JAMES MACARTHUR AND (BY AMENDMENT) THE COMMERCIAL BANK OF MANITOBA (PLAINTIFFS)..... APPELLANTS;

AND

DAY HART MACDOWALL (DEFENDANT) RESPONDENT.

1892
*Oct. 21, 24, 25.
1893
*May 1.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Promissory note—Transfer when overdue—Equities attaching—Agreement between maker and payee—Holder for value without notice—Evidence.

An agreement between the maker and payee of a promissory note that it shall only be used for a particular purpose constitutes an equity which, if the note is used in violation of that agreement, attaches to it in the hands of a *bonâ fide* holder for value who takes it after dishonour. Strong C.J. and Taschereau J. dissenting.

APPEAL from a decision of the Supreme Court of the North-west Territories (1) affirming the judgment for defendant at the trial.

The facts of the case are fully set out in the judgments hereinafter published.

Christopher Robinson Q. C. for appellants.

Ferguson Q.C. and *McKay* for the respondent.

THE CHIEF JUSTICE.—I am compelled to dissent from the judgment of the court in this case. I therefore only write shortly to indicate the grounds on which I differ, not intending to state fully the arguments and authorities in support of my view. I agree in the facts as found by the court below, and as stated

*PRESENT :—Sir Henry Strong C. J., and Fournier, Taschereau Gwynne and Patterson JJ.

(1) 1 N.W.T. Rep. Pt. 3 p. 56.

1893

MAC-ARTHUR v. MAC-DOWALL.

The Chief Justice.

in the judgment of the majority of this court, with the exception of the conclusions arrived at as to the character of the transaction by which the present appellant acquired his title to the note in question. The note was given by MacDowall to Knowles to be used for a particular purpose and not for general use as an accommodation note, and it was actually pledged to the bank by Knowles as a collateral security. The bank acquired the note in good faith as holders for value without notice and was paid off by the appellant with his own money, and this was done in pursuance of an arrangement made between the assignee in insolvency of Knowles, the appellant and the bank. The note came into the hands of the appellant upon the bank being paid off, and after it was due. The appellant had no notice of the agreement between Knowles and the respondent at the time he paid the bank and got the note.

If I had to deal with the evidence directly I should take it to be proved that the note was given as an accommodation note generally to be used as Knowles thought fit, but I cannot act upon that view of the evidence in the face of the finding of the court below, based though it is exclusively upon the evidence of the respondent himself. If it had been held to be an accommodation note generally the respondent would have been liable even though the appellant had taken it from Knowles himself after it was due and with notice

But assuming as I must on the findings of the court below that the note was given on the particular agreement which the respondent states, it is clear that the appellant had no notice and I do not consider a holder for value who takes a note signed and delivered by the maker upon such an agreement as this, in good faith, without notice, though overdue, can be affected

by any collateral agreement controlling the use which was to be made of the note though it may have been negotiated in fraud and in violation of that agreement. It appears to me that the appellant was not entitled to recover the full amount of the note, but was entitled to stand in place of the bank who were paid off with his money, that is he is entitled to be subrogated to the rights of the holder from whom he acquired title. There is no pretense for saying that the bank had notice or was otherwise than a *bonâ fide* holder for value to the extent of the sum for which the note had been pledged to it, whatever that might on taking proper accounts be ascertained to be. I understand the law to be that an endorsee or holder for value, although taking a promissory note after maturity, is entitled to the benefit of the title of any prior holder in due course whether the name of such prior holder appears on the paper or not. In other words, an agreement between the maker and payee that a note should only be used for a particular purpose does not, although the note was negotiated in fraud of that agreement, constitute an equity which attaches to the note in the hands of a *bonâ fide* holder for value even although he takes it after dishonour.

By the Bills of Exchange Act, 1890, section 27 subsection 3, it is enacted that when the holder of a bill has a lien on it arising from contract or implication of law he is deemed to be a holder for value to the extent to which he has a lien. By the 29th section a holder in due course is defined, and that in terms within which the evidence shows that the bank indubitably came. The bank took the note in good faith and for value, and at the time had no notice that Knowles was negotiating it in breach of faith or that there was any defect in his title. It was, therefore, a holder for value and also a

1893

MAC-ARTHUR v. MAC-DOWALL.

The Chief Justice.

holder in due course strictly in accordance with the provisions of the act.

Subsection 3 of section 29 is as follows:

A holder whether for value or not who derives his title to a bill through a holder in due course and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

It cannot be pretended on the facts that the appellant was a party to any fraud committed by Knowles in negotiating the note, or that the appellant had when he took the note from the bank any notice of such fraud.

It is true that the note was overdue when it came into the appellant's hands but that makes no difference. Section 36 subsection 2 of the act provides that:

When an overdue bill is negotiated it can be negotiated only subject to any defect of title affecting it at maturity and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it.

Under this provision the appellant would have been clearly entitled to avail himself of the title of the bank. The bank did not endorse the note but it had been endorsed in blank by Knowles and had thus become negotiable as an instrument payable to bearer, and the appellant upon delivery would have become entitled to the protection assured him by this provision. It is pretended however that the appellant acquired his title to the note not from the bank but from Coombs, the assignee in insolvency of Knowles. The evidence establishes directly the contrary of this proposition. Coombs was, it is true, an assenting party to the arrangement in pursuance of which the bank transferred the notes to the appellant just as a mortgagor is, on a transfer of a mortgage property, made for precaution an assenting party to the transfer, but beyond this the transfer was not a transaction between Coombs and

the appellant, but between the latter and the bank. The appellant's money paid off the bank and the securities were handed over directly by the bank to the appellant. Neither the law, business usages nor common sense authorize us to characterize such a transaction as a payment of the note by the maker and its re-issue by him. The circumstance that the draft and cheque for the amount paid to the bank passed through Coombs's hands can make no difference; it is clear that the appellant intended to acquire, and supposed, as he had a right to do, that he was acquiring, the title from the bank directly to himself. I am therefore of opinion that by force of the explicit statutory provisions I have referred to the appellant was entitled to recover the amount for which the bank, as pledgee of the note, could have maintained an action against the respondent. The note was dated the 10th November, 1889, and being payable 18 months after date did not fall due until the 13th May, 1891. The statute came into operation on the 1st September, 1890, and it contains no provision restricting its operation to notes made after that date. At this time the note was therefore current; Mr. Duncan McArthur the manager of the bank says it came into their hands "in the early fall of 1890"; granting that this was after the first of September, 1890, the act would not apply to the transfer by Knowles to the bank, though I should have thought it would apply to the subsequent transaction between the bank and the appellant, for I see no reason why the act should not apply to the subsequent transfer of pre-existing securities. But it makes no difference whether the act applies or not. The act is an almost literal transcript of the English Bills of Exchange Act of 1883. Judge Chalmers who was the draughtsman of that act, in his digest of the law of Bills and Notes (1) certainly says:

(1) 4 ed. p. 2.

1893

MAC-ARTHUR v. MAC-DOWALL.

The Chief Justice.

In so far as the act *alters the law* it is presumed it does not apply to any instrument made before its date.

And he refers to the cases of *McLean* v. *Clysdale Banking Company* (1) and *Leeds Bank* v. *Walker* (2), but in both these cases the transactions which it was held the act did not affect had taken place before the day fixed for its coming into force. I find no decision showing that the act is not applicable to the negotiation of a note made before it came into force but which had been negotiated after it became law. I do not think, however, it makes the least difference whether the statute or the pre-existing rules of the common law are to govern in the present case. All the provisions of the act to which I have referred were old law, and the statute did not in any of them make the slightest alteration. It merely formulated the law in these respects. I may, therefore, even if the act has no statutory application here, make use of it as Lord Blackburn did in *McLean* v. *Clysdale Bank* (1) as a text reproducing in precise and convenient formulas the old law on the particular subjects in question. In the case just referred to Lord Blackburn says :

> I do not think the Bills of Exchange Act applies to this case for it did not receive the royal assent until some months after the cheque had been issued ; but I do think that the enactments in that act are very good evidence of what had been the general understanding before it was passed, and of what was the law on the subject.

As regards the rights of the bank as pledgee of the note, that they were by the general law merchant before the statute was passed precisely the same as defined by section 27 of the act, appears from *Ex parte Newton* (3) ; the latter case shows that the pledgee of a bill upon which the pledgor being the drawer could not have recovered against the acceptor could only recover the amount for which the

(1) 9 App. Cas. 106. (2) 11 Q. B. D. 84.
(3) 16 Ch. D. 330.

bill is held in pledge, but that to that amount he is entitled to recover. That section 29 subsection 3 before set forth is identical with the former law is shown by *May* v. *Chapman* (1). Section 36 subsection 2 merely gives statutory effect to the law as laid down in *Fairclough* v. *Pavia* (2).

If therefore the evidence fails to establish, as I think it does, that there was a payment by or on behalf of the maker, and a re-issue of the note, the law clearly entitles the appellant to recover the amount for which the bank as pledgee was entitled to a lien on it. I do not refer the appellant's title to recover to the general doctrine of subrogation merely, but to those independent rules of the law merchant which I have pointed out, rules founded in commercial convenience, and necessary, not only to protect holders in good faith of negotiable paper but also to ensure the negotiability of such securities. These rules which had previously been well established by adjudged cases have now been adopted and confirmed by the statute. But, whilst I say this, I also think it very material that, as Mr. Robinson argued, these principles are entirely conformable to the very just and equitable doctrine of subrogation to which they most undoubtedly owe their origin.

Since writing the foregoing I have been referred by the learned counsel for the appellant to the case of *Cowan* v. *Doolittle* (3). That case was more complicated in its facts than the present, but after having made a careful analysis of it I find that it sustains the propositions of law which I have before advanced to the fullest extent, and decided as it was by a most distinguished court I should not hesitate, if I had no other authority to follow than this case of *Cowan* v. *Doolittle* (3),

(1) 16 M. & W. 355. (2) 9 Ex. 690.
(3) 46 U. C. Q. B. 398.

1893

MAC-ARTHUR v. MAC-DOWALL.

The Chief Justice.

to decide the present appeal in the manner I have indicated.

The appeal should be allowed with costs.

FOURNIER J.—I am of opinion that this appeal should be dismissed.

TASCHEREAU J.—I concur in the reasons given by the Chief Justice for allowing the appeal and in the conclusions at which he has arrived.

GWYNNE J.—I am of opinion that this appeal must be dismissed. The sole question in the case really is whether the plaintiff MacArthur purchased the note sued upon from the assignee of the insolvent estate of Knowles, the payee of the note, or from the Commercial Bank of Manitoba. If from the assignee of Knowles the action cannot be maintained, for there can be no doubt that the note was given to Knowles under such circumstances that he never could have maintained an action upon it against the defendant, and the plaintiff MacArthur became purchaser of it after it had become due. I cannot entertain a doubt that the transaction was one of purchase by the plaintiff McArthur from the assignee of Knowles of a whole batch of notes, including the one sued upon, as part of the estate of the insolvent Knowles. MacArthur, it is true, knew that the draft which he gave to the assignee of Knowles for all the notes which he purchased would go to the bank, but that was necessary to enable MacArthur's title as purchaser from the assignee of a portion of the notes which were held by the bank to be made perfect. The oral and documentary evidence is, to my mind, absolutely conclusive upon the question. Joseph Knowles had been in partnership with the plaintiff MacArthur as private

1893

MAC-ARTHUR v. MAC-DOWALL.

Gwynne J.

bankers, &c., at Prince Albert, Saskatchewan, where the defendant resided. The partnership was dissolved and thereafter each of them carried on business separately for himself. Knowles made an arrangement with the Commercial Bank of Manitoba at Winnipeg for advances to be made to him upon notes of his customers to be deposited as collateral security and upon real estate. The arrangement, as testified by the bank manager, was that the bank would advance to him to the extent of seventy-five per cent of the face value of notes to be deposited but that they would allow him to overdraw his account. Upon the note now sued upon the bank in October, 1890, advanced to Knowles $4,100, and he had also been allowed to overdraw his account to some extent. In January, 1891, Knowles failed in business and by an indenture dated the 28th of that month, he assigned and transferred all his estate, effects, choses in action, and his real estate to one Joseph M. Coombs, his executors and administrators and assigns upon trusts following: first upon trust to pay all the costs, charges and expenses, &c., attending the preparation and execution of the said trust indenture, and secondly to pay off the indebtedness of the said Knowles to the Commercial Bank of Manitoba and Katherine W. McLean, a secured creditor, and in the next place to pay and divide the clear residue into and among his other creditors ratably and proportionately and without preference or priority according to the amount of their respective claims, and lastly to pay the residue, if any, to Knowles himself.

Upon the 25th of February, 1891, the bank inclosed in a letter from Winnipeg to MacArthur at Prince Albert nine of the notes deposited by Knowles with the bank amounting in the whole to $6,912.27, and coming due between that date and the 13th May, among which was the note now sued upon.

1893

MAC-ARTHUR v. MAC-DOWALL.

Gwynne J.

Upon the 8th April the manager of the bank wrote to the plaintiff MacArthur the following letter :—

(Private.) WINNIPEG, 8th April, 1891.

JAMES MACARTHUR, Esq., *Re* KNOWLES,
Prince Albert.

DEAR SIR,—Referring to our C. S. 46 D. H. MacDowall $5,500 due 11th May next, when M. MacDowall was down here some time ago he led me to understand that he did not intend to pay this note. Please let me know what the prospects of collecting it are and give me what information you can in regard to the matter.

Yours truly,
R. T. ROKEBY,
Manager.

To this letter Mr. MacArthur seems to have replied by a letter not produced of the 14th April, for on the 18th April, 1891, the manager of the bank wrote, addressed and sent the following letter to MacArthur :—

WINNIPEG, 18th April, 1891.

DEAR SIR,—*Re* C. S. 46, MacDowall $5,500 due May 13th.

I have received your letter of the 14th instant and note contents. If the note is not paid when due hand it to Mr. Newlands for immediate suit and get judgment as quickly as possible. Meanwhile Newlands can find out quietly all that MacDowall has which may be available to satisfy the judgment.

Yours truly,
R. T. ROKEBY,
Manager.

The note appears to have been sent to MacArthur in February, under the impression that it was payable at Prince Albert where MacDowall resided from the same 18th April. The manager of the bank wrote, addressed and sent another letter to MacArthur directing him to return the note at once to the bank at Winnipeg where the manager had found that the note was payable and not as he had been under the impression at Prince Albert. MacArthur appears to have received from the manager of the bank another letter dated 23rd April (not produced) in relation to Knowles's liability to the bank and to the collateral

securities held by the bank therefor; and he appears to have contemplated at that time purchasing from the assignee of Knowles the note held by the bank as collateral security and other property belonging to the insolvent estate of Knowles if he could make an arrangement with the bank to procure funds necessary for that purpose and on the 1st May, 1891, he wrote to the manager of the bank the following letter:—

PRINCE ALBERT, SASK., 1st May, 1891.

R. T. ROKEBY, Esq., *Re* KNOWLES,
Winnipeg.

DEAR SIR,—In further reference to your letter of the 23rd ultimo and list of notes, it would appear that about $2,000 in notes sent by you to Knowles for collections was collected by him and the proceeds kept. I understand that he is now in Toronto, so that instead of you being short a margin in notes of about $1,100 you are short about $3,000. The best properties to be put on the market now are the following:—

Lot 2, block G., R. L. 78, say	$ 250 00
Lot 22, block D., R. L. 79, say	750 00
W ½ lot 5, block C., R. L. 78, say	400 00
Lot 11, block B., R. L. 78, say	500 00
S. ½ R. L. 79, P. A. S. B., say	2,000 00
	$3,900 00

I think the above lots would sell for the amounts set down provided they were sold on easy terms of payment. *I have thought of making an offer to the estate for the notes held by you and other property* for the amount of your bank's claim, provided I could make an arrangement with your Board regarding payment of same. The amount of your claim you state to be $16,807—taking off the MacDowall note due 11th May, $5,500—$11,307. I propose for the favourable consideration of your Board the following, viz.: that I assume this amount and give my notes to you at 2, 4, 6, 8, 10, 12 and 14 months in equal instalments and furnish together with same collateral notes to the amount of the principal and $2,000 more as a margin. I may state that I consider at least $1,000 of the notes held by you to be doubtful and at best are all slow. When in consideration of this matter I trust you will inform your Board that I have reduced my own indebtedness to your bank $1,600 since September, and that in the face of the most depressed business season I have ever seen here and without materially reducing the security then given.

Yours truly,
J. MACARTHUR.

1893

MAC-ARTHUR v. MAC-DOWALL.

Gwynne J.

Now when this letter was written, MacArthur well knew that the notes which the bank held and for the purchase of which together with other property he says he thought of making an offer to the Knowles estate were held by the bank merely as collateral security for the debt of Knowles, and what he proposes is not that he should purchase from the bank any of those notes so held as collateral security for the debt of Knowles but that they should accept his offer in extinguishment of the Knowles debt, thus leaving the assignee of his estate free to deal with MacArthur for the sale to him of the collaterals held by the bank, that is to say that they should accept MacArthur's notes for the amount of the Knowles debt payable as proposed in the letter together with collaterals to the like amount to be furnished by MacArthur and $2,000 in addition to be deposited by him by way of margin. To this proposal the manager of the bank replies by a letter dated 6th May, 1891, as follows:—

JAMES MACARTHUR, Esq.,
Prince Albert.

DEAR SIR,—Your letter of the 1st instant received and I note contents of same for which I am obliged. I shall write you again in regard to the proposed sale of property. With regard to your proposition to buy out our claim, you of course understand that in the meantime we are practically acting as trustees for the assignee, but *if he is willing to make a deal with* you in the way you speak of, we are quite ready to sell you our claim as it stands at present—$16,918, payable $2,000 in cash, and your note at 2, 4, 6, 8, 10, 12 and 14 months in equal instalments at nine per cent interest. You to give us collateral note with a margin of $2,000. If the MacDowall note is paid on the 11th instant the amount can be deducted.

Yours truly,
R. T. ROKEBY,
Manager.

P.S.—I saw Mr. MacDowall. I think he may possibly pay $500 or less, if pressed, on account and renew. He will hand over the property as security for the note till paid. Please say if above is satisfactory to you.

Now by this letter the manager of the bank informs MacArthur that if he can make a deal with the assignee of Knowles' insolvent estate in respect of the purchase of the collateral notes which the bank held and for the purchase of which MacArthur by his letter of the 1st May informed the bank that he contemplated making an offer to the Knowles estate, they will take from him in satisfaction of their claim against Knowles $2,000 in cash and his notes for the balance of their claim payable in seven equal instalments at 2, 4, 6, 8, 10, 12 and 14 months with interest at nine per cent, he furnishing *collateral note with a margin of* $2,000. This proposition so made by the bank in answer to the one made by MacArthur placed him in a position to deal with the assignee of the Knowles estate for the purchase of the collaterals, and so understanding the letter he appears to have acted thereon accordingly, for, as Mr. Coombs the assignee testified, MacArthur spoke to him in the beginning of May as to the purchase of the notes, and offered eighty-five per cent of their face value. Coombs in his evidence says: "his proposal was to purchase the notes held by the Commercial Bank and also those held by me, the proceeds of auction sales." Coombs expressed his approval of the offer and said that if approved by a committee of Knowles's creditors he would accept it and carry it out, and he told MacArthur to put his proposal in writing. Thereupon MacArthur addressed to him the following letter:—

PRINCE ALBERT, SASK., 12th May, 1891.

J. M. COOMBS, Esq., *Re* KNOWLES,
Assignee.

DEAR SIR,—It has occurred to me that to insure more rapid progress in the winding up of this estate, *you might be open to entertain an offer for the notes held by you and other property sufficient to wipe out the Commercial Bank claim.* I shall be glad to meet with you and discuss the matter at your convenience.

Upon receipt of this letter Coombs called a meeting of certain creditors of Knowles acting as an advisory

1893

MAC-ARTHUR v. MAC-DOWALL.

Gwynne J.

board and laid the matter before them; this was at Prince Albert. The meeting was held between the 12th and 19th of May. MacArthur attended the meeting and some mention was made of this MacDowall note. MacArthur pointed out that it did not bear interest, and some remarks were made as to whether it would be met. MacArthur produced a telegram from the bank manager at Winnipeg saying that it had not been paid. At this time the notes held by Coombs for property sold by him as assignee amounted to $2,228.60. There was also another small parcel of notes received by Coombs from the sheriff amounting to about $352, and the notes held by the bank, a list of which was furnished by MacArthur to Coombs, amounted to $13,305; these notes the bank held as collateral security for their debt which then amounted in round numbers to $17,634, for which they held security upon real estate of Knowles valued at $20,030. At the close of the above meeting of the creditors of Knowles Coombs, subject to the approval of his solicitor, agreed to sell to MacArthur without recourse against the estate of Knowles the whole of the above notes, amounting in round numbers to the sum of $16,086, for $13,673.56, being eighty-five per cent of the face value of the notes, thus also giving to MacArthur the benefit of all interest accrued and accruing upon them. The transaction was finally completed on the 20th May, 1891, at Prince Albert, by MacArthur handing to Coombs his, MacArthur's draft on the Commercial Bank of Manitoba, at Winnipeg, for the said sum of $13,673.56, and by Coombs handing to MacArthur the notes he himself held and endorsing them "without recourse," and by Coombs and MacArthur respectively signing at the foot of the list of the notes held by the bank and furnished by MacArthur which included the MacDowall note now sued on amounting in the whole to the said sum of $13,500, the receipts following:—

1. Received of J. MacArthur the sum of eleven thousand four hundred and seventy-nine dollars and twenty-five cents, being eighty-five cents on the dollar for the above mentioned list of notes.

M. COOMBS.

2. Received from J. M. Coombs, assignee of the estate of J. Knowles, the above mentioned notes.

J. MACARTHUR.

Coombs says that he endorsed the notes which he himself held "without recourse" in accordance with the agreement upon which he says all the notes were sold by him to MacArthur, and that he then had a conversation with MacArthur as to this provision in respect of the notes which were at Winnipeg, namely, the notes held by the bank, and that MacArthur said that as to them it was no matter as they were all past due and that he afterwards corrected himself saying that one of Graham & Nelson's was not past due. In fact Coombs says that everything as to the sale of the notes was completed when he received from MacArthur the draft for $13,673.56.

On the 20th May, Coombs inclosed to the Commercial Bank the above draft, together with one for $600 on the Imperial Bank, in the following letter:—

PRINCE ALBERT, 20th May, 1891.

DUNCAN MCARTHUR, Esq.,
Manager Commercial Bank of Manitoba,
Winnipeg.

Re estate of JOSEPH KNOWLES.

SIR,—Inclosed I forward you draft for $13,873.56, drawn by James MacArthur on Commercial Bank of Manitoba and draft for $600 on Imperial Bank, Winnipeg; total $14,273.50, to be applied *towards liquidating your claim against this estate.*

In the interest of the other creditors I am anxious to settle your claim in full and release the real estate, and in order to meet the balance of your claim I would like to dispose of by public auction or private sale, as the case may be, the following portions of the real estate now held by you as security, viz.:

Lot 22, block D., R. S. 79.
W ½ 5, " C. " 78.
Westerly part 3, block G. R. L. 78.
Part 11, block B. R. L. 78.

1893

MAC-ARTHUR v. MAC-DOWALL.

Gwynne J.

Under the agreement between the Commercial Bank and Mr. Knowles I think I am at liberty to do this with your approval, the proceeds to be turned over to you or so much thereof as may be necessary to meet your balance, particulars of which please furnish me with. I may remind you that the title to the westerly portion of lot 11, block B, R. L. 78, is still incomplete. I have spoken to your solicitor, Mr. Newlands, about it and he is only waiting instructions to put the matter in shape. Will you please write me stating that you will carry out any sale made by me of the above mentioned properties for the benefit of intending purchasers, also that you will reconvey the balance of the real estate upon the receipt of your claim in full.

Please acknowledge receipt of draft and oblige,

Yours truly,
J. M. COOMBS.
Trustee estate J. KNOWLES.

To this letter Mr. Coombs received in reply a short letter acknowledging receipt and stating that Mr. Rokeby was away and that on his return he would write to Mr. Coombs. On the 9th June, 1891, Mr. Rokeby wrote as follows in a letter inclosing a statement as asked for by Mr. Coombs :—

COMMERCIAL BANK OF MANITOBA,
WINNIPEG, 9th June, 1891.

J. M. COOMBS, Esq.,
Assignee, Prince Albert.
Re estate JOSEPH KNOWLES.

DEAR SIR,—On my return to business to-day, your letter of the 20th May, together with inclosures *relating to the sale of collateral notes to James MacArthur*, was placed before me and I now beg to say that we confirm the sale as arranged. I now inclose statement showing the balance due us at 21st May, viz. $3,361.27.

With regard to the sale of properties proposed to be made to cover the balance of our account, we hereby authorize you to sell and we agree to convey the said properties when requested ; of course you understand that we shall only release the whole of our securities when the balance due us with interest to date has been fully paid.

We are quite willing that Mr. Newlands should complete the title to the westerly portion of lot 11, block B.R.L. 78. His account has to be added to the amount due to us and it may be as well for him to complete the matter now. In regard to the price of the properties to be

sold I would suggest that in case any question may be raised by any of the creditors, you should submit any offer to us before accepting the same.

Yours truly,
R. T. ROKEBY,
Manager.

The statement inclosed in the above letter showing the amount remaining due by the Knowles estate to be $3,361.27, is as follows:—

Estate of Joseph Knowles. To Commercial Bank of Manitoba, 1891, May 21st. To indebtedness as per statement rendered		$17,534 83
Paid James MacArthur 2½ per cent on collection of $4,039.75		100 00
		$17,634 83
By draft of James MacArthur, *being amount of collateral notes purchased by him from estate*	$13,673 56	
By draft on Imperial Bank	600 00	
		14,273 56
Balance due to bank		$3,361 27

Now it is plain by this letter that the bank recognized the sale of the notes as having been made by Coombs, as the assignee of Knowles, to MacArthur. Upon receipt from Coombs of MacArthur's draft the bank accepted it and paid and applied the amount, together with the proceeds of the draft for $600 on the Imperial Bank, towards liquidation of the Knowles debt. The amount so applied exceeded the whole amount of the notes held as collateral security by the bank, and the balance of their debt amounting to $3,361.27 was secured by the real estate held by the bank valued at $20,000. From that moment the notes which the bank had held became, in virtue of the assignment and transfer thereof, involved in the receipt signed by Coombs at the foot of the list of the notes and given to MacArthur, the absolute property of MacArthur and thenceforth the bank could not have or acquire any title or interes

1893

MAC-ARTHUR v. MAC-DOWALL.

Gwynne J.

whatever in them unless in virtue of a title to be derived from MacArthur, and this is precisely the light in which not only the manager of the bank but MacArthur himself understood the transaction, for immediately upon receiving from Coombs his receipt at foot of the list of the notes he on the same 20th May addressed and sent a letter to the defendant, wherein he says:

DEAR SIR,—I have purchased the notes belonging to the Knowles estate. Your note for $5,500 I find is past due, and as I cannot suppose you would care to have it go to suit I shall be glad to have your draft for payment as soon as possible. I may say that if it is inconvenient to meet the whole amount now I might be able to renew a part.

Yours truly,
J. MACARTHUR.

And on the same day he addressed a letter to the manager of the bank explaining why he had not answered his letter of the 6th May, and informing Mr. Rokeby that he, MacArthur, had purchased the notes from the assignee of Knowles. The letter is as follows:

PRINCE ALBERT, SASK., 20th May, 1891.

R. T. ROKEBY, Esq., *Re* KNOWLES,
Winnipeg.

DEAR SIR,—In further reference to my letter of the 1st inst., and yours of the 6th, I found that upon meeting Mr. Coombs and his committee that I could make a purchase of the notes belonging to the estate, *but regarding the balance required to make up the amount* due you they thought it would be better to get you to allow a sale at auction in Coombs's name of so much real estate as would pay off your claim. *As I had no doubt that this would meet your views, I purchased the notes to the amount of* $13,673.56, *for which I have issued my draft on you.* I inclose my draft for $1,200 in your favour and I have charged your account with $100 being 2½ per cent for collecting $4,039.75 of Knowles notes (I saw the assignee regarding the rate and he considered it all right). Mr. Coombs will remit by this or the following mail $700, which makes $2,000. I inclose my notes at 2, 4, 6, 8, 10, 12 and 14 months for $1,667.65 each for the balance and a list of notes now held by you *assigned by Coombs to me and by me to you.* I inclose collateral notes to the amount of $2,268.21. I hold notes named in inclosed list for collection and arrangement. I shall have them all put in current order and forward to you without delay. Regarding the MacDowall

note, I have written him by this mail and expect to be able to arrange with him. Both Mr. Newlands and Brewster consider it all right. If you desire me to assume the balance of your account due by the Knowles estate I can do so upon your terms, but as Coombs is very anxious to have your amount closed out as soon as possible, I consider it much the best for all parties that he be allowed to sell without a transfer from you to me. He writes you by this mail upon this subject.

1893

MAC-ARTHUR v. MAC-DOWALL.

Gwynne J.

The list of notes referred to in the above letter as being inclosed therein and as being " a list of the notes held by you and assigned by Coombs to me and by me to you " was not produced. It appears, however, that it was a list of notes which had been in MacArthur's possession on collection for the bank before he purchased them from Coombs, for in the next paragraph of his letter he says that he holds the notes mentioned in the list for collection and arrangement, and that he would have them all put in current order and forwarded to the bank without delay. By this he no doubt meant to convey that as soon as he could get them put into current order by renewals he would forward the renewals to be held as collateral for his liability to the bank for their accepting and paying his draft for $13,673.56. That the MacDowall note was not in that list must be inferred from the fact that it was not then in the actual possession of MacArthur, it was still in the bank at Winnipeg where it fell due on the 13th May, where it remained, but as the property of MacArthur until the 2nd July when he got it for the purpose of bringing an action upon it, since which time the bank, as Mr. Rokeby says in his evidence, has never had any custody or control of the note, and he stated further that the note had never been entered in any of the books of the bank as being held collateral to MacArthur's liability to the bank, and MacArthur in his evidence says that the bank never had any right or title to the note derived from him. His evidence upon this point is as follows :—

1893

MAC-ARTHUR v. MAC-DOWALL.

Gwynne J.

I first got it as agent of the bank in February, but sent it to the bank. I first got it again after I purchased it when I wanted to sue on it. *The Commercial Bank had nothing to do with it since I bought it*, they were to have, it was understood that the bank were to take it and others as collateral security when put in current shape, but this was never so put, the bank has no lien or claim upon it legally.

Mr. Rokeby in his evidence stated that so far as the bank was concerned the whole transaction between him and Coombs and between him and MacArthur was contained in the letters produced, the only one of which not already referred to is the following of the 9th June, 1891, from Rokeby to MacArthur:—

JAMES MACARTHUR, *Re* KNOWLES,
Banker, Prince Albert.

DEAR SIR,—Your letter of the 20th ult. *re your purchase of the collateral notes in this estate* was placed before me on my return to business to-day, and I have given instructions that the matter be carried through in accordance with your arrangement. The inclosed statement shows how the matter stands as between the bank and the estate and as between the bank and you.

With regard to the amount paid to us direct on account Campbell's $600 note this was applied in reduction of the debt, and our account to the assignee was just so much less so that it will be in order for you to arrange the matter with him. We have authorized Mr. Coombs to sell the properties mentioned in his letter in order to close out the balance due us and we will convey to the purchasers when sales are made. Mr. Newlands may as well complete the title *re* westerly portion of lot 11, block B. R. L. 78, as suggested by the assignee. His account not being included in our account, will be chargeable against the estate when rendered. It is distinctly understood that none of our securities are to be relinquished until our account has been settled in full together with interest until paid. With *reference to your notes* in payment of the balance *due by you*, I may first say that I trust you will be able to meet them or most of them at any rate at maturity, as two of our directors think that you have made a very good thing of this purchase, and consequently I would like to see the matter well taken care of. *As soon as you get the collaterals into shape please forward for registration, as the bank in order to meet your views and to assist you in this deal* is parting with the best of its security. I trust you will make quite sure of your ability to meet the notes and to carry the matter through. Please let me hear from you as to this.

Yours truly,
R. T. ROKEBY,
Manager.

The statement inclosed in this letter was the statement already referred to as inclosed to Mr. Coombs, showing the balance due by the Knowles estate to be $3,361.27, and an account opened with MacArthur wherein he is debited with his draft for $13,673.56 and credited with $1,300, showing a balance due by him of $12,373.56, against which is placed his seven notes for $1,767.65, each with interest at nine per cent.

Now upon this evidence there cannot be entertained a doubt that the transaction whereby MacArthur acquired the note sued upon was one of purchase from the assignee of the Knowles estate of the whole batch of notes, amounting in the whole to $16,086 and including the note sued upon, as one purchase for the sum of $13,673.56 for which he gave to the assignee of Knowles his draft upon the Commercial Bank. Upon that draft being accepted by the bank, and the amount being by them applied to the credit of their claim against the estate of Knowles, the bank ceased to have any claim or title to or interest in the note which became the absolute property of MacArthur, but his title, as the note was overdue when purchased by him from the assignee of the Knowles estate, was only such as could be acquired by purchase of a chose in action belonging to the estate of Knowles in the hands of the assignee of that estate for sale, and as the transaction between Knowles and the defendant upon which the note was made by the defendant was such that Knowles could not have recovered against the defendant in an action brought against him, so neither can MacArthur and the appeal must be dismissed with costs.

PATTERSON J.—There are two plaintiffs, MacArthur and the Commercial Bank of Manitoba. I shall not have to refer to the bank as a party to the action and

1893

MAC-ARTHUR v. MAC-DOWALL.

Patterson J.

shall for brevity sake use the term "the plaintiff" as meaning MacArthur.

In my reference to the facts I shall not attempt to discuss the details of the evidence. That has been done with sufficient fulness by my brother Gwynne who has made it very clear that the findings of fact by the courts below cannot be disturbed.

The plaintiff bargained with Coombs, the assignee of the estate of Knowles, for the purchase of promissory notes which belonged to the estate.

There were three lots of notes. One consisting of forty-seven notes, including the note of the defendant now sued upon and of the nominal amount of $13,505, was held by the Commercial Bank of Manitoba as collateral security for a debt of upwards of $17,000 due by Knowles. Another lot consisted of thirty-six notes, amounting nominally to $2,228.60, which were not in the hands of the bank. The plaintiff bought these notes at eighty-five per cent of their nominal amount.

Lists of these two lots of notes were produced in evidence, each list having appended to it two receipts, viz., one from Coombs, the assignee, for the price, and one from the plaintiff for the notes. The price acknowledged for the one lot is $11,479.25, being eighty-five per cent of $13,505, and for the other $1,894.31, being eighty-five per cent of $2,228.60. These two receipted amounts make $13,373.56. The third lot of notes was bought for the lump sum of $300, making the whole price $13,673.56.

The negotiation with the estate of Knowles and the purchase of the notes from the estate was with the concurrence of the bank, and with an understanding between the bank and the plaintiff as to the mode in which the plaintiff was to be supplied with money to pay for the notes. In accordance with that understanding the plaintiff paid Coombs by a draft on the

bank, which the bank received from Coombs on account of the debt of Knowles, for $13,673.56, and the plaintiff accounted to the bank for that sum partly by giving his own notes for $12,373.56 of the amount, and giving as collateral security for his notes all the notes purchased from the Knowles estate.

The transfer of the notes from the assignee of Knowles estate to the plaintiff took place on the 19th or 20th of May, 1891.

The defendant's note fell due and was protested for non-payment on the 13th of that month. It was therefore an overdue note when the plaintiff took it.

The history of the note, as shown by the judgment delivered at the trial, was that Knowles, who had been partner with the plaintiff in the business of private bankers, and who continued that business after the dissolution of the partnership, wanted to provide a fund on which he could draw in the event of depositors with the dissolved firm withdrawing their deposits. He accordingly arranged with the defendant that the defendant should make the note in question and he conveyed some lands to the defendant by way of security, though by conveyances absolute on their face. The defendant accordingly made the note, payable 18 months after date, with an understanding that it might be renewed for 18 months longer, it being also agreed between the defendant and Knowles that the note was not to be used unless required for the purpose of providing the fund mentioned, and that if it was discounted it should be at the Bank of Ottawa where it was payable, and not elsewhere.

It was a violation of the terms of this agreement in both its branches to transfer the note as collateral security for other debts of Knowles, and to negotiate it in that manner with the Commercial Bank.

1893

MAC-ARTHUR v. MAC-DOWALL.

Patterson J.

The bank, which took the note without notice of the agreement, could of course have enforced it against the defendant. But the plaintiff does not take the bank's title. He bought from the Knowles estate. The bank would have had no right to sell the note which it held as collateral security unless prepared to account for its full value, and according to the findings, which are in my opinion the correct result of the evidence, the bank did not sell the note. It held the notes, that is to say, one of the three lots of notes, as security for the debt of Knowles, and receiving payment of that debt from Coombs, partly by means of the plaintiff's draft, it freed the notes as assets of the Knowles estate, though it again received them with the other notes as a pledge from the plaintiff.

The appeal is ventured on in the hope of displacing that apprehension of the facts. The contention is thus formally put by the plaintiff in his factum.

The appellant's contention is on the correspondence and on the evidence, and in regarding the legal effect of the transaction, that the sale was made by the bank directly to the plaintiff MacArthur.

It was suggested that the plaintiff might recover what he paid for the note, if not the full amount, under the title of the bank. I do not know what he paid for this or any other individual note, because the eighty-five per cent was on in the whole amount and not on each note, but whatever he paid was paid to the Knowles estate and not to the bank.

The transaction between the plaintiff and Coombs is essentially the same as it would have been between the plaintiff and Knowles.

The plaintiff took a note which was overdue and which was an accommodation note. The circumstance that it was an accommodation note would not by itself interfere with the negotiation of it after it was due; but, being overdue, the plaintiff could take

it only as subject to its equities. An agreement not to negotiate an accommodation note after it was due would be such an equity. We find that asserted in a series of cases from *Charles* v. *Marsden* (1) downwards. All the cases on the subject, as late as the year 1868, will be found commented on by Malins V.C. in *Ex parte Swan* (2) in a dissertation which may be referred to in place of citing the various cases.

After pointing out that the endorsee of an overdue bill takes it subject to the equities of the bill, not the equities of the parties, and that a set-off is not in general an equity that attaches to a bill, the learned Vice-Chancellor refers to the case of *Holmes* v. *Kidd* (3) as an illustration of what an equity attached to the bill itself is. I shall read what he says of that case (4).

In that case the acceptor had accepted a bill of £300, depositing with the drawer certain canvas which he was to be at liberty to sell as a means of providing for the bill. The bill was indorsed when overdue to the plaintiff, and afterwards the canvas was sold by the drawer, but did not wholly pay the bill. The question was whether the indorsee could recover. Here, Mr. Justice Erle said: "The question is whether the receipt of the money by the drawer is a bar to the action. The plaintiff took the bill subject to the equities affecting it. In the hands of the drawer the right to sue was defeasible; when he sold the canvas it was defeated, and the plaintiff took the bill subject to that contingency." That contingency is the equity which attached to the bill and which bound him, having taken it after maturity. Mr. Justice Crompton said: "Upon the concoction of this bill it was agreed that it was not to be paid if the canvas was sold. That agreement directly affects the bill, and was part of the consideration for it. The case therefore differs from that of a right of set-off against the indorser, which is merely a personal right not affecting the bill. In the present case the equity attaches directly to the bill. The plaintiff, therefore, got a defeasible title only."

The statement of the law by Vice Chancellor Malins in *Ex parte Swan* (2) is referred to with approval by Lord Justice Giffard in *Ex parte Oriental Commercial Bank* (5),

(1) 1 Taun. 224.
(2) L. R. 6 Eq. 344.
(3) 3 H. & N. 891.
(4) L. R. 6 Eq. 360.
(5) 5 Ch. App. 358.

1893

MAC-ARTHUR v. MAC-DOWALL.

Patterson J.

in which case an officer of the bank misapplied moneys of the bank in the purchase for himself of certain bills of exchange which he endorsed over after they were due. It was held that the equity of the bank to follow its money into the bills that were purchased with it could be enforced against the endorsee who had taken the bills after they were due.

In the present case the note of the defendant was made and was intrusted to Knowles for the special purpose of aiding Knowles, by providing a fund for the payment of depositors, if that should become necessary, in order to keep his business going. The defendant could have insisted that Knowles should use the note only in the way for which it was intended, and only for the purpose of keeping his business going, and could have restrained him by injunction from using the note after he had given up his business. That was an equity attaching to the note itself in the hands of Knowles and is enforceable against the plaintiff who took the note when overdue.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellants: *H. W. Newlands.*

Solicitor for respondent: *James McKay.*