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*Feb. 13.
*Mar. 27.

WILLIAM STEWART HERRON (PLAINTIFF) ..... } APPELLANT;

AND

ALBERT HENRY MAYLAND AND ROYALITE OIL COMPANY, LIMITED (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Contract—Transfer of shares in oil company with option of re-purchase—Nature of transaction—Construction—Alleged loan and mortgage—Admissibility of extrinsic evidence—Right to dividend accruing during option period.

H. (appellant), desiring to pay off a debt of $40,000, asked M. (respondent) for a loan of that sum on the security of 1,600 shares in an oil company. M. refused, but negotiations resulted in M. paying the $40,000, taking a transfer from H. of the shares, and giving an option to H. to re-purchase them within one year for $51,280. This sum had been arrived at by including the said sum of $40,000, the sum of $6,000, being the cash payment on a house which M. had stipulated that H. should buy from him, and interest for one year on $40,000 at 12% and on $6,000 at 8%. The option to re-purchase was in writing, and recited that M. had purchased from H. and was now the holder

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

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of 1,600 shares in the oil company, and had agreed to give an option for re-purchase for the price and on the terms thereinafter set forth, and it provided that M. "in consideration of the sale of the said shares by [H.] to [M.], and other good and valuable considerations him thereunto moving, doth hereby give and grant unto [H.] an opinion, irrevocable within the time for acceptance herein limited, to purchase," etc.; that M. should deposit the share certificates in a certain bank, and they should be left there so long as the option was open for acceptance; that H. might at any time within the year purchase blocks of not less than 100 shares upon paying $100 for each share so purchased, and receive a transfer thereof, all sums so paid to be deducted from the total purchase price. Before the expiry of the year H. paid the re-purchase price and received a re-transfer of the shares, but in the meantime a dividend had been declared by the oil company, and the question in dispute was as to who was entitled to it. The parties had apparently not contemplated the possibility of the payment of a dividend during the option period, and had not alluded to it in their negotiations or agreement. H. sued to recover it.

Held, (*a*) that the transaction intended by the parties was in reality a sale with an option to re-purchase, and not a loan or mortgage; having regard to the form in which it was deliberately put, it would require most convincing evidence to justify a contrary conclusion; and the evidence in fact tended strongly to support the view that the form of the transaction represented its real nature; (*b*) that the evidence of the surrounding circumstances and of the negotiations which resulted in the option being given did not warrant the implication of a provision entitling H. to interim dividends; there may be cases in which a court can say that it is inconceivable that, had the parties adverted to the subject, they would not have agreed to the stipulation contended for, and would then imply it; but this was very far from being such a case. M. was entitled to the dividend as incidental to his ownership of the shares at the date specified in the declaration of dividend, and no right to recover it from him, cognizable in a court of law and equity, had been shewn. In the view taken by the court on the evidence, it was unnecessary to decide as to the objection made by M. to the admissibility of the parol evidence relied on by H. The general rules as to admissibility, and the required strength, of extrinsic evidence to shew the alleged real nature of the transaction in such cases are discussed by Duff J.

Judgment of the Appellate Division of the Supreme Court of Alberta (23 Alta. L.R. 34) affirming, on equal division of the court, judgment of Ford J. (*ibid*), affirmed.

Smith J., dissenting, held that, as the written document did not, nor purported to, contain the whole bargain, parol evidence was admissible to shew what the complete bargain was, and the written document must be construed in the light of it; while not finding that the transaction was intended merely as a loan, he held that the terms of the agreement imported that any incidental advantages accruing to the ownership of the shares during the option period should go with the shares to the party who might ultimately become the absolute owner under the terms of the bargain; and H. was therefore entitled to the dividend.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming, on equal division of the court, the judgment of Ford J. (2) dismissing the plaintiff's action.

The plaintiff was the beneficial owner of 1,600 shares of the stock of the Royalite Oil Company, Limited, which he had assigned to the Royal Bank of Canada as collateral security for an indebtedness of $40,000. Desiring to obtain money to pay off the bank, he approached the defendant Mayland, through one Robinson, asking for a loan on the security of the shares. Mayland refused this, but, after some negotiations, the parties entered into an arrangement by which Mayland paid the sum of $40,000 and took from the plaintiff a transfer of the shares to him, and, by agreement under seal executed by both parties, gave to the plaintiff an option for the re-purchase of the shares within one year for $51,280. As a condition of the arrangement, Mayland had required that the plaintiff should purchase from him a certain house property at the price of $11,500, of which $5,500 should stand secured by a mortgage on that property. The said sum of $51,280 had been arrived at by including the said sum of $40,000, the sum of $6,000 as the cash payment on the house property, and interest for one year on $40,000 at 12% and on $6,000 at 8%.

The said agreement giving the option to re-purchase recited that Mayland had purchased from the plaintiff and was now the holder of 1,600 shares in the capital of the oil company, and had agreed to give an option for re-purchase for the price and on the terms thereinafter set forth, and it provided that Mayland "in consideration of the sale of the said shares by [the plaintiff] to [Mayland,] and other good and valuable considerations him thereunto moving, doth hereby give and grant unto [the plaintiff] an option, irrevocable within the time for acceptance herein limited, to purchase," etc.; that Mayland should deposit the certificate or certificates for the shares with the Stockyards Branch of the Bank of Montreal in the city of Calgary, and that they should be left there so long as the option was open for acceptance; that the plaintiff might at any time

(1) 23 Alta. L.R. 34; [1927] 2 W.W.R. 768.

(2) (1927) 23 Alta. L.R. 34.

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within the year purchase blocks of not less than 100 shares upon paying $100 for each share so purchased, and receive a transfer thereof, all sums so paid to be deducted from the purchase price payable under the option.

The option period expired on November 12, 1926. Before that time, on November 5, 1926, the plaintiff paid the repurchase price and received from Mayland a transfer of the shares. But in the meantime, on October 27, 1926, the Royalite Oil Company, Limited, declared a dividend of $2.50 a share, payable on November 25, 1926, to shareholders of record on November 1, 1926.

The question in dispute was as to who was entitled to this dividend. In entering into the arrangement no allusion was made to the question of the right to dividends, and it would appear that neither party contemplated the likelihood of any dividend being declared during the life of the option. The plaintiff sued, asking for an injunction restraining the company from paying the dividend to Mayland and restraining Mayland from receiving it, and for an order directing its payment to him, and, in the alternative, judgment against Mayland for the amount thereof. The grounds of the plaintiff's claim are set out in the judgment of Anglin C.J.C. now reported. Ford J. gave judgment dismissing the action (1) which was affirmed, on equal division of the court, by the Appellate Division (2), and the plaintiff appealed to this Court. The appeal was dismissed with costs, Smith J. dissenting.

E. Lafleur K.C. for the appellant.

R. B. Bennett K.C. and *H. G. Nolan* for the respondents.

The judgment of Anglin C.J.C. and Newcombe and Rinfret JJ., was delivered by

ANGLIN C.J.C.—Herron, the plaintiff (appellant), being indebted to a bank in the sum of $40,000, for which he had assigned 1,600 shares of the capital stock of the Royalite Oil Company as collateral security, desired to obtain money to pay off the bank. He accordingly approached the de-

(1) (1927) 23 Alta. L.R. 34.

(2) 23 Alta. L.R. 34; [1927] 2 W.W.R. 768.

fendant Mayland, through one Robinson, asking a loan on the security of the Royalite shares. Mayland refused to entertain the idea of a loan, but he suggested his willingness to purchase the shares and to give the plaintiff an option to buy them back within a year if the latter would also purchase from him a house at the price of $11,500. An agreement was eventually arrived at by which Mayland paid $46,000 and conveyed the house to Herron, taking from him a mortgage on the house for $5,500, bearing interest at 8%, and a transfer of the 1,600 shares of Royalite stock. Mayland then gave back to Herron an option to repurchase the Royalite shares for $51,280 at any time before the 12th of November, 1926. The document embodying this option bears date the 12th of November, 1925, and was prepared by the late Mr. Savary, Herron's solicitor, pursuant to his client's instructions. It was partly read over by Herron and was read in its entirety and explained to both Herron and Mayland before its execution by Mr. Bennett, Mayland's solicitor. In this document Mayland undertoook to hold the Royalite shares on deposit in his bank pending the option. The optionee stipulated for the right to make interim payments for not less than 100 shares at a time. Provision was also made for his exercise of the option to repurchase by mailing to a stated address a registered letter containing a marked cheque for the amount of the re-purchase price unpaid.

Herron states that the terms of this instrument were those on which he understood Mayland to insist; and there is no suggestion of any misapprehension of them on his part or of any mistake in their expression. Upon the execution of the option agreement the shares were transferred by Herron to Mayland who had them registered in the books of the company in his own name.

No allusion was made, either in the option itself or in the discussions, to any dividend which might be declared upon the stock, and, none having been theretofore declared, it would appear that neither party contemplated the likelihood of any such dividend becoming payable during the currency of the option. A dividend was, however, declared in October, 1926, payable, on the 1st of November, 1926, to the then registered holders of Royalite Oil Company shares. The dividend on the 1,600 shares

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held by Mayland amounted to $4,000. Learning of this, Herron desired to exercise his option to repurchase before the 1st of November, but, Mayland being out of town, he was unable to procure the money required because the shares standing in Mayland's name could not be assigned or handed over to the bank which had agreed to advance him $50,000 upon them. After Maryland's return to Calgary Herron saw him on the 3rd of November and suggested a renewal or extension of "the loan" and also applied for an order to enable him to collect the $4,000 dividend. Mayland refused to consider this proposition; and Herron, exercising the option, paid Mayland in full on the 5th of November and got back the shares.

Shortly afterwards he brought this action, demanding payment by Mayland to him of the $4,000 of dividends which the latter had collected. He put his claim alternatively on these two grounds: (*a*) The transfer, though in form one of sale and purchase with an option to repurchase, was in reality a loan, the shares being pledged as security for the repayment of the principal and interest, computed at $51,280, on payment of which sum the borrower would be entitled to the re-transfer of the security with all incidental accretions or advantages, the pledgee's rights being strictly confined to the receipt of his principal and interest, and costs, if any. (*b*) If the transfer cannot be so regarded, it should be deemed to be an implied term of the agreement between the parties that Herron on exercising his option to repurchase would be entitled to any interim dividends declared upon the shares while under option.

The learned trial judge (Ford J.), dismissed the action, holding that the transaction intended by the parties was in reality a sale with an option to repurchase and was not a loan, pledge or mortgage, and that the evidence of the surrounding circumstances and of the negotiations which resulted in the option being given did not warrant the implication of the provision entitling him to interim dividends asserted by the plaintiff.

On appeal this judgment was affirmed by a divided court. Harvey, C.J.A., with whom Hyndman, J.A., concurred, agreed with the learned trial judge; while Beck, J.A., would have upheld the plaintiff's claim on both

grounds and Clarke, J.A., without passing upon the first ground of the claim, accepted the plaintiff's alternative contention that the evidence warranted the implication of a term or provision that interim dividends should belong to him.

At bar counsel for the respondent strenuously combatted the admissibility of the parol evidence relied on by the plaintiff. While entertaining little or no doubt upon this question, we find it unnecessary to determine whether the evidence so objected to was in whole or in part improperly received. Assuming its admissibility, a careful study of it has not disclosed such manifest error in the judgment of the learned trial judge (affirmed on appeal), disposing of what is undoubtedly a question of fact, that we would be justified in setting it aside. On the contrary, we think the learned judge's conclusions as to both branches of the plaintiff's case is supported by the facts disclosed before him.

As to the claim that, notwithstanding the inconsistency of the form in which it was deliberately put, the transaction was in reality one of loan or mortgage, it would require most convincing evidence to justify such a conclusion. The uncontradicted testimony that the defendant refused to entertain the idea of making a loan to the plaintiff, and the latter's admissions, that the defendant insisted on the transaction being treated as one of sale and purchase with an option to repurchase and that the document was drawn on the plaintiff's own instructions to evidence a transaction of the latter character, in our opinion preclude any possibility of our holding that the parties in fact intended something so essentially different from what they expressed in a writing the purport of which the plaintiff fully understood.

As to the implication of the term which the plaintiff alternatively suggests in regard to the admittedly unthought of interim dividends, there may be cases in which a court can say that it is inconceivable that, had the parties adverted to the subject, they would not have agreed to the stipulation contended for, and would then imply it. But this is very far indeed from being such a case. We may be satisfied that, had he thought of it at all, the plaintiff would have sought the insertion of such a term—it may even be that, had the defendant declined to assent to its inclusion, the plaintiff would have refused to go on with

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the transaction; but that the defendant would have agreed to such a provision it is clearly impossible to predicate. Nor can it be said that it is so improbable that the defendant would have insisted upon having the right to appropriate to himself the interim dividends, as incidental to his ownership of the shares, that it should be presumed that, had this particular matter been brought to his attention, he must have acceded to the plaintiff's wishes in regard to it. Unless prepared to take that view we cannot give effect to the alternative ground upon which the plaintiff seeks relief.

The obligation of the Royalite Oil Company to pay the dividend in question to the defendant as the registered holder of the shares on the 1st of November, 1926, is unquestionable. Having received the dividend from that company he is entitled to retain it unless a right to recover it from him, cognisable in a court of law and equity, has been shewn. That he has that right the plaintiff, in our opinion, has failed to establish.

The appeal accordingly fails and will be dismissed with costs.

DUFF J.—I concur in the judgment dismissing the appeal, and only desire to add a word as to the point made by counsel for the respondent, touching the admissibility of the parol evidence.

The rule is well established. The principle upon which it rests is stated by that eminent judge, Turner L.J., in *Lincoln* v. *Wright* (1). Where the real agreement is that the transaction shall be a mortgage transaction, "it is, in the eye of this Court, a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud." Such being the principle, the rule excluding extrinsic parol evidence offered to contradict, qualify or supplement a document which the parties have made the record of their transaction, was, in Equity, displaced, in cases in which the principle came into play; and since the Judicature Act, this rule in Equity is, of course, the rule in all the courts. On the other hand, it is quite open to two parties of competent years and under-

(1) (1859) 4 De G. & J. 16, at p. 22

standing, to enter into an agreement for the sale by one to the other of a property, and for the re-purchase within a given nominated period, of the same property at the same price, with or without interest, at the option of the seller. The law recognizes such dealings, and gives effect to them according to their terms, where that is the true description of the dealing into which the parties have deliberately entered. *Williams* v. *Owen* (1). And where, in the documents they have executed, the parties have clearly explained that such is the character of their transaction, it requires powerful collateral evidence to overcome the presumption that the record is a faithful one. *Barton* v. *Bank of New South Wales* (2).

SMITH J. (dissenting).—A general statement of the facts in this case is set out in the reasons for judgment of my Lord the Chief Justice. There was a great deal of discussion as to whether or not the parol evidence given at the trial was admissible. The written document between the parties of the 12th of November, 1925, (Ex. 1), does not purport to contain the whole bargain, and it is clear that it is only part of it. The other portion of the bargain, except the written transfer of the stock in the books of the company and the certificate therefor issued to the defendant, was verbal. In my opinion, therefore, evidence was admissible to show the complete bargain between the parties, and we must construe the written document in the light of that complete bargain.

The stock transferred by the plaintiff to the defendant was selling on the market at the time at $105 per share, so that the 1,600 shares were then worth $168,000. The defendant says that he did know at the time of the transfer what the market price was, but that it was liable to run down to almost nothing. The plaintiff was seeking a loan of $40,000, with which to pay off the Royal Bank his indebtedness for that amount, for which the Bank held the 1,600 shares as security. The plaintiff had applied for this loan to one Robinson, who submitted the application to the defendant, with the result that the parties and Mr. Robinson were brought together at the office of Mr.

(1) (1840) 5 M. & C. 303, at pp. 306 and 307.

(2) (1890) 15 App. Cas. 379, at pp. 380 and 381.

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Savary, the plaintiff's solicitor, who prepared the document which was finally signed by the parties at the office of Mr. Bennett. This document is in part as follows:

WHEREAS the vendor (defendant) has this day purchased from the purchaser (plaintiff), and is now the holder of sixteen hundred (1,600) shares of the capital of Royalite Oil Company, Limited, and has agreed to give to the purchaser an option for the repurchase of the said shares for the price and on the terms hereinafter set forth.

NOW THEREFORE THIS INDENTURE WITNESSETH that the vendor, in consideration of the sale of the said shares by the purchaser to the vendor, and other good and valuable considerations * * * doth hereby give and grant unto the purchaser an option, irrevocable within the time for acceptance herein limited, to purchase from the vendor the said sixteen hundred shares * * * . The option hereby given shall be open for acceptance up to and including, but not after the 12th day of November, A.D. 1926 * * *.

The purchase price of the said shares shall be the sum of fifty-one thousand, two hundred and eighty ($51,280) dollars.

* * * * *

(1) The vendor shall forthwith on the execution of these presents deposit the certificate or certificates for the said shares with the Stockyards Branch of the Bank of Montreal in the city of Calgary, and so long as the option hereby given shall remain open for acceptance, the said shares shall be left with the said Bank at its said Branch.

Then follows a provision by which the plaintiff was to be entitled at any time up to the 12th day of November, 1926, to purchase any part of the shares, in blocks of not less than 100 shares, on depositing to the credit of the defendant in the Stockyards Branch of the Bank of Montreal, Calgary, $100 for each share so purchased. All sums so paid were to be credited on the total purchase price of $51,280. The evidence shows that the transfer of the shares by the plaintiff to the defendant was concurrent with the execution of this document, so that the transfer or sale by the plaintiff to the defendant and the option of repurchase evidenced by the document constituted one transaction. The defendant admits that the $51,280 was made up of the $40,000 to be paid to the Royal Bank in satisfaction of the plaintiff's debt, with interest at 12 per cent. for one year, and $6,000, representing the cash payment on the house, with interest for one year at 8 per cent. He also admits that at the time he did not have in mind any dividend that might be earned on the stock. No dividend, apparently, was being paid on the stock at the time, and neither party seems to have had in mind the possibility of such a dividend.

On behalf of the appellant it was urged before us that, taking these circumstances into consideration, the transaction ought to be declared to be a loan by the defendant of $46,000 at the stipulated interest. The respondent relies on the fact of his having deliberately insisted on the terms set out in the document as written, and of his having refused to go into the transaction on any other terms. I think the evidence establishes this, and that the plaintiff accepted those terms after having had them read to him, and after having understood that they imported something different from the simple loan on the security of the stock that he had first contemplated. He could scarcely have failed to notice the express provision that the option was not to be open to him after the 12th of November, 1926. There would be no question in his mind as to whether or not that provision could be enforced against him, and there is no doubt on his evidence that he quite understood that by this provision he was agreeing that he was to have the right to get his stock back up to the 12th of November, 1926, but not afterwards.

I am of the opinion, therefore, that the document cannot be reformed so as to change its terms, and must be interpreted as it stands, in the light of the whole bargain between the parties, partly verbal and partly written. It follows from the express provision that the plaintiff was to have no right to exercise the option after the 12th of November, 1926; that there was to be no legal liability on the plaintiff to pay the debt. It was an agreement between the parties, so far as the written document goes, that if the plaintiff failed to exercise the option within the stipulated time, he was to lose all interest in the stock, which defendant was in that event to have as his own absolutely, without any right to look to the plaintiff for repayment of his money.

Such were the written terms of the contract; but whether or not the plaintiff would have had a right to redeem after the date fixed, notwithstanding the express provision to the contrary, would depend on whether or not it should be held that the transfer to defendant was merely as security for a loan. That question does not arise, because the option was in fact exercised within the stipulated time. If this question had arisen, a decision that there was a right to re-

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deem after the stipulated time, notwithstanding the express provision to the contrary, would not rest on any change of the terms of the bargain, but on the rule of equity which treats as a nullity any such provision where the transaction is to be construed as a transfer of property to secure a loan.

Considering, then, the whole bargain just as it was made, we have the significant fact that the defendant stipulated for the interest on his money at the rate mentioned during the year within which the plaintiff was to be entitled to exercise the option, and that he agreed to deposit the shares in the bank and to leave them there during the year for which he was to receive this interest in the event of the option being taken up. He was, by virtue of this term of the agreement, debarred from making any use of these shares during the year, and the plaintiff was necessarily under a like disability in reference to them. They were placed in defendant's name on the books of the company merely to ensure to him the absolute ownership of the shares, without more, in the event of the option not being exercised within the time limited. His ownership was not an absolute ownership during the year, but a limited and conditional ownership, only to become absolute in the event of the option not being exercised.

In my opinion, these terms import that the shares and every advantage incident to their ownership were to belong to the party ultimately becoming entitled to the shares under the terms of the agreement. It is, of course, urged that dividends belong to the actual owner, whoever he may be, at the time when the dividend is payable, and therefore in this case belonged to the defendant. It is not, however, disputed that in a transaction such as this the parties were at perfect liberty to provide otherwise, and it becomes a question of construction in the light of the whole bargain, written and verbal, as to whether or not this whole agreement between the parties imports that any incidental advantages accruing to the ownership of the shares during the year should go with the shares to the party who might ultimately become the absolute owner under the terms of the bargain. In my opinion, that is the proper construction to be placed upon the whole bargain between the parties. The

defendant in effect agreed not to make use of the shares during the year, and stipulated for the price that he was to be paid for the use of his money and his risk during the year, and had no intention at the time, as he admits, of stipulating for any further advantage or profit. On payment to him in full of his stipulated profit, he is not, in my opinion, entitled to collect a further profit of $4,000, or about nine per cent., for which he did not bargain or intend to bargain. To interpret the whole agreement as I have indicated requires no alteration of either the verbal or written part of the bargain. There can be no doubt that if it had been provided in express terms that any dividend that might be earned on the stock during the year was to go with the stock to the party who might become absolute owner under the terms of the agreement, the plaintiff would be entitled to recover the dividend in question. If such a term is properly to be inferred from the circumstances and the whole bargain between the parties, the result is the same, although this term is not set out in express language.

I think there is no force in the argument put forward by the learned Chief Justice in the court below, in his reasons for judgment, where he says:

> As well, one might say, that the option to purchase a farm would involve the right to an account of all the profits derived from it after the option was given until the exercise.

I can see no resemblance between such an option and the one in question here. In the case put by the learned Chief Justice there is not as part of the same transaction a transfer of the farm from the party obtaining the option to the party giving it, with an agreement by the latter to put it in possession of a third party during the year within which the option was to run, and to make no use of the property during that year, and a further provision that the latter party was to have interest on the purchase price during the year in case the option should be exercised.

It appears to me that the learned Chief Justice arrived at his conclusions through having failed to take into consideration these very important differences between the case that he states and the one here in question.

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I am of opinion that the appeal should be allowed with costs of this appeal and of the appeal below, and that judgment should be entered for the plaintiff for the amount claimed, with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Savary, Fenerty & McLaurin.*

Solicitors for the respondents: *Bennett, Hannah & Sanford.*