NANOOSE WELLINGTON COLLIERIES, LIMITED (DEFENDANT)..... APPELLANT;

AND

ADAM JACK (PLAINTIFF)..... RESPONDENT.

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*Feb. 2, 3.
*Feb. 8.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Sale—Fraud—Instrument containing release of existing liability—Signed with no intention to give release—Action for specific performance—Onus probandi.

Under an agreement between the respondent and the appellant company for the sale of the respondent's brick plant, the appellant undertook to incorporate a new company to take over the business and also agreed to assume and pay the amount due from the respondent to one B. on a chattel mortgage. Some months later, the respondent signed another instrument transferring the brick property to the new company which assumed liability for the payment of the mortgage, but the instrument expressly released the appellant company from its obligation to pay off the mortgage. In an action for specific performance of the first agreement,

Held, that the basic fact on which the respondent's case must rest is that he executed the instrument containing the release clause in ignorance of its presence and effect and the burden of proving such ignorance rested on him; and that his evidence, which alone was offered to substantiate it, did not discharge that onus.

Judgment of the Court of Appeal ([1925] 2 W.W.R. 267) reversed.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of Gregory J. at the trial and maintaining the respondent's action.

The respondent brought action for a declaration that he is entitled to be indemnified by the appellant company against his liability on a mortgage to one Braun, which appellant had agreed to assume and pay off, and for specific performance of such agreement. The respondent was a brickmaker and the appellant was a company carrying on coal mining operations near Nanaimo, on Vancouver Island. In the spring of 1921, the appellant entered into an agreement with the respondent by which he was to have the right to take certain shale which was found contiguous to the company's coal and use the same for

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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making brick, and on the same date, March 12th, a lease of a three-acre portion of the company's property was made to the respondent for the purpose of using the same as a brick yard. At this time J. M. Braun was a director of the appellant company and just about the time these agreements were entered into, was appointed one of a committee of two directors to attend at the mine and assist or supervise the management thereof and did so attend and reside at the mine. Braun and the respondent then entered into an arrangement under which the respondent, at the instance of Braun, went about and bought some second-hand brick machinery and had the same installed on the leased premises. The respondent put into the proposition about $900 of his own money, while Braun apparently furnished the balance, which amounted from $14,000 to $18,000. At the end of June, Braun took from the respondent a chattel mortgage to secure advances of $23,000 and future advances to be made by Braun to the respondent and covering the brick plant and equipment. At the annual general meeting of the company on August 11th, 1921, it was decided that the company should purchase from the respondent the brick plant and this was accordingly done by an agreement of the same date. This agreement provided for the incorporation of a company to take over and carry on the brickmaking business in which company the respondent was to have a 5% interest. The respondent was also to be paid the sum of $5,000 in cash which was actually paid to him. As one of the terms of taking over the brick plant the appellant company agreed to pay certain of the respondent's liabilities which were set out, among them the liability for any money due under the chattel mortgage. Pursuant to the agreement a new company was formed within the ninety days specified in the agreement and after its formation the respondent was given his 5% interest in shares. The brick plant and assets which the appellant company had received from the respondent were conveyed and transferred to the new company and upon receiving the assets the new company likewise assumed that liability which remained unpaid, the chattel mortgage. The deed of transfer signed by the respondent released the appellant company from its own obligation in the August agree-

ment. The transfer was carried out by two agreements of the 22nd December, 1921. These agreements were drawn by Mr. Speer, of the law firm of Davis & Co., on instructions from Mr. Coleman, managing director of the appellant. Two years later, the respondent commenced this action against the appellant company only and setting up in answer to the release pleaded by the company first a plea of "non est factum" which later was abandoned and replaced by a plea of fraud. The claim for damages was abandoned at the trial and the trial judge dismissed the action. An appeal was taken to the Court of Appeal which reversed the judgment of the trial judge and declared that the respondent was entitled to be indemnified by the appellant.

J. A. Ritchie K.C. and *E. F. Newcombe* for the appellant.

R. Cassidy K.C. for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—This record, in our opinion, does not disclose any such cogent facts or circumstances as would warrant a reversal of the finding of the learned trial judge that the plaintiff was "wholly unreliable" as a witness. That finding is abundantly warranted by the inconsistencies and contradictions of the plaintiff's own testimony and its conflict in material facts with that of such an admittedly upright and trustworthy witness as Mr. Speer, the solicitor who prepared and attended upon the execution of the documents in the obtaining of which the fraud alleged is said to have been committed.

In the case as made by the plaintiff in his evidence at the trial misconduct and misrepresentation on the part of Mr. Speer formed a notable feature. That the execution of the document containing the release was procured by a scheme carefully prepared by Coleman, the defendant company's manager, as a result of which the plaintiff was kept in ignorance of the presence in it of the release, being assured by Mr. Speer that it was "just a usual transfer,"—such was the case the defendant was called upon to meet. On appeal, and again in this court, every imputation against Mr. Speer was unqualifiedly withdrawn and the plaintiff's case was rested wholly on his failure to realize the presence of a release clause in one of two documents which he was induced to sign in Mr. Speer's office, or on his in-

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ability to appreciate its significance—a situation, for which, it is charged, Coleman, deliberately prepared and on which he successfully relied. That case was not put forward at the trial and neither the defendant company nor the witness Coleman had any fair opportunity to meet it. With the utmost respect we are of the opinion that, under these circumstances, such a charge of fraudulent conduct by Coleman as that now insisted upon should not have been held by the Court of Appeal to have been established.

A basic fact on which the plaintiff's case must rest is that he executed the document containing the release clause in ignorance of its presence and effect. The burden of proving such ignorance rested on him. His evidence, which alone was offered to substantiate it, does not discharge that onus.

It is quite conceivable that the plaintiff, without any fraudulent intent or manoeuvre on the part of Coleman, such as is now suggested in support of his claim, may have executed the release with full realization of its import, because he was mistakenly optimistic as to the prospects of the brickmaking venture in which he had been engaged and of the company incorporated to carry it on. But however that may be, and without casting the slightest doubt on the right of the Court of Appeal in a proper case to find fraud established notwithstanding the contrary view taken by the trial judge (*Annable* v. *Coventry*) (1), we are all very clearly of the opinion that, under the circumstances of this case, the explicit findings of the trial judge, which obviously rested largely on his appreciation of the respective credibility of the three witnesses who testified before him—the plaintiff, Mr. Speer and Coleman—should not have been disturbed. *Nocton* v. *Lord Ashburton* (2).

The appeal will be allowed with costs here and in the Court of Appeal and the judgment of the trial judge will be restored.

Appeal allowed with costs.

Solicitors for the appellant: *Davis, Pugh, Davis, Hossir, Ralston and Lett.*

Solicitor for the respondent: *A. C. Brydone-Jack.*

(1) [1912] 46 Can. S.C.R. 573.

(2) [1914] A.C. 932, at pp. 945, 957-8.