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*Oct. 9, 12.
*Nov. 2.

WILLIAM F. MURRAY AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE DELTA COPPER COMPANY LTD. AND OTHERS (DEFENDANTS)... } RESPONDENTS.

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

Findings of trial judge—Duty of appellate court—Agency

It is for an appellate court to ascertain whether there is evidence upon which the trial judge could find, as he did find, and if there be evidence of the facts found to which he could reasonably give effect, having due regard to the weight of the evidence, it is for the court to consider further whether his finding is based upon any misdirection occasioning a substantial miscarriage of justice, or the judgment, in the light of the evidence, and having regard to the course of the trial, discloses any error of law; and, if there be no error in these particulars, the judgment should be permitted to stand.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

The appellants sought to recover $6,000 as money lent. Their transactions were with the respondent, C. R. Tufford, and the liability of the other respondents depended upon the agency of Tufford. The judgment at the trial proceeded upon the view that all three respondents were jointly and severally liable.

Held that while, if the agency were established, there might be an alternative liability, that liability continued only until the election of the appellants to accept one, either the principal or the agent, as their debtor and then only he could be sued to judgment.

Held, in view of the facts, that the appellants might elect to have judgment against the respondents, the C. R. Tufford Company, Limited, or C. R. Tufford, but that, as against the other respondent, the Delta Company, Limited, the appeal should be dismissed, because there was no proof that either of the respondents was authorized to borrow on its credit.

AN APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, reversing the judgment of the trial judge, the Honourable Mr. Justice Ives.

The judgment appealed from was reversed in part.

The facts are fully stated in the judgment now reported.

Maclean K.C. for the appellant.

Woods K.C. for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The Delta Copper Company, one of the defendants (respondents), was in possession of a copper mine in British Columbia which it was endeavouring to develop under an option to purchase, and it was trying to raise the necessary capital for the purchase and development of the property by the sale of shares of its capital stock. The defendant, C. R. Tufford, Ltd., was the exclusive agent for the sale of these shares upon the terms of a written agreement of 12th February, 1917, and the defendant, C. R. Tufford, was the president of the latter company and the agent and director of its activities in the sale of the stock. The head offices of the two defendant companies were established at Edmonton, where the defendant, C. R. Tufford, who was a broker, also had his office. The plaintiffs (appellants) resided at Caledonia in Ontario; they had acquired some of the stock of the Delta Company in December, 1916. In the following spring the defendant, Tufford, went to Ontario for the purpose of disposing of the stock or a portion of the stock which the Tufford Company was authorized to sell, and in April and

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the early part of May he had some interviews with the plaintiffs at Caledonia. Payments upon the Delta Company's option to purchase were accruing, and the defendant Tufford Company's agency for sale of the shares was conditional upon the making of sales and payment of the proceeds to the Delta Company in fixed amounts within the times limited therefor by the agency agreement; one of the provisions being that if the agent paid or procured to be paid to the Delta Company, in respect of shares sold under the terms of the agreement, the sum of $10,000, on or before 15th May, 1917, the agreement should continue until 15th June, 1917. Upon the former date, 15th May, 1917, it was also necessary for the Delta Company to make a considerable payment in order to save its rights under its option of purchase. The defendant, Tufford, in addition to his interest in the business of stock selling under the agency agreement, was a shareholder of the Delta Company, either individually or through the Tufford Company, of which he was president and had the control. In these circumstances it was necessary to provide $10,000 on or before 15th May. Negotiations took place between Tufford and the plaintiffs which resulted in the latter paying to the former, on that day, an amount of $6,000, which was immediately transmitted to Tufford, Ltd., at Edmonton, and by that company paid to the Delta Company, and 6,000 shares of the Delta Company's stock were then allotted to and placed in the name of the plaintiff, Moore, in trust. The main question at issue is as to whether this payment was made by the plaintiffs as a loan upon the security of the stock, or as consideration for the purchase of the stock. There was an agreement in writing executed at the time between Tufford, party of the first part, and the plaintiffs, parties of the second part, whereby it was mutually agreed:

That the party of the first part hereby agrees to sell six thousand shares of capital stock of the Delta Copper Company, Limited (N.P.L.) standing in the name of Thos. G. Moore in trust for the parties of the second part at or for the price of six thousand dollars on or before three months from date in the following manner, namely, one thousand shares within thirty days from date, two thousand shares within sixty days from date, and the balance within three months from date, and to prove his good faith he hereby agrees to deposit five thousand shares of his own stock in above described company with said Thos. G. Moore as trustee. said stock to be forfeited if party of first part does not carry out his agreement. Provided party of the first part does carry out his agreement

his five thousand shares are released by above mentioned trustee to said party of first part, and said party of first part immediately transfers one thousand of said shares to each of the parties of the second part, thereby liquidating any and all claims which the parties or any of them of the second part have or may have whatsoever against party hereto of first part.

The plaintiffs, Murray and Moore, testified in effect that they and their associates had, previously to 15th May, purchased all the stock of the Delta Company which, at the time, they were willing or could afford to purchase; that therefore they declined to entertain Tufford's solicitation for the purchase of further stock, but that they finally yielded to his entreaties for assistance in the urgent circumstances of the case, so far as to agree to lend the sum of $6,000, upon the security of the 6,000 shares, and subject to the terms mentioned in the agreement, which amount they borrowed from Thomas Patterson, a neighbour. Tufford on the other hand testified that he sold the 6,000 shares to the plaintiffs at $1 per share and that the money was raised and paid as the purchase price. During the following year there was considerable correspondence between the plaintiffs and Tufford, and the plaintiffs acquired some additional stock.

The mine did not realize the hopes or expectations of its promoters and shareholders; it was unproductive, and this action was instituted and brought to trial against the three defendants upon various counts, including one for the recovery of the sum of $6,000 as money lent.

At the close of the trial, the learned judge expressed the view that the $6,000 was a loan, and that the plaintiffs should succeed upon that issue, but he suggested a question as to whether the Delta Company, as distinguished from the other defendants, was liable to repay it, because it had received the money under the agency for sale agreement with Tufford Limited. Some discussion upon this topic followed, and the case stood over for judgment. Then, after consideration and further examination of the correspondence, the learned judge, having disposed of the other issues, which do not now arise, announced that he was of the same opinion as expressed when the evidence was completed at the trial; he said that the $6,000 was undoubtedly a loan, and he added:—

Tufford was bound to find $10,000, and pay it to The Delta Company that day (15th May, 1917), under the terms of the agreement between

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Tufford, Limited, and the Delta Company. He induces the plaintiffs—stampeded them—with a story of material loss to the company in which they were shareholders, if the money was not found. They get it on their credit and handed it over to him. He sends it to Tufford, Limited, and that company in turn hands it to the Delta Company. And as a further inducement, Tufford delivers to Moore to be held by him in trust, 6,000 shares of the Delta Company stock as security, and further he undertook to sell this security stock within three months to the public, and at the same time the plaintiffs also were authorized to sell it. These shares were to be sold at not less than one dollar, but eventually, as a consideration in other transactions, these shares and all others that had been sold at one dollar were reduced to fifty cents by doubling the number of shares. Neither Tufford nor the plaintiffs have sold these shares. They are still held by Moore as security for the loan. And certainly this sum remains a loan until paid or until plaintiffs expressly agree that its character be changed. I have examined all the correspondence, and I find no clear voluntary consent on plaintiff's part to accept this stock, now held as a security, in payment of the loan. There is much confusion in the letters of all parties but not sufficient for me to believe that any of these men intended at any time to release their claim for a return of this money, or that Tufford ever thought they had.

On appeal to the Appellate Division of the Supreme Court of Alberta that court allowed the appeal and dismissed the action, but the learned judges gave no reasons which are reported in the case, although we are informed that Beck J. dissented from the judgment of the majority.

At the argument I was impressed with the view that no sufficient or satisfactory reason had been shown for disturbing the finding of the trial judge upon the issue of loan or purchase, and now, after carefully reading the evidence and exhibits in proof, I am confirmed in that opinion. It is not the view of the learned judges of the Appellate Division upon the merits involved in the issue of fact which should govern the disposition of the case. It was for the Appellate Division to ascertain whether there is evidence upon which the trial judge could find as he did find; and, if there be evidence of the facts found to which he could reasonably give effect, having due regard to the weight of evidence, it was for the court to consider further whether his finding is based upon any misdirection, occasioning a substantial miscarriage of justice, or the judgment, in the light of the evidence, and having regard to the course of the trial, discloses any error of law. If there be no error in these particulars the judgment should be permitted to stand. It is by s. 51 of the Supreme Court Act the duty of this court to give the judgment which the court below should have given; and, in the endeavour to discharge this duty, I am

satisfied that there is evidence reasonably to justify the finding that the money was advanced by way of loan upon the security of the stock, and not as payment for stock purchased. This was clearly the intention of the transaction according to the testimony of the defendants, Murray and Moore, and there are moreover passages in the subsequent correspondence which are inconsistent with the view that the parties intended to become purchasers of the stock. It is urged that there are to be found in the circumstances of the case, and in other places in the correspondence, considerations or statements which are compatible only with an intention to purchase the shares; but I think the appellants failed to establish this, and I do not find in the circumstances, or in the evidence upon which the appellants rely, anything which demonstrates error in the trial judge's finding of fact.

There is a minor point, involving the liability of the borrower for $1,000, part of the loan, which it is said the learned trial judge overlooked. It appears that his attention was not directed to this point; but, upon examination of the facts, I do not think they justify any reduction of the amount found. By the agreement of 15th May, Tufford agreed to sell 1,000 shares within thirty days. On 2nd June following, he wrote Moore and his associates explaining that, by reason of a deal which he had completed in Toronto, he could not raise the $1,000 before 15th June, and he added

> that means default on my part unless you get busy and either sell or buy the thousand shares.

Moore, in his reply of 10th June, said:—

> We have decided to take care of the thousand shares mentioned in your letter.

It is urged that this correspondence should be interpreted to mean that, as to the thousand shares, part of the 6,000, the plaintiffs had become the purchasers, and that therefore, to that extent, the loan was satisfied. I think it very doubtful however that the plaintiffs in stating that they had decided to take care of the thousand shares intended to purchase them, or to take them in part payment of the money lent. I think it probable that they intended no more than to intimate that in the circumstances they would not insist upon Tufford making the sale of these shares within the thirty days stipulated by the agreement, and it

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is to be observed that by a later agreement of 3rd September, 1917, between Tufford and the plaintiffs, which is signed by all of them, it was agreed that Tufford

> with the assistance of one, or more, if required (of the plaintiffs), shall forthwith, upon demand of the latter in writing, sell all or any part of the 6,000 shares at $1 per share.

It was anticipated of course, according to the plaintiffs' case, that the loan would be repaid by the proceeds of the sale of the shares, and, if in the interval 1,000 of these had been purchased by the plaintiffs, it is remarkable that in the later agreement they should have adhered to the project of selling the whole of the 6,000 shares which still stood in the name of the defendant, Moore, in trust.

Then it is said that inasmuch as the agreement of 15th May, 1917, provided that the defendant, Tufford, should deposit 6,000 shares of his own stock with the plaintiff Moore as trustee, to be forfeited if Tufford failed to carry out his agreement, and inasmuch as those 5,000 shares were deposited and forfeited, the plaintiffs, receiving the benefit of the forfeiture, could not thereafter insist upon payment of the loan, because of the rule that, where a penalty is provided for non-performance of a contract, the penalty if recovered shall be taken as a satisfaction of the contractual liability to secure which the penalty is stipulated. *Harrison* v. *Wright* (1). It must be observed, however, that the agreement which stipulated for the deposit and forfeiture of Tufford's 5,000 shares did not expressly provide for the loan or for the repayment of it. The agreement to lend the $6,000 upon the security of an equivalent amount of the Delta Company's shares was an oral agreement, concluded between the plaintiffs and Tufford, and the purpose of the written agreement was merely to bind the defendant, Tufford, to realize by sale of these shares within the times limited, so as to provide for payment of the loan; and, to ensure that he would do this, or, as the agreement states, "to prove his good faith," he deposited his own 5,000 shares. The agreement of 15th May, and the forfeiture of the 5,000 shares of Tufford's stock, are concerned with the security for the loan, not with the loan itself. The validity of the forfeiture is not in question. It would seem that Tufford acknowledged the forfeiture and surrendered his interest; but there is no proof, except the agreement itself,

(1) [1811] 13 East. 343.

that the forfeiture was intended to satisfy the loan; and, for the reasons which I have mentioned, I do not consider that the agreement bears that interpretation.

Finally, it is urged on behalf of the respondents that, if the $6,000 paid by the appellants to Tufford was money lent, the loan was to C. R. Tufford personally and that neither of the defendant companies is liable for it. This defence was not raised by the pleadings, nor does it appear to have been suggested at the trial as affecting the liability of C. R. Tufford, Limited, although the learned trial judge did, in the discussion at the close of the trial to which I have alluded, suggest doubt as to the liability of the Delta Company; but he does not refer to the question in the reasons for judgment which he subsequently delivered. C. R. Tufford, Limited, is said to have consisted of C. R. Tufford, his wife, mother and stenographer; he was the president of the company, and no doubt was acting as its agent in his efforts to dispose of the stock of the Delta Company, and to maintain the agreement under which the Tufford Company had authority to sell the stock. It was the latter company to which he reported and to which, under his instructions, the $6,000 paid by the plaintiff were remitted, and I am not disposed to disturb the finding involved in the judgment of the learned trial judge that Tufford, in his transaction with the plaintiffs, was acting with the authority and on behalf of C. R. Tufford, Limited. Tufford borrowed the money, but as between him, or the Tufford Company, and the Delta Company the transaction was treated as a purchase of the 6,000 shares by the plaintiffs; Tufford agreed to sell them, and it was anticipated that they would realize enough to pay the loan, but the transaction is not capable of an interpretation which would exclude personal liability of Tufford to repay the money borrowed. If, as I assume, he acted as agent of the Tufford Company, he nevertheless pledged his individual credit for the repayment of the loan.

Now the judgment at the trial proceeds upon the view that all three defendants are jointly and severally liable. The judgment is that the

> plaintiffs do recover judgment against the defendants and each of them for the sum of $6,000, etc.

But the liability of the defendants, the Delta Copper Company, Limited, and C. R. Tufford, Limited, depends upon

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the agency of Tufford and upon the assumption that the loan was contracted on their behalf, Tufford undertaking at the same time personal responsibility for repayment. I find it difficult to justify a judgment holding the parties jointly and severally liable. The ordinary rule is that the principal and agent may be liable to the other contracting party in the alternative, which alternative liability continues until the election of the latter to accept one, either the principal or the agent, as his debtor. In *Priestly* v. *Fernie* (1), where the master of a ship had signed a bill of lading in his own name and was sued upon it to judgment, it was held that an action did not lie against the owner of the ship for the same cause, although satisfaction had not been obtained against the master, and Bramwell B., pronouncing the judgment of the Court of Exchequer, said:

> If this were an ordinary case of principal and agent, where the agent having made the contract in his own name, has been sued on it to judgment, there can be no doubt that no second action would be maintainable against the principal. The very expression that where a contract is so made the contractee has an election to sue agent or principal, supposes he can only sue one of them, that is to say, sue to judgment.

This case was cited with approval by Lord Cairns in *Kendall* v. *Hamilton* (2), and followed by the Court of Appeal in Ireland in *Sullivan* v. *Sullivan* (3).

As to the Delta Company however there are additional and different considerations. That company was in possession of the mine under option to purchase. There was first an agreement of 24th June, 1916, between Bernard Halloran and Robt. W. Thomson, of the first part, and Byron R. Jones, of the second part, whereby the parties of the first part gave to the party of the second part the sole and exclusive right and option to purchase, for $50,000, certain mineral claims which comprise the mine in question, payable in instalments of varying amounts half yearly, the last payment to be made on or before 15th November, 1918, the party of the first part having immediate possession of the areas and the right to develop and to mine them. Then there is an agreement of 12th May, 1917, between Bernard Halloran and Robt. W. Thomson of the first part and the Delta Copper Company of the second part, which recites that the parties of the first part are the owners of

(1) [1865] 3 H. & C. 977.

(2) [1879] A.C. 504.

(3) [1912] 2 Ir. R. 116.

the Delta group of mineral claims; that by the agreement of 24th June, 1916, they granted to Byron R. Jones an option to purchase them, and that Jones had granted a further option to Robt. Spencer, who had assigned his option to the Delta Copper Company; this agreement provided for the reduction of the payments under the Jones option which were to mature. The agreement between Jones and Spencer and the assignment by Spencer to the Delta Company are not in evidence, but I infer that the Delta Company acquired a mere option and undertook no obligation for payment of the stipulated price. Now there is no evidence that the Delta Company gave to either of the other defendants any authority to borrow money on its account. The agreement between the Delta Company and C. R. Tufford, Limited, is in proof, and it confers no authority except for the sale of shares. There is no evidence that the Delta Company was informed of the facts with regard to the $6,000 transaction between the plaintiffs and Tufford, or had any knowledge or reason to suspect that the amount which the latter remitted was a loan. On 14th May, 1917, C. R. Tufford had telegraphed his firm at Edmonton from Caledonia as follows:—

> Standard Bank here wired two thousand our credit Standard Bank, Edmonton, to-day. Turn to (Delta) company immediately.

This refers to a payment of $2,000 which Tufford had obtained from the plaintiffs on the date last mentioned. In the meantime he was endeavouring to arrange for $6,000 additional, and, on the same day, he telegraphed his firm at Edmonton, saying:—

> Watch Standard Bank, Edmonton, to-morrow for more money wired through to-morrow, but do not be disappointed if none comes, and do not depend on it.

Then on 15th May, he telegraphed again to his firm, in these words:—

> Have company allot and issue to Thomas G. Moore, box forty-four Caledonia, Ontario, out of this issue, eight thousand shares; money wired Standard Bank, Edmonton, covering same yesterday and to-day. Draw full commission under contract thirty per cent before delivering money, then buy two thousand shares our name, and again draw full commission. Complete to-day, sure.

These 8,000 shares include the 6,000 shares, which, upon the finding in the case, were to be deposited as security for the plaintiffs' loan, and, in addition, 2,000 shares, which were to be issued in the transaction referred to in Tufford's first telegram of 14th May. The telegrams, it will be per-

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ceived, convey no information or reason for conjecture, that the $8,000 represented anything but proceeds of the sale of shares, or that the 8,000 shares, or any part of them, were to be issued as security for a loan. On the contrary, Tufford, by his telegram of 15th May, directed that the Tufford Company's commission as selling agent should be withheld, and the taking of commission involved a direct representation of sale. No doubt the money was received by the company, and it may have been used to make up the payment to Halloran and Thomson, which, by the terms of the Delta Company's option, was to be paid on 15th May; but, if so, while in one sense the Delta Company had the benefit of the payment, the money did not go to discharge any obligation of the latter company. It was evidently the policy of the Delta Company that the mine, which was of course speculative property, should pay for itself; the optional payments and cost of development being provided for by money received from the sale of the shares. The plaintiffs now contend that, even if there be no evidence upon which it can be found that the Delta Company authorized the borrowing, nevertheless it is liable to repay them as recipient of the benefit, but I do not think this contention can be maintained.

The Delta Company received the money in circumstances which justified it to conclude, and no doubt it dealt with the money upon the assumption, that it was received as proceeds of the sale of its shares. The plaintiffs knew the defendant, Tufford, not otherwise than as agent for sale of the Delta Company's stock, and that agency was certainly not suggestive of any authority in Tufford to borrow money upon the company's credit. If therefore they paid the money to Tufford as a loan to the company, he must be regarded as their agent for the purpose of making the loan, and not as the company's agent to receive it; and, seeing that Tufford caused the money to be paid to the company as proceeds of the sale of the 6,000 shares of stock, which the company, under his instruction, allotted to the plaintiff, Moore, in trust, the plaintiffs have no recourse against the company for the recovery of the money, or by reason of the application of it to the company's purposes. I hold therefore that the plaintiffs cannot recover the $6,000 from the Delta Company upon the allegation of the statement of claim as money lent, or by reason of

any benefit which it enjoys through the use or application of the money which it received.

Therefore, as against the Delta Company, the appeal should be dismissed with costs, but as to the other defendants the appellants may elect to have judgment against one of them with costs throughout.

Appeal allowed in part.

Solicitors for the appellants: *Short, Cross, Maclean & McBride.*

Solicitors for the respondents: *Woods, Field & Co.*