1891
*Jan. 25.
*June 22.

JOHN J. McDONALD AND JOHN SHIELDS (DEFENDANTS) ..... } APPELLANTS ;

AND

ALEXANDER MANNING (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Suretyship—Endorsement of note—Right to commission for endorsing—Consideration.

M., by agreement in writing, agreed to become surety for McD. & S. by endorsing their promissory note, and McD. & S. on their part agreed to transfer certain property to M. as security, to do everything necessary to be done to realize such securities, to protect M. against any loss or expense in regard thereto or in connection with the note, to pay him a commission for endorsing, and to retire said note within six months from the date of the agreement. The note was made and endorsed and the securities transferred, but McD. & S. were unable to discount it at the bank where it was made payable, and having afterwards quarrelled with each other the note was never used. In an action by M. for his commission :

Held, affirming the decision of the Court of Appeal, Taschereau and Gwynne JJ. dissenting, that M., having done everything on his part to be done to earn his commission, and having had no control over the note after he endorsed it, and being in no way responsible for the failure to discount it, was entitled to the commission.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of the trial judge in favor of the defendants.

The plaintiff and defendants entered into an agreement in writing by which the plaintiff agreed to become surety for the defendants by indorsing a promissory note, for which defendants agreed to pay $1,000.

PRESENT :—Sir W. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

1891

McDONALD v. MANNING.

The recitals of the agreement were, that plaintiff had agreed to endorse the note upon receiving as security certain specified properties and that assignments thereof had been duly executed; and the substance of the operative part was as follows:—

"Now this indenture witnesseth that in pursuance of said agreement, and in consideration of the said Alexander Manning *becoming surety* and endorsing the said promissory note for the said parties of the first part" (the defendants), "they," the defendants, "do transfer, assign," etc.—setting forth the various securities—"And the said parties of the first part (the defendants) in consideration of the said party of the second part *becoming such surety*, hereby covenant and agree to pay" the $1,000 sued for.

The note was drawn as agreed, endorsed by the plaintiff and delivered to the defendants who left it in the hands of Mr. Bain, solicitor for the plaintiff, while they went to the Bank of Montreal where it was made payable and interviewed the manager, who refused to discount the note as he already held a large amount of defendants' paper. This was communicated to plaintiff and his solicitor. Subsequently the defendants, having quarrelled between themselves, respectively notified Mr. Bain not to transfer it to the other defendant. Nothing further was done for some four years, when defendants, having sold certain timber limits assigned to plaintiff as security, applied to him to re-transfer them, which he refused to do unless he was paid the $1,000, and on defendants refusing such payment the present action was brought.

On the trial judgment was given for the defendants on the ground that plaintiff never really became surety for the defendants. This decision was reversed by the Court of Appeal, and the defendants then appealed to the Supreme Court of Canada.

1891

McDONALD v. MANNING.

Hector Cameron Q.C. for the appellants. The sole question is whether or not the plaintiff ever became surety under the agreement. It is submitted that suretyship would not arise until the note was transferred to a third party as holder for value.

The mere delivery of the note is not sufficient. Chitty on Bills (1) ; *Bromage* v. *Lloyd* (2).

The claim is not meritorious and the agreement should be construed strictly.

At all events the judgment of the Court of Appeal was wrong in allowing interest which was never agreed on nor demanded.

Laidlaw Q. C. for the respondent. The plaintiff could legally stipulate for this commission. Evans on Principal and Agent (3).

The plaintiff did all that he was required to do to earn the commission.

SIR W. J. RITCHIE C. J.—The moment plaintiff endorsed the note and it was placed in the hands of Bain with defendants' consent, as trustee for them, the rights of both parties were fixed and established, the plaintiff's liability on the note commenced and he had no further control over it, and could not prevent its being handed over to defendants or used by them, and he thereby became security for defendants to whomsoever they chose to make the holders, and when plaintiff endorsed the note, and it became subject to defendants' disposal, defendants became entitled to the note and to use it as they thought proper, and thus plaintiff had, in my opinion, fulfilled his contract and become entitled to the $1,000, which the agreement specified was to be paid on the execution of these presents not on the discount or the disposal of the note,

(1) 11 ed. p. 168. (2) 1 Ex. 32.

(3) 2 ed. p. 397.

1891

McDONALD v. MANNING.

Ritchie C.J.

and he cannot be deprived of this by reason of defendants quarrelling between themselves.

If the evidence of Mr. Bain is to be believed he held the note in trust for McDonald and Shields, and his evidence is, in my opinion, entirely confirmed by the action of both McDonald and Shields, and had they not quarrelled it is clear they could have got the note at any time; unfortunately for them neither party would allow the other to have it; McDonald wanted to use the note, but Shields objected and gave Bain an emphatic notice not to give it up to him. This, to my mind, conclusively shows that McDonald and Shields well knew that Bain was holding the note for them, and that both the parties clearly recognised the note as an outstanding security available to both but not controllable by one alone, and thus they prevented the note being discounted or used as both individuals desired, but as neither would trust the other it remained in the hands of Mr. Bain. Had they been of one mind they could have discounted the note or otherwise have used it as served their purposes, and would no doubt have done so could they have trusted one another, but with the subsequent disposal of the note after plaintiff's endorsement, and after it was placed in the hands of Mr. Bain, plaintiff had nothing whatever to do that I can discover.

I think the appeal should be dismissed.

STRONG J.—I see no reason for differing from the Court of Appeal in the conclusion which it has reached, with the unanimous concurrence of all its members, that the respondent had performed the condition precedent which under the terms of the sealed agreement sued upon was to entitle him to receive the $1000 which he seeks to recover in the present action. The words of this covenant are as follows :

1891

McDONALD v. MANNING.

Strong J.

And the said parties of the first part, in consideration of the said party becoming such surety, hereby covenant and agree to pay to the said part of the second part the sum of $1000 upon the execution of these presents being a per centage of 5 per cent. upon the said sum of $20,000.

The recital of the instrument is that

Whereas the said parties of the first part have applied to the said party of the second part, to endorse their promissory note for the sum of $20,000 * * * * and whereas the said party of the second part has agreed to endorse the said note upon receiving by way of security for such endorsement, &c.

Then the operative part begins as follows :

That in pursuance of the said agreement and in consideration of the said Alexander Manning having become surety and endorsing the said promissory note for the said parties of the first part, they, the said parties of the first part, &c.

The evidence shows that the respondent endorsed the note and delivered it to the appellants who endeavored to negotiate it but failed in doing so, and that they then deposited it in the hands of Mr. Bain to keep as a depositee for them.

It appears to me that upon this state of facts the respondent did all that could be required of him to entitle him to the payment of the $1,000. It is to be observed that the $1,000 were to be paid immediately upon the execution of the deed of covenant while no time is fixed for the endorsement of the note, so that it may perhaps admit of some doubt whether the endorsement was a condition precedent at all, but I will assume in favor of the appellants that it was a preliminary condition requiring performance to entitle the respondent to recover his commission.

The note having been endorsed by the respondent, and having gone into the hands of the appellants to be used by them in such way as they might think fit, the respondent had thus become surety for the payment of the $20,000 ; it is true that no liability has ever actually

arisen by reason of the endorsement, but it was in the power of the appellants by their own act, in which they could in no way be controlled by the respondent, to cause such liability to attach at any moment, and for all that appears to the contrary this may even yet be done since the note still remains in the appellants' hands or subject to their control. The risk for which the appellant was to be paid the $1,000 attached so soon as the note left his hands and as he had literally complied with the condition by endorsing and becoming surety there can be no reason why he should not recover his commission which he had thus earned.

From the words of the recital which are that the respondent was to "endorse," and from those at the beginning of the operative part of the deed which are that upon his "becoming surety and endorsing the said promissory note" the security stipulated for was to be given, I think it a reasonable interpretation of the language of the covenant to construe it as meaning that the commission was to be paid in consideration of the respondent becoming "such surety." On the face of the instrument itself it is very clear that the suretyship contemplated was the endorsement of the note by the respondent and its delivery to the appellants to be dealt with by them as they might think fit without regard to its passing into the hands of a *bonâ fide* holder. This construction is considerably strengthened by the surrounding circumstances, and is inevitable when we find that the commission was by the covenant to be paid "upon the execution of these presents" without regard to any postponement until the note should be discounted or otherwise made use of.

I am unable, therefore, to agree with Mr. Justice Falconbridge who considered that the respondent could not recover inasmuch as no liability ever attached as

1891
McDONALD
v.
MANNING.
Strong J.

there never was any creditor, and that consequently the respondent was never a surety. In my opinion an inchoate or potential liability did attach as soon as the note got into the appellants' hands, and the respondent therefore became, if not a surety according to abstract legal definition, yet just such a surety as the instrument executed by the parties contemplated.

The appeal must be dismissed with costs.

TASCHEREAU J.—I would allow this appeal. I concur with my brother Gwynne.

GWYNNE J.—The question involved in this case is simply one of fact, and the true conclusion to be deduced from the facts in evidence, in my opinion, is that the object of the defendants in applying to the plaintiff to endorse their note, and of the plaintiff in consenting to do so, was to enable the defendants to raise money for which they had immediate occasion to pay for logs which they had contracted for to carry out a purpose in which the plaintiff then had, or had had, an interest under an agreement to which he had been a party with the defendants; and that the intention of both the defendants and the plaintiff was that the note when endorsed by the plaintiff should be discounted in the office of the Bank of Montreal at Toronto, where the note was made payable, in order to raise the money for the purpose aforesaid, and that, in point of fact, the defendants after making the note and leaving it in the hands of the plaintiff's solicitor for the purpose of its being endorsed by the plaintiff never did receive it back, and so never received the consideration which in the instrument sued upon is expressed to be the sole consideration for their undertaking to pay the plaintiff the amount sought to be recovered in the present action. As soon

1891

McDONALD v. MANNING.

Gywnne J.

as the defendants made the note and had left it in the hands of the plaintiff's solicitor they went immediately to Mr. Yarker, the manager of the Bank of Montreal at Toronto, to make arrangements with him for the discount of the note as soon as they should receive back the note with the plaintiff's endorsement thereon, and told him that they were getting the plaintiff's endorsement on their note, and asked him if he would not discount it for them. He refused to do so, alleging for reason that the debt of the firm of Manning, McDonald, McLaren & Co., of which the plaintiff and the defendants were members, to the bank was so heavy that he could not do it, and to the defendants' request that he should apply to the head office of the Bank of Montreal for authority to discount it, he replied that there would be no use in applying to the head office until the debt of the firm should be reduced. Thereupon the defendants went straight back and informed the plaintiff's solicitor of what Mr. Yarker had said, and of his refusal to discount the note. The defendants said that according to their recollection the papers which, in order to perfect the transaction on their part, they had to sign were signed by them before they went down direct, as they say, from the plaintiff's solicitors office to negotiate with Mr. Yarker for the discount of the note; the plaintiff's solicitor's recollection is, that it was immediately upon the defendants' return to his office with the information that Mr. Yarker had refused to discount the note that these papers were signed by the defendants. Adopting this view it is obvious that the transaction remained still incomplete at this time, and that although the defendants had subscribed their names to the instrument now sued upon they had not as yet became liable to pay the $1,000 mentioned in that instrument as payable only on consideration of the

1891
McDONALD
v.
MANNING.
Gwynne J.

plaintiff becoming a party to the note as their surety. That liability could only arise upon their receiving back the note endorsed by the plaintiff which, in point of fact, they never did so receive. Before the transaction could be completed some of the papers signed by the defendants had to be sent to Ottawa to Mr. McLaren whose acknowledgment of the receipt of them, and his undertaking to comply with the directions contained in them, was a condition precedent to the plaintiff incurring the responsibility of becoming surety for the defendants on their note. So, likewise, the chattel mortgage signed by the defendants had to be sent to Manitoba for registration and for the purpose of seeing that there was no prior charge on the mortgaged premises This would require some little time. Now the plaintiff's solicitor's own view of the condition in which the transaction was when the defendants came back on the same day they had signed the note, and informed him what Mr. Yarker had said upon refusing to discount the note, is that the note remained in his hands so that when everything was ready and when Mr. Yarker would be prepared to discount the note the defendants could come and get it and discount it after the account should be reduced.

It can only be inferred, I think, that this view was based upon the instructions he had received from his client the plaintiff, namely, not to give up the note to the defendants with the plaintiff's endorsement upon it until he should be satisfied that the papers signed by the defendants were all right, and that the defendants could get the note discounted at the Bank of Montreal. There is not a suggestion in any part of the evidence that the defendants had ever said anything constituting the plaintiff's solicitor as their agent to take charge of the note for them as their property. His statement, therefore, that he held the note until

everything was ready and Mr. Yarker could be procured to discount the note tends, in my opinion, to confirm the statement of both of the defendants that it was for the purpose of being discounted at the Bank of Montreal as aforesaid that the plaintiff agreed to endorse the note,

The Bank of Montreal still persisting to refuse to discount the note the defendants made arrangements otherwise to raise the money they required to meet the purpose for which they say the plaintiff had agreed to endorse their note ; difficulties arose between the defendants themselves, each appearing to have entertained distrust of the other. In July the defendant, McDonald, seems to have applied to the plaintiff's solicitor for the note, and in so doing explained that the purpose he had in view was to obtain some power over the defendant Shields, in a manner not necessary to set out here, but which showed that his object was to use the note for a purpose different from that for which both of the defendants say the plaintiff consented to endorse the note for them. The plaintiff's solicitor refused to give the note to McDonald. He says that he did so in Shields's interest but he admitted that he had not any instructions from Shields to act on his behalf in the matter, and he added, moreover, that he had never given any notice to the defendants or to either of them that he held the note for them.

Now, if the defendants' right to have the note returned to them with the plaintiff's endorsement upon it was not qualified by any condition to the effect that the Bank of Montreal should first consent to discount for them, surely it was but natural, after the plaintiff's solicitor had received Mr. McLaren's reply to the letter of the 28th May, and after search in the registry office in Manitoba to ascertain whether property covered by the chattel mortgage was subject to any prior incumbrance,

1891

McDONALD v. MANNING.

Gwynne J.

that the defendants should have been informed that the matter was concluded so as to entitle them to receive back their note with the plaintiff's endorsement upon it, and that therefore the time had arrived which, in the meaning of the defendants' covenant, entitled the plaintiff to demand and receive the $1,000, which sum would not be payable until they should receive the note so endorsed, or at least until they should be notified that it was ready to be delivered to them; but nothing of the kind was done, no notice given to the defendants that they could receive the note endorsed by the plaintiff, and no demand made for the $1,000. The plaintiff's solicitor, however, informed Shields of McDonald's application for the note, and he says that Shields then gave him notice not to give up the note to McDonald, or to deal with it at all. Shields's explanation of the meaning of this notice, whatever may have been the time of its having been given as to which there was a conflict of opinion, was that he considered the whole matter at an end as they had failed to get the note discounted for the purpose for which it had been, as the defendants allege, made and endorsed.

There does not in this refusal to give the note to McDonald appear to me to be anything inconsistent with the fact that the note still remained in the plaintiff's solicitor's hands as still under the control of the plaintiff, as whose agent it originally came into his hands and as whose agent he must still be regarded as having held it under the instructions given by the plaintiff when he endorsed it and placed it in his hands, which instructions may be fairly inferred to have been to the effect of the view entertained by the solicitor himself as to the purpose for which he held the note, when on the 24th of May as before stated he was informed by the defendants that Mr. Yarker, the manager of the bank of Montreal, refused to discount the paper.

1891

McDONALD v. MANNING.

Gwynne J.

Then again at a subsequent period, when precisely is not stated but before the note if it had been negotiated would have fallen due, the plaintiff's solicitor admits that, as he thought it probable the note would remain in his hands, he converted the endorsement of the plaintiff which was in blank upon the note into one making the note payable to himself or to his order. It is, I think, inconceivable that he could have done this in virtue of any authority supposed to have been derived from the defendants, or otherwise than as the plaintiff's agent, and the effect of this endorsement so made special, whatever may have been the intent with which it was done, was, I think, to nullify the endorsement, and to put an end to the transaction, if it had not already been determined by reason of the note with the plaintiff's endorsement upon it never having been returned into the power and possession of the defendants; and that it never was so returned, but on the contrary remained always in the possession and under the control of the plaintiff, is, in my opinion, the proper conclusion to be deduced from the evidence. I am of opinion, therefore, that the appeal should be allowed with costs, and the judgment of the learned judge who tried the case, in favor of the defendants, restored.

PATTERSON J.—I do not see any way to interfere with this judgment, although I cannot help feeling that the defendants are made liable to pay without in reality having enjoyed what they have to pay for, and that the plaintiff is being paid for a risk which he cannot in strictness be said to have run. It seems to me that in disallowing the plaintiff's claim we should be enforcing a bargain which it would have been reasonable enough for the parties to have made, and which they perhaps would have made if they had anticipated the difficulties that they encountered when

1891

McDONALD v. MANNING.

Patterson J.

they attempted to negotiate the note, but not the bargain set out in their deed. That bargain was that upon the execution of the deed the defendants would pay $1,000 to the plaintiff, being a percentage on the amount of the note which he was to endorse, and which he did endorse.

I think we cannot properly do otherwise than dismiss the appeal.

Appeal dismissed with costs.

Solicitors for appellant McDonald: *Cameron and Spencer.*

Solicitors for appellant Shields: *Mulock, Miller, Crowther and Montgomery.*

Solicitors for respondent: *Bain, Laidlaw & Co.*