.

Q. You say Nichol owed Redford and Barton? A. Yes, on the 4th April, '76, $7,323.00. Redford and Barton held a deed of this property as a security for their debt.

Q. It was an absolute deed in form? A. Absolute in form but in reality a mortgage.

Mr. Idington.—Q. The one that is put in? A. Yes.

His Lordship resuming:

Q. That was signed by? A. By Nichol alone, that deed.

Q. To secure this amount? A. To secure this total amount. Then on the 4th April, '76, Baechler having formed a partnership with Nichol, purchased the property jointly with Nichol from Redford and Barton.

Q. After they formed their partnership, they did what? A. They purchased from Redford and Barton this mill property at the total indebtedness less $1,000.00 that was forgiven, and on the 4th April, '76, the conveyance was made by Bedford and Barton to Baechler and Nichol, and on the same day a mortgage was given back for the full consideration mentioned in the deed.

By Mr. Purdom.—Q. Barton had held the note of the plaintiff prior to the time that mortgage was taken? A. Yes, or I had held it for Barton and Redford, this note of the plaintiff that is sued on now.

Q. Did you continue to hold it after that mortgage was taken. A. Yes.

Q. After the mortgage was given did you hold it as collateral security to that mortgage? A. Well, I don't know whether——there was never anything said at all about how it should be held. There

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never at any time was anything said that I can recollect of of the note being held as collateral security, though that might be the effect of it.

Q. At all events did you have any claim against Nichol and Baechler outside of the amount stated in the mortgage? A. No claim outside of the amount that was stated.

His Lordship.—Q. But the mortgage might be collateral to the note, rather than the note collateral to the mortgage? A. It might be.

Mr. Purdom resuming:

Q. Any more than the mortgage was for a larger sum. Do you know as a matter of fact whether the mortgage was collateral to the note or the note to the mortgage? A. I cannot recollect of anything being said about it at all, of there being any arrangement at all. I don't think that when the mortgage was made that Baechler knew anything whatever about the notes.

His Lordship—Well, is that all you know about the note? Do you know when it first came into Mr. Redford's hands, or Barton's hands?

Witness. My recollection is a couple of weeks after it was drawn in came into my hands and remained with me over a year.

Mr. Idington. Q. That is as attorney for Mr. Barton? A. As attorney for Mr. Barton and Mr. Redford.

His Lordship. It is dated the 14th April, 1875? A. Yes.

Q. Then it would be somewhere about the 1st May '75 it came into your hands? A. About that time.

Q. Do you know from whom you received it? A. I received it from Nichol.

Q. Why did you get it? A. Mr. Redford and Mr. Barton had arranged; I think the arrangement was that each of them should—that they should carry Nichol in equal amount, that their indebtedness should be made equal by the payment from one to the other of what the excess might be, and then they both instructed me to try and collect a couple of thousand dollars from Nichol if possible without suit. I saw him and thought his friends ought to assist him to that extent, and he said he would try, and he went away and in a week or two he came back and said he had not been able to raise any money. Then I made the other suggestion that instead of paying the cash that possibly if he could get his friends to endorse notes, and I prepared four notes for him of $500 each leaving the name blank as you see in that note, not writing in the name of the endorser, and gave him these four notes to get signed. He was away sometime, perhaps a couple of weeks and brought me back three of them. They were received in that way; whether as collateral I cannot recollect at all, or whether as payment, I cannot recollect. They remained in my safe until after this mortgage was taken.

By Mr. Idington. Q. Nichol was the only party to whom the note was given at first? A. Yes.

Q. Baechler had nothing to do with the transaction at all? A. Not for a year afterwards.

Q. And yet you say Baechler never heard of the note? A. Not that I ever heard of, not that I ever knew of.

Q. Even down to the time you were crediting him on the mortgage? A. I think he had ceased at that time to have much interest in it.

Q. At the time he signed this agreement he was insolvent? A. Oh, yes, insolvent.

Q. It was practically a matter of no consequence what he signed? A. He never examined the agreement. He took my figures for it in signing that agreement of the 15th January '81.

Q. It was a desirable thing to get the property sold without costs? A. Yes.

Q. And he was quite willing you should sell the property and to facilitate your selling it held himself liable for anything you choose to say he was liable for? A. That was the position.

Q. At the time you got his covenant he was supposed to be quite good? A. Yes.

Q. That is the covenant in the mortgage? A. Yes.

I am of opinion that the effect of the transaction of the 4th April, 1876, without the consent or knowledge of Purdom and without any knowledge of Baechler of the existence of the note, was to discharge the plaintiff as surety for Nichol; that when Baechler discharged the mortgage of the 19th of January, 1872, for securing of which the note was held by Baechler, he thereby likewise discharged the note; and when Purdom was sued by Baechler he should have resisted payment: the mortgage having been discharged the note was thereby also discharged; the dealings between the parties changed the whole claim and all right to assert any claim on the note against the indorser ceased to exist, and therefore the payment by the plaintiff was a purely voluntary one as regards the defendant Baechler; therefore I think the Court of Appeal was right in restoring the judgment at the trial.

There is no evidence to show that Nichol ever authorised Redford and Barton to retain the note as collateral security for the debt in its altered form. I

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think the true inference to be drawn from the evidence is, that having obtained the additional security of Baechler's covenant payable at a shorter time than the note, he being proved to be at the time in quite good circumstances, might well account for the note not having been considered at all in the transaction or being entirely overlooked, and consequently did not enter into the calculation of any of the parties and formed no portion of the new arrangement but was treated as having served its purpose and as of no account in the new arrangement; it would be somewhat singular that a note not payable until the 17th of April, 1879, should be held as collateral security for a mortgage payable on the 7th of April, 1878, and as Mr. Macpherson shows nothing was said by either of the parties in reference thereto. Unless this is so I must confess it strikes me as somewhat extraordinary that a professional gentlemen who appears to have negotiated the whole transaction with reference to the note should receive and hold such a note and not be able to state whether he held it as a payment or as security, and should have allowed the new transaction to be entered into without consulting the indorser or in any way indicating to the parties that the note was to be held as a continuing security for the indebtedness secured by the new joint mortgage, but on the assumption that the note was not, or was not intended to be taken into account in the new arrangement the matter of the note might very well have escaped his memory.

At the time this note was given there was no partnership; it was to be used in payment of, or security for, Nichol's individual indebtedness to Barton and Redford secured by his mortgage to them; when the firm was formed an entirely new arrangement was entered into and the individual debt of Nichol became

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a partnership debt in the new firm and the original mortgage was discharged and a new joint liability incurred, and for which a new mortgage security was taken creating an entirely different transaction. How is it possible to say that under such circumstances the liability of an accommodation indorser can be continued and he be made security without his consent for a joint indebtedness to which he never assented ?

In the absence, then, of any evidence to show any request on the part of Baechler to become security or to pay this amount for him, or any facts from which such request can be inferred, or any evidence to show that the new arrangement was entered into with the consent of Purdom or that it was ever in the contemplation of the parties to the new arrangement that the liability of the accommodation indorser was to continue and become security for the new joint mortgage, and without any evidence, even, that McPherson held, or professed to hold, the note as collateral security for the debt secured by the new mortgage from Nichol and Baechler to Barton and Redford, I fail to see how the payment to the plaintiff can be looked on in any other light than as a voluntary payment.

Under these circumstances I think the appeal should be dismissed.

STRONG J.—I am of opinion that this appeal should be allowed. It appears to me that the plaintiff, the present appellant, was entitled to recover on several distinct and independent grounds Putting it merely as a voluntary payment, by Purdom, the appellant's testator, and assuming him to have been, as the appellant contends, no longer liable on the note, but considering it as a voluntary payment afterwards adopted by Baechler, as in fact it was, it seems clear, on plain principles of law, that the defendant is liable.

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An adoption of the payment by Baechler is clearly established by what took place on the 15th of January. 1881, when the three accounts *i.e.* (1) the account between Baechler and the mortgagees jointly and (2 & 3) the separate accounts between Baechler and each of the mortgagees (Barton and Hossie) showing the apportionment of the debt between the two latter, were stated and settled. In all three of these accounts Baechler was given credit for Purdom's payment. Moreover, on the foot of these accounts Baechler entered into the several covenants with Barton and Hossie which bear even date with the settlement of the accounts, in which covenants he agreed to pay the balance arrived at after crediting Purdom's payment. Baechler thus, clearly, got the benefit of the payment, and as he executed the covenants on the basis of the accounts stated between himself and the parties entitled to the mortgage in the three different forms before mentioned he thereby, beyond all question, adopted these accounts and assented to the credits therein given to him. This, by itself, is sufficient ground for reversing the judgment of the Court of Appeal, it being a well settled principle of law that a party who adopts a voluntary payment made by a third person on his behalf is liable in an action by the latter for money paid at the request of the debtor, the subsequent adoption warranting an implication of the request.

Secondly.—Mr. Justice Armour in the Divisional Court puts the Appellant's right to recover on a distinct ground, in which I also concur. This view of the case may be presented as follows :—

Nichol having sought Purdom's assistance in the way of a loan of money, Purdom, not finding it convenient to accomodate him with a loan, lent him, instead of cash, his credit in the shape of an accommo-

dation indorsement of the promissory note of the 14th April, 1875, for $500, payable four years after date. Purdom did not limit Nichol as to the use he was to make of this promissory note but left him free to use it in any way he thought fit, just as he might have used the cash if Purdom had been able to accomodate him with the loan first requested Having, thus, authority to deal with the note as he pleased Nichol, first of all, deposited it with Barton as a collateral security and afterwards, when the transaction of the 14th of April, 1876, took place, and Baechler as well as Nichol came under liability for the aggregate amounts of the debts of the latter to both Barton and Redford, Nichol allowed this note to remain as a collateral security in the hands of Barton and Redford for their consolidated debt, a disposition of it which was entirely within the authority as to its use which had been conferred on Nichol by Purdom.

Thus, it is simply the case of one of two joint debtors giving the creditors the note of a surety as a collateral security for the joint debt and the creditors afterwards realizing the security by enforcing payment from the collateral surety, and giving credit on account of the joint debt for the payment so made. Surely in such a case there can scarcely be a doubt that the surety can recover, in the equitable action for money paid, against both of the joint debtors. So that, even if the transaction of the 24th February, 1877, when the deed of dissolution was executed and Baechler undertook to pay the mortgage debt, had never taken place Baechler would still, on the ground last indicated, have been liable to indemnify Purdom, whose money had gone to discharge Baechler's liability *pro tanto*, and who would, therefore, to the extent of his payment, have a good equitable claim to stand in the shoes of the creditors who had thus been partially satisfied by him.

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It is said, however, in answer to this, that Purdom was discharged on the 14th of April, 1876, by the novation resulting from the transaction which then took place. Granting, for the present purpose, that the legal effect of the transaction of that date was to operate as a novation still, as Purdom had no notice of the facts which are said to have constituted his discharge, it is plain, I think, just as Mr. Justice Armour puts it, that his payment under these circumstances is not to be considered a voluntary payment, but Purdom having paid in the *bonâ fide* belief of facts warranting the conclusion that he was still liable on the note it stood on precisely the same footing as if he had, in law, remained liable, in which case, the payment having enured to the benefit of Baechler, he would, even without any assent or adoption of it, and that for the reasons before stated, have been liable to reimburse Purdom for the amount he had paid. The authorities referred to in the judgment of Mr. Justice Armour seem to me conclusive on this point.

Thirdly.—At all events, on equitable grounds Baechler must be held liable. Nichol, as before shown, had authority, as between Purdom and himself, to deal with the note, as he in fact did deal with it, by leaving it as collateral security for the consolidated debt of the two creditors, Barton and Redford, for which, as before stated, he and Baechler became jointly liable. Then, even though Baechler knew nothing about the disposition of the note, Purdom, on paying it, had a perfect right to be subrogated *pro tanto* to the securities held by the creditors paid by him, viz.: (1) to their rights and actions under and upon the covenant contained in the mortgage deed, and (2) to their rights as against the real security, the land. As to the latter—the land—the plaintiff cannot, in this action, to which the purchaser, Young, and his mortgagee (both of

them, probably, purchasers for value without notice) are not parties, have any relief; but under the first head the plaintiff is clearly entitled to relief, as a party entitled to be subrogated to the mortgagees' rights under the covenant in the mortgage, to the extent of the payment made by him. The only answer which, as far as I can see, can possibly be suggested to this is the state of the pleadings, but no difficulty need be felt on that score, as the Divisional Court expressly gave leave to amend the record in such a way as to adapt it to the facts in evidence.

The judgment of the Court of Appeal should be reversed and the judgment of the Divisional Court restored, with costs to the appellant in all the courts.

FOURNIER J.—I am in favor of dismissing the appeal and restoring the judgment of the late Chief Justice Cameron. I concur in the views expressed by Mr. Justice Osler in the Court of Appeal.

TASCHEREAU J.—I am of opinion that this appeal should be allowed with costs for the reasons given by my brother Strong.

GWYNNE J.—I also concur in the judgment of Mr. Justice Strong allowing the appeal.

Appeal allowed with costs.

Solicitors for appellant: *Park & Parson.*

Solicitors for respondent: *Idington & Palmer.*