STANLEY JOHNSTON AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

1937
*March 8.
*March 30.

AND

DAME VERA CHANNELL (PLAINTIFF) ... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Husband and wife—Brokers—Stock exchange transactions—Marital authorization—Nullity—Action by married woman for accounting—Plea alleging enrichissement sans cause and direct loss—Articles 177, 183, 406, 983, 1011 and 1057 c.c.

In an action brought against a broker by a married woman for the annulment of stock transactions on the ground that the plaintiff had entered into such transactions without the authorization of her husband, and also for an order for accounting and further for the payment of the balance shown to be due as a result of such accounting, the defendant cannot set up in his plea allegations that the moneys and securities received did not enrich him in any way and that if he is ordered to pay them over to the plaintiff, such moneys or securities will represent a direct loss to him.

The case of a person suffering from a fundamental incapacity to do a juridical act and attempting to create obligations beyond its powers must be distinguished from the case of a person capable *bona fide* of creating obligations which become inoperative by reason of causes

*PRESENT:—Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

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recognized by the law. In the latter case, the law merely seeks the most equitable solution to the situation, while in the first case, so that the incapable person may receive the full protection which the law seeks to give it, it is inevitable and imperative that the law shoud order full restitution when decreeing nullity.

Accordingly, when once it has been found that a married woman acted without the participation or the consent of her husband, as required by law (arts. 177, 183, C.C.), the consequence is that her deed or her act is the equivalent of non-existent. And, applying this principle to the present case, the supposed contract or agreement with the appellants being absolutely null on account of the legal incapacity of the respondent to act as she alleged she did, it is not susceptible of any effect; the appellants derived thereby no legal right to deal as they have done with the monies and securities. They acquired no title to these moneys and securities; they never had any legal right to hold them; and, therefore, the monies and securities still belong to the respondent. And if, on account of the fact that the monies and securities are no longer in the appellants' possession, it has become impossible to return them to the respondent, then she is entitled to get the equivalent from the appellants.

Moreover, without deciding whether the doctrine of unjustified enrichment (*enrichissement sans cause*) forms part of the law of the province of Quebec, even if the attempt to place the demurrer on such a ground could have been entertained in the present case, it could not have supported the allegations of the appellants' plea, as that doctrine could not be invoked to defeat either the principle or the effect of the precept of public order embodied in article 183 C.C.

Judgment of the Court of King's Bench (Q.R. 61 K.B. 42) aff.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Curran J. and maintaining in part respondent's inscription in law against certain paragraphs of appellants' plea.

The respondent instituted proceedings against the appellants, a firm of stock brokers, to have declared null and void certain transactions in stocks and bonds and also transfers or delivery by the respondent of money and securities in connection therewith. The respondent prayed for a declaration of nullity and for an order for accounting by the appellants, and further that the latter be condemned to pay to the respondent the balance shown to be due as a result of such accounting. By her declaration the respondent set forth that she was a married woman, separate as to property from her husband, and that she had entered into the transactions in question without the authorization of her husband, as required by law, and that consequently such transactions were absolutely null and void. The

(1) (1936) Q.R. 61 K.B. 42.

appellants' plea was, in effect, a denial of the allegations of the declaration, coupled with an averment that the accounts in question, now repudiated, were opened by the respondent with the knowledge, consent and approval of her husband, and in so far as his authorization was necessary the same was given. The plea, moreover, contained two paragraphs, the text of which are recited in the judgment now reported. The respondent inscribed in law against these paragraphs, and by the judgment now appealed from they were rejected from the plea as being irrelevant.

L. A. Forsyth K.C. and *G. F. Osler* for the appellants.

John T. Hackett K.C. and *J. E. Mitchell* for the respondent.

The judgment of the Court was rendered by

RINFRET J.—The respondent instituted proceedings against the appellants, a firm of stock brokers, to have declared null and void certain transactions in stocks and bonds and also transfers or delivery by the respondent of money and securities in connection therewith, on the ground that the respondent, being a married woman, engaged in the transactions in question without the knowledge or authorization of her husband. She prayed for a declaration of nullity and for an order for accounting by the appellants:

(*a*) of all sums of money paid to them;

(*b*) of all securities delivered by her or on her behalf; and, in default, that the appellants be condemned to pay the sum of $162,000.

The plea filed by the appellants was, in effect, a denial of the allegations of the declaration; but, moreover, it contained the two following paragraphs, among others:

22B. Receipt by the defendants of the securities and moneys referred to in plaintiff's declaration did not and has not enriched or benefited defendants in any way, all such securities and moneys having been set apart by defendants as a fund at the disposal of the female plaintiff, and subject to her instructions, and credited to one or the other of the four accounts, exhibits D-1, D-2, D3 and D-4.

22C. That if defendants are ordered by the judgment to be rendered herein, to pay to female plaintiff any money or securities, such money and/or securities will represent a direct loss to defendants, and will not and cannot have the effect of replacing the parties in the respective posi-

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tions occupied by them before the opening of the four said accounts, exhibits D-1, D-2, D-3 and D-4.

Upon inscription in law by the respondent, these two paragraphs were ordered by the Superior Court to be struck from the appellants' plea; and this judgment was unanimously confirmed by the Court of King's Bench (1).

The appellants did not for a moment suggest that either paragraph was in any way relevant to or that it affected the respondent's allegations of nullity. They conceded at bar that all transactions in respect of which no sufficient authorization was given by the respondent's husband are null and void and must be so declared by the courts.

It must also be admitted that, if the transactions be declared null, neither paragraph, even if proven, would relieve the appellants of the obligation to account to the respondent. The appellants' contention may, we think, be condensed as follows:

> The action is based upon a *supposed* rule of the civil law which says that where a contract is annulled by the courts, or declared to have been null, the parties to that contract must be put back as nearly as may be in the respective positions in which they were before the contract and that whatever has been paid by either party in execution of that contract must be restored. The appellants do not deny that such a rule exists, * * * but they submit that the facts alleged in the paragraphs of their plea which have been struck out on respondent's inscription-in-law, if they should be proven, are of a nature to exclude the operation of the rule.
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> * * * *
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> In whatever form the rule may be stated, however, and whatever its limitations, it is submitted that the source of the obligation to restore which is imposed in virtue of the rule must be found within one of the categories enumerated in art. 983 of the Civil Code. The obligation must arise either from a contract, a quasi-contract, an offence, a quasi-offence, or from the operation of the law solely. The enumeration is limitative (*Desruisseaux* v. *Desruisseaux* (1)), and therefore, if there is any obligation to restore in the present case, and regardless of whether or not the rule applies, that obligation must have arisen in one of the manners enumerated. * * * Obviously the obligation does not arise either from contract, delict or quasi delict, and therefore, if we can succeed in eliminating "the operation of the law solely" as a source of the alleged obligation, it follows that, if there is an obligation, it must be the result of a quasi-contract.

The appellants then refer to art. 1057 of the Civil Code, which enumerates the obligations resulting from the operation of the law solely; and they say that the

> examination of the various authorities confirms the view that that class of obligations * * * is not broad enough to include an obligation such as is alleged in the present case.

(1) (1936) Q.R. 61 K.B. 42.

It is the appellants' submission

that the Court of King's Bench was in error in holding that the obligation forming the basis of the present action arises from the sole operation of the law.

This is followed by a lengthy reference to the Roman law, to a few English cases and to the opinion of English and French commentators, on the strength of which the appellants submit

that the rule as to restoration of what has been paid by reason of a contract subsequently declared to be null is restricted to those cases where there has been both an enrichment of the defendant and an impoverishment of the plaintiff, and that the enrichment of the defendant is the measure of the amount which must be repaid.

The appellants go on to say:

We admit that in so far as the respondent asks for the nullity of certain transactions, it is an "action in nullity" and is founded on articles 177 and 183 C.C., but we submit that neither of these articles deal in any way with the question of what shall be done once the nullity is declared, and that the solution of that problem must be looked for elsewhere. * * *

The judgment under appeal proceeds on the basis that where there is a declaration of nullity, something else follows as a matter of course. But what that something else is, is not clear. Whether it is that the plaintiff shall be indemnified against loss, or that both parties shall be replaced in the respective positions occupied by them before the deliveries (which is impossible), or that everything delivered shall be returned (which is equally impossible), or that some other action should be taken, is not stated. We submit that what in fact should be done is that the defendant should be prevented from making an unjustified enrichment and be ordered to repay whatever amount is necessary to effect that end. We further submit that the date as of which the enrichment must be tested is the date of the taking of the action.

* * * *

It is respectfully submitted that the learned judges of the Court of King's Bench did not deal with the real point in issue in this case, namely, what is the result of a declaration of nullity, but merely applied the rule as to restitution without any consideration of its source or limits.

We trust we have correctly and completely stated the problem as presented by the appellants. For the most part, we have endeavoured to do it in the words they have used in their written argument. And we thought we would transcribe it as fully as possible because of the evident attempt to introduce in the case allegations based on the doctrine of unjustified enrichment so much discussed in later years in France.

There are many points, however, in the argument submitted which are clearly irrelevant to the issue in this case and which need not retain our attention. As a whole, the

(1) (1920) Q.R. 57 S.C. 430.

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appellants' contention arises from a confusion of the case of a person suffering from a fundamental incapacity to do a juridical act and attempting to create obligations beyond her powers with the case of a person fully capable *bona fide* of creating obligations which become inoperative by reason of causes recognized by the law. As rightly observed by counsel for the respondent, in the case of a person fully capable whose obligation becomes inoperative, the law merely seeks the most equitable solution to the situation; but in the case of the incapable person, so that it may receive the full protection which the law seeks to give it, it is inevitable and imperative that the law should order full restitution when decreeing nullity.

Whether the doctrine of "enrichissement sans cause" forms part of the law of the province of Quebec and whether it should be recognized as part of the legal rules under which a Quebec case ought to be solved, is unnecessary to decide here and the respondent has no need to support her case on any such ground. The allegation of the respondent was that she acted without the authorization or the consent of her husband (art. 177 C.C.). By force of art. 183 of the Code,

> The want of authorization by the husband, where it is necessary, constitutes a cause of nullity which nothing can cover, and which may be taken advantage of by all those who have an existing and actual interest in doing so.

In no part of the Code can a pronouncement of nullity be found in stronger terms. Both in the doctrine and the jurisprudence, it is universally regarded as a matter of public order.

Limiting the discussion to the case of the incapable married woman claiming under the prohibition of art. 177 C.C. and the resulting nullity declared by art. 183 C.C., it is clear that, when once it has been found that she acted without the participation or the consent of her husband, as required by law, the consequence is that her deed or her act is the equivalent of non-existent. And if, for example, one should apply the principle in a case such as that which is brought by the respondent, the necessary result is the following:

The respondent deposited monies or securities with the appellants under a supposed contract or agreement with them. Exclusively as a consequence of that contract, the

appellants became entitled to hold or to deal with these monies and securities. But the contract being absolutely null on account of the legal incapacity of the respondent to act as she did, it is not susceptible of any effect; the appellants derived thereby no legal right to deal as they have done with the monies and securities; they acquired no title to these monies and securities; they never had any legal right to hold them; and, therefore, the monies and securities still belong to the respondent.

Under the circumstances, it is a complete fallacy to say that the obligation incumbent upon the appellants to restore or to return the monies and securities results from some quasi-contract unknown to the Quebec Civil Code and which must be looked for in the Roman law or in the old French law. It is clear that the obligation to restore or to return results from the simple fact that the respondent is the owner of these monies and securities, and that she has always been the owner. These monies and securities were physically transferred to the appellants by the respondent under a supposed agreement which proves to be non-existing in law. Her right to repossess herself of these monies and securities is strictly based on her title of ownership. It is the undisputed right of every proprietor to hold and to possess his property in the most absolute way (art. 406 C.C.). If, on account of the fact that the monies and securities are no longer in the appellants' possession, it has become impossible to return them to the respondent, then she is entitled to get the equivalent from the appellants; and that is the nature of the prayer in the conclusion of the respondent's declaration. The purpose of the accounting is to ascertain whether the monies and securities are still in the appellants' possession, in which case the respondent would be authorized to take possession of them, as her property, in the hands of the appellants. And the alternative purpose of the accounting, if the monies and securities have ceased to be in the possession of the appellants, is to establish what is the equivalent that they should pay to the respondent in lieu of her property.

That is what Messrs. Colin and Capitant observe in their treatise (1931, 7th ed., vol. 1, at p. 80):

> La recevabilité de cette action en revendication ou en répétition est subordonnée à l'inefficacité du titre en vertu duquel le possesseur a été mis en possession.

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The situation was explained in a most satisfactory way by the Court of Review, in the case of *Martin* v. *National Real Estate and Investment Company of Canada* (1).

> Quant aux sommes payées par la demanderesse ou pour elle, cette partie de la demande n'est que l'accessoire de la demande en nullité qui est la demande principale; et le remboursement des dites sommes n'est que la conséquence de la nullité demandée et prononcée. Il s'agit moins, quant à cette restitution, dans l'espèce, d'une action en répétition de l'indû pour défaut de cause, que du règlement de la situation faite aux parties par cette déclaration de nullité.

It may be stated that the object of this subsidiary conclusion in the declaration of the respondent's action is to reduce the state of fact into conformity with the legal position of the parties resulting from the nullity of their agreement.

Such, in our view, is the real situation and, under the circumstances, it follows that the judgments appealed from ought to be confirmed.

But we would not like to part with this case without pointing out that, even if the attempt to place the demurrer on the ground of "*enrichissement sans cause*" could have been entertained in this case, it could not have supported the two paragraphs of the appellants' plea which are the subject of this appeal.

Even amongst its most ardent supporters, it is well recognized that the doctrine of

> *enrichissement sans cause,* as in the case of all other legal doctrines, must not be employed for the purpose of defeating the principles of positive law.

(Cambridge Law Journal, 1934, vol. 5, p. 220; Rouast, Revue Trimestrielle de Droit Civil, 1922, vol. 21, p. 35, at page 86.)

We have already observed that nowhere in the Civil Code could stronger language be found than that in which is couched article 183. The doctrine of unjustified enrichment cannot be invoked to defeat the purpose of that article. It cannot be permitted to defeat either the principle or the effect of the precept of public order embodied in that article. As counsel for the respondent well said: As a result, if the person dealing with the incapable suffers impoverishment or cannot be put in the same position as he was, he is suffering the sanction of the infringement of the prohibition in favour of the incapable. To admit other-

(1) (1921) Q.R. 60 S.C. 148, at 153.

wise would be to remove the very protection the law gives to the incapable and to his property.

An instance of this may be derived from art. 1011 of the Civil Code by force of which

> When minors, interdicted persons or married women are admitted in these qualities to be relieved from their contracts, the reimbursement of that which has been paid in consequence of these contracts, during the minority, interdiction or marriage, cannot be exacted, unless it is proved that what has been so paid has turned to their profit.

For be it noticed that what this article contemplates is the possibility of obtaining from the incapable person "the reimbursement of that which has been paid," to that person. It may not be exacted from the incapable person and it will be legally lost "unless it is proved that what has been so paid has turned to (the) profit" of the incapable person. The reverse, however, is not true; and the very existence of that article negatives any such principle as is advanced by the appellants. It is clear that if the reverse were true the principle would apply in every case to a capable as well as to an incapable person; and article 1011 C.C. would have been quite unnecessary; it would serve no purpose.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Hackett, Mulvena, Foster, Hackett & Harmer.*