THE CANADIAN BANK OF COMMERCE (DEFENDANT) ..... } APPELLANT;

AND

JOSEPH BARRETTE (PLAINTIFF) AND LE SYNDICAT LYONNAIS DU KLONDYKE (DEFENDANTS) ... } RESPONDENTS.

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*Feb. 18, 19.
*April 5.

ON APPEAL FROM THE TERRITORIAL COURT OF THE YUKON TERRITORY.

Trust—Banking—Hypothecation of securities—Terms of pledge—Duty of pledgee.

B. sold property to the Syndicat and took as security for the price mortgages on real and personal property and a promissory note and transferred the securities to the bank to secure his present and future indebtedness to it. He signed a document authorizing the bank to realize on the same in its discretion, to grant extensions and give up securities, accept compositions, grant releases and discharges and otherwise deal with them as it might see fit without prejudice to B.'s liability. The note not being paid at maturity, the bank sued the Syndicat and B. upon it and on the covenants in the mortgages and obtained judgment against both. In the same action, the Syndicat, on counterclaim for damages for deceit, had judgment against B. which was eventually set aside, but, while it existed, the bank made a settlement with the Syndicat and discharged the latter from all liability on the judgment of the bank on payment of over $20,000 less than the debt. B. was not a party to this settlement and the bank afterwards refused to give him any information about it or to give him a statement of his account with the bank itself. In an action by B. for an account and to have the bank enjoined from further dealings with the securities:—

Held, that the power given to the bank to deal with the securities was to be exercised for the purpose of liquidating B.'s debt, and, as to the surplus, for B.'s benefit; that, the settlement having

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

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been made solely for the benefit of the bank and in sacrifice of B.'s interests, the bank violated its duty, and had not satisfied the onus upon it of shewing that, had the whole amount of the judgment been recovered from the Syndicat, B. would not have benefited thereby.

APPEAL by the Canadian Bank of Commerce (defendant) and CROSS-APPEAL by the plaintiff from the judgment of the Territorial Court of Yukon Territory, *in banco,* varying the judgment and a supplementary judgment in the action by Craig J., and dismissing the appeal from the first judgment by the present appellant.

The circumstances of the case are stated in the head-note and in the judgment now reported.

A. W. Anglin K.C. and *Glyn Osler* for the appellant.

Holman K.C. and *Congdon K.C.* for the respondent and cross-appellant Barrette.

C. J. Bethune for the respondent, Le Syndicat Lyonnais du Klondyke.

THE CHIEF JUSTICE and GIROUARD and DAVIES JJ. concurred in the opinion of Duff J.

IDINGTON J.—The respondent Barrette sold several mining properties to the respondent, the Syndicat Lyonnais du Klondyke, hereinafter called the Syndicat, and got from it for the balance of purchase money a promissory note for $92,500, secured by mortgages for the like amount respectively on the real and personal property so sold.

These securities were all transferred by Barrette to the bank to secure such sums as he owed or might come to owe it, and the face value of them was largely in excess of any then existent indebtedness due by him.

The note fell due on the 1st October, 1902, and the bank sued the Syndicat as makers and Barrette as indorser and claimed under the mortgages also.

The Syndicat set up by way of counterclaim thereto a claim of damages for deceit alleged to have been so practised by Barrette as to induce the Syndicat to give the note for a larger sum than it should have given.

The claim was made against the bank that its local manager was either party to the alleged fraud or knew of it, and hence the bank not entitled to recover upon the promissory note or at all events only beyond the damages to which the Syndicat might be found entitled.

The case went to trial in this shape and after the trial had lasted some days (and I apprehend the charges against the bank and its manager had failed) Barrette agreed to plead to this counterclaim though not served and fight out the issue thus framed against him.

Upon Barrette taking this bold stand the appellant had no further concern in the issue raised by the counterclaim and the Syndicat was content to fight out that issue with him and let judgment go against it for full amount of the note. The result was a judgment on the counterclaim dismissing it as against the bank, but in favour of the Syndicat against Barrette for $40,500 and for the bank for $101,204.15 against both the Syndicat and Barrette and a reference to adjust accounts on this basis.

This judgment for the bank never was intended to

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be against any one except the Syndicat and on the discovery of its standing also against Barrette, was set aside as against him some years after the order of release I am about to refer to.

Except for the interpretation of the said order of release we are not concerned how it came about or why it disappeared.

This judgment was entered up on the 4th of March, 1903. On the 1st of April, 1903, Barrette appealed to the court *in banco,* and on the 16th of June, 1904, that court reversed the learned trial judge's judgment and dismissed the counterclaim with costs.

Meantime on the 6th May, 1903, the bank and the Syndicat having settled, carried out their settlement by means of an order in the case made by the learned trial judge on a consent signed by their respective solicitors, and without notice to or consultation with Barrette or his solicitors, who were served with it the same day.

This remarkable document, explicit in the earlier and main part of it as anything can well be, distributed the moneys in court between the bank, its solicitors and the solicitors of the Syndicat in sums aggregating $87,156.62 and proceeded thus:

> said payment being intended as a release and settlement in full from all and any claim for moneys, or costs, whatsoever between the Canadian Bank of Commerce, and the Syndicat Lyonnais du Klondyke in this action, or by counterclaim, and an adjustment of all matters of difference between them to this date.
>
> It is further ordered that the plaintiff's suit against the defendant corporation the Syndicat Lyonnais du Klondyke be and the same is hereby dismissed without costs and the counterclaim of the Syndicat Lyonnais du Klondyke against the plaintiff be, and the same is hereby dismissed without costs.

This would, as I have said, seem comprehensive enough to release the judgment in which had merged

the above-mentioned note in respect of which Barrette could only claim by and through the bank.

Is its effect saved from such result by the following later part of the order? It is as follows:

> It is further ordered that neither this order nor the settlement between the Canadian Bank of Commerce and the Syndicat Lyonnais du Klondyke made this day shall, in any way, affect the rights or remedies, if any, which the above named defendant by counterclaim, Joseph Barrette, may have against the above named defendant the Syndicat Lyonnais du Klondyke, or that the Syndicat Lyonnais du Klondyke may have against the said defendant Joseph Barrette. Nor shall this order affect any rights which either the said Joseph Barrette or the said Syndicat Lyonnais du Klondyke may have to appeal the judgment now standing against the said Joseph Barrette in this cause, or any rights which either of them may have under the judgment now signed against the Syndicat Lyonnais du Klondyke.

What rights had Barrette that were covered by this? In law he had no rights against the Syndicat and hence no remedies. His rights on this judgment were through and against the bank to have it collect and account for this judgment thus released.

His other rights as to the appeal against the judgment of the Syndicat were his own and needed no reservation. Nor had the Syndicat against him any rights or remedies save relative to that under the counterclaim. At the date of this order of release the judgment stood against both as entered up improperly, but when the judgment is read as it now has to be, not as against joint defendants, but only as against the Syndicat, the paragraph seems senseless. Do the last two lines help the matter?

I am unable to see how any officer of the court could have ventured in face of this order on record to have issued an execution to enforce the judgment. I suggested this difficulty in the course of the argument and am yet without any effective answer to it.

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Most ingenious and plausible arguments were put forward to shew that the purport of the whole dealing was to settle the judgment so far only as it stood then effective and until the reversal of the judgment on the counterclaim when such rights as Barrette had would enure to him.

I fail to see how that reversal would revive any right in the officer of the court to enforce it by issuing execution. And I think no attempt having been made, as was open to the bank in this case, to rectify the form of release or restore the unpaid claim of Barrette, it must have deliberately intended and agreed to the absolute release that appears in the order and it could not hope to reform it.

If ever men were properly pressed by a debtor, whose securities they had, to give needed explanation and help the bank managers and solicitors were by the repeated and long continued demands of Barrette's solicitors from the time of the reversal of the judgment.

They asked for an account and were told Barrette had his pass book and could make it for himself.

Complications needless to dwell upon rendered this an inadequate and improper reply.

Whenever that reversal took place it was Barrette's right and the duty of the bank, pressed as it was, to have issued execution to recover from the Syndicat, or if by reason of this order of release that course had become impossible to have had it amended or account for and make good the loss Barrette had incurred thereby.

They did neither. The manager said it was time enough to ask for an account when a demand was made upon Barrette that none was being made and

thereupon being requested to hand over the securities he refused, and refused explanations of what the ambiguous settlement meant.

The correspondence lasted months before this action was begun.

Barrette's solicitors repeat the request for an account and demand of the bank the transfer of notes, mortgages and all securities, etc.

This evoked a reply from the bank solicitors merely to refer to their answer of the 13th July, which states as follows:

> The securities which were taken from the Syndicat remain in exactly the same position as they were before the settlement was made.
>
> The bank are prepared so soon as final judgment is given in the case to deliver over these securities to the persons properly entitled thereto.

This statement was either true or not. If true the execution should have been issued on the reversal of the judgment against Barrette. And if the bank had no more claim or, as the local manager put it, were not making a demand on Barrette then it was none of the business of the bank to concern itself as to the future course of litigation between Barrette and the Syndicat.

He was entitled the moment the judgment against him was reversed, if the bank made no claim on him, to have these securities.

He was entitled also to know exactly what the bank claimed if it claimed anything as against or binding these securities.

In default of the bank discharging any of these several alternative duties I have referred to, Barrette was well entitled to bring this action as he did in October, 1904. Had it been tried then I cannot see what answer the bank could have had to it.

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And as to the measure of damages Barrette, on such a trial and reference as would have been had then, would have been entitled to claim by reason of the loss of his securities it would just have been that measure which the learned judge has adopted in the court below.

The bank could not answer then that an appeal was intended by some one, nor could it succeed in setting up the claim for the consideration of the damages arising out of the alleged deceit short of and unless it established as matter of law that such a valid claim existed.

We know now that no such valid claim existed; that the law was always against its maintenance and there is no room for speculation as to it.

Nor, I venture to submit, was there ever any room for speculating as to what this court or any other might or might not have done or ordered.

If the bank had duly discharged its obvious duty in law when it learned of the reversal of the judgment *en banc* in the Yukon, neither it nor any one else would have had occasion to speculate.

It would have been protected if the court had ventured to interfere, which I very much doubt.

Courts have long exercised the equitable jurisdiction of setting off one judgment against another when between the same parties in the same rights.

But beyond this they have in many cases, and I rather think uniformly, refused to go.

These parties were not before the court in the same way and rights at all.

The bank had nothing to do with the litigation after its customer came in and the court relieved it.

Nor do I see anything in the circumstances set up

of the threatened appeal by the Syndicat against the bank worthy of a moment's serious consideration. The Syndicat it must be remembered had and kept possession of the properties covered by these securities, dropped their contentions of notice to the bank and their utmost limit of relief was fixed at $40,500 as against Barrette long before the settlement. Beyond relief from a law suit there was nothing to compromise or justify surrendering Barrette's rights whatever the bank saw fit to do with its own.

I therefore conclude that in either alternative construction of the order of release the appellant's case is hopeless. If a full release thereby is given of the judgment then the rights of Barrette were sacrificed as charged. If the judgment remained after the order in full force and effect to the extent of Barrette's rights, then the bank having it in its hands as a security by way of pledge or hypothecation failed to proceed upon it in accordance with law which is almost synonymous with common sense and a proper regard for the rights of others.

As to items of $2,500 costs claimed by the bank as paid between solicitor and client, I see no evidence to warrant them.

We have not the evidence upon which to determine that it was money properly and necessarily expended in defending the title to the security or of collecting it.

And in the general way it is put merely as costs between solicitor and client I suppose it includes the charge for settling with the Syndicat including the charge for drawing up and getting the above order signed.

I doubt if in such a doubtful cause of complaint as this relative to costs we ought to interfere except

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upon the clearest possible ground that there has been error which assuredly does not appear.

As to the judgment directing re-assignment of the securities for the value of which Barrette is to be allowed in the account I do not so read the judgment. Judgments in such cases usually provide for some officer of the court settling the reconveyance of securities when parties cannot agree and if any doubt exists that precautionary clause can be inserted now if desired.

The same sort of thing can be done if any wrong has arisen in regard to the requirement for evidence in writing.

That brings us to the question of the costs of this suit.

Counsel took some pains to make clear that there was and is still a debt due from Barrette to the bank which was not tendered when the securities were demanded.

I have dealt with some aspects of that already. If the case rested on trover tender of amount due might be a necessary preliminary. The case does not necessarily rest on that ground. If the case is rested on the right to redeem and account incidental thereto, then there is no inflexible rule of law requiring tender of the debt, even to entitle to costs.

If the conduct of the mortgagee has been oppressive or unjust in the sense I have elaborated already as existent here relative to the demand for an account or statement of claim and extent of demands by the mortgagee not only is the mortgagor or pledgor freed from the ordinary liability to pay costs when no tender had been made, but is entitled to costs if the trial court sees fit to award them. I think, in view of the facts, they were righteously awarded in this case.

I do not think on the evidence here the cross-appeal can be maintained.

I think the respondent Barrette was entitled to his costs of suit as given; that this appeal should be dismissed with costs to respondents as against appellant.

DUFF J.—This appeal raises the question of the liability of the appellant bank to account to the respondent Barrette for moneys with which Barrette alleges the bank is chargeable in the circumstances I proceed to mention.

On the 27th of June, 1901, Barrette transferred to the bank as collateral security for existing and future indebtedness two mortgages, one of certain chattels, and the other of certain mining claims executed by the Syndicat Lyonnais in favour of Barrette to secure payment of $92,500 payable in October of the same year, and a promissory note of the same date payable at the same time expressed to be collateral to the mortgages.

The Syndicat having failed to pay the sums due under these securities, the bank commenced an action against them upon the covenants in the mortgages as well as upon the promissory note, and on the 16th of February, 1903, judgment was delivered in the action. By that judgment it was adjudged that the bank recover from the Syndicat the sum of $92,500 with interest (in all $101,204.15). At the same time, and in the same action, Barrette was adjudged to be liable to pay to the Syndicat $40,500 on a counterclaim set up against Barrette by the latter. The judgment further provided that upon certain conditions being satisfied the Syndicat might have an account taken of the moneys owing from Barrette to the bank and that the Syndicat should be at liberty to credit on its judg-

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ment against Barrette any amount by which the sum recovered against it by the bank as mentioned above should exceed that indebtedness.

In the following April Barrette appealed from the judgment against him. On the 6th of May, the bank entered into a settlement with the Syndicat which was embodied in an order of court of that date, and which it will be necessary to consider more particularly later.

In June, 1904, Barrette's appeal was allowed by the Territorial Court sitting *in banco*. From that judgment an appeal to the Supreme Court of Canada was brought by the Syndicat, and in the following May judgment was given in favour of the Syndicat restoring the judgment of the trial judge with a reduction of the amount awarded by that judgment.

In June, 1907, the judgment of the Supreme Court of Canada was reversed by the Privy Council, that of the Territorial Court *in banco* being restored and the counterclaim against Barrette dismissed.

It is not disputed that at the date of the settlement referred to the Syndicat had assets in the Yukon Territory sufficient to answer the full amount of the judgment recovered against them; and it is admitted that this condition of things existed in the following June when the judgment against Barrette was reversed by the Territorial Court *in banco;* when, however, that judgment (having been reversed by this court) was finally restored by the Privy Council, these assets had disappeared and with them all possibilty of recovering from the Syndicat the unpaid balance of the judgment.

There are two principal questions for decision. The first is whether in making the settlement referred to the bank violated its duty to Barrette in relation to the securities; and the second, whether, assuming it

did so, the bank is chargeable at the suit of Barrette with the full amount which could have been recovered from the Syndicat at the time the Territorial Court *in banco* delivered its judgment.

As to the first of these questions.

The effect of the transactions of June, 1901, was that the legal title to the securities was vested in the bank; and that the bank alone was invested with authority to enforce them or collect the moneys secured by them. Under the special stipulations of the letter of hypothecation (so called) of 27 June, 1901, the bank was empowered to realize the securities "in such manner as to it might seem advisable" to "grant extensions," to "enter into compositions" and generally to "deal with" the parties to the securities as "it should see fit," without prejudice to the liability of Barrette. The bank acquired in other words the full control of the securities to the exclusion of the plaintiff.

It is not necessary and I will not attempt to define with accuracy the precise nature of the duty which in these circumstances the bank owed the plaintiff in respect of the enforcement of the securities. This much is clear: the securities were to be realized, if realized at all, for the purpose not only of liquidating Barrette's debt to the bank, but as to the surplus, for Barrette's benefit. Respecting the manner in which this was to be done a discretion was under terms of the letter reposed in the bank; a discretion, however, controlled by the dominant obligation that it should be exercised in good faith with a view to the purpose for which it was conferred, viz., to realize the moneys owing upon the securities and so far as with reasonable diligence it could be done to realize the full amount. In this view and for this purpose the bank

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might grant extensions, enter into compositions or special arrangements; but only in this view, and for this purpose. A compromise framed with an eye to the interests of the bank alone, in which the interests of Barrette should be recklessly disregarded or wilfully sacrificed would involve a plain violation of duty on the part of the bank. This, I think, is as much as it is necessary to say upon this point for the purpose of this case.

There was a good deal of controversy as to the effect of the settlement in question. I do not think it really necessary to determine the precise legal effect of it. It was argued and, I think, it is quite clear that until the judgment against Barrette on the Syndicat's counterclaim was reversed, the judgment against the Syndicat could not have been enforced beyond the amount due the bank from Barrette. But the moment the judgment on the counterclaim should be reversed the situation would become wholly changed; in that contingency it would be the plain right of Barrette in the ordinary course to have the judgment enforced to the full extent of his interest in it, to have, that is to say, payment of it or, if proceedings were to be stayed pending a further appeal, to have proper provision made by way of security for the protection of his rights in the meantime.

Now nobody disputes that the documents in which the settlement is embodied are at least ambiguous; and it is perfectly clear that if those documents did—as the bank contends—reserve to Barrette the right, in the name of the bank, to enforce the judgment against the Syndicat to the extent to which Barrette should be interested in that judgment, then it is also plain that the stipulation in the settlement providing that the

action be dismissed was to the extent of that interest nugatory; and that was, of course, a contention which the Syndicat would have disputed to the full extent of its means and ability. Thus Barrette's rights were beclouded by the settlement to such an extent as most seriously to impede him in the enforcement of them, if he should succeed in his appeal; so much so indeed as to substitute for a judgment against the Syndicat a stubborn and doubtful—and, in my view, a hopeless—dispute with the Syndicat. But the grounds of complaint against the bank do not end there. The settlement was made behind Barrette's back; the bank refused to give his solicitors information respecting the terms of it; and refused, too, after the judgment against Barrette had been reversed, to give him the information required in order that he should be able to make up his account with the bank, (a step necessary to enable him in any case to ascertain the extent of his interest in the judgment and to enforce it against the Syndicat); or to take any steps themselves to enforce the judgment against the Syndicat.

It was, I may add, frankly admitted by the bank's agent, what indeed is patent from the correspondence between the agent at Dawson and the head office in Toronto, that in so acting the agent proceeded in total disregard of Barrette's interests.

I think it is impossible to maintain on these facts and in face of this admission that in the dealings I have mentioned, the bank acted in good faith under the powers vested in it under the transactions of June, 1901. The only question indeed which to my mind is at all doubtful is the question whether it sufficiently appears that as a result of these transactions Barrette suffered any loss.

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I have come to the conclusion that the plaintiff having shewn that at the date of the judgment of the Territorial Court *in banco* the full amount of the judgment (had the bank acted in accordance with its duty to Barrette as above indicated) could have been realized; and that the bank in violation of its duty to Barrette having so dealt with the judgment that Barrette was prevented from recovering upon it; the onus was on the bank to shew that had the sum owing under the judgment been realized or security been given the subsequent course of events would have deprived Barrette of the benefit of the security or of the sum thus recovered; and of this onus I think the bank has not acquitted itself.

Appeal and cross-appeal dismissed with costs.

Solicitor for the appellant: *F. J. Stacpoole.*

Solicitors for the respondent and cross-appellant Barrette: *Pattullo & Tobin.*

Solicitors for the respondents Le Syndicat Lyonnais du Klondyke: *Bleecker & O'Dell.*