THE UPLANDS, LIMITED (PLAINTIFFS) ..... } APPELLANTS;

AND

LAWRENCE GOODACRE (DEFENDANT) ..... } RESPONDENT.

1914

*May 11.
*June 1.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Cancellation—Expelling contractor — Condition precedent —Possession of plant—Waiver—Seizure in execution—Interpleader—Insolvency—Abandonment of works—Suretyship.

A contract for the construction of works provided that upon the insolvency of the contractor, or the company's manager certifying that, in his opinion, the contractor had abandoned the contract, then the company might enter upon the works, expel the contractor and itself use the materials and plant upon the premises for the use of itself or another contractor in the completion of the works, and that, upon such entry the contract should be determined. In consequence of a letter from the contractor notifying the company of the stoppage of the works, on account of alleged unjustifiable interference therewith, the company took possession of the materials and plant of the contractor, without obtaining the certificate specified, did some work therewith, and then entered into correspondence with the contractor's bondsmen to induce them to proceed with the contract. Upon seizure of the goods under execution by a judgment creditor of the contractor,

Held, Duff J. dissenting, that as the insolvency of the contractor had not been proved nor a certificate of their manager procured, as provided by the contract, the goods in question did not become the property of the company and the contractor's letter could not be considered as a waiver of the conditions precedent stipulated in the contract; consequently, the possession so taken of the plant and materials did not entitle the company to the right of possession thereof as against the execution creditor.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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Per Duff J., dissenting.—In the contract in question the term "insolvency" should be construed as meaning the condition of a person unable to pay his just debts in the ordinary course of business; the contractor was visibly insolvent in this sense; the contract had also been abandoned, the company had taken possession under the provision in the contract, and, there being no evidence to establish a contract of suretyship by the bonding company which was requested to proceed with the works, the possession of the company was effective as against the execution creditor. *The Queen* v. *The Saddlers' Co.* (10 H.L. Cas. 404), and *Parker* v. *Gossage* (2 C.M. & R. 617), referred to.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment of Gregory J., at the trial, by which an interpleader issue to determine the ownership of goods seized by the sheriff under an execution issued by the respondent, as judgment creditor of the Anderson Construction Company, was decided against the present appellants.

The circumstances in which the interpleader issue was directed are set out in the head-note and the questions raised on the present appeal are stated in the judgments now reported.

Nesbitt K.C. for the appellants.

Ewart K.C. for the respondent.

THE CHIEF JUSTICE agreed with Anglin J.

IDINGTON J.—This appeal turns, I think, upon the true construction of the application to the facts of the following part of paragraph 5 in the contract between appellant and the Anderson Construction Company:—

5. Upon the insolvency of the contractor, or upon an execution being levied on his goods, or upon a judgment in a court of British

(1) 18 B.C. Rep. 343.

Columbia being obtained against him, which shall not be satisfied or secured within fourteen days, or upon his making arrangements for assignment in favour of his creditors, or upon the manager certifying under his hand to the company that in his opinion the contractor

(*a*) Has abandoned the contract, or * * *

Then the company, without in any wise prejudicing any other of the rights or remedies of the company under the contract, may enter upon the said works and expel the contractor therefrom, and may itself use the materials and plant upon the premises for the completion of the works, and employ any other contractor to complete, or may itself complete the works, and upon such entry the contract shall be determined save as to the rights and powers conferred upon the company and manager thereby.

The contractor, by a letter of remonstrance with regard to the alleged unjustifiable interferences of the appellant, wrote appellant notifying it of the stoppage of the work. Thereupon the appellant's president had directed some of his men to take possession of the goods in question, but instead of adopting the methods specified in the contract for expelling the contractor therefrom, and thereby determining the contract, entered into correspondence with the contractor's surety to induce it to proceed with the contract.

Meantime the sheriff seized the goods, which were thus, in my view of the facts and reading of the contract, merely held tentatively in possession.

To speak of such a possession as that which might have ensued upon a determination of the contract within and according to the terms thereof and a possible bar to a sheriff's seizure, seems a misinterpretation of what actually happened.

It is beside the question to set up the doubtful state of solvency or insolvency. For even if insolvent the contractor was not *ipso facto* by the terms of this contract, to be considered as expelled from the contract and the right of property or possession in its tools and material changed.

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It is the election beyond doubt to actually expel it from and terminate the contract that is the right given.

The method of doing this, if intended before the seizure, certainly fell far short of what the contract had in contemplation.

And as a result the sheriff's seizure cannot be displaced or the claim that it was irregular, and such as only a trespasser might have effected, be upheld.

The appeal must, therefore, I think, be dismissed with costs.

DUFF J. (dissenting).—The provision of the agreement upon which the dispute arises is as follows:—

5. Upon the insolvency of the contractor, or upon an execution being levied on his goods, or upon a judgment in a court of British Columbia being obtained against him, which shall not be satisfied or secured within fourteen days, or upon his making arrangements for assignment in favour of his creditors, or upon the manager certifying under his hand to the company that in his opinion the contractor

(*a*) Has abandoned the contract, or

(*b*) Has suspended the progress of the work for ten days after receiving from the manager a written notice to proceed, without any lawful excuse under these conditions, or

(*c*) Has failed to give the manager all facilities for inspecting any material before the same is in any way used on the work, or

(*d*) Has failed to complete all or any of the works by the time herein specified for their completion.

Then the company, without in any wise prejudicing any other of the rights or remedies of the company under the contract, may enter upon the said works and expel the contractor therefrom, and may itself use the materials and plant upon the premises for the completion of the works, and employ any other contractor to complete, or may itself complete, the works, and upon such entry the contract shall be determined save as to the rights and powers conferred upon the company and manager thereby.

Insolvency is here used in the sense in which the term has usually been interpreted in clauses of for-

feiture. To quote the judgment of Mr. Justice Willes in *The Queen* v. *The Saddlers' Co.*(1), at p. 425:—

> The term "insolvent" has been repeatedly construed in a like context, both in private instruments and upon the construction of a statute, to apply to a person labouring under a general disability to pay his just debts in the ordinary course of trade and business.

To the same effect is the dictum of Parke B., in *Parker* v. *Gossage*(2):—

> An insolvent in ordinary acceptation is a person who cannot pay his debts.

The Anderson Construction Company was visibly insolvent in this sense. They abandoned their contract explaining that they were unable to carry it on for want of means. Their workmen presented time cheques to the manager of the appellants which the construction company had refused to pay, to the amount of $8,000. Mechanics' liens were filed and proceedings were taken under them against the property of the company. The company was called upon to implement a guarantee of a debt of $5,000 which it had given to Balfour, Guthrie & Co. at the request of the construction company. Very shortly after the appellants took possession the sheriff seized the tools and plant of the construction company under an execution issued at the suit of the butcher who had supplied the boarding house with meat. The plant and tools were sold and this litigation arose out of a contest between the appellants and various creditors of the construction company over the disposition of the proceeds. Not only is there evidence of insolvency; insolvency was demonstrated within the meaning of this clause. Indeed, it was only in this court

(1) 10 H.L. Cas. 404. (2) 2 C.M. & R. 617.

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for the first time that anybody was bold enough to make the suggestion that insolvency had not been proved.

It is equally clear that the appellants entered and took possession under the authority of this clause. That they took possession in point of fact is not disputed. It was expressly admitted at the trial. It is, moreover, conclusively proved. The appellants, for example, made use of material belonging to the contractors in a manner which would have been wrongful unless the appellants were rightfully acting under this clause.

A suggestion, made for the first time in this court, that some dealings between the appellants and a company referred to in the evidence as the "bonding company" are relied on as shewing conduct on the part of the appellants incompatible with an intention to proceed under paragraph 5 of the contract. The difficulty with this contention is that it has no basis in point of fact. It is founded on the assumption that the contract with the "bonding company" was a contract of suretyship, and that the demand made by the appellants was a demand that the sureties should execute the construction company's contract. There is not a scrap of evidence to shew that there was any contract of suretyship. The contract may have been and probably was a contract of indemnity by which the "bonding company" made themselves answerable for any loss occasioned by the failure of the construction company to perform their contract, a very different thing indeed from a contract of suretyship. There is nothing whatever in Mr. Rogers' evidence justifying the assumption that anything he did was in the least consistent with the assertion and exercise of the appel-

lants' rights under clause 5. If such a point was to be raised it ought, of course, to have been suggested at the trial when the document could have been produced and all the facts bearing upon the point could have been considered. It would be quite contrary to the settled rule upon which this court has acted, over and over again, to permit such a point to be raised in such circumstances in this court for the first time.

I have dealt with the points upon which Mr. Ewart sought to support the judgment — points not hinted at apparently, any one of them, in the courts below. Virtually, I think he admits that the construction of clause 5 upon which the British Columbia courts proceeded is a construction which cannot be sustained.

With very great respect, I can see no answer to the dissenting judgment of Mr. Justice Irving upon that point. I ought, perhaps, to mention before taking leave of the case, the form of the issue which was the subject of much discussion at the argument. There can be no doubt that the question the parties intended to raise and that the learned judge who made the order, intended to be tried, was the question whether, in the circumstances then existing, the property in question was exigible under the writ of execution against the construction company. It was not at all disputed at the trial that the agreement between the parties in reference to the sale precluded the respondents from relying upon the sale as in any way prejudicing the rights of the appellants.

I think the appeal should be allowed with costs.

ANGLIN J.—While unable to accept the construction of the agreement, under which the appellants as-

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sert a right to possession of the property in question as against the sheriff, which would give them the right to take possession only if they intended to proceed themselves to complete the works and not to do so through other contractors, I am of the opinion that this appeal fails on other grounds.

The agreement prescribes certain alternative conditions precedent to the appellants' right to take possession of and use the plant and materials of their contractors, the execution debtors. Two of those conditions which they claim to have been fulfilled are insolvency of their contractors, and abandonment of the contract.

Insolvency, though by no means improbable, has not been proved.

The contract requires that its abandonment shall be certified under the hand of the manager of the company before the right to take possession of and use the contractors' materials arises. I cannot accept the suggestion that this stipulation was so wholly in the interest of the contractors that it could be and was waived by their letter stating that for certain reasons they would be unable to proceed with the work. Having chosen to make the procuring of this certificate a condition precedent to their right to take possession on abandonment, I am of the opinion that without it the appellants cannot establish a right to possession as against the sheriff.

Moreover, I am not satisfied that there was in fact an abandonment by the contractors within the meaning of the provision of the contract which is invoked. I would, on these grounds, dismiss the appeal with costs.

BRODEUR J.—I am of the opinion that this appeal should be dismissed for the reasons given by my brother Anglin.

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Appeal dismissed with costs.

Solicitor for the appellants: *H. W. R. Moore.*

Solicitor for the respondent: *F. Higgins.*