JOHN INGS (Defendant) .....APPELLANT; 1885

AND

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF PRINCE EDWARD ISLAND (Plaintiffs) ..... RESPONDENTS.

*Feb'y.24,25.
*June 23.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND.

Demurrer—Shareholder or contributory of bank—Action against—Right of set-off—45 Vic., ch. 23, sec. 76—Construction of.

An action was brought by the bank of P. E. I. against the appellant on a promissory note, to which he pleaded set-off of a draft made by the plaintiffs and endorsed to him; to this there was a replication that the defendant was a contributory on the stock book of the bank, and knew that the bank was insolvent when the draft was purchased; the defendant demurred on the ground that the replication did not aver that the debt for which the action was brought was due from the defendant in his capacity as shareholder or contributory:

Held, reversing the judgment of the court below, that the replication was bad in law (1).

J. I., the appellant, gave to one Q. his note for $6,000, which was en-

*PRESENT—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry and Taschereau JJ.

(1) 45 Vic. ch. 23 sec. 76.

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dorsed to the bank of P. E. I.; the Union Bank of P. E. I. at the time held a check or draft, made by the bank of P. E. I., for nearly the same amount, and this draft the appellant purchased for something more than $200 less than its face value; being sued on the note he set-off the amount of such check or draft, and paid the difference. On the trial he admitted he had purchased it for the purpose of using it as an off-set to the claim on his note, which he had made non-negotiable, and he also admitted that if he could succeed in his set-off and another party could succeed in a similar transaction, the Union Bank would get their claim against the bank of P. E. I., which had become insolvent, paid in full. The judge on the trial charged that if the draft was endorsed to the defendant to enable him to use it as a set-off, he could not do so, because he was a contributory within the meaning of the 76th section of the Winding-up Act, and that the Act which came into force on the 12th May, 1882, was retrospective as regards the endorsements made before it was passed, but within thirty days before the commencement of the proceedings to wind up the affairs of the bank. The jury under the direction of the judge, found a general verdict for the plaintiff for the amount of the note and interest, which the Supreme Court refused to disturb. On appeal to the Supreme Court of Canada:

Held, reversing the judgment of the court below, that appellant having purchased the draft in question for value and in good faith prior to 26th May, 1882, the Canada Winding-up Act, 45 Vic. ch. 23, was not applicable, and therefore the appellant was entitled to the benefit of his set-off, and that the Winding-up Act was not retrospective as to this endorsement.

By sections 75 and 76 Vic. ch. 23, it is provided that if a debt due or owing by the company has been transferred within 30 days next before the commencement of the winding up under that Act, or at any time afterwards, to a contributory who knows, or has probable cause for believing, the company to be unable to meet its engagements or to be in contemplation of insolvency under the act, for the purpose of enabling such contributory to set up by way of compensation or set off the claim so transferred, such debt cannot be set up by way of compensation or set off against the claim upon such contributory.

Held, that the sections in question only apply to actions against a contributory when the debt claimed is due from the person sued in his capacity as contributory.

APPEAL from a judgment of the Supreme Court of

Prince Edward Island, refusing to set aside a verdict for the plaintiff and order a new trial.

The facts of the case and the pleadings are sufficiently set out in the above head note.

L. H. Davies Q. C. for appellant:

When appellant purchased for value the draft, he had a perfect right to do so, unless the statute 45 Vic. ch. 23 interferes.

But it is contended that sect. 76 of the Act respecting Insolvent Banks deprives the appellant of the ordinary right of set off as respects this draft, because he was placed on the list of contributories as the holder of some shares in the insolvent bank, and although it is not alleged he made any default in paying the calls on him as such shareholder.

I maintain that this section does not touch the present case or take away his right of set off under the 60th section.

The note sued on is dated 1st May, 1882. The draft pleaded as set off was endorsed to the appellant 5th May, 1882.

The Act respecting Insolvent Banks was passed 17th May, 1882.

The commencement of the winding up was not till 26th May, 1882. And therefore the purchase of the draft by the appellant could not be in contravention of the Act, for the Act had not been passed at the time of the purchase.

The right of the parties must be determined by the state of facts existing at the time of the transfer of the draft. See remarks of Smith J. in *Watson* v. *Midwales Railway Company* (1).

Again, the appellant was placed on the list of contributories for one reason and one reason only, viz: Because he was a holder of some shares of Bank of P. E.

(1) L. R. 2 C. P. 601.

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Island Stock of the orignal value of £10 or $32.44 each, and in respect of which he was liable to a call for $64.88 on each share. He has paid all calls and is not sued as a contributory.

This is a right to prove for a debt, and statutes affecting such rights are held not to be retrospective. *Re Joseph Suche & Co.* (1).

The right of set off is liberally allowed by the court, unless expressly taken away by statute, and in case of doubt will be allowed to prevail. The right of set off having been given by statute the onus of proof is on the party denying the right. Lindley (2).

This is shewn by Blackburn L.J. in *Bailey* v. *Finch* (3).

The fact that a statute provides that assets of a company being wound up shall be divided *pari passu*, does not deprive the defendant of the right of pleading set off in an action for calls by liquidators of a company being voluntarily wound up. *Brighton Arcade Co., limited*, v. *Dowling* (4); per Lindley L.J. in *Mersey Steel Co.* v. *Naylor* (5).

There were no equities attaching to this draft, nor is there any equity to prevent the holder of an overdue draft from indorsing it away to avoid set off. *Re Commercial Bank* (6); *Oulds* v. *Harrison* (7).

Right of set off is never an equity attaching to a bill, and even in the case of debentures it must be:—

1. An equity subsisting at date of assignment.

2. Not subject to a debt which arose afterwards on a previous contract. *Re China S. S. Co.* (8).

R. R. Fitzgerald Q.C. and *F. Peters* for respondents contended that this set off cannot be allowed:—

(1) 1 Ch. D. 48.
(2) Pp. 1321-3.
(3) L. R. 7 Q. B. 43-5.
(4) L. R. 3 C. P. 175,
(5) 9 Q. B. D. 667.
(6) L. R. 1 Ch. App. 538.
(7) 10 Exch. 572.
(8) L. R. 7 Eq. 243,

First—Because this transaction was only a contrivance to obtain a preference for the Union Bank over other creditors of the insolvent bank, and that appellant was not the real beneficial holder of the draft sought to be set off.

Fair v. *McIver* (1); *Lackington* v. *Combes* (2); *Foster* v. *Wilson* (3); *Watson* v. *Mid Wales Railway Co.* (4); *London, Bombay and Med. Bank* v. *Narraway* (5); *Bailey* v. *Finch* (6); *Ince Hall Rolling Mills Co.* v. *The Douglas Forge Co.* (7).

Secondly—Under the Winding-up Act, 45 Vic. ch. 23, this set off is taken away by section 76.

The appellant comes clearly within this section; he was a contributory, and he knew that the insolvent bank was unable to meet its obligations, and that it would go into insolvency under this Act so soon as it passed, and he had the draft transferred to him within the prohibited time, and for the purpose of enabling him to set it off against the claim upon him.

The word "claim" in the 76th section, is general, and includes all claims no matter whether for contribution or otherwise.

The object of this section was to prevent contributories from using the knowledge they had as shareholders to obtain a preference over other creditors. The disablity is personal to the contributory, and its object is to prevent the possibility of his using his position to secure an inequitable distribution of the assets of the insolvent company.

The respondents also contend that if the word "claim," in section 76, means only (as the appellant contends) a claim against the contributory in his capacity as contributory, then it would follow that in an

(1) 16 East 130.
(2) 6 Bing. N. C. 71.
(3) 12 M. & W. 191.
(4) L. R. 2 C. P. 593.
(5) L. R. 15 Eq. 93.
(6) L. R. 7 Q. B. 34.
(7) 8 Q. B. D. 179.

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ordinary case a contributory would be allowed to set off any debt due by the insolvent company to him against calls made on him as a contributory, otherwise it was unnecessary to prevent it in the one case mentioned in the 76th section.

Such a conclusion cannot be correct, as it is contrary to the whole spirit of the statute, and to all the English authorities, which clearly establish that there is no right to set off as against calls on contributories. *Grissell's* case (1); *Calisher's* case (2); *Gill's* case (3); *In re White House & Co.* (4).

As to the transaction having taken place before the Winding-up Act was passed, and that the Act is not retrospective, we contend that it is unnecessary to claim any retrospective effect. The note sued on did not become due until after the Act passed, and no right of set off existed until it became due, our statute relating to set off being a transcript of the English statute. *Smith, Fleming & Co.'s* case (5).

The respondents also contend that set off is a matter of procedure only, and as a general rule statutes regulating procedure are retrospective in their effect. Maxwell on Statutes (6).

STRONG J.—I think it was very clearly and satisfactorily proved that the appellant acquired the draft which he seeks to set off *bonâ fide* and for a valuable consideration, and that he does not hold it as a trustee for the Union Bank; nor was it indorsed to him in order to carry out any fraudulent or colorable contrivance to enable the Union Bank to obtain a preference.

If the 76th section does not apply to the case, there can be no doubt but that under the second part of the

(1) L. R. 1 Ch. App. 528.
(2) L. R. 5 Eq. 214.
(3) 12 Ch. D. 755.
(4) 9 Ch. D. 595.
(5) L. R. 1 Ch. App. p. 538.
(6) 2nd Ed. page 271.

60th section it was perfectly legal for the appellant to purchase this draft, and he was entitled to set it off against his promissory note given to Quirk and indorsed by the latter to the respondents, and now sued on in this action.

I am of opinion that the 76th section does not apply for two reasons: In the first place, as the appellant bought the draft before the Act passed, to make it applicable to the appellant would be manifestly to give it an *ex post facto* effect, an objection which is not answered by calling the right of set off a mere matter of procedure. The rule being that an *ex post facto* construction will never be adopted when substantial rights are affected, even in respect of matters of procedure.

Next, the 76th section, in terms, is, as plainly as words can make it so, confined to cases of set off by contributories against claims for contributions, and this is not such a claim. The only argument against this interpretation, which the language of the clause manifestly calls for, is that so to construe it, implies that in respect of all claims other than those transferred within the time limited in sec. 75, the contributory would have a right of set off against his liability for calls; whether such a consequence would follow or not, it is not necessary now to decide, but certainly such an argument is entirely insufficient to warrant a construction which would place a contributory, who has paid up his calls but who is also liable to the bank as an ordinary debtor, in a worse position than other debtors; there is nothing in the statute depriving a debtor of the bank sued upon a promissory note from purchasing a negotiable instrument upon which the bank is liable, and setting it off; and a person who may happen to be a contributory, stands in no worse position in this respect than any other debtor of the bank, unless indeed we are to import by implication into the statute a prohibitory clause making

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a distinction between a debtor, who happens also to have been a contributory, and one who was not so liable; such a mode of construction I never before heard of, and no principle can be suggested, nor authority cited, to warrant it.

I think, therefore, the respondent wholly fails in supporting the judgment of the court below which must be reversed, both as regards the refusal to grant a new trial and on the demurrer, and the rule for a new trial must be made absolute in the court below as being against the weight of evidence and for mis-direction, and judgment entered for the appellant on the demurrer, with costs to the appellant in both courts.

Sir. W. J. Ritchie C.J. and Fournier and Taschereau JJ. concurred.

HENRY J.—I have no doubt that the party was entitled to take the note that he did, and that having taken it before the call was made upon him, he had a right to set it up against the claim of the bank. If he had purchased it after the call was made, he would stand in a different position. Here the call is of a certain and definite nature, and not a mere matter of account between the parties. If a call is made upon a contributory he is bound to pay it, unless the bank owes him at the time, in which case he has a right to a set off. I therefore agree in the judgment of my brother Strong.

Appeal allowed with costs. Judgment to be entered for defendant on demurrer, and rule for a new trial made absolute.

Solicitor for appellant: *M. McLeod.*

Solicitor for respondents: *R. R. Fitzgerald.*