JOSEPH POIRIER (DEFENDANT).....APPELLANT; 1891

AND *Mar. 11, 12.
*Nov. 17.

JEAN BAPTISTE BRULÉ (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Trustee—Conditions to be performed by cestui que trust—Failure of—Revocation by grantor.

By deed between B. grantor of the first part, certain named persons, trustees, of the second part, and P. grantee of the third part, B. conveyed his property to the trustees, the trusts declared being that if P. survived B. and performed certain conditions intended for the support or advantage and security of B. which by the deed he covenanted to perform, the trustees should convey the property to P., and it should be reconveyed to B. in case he survived. No trust was declared in the event of P. surviving and failing to perform the conditions or of failure in the lifetime of both parties. In an action by B. to have this deed set aside the trial judge held that B. when he executed it was ignorant of its nature and effect and set it aside on that ground. The full court, on appeal, dissented from this finding of fact, and varied the judgment by directing that the trustees should reconvey the property to B. on the ground that P. had failed to perform the conditions he had agreed to by the deed. On appeal to the Supreme Court :—

Held, affirming the decision of the court below, that the conditions to be performed by P. were conditions precedent to his right to a conveyance of the property; that by failure to perform them the trust in his favour lapsed, and B., the grantor, being the only person to be benefited by the trust, could revoke it at any time and demand a reconveyance of the property.

APPEAL from a decision of the Supreme Court of British Columbia affirming the judgment of the trial judge in favour of the plaintiff. The facts of this case

*PRESENT :—Sir W. J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

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are sufficiently set out in the above head-note, and in the judgment of Mr. Justice Strong.

S. H. Blake Q.C. for the appellant cited *Hall* v. *Hall* (1); *Phillips* v. *Mullings* (2); *Campbell* v. *Edwards* (3); *Henry* v. *Tupper* (4); *Bryant* v. *Erskine* (5).

Gemmill for respondent referred to *Roberts* v. *Brett* (6); *Goodall* v. *Elmsley* (7); *Coatsworth* v. *City of Toronto* (8).

Sir W. J. RITCHIE C.J.—The learned trial judge thought:

> The fact that the covenants or the deed have not been performed is not necessary for the decision of this case. The main question is: Did the plaintiff understand what he was doing when he signed the deed? Taking into consideration his great age and the non-intervention of a professional or an interested person on his behalf, the deed was undoubtedly executed under the influence of his spiritual adviser, Father Jonckau and without independent advice. I exonerate Father Jonckau from being influenced by any improper motives but he was guided apparently in the matter by the defendant Johnson. In deeds of this character the absence of a power of revocation and the improvidence of the transaction, independent of the question whether or not the grantor understood what he was about, will in certain cases induce the court to set aside a deed, but on the evidence of the case before me and from the surrounding circumstances I think this deed cannot stand. The plaintiff did not understand the settlement he was making and in coming to this conclusion I am supported by the authorities of *Dutton* v. *Thompson* (9) and *Griffiths* v. *Robins* (10) and *Wollaston* v. *Tribe* (11).

With regard to the costs, as Johnson admitted he had never acted in the trusts of this settlement, that he had refused to furnish a copy of the deed to his *cestui que trust*, although payment was offered for such

(1) 8 Ch. App. 430.
(2) 7 Ch. App. 244.
(3) 24 Gr. 152.
(4) 29 Verm 358.
(5) 55 Me. 153.
(6) 18 C.B. 561.
(7) 1 U.C.Q.B. 457.
(8) 10 U.C.C.P. 73.
(9) 23 Ch. D. 278.
(10) 3 Madd. 191.
(11) L. R. 9 Eq. 44.

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copy, from thus refusing plaintiff the information he was entitled to receive and from the fact of his being the author of the impeached deed he did not think him entitled to costs and made no order in respect thereof; he directed Poirier to pay plaintiff's costs and directed an account of the live stock (not being the produce of the stock on the farm when taken over by Poirier) sold by Poirier to be taken and the value paid by Poirier to plaintiff; deeds in defendant's possession to be deposited in court and proper conveyances made at the cost of the trust estate by Johnson to plaintiff, injunction to be made perpetual and Poirier to give up possession forthwith of plaintiff's property.

On appeal to the full court this decree was varied, the court refusing to rectify or to set aside the deed and declare it void, but affirmed the decision on the ground that the conditions to be performed by Poirier had not been carried out.

From the purport and intention of this deed, and the object it was intended to compass, I think the performance of the covenants must be considered in the nature of conditions precedent, and it having been clearly established as a question of fact to the satisfaction of the court of first instance that these stipulations had been completely set at nought by Poirier, the court of appeal agreeing in this conclusion, I do not see how justice can be done otherwise than by confirming the judgment of the court of appeal and dismissing this appeal.

STRONG J.—This is an appeal from a judgment of the Supreme Court of British Columbia pronounced in an action in which the respondent was plaintiff and the appellant and one Edward Mainwaring Johnson were defendants. By the statement of claim the respondent impeached and sought to have set aside or

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rectified the deed hereafter mentioned. The learned Chief Justice of British Columbia prefaces his judgment with a concise statement which gives the terms and effect of the deed and embodies the material facts of the case. It is as follows:

> In and previous to the year 1882 the plaintiff, a French-Canadian farmer, was entitled for his own sole benefit to sections 45 and 46 in Sooke district, and a cottage and some live and dead stock thereon. The plaintiff being of very advanced years, as was also his wife, and the defendant Poirier, also a French-Canadian, being a neighbour and ostensibly at least a farmer, and a much younger man, it appears to have been suggested that Brulé should make over all his property both land and chattels to Poirier, in consideration of his supporting and providing for the plaintiff and his wife during their lives, at the termination of which Poirier was to hold the same for his own benefit. After a good deal of preliminary negotiation, the precise nature of which was much disputed but which in our opinion it is neither possible nor necessary for us now to decide, a deed was executed dated 12th of September, 1883, and made between Brulé of the first part (therein called the grantor) the defendant Poirier (called the grantee) of the second part, and Father Jonckau, O. M. I. (deceased September 7th, 1888, before the institution of this suit June 22nd, 1889) and the defendant E. M. Johnson (called the trustees) of the third part. This deed was duly registered in the Land Registry Office. It recites the general intention and conveys the land to the trustees as joint tenants in fee on the trusts thereinafter mentioned. It also conveys to them the chattels mentioned in the schedule to be applied on the same trusts as nearly as may be as the land. The trusts declared are if Brulé survive Poirier in trust to reconvey to Brulé. If Poirier survive Brulé and shall during the lifetime of the latter and his wife have performed and fulfilled the stipulations in the deed separately enumerated and intended for the support or for the advantage and security of the grantor then the trustees after the death of Brulé and his wife are to convey to Poirier for his own benefit, as well the lands in question as also the live and dead stock enumerated in the schedule. But no trust is declared in the contingency of Poirier surviving Brulé and having neglected to perform the stipulations set out in the deed. Nor is there any provision for terminating the arrangement during the lifetime of both parties in case of Poirier's continued neglect.

The respondent's statement of claim distinctly alleges that the appellant had failed to perform the

covenants of the deed which were expressly made conditions precedent to the trust which was limited in his favour in case of his survival of the respondent.

The statement of defence on the other hand alleges performance by the appellant of those conditions.

The action was tried before Mr. Justice Drake without a jury, and that learned judge pronounced a judgment in favour of the respondent, ordering that the deed should be set aside upon the ground that the respondent had not understood the nature of the settlement he was making.

Against this judgment the present appellant appealed to the full court, whereupon the order now under appeal was made varying the original judgment by discharging so much of it as set aside the deed and substituting therefor a direction that the appellant should forthwith reconvey the lands and reassign the chattel property to the respondent.

Mr. Justice Drake at the trial found that the covenants entered into by the appellant, and which as I have said were conditions precedent to any trust arising in his favour on the death of the respondent, had not been performed. In his written judgment he says :

> The evidence shows that after the first year but a small portion of the obligations of the defendant Poirier have been performed, and he has dealt with the live stock as his own which under the deed did certainly not belong to him, and were not to become his property until after the death of the grantor.

And in his judgment on the appeal the learned chief justice says :

> The judge below has found, and we agree with him, that those stipulations have been completely set at nought by Poirier.

And Mr. Justice McCreight also says :

> I think there is no case shown for rectification or rescission, but I think there is an equity open to the plaintiff by which the decision of my brother Drake may be supported. His judgment states that the

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covenants of the deed have not been performed by the defendant, and the evidence decidedly points in that direction.

We must, therefore, in view of these concurrent judgments in both the courts below, take it to be established as a fact that Poirier had failed to perform the obligations which by the deed he had undertaken. According to the clear and distinct terms of the deed the contingent trust in his favour had therefore entirely failed, and he and the trustee consequently held the property of the respondent freed from any trusts except those in the respondent's own favour, the deed containing no ulterior trust and making no express provision for the disposition of the property in this event of the respondent's non-performance of his covenants. But it is clear beyond doubt that when property is conveyed to a trustee upon trusts which fail the trustee does not himself acquire the beneficial interests but holds the property thenceforth as a trustee for the settlor in whose favour the law raises a resulting trust. It is equally clear that when property is in the hands of a trustee merely for the benefit of the settlor himself he can at any time revoke such trusts and call upon the trustee to reconvey to him.

In the present case both these elementary principles of courts of equity relating to trusts have been rightfully applied by the court below.

By reason of the appellant's failure and neglect to perform his covenants the contingent trust limited in his favour in the event of his surviving the respondent has failed and cannot possibly arise.

Then the only remaining trusts are in favour of the respondent himself, and these he is at liberty to put an end to at his option and to call on the trustee to reconvey.

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I am therefore of opinion that the judgment appealed against was entirely right, and that the reasons assigned for their conclusion in the judgments of the Chief Justice and Mr. Justice McCreight are in all respects a correct application of well-settled principles of equity to the facts established by the evidence.

Whilst I say this I am far from differing with the view of Mr. Justice McCreight that the deed was not sustainable upon the ground he proceeded upon, with this exception, however, that I incline to agree with the full court in thinking that the lapse of time was sufficient to bar the respondent's right to a rescission. We need not, however, consider this. It is impossible that the judgment of the full court, proceeding as it does upon the clearest principles of the law of trust, can be in any way successfully impugned.

Leave was given by the court to amend the statement of claim by claiming a reconveyance, and although this has not been formally done we may consider the case as if the record had been actually amended. I quite agree that it was a proper case in which to give leave to amend.

It is to be observed that the order in appeal does not affect that portion of the decree made by the court of first instance which directs an account to be taken of the live stock and personal estate sold or disposed of by Poirier. This direction therefore still stands. I think it was a proper direction.

The learned counsel for the appellant suggested that an account should be directed of what Poirier had expended in the performance of his covenants, and that this should be allowed to him. I cannot assent to such an account. To give such a direction would, it seems to me, be in effect to give damages to a man who has broken his covenants in respect of what he has done and expended towards a performance of them,

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in which performance, however, he has ultimately failed. An account directed for such a purpose would not, in my opinion, be justified by any principle of either law or equity. The appeal must be dismissed with costs.

FOURNIER, GWYNNE and PATTERSON JJ. concurred in the appeal being dismissed.

Appeal dismissed with costs.

Solicitor for appellant: *Theodore Davie.*

Solicitor for respondent: *J. Rolland Hett.*