BASIL ANTONIOU AND OTHERS (DEFENDANTS) ..... } APPELLANTS);

AND

UNION BANK OF CANADA (PLAINTIFF) ..... } RESPONDENT.

1920
*Nov. 2, 3.
*Dec. 17.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Bills and notes—Acceptance—Holder in due course—Damages against drawer—Set off—"And exchange"—Definite liability.

The appellants agreed to buy certain goods from A., who assigned, for an indebtedness, to the respondent bank his interest in the contract. A. later on shipped the goods, attached bills of lading to the drafts and delivered them to the bank, which credited A. with the proceeds of the drafts and forwarded them with the bills of lading to its branch where appellants accepted them and received the bills of lading. The bank brought action on the drafts but the appellants, having a claim for damages suffered by them by reason of A.'s breach of contract, set it off against the bank's claim.

Held, Duff J. dissenting, that the acceptance of the drafts by the appellants, with full knowledge of A.'s breach of contract, implies an acknowledgement of unconditional liability towards the respondent bank, which had no notice of the breach.

The appellants raised for the first time in this appeal the objection that the words "and exchange," written on the bills without indicating the rate of exchange, prevented them from being for a sum certain under the "Bills of Exchange Act," section 28.

Per Sir Louis Davies C.J., Anglin and Mignault JJ.—This objection should not be entertained now, as, if it had been raised on the pleadings or at the trial, evidence might have been adduced to show, by custom of trade or otherwise, that these words import a definite and precise liability.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault J.J.

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Per Sir Louis Davies C.J. and Anglin J.—If these words have any application at all in the case of these inland bills, they cannot be taken to deprive the instruments before us of their character as bills of exchange because of any indefiniteness or uncertainty in the amount for which the acceptors became liable.

Judgment of the Appellate Division (15 Alta. L.R. 482) affirmed, Duff J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of Simmons J. at the trial and maintaining the respondent's, plaintiff's action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

J. B. Barron for the appellant.

A. H. Clarke K.C. for the respondent.

THE CHIEF JUSTICE.—I concur with Mr. Justice Anglin.

IDINGTON J.—The respondent recovered judgment at the trial upon certain bills of exchange drawn by one Arnett, upon appellants, which were accepted by them.

The appellants had entered into a written contract with said Arnett, a manufacturer at Souris, Manitoba, for the manufacture by him of certain goods which were to be shipped for them to Calgary and ultimately used by them for their place of business in Calgary.

The bills of exchange in question were drawn by said Arnett at Souris and discounted with respondent at its Souris agency.

(1) [1920] 15 Alta. L.R. 482; [1920] 2 W.W.R. 746.

These bills of exchange were respectively accompanied by shipping bills, or bills of lading, with instructions written at head of each draft "hold for arrival of goods."

And not until and evidently in consideration of the delivery of such bills of lading was the acceptance written by appellants of the bills of exchange now in question.

Out of such an ordinary course of dealing we have presented in this appeal some remarkable contentions founded on the proposition that because the manufacturer, Arnett, had assigned (beyond question I assume as collateral security for advances made or to be made by respondent) the said contract to the respondent by the following memorandum:—

> For value received I hereby assign all my rights, title and interest in the attached contract between myself and the King George Ice Cream Parlors dated February 10, 1919, and all the moneys payable thereunder and in the property therein mentioned, to the Union Bank of Canada.
>
> Dated April 19th, 1919.
>
> T. L. Arnett

therefore any bills of exchange drawn by Arnett and discounted with respondent, though only accepted by appellants under circumstances as above related, were possibly worthless in the hands of the respondent and, at all events, were subject to be set off by any claim for damages suffered by appellants by reason of Arnett's breach of said contract.

I submit such a proposition only needs to be stated to shew how very unfounded is this appeal. To my mind it is not arguable.

The respondent is suing upon a bill of exchange given for good and valuable consideration, accepted by appellants, as already stated in consideration of its delivery to them of the documents enabling them to get posses-

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sion of the goods. And there is no pretence of knowledge on the part of the respondent of any breach or notice by appellants to it, when so accepting these drafts, of breach or claim for damages in consequence thereof.

Even if there had been it could not have put the appellants in any better position as against the respondent. I only mention it as one of the peculiarities of the case set up.

The contracts of appellants with respondent evidenced by these several acceptances are entirely collateral to the original contract and shew no privity of contract between the respondent and appellants founded on the said original contract.

And, if possible, there is still less upon which to rest any equitable claim of set off, or anything to entitle the appellants to have respondent restrained from enforcing the clear undoubted claim it has in respect of each of said acceptances.

The respondent was the undoubted holder, in due course, of each of these bills of exchange, and entitled to recover from the appellants by reason of their respective acceptances thereof in consideration of the delivery of the bills of lading, or shipping bills, as more usually called in speaking of shipments by railway.

And the question raised as to the certainty of the amount of each bill by reason of the use of the words "and exchange" which for a few minutes seemed to me the only serious point taken in the argument, seems to be answered in several ways.

In the first place the amount of such inland rate for cost of collection is well settled by daily practice forming part of our common knowledge and that specifically referred to in the Banking Act to be a clearly fixed sum.

In the next place the memo. written on the bill should be used in light of such common knowledge and it leaves no doubt in my mind of the exact sum covered by the use of these words.

And again the original contract of appellants with Arnett expressly provides that appellants were to pay by accepting drafts

> to bear eight per cent per annum and bank charge for collection

which latter phrase has a well known definite meaning.

There is also the suggestion, made by Mr. Clarke, of counsel for respondent, that the instrument, with the evidence connected therewith, was at all events evidence of a contract between the respondent and the appellants of the meaning of which there can be no doubt.

And I may repeat that it was as such a collateral contract in no way dependent upon, or reduceable in effect by reason of the result of breaches by Arnett of the original contract.

Another point was faintly made by counsel for appellants that the only signature to the acceptance was that of Antoniou, which seems amply met by the following statement made on examination for discovery:—

> Q. Were you authorized by your firm to accept these drafts and the contract, you have signed all of them I see, I do not see any other members of your firm on them?
>
> Mr. Barron: You can take that as an admission from us that he was authorized and was acting on behalf of the King George Ice Cream Parlors and for his partners and whatever signing he did do, is the same as the signature of all the partners of the firm. I have told Mr. Carson I would admit that all the time. That will save you considerable time in getting an answer out of the witness.

I think the appeal should be dismissed with costs throughout.

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DUFF J. (dissenting).—As between the respondent and the appellant the effect of the assignment of the 19th April, 1919, no doubt depends upon the Consolidated Ordinances, Ch. 21, sec. 10, s.s. 14 ("The Judicature Ordinance") but the rights of the bank and Arnett *inter se* are governed by the Manitoba statute in force at the date of the assignment, the effect of which appears to be that the bank acquired a legal title to Arnett's rights under his contract with the appellant. Apart from this statute the bank became, even without notice, the owner, at least in equity, of Arnett's rights.

At the date of the bills of exchange sued upon, June 10th, 1919, Arnett was largely indebted to the bank, considerably, that is to say, in excess of the aggregate of the three bills. The evidence makes it quite clear that the bills of lading were to be accompanied by drafts and I think the proper inference from the facts is that the parties recognized the legal position, namely, that the bank held the assignment and any rights accruing to Arnett under his contract with the appellant as security for his indebtedness and that the right given by the contract to require acceptance of drafts by the appellant was a right which Arnett was to exercise for the bank. This right, as between Arnett and the bank was, as already indicated, the bank's, the drafts were drawn for the immediate benefit of the bank, the discounting of the bills was, in substance, only a recognition of the bank's right and the bank's title, in other words, in substance the bank was the drawer of the bills. In these circumstances, with great respect, I cannot accept the view that the bank was a holder in due course. It follows, moreover, that the bank was merely in exercise of its rights under the contract and assignment. The acceptance which indeed was not strictly a voluntary

acceptance, can be no answer to the appellant's claim to set up in reduction a right to reparation in damages arising from Arnett's failure to observe the terms of the contract. Such a claim is not a mere personal claim or defence but a claim arising out of the very transaction upon which in the view above expressed the bank's right to recover is based.

Nor am I able to understand how the appellant's right is affected by the fact that judgment has been recovered against Arnett. The doctrine of *res judicata* is founded in justice and convenience and has no application here; the right as against Arnett arises under the contract; the right of set-off against the claim of the bank rests upon the ground that the bank is not entitled to recover moneys which in the circumstances it would be unjust to call upon appellant to pay.

ANGLIN J.—By accepting the bills of exchange sued upon, the appellants contracted directly and unconditionally with the respondent bank to pay to it the amounts thereof. An acknowledgement of absolute liability therefor was implied. The consideration for these contracts was the surrender of the bills of lading held by the bank. This alteration of the bank's position, quite apart from any right it may have as the "holder in due course" of negotiable paper, I think, precludes the defence of set-off of the appellants' claim for damages against Arnett, the drawer of the bills.

Moreover, for the establishment of their right of recovery on their claim for damages the appellants must invoke the judgment pronounced, but not yet entered, in their action against Arnett. They cannot successfully prefer this inchoate judgment as establishing their right to damages and at the same time deny its effect as a merger of the cause of action on which

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it was pronounced merely because it had not been formally entered. If effective to establish their right to damages it must also operate to merge the claim for those damages which it is sought to set off in this action. That the judgment against Arnett can be set off against the plaintiff's claim is not contended.

The other grounds of appeal lack substance and even if well founded as answers to a claim dependent on the bank's status as a holder of the bills in due course being established, they would be ineffectual to defeat its claim based on its position as the holder of independent contractual rights on which the defendants are directly liable to it.

Pressing the defence that the acceptances by Basil Antoniou did not bind the firm of which he was a principal and his co-partners seems to me scarcely consistent with good faith in view of the following admission of counsel for the defendants on the examination of one of his clients for discovery.

> You can take that as an admission from us that he (Antoniou) was authorized and was acting on behalf of the King George Ice Cream Parlors and for his partners and whatever signing he did do is the same as the signature to all the partners of all the firm. I have told Mr. Carson I would admit that all the time.

The objection based upon the insertion of the words "and exchange" in the bills is taken for the first time in this court. In my opinion it should not be entertained, as, if it had been raised on the pleadings or at the trial, evidence might have been adduced to shew that these words import a definite and precise liability. If they have any application at all in the case of these inland bills, I think they cannot be taken to deprive the instruments before us of their character as bills of exchange because of any indefiniteness or uncertainty in the amount for which the acceptors became liable.

The appeal fails and should be dismissed with costs.

MIGNAULT J.—It is unfortunate for the appellants that before accepting the bills sued on, they did not consider the objections they now urge as reasons why they should not be held on their acceptances. The breach of contract they complain of had then occurred, and they nevertheless accepted the bills. They now say that as the drafts were attached to the bills of lading, they could not get the goods without accepting the drafts, but then, to get possession of the goods, they rendered themselves personally liable to the bank for payment, unless they can shew that the latter is in no better position than Arnett. The fact is, however, that the bank had made advances to Arnett in view of his contract with the appellants and had credited the five drafts drawn by him on the appellants against his overdraft so that there remained a credit in Arnett's favour of $360.00. The bank was therefore a holder in due course of the bills, and the appellants by accepting them, with full knowledge of Arnett's breach of contract, accepted an unconditional liability towards the bank and should not now be listened to when they attempt to offset Arnett's liability for breach of contract against the bank's claim against them on their acceptance of the bills. The fact that for greater security the bank took an assignment of Arnett's rights under his contract with the appellants is no reason for depriving it of its claim based on the appellants' acceptance.

But Mr. Barron now says, for the first time, that although the bills were accepted by Antoniou duly authorized by the other appellants, this is not in law an acceptance for the other appellants.

At the examination on discovery of Antoniou Mr. Barron made the following admission:—

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Q. Were you authorized by your firm to accept these drafts and the contract, you have signed all of them I see, I do not see any other members of your firm on them?

Mr. Barron. You can take that as an admission from us that he was authorized and was acting on behalf of the King George Ice Cream Parlors and for his partners and whatever signing he did do, is the same as the signature of all the partners of the firm. I have told Mr. Carson I would admit that all the time. That will save you considerable time in getting an answer out of the witness.

In view of this admission, which no doubt lulled the respondent into complete security on the question of Antoniou's authority to accept, I think Mr. Barron should not be listened to when he now attempts to escape from the effect of his admission, which I can only construe as fully recognizing that Antoniou's acceptance was the acceptance of the appellants.

Mr. Barron made another objection at the argument for the first time, and that is that the words "and exchange" in these bills without indicating the rate of exchange, prevented them from being for a sum certain, under the Bills of Exchange Act, sect. 28, parag. (d) of s.s. 1.

Had this objection been made at the trial, it might have been shewn that these words have, by custom of trade or otherwise, a definite meaning well understood by the parties. It seems scarcely consistent with the rules of fair dealing in judicial proceedings to consider now such a technical objection, and I do not propose to do so.

On the whole I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Barron, Barron & Helman.*

Solicitors for the respondent: *Clarke, Carson, MacLeod & Co.*