THOMAS LOCKHART (DEFENDANT) . . APPELLANT. 1907

AND

ALBERT J. WILSON (PLAINTIFF) . . . . RESPONDENT.

*Nov. 6-8.
*Dec. 13.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Promissory note—Fraud in procuring—Discount—Good faith—Evidence.

L. and others signed promissory notes each for the amount of ten shares in a company formed to manufacture rotary engines under an invention of the payee who fraudulently misrepresented to them the prospects and intentions of such company. At the same time each maker signed an application for ten shares. The payee and T., the assignee of his patent of invention, induced W. to discount these notes and received a portion of the proceeds, part being retained by W. in payment of debts due him from these two parties. On the trial of actions by W. on the notes the evidence of T., who had absconded, was taken under commission and he swore that the form of application signed by the respective defendants had been shewn to W. before the notes were discounted. W. denied this and swore that he had been told that the notes were given in payment of stock held by the payee.

Held, that the evidence of W., on whom the onus of proof rested, could not be accepted; that the whole testimony and attendant circumstances shewed that W. suspected that the proceeds of the notes belonged to the company; and, having discounted them without inquiry as to the right of the payee and T. to receive these proceeds, he was not in good faith and could not recover.

APPEAL from decisions of the Court of Appeal for Ontario reversing the judgment at the trial by which the plaintiff's several actions were dismissed.

The plaintiff took action on eleven promissory

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

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notes procured and discounted as stated in the above head note. The trial judge dismissed all the actions and in every case but one his judgment was reversed by the Court of Appeal. Each of the other ten defendants appealed to the Supreme Court of Canada.

Blackstock K.C. and *McMullen* for the appellant.

Shepley K.C. and *Peter McDonald* for the respondents.

The judgment of the court was delivered by

IDINGTON J.—The respondent brought eleven actions, each founded upon a promissory note of one thousand dollars, or several such notes to that amount, made by the respective defendants and indorsed by one Tree, the payee, to the respondent, who claimed to have thus become the holder in due course within the meaning of section 56 of the "Bills of Exchange Act."

The defendants respectively set up the several defences that the notes were obtained by fraud, and upon an agreement or agreements in fraud of which they were negotiated and, that the respondent had notice or knowledge thereof, and, indeed, was a party to the fraud, and that he was not a *bonâ fide* holder for value.

These actions were all tried together and Mr. Justice Clute, the learned trial judge, found the alleged fraud, and that the notes obtained thereby were put off in fraud of the understanding upon which they had been made.

The learned trial judge expressly finds he could

not give credit to the evidence of the respondent; and, not having other evidence on which to rely for the proof of respondent's good faith necessary to support his actions, dismissed them.

The Court of Appeal for Ontario, by a majority from whom Mr. Justice Meredith dissented, reversed this latter finding of the learned judge, but did not disturb the findings of fraud, and allowed the appeals, except in one case. The other defendants have each appealed and these appeals were heard together.

The counsel for the appellants was stopped by this court from fully elaborating his argument as to the fraud, counsel for respondent conceding that it seemed hopeless to expect to reverse the findings of the courts below in this regard, though reserving his right to make some remarks upon that branch of the case in his argument, as I understood him, necessarily incidental to the questions of notice and of good faith.

I am content to say, therefore, in that regard, that I have not heard or read anything to shake the findings of the learned trial judge on the first branch of the case.

I think the results arrived at by the learned trial judge on the other branch are also correct and the conclusions of the Court of Appeal erroneous.

Tree, the payee, held patents as the inventor of a rotary engine or improvements thereon or both and induced, in 1897, or thereabouts, the appellants and the respondent, with numerous others, to join him in forming an incorporated company, of which respondent was the vice-president, to experiment with and place on the market, if possible, the engine manufactured in accordance with these patents. The venture failed hopelessly. Notwithstanding this, in March,

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1901, a Dr. Taylor, seemingly impressed with the future possibilities of these patents, anticipating their acquisition from the company and the formation of a new company, agreed with the respondent that if he would help him by advancing him $900, he would return on or before the 1st of May, then next, or so soon thereafter as certain parties or a company to be formed had acquired said Tree patents, $1,800 to him, Wilson. As part of this agreement, Taylor also agreed to secure the re-payment of two certain notes made by said Tree to Wilson, due in October, 1898, for $200 and $1,000, with interest thereon *at the time of transference of the said "Tree patents" to said parties.*

This is interesting as part of the history of the dealings in question and of the light it sheds on the respondent's relations with Tree and Taylor, when consideration has to be directed to the question of good faith and the price paid them for the notes, of which price a goodly part springs out of this agreement.

On the 9th October, 1901, by another agreement of that date, purporting to be between Taylor of the first part and the several persons whose names were subscribed thereto, being directors in the Tree Rotary Engine Company, of the second part, but only executed by Taylor, and respondent signing as vice-president, there seems anticipated some exchanging of stock in the old company for some in the expected new company. And Dr. Taylor agrees to pay $500 at the expiration of two months and $15,500 within a year from date, with interest at 6% until paid. The Tree Company wanted but could not get security from Taylor and, as their secretary puts it, to make best

of a bad bargain, were content to take his own notes. Perhaps the best evidence of his financial standing was the enormous price he agreed to pay for an advance of $900 as shewn above. The secretary swears he was worthless. I infer that if the patents were no good, no one expected him to pay. If the patents were any good he could easily pay. Wilson throughout these dealings shews his gambling spirit in pursuit of gain.

A new company, named the Imperial Engine Company, with Dr. Taylor as president, was incorporated shortly after this, and had a secretary and head office or seat at Brantford. Its alleged capital was $600,000. A good deal of this was given to Tree and Taylor, or Tree, for nothing, unless I assume the interest in the patents. There were other generous allotments or donations of stock that left stock of the company to the amount of $185,000 to be disposed of to get cash to carry on business with, if any one would buy. I cannot find that any one did so though canvassing therefor had taken place. One thousand shares of this stock for disposal were in the hands of the company's solicitor in Brantford as trustee for the company. He, quite properly, drew up a form of application to be used in canvassing purchasers for such shares.

Then Tree and Taylor, being directors, after this state of helplessness had continued for four years, got some of these forms supplied by the solicitor and, without authority, ventured amongst the farmers of Oxford, near to the Village of Tavistock, and, on the one hand, it is said, tried to sell stock, and, on the other hand, it is said, made these forms of sale a blind to procure notes by fraud, but, in either cases, in doing so, made the statements and proposals found

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false and fraudulent upon which and by means of which the notes in question were got.

The notes of Rowe, T. Pearson, S. Pearson, Bollert, and Palliser, for a total of $5,000, were supposed, theoretically, to have been given, and if given at all, on any basis of honest business, so far as respondent is concerned, were given for stock in the Imperial Engine Company to be issued by the company to them in response to the following form of application:—

> Nov. 29th, 1905.—I hereby apply for ten shares of stock of the Imperial Engine Company, Limited, of a par value of $100 each, at $100 per share.
>
> I hereby agree to accept the shares and to pay for them as follows:—A promissory note dated Nov. 29th, 1905, payable four months after date for $1,000.
>
> I hereby appoint W. H. Hammond of Brantford, Ont., my attorney to subscribe my name in the stock book of said company and to accept the shares which may be allotted to me and to register me therein as holder of such shares.

It is alleged by appellants, however, that this application was, in each case, a something that followed a giving of the note which was supposed to be for entirely another purpose.

I assume, however, for the present, for the sake of argument so far as this respondent's good faith is concerned, each note founded on this form of application and the obvious design of the instruments.

These five thousand dollars' worth of promissory notes of absolutely solvent men, well known to and old neighbours of respondent, were, on the evening of the 1st of December, 1905, a day or two after their dates, taken by Tree and Taylor to respondent and offered by Tree to him for sale. At first he demurred by saying he had no money. But when Tree suggested to him he could keep out of the proceeds part of the old indebtedness of Tree and Taylor, due to him, his

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cupidity induced him to entertain the proposal and stretch a point. They agreed on the basis of $2,000 cash and the balance of $3,000 made up of old notes or credits on old notes and agreements for which Tree or Taylor or both were liable, and $250 discount charged on $5,000 for four months. The greater part of this old stuff was absolutely worthless. As to the other part of it, the securities may have been good in part or indifferent. If good, one is disposed to ask, why so long lying uncollected, overdue in the hands of a gentleman who seems to have had a proper appreciation of the earning power of money? Noting that, I pass to what happened anent the basis upon which the new notes rested.

The above set out form of application for stock, drawn by the company's solicitor, was shewn to the respondent who understood that the notes were given for such stock or sales of stock. He made the remark that, having seen the notes with the other information Mr. Tree had given him, his position was different than if he had seen the notes only.

It is quite clear that men selling as agents of the company, stock to be issued by the company, were bound to account to the company, and had no right to sell the notes given for such stock as if it had been their own, and, if any shadow of authority existed by reason of their directorship to realize on the notes for the company, they had no colour of right to appropriate the notes to pay their own debts. The transaction, on its face, was such as no honest man should have or, unless unusually dense, could have entertained for a moment. Even the respondent squirmed at it.

It seems idle to talk of good faith in such a con-

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nection. We are invited to accept his denial as conclusive or to suppose that the man Tree, in reply to his observation, said: "Oh, well, it is of no consequence for we (Tree and Taylor) have stock of our own allotted to us from which we can satisfy them, and will, and the form of application is a matter of no consequence from that point of view."

There is not a tittle of evidence directly to support this supposition. The respondent and his solicitor, by their evidence, have swept away any respectable chance to rest on such a work of imagination, if one felt inclined to do it. There appears, speaking of the first batch of notes, in one of respondent's examinations for discovery, the following:—

80. Q.—What did he say? A.—He asked me if I would discount all these notes. I told him I had not enough money to discount all these notes, at the time. He talked on; he told me these people had been in Cassel and he had a Tree engine running there and they were pleased with the way it worked and *that they had taken stock in the Imperial Engine Co.* As a matter of fact, he said he sold them part of his stock which he had acquired from the engine company and he told me these notes were given in payment of stock.

81. Q.—Did you make any inquiry yourself; did you ask him any questions? A.—No. I did not. He simply told me these people gave these notes in payment of some stock.

82. Q.—From first to last, during your negotiations with Tree for the purchase of these eleven notes, did you make any inquiry as to the circumstances under which the notes were given? A.—No. I did not.

83. Q.—From any person? A.—No.

In another examination for discovery, the following appears, relative to the first batch of notes:—

94. Q.—Did Taylor shew you any papers? A.—No.

95. Q.—Did you see any applications for stock? A.—No.

96. Q.—What did they tell you? You were a little suspicious about the notes and asked him how he came to get them? A.—I

don't know whether I asked them. *It strikes me I asked them if these people owed this money and they said they did.*

* * * * *

140. Q.—Did you ask them if these men owed Tree the money? A.—I think I asked them *if they had been selling these people some stock.* That is the recollection I have of it;—*if they had been selling some more stock;—I don't just remember the exact words.*

141. Q.—Apart from that, did you make any further inquiry in regard to these notes; this second batch of notes on the 18th? A.—No.

And in the same examination, is the following:—

289. Q.—You understood the proceeds of the $11,000 of notes was not to go in the company? A.—*I didn't know where it was going.*

On the trial he said, as follows:—

Q.—Did you know what steps were being taken in regard to the stock of the Imperial Engine Company, in December, 1905?

A.—No. I had no knowledge of the stock of the Imperial Engine Company.

* * * * *

Q.—What did you say when he shewed you these notes?

A.—I looked at them and came to the conclusion that these people had been investing some money in the engine, and I asked him if they had, and he told me that they had, that they had bought some stock in the company—some of his stock—and these notes were given in payment of it; that is about the extent of it.

And, as to the second batch:—

Q.—When you and Tree and Taylor went up, what did you do?

A.—He produced the notes and I looked at them, and he told me he was agreeable to discount them as he had others—practically the same thing; I asked him if these people had been buying stock, or if he had been disposing of some stock, and he said that he had, and that these people had given him the notes to pay for it.

Is it possible to draw any inference such as we are asked from these varied statements? If he never heard of nor saw any certificates of stock or application therefor, how does he, instinctively, as it were, bend his statements as to whose stock was being sold? Passing meantime this from Wilson to that from

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Taylor, and let us see which of them is telling the truth.

Of course, the question of the credibility of Taylor and of Taylor's story are vital points here. Counsel for the respondent wisely abstained from any general attack on him.

So far as one can judge from reading the depositions, Taylor, though possibly to be looked on as if (whether so or not in fact), a fugitive from justice, in his manner of speech, even making due allowance for the educated man's greater power than the other of discriminating expression seems to be inherently a more truthful witness than the respondent.

Taylor was examined under a commission in New York and his story is that, on the 1st December, 1905, a form of application for a stock certificate, amongst other things, was exhibited by Tree to Wilson, of which the

> original form was prepared by Mr. Sweet of Harley & Sweet, Brantford, the form of which that one was a copy.

Can there be any mistake on such a point? One man says there was nothing said relative to the stock business but mere loose expressions about selling stock or taking stock. The other says this was thus explained.

His examination was led on after that for a page or so by the counsel to the next day's happenings in the solicitor, Mr. McDonald's office, when the witness was asked, in reference to Wilson being present, and the following takes place:—

> Q.—Who spoke first; who was talking; what did Mr. Wilson, the plaintiff, say? A.—Well, *in order to understand that, it would be necessary to go back to the evening before.*
>
> Q.—As to something the plaintiff said? A.—*As to something the plaintiff said, because that was the object of my being there.*

Q.—Let us hear what he said then? A.—That, having seen the notes, with the other information Mr. Tree had given him, his position was different than if he had seen the notes only.

Q.—That was said on the night of the 1st? A.—*The night of the 1st. "Now then, Mr. Wilson said, it would be necessary to have proper applications which would be legally holding on the parties making the notes."*

The witness may be right or wrong as to Wilson being present on the 2nd of December, in Mr. McDonald's office. He may be right or wrong as to the date when there. In this sense the Court of Appeal is clearly right, I think, in treating this sort of discrepancies as of no consequence.

But there is a significant part of this story interjected, so to speak, which I have underlined above, that is of the very utmost importance. Yet, I say with respect, the Court of Appeal overlooked it and that was the source of radical error in that court.

"As to something the plaintiff said *because that was the object of my being there*"—means what? It means, as clearly as noon-day can make it, that what took them to Mr. McDonald's office was the remark of respondent the night before, when he pointed out the unfortunate mistake he, Tree, had made, in using a form that clearly implied he was selling stock for the company and not his own stock. It is impossible, on the evidence before us, to find any plausible reason for going to Mr. McDonald, or any one else, at that time anent the form of the application, unless what sprang from respondent, or from the conversation with him, on the evening of the 1st of December. The solicitor, McDonald, on his evidence says, as follows:

Q.—Did they both come to see you—Tree and Taylor?
A.—Yes.

Q.—What did Tree say to you? A.—That he wanted me to draw up some applications for stock, and laid a blank form before me and asked me what I thought of that. I said "I think this is an

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application for stock in the Imperial Engine Company." Then he said, "Is it right?" and I said "It is all right as an application to the Imperial Engine Company." He said, "Is it all right for me?" I said, "What have you to do with it? I understood you were in the Tree Engine Company," and he told me that the Imperial had taken the place of the old Tree Rotary Engine Company, and also told me he was selling his own stock in the Imperial Engine Company.

Every word of this bears the mark of a recent impression that had dawned on Tree. How did it come to him, if not in the way Taylor's story tells? Taylor does not try to account for it or attach importance to it. Yet it is there. And how does Taylor come to tell it? Counsel did not seem to see the import of it at the moment. Nor had it the import then that it came to have months later, when McDonald swore to that which fitted into it exactly as if made to do so and thus confirms this story of Taylor. Yet Taylor is not a prophet. The impression he had of Wilson being present when the document was laid before McDonald is possibly correct. It matters, in one way, little whether so or not, but there is this to be observed, that, if he is, as Wilson and McDonald positively swear, in error, then there is removed the last vestige of reason for supposing that he can have imported into his story what Wilson said in McDonald's office and confused what happened after the dealing was completed with what had happened before in Wilson's house.

The incident of consulting on the very point, and at the very time noted, a new solicitor on such a point is confirmatory of Taylor's story and must stay so till some explanation not yet forthcoming is found.

The story of respondent has, interjected into it twice, an alternative or amended form so as to represent Tree as saying he was selling his own stock.

By the time respondent is thus reciting these variorum editions of the story, he had, I infer, no doubt learned what was done anent the change of form and supposed ratification of what was done under the first form.

In light of a knowledge of that curious history one can see reasons for the changes of expression used by respondent in his evidence.

If the story had been the simple one of Tree selling his own stock and getting notes for the price thereof what need for the use of a form of application? All he had to say was,—here is a transfer of my certificate of stock.

If that in truth had been all that ever was presented to the respondent's mind as the fact, then his amended and amending mode of expression would not have appeared. The many ways it is expressed are, I conclude, but ways of getting away from what he had found an uncomfortable mental position.

It was because the story had not the native simplicity he would have us believe that his mind and expression thereof vary so very much.

It might need an application form, for use in selling stock to be issued by a company, but if a man only offered his own stock for sale to such well-known, absolutely solvent people as in question, it puzzles one to know its honest use. Tree and Taylor had the actual power to command the present issue to them out of that allotted to themselves.

If Wilson for whose benefit, at least in part, the supposed ratification was done knew of it, so much the worse for him.

It was one thing to subscribe for stock and pay therefor money that would find, if not stolen in pass-

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ing, its way into the treasury of a company to erect a factory or promote its business, and quite another to pay for wind or water, money that would inevitably go into the pockets of Tree or Taylor or Wilson.

It is not of the slightest consequence whether the meeting leading up to this took place on the 2nd or on the 6th December, nor of who paid or was charged the fee.

Can one, in face of these facts and this train of reasoning, find it possible to say that what Wilson, on whom, as is conceded, the onus of proof rests, has said, satisfies or ought to satisfy us that he acted in good faith?

Can we believe him when he swears or tries to swear or lead us to believe that the unsecured debts of Tree and Taylor were of any substantial value? Can we believe that he who held between $6,000 and $7,000 against such financially worthless people did not constantly keep an eye on their exploiting the engine business on which his only hopes of recovery depended? Can we believe that he who put up $900, 12th March, 1901, and took an agreement from Taylor for that consideration to have returned to him $3,000 (and interest on part of that in arrear for years before) lost all interest in the hopes he had of receiving the balance of this $3,000 (on which only $400 paid at expected time), and interest, so completely, that he was as ignorant of the fortunes of the rotary machine and its patrons, corporate or otherwise, as he would lead us to believe, though his entire hopes in regard to the balance of that $3,000 and interest as well as other large sums clearly rested on their efforts to make a success of the engine?

His call on Tree, in London, at Easter, 1905, was

not followed up but is indicative of some interest in him and his engine. Parson's case also gave him reason to be reminded.

Can anybody believe his pretence of faith, in 1905, in the engine as a successful piece of mechanism, apart from faith in it as a basis for the flotation of stock? His own language on seeing the first notes expresses the source of his hopes. If he believed in the engine company, why did he not subscribe for stock? What became of the anticipatory provision for such being allotted him and fellow directors is not clear.

Then, it is said, that if he did see the application and say what Taylor imputes to him, how can one suppose he would discount the notes? How can any one say he would not? How can any one imagine he would be stayed thereby? It all depended upon the chances of gain, and the amount of gain, proportioned to the risk; and that loomed large in his eye, whilst this seemed trifling; especially if he knew of the plan of ratification, and had faith in it.

If his oath is worth anything, he could not suppose he ran any legal risk. He might not care to have the old neighbours know he was getting for himself their money or credit, that was to have built a factory. Indeed, when he did refer later to the subject, he said to one of them he had paid $10,000 for these notes, when he had only paid $5,000. As to his notions of the law on the subject, this is what he says:—

229. Q.—You knew a man in purchasing notes, although he might give value, unless he dealt in good faith could not acquire a good title to the notes as against people who had been defrauded?

A.—*I didn't know that.*

230. Q.—You thought if you gave value for the notes it didn't matter whether you took them in good faith or not? A.—*That is the impression I had.*

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317. Q.—Your idea of the law was that it didn't matter what you gave for these notes as long as you bought them and paid something for them? A.—No. I didn't know; I had no idea of the law; I supposed that, when I bought these notes and paid for them, they were mine.

318. Q.—It didn't matter what you gave for them? A.—I didn't know as I had that in my head.

318. Q.—You never gave that a thought at all? A.—Just a question as between myself and Tree what I paid for them.

319. Q.—The question of amount had nothing to do with the nature of the transaction? A.—It didn't strike me that way.

Not much trouble for one holding such opinions to go far astray.

It occurred to me as possible that the second and third transactions might be severable from the first. I cannot, on consideration, see how.

The law is laid down in *London Joint Stock Bank* v. *Simmons* (1), as follows:—

> Of course, if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction, the case would be different, the existence of such suspicion or doubt would be inconsistent with good faith. And, if no inquiry were made, or if, on inquiry, the doubt were not removed and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting.

The suspicion once aroused, remained unremoved, I have no doubt, and respondent's eyes and ears shut, did not prevent the suspicion from continuing. The remarkable exclusion of all knowledge entering his mind on the subject may, under the circumstances, be attributable to a recognition of its danger even though he asserts, as he does, as to his idea of the law.

There have been a good many things pressed upon us to shew the remarkable conduct of the respondent in this regard. Some of them were of trifling import,

(1) [1892] A.C. 201, at p. 223.

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some of none at all, but others and a great many taken together form an unpleasant picture of a man bent on getting gain, no matter at whose expense, and constitute some proof that he purposely abstained from making inquiry.

I think the appeals should be all allowed with costs, here and in the court below, of each to the respective appellants, and the learned trial judge's judgments dismissing the actions with costs be restored.

Appeals allowed with costs.

Solicitor for the appellant: *W. T. McMullen.*

Solicitor for the respondents: *Peter McDonald.*