NIAGARA DISTRICT FRUIT GROWERS' STOCK COMPANY (PLAINTIFFS) ... APPELLANTS;

1896
*Oct. 21, 22.
*Dec. 9.

AND

ANGUS CHARLES STEWART, JOHN WALKER AND SOLON WOOLVERTON (DEFENDANTS) ... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Principal and surety—Guarantee bond—Default of principal—Non-disclosure by creditor.

W. was appointed agent of a company in 1891 to sell its goods on commission, and gave a bond with sureties for faithful discharge of his duties. His appointment was renewed year after year, a new bond with the same sureties being given to the company on each renewal. His agreement with the company only authorized W. to sell for cash but at the end of each season he was in arrear in his remittances which he attributed to slow collections and which he settled by giving an indorsed note, retiring the same before the bond for the next year was executed. After the season of 1894 the compamy discovered that W. had collected moneys of which he had made no return and brought an action to recover the same from the sureties.

Held, reversing the decision of the Court of Appeal, that each year there was an employment of W. distinct from, and independent of, those of preceding years; that the position of the sureties on re-appointment was the same as if other persons had signed the bond of the preceding year; and that the company was under no obligation, on taking a new bond, to inform the sureties that W. had not punctually performed his undertakings in respect of previous employment nor did the non-disclosure imply a representation to the sureties when they signed a new bond that they had been punctually performed.

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

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APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment at the trial in favour of the plaintiff company.

The facts of the case are thus stated by Mr. Justice Maclennan in the Court of Appeal:

"The plaintiffs are themselves an agency company and their business is to sell fruit for the growers and producers thereof on commission. They employed the defendant, R. B. Walker, to act as agent at London, to receive, take charge of and to sell the fruit and produce which the company's customers might send to him. They had a written contract with him, dated the 20th of July, 1894, in which he covenanted with them :— 1. To act as their agent for seven months from date, to receive, take charge of, sell and dispose of for cash only, all fruit or produce shipped or forwarded to him from time to time by the company's customers, and for the purposes of the agreement payments made within seven days, but not later, of the sale or disposal, were to be considered as cash. 2. To keep full and correct entries in a book to be kept for that purpose of the following matters and things, namely: (1.) The quantity of fruit or produce contained in each consignment. (2.) The name of the person from whom received. (3.) The date when received. (4.) The names in full of the persons or firms to whom sold. (5.) The date of the sale. (6.) The selling price. (7.) The sum of money received. (8.) The date when received. (9.) The amount of freight and other expenses paid. 3. He was at all times during the continuance of his engagement diligently and faithfully to employ himself in the performance of his duties as agent. 4. He was well, truly and faithfully to account for and promptly pay over daily, and every day, to the credit of the company at the Traders Bank, all and every sum and sums of

(1) 23 Ont. App. R. 681.

money which should from time to time, or at any time, be received or come into his hands, and conduct himself with fidelity, integrity and punctuality in and concerning the matters and things which should or might be reposed or entrusted to him in the course of his employment. 5. He was to give and render to the company just and true accounts daily, and every day, unless otherwise directed by the company, of all moneys, business dealings and transactions whatsoever, in relation to the company's business. 6. He was on Tuesday to render to the company's secretary and president a complete statement according to forms furnished for that purpose by the company of the business done during the week ending on the Monday of the same week, each business week, for the purpose of such statements, to begin on Tuesday morning and to end on the following Monday evening. The company were to pay him monthly as long as the engagement lasted, and he fulfilled its terms, a commission of seven per cent on gross sales when the money for all sales had been deposited in bank to the company's credit, such commission to be in lieu of salary and all expenses. And he was to be responsible to them for the selling price of all goods sold by him whether he should actually receive the purchase price or not, and he was to bear all the risks of bad debts arising from such sales.

"It was also provided that in the event of any neglect or violation on the part of the agent of any of the foregoing covenants, conditions or agreements the company might forthwith discharge him. And the company were to furnish him with an agency book, agent's tissue account sales book, tags, weekly report forms, monthly report forms and agent's pay sheets, which were to be returned to the company, together with all books used by him in the business at the expiration of

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the term of the employment. The company required Walker to furnish sureties for the performance of his duties under the agreement and they gave him a printed form of bond for the purpose, and he procured it to be executed some time after the date of the agreement, and that is the bond on which the appellants have been held liable in this action. It recites the employment of Walker by the company as their agent, and that the bondsmen had become sureties for his faithfully serving and accounting to the company in manner thereinafter mentioned so long as his service continued, and the condition is that he should faithfully serve and should from time to time, and at all times, promptly account for and pay over and deliver up to the company all moneys, securities for money, goods and effects whatsoever which he should receive for the use of the company or their customers, and should not embezzle, withhold or allow or permit to be embezzled or withheld any such moneys, securities for money, goods and effects as aforesaid or any books, papers or writings of the company.

"There had been a similar contract between the company and Walker, and a similar bond of suretyship by the same bondsmen during the three preceding years. This action is on the bond of 1894 to recover from the sureties a sum $1,774 which it is alleged Walker, the agent, received for the plaintiffs but failed to account for. And the defence is that he was unfaithful in the former years to the knowledge of the plaintiffs, and had in other years, with their knowledge, appropriated money of theirs to his own use; that in employing him again in 1894 the plaintiffs held him out contrary to the fact as a trustworthy agent, and that the bondsmen became his sureties in ignorance of his defalcations and in the belief that he had theretofore been faithful."

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The trial judge found that the company had no knowledge of the true nature of the agent's default and gave judgment against the defendants for the amount claimed. The Court of Appeal reversed this judgment proceeding almost entirely on the evidence of the president. The company appealed to this court.

Moss Q.C. and *Meyer* for the appellant. The finding of the trial judge as to the plaintiff's want of knowledge was a finding of the fact on the whole evidence which the Court of Appeal should have accepted. *Grasett* v. *Carter* (1).

There was no fraudulent concealment as there was no duty on the part of the company to disclose. *Davies* v. *London and Provincial Ins. Co.* (2); *Town of Meaford* v. *Lang* (3); *Mayor of Durham* v. *Fowler* (4).

Armour Q.C. for the respondents. The agent having been in default at the end of 1893 the company was bound to inform the sureties of the fact before re-employing him. *Smith* v. *Bank of Scotland* (5); *Railton* v. *Mathews* (6); *Phillips* v. *Foxall* (7); *Adjala* v. *McElroy* (8); *Mayor of Kingston* v. *Harding* (9).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—I need not state the facts established by the evidence as they are accurately and fully set forth in the judgment of Mr. Justice Maclennan in the Court of Appeal.

There can be no doubt but that the several appointments of R. B. Walker, as the appellants' agent for the several years 1891, 1892, 1893 and 1894, were all independent of each other and that the contracts of

(1) 10 Can. S. C. R. 105.
(2) 8 Ch. D. 469.
(3) 20 O. R. 541.
(4) 22 Q. B. D. 394.
(5) 1 Dow 272.
(6) 10 Cl. & F. 934.
(7) L. R. 7 Q. B. 666.
(8) 9 O. R. 580.
(9) [1892] 2 Q. B. 494.

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suretyship entered into by John Walker and the respondent Stewart, for those years respectively, were distinct and independent contracts. The question is, therefore, as regards the point of law, precisely the same as if other persons than John Walker and Stewart had been sureties in the years preceding 1894, or, as if there had been no sureties in respect of those preceding years.

It is also beyond question that R. B. Walker had in each year before his re-appointment settled, in a manner satisfactory to the appellants, the balance due from him in respect of his agency for the preceding seasons.

Further, it is not pretended that there was any direct communication between the appellants and the sureties, the bond in each case having been sent in blank to R. B. Walker in order that he might return it executed by sufficient sureties, there being no stipulation by the appellants that the sureties for the previous year should again become bound.

The question is, therefore, simply this: Were the appellants under any legal obligation spontaneously to communicate to the sureties the fact, that in the years anterior to 1894 the agent, although he had at last and before his re-appointment duly accounted for his receipts, and to the satisfaction of the appellants discharged his debt to them, had not done so promptly and in accordance with the terms of his agreement with the company?

It is now a well-established proposition of law that one who takes from a surety a guarantee or other security for the fidelity of an agent in his employment, is not, as in the case of a contract of marine insurance, under any obligation to disclose all facts material to be considered by the proposed surety. The case of *North British Insurance Co.* v. *Lloyd* (1), which has never

(1) 10 Ex. 523.

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been doubted, is a sufficient authority on this head. In *Davies* v. *London and Provincial Insurance Co.* (1), Mr. Justice Fry says:

It has been argued here that the contract between the surety and the creditor is one of those contracts which I have spoken of as being *uberrimæ fidei*, and it has been held that such a contract can only be upheld in the case of there being the fullest disclosure by the intending creditor. I do not think that that proposition is sound in law. I think that, on the contrary, that contract is one in which there is no universal obligation to make disclosure, and therefore I shall not determine this case on that view. But I do think that the contract of suretyship is, as expressed by Lord Westbury in *Williams* v. *Bayley* (1), one which "should be based upon the free and voluntary agency of the individual who enters into it."

The case of *Railton* v. *Mathews* (2), which was strongly relied on by Mr. Armour in his very able argument at this bar, does not appear to me to go the length contended for. That was an appeal from Scotland in an action which had been tried by a jury, and in which there had been an application for a new trial (on the ground of misdirection) which the Court of Session had refused to grant. The appeal was heard before Lord Cottenham and Lord Campbell, who reversed the decision of the Scotch court. There are, no doubt, in the judgment of Lord Cottenham, some expressions favourable to the view contended for by the respondents in the present appeal. These expressions seem to me, however, to be *dicta* merely, and to be neutralized by other passages in the same judgment, which indicate that the true ground of decision was the misdirection involved in the charge of the judge at the trial who had instructed the jury that:

The concealment to be undue must be wilful and intentional, with a view to the advantage they (the creditors) were thereby to receive.

Lord Cottenham on this proceeds to say:

The charge, therefore, I conceive, was not consistent with the rule of law. I think that it narrowed the question for the consideration

(1) 8 Ch. D. 475. (2) L. R. 1 H. L. 200.

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of the jury beyond the limits which the rights of the parties required to have submitted to the consideration of the jury.

At page 939 of the report, Lord Cottenham himself defines the question which he considered *sub judice* as follows:

> The real question is whether the way in which the learned judge put this case to the jury and described to them the duty they had to perform, was, or was not, consistent with and properly applicable to the issue raised for their consideration.

And at page 940 there is this further passage:

> Now when the issue in this case was tried, such being the points between the parties, we have nothing to do with the evidence in the cause, or the facts proved, or the conclusion to which the jury might or might not have come under the circumstances, but with the question whether the charge which was made to them was such a charge as we conceive ought to have been made to them.

Lord Campbell, in his judgment, even more distinctly proceeds on the same grounds. He points out that the direction of the judge at the trial that

> the concealment being undue, must be wilful and intentional, with a view to the advantage they were thereby to receive,

involved a misconception of the law; and on this ground he decides for the appellants, without in any way adverting to the merits, or laying down, as a matter of law, that the non-disclosure complained of was sufficient to avoid the cautionary security.

I cannot, therefore, consider *Railton* v. *Mathews* (1) a decisive authority governing the present case to such an extent as to have required Mr. Justice Street, in deciding not only on the law but on the facts also, to have held that the evidence before him disclosed a case of undue concealment. Further, in this explanation of the decision of the House of Lords in *Railton* v. *Mathews* (1), we have the support of the Court of Exchequer in *North British Insurance Co.* v.

(1) 10 Cl. & F. 935.

Lloyd (1), where Pollock C. B., in delivering the judgment of the court, uses this language :

In *Railton* v. *Mathews* (2), the point decided by the concurrent judgments of Lord Campbell and Lord Cottenham was in effect that it was not necessary, in order to render a concealment by a person fraudulent, that it should be made with a view to the advantage that person was thereby to receive, the Lord Justice Clerk having left that to the jury as part of a more complex definition of fraud.

I have considered it important to point out the distinction between *Railton* v. *Mathews* (2) and the case now before us, for the reason that in some respects that case in its facts resembles the present, for there, as here, the non-disclosure of previous defaults and misconduct complained of had relation to a previous employment of the agent, and there, as here, there was no direct communication between the creditor and the sureties, the bond of the latter having been obtained through the intervention of the principal debtor. Neither of these points was, however, touched upon in the judgments delivered, nor was there any observation on them called for. If this explanation of the case of *Railton* v. *Mathews* (2) is not adopted I do not see how that case can possibly be reconciled with the subsequent decision of the House of Lords in *Hamilton* v. *Watson* (3).

Smith v. *Bank of Scotland* (4), approved by Lord Cottenham in *Railton* v. *Mathews* (2), is also distinguishable. Pollock C. B., in *North British Insurance Co.* v. *Lloyd* (1), thus states the *ratio decidendi* in this case :

In *Smith* v. *Bank of Scotland* (4), decided by Lord Eldon and Lord Redesdale, they evidently proceeded on the ground of a representation to the surety of trustworthiness in the principal known or believed by the bank to be true.

(1) 10 Ex. 523.
(2) 10 Cl. & F. 935.
(3) 12 Cl. & F. 109.
(4) 1 Dow 272.

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Moreover, in *Smith* v. *The Bank of Scotland* (1) the defalcation of the principal debtor had been in the course of the same employment to which the cautionary security was applicable. It was also held that the security applied to past as well as to future transactions.

In *Lee* v. *Jones* (2), a case decided by the Exchequer Chamber in 1864, on appeal from the Court of Common Pleas, the question was really not one of undue concealment, but of misrepresentation, for the creditor who had prepared the instrument executed by the surety had introduced into it recitals which not only suppressed the truth, but were actually so misleading as to be equivalent to false representations of the true facts.

I now proceed to call attention to some decisions in which it appears to have been considered, even as a matter of law, that there was no obligation on the intended creditor to disclose to the proposed surety defaults of the debtor, under circumstances like the present, in the course of previous and distinct employment, or even previously incurred and continuing liabilities under the same contract.

Wythes v. *Labouchere* (3) was a case before Lord Chelmsford. After expressing approval of the decision of the Court of Exchequer in *North British Insurance Co.* v. *Lloyd* (4), the Lord Chancellor proceeds to say:

> The creditor is under no obligation to inform the intended surety of matters affecting the credit of the debtor, or of any circumstances unconnected with the transaction in which he is about to engage, which will render the position more hazardous.

In *Hamilton* v. *Watson* (5), Lord Campbell had previously laid down the rule to be that the creditor was not bound to exercise his judgment as to what it

(1) 1 Dow 272.
(2) 17 C. B. N. S. 482.
(3) 3 DeG. & J. 593.
(4) 10 Ex. 523.
(5) 12 Cl. & F. 109.

was material for the surety to know, and to that extent to make disclosure of everything to the proposed surety, saying:

> If such was the rule it would be indispensably necessary for the bankers to whom the security is to be given to state how the account has been kept; whether the debtor was in the habit of overdrawing; whether he was punctual in his dealings; whether he performed his promises in an honourable manner; for all these things were extremely material for the surety to know.

This case of *Hamilton* v. *Watson* (1) was sought to be distinguished on the ground that it had only application to a suretyship undertaken towards a particular class of creditors, namely, bankers. I deny, however, that any such distinction exists, and whatever may be said to the contrary in judicial *dicta* and in text books, I venture to maintain that there is no judicial authority requiring us to treat the language of Lord Campbell as laying down anything less than a general rule.

Roper v. *Cox* (2), a decision of the Court of Common Pleas, in Ireland, also appears to me to be a strong authority in support of this appeal. It was an action upon a guarantee given by a surety for a tenant to his landlord. The defence was that under the same tenancy the principal had previously been largely in arrear for rent, and had been guilty of gross irregularities in not observing the stipulations of his lease, and that the plaintiff (the landlord) had omitted to communicate these to the defendant. A defence embodying these allegations was demurred to and the demurrer was allowed.

An American case, the *Home Insurance Company* v. *Holway* (3), although of course not an authority in any way binding on us, is well worthy of consideration. The circumstances there were very similar to those in the appeal before us, and the numerous American

(1) 12 Cl. & F. 109. (2) 10 L. R. Ir. 200.
(3) 39 Am. Rep. 179.

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authorities to the same effect cited in the judgment give it great weight.

On the whole, therefore, if this appeal is to be considered as depending on principles of law and on decided cases, it appears to me that Mr. Justice Street's judgment was in all respects correct.

It is, however, not to be assumed that the case is altogether governed by legal considerations. In *Lee* v. *Jones* (1), Blackburn J. says:

> I think that it must in every case depend upon the nature of the transaction, whether the fact not disclosed is such that it is impliedly represented not to exist, and that must generally be a question of fact proper for a jury.

Applying this principle to the case before us, I am not able to say that the non-disclosure by the appellants of the want of punctuality in making payment and in settling balances by R. B. Walker, under his former agencies, in any way implied a representation to the respondents when they entered into the bond sued upon that he had punctually performed his undertakings in respect of such previous employments. He had at that time, to the satisfaction of the appellants, discharged himself from all prior liabilities. That the appellants were bound to inquire into Walker's expectations as to how he was going to pay the note he had given in settlement of the balance due on account of the business of 1893, and surmise that he could only do this out of his receipts for 1894, is a proposition to which I cannot assent. The creditor is not bound to make himself a detective for the benefit of the surety. On the whole I think the law, as embodied in the decided cases, entirely supports Mr. Justice Street's judgment; and if the question is to be regarded as one of fact, no other conclusion could, on the evidence before him, be reasonably arrived at than that which he came to.

(1) 17 C. B. N. S. 482.

As regards the request not to give notice to the sureties, made by Walker to the appellants, that had no reference to any further suretyship which might be entered into by the respondents. It was a mere request to forbear from enforcing the sureties' liability under the current bond, the arrearages secured by which were soon after settled to the satisfaction of the respondents.

In my opinion the appeal must be allowed, the order of the Court of Appeal vacated, and the judgment of the trial judge restored with costs to the appellants in all the courts.

Appeal allowed with costs.

Solicitor for the appellants: *Geo. W. Meyer.*

Solicitors for the respondents: *Teetzel, Harrison & McBrayne.*