

1901 JOHN PETERS & CO. (DEFENDANTS)...APPELLANTS;

\*Nov. 25.

AND

1902

\*Feb. 20.

MARY WORRALL (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Action for account—Agent's returns—Compromise—Subsequent discovery of error—Rectification—Prejudice.*

P. was agent to manage the wharf property of W., and receive the rents and profits thereof, being paid by commission. When his agency terminated W. was unable to obtain an account from him and brought an action therefor which was compromised by P. paying \$375 giving \$125 cash and a note for the balance and receiving an assignment of all debts due to W. in respect to the wharf property during his agency, a list of which was prepared at the time. Shortly before the note became due P. discovered that, on one of the accounts assigned to him, \$100 had been paid and demanded credit on his note for that sum. This W. refused, and in an action on the note P. claimed that the error avoided the compromise and that the note was without consideration or, in the alternative, that the note should be rectified.

*Held*, affirming the judgment of the Supreme Court of Nova Scotia, that as it appeared that P.'s attorney had knowledge of the error before the compromise was effected, and as, by the compromise, W. was prevented from going fully into the accounts and perhaps establishing greater liability on the part of P., W. was entitled to recover the full amount of the note.

APPEAL from the decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in so far as it allowed the defendant a deduction of \$100 from the amount of the note sued on.

The action was on a promissory note given to settle a suit for an account as stated in the above head-note.

\*PRESENT :—Taschereau, Sedgewick, Girouard and Davies JJ.

[Mr. Justice Gwynne was present at the argument but died before judgment was given.]

The defence set up was the error above stated and, by way of counterclaim it was asked that the action should be dismissed on the ground that the compromise was void and inoperative, and the note given without consideration, or, in the alternative, that the note be rectified by \$100 being indorsed on it as a payment.

The trial judge held that the error was due to defendant's own carelessness but plaintiff could not take advantage of it to get \$100 more than she was entitled to. Defendant appealed asking for dismissal of the action, or, at all events, for reversal of the judgment against him for costs. The plaintiff cross-appealed, claiming judgment for the full amount of the note. The appeal was dismissed and the cross-appeal allowed. The defendant then appealed to the Supreme Court.

*Drysdale K.C.* and *Mellish* for the appellant. A contract incapable of performance by reason of mutual mistake is void. *Durham v. Legard* (1); *Couturier v. Hastie* (2). If respondent was not mistaken she was guilty of fraud in undertaking to assign to appellant a debt which she knew did not exist. *Paget v. Marshall* (3); *New London Credit Syndicate v. Neale* (4); *Ward v. Wallis* (5); *May v. Platt* (6); *Wright's case* (7); Pollock on Contracts (4 ed.) Bl. Ser. p. 573.

*Harrington K.C.* for the respondent. The fact that the note was given in compromise of pending litigation places this case in a category specially recognized by the law. *Paget v. Marshall* (3); Kerr on Mistake pp. 474, 475, 478; *Trigge v. Lavallée* (8); *Dixon v. Evans* (9); *Pickering v. Pickering* (10); *Beauchamp v. Wynn* (11).

(1) 34 Beav. 611.

(2) 9 Ex 102.

(3) L. R. 28 Ch. D. 255.

(4) [1898] 2 Q. B. 487.

(5) [1900] 1 Q. B. 675.

(6) [1900] 1 Ch. 616.

(7) L. R. 7 Ch. App. 55.

(8) 15 Moo. P. C. 270.

(9) L. R. 5 H. L. 606.

(10) 2 Beav 31.

(11) 38 L. J. ch. 556.

1901

PETERS

v.

WORRALL.

Davies J.

The judgment of the court was delivered by :

DAVIES J.—I am of opinion this appeal should be dismissed. The alleged mistake of \$100 was known to Worrall's attorney at the time the settlement was being negotiated. He communicated the knowledge to Peters's attorney with whom the negotiations were carried on. At any rate the fact that Peter's attorney had such knowledge at the time he agreed to the settlement was found by the learned Chief Justice who tried the cause and on evidence which I think fully justified the finding. With full knowledge therefore of the necessary facts on both sides, a settlement of outstanding accounts was proposed and accepted, and it is now contended that this settlement should be upset because the written memorandum in which the negotiations were conducted showed one of the accounts which Peters was to have had assigned to him to be \$100 larger than it really was. It does not appear to me that this fact, known to the attorneys of the parties at the time and acted upon by both of them, should be allowed to operate to defeat the agreed settlement. In itself the settlement appears to be a fair one and if the \$100 was deducted from the amount Peters agreed to pay he would be gaining an unjust advantage.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *F. F. Mathers.*

Solicitor for the respondent: *C. P. Fullerton.*

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