E. R. BEATTY (DEFENDANT).....APPELLANT;

AND

WILLIAM T. BEST AND G. P. ASH (PLAINTIFFS).....RESPONDENTS;

E. R. BEATTY (DEFENDANT).....APPELLANT;

AND

JONATHAN CALVERT AND G. P. ASH (PLAINTIFFS).....RESPONDENTS.

1920
*Nov. 25.
1921
Feb. 1.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Sale — Vendor or trustee — Rights of beneficiaries — Representation — Term "or thereabouts."

The vendor may be a trustee for others of the money payable by the purchaser but his beneficiaries have no rights but those given by the contract and if, in carrying out the sale, the purchaser incurs a loss for which the vendor is liable it may be deducted from the purchase money.

In a contract for sale of a going concern the liabilities were stated to be $36,894, "or thereabouts."

Held, that an excess of $857 was too substantial to be covered by the qualifying expression.

Judgment of the Appellate Division (47 Ont. L.R. 265) reversed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment at the trial which dismissed the actions of the respective plaintiffs (respondents)

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 47 Ont. L.R. 265.

The respondent Ash executed an agreement with the appellant to sell to him the stock and assets of a company. Appellant was to assume the liabilities and pay $5,900 in cash. Ash had collected a part of this amount from the other respondents to purchase stock in the company but never procured the stock. The respondents Best and Calvert brought action to recover from appellant the amounts due them.

In a schedule to the agreement of sale the liabilities of the company were given as $36,894, "or thereabouts." Appellant was obliged to pay $857 more and claimed the right to deduct it from the amount payable to Ash. The trial judge acceded to this but on refusal to add Ash as a party he dismissed the two actions. In the Appellate Division Ash was added and judgment was given allowing Best and Calvert the amounts they respectively claimed. The Court held that Ash was a trustee of the amount payable by appellant who could not set off the $857 against it as the debts were not mutual. Beattie then appealed to the Supreme Court of Canada.

W. J. McCallum for the appellant.

J. J. Gray for the respondent.

THE CHIEF JUSTICE.—I would allow this appeal and concur in the reasons for judgment stated by Anglin J.

IDINGTON J.—This is an appeal from the judgment of the second Appellate Division of the Supreme Court of Canada against appellant in two actions alleged to have been consolidated, and founded upon an agreement dated the 27th day of May, 1919.

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That agreement was made between the respondent Ash as vendor, of the first part; appellant as purchaser, of the second part; and the Canadian Drill and Electric Box Company, Limited, thereinafter called "The Company." of the third part,

The recitals set forth his acquisition of the business and assets of two companies and a sale thereof by him to the party of the third part which had by two agreements agreed to issue certain of its capital stock to said vendor who had agreed to pay certain liabilities therein referred to and that the company had purported to carry on business and had

incurred certain obligations, and certain shares of its capital stock have been applied for, sold, issued or allotted or agreed to be sold, issued or allotted either by the company or the vendor, and the vendor has received certain monies from persons who subscribed for shares of the company's capital stock and has paid certain monies either to or for the company.

And whereas the agreements hereinbefore mentioned have not been carried out and default has been made thereunder and the vendor is financially unable to carry out his part of the same and it is inexpedient for the company to insist on the performance of the same, and the company and the vendor have agreed to cancel the agreements between them.

And whereas, on the representation, condition and understanding that at the date hereof the assets of the company are as set out in Schedule "A" attached hereto, and that the total liabilities or obligations of the company are as set out in Schedule "B" attached hereto, and upon all the said assets of the company being transferred and assigned to the purchaser and upon all the shares of the capital stock of the said company which have been sold, issued or allotted and all the interest of the vendor and any other persons in shares which have been agreed to be sold, issued, or allotted, being transferred and assigned to the purchaser or his nominee or nominees and upon the vendor releasing the company and the purchaser from all claims of every nature and kind whatsoever which he may have against the company or under the said agreements or any of them or otherwise howsoever, the purchaser herein called the party of the second part has agreed with the vendor and the company to enter into these presents.

The operative part of the agreement then proceeds in consideration of the premises and of the mutual covenants and agreements to set forth in most comprehensive terms that:—

The vendor doth hereby grant, transfer, assign and set over unto the purchaser all his interest, if any, in the agreements hereinbefore mentioned and, in the shares of the capital stock of the said company which has been subscribed, applied for, sold, issued or allotted, or agreed to be sold, issued, or allotted, whether to the vendor himself or to any other person or persons.

The vendor hereby appointing the purchaser his attorney to transfer on the books of the company either in the name of the purchaser or his nominee or nominees, such of the shares as are owned by or as stand in the name of the vendor or in which he is interested in any way.

And the vendor covenanting and agreeing to procure and deliver to the purchaser within thirty days valid and proper transfers or assignments of all shares owned by or standing in the name of, any other persons or in which such persons may be interested in any way.

And the vendor further covenanting and agreeing to procure the execution and delivery by the company of these presents and the approval and ratification of the directors and shareholders of the same.

And the vendor further waives all claims of every nature and kind whatsover which he may have against the company or under the said agreements or any of them or otherwise howsoever, and hereby releases and discharges the company and the purchaser from all obligations therefor and thereunder.

Then:—

The company doth hereby grant, transfer, assign and set over unto the purchaser all its right, title and interest, if any, in and to the agreements hereinbefore mentioned and its goodwill, chattels, stock, lands, buildings, fixtures, patents, formulas, blue prints, accounts and bills receivable and particularly the assets as set forth in the schedule "A" attached hereto, as well as all other assets and claims whatsoever.

That is followed by the covenant of the appellant now sued upon, which reads as follows:—

And in consideration of the foregoing the purchaser hereby covenants and agrees to assume the obligations and liabilities of the company as set forth in Schedule "B" attached hereto amounting to the sum of $36,894.38 or thereabouts, and to pay to the vendor or the various persons entitled thereto the sum of $5,900.00 upon receiving releases of their respective rights arising from the payment of money to the vendor, or transfers of the shares in the said company upon which the said amount has been paid by the persons making said payments or subscribing for shares.

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The respondent Ash presumed to assign $1,000, part of the said $5,900 to Best, his father-in-law, and to Calvert, his brother-in-law, the sum of $900.00 out of said $5,900.00.

Then, as the evidence discloses in the following questions and answers

Q. Did they instruct the bringing of these actions or did you? A. I instructed my solicitor to take action.

Q. For them? A. Yes.

he instituted these actions in the respective names of his said friends.

The defendant, now appellant, set up that the liabilities represented in said schedule had substantially exceeded the total represented in said Schedule "B" and that in some respects the assets had fallen short of the total represented.

The learned trial judge arrived at the conclusion that these assignees could not maintain, as mere assignees of the chose in action, any action unless the covenantee Ash was added as party plaintiff.

He proceeded then at the close of the trial to set forth the difficulties in the way of such plaintiffs, even if Ash were added as a party attempting to recover, and, in any event, inasmuch as the covenant sued upon, had proceeded upon the implied covenant on the part of Ash, relative to the substantial correctness of the Schedules "A" and "B," the defendant, now appellant, was entitled to have the balance, due under his covenant, reduced by the sum of $857.06, and such further sums as a reference might, if desired, disclose.

He then gave the plaintiffs a limited time to procure the consent of Ash to be so added.

It turned out, as represented later to the learned trial judge, that Ash had refused to give such consent.

He then, quite properly, proceeded to dismiss the actions and in support of his judgment referred to relevant authorities which support the position he took.

Thereupon, the plaintiffs appealed to the court of appeal for Ontario, and, on the case coming up before the Second Appellate Division, that court properly held Ash was a necessary party, and he consented to be added accordingly.

The appellant seems to have consented to that being done.

The next question that thus arises was whether the said claim of $857.06 could be, as that court treats it, set off, or, as I prefer, set up by way of defence to the action on the covenant sued upon.

In my opinion an assignment of anything less than a whole chose in action does not entitle the assignee to sue, and these actions should, I submit with respect, have been dismissed on that ground, long before they were.

The statute enabling an assignee of a chose in action to sue, in my opinion, never was intended to enable the possessor of a valuable chose in action to issue a kind of currency, as it were, by dividing up his right into little bits and distributing them amongst his friends, and giving each of them a chance to worry and annoy the debtor.

The Second Division of the Appellate Court would seem also to have held, at first blush, something akin thereto, else it need never have insisted upon Ash being made a party plaintiff, as it seems to have directed.

Having, however, so directed and allowed the argument to proceed on that basis, it seems to be alleged by the judgment appealed from that counsel for appellant admitted or made some admission from which it had inferred as follows:—

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In the course of promoting the Canadian Drill and Electric Box Company, Limited, Ash went about seeking subscribers for shares, and obtained $5,900 of money which it now transpires he received as trustee for the subscribers in order that he might procure for them shares in the company. No shares were ever issued to these subscribers and Ash remained a trustee of the moneys which he had received and of the $5,900 payable by the defendant under the terms of the agreement in recoupment of these trust moneys which are traced to the defendant.

This situation does not appear to have been brought to the attention of the trial judge by counsel for the plaintiff and only transpired in the course of the argument in this court from the admissions of counsel for defendants in answer to questions from the court. This circumstance appears to me to be decisive of the controversy. The issue is as to the right to set off against the $5,900 due by defendant to Ash as trustee the over payment made by defendant on account of general liabilities, for repayment of which Ash is alleged to be personally responsible.

There is nothing in the respondents' case at the trial as presented in the evidence supporting same, or in reply to justify counsel in making any such admission and he stoutly asserts he never did.

It is difficult to see how, after all that had transpired in the trial court, and the contentions set up there and in appeal, that he should have done so, and given away his client's case.

He may no doubt in argument have conceded something not intended, as young men may almost concede anything and then be mistaken.

I have no hesitation in holding that in such a case as is presented herein, counsel could not bind his client to something the document sued upon does not warrant him in conceding.

I deal, therefore, only with the document and the relevant facts as disclosed at the trial.

Nothing appears therein to constitute a trust or a condition of things involving a trust and notice thereof to appellant.

I fully agree with the law as set forth by the late Street J., one of the best of Ontario judicial authorities in law, in the following paragraph quoted by the judgment appealed from, as follows:—

> In all the cases since *Tweddle* v. *Atkinson* (1) in which a person not a party to a contract ha brought an action to recover some benefit stipulated for him in it he has been driven, in order to avoid being shipwrecked upon the common law rule which confines such an action to parties and privies, to seek refuge under the shelter of an alleged trust in his favour: *Mulholland* v. *Merriam* (2) *Re Empress Engineering Co.* (3) *Re Rotherham Alum Co.* (4) *Gandy* v. *Gandy* (5) *Hendersom* v. *Killey*; (6) *Osborne* v. *Henderson* (7); *Robertson* v. *Lonsdale* (8)

An examination of the authorities thus cited and what they demonstrate leads me to conclude that a covenantor who is a bare trustee need not be made a party to enable his *cestuis que trustent* to sue; that a covenant to pay to some third party a sum named, or fruit of something being contracted for, does not create such a trust as to entitle the third party to sue; and that the trustee may be made a party if the requirements of justice so demand.

The first of these decisions clearly indicates conclusively the legal truth of the first of the propositions I submit, and the foundation for the next of foregoing propositions is found in the others, as well as the reason for the last, which is merely a safeguard against injustice in executing the equities involved in some complicated cases.

With great respect I cannot agree with the deductions which the court below appears to have drawn from said decisions.

(1) 1 B. & S. 393.
(2) 19 Gr. 288.
(3) 16 Ch. D. 125.
(4) 25 Ch. D. 111.
(5) 30 Ch. D. 57.
(6) 17 Ont. App. R. 456.
(7) 18 Can. S.C.R. 698
(8) 21 O.R. 600.

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One more point made on the argument for respondent was that the words "or thereabouts" in the covenant disposed of the claim. No authority was cited, and common sense would perhaps be the best. A trifling or comparatively insignificant sum, which I do not think $857.06 is, even in a large deal, might possibly be covered thereby. Abler judges than I have refused to go further, or so far, perhaps. The cases of *Barker* v. *Windle* (1), *Davis* v. *Shepherd* (2), and *Oddie* v. *Brown* (3), present the use of the phrase. They seem to refer us to common sense.

I think the learned trial judge was right and that his judgment should not have been disturbed, and that this appeal should be allowed with costs herein, and a reference as the learned trial judge offered be again offered if desired by either party, costs thereof to abide the event.

DUFF J.—The only question requiring discussion turns upon the effect of certain provisions in the agreement of the 27th May, 1919. Among other things it is provided as follows:—

> Whereas on the representation, condition and understanding that at the date hereof * * * the total liabilities or obligations of the company are as set out in Schedule B attached hereto * * the purchaser * * * has agreed with the vendor to enter into these presents
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> * * *
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> And in consideration of the foregoing the purchaser hereby covenants and agrees to assume the obligations and liabilities of the company as set forth in Schedule B attached hereto amounting to the sum of $36,894.38 or thereabouts, and to pay to the vendor or the various persons entitled thereto the sum of $5,900 upon receiving releases of their respective rights arising from the payment of the money to the vendor, or transfers of the shares in the said company upon which the said amount has been paid by the persons making the said payments or subscribing for shares.

(1) 6 E. & B. 675. (2) 1 Ch. App. 410.
(3) 4 De G. & J. 179.

The liabilities of the company proved in fact to include liabilities not mentioned in the schedule and to be in the aggregate considerably more than the sum mentioned, $36,894.38; the purchaser asserts the right to apply the sum of $5,900 mentioned in the paragraph above quoted in liquidation in part of these obligations.

The Appellate Division has held that the vendor was a trustee in respect of this sum of $5,900 because it was made up of sums which the appellant's counsel was understood to have admitted on the hearing of the appeal were owing by the vendor to various persons from whom he received them for the purpose of applying for and securing shares in the company, which shares were never issued; and the conclusion is drawn from these facts that the covenant contained in the paragraph quoted from the operative part of the agreement in respect of this $5,900 is a covenant entered into with the vendor as trustee for these persons and, consequently, it is said that no part of this sum can be diverted for the purpose of liquidating the undisclosed liabilities.

With respect, I think it is a debatable point whether the covenant in question is a covenant with the vendor as trustee. Assuming that he was accountable to other persons as trustee for these moneys which he received from them for a purpose which was never carried out, it would by no means necessarily follow that the purchaser was contracting with him as trustee. The true meaning of the contract may be that the purchaser agreed with the vendor to indemnify him against these obligations either by paying the vendor or by paying the vendor's creditors.

However that may be, with great respect, the answer to the respondents' contention is to me abundantly clear that, assuming the covenant as regards

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this sum of $5,900 to be a covenant exacted by the vendor and entered into by the purchaser for the benefit of other persons, the rights of these other persons must depend upon the terms of the agreement and the rights of the beneficiaries in respect of the fruits of the enforcement of this covenant can be no higher than the rights given by the covenant itself. The beneficiaries' rights whatever they were as against the vendor, could not be affected by the covenant. The covenant itself takes its effect as part of the agreement in which it is found and gives such rights and only such rights as flow from that agreement.

Now the recital quoted above makes the right of the vendor depend upon the condition that the representation mentioned is a true representation. Saving in so far as subsequent events may have affected the reciprocal rights of the parties, the condition expressed in the recital is an essential term of every obligation undertaken by the purchaser. Now, it is not suggested that anything has happened which has relieved the vendor and the beneficiaries from the exigency of this term to such a degree at all events as to deprive the purchaser of the right to set up the non-fulfilment of it as a defence *pro tanto* against any action on the covenant now sued upon.

The point made upon the words "or thereabouts" in the covenant is without substance. The recital shews that the agreement proceeds upon the representation that the liabilities and obligations of the company are set out in full in Schedule B. There is nothing in the words of the operative part of the agreement to qualify this, the words "or thereabouts" obviously being intended to qualify only the statement as to the aggregate amount of the liabilities and obligations mentioned.

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The appeal should be allowed with costs here and in the Appellate Division and I think justice will best be done by making an order in terms of the judgment offered by Mr. Justice Hodgins at the conclusion of the trial.

ANGLIN J.—Whatever they may be, the rights of the original plaintiffs, Best and Calvert, or of the added plaintiff, Ash, as against the defendant Beatty in respect of the moneys sued for in these actions arise out of and are subject to the terms and conditions of the agreement made between Ash and Beatty on the 27th of May, 1919. It is solely under that agreement that any liability exists against Beatty and he is entitled to insist on the terms on which he undertook it being fulfilled. These terms cannot be affected by the relationship between Ash and Best and Calvert.

It may be that the $5,900, if it should reach Ash, would in his hands be subject to a trust for the plaintiffs, Best and Calvert, and others. It does not follow that it was as a trustee that Beatty agreed to pay him this sum. But, assuming that to be the case, Beatty's undertaking to pay it would be subject to the conditions of the agreement whereby he assumed that obligation. Those conditions were, *inter alia*, that the company which Beatty was acquiring possessed certain assets as shewn in Schedule A to the agreement, and that its liabilities did not exceed $36,894.38 "or thereabouts," as shewn in Schedule B. Beatty alleges breaches of both these conditions.

At common law a breach of either condition would preclude recovery on Beatty's covenant. But in equity on the defendant being put in the same position as if the conditions had been strictly observed by deducting from what he has undertaken to pay enough

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to make good the default, he may be required to pay the balance. The case is not one of set-off in the ordinary sense, but one of inability on the part of the plaintiffs to establish their claim until the conditions of the defendant's obligation have been fulfilled at their expense.

Upon evidence warranting such a finding the learned trial judge held that Beatty's claim that the liabilities exceeded $36,894.38 by $857.06 was established. This amount is too large to be covered by such words as "or thereabouts." Having been obliged to expend $857.06 to put himself in the position which he would have held had the condition as to the amount of the company's liabilities been fulfilled, Beatty's obligation to pay $5,900 to Ash "or to various persons entitled thereto" is *pro tanto* reduced. Having already paid $4,000 on this account, to "various persons entitled thereto," subject to the further deductions which he asserts a right to make, there remains due from Beatty $1,900 less $857.06, or $1,042.94.

The defendant also claimed to deduct damages which he alleged he had sustained because certain assets included in Schedule A either did not fulfil representations made as to them or were subject to defects in title not disclosed. This claim was rejected by the learned trial judge on the ground that the evidence did not sufficiently support it and I am not prepared to overrule that finding.

Another deduction claimed referred to a sum of $425 owing by one Aylesworth to the company whose assets were acquired from Ash. This claim was for money advanced and the record contains a written acknowledgment of it by Aylesworth. All that appears in evidence about this item is a statement by Beatty that Aylesworth demurred when asked by him to

pay it on the grounds that he had lost money and time through his connection with the company and that Ash had personally claimed this sum from him. But it is not proved that Beatty is unable to collect this sum from Aylesworth—still less that it was not a valid asset of the company. Ash was not asked about it when he gave evidence. The learned trial judge makes no reference to this claim of the defendant, probably either because it was not pressed upon him or because he thought it could not be seriously contended that the evidence established it.

The sole deduction to which the defendant is entitled, therefore, is the sum of $857.06. The disposition of the case proposed by the learned trial judge in his opinion of the 12th December, 1919, seems to have been correct and should now be directed.

The appellant is entitled to have his costs in this court and the Appellate Division paid him by the respondents.

BRODEUR J.—This case has caused very serious misunderstandings. At the conclusion of the trial, the trial judge expressed his willingness to maintain the action in part if the plaintiffs Best and Calvert would bring into the case G. P. Ash as co-plaintiff with them. But the trial judge having ascertained that the plaintiffs had declined to add Ash as a party plaintiff, later on dismissed the action.

Then in the Appellate Division counsel for the plaintiffs stated that he had been misunderstood by the trial judge and that he was willing to add Ash as a co-plaintiff; he applied to the Appellate Division for an order making Ash co-plaintiff, and the case was argued.

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It was contended in appeal that Ash acted with regard to the sum of $5,900 which Beatty undertook to pay by agreement of the 27th of May, 1919, as trustee and that no deduction could be claimed from that sum for non-fulfilment on the part of Ash of obligations which he contracted in virtue of this agreement.

The Appellate Division declared that in the course of the argument and from admissions of counsel for Beatty in answer to questions from the court, it appeared that the said sum of $5,900 was trust money and that this sum could not be set off against claims that Beatty could claim against Ash personally.

As a result the plaintiffs' actions were maintained by the Appellate Division.

Now Beatty appeals to this court and his counsel virtually states that he never made any admissions which would justify the inferences drawn by the court below.

It seems to me that all these misunderstandings which have arisen, as well before the trial judge as before the Appellate Division, should have been brought formally to the attention of the judge or of the court before whom the consent or admissions have taken place.

If a judgment is rendered upon alleged refusals or admissions which have, according to the views against whom they were invoked, never occurred, then they should bring the matter before the tribunal where the alleged refusals or admissions have been made, in order that the matter be more conveniently discussed and dealt with.

None of the parties however in this case have been willing to adopt this procedure and the appellant now asks relief from this court.

The respondent claimed at first that we had no jurisdiction, at least in the case of Calvert, because the amount in controversy did not exceed $1,000. (Sec. 48 Supreme Court Act).

It is to be noticed that the real plaintiff, according to the judgment of the court below, is the trustee Ash and that the two actions have been consolidated. The defendant Beatty has a judgment against him for an amount exceeding $1,000, viz., $1,962.72.

In these circumstances, this court has jurisdiction.

As to the merits of the appeal, I have not been able to find in the record the evidence that Ash was acting as trustee for the persons who, like Best and Calvert, purchased shares in the company in question. This item of $5,900 should be treated in the same way as the rest of the purchase price.

As Ash has not fulfilled the conditions of his agreement, the appellant may raise successfully this issue in an action to recover part of the purchase price.

The appellant Beatty claims that he could recover from the plaintiff Ash a sum of $857.06 alleged to be due by him for excess liability which he paid for Ash's benefit. This sum should be deducted from the amount which he still owes to Ash.

There is also a sum of $425 which he claims should be deducted from the $5,900.00. As to this claim of $425.00 the evidence is not complete and the matter should be referred to the Master.

MIGNAULT J.—Ash, having been added as co-plaintiff in the Appellate Division, the question was whether, under the agreement between Ash and Beatty, the latter, being sued by Best and Calvert in two separate actions

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for amounts claimed to be due to Best and Calvert as transferees of Ash by virtue of this agreement, could set off against the plaintiff, the sum of $857.06, being the amount paid by him, Beatty, in excess of $36,894.00, the amount represented to him as the liabilities of the Canadian Drill and Electric Box Company, whose assets were sold by Ash to Beatty. The sale agreement in question represented that the liabilities of this company were $36,894.38 or thereabouts, as set out in a schedule attached to the agreement, and Beatty paid liabilities amounting to $857.06 in excess of this amount. The amount payable by him to Ash by virtue of this agreement was $5,900.00. The two actions were for $1,000.00 and $900.00 respectively as a part of this price, and against these actions Beatty claimed that he was entitled to set off the said sum of $857.06.

The Appellate Division refused him this right of set-off for the following reasons which I quote from the judgment of Mr. Justice Masten:—

> In the course of promoting the Canadian Drill and Electric Box Company, Limited, Ash went about seeking subscribers for shares, and obtained $5,900 of money which it now transpires he received as trustee for the subscribers in order that he might procure for them shares in the company. No shares were ever issued to these subscribers and Ash remained a trustee of the moneys which he had received and of the $5,900 payable by the defendant under the terms of the agreement in recoupment of these trust moneys which are traced to the defendant.
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> This situation does not appear to have been brought to the attention of the trial judge by counsel for the plaintiff and only transpired in the course of the argument in this Court from the admissions of counsel for defendants in answer to questions from the court. This circumstance appears to me to be decisive of the controversy. The issue is as to the right to set off against the $5,900 due by defendant to Ash as trustee the overpayment made by defendant on account of general liabilities, for repayment of which Ash is alleged to be personally responsible.

In other words what is claimed is to set off against a debt due to Ash as trustee a claim against him personally. But these are not mutual debts and could not be set off in law or equity. *Ambrose* v. *Fraser* (1)

The plaintiffs are therefore entitled to recover the full amount claimed without any set off or deduction in respect of the claim of $857.06.

With respect, I am of opinion that while undoubtedly a debt due by a person personally cannot be set off against a claim made by him as trustee, this legal principle is without application in this case. Best and Calvert and their co-plaintiff Ash sue for something alleged to be due under this sale agreement between Ash and Beatty. It was a condition and representation of this agreement that the liabilities assumed by Beatty amounted to $36,894.38 or thereabouts, and notwithstanding this condition and representation Beatty had to pay $857.06 in excess of this amount. It is therefore immaterial whether Ash was or was not a trustee for third parties as to the amount payable by Beatty under the agreement. The actions are for an amount due by Beatty as price of this sale and are founded on the agreement which contains this condition and representation. The defence of set-off of Beatty is also based on this agreement. Therefore if Ash or his assignees claim under the agreement, they can be met by any defence arising out of its terms, and it matters not whether they sue as trustees or otherwise. I am therefore of opinion that the defence of set-off was open to Beatty.

I had some doubts whether the excess amount paid by Beatty could come within the words "or thereabouts." But, on reflection, I have come to the conclusion that the difference is too substantial to permit us to exclude it under so vague a clause.

(1) [1887] 14 O.R. 551.

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Mignault J.

The appeal should, therefore, be allowed with costs here and in the Appellate Division and the judgment should be in the terms of the opinion of Hodgins J.A., dated the 12th December, 1919.

Appeal allowed with costs.

Solicitors for the appellant: *Lamport, Ferguson and McCallum.*

Solicitor for the respondents: *T. T. Gray.*