

1895 PETER SARSFIELD MURPHY } APPELLANT;
 *Feb. 22, 23. (PLAINTIFF) }
 *May 6.

AND

GEORGE BURY (DEFENDANT) RESPONDENT.
 ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR
 LOWER CANADA (APPEAL SIDE).

Signification of transfer—Condition precedent to right of action—Partnership transaction in real estate—Act of resiliation, effect of.

The signification of a transfer or sale of a debt or right of action is a condition precedent to the right of action of the transferee or purchaser against the debtor, and the necessity of such signification is not removed by proof of knowledge by the debtor of the transfer or sale.

The want of such signification is put in issue by a *défense au fonds en fait*.

M. and B. entered into a speculation together in the purchase of real estate the title to which was taken in the name of B. and the first instalment of purchase money was acquired from a brother of M. to whom B. gave an obligation therefor and transferred to M. a half interest in the property. As each subsequent instalment of purchase money fell due a suit was taken by the vendor against B. and the judgments in such suits as well as the obligation for the first instalment were transferred to M. but without any signification in either case. Subsequently by a formal act of resiliation B. and M. annulled the transfer of the half interest in the property made by B. to M. and formally relieved M. of all further obligation as proprietor *par indivis* for further advances toward the balance due the vendor and threw the burden of providing it entirely upon B.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the act of resiliation and the replacement of the title which it effected into the name of B. was a virtual abandonment on the part of M. of all previous investments made by him in the property or in the claims of others against that property of which he may have taken transfers.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming a

*PRESENT:—Sir Henry Strong C.J., and Fournier, Taschereau, Sedgewick and King JJ.

judgment of the Superior Court at Montreal (Gill J.), by which an incidental demand made by the appellant Murphy was dismissed.

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The difficulties which gave rise to the litigation between the parties originated in two distinct transactions or real estate speculations, one called "the Barsalou transaction," on lot 615 in St. Mary's Ward, in the city of Montreal, and the other known as the "Hall transaction" and relating to property at the corner of St. Catherine Street and Papineau Road in the same city.

In his factum and argument before the Supreme Court, the appellant abandoned that part of his claims which related to the Barsalou transaction, and confined his demand to the sums due him by the respondent upon the Hall property venture.

The facts of the case, which are somewhat complicated, are very clearly set out in the following reasons given by the Honourable Mr. Justice Hall of the Court of Queen's Bench, when delivering the judgment of that court:

"The two parties to this litigation were possessed of certain rights and interests in a property known as part of lot no. 615 in St. Mary's Ward, in this city. The title, which prior to 18th November, 1882, had been standing in the name of Bury, was transferred on that day to Murphy, the appellant, and the respective rights of the parties in the property were determined and expressed by means of a written memorandum signed by both. * * * * * The property was sold by Murphy for the sum of \$13,382.60, most of which remained in the purchaser's hands, under stipulations and conditions which Bury considered only as concerted methods on the part of Murphy to deprive him of his rights in the proceeds. Bury thereupon took an action against Murphy and the purchaser, asking that

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the imputation of payment in the deed be declared fraudulent, and that the purchaser be ordered to retain all the balance of purchase money in his hands until the court should determine the precise amount of Bury's interest therein. A subsequent action was taken by Bury against Murphy, for an account. The first action was dismissed in the Superior Court upon the ground that Bury, having trusted Murphy with his interest in the property for the purpose of selling it, had no longer an actual right of property in the land, or its proceeds, but only a recourse against Murphy in the nature of an action to account. That judgment was confirmed by the Court of Queen's Bench upon the ground that if Bury's right were a '*jus ad rem*,' the '*motif*' of the judgment was correct, while if it were a '*jus in re*,' Bury had no right, under the procedure of this province, to attach even his own property once out of his possession, without an attachment *saisie revendication*, or *saisie-arrêt* based, in either case, upon affidavit, and hence that his action should, under any circumstances, be dismissed. The Supreme Court, considering apparently that the only point in litigation was the question as to whether Bury's right was a '*jus ad rem*' or a '*jus in re*' ranged itself upon the side of the latter contention and reversed the judgment, without reference to the point of procedure upon which this court had principally relied (1). In the meantime Murphy, after first disputing his liability, had eventually been condemned to render the account called for by this second action, had rendered it and had been found liable toward Bury in the sum of \$5,343 under the terms of the '*contre-lettre*.' In connection with and diminution of his account, Murphy had brought forward certain claims against Bury to the extent, including interest, of \$15,593.30 principally arising out of another transac-

(1) See 22 Can. S. C. R. 137.

tion. These claims had been ruled out by the court as inadmissible under the order to render an account in connection with Murphy's *contre-lettre*, but his right had been reserved to urge the same claims by means of an incidental demand, a right of which he hastened to avail himself. That incidental demand having been contested by Bury was eventually dismissed by the judgment from which the present appeal has been taken. The items of which it is composed are based upon transactions relating to two separate properties; in connection with which these two parties Bury and Murphy had most intimate and complicated relations extending over a long term of years, one called the 'Hall property' at the corner of St. Catherine Street and Papineau Road, the other called 'lot 615' St. Mary's Ward, already referred to. These properties were acquired in the year 1874, in the name of Bury, but it is apparent and is indeed admitted that the transactions were speculations in which Bury and Murphy were equally interested. It is alleged by Bury that the terms of the agreement between them were that he, Bury, should devote his attention to the selection, purchase, management and sale of these properties while Murphy should provide the capital necessary for securing and holding them until sales should be effected, a delay which both expected to be only temporary, but owing to a collapse in the real estate 'boom,' the speculation proved a protracted burden and in the end a serious loss."

[The learned judge, after dealing with the lot 615 transaction, continued as follows]:

"All the other items of the appellant's incidental demand are based upon the transaction in regard to the Hall property speculation. The title to that property had also been taken in the name of respondent Bury and the first instalment of the purchase money had

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also been acquired in a similar way from P. A. Murphy, the appellant's brother, to whom an obligation for \$4,000 was given by Bury. On the succeeding day Bury transferred a half interest in the property to the appellant Murphy who thereby became liable for one-half the amount of the mortgage to his brother, and also for the same proportion of the balance of the purchase money still due to the original vendor Miss Hall. As the instalments of the latter obligation fell due suits were taken by Miss Hall against Bury, with whom alone she had contracted, but as fast as these demands assumed the form of a judgment, the appellant Murphy advanced the requisite amount and took a transfer of them as he did also of P. A. Murphy's obligation against Bury, but without any signification in either case, thereby confirming to a certain extent Bury's pretensions that the appellant undertook the financial burden of carrying the properties as his contribution to the partnership speculation. On the 10th March, 1879, by a formal act the two parties Bury and Murphy annulled the transfer of a half interest in the property which Bury had made to Murphy on the 22nd of July, 1875. This resiliation by its terms formally relieved Murphy of all further obligation as proprietor *par indivis* for further advances toward the balance of about \$12,000 still due to Miss Hall and threw the burden of providing it entirely upon Bury.

"What were the liabilities, if any, of Bury to Murphy after this resiliation for advances previously made by the latter in connection with the Hall property? Recognizing even the transfer to appellant of P. A. Murphy's claim for the first instalment toward the purchase money, and adding to it the four judgments in favour of Miss Hall for other instalments, which appellant paid, the total amounted to about \$6,500, and as under the terms of their agreement,

appellant assumed one-half the cost, his total advances on this property on Bury's account only reached the sum of \$3,250. At the time when this resiliation took place, 1879, real estate was very much depressed in value and the speculation was admittedly a losing one. Respondent says that appellant voluntarily surrendered and abandoned what he had already paid on the property as an inducement to respondent to take it over and relieve him from any further liability upon it, and it seems to us, as it did to Mr. Justice Gill, a much more reasonable assumption than the pretension of appellant that Bury not only relieved him without any consideration whatever from further liability in a disastrous speculation, but actually undertook to return to him (appellant) not only the \$3,250, which he had advanced for Bury, but a like amount which he (Murphy) had paid on his own account. The transactions between the parties were of the most complicated description. If any plain, satisfactory and incontrovertible interpretation of their meaning and effect were possible, the courts would not have been called upon to adjudicate upon them. As it is we are compelled to draw the most reasonable conclusion possible from a series of transactions which seem for some purpose or other to have been purposely or at least unnecessarily complicated and the solution which most commends itself to our judgment is that for which the respondent contends and which was adopted by the learned judge who adjudicated upon the case in the court below, viz., that the act of resiliation of the 10th March, 1879, and the replacement of the title, which that effected, into the name of the respondent, was a virtual abandonment on the part of the appellant of all previous investments made by him in the property or in the claims of others against that property of which he may have taken transfers, for the consideration

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therein expressed, viz.: 'In order to be acquitted and discharged of the several obligations by him assumed by virtue of said sale.' It is true that afterwards the appellant again advanced to Miss Hall the amount of another judgment, \$702.50, against Bury for another instalment of interest upon the unpaid balance of the purchase money, but although paid subsequently it was for interest, one instalment of which had matured before the act of resiliation and the other was about to mature within a very few days of that date, and its subsequent payment by appellant was to the extent of one-half only the discharge of his personal obligation and for the other half, undoubtedly in fulfilment of his very natural undertaking to relieve Bury from all prior or then maturing interest, in consideration of the latter's taking the property and relieving Murphy from all future liability either for principal or interest.

"The result is that the judgment dismissing appellant's incidental demand in the Superior Court is confirmed. A majority of the court see no reason to differ from the conclusion of Mr. Justice Gill that the lack of signification of the different transfers under which appellant claimed to have acquired obligations and judgments against the respondent Bury, without signification upon the latter, would alone have been a valid defence against any legal demand based thereon, and the judgment '*a quo*' might have been confirmed upon this *considérant* alone, treated as a preliminary objection, without investigation of the facts and respective pretensions of the parties, but the whole case having been carefully considered, we have deemed it best to state our views at length upon the merits of the issues and only incidentally upon the legal objection founded upon lack of signification.

"Mr. Justice Bossé concurs in the above notes except in regard to signification, which under the special circumstances of this case he thinks was unnecessary."

The portions of the judgment of the Superior Court, more particularly relating to the Hall transaction, are as follows :

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“ Considérant * * * 2o. Que quant aux autres item qui ont rapport à la propriété Hall, il y eut une société formée entre les parties pour la dite propriété, et que Murphy s'était obligé de payer la moitié de l'obligation que son frère, P. A. Murphy, avait sur la dite propriété, c'est-à-dire l'item susdit de \$4,000 et la moitié de l'hypothèque de Melle Hall, et qu'en payant à ses créanciers il acquittait sa propre dette quant à la moitié et ne pouvait obtenir de subrogation contre Bury pour cette moitié, ni contre personne autre, mais qu'il y avait confusion en lui-même et que pour l'autre moitié il obtenait transport ou subrogation contre la dite société et non contre Bury individuellement, et que pour faire valoir cette prétendue réclamation il faudrait une action *pro socio*, entre eux ;

“ 3o. Que, par l'acte du 10 mars 1879, entre les dites parties, devant Mtre L. O. Hétu, notaire, qui a mis fin à la dite société, Murphy a abandonné tout recours contre Bury pour les créances qu'il pouvait avoir contre la dite société et par suite contre Bury par le fait qu'il annulait l'acte par lequel il était devenu propriétaire de la moitié indivise de la dite propriété Hall associé en icelle afin d'être déchargé des obligations qu'il avait assumées en y entrant, sans faire aucune réserve quant aux paiements qu'il pouvait avoir faits pour acquitter la propriété, abandonnant le tout parce qu'il voyait qu'il ne pouvait y faire que des pertes ;

“ 4o. Qu'à tout événement Murphy ne peut demander paiement à Bury d'aucune de ses dites prétendues créances hypothécaires acquises par transports et subrogations, parce qu'il n'a jamais fait signifier ces transports et subrogations au dit Bury ;

“ Considérant en effet qu'en effectuant les dits paiements, Murphy acquittait sa propre dette pour la

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moitié, et pour le surplus ne pouvait qu'être subrogé contre la société, et le moyen de faire valoir ses droits contre son associé serait par l'action *pro socio* ;

“ Considérant qu'en tenant compte des faits de la cause et les circonstances sous lesquelles se trouvaient les spéculations de terrain en ce temps et endroit-là, et d'après le texte de l'acte lui-même l'interprétation à donner au dit acte du 10 mars 1879 est bien que Murphy a abandonné tous droits à la dite propriété Hall en perdant ce qu'il y avait mis ;

“ Considérant que s'il n'y a pas eu société, et encore qu'il y aurait eu société, elle n'affecterait pas le dernier item en date du 22 novembre, 1880, et postérieur à la dissolution, il est certain que le demandeur incident ne peut réussir pour aucun des dits items parce que ses transports et subrogations n'ont jamais été signifiés au défendeur incident, ainsi que l'exigent les articles 1571 et 2127 du C. C. et la jurisprudence de la Cour d'Appel, avant de pouvoir former sa demande en justice.

“ Pour ces motifs maintient les défenses du défendeur incident, comme bien fondées et déboute le demandeur incident des conclusions de sa dite demande incidente avec dépens, etc.”

Beique Q.C. and *Monk* Q.C. for appellant.

Barnard Q.C. for respondent.

The judgment of the court was delivered by :

TASCHEREAU J.—This appeal must fail. Upon the facts of the case, as well as upon the construction of the deed of March, 1879, I adopt in its entirety the reasoning of Hall J., in the Court of Appeal, and the *considérants* of the Superior Court. The appellant's incidental demand was rightly dismissed.

It is proper, however, that we should also sanction the law laid down by the two courts below on the

necessity of the signification of a transfer or sale of a debt or right of action, as a condition precedent absolutely required to vest the transferee or purchaser with the full right of action against the debtor, the necessity of which signification is not removed by proof of knowledge by the debtor of the transfer or sale; and it is when he issues his writ that all of a plaintiff's right of action, in any case, must have fully accrued. We also hold that the want of such signification is put in issue by a *défense au fonds en fait*.

A repetition here of all the controversy, or a review of the authorities on the question, would be useless. It has been done in so many cases that I could add nothing now to it. When at the bar, I succeeded years ago as the attorney of the defendant, in the case of *Mignot v. Reeds* (1) in getting an action upon a transfer dismissed on demurrer for want of an allegation of the signification of the transfer. The jurisprudence has since been far from uniform, though the case of *Charlebois v. Forsyth* (2) should have put an end to any controversy.

We hold with the two courts below, that the appellant's incidental demand could not in any case have been maintained, for want of signification of the deeds of transfer and sale upon which his claim is based. There is undoubtedly great weight in the appellant's contention that there is no room for the application of that doctrine to the present case, for the reason that his claim is based on legal subrogation (3). But as on the merits his action must fail, it becomes unnecessary to further investigate that part of the case.

Appeal dismissed with costs.

Solicitor for appellant: *F. D. Monk*.

Solicitors for respondent: *Barnard & Barnard*.

(1) 9 L. C. Jur. 27.

(2) 14 L. C. Jur. 135.

(3) Sirey C. C. under art. 1250, nos. 31, 32.

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