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*Mar. 7
June 26

THE LOUNSBURY COMPANY LIMITED (*Defendant*) ..... APPELLANT;

AND

GEORGE DUTHIE (*Plaintiff*) .....RESPONDENT;

AND

EARL SINCLAIR (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Conditional sales—Remedies of unpaid seller—Repossession and resale of goods—Special contractual obligation to obtain best price possible on resale—The Conditional Sales Act, R.S.N.B. 1952, c. 34, s. 10.

Contracts—Novation—Assignment of liabilities—When permitted—Absence of consent of other party.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Fauteux JJ.

(1) [1927] A.C. 487 at 508-9.

The appellant sold to the respondent D a tractor under a conditional sale agreement in which it was provided, *inter alia,* that on default by D the appellant should be entitled to retake possession of the property "and sell the same at public auction or by private sale and apply the proceeds . . . on account of the purchase price . . . and interest then unpaid", and that: "Any surplus after such sale shall belong to the purchaser." At a time when the balance unpaid including interest was less than $1,500 (out of a total purchase-price of $7,780), the appellant took possession of the tractor and, after some unsuccessful negotiations with D, it delivered the tractor to P on payment by him of the exact balance owed by D and, on P's instructions, assigned its interest under the contract to the defendant S, an employee of P.

Held: The appellant was liable in damages for breach of its obligation under the contract to effect a provident sale of the tractor. The evidence established that the market value of the tractor at the time of repossession was much in excess of the price obtained by the appellant from P and the measure of damages was this excess value. D had never consented to the substitution of S or P as a party to the original contract and the circumstances did not in any way amount to a novation. The appellant's obligation under the contract was one that it could not assign without D's consent so as to be discharged of its own liability.

Courts—Jurisdiction—Appellate jurisdiction of Supreme Court of Canada—Issue as to costs only—The Supreme Court Act, R.S.C. 1952, c. 259, ss. 36(a), 43.

An action was brought against L Co. and S. The trial judge dismissed the action as against both defendants, with costs. On appeal, this judgment was reversed as against L Co. and the Court ordered that S's costs should be paid by L Co. L Co. appealed.

Held: In the circumstances, the Supreme Court had no jurisdiction in respect of the judgment in favour of S, which was for costs only. Neither the plaintiff nor S had appealed and the only issue before the Supreme Court in which S was concerned was the order as to costs, in respect of which leave to appeal had not been obtained.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division (1), allowing in part an appeal from a judgment of Anglin J., who dismissed the action as against both defendants. Appeal dismissed.

R. Dwight Mitton, Q.C., for the defendant, appellant.

J. T. Gray, for the plaintiff Duthie, respondent.

J. E. Murphy, Q.C., for the defendant Sinclair, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of The Supreme Court of New Brunswick, Appeal Division (1), allowing an appeal from a judgment of Anglin

(1) 4 D.L.R. (2d) 631 (*sub nom. Duthie v. Lounsbury Co. Ltd. and Sinclair*).

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J. and directing judgment to be entered in favour of the respondent Duthie against the appellant for $4,555.85; the judgment at the trial dismissing the action against the respondent Sinclair was affirmed but the order as to costs was varied to provide that Sinclair's costs of the action and appeal should be paid by the appellant.

Pursuant to the terms of a conditional sale agreement dated August 12, 1948, the respondent Duthie, hereinafter referred to as "Duthie", purchased from the appellant a crawler tractor and a Smith angledozer, which are used together as a composite unit and will be referred to hereinafter as "the tractor". The price was $7,780 of which $3,700 was paid in cash, the balance of $4,080 plus a financing charge of $160 to be paid in instalments the last of which fell due on August 19, 1949. Interest was payable on any instalments not paid when due.

The conditional sale agreement provided in part as follows:

> . . . if the Purchaser makes any default in payment the Vendor shall be entitled to possession and may retake possession of the property, so agreed to be sold to the Purchaser, without process of law, and in accordance with the provisions of Section 10 of Conditional Sales Act, and sell the same at public auction or by private sale, and apply the proceeds after deducting all expenses connected with such retaking possession and sale, including the payment of any lien or distress for rent of a third party on the said property, on account of the purchase price of said property and interest then unpaid; and the Purchaser further agrees to pay for any deficiency after such repossession and sale of above property if provisions of Section 10 of Conditional Sales Act have been complied with. Any surplus after such sale shall belong to the Purchaser.

On January 24, 1950, the balance of the purchase-price remaining unpaid including interest was $1,444.15 and on that day the appellant took possession of the tractor and sent to Duthie a notice of seizure pursuant to the provisions of *The Conditional Sales Act*, R.S.N.B. 1927, c. 152, now R.S.N.B. 1952, c. 34. The notice, which was addressed to Duthie and signed by the appellant, read in part:

> AND FURTHER TAKE NOTICE that demand is hereby made upon you for payment of the sum of Fourteen Hundred and Forty-four Dollars and fifteen cents being the balance due under the said Conditional Sales Agreement, and that unless the said sum of Fourteen Hundred and Forty-four dollars and fifteen cents is paid to the undersigned on or before the 14 day of February 1950 the undersigned will thereafter sell the said Tractor and angledozer by private sale on the premises of the undersigned at

Pleasant St. in the town of Newcastle, in the County of Northumberland and that if the proceeds of such sale are less than the said sum of Fourteen Hundred and Forty-four dollars and fifteen cents you will be held liable of any deficiency, but should there be a surplus on such sale, you will be entitled to same.

Between the date of the seizure and February 14, 1950, Duthie had some discussions of the matter with Mr. Roy, manager of the appellant, who urged him to get the money to pay off the balance due; Duthie tried unsuccessfully to do this and then told Roy he had not been able to get the money and would have to let the tractor go. Duthie assumed at this point that the appellant would sell the tractor and that in due course he would receive the surplus of the selling price as it is not disputed that the market value of the tractor in its then condition was substantially greater than the balance owing under the conditional sale agreement, and his evidence on discovery, put in at the trial by the appellant, was that he was quite willing that the appellant should sell it.

Duthie heard nothing further from the appellant, or from anyone else. At a later date, not fixed exactly in the evidence, he found out that the tractor had been delivered to one Price who was using it in his business as if it were his own.

On March 18, 1952, Duthie commenced this action against the appellant and the respondent Sinclair. The statement of claim, as originally delivered, recited the conditional sale agreement, the seizure, the terms of the notice quoted above and continued:

7. The Plaintiff says that, instead of selling the said Tractor and Angle Dozer and accounting to the Plaintiff, as required so to do, under the said Notice in writing hereinbefore referred to and under and by virtue of the Provisions of Section 10, of the Conditional Sales Act, being Chapter 152 of the Revised Statutes of New Brunswick, 1927, the said Defendant, Lounsbury Company Limited, on or about the 20th day of February, A.D., 1950, unlawfully and wrongfully assigned and transferred the said Conditional Sale Agreement hereinbefore referred to and wrongfully and unlawfully converted the said Tractor and Angle Dozer to it's [*sic*] own use thereby depriving the Plaintiff thereof.

8. The Plaintiff further says that on or about the 20th day of February, A.D., 1950, the Defendant, Lounsbury Company Limited, wrongfully and unlawfully delivered possession of the said Tractor and Angle Dozer, which it had wrongfully and unlawfully converted from the said Plaintiff, to the Defendant, Earl Sinclair.

9. The Plaintiff says that the Defendant, Earl Sinclair, wrongfully and unlawfully converted the said Tractor and Angle Dozer to his own use and continues so to do.

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10. The Plaintiff claims against the Defendants, for the wrongful conversion of the said Tractor and Angle Dozer and for an accounting.

The statement of claim concluded with a claim for damages in the sum of $6,335.85 being the difference between the purchase price of the tractor and the unpaid balance of $1,444.15.

At the opening of the trial para. 7 of the statement of claim was amended to read:

7. The Plaintiff says that the Defendant The Lounsbury Company Limited did not sell the said Tractor and Angle Dozer in accordance with the Notice of Sale above referred to, and further says that the said Defendant The Lounsbury Company Limited wrongfully and illegally, and contrary to the provisions of Section 10 of the Conditional Sales Act, Chapter 152, R.S.N.B. (1927), on or about the 20th day of February, 1950, delivered possession of the said Tractor and Angle Dozer to one Harold N. Price, and otherwise converted the same to its own use.

Paragraph 8 was struck out and there was added an alternative claim for damages amounting to the difference between the value of the tractor at the time of repossession and the unpaid $1,444.15. I agree with the view of the learned Chief Justice of New Brunswick that the pleadings sufficiently asserted a claim for damages for breach by the appellant of its contractual obligation to act in realizing on the seized property as a reasonable man would in the realization of his own property.

The defence pleaded by the appellant was that after having seized the tractor and given the notice quoted above to Duthie, it received a request from one Price to assign the conditional sale agreement to him, that it agreed to do so on payment to it of the $1,444.15, that Price paid this amount to it, that Price directed the assignment to be made to the respondent Sinclair who was then an employee of Price, that this was done and that it then delivered the tractor to Price.

An assignment under seal from the appellant to Sinclair dated February 14, 1950, was filed as an exhibit at the trial; the affidavit of execution attached to it was sworn on February 14, 1950. No notice of the assignment, in writing or otherwise, was given to Duthie, nor was he advised that the appellant was not going to proceed with the sale of the tractor in pursuance of the notice of seizure.

The learned trial judge found the facts to be as pleaded by the appellant, and was of opinion that, Sinclair being merely the nominee of Price, the latter "by virtue of the assignment and taking over possession of the repossessed tractor stepped into the shoes of the defendant Lounsbury Company as the conditional vendor". While he does not say so expressly it is implicit in the reasons of the learned trial judge that as a result of the assignment the appellant was relieved of its obligations to Duthie which were *ipso facto* fastened upon Price, so that Duthie's right of action, if any, was thereafter against Price only.

In allowing the appeal the Appeal Division proceeded on two alternative grounds. The first is stated in the following terms (1):

> In his judgment the learned trial Judge discussed briefly the transactions between Duthie and Price involved in the lumbering operations or resulting therefrom. He expressed the view that they constituted a collateral matter in no way material to the issues raised in the action, in which opinion I concur. He proceeded to find that the company had duly repossessed the machine as it was entitled to do under the conditional sale agreement by reason of Duthie's default in completing payment and that due notice had been given by the company to Duthie, in accordance with the *Conditional Sales Act*, that unless payment was made on or before February 14, 1950, the machine would be sold by the company at private sale. There can be no question as to the correctness of such findings.
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> He concluded however that there had been no sale of the machine by the company and therefore no conversion for which it could be held responsible. With this view I find myself unable to agree. It seems to me that the acts of the company in assigning the conditional sale agreement, at the instigation of Price, to Sinclair, without the knowledge or consent of the latter, and in delivering the machine, without any authorization from Sinclair, to Price on being paid by the latter $1,444.15 were mere subterfuges to cloak the nature of the real transaction which was a sale and nothing else.
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> On this view of the case the company is liable for its failure to effect a provident sale on principles enunciated in *McHugh v. Union Bank*, 10 D.L.R. 562, [1913] A.C. 299, and *Vanstone & Rogers v. Scott* (1908), 1 Alta. L.R. 492.

I do not find it necessary to discuss this first ground as, in my respectful opinion, the alternative ground on which the judgment of the Appeal Division is based is clearly right.

(1) 4 D.L.R. (2d) at p. 636.

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Proceeding on the assumption that the findings of fact made by the learned trial judge were correct the learned Chief Justice of New Brunswick was of opinion that the appellant was liable in damages to Duthie for failing to effect a provident sale of the tractor. He says in part (1):

> By its contract with Duthie the company undertook that, in the event of repossession, it would proceed to sell the machine and pay to Duthie any surplus remaining after expenses and the balance of the purchase-price had been paid. The conditional obligation so undertaken became an absolute obligation when the company resumed possession under the contract. The liability under that obligation could not be assigned by the company so as to deprive Duthie of his right to have the company proceed to a sale of the machine and pay to him any surplus resulting therefrom.
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> In Anson's Law of Contract, 20th ed., p. 262, the relevant principles of law are stated thus:
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> "A promisor cannot assign his liabilities under a contract.
>
> "Or conversely, a promisee cannot be compelled, by a promisor or by a third party, to accept any but the promisor as the person liable to him on the promise.
>
> "The rule is based on sense and convenience, for a man is entitled to know to whom he is to look for the satisfaction of his rights under a contract.
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> In 8 Halsbury, 3rd ed., p. 258, the principles are enunciated as follows:
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> "451. Assignment of Liabilities. As a rule a party to a contract cannot transfer his liability thereunder without the consent of the other party. This rule applies both at common law and in equity and is generally unaffected by statute.
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> "There is, however, no objection to the substituted performance by a third person of the duties of a party to the contract where the duties are disconnected from the skill, character, or other personal qualifications of the party to the contract. In such a circumstance, however, the liability of the original contracting party is not discharged, and the only effect is that the other party may be able to look to the third party for the performance of the contractual obligation in addition to the original contracting party.
>
> "By the consent of all parties liability under a contract may be transferred so as to discharge the original contract. Such a transfer is not an assignment of a liability but a novation of the contract."
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> * * *
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> There is nothing in the circumstances that can be construed as a novation. As already stated the agreement contained no provisions respecting an assignment of it or of any right or obligation created thereby. There was nothing said or done by Duthie that can be taken as authorizing or consenting to a transfer by the company of its obligations under the agreement. Consequently the company had no right to seek to divest itself of its undertaking contained in the agreement that, in the event of seizure, it would proceed to a sale of the repossessed machine and account to Duthie for any surplus. Having resumed possession of the machine the company was bound to proceed in a proper manner to sell the machine

(1) 4 D.L.R. (2d) at pp. 638-40.

and pay to Duthie any surplus resulting, being powerless to rid itself of its obligation in this regard. For its breach of contract the company should be held liable.

In my opinion, the passage from Halsbury quoted by the learned Chief Justice of New Brunswick correctly states the law; and, assuming that it could validly assign the contract without Duthie's consent, the appellants' liability to perform its contractual obligation to effect a provident sale would not be discharged by the making of the assignment.

I wish to make two additional references. The first is to the judgment of Collins M.R. in *Tolhurst v. The Associated Portland Cement Manufacturers (1900), Limited; The Associated Portland Cement Manufacturers (1900), Limited and The Imperial Portland Cement Company, Limited v. Tolhurst* (1):

> It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to some one else; this can only be brought about by the consent of all three, and involves the release of the original debtor.

The second is to the judgment of the Lord President in *Thomas Stevenson & Sons v. Robert Maule & Son* (2). That was a case in which the obligation undertaken by the defenders did not require any special skill or experience and consequently was one which might be performed vicariously. After differentiating the contract from one to which the principle *delectus personae* applies and which is therefore not assignable, the Lord President treats it as a matter of course that the assignment of the contract would not relieve the assignors from liability if their obligation was not performed. He says at p. 343:

> It is work, therefore, the performance of which might quite well be delegated to another, the defenders' liability, of course, remaining the same as if the work was being done on their own premises by their own servants. The law applicable to this case is nowhere more succinctly and accurately stated than in Anson on Contracts (15th ed., p. 286). "If A undertakes to do work for X which needs no special skill, and it does not appear that A has been selected with reference to any personal qualification, X cannot complain if A gets the work done by an equally competent person. But A does not cease to be liable if the work is ill done." That appears to me to be good law and good sense, and is directly applicable to the present case.

(1) [1902] 2 K.B. 660 at 668. (2) [1920] S.C. 335.

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No attempt was made to challenge the assessment of Duthie's damages made by the Appeal Division.

I share the view of both Courts below that the state of accounts between Price and Duthie was irrelevant to the latter's claim against the appellant.

For the above reasons I would dismiss the appeal against the judgment in Duthie's favour.

The appellant also appeals from that part of the judgment of the Appeal Division which requires it to pay the costs of Sinclair. The judgment at the trial dismissed the action as against Sinclair with costs payable by Duthie. The Appeal Division affirmed that dismissal but varied the order as to costs. Neither Duthie nor Sinclair appealed from that part of the judgment dealing with Sinclair and the only issue before us in which he is concerned is the order as to costs. No leave to appeal having been granted, it appears to me that, under ss. 36(*a*) and 43 of the *Supreme Court Act*, R.S.C. 1952, c. 259, we are without jurisdiction in regard to the judgment in favour of Sinclair which is for costs only.

In the result I would dismiss the appeal against Duthie with costs and would dismiss the appeal against Sinclair with costs as of a motion to quash.

Appeals dismissed with costs.

Solicitor for the defendant company, appellant: R. Dwight Mitton, Moncton.

Solicitors for the plaintiff, respondent: Dougherty, West & Gunter, Fredericton.

Solicitors for the defendant Sinclair, respondent: Murphy & Murphy, Moncton.