1959
*May 22, 25
1960
Jan. 26

TRADERS FINANCE CORPORATION LIMITED (*Plaintiff*) ..... APPELLANT;

AND

I. G. CASSELMAN (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Promissory note—Conditional sale contract—Transaction through agent—Transaction made in Saskatchewan and action brought in Manitoba—Endorsee of note with knowledge of want of consideration—Whether the Limitation of Civil Rights Act, R.S.S. 1953, c. 95, applicable—Whether procedural and not applicable to Manitoba action.

The defendant C purchased a tractor-trailer from a dealer in Saskatchewan, but wished to make D appear to be the owner. Consequently, D went through the form of purchasing the equipment and made a down-payment with moneys supplied by C. In the conditional sale agreement, the dealer reserved title and D signed a promissory note for the unpaid balance. The agreement was assigned and the note endorsed to the plaintiff finance company, which knew who was the real owner. Subsequently D transferred the equipment to C, and this transfer agreement was concurred in by the plaintiff and the dealer. C then purported to give a promissory note for the unpaid balance to D. This note was endorsed by D to the dealer and then to the plaintiff, which sued upon it in Manitoba. The transfer agreement provided that this last mentioned note was collateral only to the original sale agreement and the note already held by the plaintiff. The trial judge maintained the action because s. 18 of *The Limitation of Civil Rights Act* was found to be *ultra vires*. The Court of Appeal dismissed the action. The plaintiff appealed to this Court and abandoned any argument against the validity of the legislation.

Held: The appeal should be dismissed.

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

Per Kerwin C.J. and Taschereau, Cartwright, Fauteux, Martland and Judson JJ.: The submission that the Act was not applicable because the vendor had no lien for "all or part of the purchase price", failed. D was not the vendor to C but merely a nominee or agent of C executing formal documents for the purpose of putting the paper title in the person who was, from the beginning and to the knowledge of the plaintiff and the dealer, the real purchaser and equitable owner. There was, therefore, a reservation of a lien for all or part of the purchase price when the property was sold to D. The note given for that transaction was not enforceable under the Act because no debt existed to the knowledge of the payee and endorsee. The note given in the second transaction by the principal C to the agent D was in no higher position. Since there was a lien reserved there was no right of personal recovery under s. 18(1). The plaintiff held the note and sued upon it, knowing that it was given without consideration and without the existence of any personal obligation to pay.

The sections of the *Bills of Exchange Act* having to do with the rights of a holder in due course or the rights of a holder for value against an accommodation party, had no application.

The second submission to the effect that s. 18 was a procedural rule of the Courts of Saskatchewan and therefore inapplicable in an action brought in Manitoba, also failed. The section was in no way concerned with procedural rules for the enforcement of a right. It was concerned with substantive law.

It was unnecessary to deal with the validity of the statute since counsel for the plaintiff had abandonned any argument against it on constitutional grounds.

Per Locke J.: There was no consideration for the giving of the note, to the knowledge of the plaintiff who sued *qua* endorsee. The promise to pay, signed by D as the nominee of C, was, to the knowledge of the plaintiff, unenforceable by virtue of s. 18 of the Act, the rights of the promissee, in case of default, being limited to repossession. The note sued upon, being given as collateral security only for a non-existent debt, to the knowledge of all parties to the action, was thus without consideration and unenforceable at the suit of the plaintiff.

In the absence of consideration, the question as to whether s. 18 of *The Limitation of Civil Rights Act* was in conflict with the sections of the *Bills of Exchange Act,* dealing with the rights of holders for value or holders in due course, did not arise in this case.

Since the rights of a holder in due course or a holder for value to whom a note had been endorsed after maturity without knowledge of the lack of consideration, did not arise in this case, there was no necessity to pass on the question of the validity of s. 18 of the Act.

APPEAL from a judgment to the Court of Appeal for Manitoba[1], reversing a judgment of Monnin J. Appeal dismissed.

J. L. McDougall, Q.C., for the plaintiff, appellant.

H. B. Monk, Q.C. and *G. A. Higenbottom,* for the defendant, respondent.

[1] (1959), 16 D.L.R. (2d) 183.

1960

TRADERS FINANCE CORPN. LTD. v. CASSELMAN

L. A. Chalmers, for the Attorney General of Canada.

W. G. Doherty, for the Attorney-General of Saskatchewan.

The judgment of Kerwin C.J. and of Taschereau, Cartwright, Fauteux, Martland and Judson JJ. was delivered by

JUDSON J.:—The appellant, Traders Finance Corporation Limited, sued the respondent, I. G. Casselman, as maker of a promissory note, which had been given in connection with the purchase of a tractor-trailer. The purchase was made in the Province of Saskatchewan, delivery of the property was taken there and all arrangements in connection with the transaction were made in that province. The proper law of these transactions is that of the Province of Saskatchewan but the action was brought in the Province of Manitoba and the main defence pleaded, and the only one that I propose to consider in these reasons, was based upon s. 18 of the Saskatchewan legislation known as the *Limitation of Civil Rights Act*. This section provides that "When an article, the selling price whereof exceeds $100, is hereafter sold, and the vendor, after delivery, has a lien thereon for all or part of the purchase price, the vendor's right to recover the unpaid purchase money shall be restricted to his lien upon the article sold, ..." This defence failed at the trial because of the conclusion of the learned trial judge that the legislation was beyond the provincial power and an infringement of the exclusive jurisdiction of Parliament under s. 91(18) of the *British North America Act* in so far as it purported to affect the liabilities of parties to bills of exchange and promissory notes. The Court of Appeal[1] reversed this conclusion, Adamson C.J.M. dissenting. On appeal to this Court, counsel for the plaintiff-appellant abandoned any argument against the legislation on constitutional grounds. It is, therefore, unnecessary to deal with the point further and I confine my reasons to a consideration of the only two grounds that were urged against the application of the legislation to the facts of this case. The first was that the legislation did not apply because of the peculiar form which the transaction took in this case, where the vendor according to the documents executed had no lien on

[1] (1959), 16 D.L.R. (2d) 183.

the property for "all or part of the purchase price." The second was that this legislation should be characterized as procedural and, in consequence, held to be inapplicable to an action brought on the note in the courts of the Province of Manitoba. I will deal with these submissions in turn.

The first submission makes it necessary to examine in some detail the form and substance of the transaction. The respondent Casselman wished to purchase a tractor-trailer from Transport Equipment Company Limited, a dealer carrying on business in the City of Regina. His intention was to incorporate a company which would own this vehicle and to have this company lease it to a transport company, Delarue Bros. Limited, which was engaged in the long distance haulage business between Regina and Toronto. Because the licensing regulations of the Province of Ontario did not permit operators to use leased equipment, to procure this licence it was decided to make Delarue Bros. Limited appear to be the owner. Therefore, Casselman caused Delarue Bros. Limited to go through the form of purchasing this equipment from the dealer with a substantial down-payment supplied by him. The usual conditional sale agreement was signed whereby the dealer reserved title. Attached to the agreement was the usual promissory note for the unpaid balance, which Delarue Bros. Limited signed. The agreement was then assigned and the note endorsed by the dealer to the appellant Finance company. All these transactions took place on September 30, 1952 and there is no doubt on the evidence that the Finance company knew that Delarue Bros. Limited was not the real purchaser and that Casselman Carriers Limited or Casselman personally was supposed to be in the background.

As the ostensible owner, Delarue Bros. Limited obtained a licence from the Province of Ontario and was then ready to transfer the equipment to the real owner and take a lease back. The transfer was made on October 14, 1952 by an agreement between Delarue Bros. Limited and Casselman Carriers Limited, concurred in by the Finance company and the dealer. Casselman Carriers Limited purported to give a new promissory note for the unpaid balance to Delarue

1960

TRADERS FINANCE CORPN. LTD. v. CASSELMAN

Judson J.

Bros. Limited, the apparent original purchaser. This is the note sued upon and it was endorsed by Delarue Bros. Limited to the dealer, and then to the Finance company.

The transfer agreement provides that it is not to disturb or affect in any way the security held by the Finance company on the equipment and that the new promissory note signed by Casselman Carriers Limited "shall not constitute payment of the Conditional Sale Contract and/or the promissory note given by the original Purchaser to the Dealer and now held by the Corporation (Traders Finance) and shall be collateral only to the said original Conditional Sale Agreement and the promissory note already held by the Corporation."

The new note was signed in this form: "Casselman Carriers Ltd. I. G. Casselman". The company, however, had not at that time been incorporated and both Courts have held that in the absence of other defences, a note so signed would have involved Casselman in personal liability. In this Court, counsel for Casselman did not question this finding and confined his argument to the other defences.

It is at once apparent that when Delarue Bros. Limited transferred this property to Casselman there was no reservation of title. Delarue Bros. Limited transferred all its right, title and interest, which was, of course, subject to the reservation of the legal title contained in the conditional sale agreement when Delarue became the apparent purchaser. If Delarue Bros. Limited had been an actual vendor of this equipment to Casselman the transaction would not be within s. 18 above mentioned because the vendor, in the words of the legislation, would, after delivery of the property, have no lien thereon for all or part of the purchase price. But Delarue Bros. Limited was not the vendor of this equipment to Casselman but merely a nominee or agent of Casselman executing formal documents for the purpose of putting the paper title in the person who was, from the beginning and to the knowledge of the Finance company and the dealer, the real purchaser and equitable owner. There was, therefore, a reservation of a lien for all or part of the purchase price when the property was sold to the known agent for Casselman. The note given for that transaction was not enforceable under the statute because no

debt existed to the knowledge of the payee and endorsee and the note given in the second transaction by the principal Casselman to the agent Delarue Bros. Limited and ultimately endorsed to the appellant Finance company is in no higher position. In spite of the form, this transaction was one between the dealer and Casselman through the intervention of an agent. It was done in two stages instead of one. There was a lien reserved and therefore there is no right of personal recovery. I have reached this conclusion on a consideration solely of s. 18(1). I do not regard the transaction as involving an agreement to make the provisions of the Act inapplicable and consequently null and void under s. 28. There was in fact no such agreement, either express or implied, for the form of the transaction was dictated solely by the determination to evade the licensing regulations of the Province of Ontario.

On this branch of the case, I therefore conclude that there was no debt between Casselman and Delarue Bros. Limited or between Casselman and the dealer because by the terms of the statute there could be no personal obligation to pay the unpaid balance in a transaction of this kind. The Finance company holds this note and sues upon it, knowing that it was given without consideration and without the existence of any personal obligation to pay. There is no suggestion here that Traders Finance was a holder in due course or a holder for value with Casselman as an accommodation maker. The sections of the *Bills of Exchange Act* having to do with the rights of a holder in due course or the rights of a holder for value against an accommodation party have no application and the action on the note fails unless it can be successfully argued that the legislation is a procedural rule of the Courts of Saskatchewan and inapplicable in an action brought in Manitoba.

The appellant, in my opinion, has set itself an impossible task in seeking to have this legislation characterized as procedural. The section takes away a personal right of action for the balance of the unpaid purchase price if a lien is reserved. It is in no way concerned with procedural rules for the enforcement of a right. Therefore, the fact that there is no equivalent legislation in the Province of Manitoba

1960

TRADERS FINANCE CORPN. LTD. v. CASSELMAN

Judson J.

does not help the appellant. This was undoubtedly a Saskatchewan cause of action, without a single element which might connect it with the Province of Manitoba. Even in the absence of persuasive authority it is difficult to see how the Manitoba Court could have done other than characterize the matter as one of substantive law. While it is true that the Manitoba Court must characterize this legislation by its own tests of what is procedure and what is substantive law and is not bound by what another jurisdiction may have done, there is no problem of conflicting characterization here because the Manitoba Court took the same view as that of the Saskatchewan Court of Appeal in *Canadian Acceptance Corporation Limited v. Matte*[1], where this very section was characterized as a matter of substantive law and not procedure. In that case the conditions were in reverse. The plaintiff sued on a Manitoba contract in the Courts of Saskatchewan. This statute was pleaded as a defence on the ground that it was a procedural rule of the forum. The judgment of the Court of Appeal was that the matter was one of substantive law and not of procedure and that this Saskatchewan legislation had no application to the Manitoba contract under litigation. I agree with this conclusion.

I would dismiss the appeal with costs. There should be no costs to or against the Attorney General of Canada or the Attorney-General for Saskatchewan.

LOCKE J.:—In my opinion the ground upon which this appeal should be dismissed is that, as it was found by Mr. Justice Coyne in the Court of Appeal[2], there was no consideration for the giving of the note, to the knowledge of the appellant who sues *qua* endorsee.

It was, no doubt, by reason of the fact that this defence was not clearly pleaded in the statement of defence and presumably not argued before Monnin J. that the question was not dealt with by him. While not raised expressly in the notice of appeal to the Court of Appeal, I judge that it was argued there, though the reasons delivered by Tritschler J.A.

[1] (1957), 22 W.W.R. 97, 9 D.L.R. (2d) 304.
[2] (1959), 16 D.L.R. (2d) 183.

do not mention the matter. The defence appears to me to be sufficiently raised by paras. 11 and 12 of the statement of defence.

I also agree with Coyne J.A. that, in the absence of consideration, the question as to whether subs. (1) and (4) of s. 18 of the *Limitation of Civil Rights Act* of Saskatchewan, R.S.S. 1953, c. 95, are in conflict with the sections of the *Bills of Exchange Act,* dealing with the rights of holders for value or holders in due course, does not arise in the circumstances of the present case. That the Province may validly restrict the rights of the vendor under the conditioned sale agreement in the manner described in the section is not questioned.

The evidence, in my opinion, supports the finding that the manager of the appellant company was aware at the time that, in entering into the agreement to purchase the equipment dated September 30, 1952, and in signing the promissory note bearing that date in which Transport Equipment Co. Ltd. was named as the payee, Delarue Brothers Ltd. acted simply as the nominee of Casselman, for the purposes explained in the evidence.

The conditional sale contract and the promissory note were assigned and endorsed respectively to the appellant and it was upon this security that the moneys were advanced by it to pay the purchase price of the equipment, apparently at or about the above mentioned date.

The undated transfer agreement, found by the learned trial judge to have been executed on October 14, 1952, was made with the consent of the appellant, and it was on that date that the promissory note sued upon was given by Casselman to Delarue Brothers Ltd. and negotiated by endorsement to the appellant.

While the conditional sale contract on the face of it obligated Delarue Brothers Ltd. to pay to the vendor by instalments the balance of the purchase price amounting to $20,391.35, the promise to pay was, to the knowledge of the appellant, unenforceable by virtue of the provisions of s. 18, the rights of the promisee, except in certain respects with which we are not concerned, being limited in case of default to repossessing the machinery.

1960

TRADERS FINANCE CORPN. LTD. v. CASSELMAN

Locke J.

The transfer agreement referring to the note then given by Casselman, so far as it needs to be considered, reads:

> The Dealer and Purchaser further agree that the new promissory note drawn by the Sub-Purchaser (Casselman) payable to the Purchaser (Delarue Brothers Ltd.) and by the Purchaser and the Dealer endorsed to the Corporation shall not constitute payment of the Conditional Sale Contract and/or the promissory note given by the original Purchaser to the Dealer and now held by the Corporation and shall be collateral only to the said original Conditional Sale Agreement and the promissory note already held by the Corporation.

The note sued upon, being given as collateral security only for a non-existent debt, to the knowledge of all of the parties to the action, was thus without consideration and unenforceable at the suit of the appellant.

While upon the argument before us counsel for the appellant stated that he did not contend that subs. (1) and (4) of s. 18 of the *Limitation of Civil Rights Act* were *ultra vires* and did not seek to support the judgment in the appellant's favour given at the trial on that ground, we would not, in my opinion, be relieved of our duty to deal with that question if the rights of a holder in due course or a holder for value to whom the note had been endorsed after maturity without knowledge of the lack of consideration were involved. The learned trial judge and the learned Chief Justice of Manitoba have both expressed the opinion that these portions of the section, in so far as they affect the rights of the holder of a negotiable instrument, are *ultra vires* the Province, while Coyne and Tritschler JJ.A., who constituted the majority in the Court of Appeal, have expressed the contrary opinion.

It is well that it be made clear that no such questions arise in this action. There is nothing in the reasons for judgment delivered in this Court in the case of *Attorney-General for Alberta and Winstanley v. Atlas Lumber Co. Ltd.*[1], which as between the original parties to the note affects the rights of the promissor to rely upon either the lack or a failure of consideration by way of defence.

I would dismiss this appeal with costs. I would make no order as to the costs of the Attorney General of Canada or of the Attorney-General of Saskatchewan.

Appeal dismissed with costs.

[1] [1941] S.C.R. 87, 1 D.L.R. 625.

Solicitors for the plaintiff, appellant: Parker, Tallin, Kristjansson, Parker & Martin, Winnipeg.

Solicitors for the defendant, respondent: Monk, Goodwin & Higenbottam, Winnipeg.

Solicitor for the Attorney General of Canada: L. A. Chalmers, Ottawa.

Solicitor for the Attorney-General of Saskatchewan: R. S. Meldrum, Regina.