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HOLLAND v. CITY OF TORONTO.

The judgment of the Supreme Court of Canada, delivered (on 1st December, 1926) by the Chief Justice, after referring to an apparent misapprehension in the minds of the majority of the judges of the Appellate Division as to the basis (with regard to credibility of evidence) of the judgment of Mowat J., and pointing out that in view thereof there is not presented the formidable obstacle to the success of the present appeal which usually arises from concurrent adverse findings on a question of fact, discusses the factors to be considered in determining whether the fault (if any) attributable to a municipal corporation is so much more than merely ordinary neglect that it should be held to be very great or "gross" negligence, within s. 460 (3), reviews the evidence in the case, and concludes that there is established "gross negligence" of defendant city's sectionman in not taking steps for the remedying of the condition of the sidewalk, which the judgment finds to have been highly dangerous.

The judgment of the Supreme Court of Canada is reported in full in 59 Ont. L.R. 628, at pp. 631-637.

Appeal allowed with costs.

Gideon Grant K.C. for the appellant.

G. H. Kilmer K.C. and *W. G. Angus* for the respondent.

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*Oct. 19.

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*Feb. 1.

J. R. BOOTH LIMITED (DEFENDANT).....APPELLANT;

AND

W. K. McLEAN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Sale—Right of redemption—Contre-lettre—Transfer—Pledge—Collateral security for advances—Construction of agreement. Arts. 1014, 1025, 1550, 1966, 1970 C.C.

On the 23rd of September, 1920, the respondent and the appellant's auteur, J. R. B., entered into an agreement, by which the respondent undertook to raise out of the water and salve certain logs known as "deadheads" belonging to J. R. B., which might be found in a certain

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

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definite area on the Ottawa river. The respondent undertook to erect a sawmill at a place called Dow's Bay for the purpose of sawing the logs by him raised and salved. In order to carry out the undertaking the respondent required financial assistance and the appellant consented to lend it. The respondent performed his operations under the contract and the appellant continued to make advances. On the 8th of September, 1921, the amount advanced by the appellant reached the sum of $26,090 and, on that date, an agreement was entered into by which the respondent "hereby bargains, sells, conveys, assigns and makes over unto the (appellant) * * * the following property." The concluding clause of the agreement was as follows: "The present bargain and sale is so made for and in consideration of the price and sum of $26,090 in hand paid by the (appellant) * * *." On the same date the appellant wrote a letter to the respondent as follows: "Upon payment by you to the J. R. Booth Limited of the amount of your indebtedness to it the company will reassign and make over to you the property assigned this day by you to it, provided the contract between you and the company is still in force."

Held, Duff and Newcombe JJ. dissenting, that the above agreement was a sale vesting in the appellant the ownership of the property with a right of redemption stipulated in favour of the respondent upon payment by him of the amount of his indebtedness to the appellant.

Per Duff and Newcombe JJ. (dissenting). The agreement between the parties was a transfer or assignment of the property by way of collateral security for the advances made by the appellant to the respondent in the carrying out of the contract.

Judgment of the Court of King's Bench (Q.R. 40 K.B. 331) aff., Duff and Newcombe JJ. dissenting.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, at Hull, Trahan J. and maintaining the respondent's action.

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

H. Aylen K.C. and *J. A. Aylen* for the appellant.

J. N. Beauchamp for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Mignault and Rinfret JJ.) was delivered by

MIGNAULT J.—The appellant's contention is that the agreement of September 8, 1921, while made in the form of a sale, was only intended by the parties to operate as a transfer by way of security for the advances made by the

(1) (1926) Q.R. 40 K.B. 331.

appellant to the respondent in the carrying out of the contract, and which advances at that date, the appellant alleges, amounted to about $26,090, the price for which the sale was made.

But if we assume that that was the intention of the parties, there could have been no valid pledge of the movables, without giving possession to the appellant or to a third party agreed upon (arts. 1966, 1970 C.C.). This was not done and the respondent retained possession of the movables which he used in carrying out the contract. So that if the parties intended what the appellant says they intended, the whole contract was void.

If, on the contrary, they intended to make a sale of the movables to the appellant, coupled with a promise to reconvey them to the respondent (which is the effect of what is called the counter-letter), then possession could remain with the respondent and the sale would nevertheless be perfect (art. 1025 C.C.).

Construing therefore the contract according to the rule of art. 1014 C.C., that is to say so that it may have some effect rather than none at all, *magis ut valeat quam ut pereat,* it must be held to have been a sale with right of redemption. To such a sale the decision of this court in *Salvas* v. *Vassal* (1) fully applies, and the respondent not having exercised the right to redeem, the appellant remained absolute owner of the movables (art. 1550 C.C.). The obvious consequence is that it cannot now set up the amount of its advances for which the sale was made, in answer to the respondent's action.

While, at first blush, the word "indebtedness" in the counter-letter presents some difficulty, it is more apparent than real. The sale extinguished the indebtednes theretofore subsisting. But when we remember that the sale and the promise to reconvey really formed but one transaction, the indebtedness referred to in the counter-letter so called must be that which formed the consideration for the sale, and only ceased to exist upon its becoming effective.

Moreover, it is abundantly clear from the record before us that the dominant purpose of the parties in the making of the deed in question was to protect the property covered

(1) (1896) 27 Can. S.C.R. 68.

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by it against the pressing claims of the respondent's other creditors. Both appellant and respondent were ready to give the transaction whatever form was best adapted to ensure that result. The appellant was prepared to accept the transfer without restriction or qualification; the counter-letter was given at the instance of the respondent. Both parties may have expected that the respondent would exercise the *droit de réméré* and that the transfer of the property would thus operate as a security. But they must be taken to have known the legal effect of the transaction as it was carried out and must be assumed to have intended that effect. J. R. Booth Ltd. took the transfer in the only form in which it could be effective (if at all) to prevent McLean's other creditors from seizing the property transferred; it took, in order to secure that benefit, a deed the legal effect of which was to extinguish the indebtedness in consideration of which it was given. Having taken the chance of McLean's failing to redeem within the period stipulated, it cannot now be allowed to set up that the transfer—absolute in form—was meant to operate merely as a pledge—as such invalid—and that the indebtedness, the extinction of which was the consideration for which such transfer *ex facie* purports to be made, still subsists and is available by way of set-off or counter-claim against the plaintiff's demand.

As to the amount of the respondent's recovery, the two courts are in agreement, and I would not disturb their finding on this point.

I would dismiss the appeal with costs.

The judgment of Duff and Newcombe JJ. (dissenting) was delivered by

DUFF J.—In September, 1920, the respondent entered into an agreement with J. R. Booth, the predecessor of the appellant, by which the respondent undertook to take a quantity of logs from the water in a certain part of the Ottawa river, to erect a sawmill at a place called Dow's Bay, and there to saw into lumber the logs salved by him under the contract. Shortly afterwards, the

respondent applied to Booth for financial assistance to enable him to execute his contract, and received an advance of $5,000, which was secured by an assignment by one Lusk of a portable sawmill, together with some horses, wagons and other movables; an assignment which, it may be observed though absolute in form, was admittedly given as security only. The respondent proceeded with the execution of his contract, and in December, 1920, he acknowledged, by letter, that the steam mill he was then engaged in building, pursuant to the contract, and its appurtenances, were to be held by Booth as security for advances. Further advances having been made in the early part of 1921, on the 1st of April of that year the respondent, in an informal document, declared that certain specified property, comprising the sawmill and machinery and other articles connected with it, as well as horses, wagons, sleighs and other movables (including those which had been previously transferred by Lusk), were held by Booth as security for advances.

In the summer of 1921, the respondent obtained still further advances, and on the 8th of September, 1921, two additional documents were executed; and the crucial question on this appeal concerns the effect of these documents. The respondent's interpretation of them is this: There was a sale, he says, or, rather, a giving of property (comprised in a transfer from the respondent to the appellant) in payment of the respondent's indebtedness, to the amount of the consideration mentioned in the transfer, with a right of repurchase by the respondent for the same amount declared in a *contre-lettre* attached to the transfer. The appellant, on the other hand, avers, in substance, that there was merely a formal transfer to the appellant as security of property which, by existing arrangements informally expressed, was already held by him as security. Parol evidence was offered as to declarations of the parties touching the understanding between them, and rejected. There appear, however, to be good grounds, quite apart from this extrinsic evidence, for holding that the appellant's version of the transaction is the right one.

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The *contre-lettre* is in these words:

OTTAWA, 8th Septr., 1921.

MR. WALTER K. MCLEAN,
Breckenridge.

Dear Sir,—Upon payment by you to the J. R. Booth Limited of the amount of your indebtedness to it, the company will re-assign and make over to you the property assigned this day by you to it, provided the contract between you and the company is still in force.

Yours truly,

(Sgd.) J. R. BOOTH LIMITED,
Per JOHN BLACK,
Secretary.

And the material part of the transfer is as follows:

The present bargain and sale is so made for and in consideration of the price and sum of twenty-six thousand and ninety dollars ($26,090) in hand paid by the party of the second part to the party of the first part, the receipt whereof is hereby acknowledged which said sum of money has been used by the party of the first part for the purchase, acquisition and construction of the foregoing property.

When the whole of the facts in evidence are considered, those anterior to these documents of the 8th September, as well as those subsequent, the fair interpretation of them seems to be that accepted by Mr. Justice Dorion, upon whose dissenting judgment the appellant largely relies.

The critical point is: Did the parties intend a *pro tanto* payment and extinguishment of the respondent's debt to the appellant?

First it should be observed that the consideration for the transfer is in that document expressed in language which is far from apt to describe a consideration which consists merely in the satisfaction of a debt. The instrument records a bargain and sale, but a bargain and sale in consideration of moneys paid by the appellant which had previously been expended by the respondent in acquiring and constructing the property transferred. This does not suggest the extinction of a debt, as the true consideration. Indeed, the statement of the consideration itself is strictly consistent with the idea of a transfer—a "bargain and sale" —made in consideration of moneys "paid" by way of loan; and this is, in substance, the form of words ("in consideration of advances") used in one at least of the earlier documents, when admittedly the transfer was intended to be by way of security only.

Then, when we come to the *contre-lettre,* we find it expressed in terms which could hardly have been employed by parties intending by these documents to effect the extinguishment of any part of the respondent's debt. The respondent himself deposed that the sum mentioned in the transfer as the consideration for it was arrived at by ascertaining the value of the property transferred, and in his factum he points out that this sum was considerably less than the amount that had been advanced in cash prior to the 8th of September. It is difficult, if not impossible, to reconcile with this the contention that "indebtedness" in the *contre-lettre* means the sum mentioned in the transfer. Moreover, after the date of the transfer advances were made to a considerable amount, and it is impossible to suppose that this was not in contemplation when these documents were drawn up. Having regard to these considerations, the better view seems to be that the proper construction of the *contre-lettre* is that which ascribes to the word "indebtedness" its natural and ordinary meaning, and that the parties intended a retransfer upon payment by the respondent of the amount owing by him, whatever it might be at the time of payment; in other words, that the property was to be held as security for that indebtedness.

Then it must be remembered that the respondent retained possession of the property for some time after the execution of the documents, treating it as his own, and employing it as he had always done, in manufacturing lumber from the appellant's logs.

All these considerations, taken collectively, seem to afford a satisfactory ground for the conclusion reached by Mr. Justice Dorion in the court below.

In this view it is unnecessary to examine the question so much discussed in the courts below, whether the evidence offered by the appellant and rejected by the trial judge, of contemporaneous oral declarations by the parties as to their intention in executing the documents, was properly rejected as being excluded by art. 1234 of the Civil Code. That article is derived from the law of England; but we are not now concerned with any question as to the propriety of consulting the established principles of that law, governing the interpretation and application of the rule

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embodied in the article. Nevertheless (learned judges in the court below, the majority of whom considered the evidence inadmissible, having intimated views as to the pertinent rule of English law) it is perhaps desirable to say this: Had such a question arisen in a similar case before a tribunal administering law according to the principles of the law of England, there never could have been a doubt concerning the disposition of it. As a rule, where a debtor transfers property to his creditor, by a conveyance absolute in form, and a question arises whether or not the debt has been extinguished, parol evidence is technically admissible to shew that the conveyance, notwithstanding its absolute form was intended to take effect as a security only. The practice of the courts in dealing with such questions is admirably illustrated by the judgment of Lord Watson, speaking for the Judicial Committee, in *Barton* v. *The Bank of New South Wales* (1).

It follows from this view that the respondent's action should be dismissed. It results also that the appellant is entitled to recover the amount of his cross demand, $24,010.42. The appellant should have his costs of the action and of the cross demand, as well as those of both appeals.

Appeal dismissed with costs.

Solicitors for the appellant: *Aylen & Aylen.*

Solicitors for the respondent: *J. N. Beauchamp.*

(1) (1890) 15 A.C. 379.