1916

*Oct. 17.
*Oct. 30.

DAVID A. McKEE (PLAINTIFF).....APPELLANT;

AND

WILLIAM PHILIP (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Sale—Recovery of moneys paid—Evidence—Onus probandi—Estoppel by receipt.

The appellant, having sold a property to one Arnold, purporting to act as agent for the respondent, received in part payment a cheque for $1,300 of the Dominion Trust Company of which Arnold was manager. The respondent, on the ground that the purchase was beyond the powers vested in Arnold, resisted an action of the appellant for the enforcement of the agreement and sued the appellant, by counterclaim, for the reimbursement of the $1,300 so paid, alleging that this sum, which was borrowed by Arnold from the Trust Company, was repaid by Arnold out of his moneys in the hands of Arnold for investments. The trial judge and the Court of Appeal held, and it was not disputed, that Arnold, in entering into the purchase in the name of the respondent, exceeded his authority.

Held, Duff J. (dissenting), that the *onus probandi* as to the ownership of the moneys, was not on the respondent, and that, even if it was so, the receipt in the agreement of sale and the facts leading up thereto were sufficient proof that the money paid to the appellant was that of the respondent.

Per Duff J. (dissenting).—Respondent can not repudiate Arnold as his agent for the purchase and at the same time treat him as such in connection with the advances. The receipt in the agreement for sale could only constitute an *estoppel* in an action based upon the agreement and between the parties to it. On respondent lies the *onus* of showing that the moneys in question are his moneys; and the admission derived from the receipt in the agreement did not constitute a *primâ facie* case sufficient to shift the burden of proof.

APPEAL from the judgment of the Court of Appeal for British Columbia, reversing the judgment of Mac-

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

donald J. at the trial, by which the respondent's counterclaim was dismissed.

The material facts of the case are fully stated in the judgments now reported.

E. L. Newcombe K.C. for the appellant.
S. S. Taylor K.C. for the respondent.

THE CHIEF JUSTICE.—The late W. R. Arnold who held a power of attorney from the respondent purchased for him and in his name certain lands in British Columbia. The consideration was $11,700 of which $1,700 was paid in cash, the receipt being acknowledged in the agreement for sale, and the balance was to be paid in future instalments. The $1,700 was paid by a cheque of the Dominion Trust Co. of which Arnold was manager and on which he could draw for any money he wanted.

It was held and it is not now disputed that the purchase was beyond the powers vested in Arnold and is void. The trial judge, however, refused to order the return to the respondent of the $1,700 paid to the appellant because he was not satisfied that the moneys were the moneys of the respondent; he held that the onus was on the respondent to shew that they were his moneys. I can see no grounds for this decision. The respondent, as he admits, is a man of small education and trusted his affairs entirely to his friend Arnold. He states over and over again that he knew nothing whatever about the transaction; it was useless therefore for the judge to give him, as he says he did, an opportunity of proving that the money was his.

But even if the onus was on the respondent, I think that it has been sufficiently discharged. The respondent has proved that some years previously he had

1916
McKEE
v.
PHILIP.
The Chief Justice.

placed in Arnold's hands a sum of $1,700 and even if this had been invested there is nothing to shew that Arnold, a man of endless speculations, had not realized the money again. Further there is no doubt that very shortly after making this agreement for purchase Arnold collected and had in his hands many thousand dollars belonging to the respondent.

I do not know how you can identify any particular moneys of the respondent in the hands of Arnold; men of his type are not very particular about money coming into their hands from whatever sources and I think it is likely that he used either the respondent's, his own or his company's cash very indifferently.

I cannot see that there is anything in the fact that the appellant was paid by a cheque of the Dominion Trust Co. which will enable him to dispute that the money was received from the respondent, the purchaser named in the deed, as by this writing under seal he admitted was the case.

The respondent has lost all his money which he confided to Arnold and the appellant has certainly no claim to the $1,700 beyond the fact that it is in his possession. Under these circumstances one might have supposed that he would have been content to pay it over under the judgment by which, of course, he was fully protected, without bringing the respondent before this court.

The judgment should be affirmed and this appeal dismissed with costs.

DAVIES J.—A majority of the learned judges of the Court of Appeal drew the inference that the money which is in dispute in this case belonged to Phillip. Though at the close of the argument I entertained some doubts upon the point, subsequent consideration,

1916

McKEE v. PHILIP.

Davies J.

after reading the evidence, has convinced me that the inference is a reasonable and proper one.

I have nothing to add to the reasons of Chief Justice Macdonald and would dismiss the appeal with costs.

IDINGTON J.—I think there was evidence furnished by the receipt in the agreement in question and the facts leading up thereto and surrounding all the transactions in relation thereto from which it should be inferred that the money paid to appellant was that of the respondent which he is entitled to recover when repudiating the onerous contract which he never had authorized. It certainly was not the money of Arnold and could not be claimed honestly by appellant unless it was so which he has failed to establish.

The appeal should, therefore, be dismissed with costs.

DUFF J. (dissenting)—The appellant's action was based upon a purported agreement, dated the 1st Nov., 1909, for the sale of land near Vancouver. The instrument was executed by the appellant as vendor and by one W. R. Arnold, who has since died, but was then the manager of the Dominion Trust Co. in the name of the respondent and professedly as the respondent's agent. The appellant claimed judgment against the respondent for the unpaid instalments of the purchase money and, in the event of nonpayment, for foreclosure of the interests of the respondent and certain persons claiming by transfer from him. The respondent denied the authority of Arnold to enter into the agreement on his behalf or in his name and counterclaimed for the restitution to him by the appellant of certain sums amounting in all to $1,300 which he alleged had

1916
McKEE
v.
PHILIP.
Duff J.

been paid to the appellant as part of the purchase money, but without authority, out of the moneys in Arnold's possession for him. The trial judge held, and this is a point upon which all parties are agreed, that Arnold had in fact no authority to execute the so called agreement in the name of the respondent and dismissed the action against the respondent. He held also that the respondent had failed to shew any title to the moneys received by the appellant from Arnold and dismissed the counterclaim. In the Court of Appeal Mr. Justice McPhillips concurred with the trial judge in his view that the counterclaim should be dismissed; but the majority of the court, the Chief Justice and Mr. Justice Martin, held that the respondent had sufficiently established his title to the moneys claimed and judgment was given accordingly.

I think the opinion of the learned trial judge and that of Mr. Justice McPhillips is the opinion which ought to prevail; and I think it right to state my reasons in full because the points in controversy are not exclusively points of fact, the decision in favour of the respondent having no unimportant relation to the proper application of one of the leading principles governing the incidence of the burden of proof. The agreement between Arnold and the appellant which the document above mentioned professes to embody was made on the 1st of Nov. when $200 was paid to the appellant on account of purchase money by means of the cheque of the Dominion Trust Co. At that time the respondent's name was not mentioned and nothing appears to have been said to indicate that Arnold himself was not the purchaser. On the 12th Nov., when the residue of the cash payment was due (nominally $1,500, but in reality $1,100, $400 being allowed, as it was said, for a commission to the purchaser) Arnold

informed the appellant that he wished the agreement to be taken in the respondent's name and the document on which the appellant's action was brought was produced and executed. The residue ($1,100) was also paid by means of the cheque of the Dominion Trust Co. These sums of $200 and $1,100 paid in the manner mentioned were treated by the Dominion Trust Co., as in fact they were, as advances for the purpose of the purchase. The respondent had a personal account with the Trust Co. but the moneys advanced were not charged to him in this account; nor was he there charged with the Trust Co's share (½) of the sum allowed the purchaser as commission (so called) which would have been $200. The only entries in the Trust Co.'s books relating to the transaction are to be found in a book known as the "real estate ledger" in which there is a description of the transaction, the appellant being entered as vendor and the respondent as purchaser and in which the sums advanced on Nov. 1st and Nov. 12th are entered as debits against the transaction as well as the repayment of these advances on July 12th, 1910, which is entered as a credit. This latter payment was made by Arnold, a receipt being given to him as for money paid by him personally and not in the character of agent. In the meantime, in April, 1910, Arnold, professing to act under his power of attorney from Phillip, had transferred the agreement to himself. Subsequently Arnold sold certain undivided interests receiving therefor shares in the capital stock of a certain company. These shares were taken in his name and treated as his own property.

Arnold was an old friend of the respondent's and in 1904 and 1905 had received some money from him for investment which had then been invested. He seems to have acted as the respondent's agent in vari-

1916
McKEE
v.
PHILIP.
Duff J.

ous ways and the respondent seems to have trusted him implicitly, not asking for accounts, and in fact the only account he received appears to have been one rendered in 1912. This account did not treat the property in question as a property held for Phillip. His power of attorney admittedly did not confer authority to pledge the respondent's credit in purchasing land or in borrowing money. There is no direct evidence and there is no fact pointing to the conclusion that Arnold had any funds of the respondent's in his possession either at the time the purchase was made or at the time the advances were repaid in July, 1910. The respondent, it may be added, did not become aware of this purchase or of the advances until after Arnold's death and some little time before the appellant's action was brought.

The respondent's counsel rightly assumed that he could make no progress towards establishing his claim without first satisfying the tribunal of the fact that there were sufficient grounds for judicially inferring either (1) that in taking over the agreement in April, 1910, and in repaying in July, 1910, the advances of Nov., 1909, as well as in procuring these advances to be made Arnold was acting as the agent of the respondent or (2) that in point of fact the advances were repaid out of moneys belonging to the respondent in his possession. There is no evidence to support either of these propositions, and it will be clear enough I think, from the considerations I shall briefly mention, that the preponderance of probability to be derived from the facts in evidence is against both of them. It will be sufficiently clear also that even assuming the first proposition to be established in fact that proposition can lead us nowhere in view of the circumstance that the respondent's case made upon his counterclaim and in his defence is wholly based upon the repudiation of

Arnold's authority to act as his agent; and, as to the second proposition, assuming it established, it is hardly doubtful that it would afford no ground for relief to the respondent as against the appellant.

Before proceeding to discuss these propositions in detail it is well to emphasize the fact already mentioned that the moneys in question were paid by the Dominion Trust Co. and that the payment was treated by the Trust Co. and by Arnold as an advance for the purpose of the purchase and that, eight months afterwards, this advance was repaid by Arnold. The fact that these moneys were advanced and the advance was running for a period of eight months is conclusive against any suggestion that the sums in question were paid out of moneys in the Trust Co.'s possession for the respondent or out of moneys at the time in Arnold's possession for him, the advance having been made, as already mentioned, in the form of a payment direct from the Trust Co. to the appellant. The respondent can therefore successfully contend that these moneys were his moneys only on one of two assumptions; first, that the advance was an advance to Arnold as the respondent's agent; or, secondly, that the payment was a payment by the Dominion Trust Co. acting as the respondent's agent, which latter assumption could only be supported upon the theory that the Trust Co. had been employed to act as the agent of the respondent in making the advance by Arnold acting as his agent. Admittedly there was no communication between the respondent and the Trust Co. with regard to this particular transaction and the Trust Co. had not been empowered by the respondent himself directly to act for him in such transactions generally.

This brings us to the first of the above mentioned propositions put forward on behalf of the respondent.

1916

McKEE v. PHILIP.

Duff J.

There is one circumstance which can be urged in support of the theory that Arnold in procuring the advance to be made by the Trust Co. professed to act for the respondent, that is the fact that the purchase was made in the respondent's name and that in the real estate ledger of the Trust Company the transaction was entered as being, that which it appeared to be on its face, a purchase by the respondent. As against this theory, on the other hand, there are all the circumstances which seem to indicate that Arnold was merely using Phillip's name as a convenience in a transaction which in reality was, and was intended to be, his own.

These circumstances include the fact, according to the appellant's testimony which the learned trial judge seems to have accepted, that Arnold approached the appellant in the guise of being himself the purchaser but taking the purchase in Phillip's name for his own convenience; they include also the facts that no notice was given to Phillip that Arnold was pledging his credit for large deferred payments; that the agreement was afterwards taken over by Arnold without notice to Phillip; that the advances were repaid in a manner which indicated that he treated them as advances to himself personally; that he treated the property as his own making no reference to it or to the proceeds of the sale of an interest in it in the subsequent account rendered to the respondent. These circumstances all point to an intention on the part of Arnold not to throw the burden of the purchase on Phillip, but rather to use Phillip's name in a transaction which was his own and the burden of which he intended to carry. There is the additional circumstance already mentioned that the respondent had a personal account with the Trust Company and that in this account no mention is made either of the advances or of the sum of $200.00

(commission) which the Trust Company was entitled to charge against the real purchaser. Add to these the circumstances that Arnold in fact had no authority to borrow money from the Trust Company on behalf of Phillip and that as between the Trust Company and himself he treated the loan as his own (see receipt of July 21st, 1910) and it seems sufficiently clear that the weight of evidence is distinctly in favour of the view that the advance was not procured by Arnold intending to act as the respondent's agent and was not made by the Trust Company intending to act as the respondent's agent at Arnold's request.

If indeed it could have been shewn, either by direct evidence or through a well founded inference, that the advance was in fact repaid out of the moneys in Arnold's possession on behalf of the respondent, then a different colour would be given to the whole business and it would not then, I think, have been open to Arnold to say as against the respondent that he had not acted for the respondent in all these dealings with the Trust Company as well as with the appellant and it would have been open to the respondent to adopt these dealings as his own. But in truth, as I have already said, there is no direct evidence and there is no fact which indicates that Arnold at any time in the course of these transactions had funds of the respondent's in his possession, still less that the advances were repaid out of any such moneys. The suggestion that this was so cannot be put in any higher category than mere guesswork; as against it there are all the circumstances above mentioned indicating that Arnold was merely using the respondent's name as a convenience, in which case the use of the respondent's money for the repayment of the advances could only be classed as intentional misappropriation.

1916

McKEE v. PHILIP.

Duff J.

But with respect to all these theories as grounds for supporting the respondent's claim, the respondent is in hopeless difficulties by reason of the position he is obliged to take up as the very foundation of his claim. The respondent now repudiates the authority of Arnold to enter into the purchase on his behalf or in his name. Arnold, as already mentioned, was equally without authority either to enter into the purchase or to procure advances on behalf of the respondent; and it is impossible to draw a line between the purchase and the arrangement resulting in the advances in such a way as to enable the respondent at one and the same time to repudiate the purchase and to adopt as his own act the act of Arnold in procuring the Trust Company to make the payments. As against Arnold it could not be done and therefore as against the appellant, with whom Arnold was professing to deal in the respondent's name with the respondent's authority, it cannot be done. The respondent, by repudiating Arnold's authority to pledge his credit in respect of the purchase (thereby escaping all responsibility to the appellant under the professed agreement), has incapacitated himself from alleging as a ground of his claim against the appellant that the moneys in question were borrowed by Arnold for him and that they became in consequence his moneys in the appellant's hands.

The respondent cannot insist upon adopting any one of Arnold's acts from that by which he procured the advances to that of repaying the advances without treating Arnold as his agent for making the purchase.

From all this it is quite evident that even if the respondent had been able to shew that Arnold had used his funds in July, 1910, in repaying the Trust Company the respondent would still have one or more difficult bridges to cross before making good his claim

against the appellant. The root of the difficulty is that the respondent's position in repudiating Arnold's authority and the Trust Co.'s authority to make payments for him, that is to say, in his behalf, necessarily separates any misappropriation by Arnold of his funds for the purposes of the transaction from the transaction itself and he could only make good his claim to moneys of his misappropriated by Arnold as far as he could trace these moneys (if in fact such moneys had passed into the hands of the Trust Company). He might have remedy against the Trust Company but he cannot trace his moneys further. It was not his funds, but the Trust Company's funds which went to pay the appellant. He cannot allege that the Trust Company paid out his moneys eight months before it received them because he has repudiated any authority on the part of the Trust Company to act for him in making payments. Whether or not the Trust Company in such circumstances might have had a claim against the appellant would be a profitless inquiry for many reasons, the most conclusive for the present being that the whole discussion is hypothetical, there being as already said nothing to indicate that the Trust Company was repaid out of the respondent's moneys, and much to indicate the contrary.

On behalf of the respondent the judgment below is supported on two other grounds. The first is the ground upon which the Chief Justice in the court below proceeded, namely, that the agreement of the first of November, 1909, contains a statement in the following words:—

> The sum of $1,700 (Seventeen Hundred Dollars) on the execution of this agreement, the receipt whereof the vendor doth hereby admit and acknowledge,—

1916

McKEE v. PHILIP.

Duff J.

and that this constitutes an admission by the appellant who executed the agreement of the receipt of the sum in question for the respondent. This admission is said to constitute a *primâ facie* case in favour of the respondent and as the learned Chief Justice puts it in his judgment, it is said that there are no other facts in evidence which "displace" this *primâ facie* case. There are two reasons which force me to reject this line of reasoning:—First, the statement of fact upon which it is based could only constitute an estoppel in an action between the parties to the agreement and based upon it. The respondent's counterclaim is not an action based upon the agreement, it is an action in repudiation of the agreement. Then if this so called admission is to be treated as a piece of evidence simply it must be construed and weighed for the purpose of appraising its value with reference to the circumstances in which it is said to have been made. It is not at all a point in controversy that the appellant, in executing the agreement, acted on the representation made to him by Arnold that Arnold had the respondent's authority for using his name. What then does this statement, which, be it observed, is not a statement that the appellant has received the sum mentioned from the respondent, amount to? Neither expressly nor by implication can it be read as a declaration of anything more than this—that in a transaction in which Arnold professes with the respondent's authority to be using the respondent's name as purchaser, the appellant as vendor has received a certain sum as part of the purchase money. The so called admission in other words does not carry us a step beyond the fact that Arnold did profess to have authority to enter into the transaction and to make these payments, in the name of the respondent. The so called admission

1916

McKEE v. PHILIP.

Duff J.

then being an admission only of certain undisputed facts is not of the least assistance to us. The second reason is this:—The so called admission being nothing but a piece of evidence, it does not shift the burden of proof as determined by the pleadings, which cast on the respondent (plaintiff by counterclaim) the onus of shewing that the moneys in question are his moneys. An admission may, of course, without shifting the burden of proof in that sense, constitute a *primâ facie* case and thereby shift the burden of proof in the other sense, namely, the burden of going on with the evidence, with the consequence that if the defendant fails to give further evidence judgment may be given to the plaintiff. In the case before us the so called admission in itself could not constitute a *primâ facie* case for the respondent (plaintiff by counterclaim) and shift the onus in this last mentioned sense. That is so for the simple reason that the very document containing the admission taken by itself alone, instead of establishing the respondent's right to recover the money back from the appellant, would have established the appellant's right not only to retain the money paid but to hold the respondent for the still unpaid purchase money. But, assuming a *primâ facie* case to be established, it is quite a misconception to suppose that (except in special cases where, for example, the facts proved give rise to a presumption of law in the plaintiff's favour) the effect of a *primâ facie* case is to cast upon the defendant the burden of disproving the plaintiff's allegation of fact in the sense of negativing that allegation by a preponderance of evidence in favour of the defendant. The real effect, as I have indicated above, is that if further evidence is not given the plaintiff is entitled to judgment; if further evidence is given, whether by the plaintiff or the defendant, then

1916

McKEE v. PHILIP.

Duff J.

the evidence being complete, the plaintiff must fail unless the evidence as a whole is sufficient to establish the allegation of fact upon which his case depends. The burden of establishing remains on him to the end and if at the end the scales are even, he must fail. The matter is stated very succinctly by Lord Esher in the following passage from his judgment in *Abrath* v. *The North Eastern Railway Co.* (1).

> It is contended (I think fallaciously) that if the plaintiff has given *primâ facie* evidence, which unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the *decision of the question itself*. . . It seems to me that the proposition ought to be stated thus:—the plaintiff may give *primâ facie* evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour; the defendant may give evidence, either by contradicting the plaintiff's evidence or by proving other facts; the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer. . . Then comes this difficulty—suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff; in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

Taking all the facts before us as a whole, the preponderance appears to be rather in favour of the appellant (defendant by counterclaim).

The second ground upon which the respondent relies is the fact that the Dominion Trust Company, the executor of Arnold, both as executor and personally, disclaims in its pleading any interest in the moneys in question. The respondent founds upon this fact the argument that the moneys were not provided by Arnold himself and it follows, he contends, that they must have been taken from the funds in Arnold's hands for him.

(1) 11 Q.B.D., 440 at p. 452.

This argument is not wanting in audacity although as a ground supporting the judgment below it seems to be lacking in everything else. It is an extraordinary proposition that the disclaimer by Arnold's executor of any interest in these moneys should in itself be considered to establish as against the appellant, who, of course, is no way responsible for the pleading of any fact of any description whatever. If there was any fact within the knowledge of those responsible for the pleading which would have added to the weight of the respondent's case there is not the slightest reason for supposing that evidence of that fact would not have been forthcoming. But quite apart from that it would be a most unlawyerly proceeding to treat this pleading as of any judicial relevancy in the dispute between McKee and Phillip.

This is a conclusive answer to the suggestion, but it is only just, I think, to add that the course taken by the Trust Company as executor in making no claim to these moneys is not in the least difficult to understand; and indeed it would be difficult to suppose the experienced professional gentlemen who were advising the Trust Company taking any other course. The moneys in question had been paid by Arnold under an agreement executed by the appellant in consequence of Arnold's representation that he had authority to enter into it in the name of the supposed purchaser. Arnold's executor advancing a claim now to recover these moneys would be exposed to a conclusive defence in the estoppel created by Arnold's representation or, if the appellant chose to rely upon the true facts, to a counter-attack upon the ground that Arnold was responsible in damages under his warranty of authority, a field of litigation obviously not presenting an inviting prospect to a judicious representative of Arnold's

1916

McKEE v. PHILIP.

Anglin J.

estate. Personally the Trust Company having been repaid has no interest.

ANGLIN J.—This case is, no doubt, very close to the line and there is not a little to be said in support of the position taken by Mr. Newcombe that the respondent (plaintiff by counterclaim) can only succeed upon the strength of his own title and that he has failed affirmatively to establish that it was his money that Arnold paid to McKee. On the other hand, it is certain that the money in question does not belong to McKee and that his only right to retain it is that of possession. It is also clear that the money belonged either to the respondent Phillip or to Arnold or to the Dominion Trust Company. The Dominion Trust Company in its own right and as executor of Arnold is a party to this litigation and in both capacities disclaims all right or title to the money. Under these circumstances, I am not convinced that the inference drawn by the majority of the judges in the Court of Appeal that the money belonged to Phillip is so clearly erroneous that we should reverse the judgment rendered in his favour. I would, therefore, dismiss this appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Bowser, Reid & Wallbridge.*

Solicitor for the respondent: *C. S. Arnold.*