ROBERT GRANGER (PLAINTIFF).....APPELLANT;

AND

ARTHUR BRYDON-JACK (DEFENDANT).....RESPONDENT.

1919
*May 7,
*May 19

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Evidence—Finding of facts by trial judge—Appeal—Mortgage—Given as security or payment—Parol evidence—Time of payment not fixed—Reasonable time.

B., having bought from G. a four-fifths interest in a yacht, gave him a mortgage on real estate for the amount of the purchase-price. The deed provided that "the principal (should) be paid out of the first proceeds of the sale of the equity of the mortgagee," and there was no covenant of the mortgagor to pay the debt. The evidence of both parties was in direct conflict as to whether the mortgage had been given in payment of the purchase-price or merely as security.

Held, that under the circumstances the Court of Appeal was not justified in reversing the finding of fact of the trial judge, who had declared the mortgage to have been given as security only.

Per Davies C.J.—The absence in the deed of a covenant as to the personal liability of the mortgagor to pay the debt is not material.

Per Idington and Anglin JJ.—The result of the failure to fix a time for payment is that the debt became payable within a reasonable time according to the intentions of both parties and having regard to all the circumstances.

Judgment of the Court of Appeal reversed.

APPEAL from the judgment of the Court of Appeal for British Columbia, reversing the judgment of Grant J. and dismissing the plaintiff's action with costs.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Geo. F. Henderson K.C. for the appellant.

F. H. Chrysler K.C. for the respondent.

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*Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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The Chief Justice.

THE CHIEF JUSTICE.—The trial judge in this case in all matters where the evidence of the appellant and the respondent was at variance accepted that of the appellant plaintiff and discredited that of the respondent.

The action was one brought to recover the price of four-fifth shares in a yacht claimed to have been sold to the defendant respondent by the plaintiff and to have been secured by a third mortgage on certain lands of the defendant.

The issues were whether the mortgage was taken and accepted by plaintiff as security only or in payment by way of exchange of the yacht shares for the mortgage, as contended by the defendant. The mortgage, which was drawn up by the defendant respondent, did not contain the usual covenant to pay the amount for which it was given.

On the findings of fact made by the trial judge, which I do not think we should disturb or set aside, and the admissibility of the evidence as to what the real bargain between the parties was, as to which I do not entertain any doubt, such evidence not contradicting the written documents, I am satisfied there was not merely an exchange of properties between the parties, nor do I think the acceptance by the plaintiff of the mortgage without a personal covenant to pay which mortgage had been prepared by the defendant discharged the debt which, in my opinion, the facts shew the mortgage was taken to secure.

I think the payment of the interest on the mortgage for the two years preceding the action admitted by the defendant in his examination for discovery quite inconsistent with his claim that there had been merely an exchange of properties between the parties or an absolute sale of the shares in the yacht without any

personal liability on defendant's part to pay the agreed price.

The evidence admitted to explain the real bargain did not contradict the written documents.

As to the absence of any personal liability of the mortgagor to pay the debt for which a mortgage is given, in which there is not a personal covenant to pay, see Canadian Edition of Fisher on Mortgages (1910), pp. 7, 413, 415, and Halsbury, vol. 21, p. 70.

I would allow the appeal and restore the judgment of the trial judge with costs in this court and in the Court of Appeal.

IDINGTON J.—I am of the opinion that the questions raised herein ought to be determined by the facts of whether or not the mortgage taken was accepted as payment or merely as security for the payment of the price agreed on.

I cannot see how the undoubted principle of law, that when an agreement between parties has been reduced to writing that writing must govern, can help us herein.

The actual question to be first determined is whether or not the agreement has been reduced to writing or at all events whether or not what has been reduced to writing was really in truth intended to cover the entire contractual relations in question or not.

The reliance placed upon the receipt clause of the bill of sale has very little to support it if we bear in mind the history of our law and its final results in relation thereto. At common law a man signing and sealing a document of that kind was estopped from denying such an acknowledgment. In equity it counted for little and standing alone without a duly

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endorsed receipt was held to put third parties on inquiry.

A concise statement of the relevant law and authorities is to be found in Elphinstone on the Interpretation of Deeds, pp. 151 *et seq.*

I admit it is a circumstance, even though of minor import, to be had in mind when all the surrounding circumstances have to be considered in order to determine which party's story is correct.

Then there is another circumstance, also of very minor import, in the absence of a covenant for payment.

The general principle of law applicable to a mortgage debt, as stated by Fisher on Mortgages, 5th ed., at par. 8, implying a recoverable debt because it is presumed to be given for a loan, is *primâ facie* applicable. And I do not think that the express statement of the consideration being the price of the sale of same article entirely eliminates the need for observing the general rule.

I may remark, in passing, that is none the less so, when the instrument has been drawn by a professional man a party thereto to be tendered to another, and contains no restriction upon said rule of law or explanation of what was really intended.

Moreover in this case the respondent paid the interest from time to time for four years, although he had not covenanted to do so.

The following contains the peculiar terms of payment:—

> Provided this mortgage to be void on payment of two thousand dollars ($2,000) of lawful money of Canada, with interest at seven (7) per cent. per annum, as well after as before maturity, as follows: the principal to be paid out of the first proceeds of the sale of the equity of the mortgagee in the said land, the first payment of interest to be made on the nineteenth day of January, 1915, interest thereafter to be paid annually on the 19th day of January in each and every year.

The interest was to run, apparently from date, and to continue "as well after as before maturity;" but when was maturity? We may try to assume that it was meant to be when the sale of the equity was obtained. Are we on such assumption to conclude that unless and until such a sale was effected as would produce $2,000 there could be no maturity?

If we observe literally the language used that would seem to be the case. But if it was found impossible to get more, who was to pay the interest? Was respondent to be presumed bound to supply it? Or was the provision for payment of interest after maturity a mere mockery? And if no more than say $1,000 or $1,500 could be got, what was the purpose of providing for payment of seven per cent. on $2,000 for that is clearly implied? Who was to pay it?

Again was all that a solemn mockery? And if only say $100 to $500 was ever, or within a reasonable time, realizable, are we to suppose the parties had so contracted that the four-fifths of the value of the yacht was to pass for that trifle?

Such a gamble is conceivable but does the story told, by either party, indicate that such was the nature of the transaction? All these and many more like considerations press upon one in considering what in truth was the essential nature of the bargain entered into.

The appellant swears he never considered or inquired what the value of the property was but took the respondent's word as to the probabilities and estimates relative thereto, and there is no attempt made to contradict this statement, or shew facts and circumstances which would furnish contradiction and thereby indicate the intention of the appellant to accept a gambling proposition.

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Surely if a gamble of that sort really was what the parties were negotiating, he who drew the instrument, and against whom it must, therefore, be most strongly construed, should and would have applied his professional skill to frame something entirely different from that presented for our consideration.

It would, I submit, be much more like what the stories given by either or both, so far as reconcilable, should lead us to expect, to infer that the deal was one of bargain and sale at a named price, with a mode and nature of security to be given, for carrying it out, in harmony and consistently with the relations between old friends, whereby there should be a mutual trust and forbearance to be limited by the bounds of what might and should in law be held reasonable.

To so interpret the conduct and purpose of the parties and their intentions towards each other under such circumstances that neither suffer an injustice, is what we should aim at, in order to do justice between them, when unfortunately they have been led to entertain what are probably unjust views of each other's conduct.

Following out that line of thought, and bearing in mind the findings of fact by the learned trial judge, it seems to me that there was an actual sale of the four-fifths of the Ailsa at $2,000, and that, not as evidence of contract but to secure the carrying out thereof, there was a rather crudely framed mortgage, intended only as a security, for the execution of the contract, and thus leaving much to be supplied or fulfilled, by the application of the rule of what was, under the circumstances, reasonable.

It seems to me that if the parties had not fallen out, there would have been either an earlier sale of the property so put up as security, or greater forbearance

in enforcing the claim for the payment. Should the case not have been tried out and treated on some such basis?

I regret to say that such views received little attention at the trial, and some evidence on that, and other points bearing on the possibilities of realization of the security, has not been presented. We are then left to determine the question of whether or not a reasonable time has elapsed or not to carry out what was the evident intention of the parties.

To blame the war for the condition of things during a year preceding it is not very satisfactory.

I am quite clear the bargain was concluded a year before the war broke out and the execution of the document only postponed to enable respondent to complete his final arrangements with others.

The conclusions I have reached are, that there was an actual bargain and sale by which the appellant agreed to pay $2,000 for four-fifths of the yacht; that there was to be given a mortgage to secure such payment; that the time for payment was not specified; and hence must be taken to be within what would be a reasonable time within the contemplation of the parties; that such time was not wholly dependent upon the will of the respondent; that having regard to all the circumstances such reasonable time had elapsed at the time of the institution of this action, and hence the appeal should be allowed and the judgment of the learned trial judge restored with costs herein and of the Court of Appeal.

ANGLIN J.—The issue in this case is whether a mortgage on real estate made by the respondent to the appellant was intended to be given and accepted merely as security for the payment by the respondent of the purchase-price of a four-fifths interest in a yacht

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bought by him from the appellant or was intended to be given and taken in payment and satisfaction of such purchase-price. Upon that issue parol evidence was, in my opinion, admissible. It in nowise contradicts or varies the written instruments which passed between the parties. The outcome rests entirely upon the credit to be attached to the evidence of the parties themselves who are in direct conflict. The learned trial judge had the advantage of seeing and hearing them, and his conclusion was that the evidence of the appellant was entitled to credit while that of the respondent could not be accepted.

So far as the probabilities may be taken into account they would appear to be almost equally balanced. While it is most improbable that the vendor intended to accept a third mortgage on highly speculative real estate as payment, it is at first blush difficult to account for the omission from the mortgage of a covenant for payment if a personal obligation on the part of the purchaser had been assumed. But it must not be forgotten that the mortgage was taken only many months after the sale, when the obligation (if any) to pay the purchase-price had been assumed. On the whole, I incline to think the probabilities rather favour the vendor's contention, because otherwise he would not only have to wait indefinitely for payment, but his prospects of ever receiving anything would depend entirely upon the sale of the mortgaged property for a sum over and above what would be sufficient to satisfy the two prior incumbrances upon it. He would be taking all the risk of the defendant's real estate speculation without any prospect of advantage from it beyond his purchase-price. He might get nothing at all and in no case could he hope for more than his $2,000. The admitted agreement to pay

interest on that amount almost implies an obligation to pay the principal.

But assuming the probabilities to be equally balanced, which, I think, is the view most favourable to the respondent of which the circumstances admit, with respect, it was, in my opinion, to quote Viscount Haldane, "a rash proceeding on the part of the Court of Appeal" to reverse on an issue of pure fact such as that presented, the finding of a trial judge necessarily and expressly made to depend upon the credit to be given to the conflicting evidence of the parties to the transaction whom he saw and heard testify. *Nocton* v. *Ashburton* (1).

The chief difficulty in the case is to determine when the purchase-price became payable, no definite time for payment having been fixed. In my opinion the result of the failure to fix a time for payment was that the money became payable within a reasonable time having regard to all the circumstances. I think the purpose of the parties was to allow the respondent what might be regarded as a reasonable time in which to make a sale of the mortgaged property in order to place himself in funds to meet the appellant's claim. Such a time, in my opinion, expired long before this action was brought and the purchase money was then exigible.

I would, therefore, allow this appeal with costs here and in the Court of Appeal and would restore the judgment of the learned trial judge.

BRODEUR J.—The respondent having paid interest on the mortgage for which he is sued cannot now claim that the mortgage was given in payment of his obligation.

(1) [1914,] A.C. 932, at p. 945.

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This case was principally a question of credibility of the parties. The trial judge having found in favour of the appellant, it seems to me that the Court of Appeal should not have disturbed that finding.

The appeal should be allowed with costs.

MIGNAULT J.—In this case I am of the opinion that the appeal should be allowed and the judgment of the learned trial judge restored.

I cannot take the bill of sale, which falsely states that the price of the four-fifths share of the yacht Ailsa II. was paid by the respondent to the appellant, nor the mortgage signed by the respondent as correctly expressing the terms of the agreement of the parties. The learned trial judge has found what this agreement really was, and I would not disturb his finding on this question of fact. It would require stronger evidence than that afforded by these documents to make me believe that the appellant agreed to sell an interest in his yacht on terms that would have given the respondent the right to defer payment until he obtained a satisfactory price for his property in Vancouver, an event which might never occur. The mortgage, like any other mortgage, is an accessory contract and a security for a debt. What this debt was is shewn by the testimony of the appellant, which the learned trial judge accepted in preference to that of the respondent.

I would, therefore, allow the appeal and restore the judgment of the trial court with costs here and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Bowser, Reid, Wallbridge, Douglas & Gibson.*

Solicitor for the respondent: *E. M. N. Woods.*