

1905
 *March 16. LA BANQUE D'HOCHELAGA (DE- { APPELLANT ;
 *March 20. FENDANT)..... }
 AND
 LOUIS EUCLIDE BEAUCHAMP { RESPONDENT ;
 (PLAINTIFF)..... }
 AND
 LA COMPAGNIE DE TÉLÉ-
 PHONE DES MARCHANDS } MISE EN CAUSE.
 DE MONTRÉAL..... }

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

*Composition and discharge—Construction of deed—Novation—Reservation
of collateral security—Delivering up evidences of debt.*

By deed of composition and discharge the bank agreed to accept composition notes in discharge of its claim against the plaintiff at a rate in the dollar, special reserve being made as to the securities it then held for the debt due by the plaintiff. The original debt was to revive in full on default in payment of any of the composition notes. Upon receiving the composition notes the bank surrendered the notes representing the full amount of its claim.

Held, reversing the judgment appealed from, that the effect of the agreement coupled with the reservation made was that the debtor was to be discharged merely from personal liability on payment of the composition notes but that the securities were to be still held by the bank for the purpose of reimbursing itself, if possible, to the extent of the balance of the original debt.

Held, also, that the surrender of the original notes by the bank did not extinguish the debt they represented and under the circumstances there was no novation.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, maintaining the plaintiff's consolidated actions with costs.

In March, 1900, the plaintiff obtained a deed from his creditors for sums of \$100 and upwards in composition and discharge of the debts owing by him to them, as follows ;—

“ We the undersigned creditors of L. E. Beauchamp, of the City of Montreal, hereby agree to accept from

*PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

him a composition of seventy-five cents in the dollar on the amount of our respective claims against him at this date; said composition payable by his notes at 3, 6, 9, 12, 15, and 18 months from 1st May next without interest, it being a condition to this agreement that Mrs. L. E. Beauchamp's claim will remain in abeyance till all the composition notes are fully paid. Said composition to be signed by all creditors for \$100.00 and over. The real estate to be transferred to the Hochelaga Bank, Gault Bros. & Co. and J. G. Mackenzie & Co., till composition notes are fully paid.

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" S. GREENSHIELDS, SON & Co.

" J. S. MACKENZIE & Co.

" THE GAULT BROTHERS Co. Limited.

" L. J. B. PICKEN, Attorney.

" BROPHY, CAINS & Co.

" THE W. R. BROCK COMPANY, (Limited).

" A. C. CUMMING, Attorney.

" LIDDELL, LESPERANCE, accept a 3 and 6 months note.

" CAVERHILL & KISSOCK,

" Except on goods dated 1st April, 1900.

" Special reserve being made as to the securities which we hold.

" BANQUE D'HOCHÉLAGA,

" per M. J. A. PRENDERGAST, Gen. Mgr,

" 3 months note THIBAudeau BROTHERS & Co.

" DALY & MORIN

" DALY

" ISIDORE LECLAIRE

" J. GRENIER & CIE., 3 et 6 mois.

" In case any of the instalments are not paid at maturity the balance of the original debt will revive in full.

The security held by the bank was an assignment of a debt of \$5,000 owing to plaintiff by the telephone company, *mise en cause*. The debt due by the plaintiff to the bank, at the time of the signing of the deed, amounted to \$12,985.60, and on execution of the composition thereby effected the bank received six notes

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from the plaintiff amounting to \$9,839.20 and, thereupon, surrendered to the plaintiff his original notes then held by the bank, representing their full claim of \$12,985.60.

The first three composition notes were duly paid to the bank which, in the meantime, had continued collecting from the telephone company on their collateral security, so that upon the maturity of the fourth composition note it had collected \$4,350 on this security. The plaintiff asked to have this sum applied towards payment of the three last composition notes, but the bank refused to do so, contending that the reserve made in the deed entitled it not only to receive the amount of the composition at the rate of seventy-five cents in the dollar upon the amount of their full claim against the plaintiff, but also to make the remaining twenty-five cents in the dollar by realizing, if possible, upon the collateral security so reserved.

The plaintiff then brought two actions against the bank, which were subsequently consolidated, and the plaintiff's *demandes* therein were, in effect, granted by the trial court judge (Robidoux J.) affirmed by the judgment appealed from, which condemned the bank to return all the composition notes to the plaintiff and retransfer to him the collateral security or the balance due thereon.

The material questions at issue on the present appeal are stated in the judgment of the court as delivered by His Lordship Mr. Justice Nesbitt.

Brosseau K. C. for the appellant.

Angers K.C. and *Beauchamp K. C.* for the respondent.

The judgment of the court was delivered by :

NESBITT J.—The plaintiff being indebted to the bank in the sum of \$12,800 for which the bank held as col-

lateral security certain debts due from the company *mise en cause* to the plaintiff to the amount of about \$5,000 asked his creditors for a composition at seventy-five cents on the dollar, said composition to be payable by his notes at three, six, nine, twelve, fifteen and eighteen months from the 1st May, 1900. All creditors of \$100 and over were to sign. Certain of the creditors signed with a condition following their signatures that notes at three and six months should be given instead of the notes provided for in the deed, and one firm signed excepting goods sold on a certain date. The bank signed by its general manager adding the words "special reserve being made as to the securities which we hold."

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The bank had collected from the Telephone Company about \$4,500 and the plaintiff has paid them in addition some \$4,869, which two sums added together would pay the seventy-five cents on the dollar due under the composition deed. The plaintiff claims that the money collected from the Telephone Company should be applied on the seventy-five cents on the dollar and that he should be entitled to receive the return of the balance of the claim against the Telephone Company and a return of his notes. And the bank claim that they are entitled to receive from him seventy-five cents on the dollar and to obtain, if possible, the other twenty-five cents on the dollar from the realisation of the collateral security.

The trial judge found in favour of the plaintiff and that judgment has been confirmed by a majority of the judges of the Court of King's Bench. The majority of the court below take the view that the reserve of the securities in the composition deed was a reserve to guarantee the payment of the seventy-five cents on the dollar.

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I think that the true construction of the bank's reservation when they signed the deed is that the bank say to the debtor, " we will accept seventy-five cents on the dollar from you in full discharge of your personal liability to us, but the collateral securities we have we will hold for whatever they may be worth, and to the extent of twenty-five cents on the dollar we will collect on them if we can."

Of course any balance over the twenty-five cents would be accounted for. I think the view taken by Mr. Justice Hall in the court below was the correct one.

True the original notes were given up by the bank to the respondent, but not to extinguish the debt, but for the purpose of being handed to the other creditors. These notes were, moreover, mere evidence of the debt and if it can be established that the latter was not extinguished or novated then it is in full force. The deed of composition declares in express terms that in case any of the instalments were not paid at maturity the balance of the original debt would revive in full.

Some interesting questions presented themselves at the hearing arising out of the manner and expressed conditions under which the deed of composition was signed by the several creditors by virtue of which the necessary equality which the deed called for amongst the assenting creditors was destroyed. No question was raised before us on the point and in the view we take of the case it is not necessary to do more than refer to it to shew that we have not by our silence given an apparent sanction to such a proceeding.

The actions of the respondent should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Brosseau, Lajoie, Lacoste & Quigley.*

Solicitor for the respondent: *J. E. Beauchamp.*