GASPARD DESERRES (PLAINTIFF) . APPELLANT; 1906

AND *June 7. *Oct. 11.

HENRI A. A. BRAULT (DEFENDANT) . RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Construction of deed—Ambiguity—Discharge of debtor—Contract—Illegal consideration—Right of action.

Where the language of an instrument is ambiguous or obscure, the intention of the parties should be ascertained by consideration of the circumstances attending the execution of the agreement.

A deed of settlement between B and a bank declared that he owed the bank $4,731.61 for interest on an advance in respect to a lottery scheme and a further sum of $18,762.02 for advances on an account for the purchase of stock, two notes being given for these amounts, respectively, and the shares of stock being pledged as security for the large note only. Subsequently, the directors of the bank passed a resolution authorizing the discharge of B., on payment of $15,000 by one V., *"jusqu'a concurrence de la dite somme de* $15,000" and the transfer of the shares to V. This resolution was followed by a deed of compromise, V. paying the $15,000, and obtaining a transfer of the shares, and it was thereby declared that, by the transaction, B. was discharged in so far as concerned the bank's advances on the stock account *"vis-à-vis la banque des avances qu'elle lui a faites du chef susdit mentionnées en un acte de règlement," etc.*, the resolution being annexed and the deed of settlement referred to for imputation of the payment, and V. was to become creditor of B. under conditions mentioned, *"jusqu'à concurrence de* $15,000," the note which had not become due and the securities being allowed to remain in possession of the bank. In an action by D. to whom the notes held by the bank were assigned:

Held, reversing the judgment appealed from, that the effect of the deed of compromise was to discharge B. merely to the extent of the $15,000 on account of the larger note; and further, affirming the judgment appealed from, that no action could lie upon the smaller note as it represented interest on a claim in relation to a contract of an illegal nature. *L'Association St. Jean Baptiste* v. *Brault* (30 Can. S.C.R. 598) followed.

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*PRESENT:—Fitzpatrick C.J. and Girouard, Davies, Idington and Maclennan JJ.

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APPEAL from a decision of the Superior Court, sitting in review, at Montreal, affirming the judgment of the Superior Court, District of Montreal, at the trial, by which the plaintiff's action was dismissed with costs.

The plaintiff sued to recover $9,600.54 for the balance of two promissory notes made by the defendant in favour of La Banque du Peuple in settlement of debts owing by him to the bank, one for $18,762.02 for advances and interest on a loan for the purchase of Dominion Cotton Co. shares, and the other for $4,731.61 advanced to meet the interest on a loan made in connection with a lottery scheme. Credit was given for a payment of $15,000 on account of the larger note, thus leaving the balance claimed. The defendant contended that the whole amount of the larger note had been discharged by the deed of compromise mentioned in the head-note and that the smaller note had been compensated by a larger sum due him by the bank for interest on an obligation assigned by him to the bank. At the trial Mr. Justice Archibald held that the deed of compromise had discharged the whole of the larger note as a draft thereof had been approved by the bank before execution and the resolution of the directors in respect to its execution could be so construed as to authorize a full discharge; the learned judge also held that the consideration for the other note was illegal, being based upon an immoral contract relating to a lottery and, therefore, that no recovery could be had thereon. This judgment was affirmed by the judgment now appealed from.

The questions raised upon the appeal are stated in the judgments now reported.

Béique K.C. and *Delfausse* for the appellant.

Belcourt K.C. and *Lamothe K.C.* for the respondent.

THE CHIEF JUSTICE concurred in the judgment delivered by His Lordship Mr. Justice Maclennan.

GIROUARD J. concurred for the reasons stated by Idington J.

DAVIES J. concurred for the reasons stated by their Lordships Justices Idington and Maclennan.

IDINGTON J.—The respondent owed the Banque du Peuple $18,772.17 on the 20th July, 1897, for which he gave his promissory note at eighteen months with interest at six per cent. per annum pursuant to a deed of settlement relative to this and another debt he owed the bank. By that deed of settlement there was declared to be held by the bank "Dominion Cotton" and "Duluth" stocks of the respondents, as collateral security only for this debt, and that the bank could sell if default made in paying this note. The original advance on this amount had been $18,000 and the balance odd since is made up of interest thereon.

On the 15th September, 1898, the parties agreed that one Vinet should advance the bank $15,000 and get the "Dominion Cotton" stock, and that the respondent would have three years to pay the said sum, and the bank release the respondent.

The question is raised whether or not this release should be of the whole indebtedness or only the sum of $15,000, part of the whole principal debt.

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Several causes no doubt moved each party to this arrangement, but none of such a character as to suggest that the bank was likely to be willing, with such securities as it had, to sacrifice $3,772 and 14 months' interest on $18,772 for the sake of getting what they got.

Yet we are asked to construe the instrument which concluded the arrangement in this sense.

This instrument certainly contains some expressions which lend a colour to the contention which has received the support of the courts below.

It purports, however, to have been made by virtue of a resolution of the bank directors which is annexed to it.

This resolution must be held to govern all that is doubtful in the document in question. It is not clear that without such authority the bank agents had any power to make such a surrender of its claims, under such circumstances as existed here.

It is idle, however, to suggest that this agreement for release in whole or in part might have fallen within the scope of such general authority as the officers of the bank might have had, for it obviously never was intended by either party that in this case such authority was to be or was relied on.

The resolution clearly contemplates an acquittance to the respondent of his debt to the extent of the sum of $15,000—and no more.

If the parties have not been in accord as to that then there was no release.

It seems to me, however, that he well understood this was the extent to which he was released and all he expected or desired.

One crucial circumstance, in this connection, is

the retention by the bank of the respondent's promissory note and of the further collateral securities known as the "Duluth" stock, which so remained without objection in their hands until respondent heard of the proposed sale of same to the appellant, who acquired them from the bank and now sues upon said promissory note.

The intention of the parties must be sought in interpreting any document, and as an aid thereto the surrounding facts and circumstances can and, in doubtful cases when ambiguous words are used, must always be looked at.

I must not be understood as including in that, evidence of actual intention or agreement. Evidence of that kind given here I exclude, as it is not necessary to consider questions here raised thereby.

On this branch of the case I think appellants are entitled to succeed.

On the other branch where the question of illegality is raised I am unable to see how the appellants can succeed.

The promissory note sued upon was given for the balance of a debt of $34,731.61 of which $30,000 was extinguished by dealings, needless to refer to, save for the purpose of such indications as they furnish, as to the contested point of whether or not the $30,000 was paid on account of principal or interest.

It seems, by the case of *L'Association St. Jean Baptiste* v. *Brault*(1), that a claim for interest upon such advances can not be maintained.

Hence, in this case, if the promissory note now in question were given for interest, it must be held void in law.

(1) 30 Can. S.C.R. 598.

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It seems to me that the intention of the parties, as shewn by expressions in the documents dealing with this adjustment of thirty thousand dollars, on account of the appellant's claim when it stood at $34,731, as stated above, as well as date of note in question being a few days prior to those dealings, shew a clear intention to apply that sum of $30,000 on account of principal. The appellant's factum clearly refers to this payment as if on account of capital.

But, in case there be not a clear appropriation to pay principal, it might be urged, in the absence of such express appropriation, that the payment of $30,000 would, in due course of law, wipe out the interest first, and that as a result the balance going to make up the note in question must be treated as part of principal.

I am, however, of the opinion that if the illegality so tainted the interest that it be irrecoverable, then the law will not impute, in the absence of express application, the payment of any sum to the liquidation of such a debt when there is another to which it can be properly and lawfully imputed.

I have not been able to find express authority on the point or any allusion to it in the text books, but such a result seems to me clear on principle.

Hence I find that appellants must fail—on this ground—which leaves the interest all that the note in question can represent.

The reservation in the Criminal Code relied upon by Mr. Béique will not cover a lottery, of the character of this, as it was carried on. The case above referred to seems decisive unless that reservation could possibly have distinguished, as I think it cannot, this from that case.

All other debts of the respondent he swears were paid, and in this he is not contradicted.

As to this part of appellant's claim I think their appeal must fail.

As each had succeeded in a material part of the case I think there should be no costs of this appeal, but plaintiff (appellant) should get costs in courts below.

MACLENNAN J.—I am of opinion that the judgment should be affirmed so far as relates to the smaller of the two notes of the 20th July, 1897, but that we ought to reverse it with respect to the claim upon the other note.

The question is one of some nicety, depending on the construction of a deed dated the 15th September, 1898, between the Banque du Peuple and the respondent.

At the date of this deed the Banque du Peuple held two notes made by defendant, one for $18,772.17, and the other for a smaller sum, both made the 20th July, 1897, and both payable with interest at 6%, eighteen months after date; and for the largest note they held as security 150 shares of Dominion Cotton Co. stock, and 200 shares of Duluth Railway Co. stock, with power of sale on default. The larger note was for an advance made by the bank to the respondent of money wherewith to purchase the cotton shares.

While these notes had still about four months to run the dealing now in question took place.

It is in the form of a deed acknowledged before a notary. The parties to the deed are the bank and the respondent, and also a Mr. Vinet. The descrip-

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tion of the bank as party appearing is expressed as follows:—The Banque du Peuple represented in these presents by Mr. Dufresne, its cashier, in virtue of a resolution of its Board of Directors at a meeting of the ninth instant, *hereto annexed.*

The deed goes on to say:—As the result of a compromise between the parties, Vinet has this day paid in discharge of Brault to the bank a sum of $15,000 which it had advanced to him to acquire 150 shares of the Dominion Cotton Co., and the bank, which was guaranteed the repayment of its advance by the transfer which had been made to it of the said 150 shares, has this day transferred to Vinet the same shares. And by this act Brault is discharged towards the bank from the advances which it had made to him of the character aforesaid mentioned in a deed of settlement passed * * * the 24th July, 1897, to which the parties refer for the *application or reduction* of the sum, and Vinet becomes the new creditor of Brault on the following conditions, to the extent of $15,000 secured by the transfer of the said shares which takes effect from the first instant.

The remainder of the deed concerns Brault and Vinet alone and has no bearing on the question in the appeal except in declaring that the shares were to be regarded as worth par.

The judgment declares that upon the true construction of this deed the bank has discharged Brault from the full amount of the note, whereas the appellant contends that the discharge is limited to the sum of $15,000, and that he, as assignee of the bank, is entitled to recover the difference.

Now unless it is made perfectly clear that the

bank has released the respondent by this deed the appellant must succeed, for there is absolutely nothing else in evidence favouring that conclusion, and everything outside of the deed favours the contrary view. Some of these last circumstances may be noticed. The debt was represented by a note not yet due, which remained in the possession of the bank for more than a year afterwards, without objection or demand by Brault. The bank held as security, besides the 150 shares of the Cotton Co., 200 "Duluth" shares and these were left and continued in the name of the bank for more than a year afterwards, without any complaint or demand of transfer by Brault. The deed makes no provision whatever for delivering up of the note or the transfer of the shares to him.

Then let us see whether the deed, while it does not in terms discharge the note or provide for the retransfer of the shares, clearly releases the defendant beyond $15,000.

The first thing to be noted is that the resolution of the directors of the bank is referred to in the deed as being annexed (*ci-jointe*), and is therefore to be regarded as part of the deed. That resolution authorizes the cashier on the receipt of $15,000 from Vinet to transfer to him the 150 shares of "Cotton" stock, held by the bank as security from Brault, in such a manner that Vinet shall become the creditor of Brault, and that Brault shall be discharged to the bank *to the amount of the said sum of* $15,000, *"telle qu'enoncée"* in a deed of 24th July, 1897, and this present transfer being more particularly expressed in a draft deed approved by the counsel of the bank and which is to be signed by the bank and Vinet and Brault. The resolution further authorizes the cashier in order to complete the business, so far as con-

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cerned Mr. Brault, to transfer to Vinet in the name of the bank the 150 shares of "Cotton" stock.

This resolution is signed by the president, and professes to have been passed at a meeting at which five other directors were present. The draft deed referred to is the deed in question, which was in fact prepared by Brault some time before, and was approved of by the bank's counsel.

It is quite plain that what the board intended to do, and to authorize their cashier to do, was to discharge Brault only to the extent of $15,000. There is no sum of $15,000 mentioned in the deed of 24th July, 1897, and I therefore read *"telle qu'enoncée"* as intending to say that the $15,000 to be released was part of the money mentioned in that deed.

But then there is the reference to the draft deed, which is the very deed in question, and which now requires consideration. The deed says that, as the result of what had been agreed, Brault is discharged to the bank of the advances, which it has made to him, of the character or for the purpose aforesaid, (that is, as I understand the words "du chef susdit," for the purpose of buying the "Cotton" shares), mentioned in the deed of 24th July, 1897,

> auquel les parties refèrent pour l'imputation de la somme, et M. Vinet devient le nouveau créancier de M. Brault aux conditions ci-après jusqu'à concurrence de quinze mille dollars garanties par le transporte des dites actions.

Reading these words, and omitting all but the substantial governing words, they read thus:—By this transaction Brault is discharged from the advances mentioned in the deed of 24th July, to which the parties refer for the deduction of the sum, and Vinet becomes the creditor of Brault to the extent of $15,000.

That is, the words *to the extent of* $15,000 qualify not merely the words immediately preceding them, but also the words, *Brault is discharged from the advances mentioned.* The deed of 24th July is to be referred to for the deduction of *the sum.* What sum? Evidently the sum which was to be discharged, as well as the sum for which Vinet was to become the new creditor of Brault.

The language of the deed is obscure, but when studied and applied to the circumstances, may and ought to be read as above. Reading it in that manner makes it consistent with the clearly expressed intention and purpose of the directors of the bank, as expressed in the resolution, and also with the conduct of the parties at the time and for more than a year afterwards.

Appeal allowed in part without costs.

Solicitors for the appellant: *Martineau & Delfausse.*

Solicitors for the respondent: *Lamothe & Trudel.*