Supreme Court of Canada
Lecomte v. O'Grady, (1918) 57 S.C.R. 563
Date: 1918-12-09

Joseph Lecomte (Defendant) Appellant;

and

J. M. De C. O'grady (Plaintiff) Respondent.

1918: October 15; 1918: October 21; 1918: October 29; 1918: December 9.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

Present: Sir Louis Davies C.J. and Idington, Anglin and Brodeur JJ. and Cassels J. *ad hoc.*

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Appeal—Final judgment—Substantive part of action—Promissory note— Security—Conditional Payment.

In an action in the Court of King's Bench, Man., on a document providing for payment of money a case was stated for the opinion of the court as to whether or not said document was a promissory note. On appeal from the judgment of the Court of Appeal thereon:—

Held, that the judgment disposed of substantive rights of the parties, and was a final judgment as the same is defined in sec. 2 (*e*) of the "Supreme Court Act."

The document was in the following form:—

"On the 15th Sept., 1911, without grace, after date I promise to pay to the order of O'G., A. & Co. at the Bank of Nova Scotia, Winnipeg, the sum of three thousand dollars, value received."

"Stock certificate for 50 shares Gas Traction Co. Ltd., attached to be surrendered on payment."

The memo. as to shares was written on the document before it was signed.

Held, Brodeur J. dissenting, that the memo. was not an integral part of the document, that it was not a condition but a consequence of payment, and the document was, therefore, a valid promissory note.

Judgment of the Court of Appeal ([1918] 2 W.W.R. 267; 40 D.L.R. 378) reversing ([1918] W.W.R. 115), affirmed.

APPEAL from a decision of the Court of Appeal for Manitoba[1], reversing the judgment at the hearing[2], on a stated case.

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[1] [1918] 2 W.W.R. 267; 40 D.L.R. 378.
[2] [1918] 1 W.W.R. 115.

The facts are fully stated in the above head-note.

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A motion was made to quash the appeal on the ground that the judgment of the Court of Appeal was not final.

W. L. Scott for the motion referred to St. John Lumber Co. v. Roy[3]; Jones v. Tucker[4].

Geo. F. Henderson K.C. contra was not called upon.

THE CHIEF JUSTICE.—This is an action to quash for want of jurisdiction. In this case an action was brought on a document claimed to be a promissory note for $3,000. After the statement of claim had been amended a stated case was prepared by the parties which, after reciting the document, asked the opinion of the court as to whether it was a promissory note, and if the court should decide that the document was not a promissory note the plaintiff should have leave to amend, whereas if the court should hold that the document was a promissory note the defendant should have the right to set up any defence he desired. The stated case was heard by Mr. Justice Metcalfe, who held that the document in question was not a promissory note. Appeal was taken to the Court of Appeal; where the judgment below was reversed, the court holding that the document was a promissory note. The defendant now appeals to the Supreme Court and the respondent moves to quash on the ground that the judgment is not a final judgment.

In my opinion the judgment below finally disposes of an important element of the defendant's defence and with respect to which he is without remedy if the appeal here is refused.

Motion dismissed with costs.

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

E. K. Williams for the respondent.

DAVIES J.—I concur with Mr. Justice Anglin.

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ANGLIN J.—The respondent moves to quash this appeal on the ground that the judgment appealed against is not final. That judgment disposed of a preliminary issue of law submitted upon a stated case. It determined that the document sued upon was a promissory note. It follows, should the judgment stand, that rights peculiar to a promissory note as distinguished from an agreement to pay money not of that character have been finally accorded to the plaintiff, and the defendant has been deprived of defences which he might have had to a mere promise to pay money not in the form of a negotiable

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[3] 53 Can. S.C.R. 310; 29 D.L.R. 12.
[4] 53 Can. S.C.R. 431; 30 D.L.R. 228.

instrument. Such rights I cannot but regard as substantive rights within the meaning of the definition of final judgment adopted by Parliament in 1913.

The motion, in my opinion, fails and should be dismissed with costs.

BRODEUR J.—This is a motion to quash for want of jurisdiction.

An action had been brought on a document claimed to be a promissory note and a stated case was prepared by the parties which, after reciting the document, asked the opinion of the court as to whether it was a promissory note or not. The trial judge held that the document in question was not a promissory note. An appeal was taken and the Court of Appeal held that the document was a promissory note. The defendant now appeals to this court.

It seems to me that we have jurisdiction. The right which has been determined by the court below is a substantive right and, in view of the "Supreme Court Act" as amended in 1913, we have the power to determine now which of the parties was right as to their contentions affecting the document in question.

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The motion to quash should be dismissed with costs.

On a later day the appeal was heard on the merits.

THE CHIEF JUSTICE.—This appeal comes to us in the form of a stated case, and we are asked whether a certain document is a promissory note or not.

The document in question was on a printed form, except the memorandum in the lower left-hand corner and reads as follows:—

Winnipeg, 1st December, 1910.

> On the 15th of September, 1911, without grace, after date I promise to pay to the order of O'Grady, Anderson and Co. Ltd., at the Bank of Nova Scotia, Winnipeg, the sum of three thousand dollars.
>
> Value received.

JOSEPH LECOMTE.

Stock certificate for
50 shares Gas Traction Co. Ltd.
attached to be surrendered on
payment.

I am of the opinion that the document is a promissory note, and J answer the question submitted in the affirmative.

The point to determine was whether the memorandum on the lower left corner of the note formed an integral or substantive part of the note. I am of the opinion that it did not and answer accordingly.

IDINGTON J.—I am of the opinion that the instrument in question herein is clearly a promissory note, and hence this appeal should be' dismissed with costs.

ANGLIN J.—On the short ground that the appended words do not qualify the obligation created by the

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unconditional promise to pay which precedes the maker's signature, I would hold the document before us to be a promissory note within s.s. 1 of sec. 178 of the "Bills of Exchange Act" (R.S.C. 1896, ch. 119). Any rights which the maker of the note may have under the appended memorandum will not arise until payment of the note has been made. It is, therefore, not necessary for the holder to aver or to prove readiness and willingness at the date of maturity of the note to deliver to the maker the stock certificate mentioned in the memorandum as a condition of his right to recover on the note. Still less can he be required to aver or to shew tender of the certificate either then or before action.

As Hawkins J. said, with the concurrence of Wills J., in *Yates* v. *Evans*[5], at p. 448:—

> The early part of the document is a complete note in itself—there is nothing in the memorandum to qualify the terms of the note and there is no ambiguity in the note * * * All that is necessary for the purpose of suing is that the amount claimed is due.

The decision of the English Court of Appeal in *Kirkwood* v. *Carroll*[6], overruling *Kirkwood* v. *Smith*[7], and holding that s.s. 3 of sec. 83 of the Imperial statute (our s.s. 3 of sec. 176) does not import, as Lord Russell C.J. had held in the earlier case, that

[5] 61 L.J.Q.B. 446.
[6] [1903] 1 K.B. 531.
[7] [1896] 1 Q.B. 582.

> if the document contains anything more than is there referred to it would not be a valid promissory note,

very materially weakens, if it does not wholly destroy, the value of a number of Canadian cases relied on by the appellant.

I would dismiss the appeal.

BRODEUR J.—The question we are called upon to decide is whether the written document on which the action is based is a promissory note.

It reads as follows:—

Winnipeg, 1st December, 1910.

> On the 15th of September, 1911, without grace, after date I promise to pay to the order of O'Grady, Anderson and Co. Ltd., at the Bank of Nova Scotia, Winnipeg, the sum of three thousand dollars.

JOSEPH LECOMTE.

> *Stock certificate for*
> *50 shares Gas Traction Co. Ltd.*
> *attached to be surrendered on payment.*

The part in italics was written on the document before it was signed. The other part was on the ordinary printed form of a promissory note.

It cannot be disputed that these written words, providing that the stock certificate for 50 shares should be surrendered on payment of the $3,000 agreed upon, form part of the document. The signature is inserted in such a manner as to have the effect of authenticating them. Halsbury, vbo. Contract, No. 775.

In a case of *Campbell* v. *McKinnon*[8], decided in 1859, some words had been written on the back of an ordinary form of promissory note, and Chief Justice Robinson said, at page 614, that

> The agreement written on the back must be looked upon as part of the instrument, being upon it before and at the time it was signed.

[8] 18 U.C.Q.B. 612.

The respondent is, then, under abligation to pay to O'Grady, Anderson & Co., or to their order, at such a date a certain sum of money provided that a certain stock certificate should be at the time of payment surrendered to him.

And O'Grady, Anderson & Co., in accepting that document, become entitled to claim under it on the condition that they surrender that stock certificate.

And any subsequent assignee who becomes the holder of that promise to pay cannot claim payment without tendering that stock certificate.

But is that document an unconditional promise to pay?

It was decided in England, in a case of *Bavins* v. *London and South Western Bank*[9], that a document in the form of an ordinary cheque ordering a banker to pay a sum of money

> provided the reciept form at the foot hereof is duly signed, stamped and dated

was not unconditional and, therefore, was not a cheque within the meaning of the Act.

In the case of *Bavins,* as in the present case, the document provided payment to order and was in that respect apparently negotiable; but the obligation for the payee or the bearer to sign a certain receipt in that case, and the obligation for the bearer or the payee in this case to deliver a certain stock certificate, rendered the document a conditional one. As a result, the document we have to construe is not a negotiable instrument the property in which is acquired by any one who takes it *bonâ fide* and for value notwithstanding any defect of title in the person from whom he took it. The engagement contained therein could not be transferred by simple delivery of it (Stevens Mercantile Law, 5th ed., page 286).

Several decisions have been brought to our attention in connection with this question of unconditional promise to pay.

I may divide them into two groups:—

One has reference to those promissory notes called lien notes because in the body of the notes it is stipulated that the money which is to be paid is the consideration for sale of property and that neither the title nor the right to possession is to pass until payment.

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[9] [1900] 1 Q.B. 270.

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The other group has reference to what I will call suretyship notes. They are notes signed by two persons of whom one is a surety, and stipulation is made in the body of the note that the time given to one of the makers of the note will not prejudice the right of the holder to proceed against the other maker.

With regard to the cases on lien notes the jurisprudence was at first somewhat uncertain. They were generally used in connection with the sale of agricultural implements. By the contract, the vendor would retain the ownership of the machines sold to the farmers, but would put the latter in possession thereof. Then the farmers would give their promissory notes, and it would be stipulated in the body of the notes that the title to the machine for which the note was given should remain in the vendors until the note was paid.

In 1894, in a case of *Merchants Bank* v. *Dunlop,* decided in Manitoba[10], it was held that the recital in the notes should be construed as simply stating the consideration for which the note was given, viz., the sale of the article and the vendor's promise to complete the sale upon payment. The note was held a valid promissory note.

In the same year (1894) the same question came before Mr. Justice Maclennan in Chambers in Ontario, on an appeal from the County Court in a case of *Dominion Bank* v. *Wiggins*[11]. In rendering his decision Mr. Justice Maclennan said that in view of the general interest and importance of the question he had conferred with the other members of the Court of Appeal, of which he was a member, and that they agreed in his conclusions, viz., that the maker of the

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note is not compellable to pay when the day of payment arrives, unless at the same time he gets the property with a good title, and the payment to be made is, therefore, not an absolute unconditional payment at all events, such as is required to constitute a good promissory note.

In the following cases, the decision of the Ontario case was followed:—

[10] 9 Man. R. 623.
[11] 21 Ont. App. R. 275.

1897.—Prescott v. Garland[12], by the full court of New Brunswick; 1899.—Bank of Hamilton v. Gillies[13], by the full court of Manitoba; 1906.—Frank v. Gazelle Live Stock Association[14].

In the group of suretyship cases there are three decisions:—

1892.—Yates v. Evans[15]; 1896.—Kirkwood v. Smith[16]; 1903.—Kirkwood v. Carroll[17].

The document on which those decisions were based was in the form of a joint and several promissory note by a principal debtor and a surety with a proviso that time may be given to either without the consent of the other, and without prejudice to the rights of the holders /?/to proceed against either party.

In the *Yates Case*[15], which was the first decided, the court held that the clause was a mere consent or licence that time may be given to the principal debtor and that if time may be so given the surety will not avail itself of that as a defence.

In *Kirkwood* v. *Smith*[16], it was held that the documents were not valid promissory notes.

But in 1903, in *Kirkwood* v. *Carroll*[17], the Court of King's Bench decided that those additions to the promissory notes did not qualify them, and it was

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declared that *Kirkwood* v. *Smith*[18], could not any longer be regarded as an authority.

In those documents the makers did not stipulate any conditions in their favour; the words added to the promissory notes were simply licences in favour of the holders; and they are in that respect very different from the lien cases and the present case, where the makers practically said: I am ready to pay at such a date, but provided you give me a full title to the machine sold, or provided you give me my stock certificates.

It is a condition which is imposed upon the creditor of the debt and in favour of the maker of the alleged promissory note.

[12] 34 N.B. Rep. 291.
[13] 12 Man. R. 495.
[14] 6 Terr. L.R. 392.
[15] 61 L.J.Q.B. 446.
[16] [1896] 1 Q.B. 582.
[17] [1903] 1 K.B. 531.
[15] 61 L.J.Q.B. 446.
[16] [1896] 1 Q.B. 582.
[17] [1903] 1 K.B. 531.
[18] [1886] 1 Q.B. 582.

The payment of the money and the surrender of the stock certificates are to be contemporaneous acts.

Anson, Contracts, 7th ed., p. 299, says:—

> It is safe to say that, in the absence of clear indications to the contrary, promises, each of which forms the whole consideration for the other, will be held to be concurrent conditions.

Applying these principles to the present case I come to the conclusion that the document in question is a conditional one, and that it does not constitute a valid promissory note as defined by section 176 of the "Bills of Exchange Act."

I would adopt the views expressed by the Court of King's Bench and by Mr. Justice Fullerton in the Court of Appeal.

CASSELS J.—I concur with Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitor for the appellant: L. A. Delorme.

Solicitor for the respondent: Philip C. Locke.