1922
*Oct. 17
*Dec. 19.

JOSEPH P. MORIN (PLAINTIFF).....APPELLANT;

AND

THE HAMMOND LUMBER COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Contract—Sub-contract—Default of contractor—Recission—Arrangement with sub-contractor—New contract or guarantee—Statute of frauds.

A lumber company gave G. a contract to cut and drive logs and a sub-contract for part of the work was given to M. Before his contract was completed G. absconded and the company treated his contract as abandoned and took possession of the logs cut. M., to whom nothing was due by G. at that time, had an interview with the president of the company, who said to him: "You will keep on with the work exactly as you were to do with G.; you will finish your contract. Put your wood where you expected to put it with G. I will pay you. You are not dealing with G. any more, you are dealing with us. Make your drive and I will pay you. I will pay you your contract as G. was supposed to pay you." M. completed his contract but payment was refused.

Held, that the undertaking by the company to pay M. was not a contract to answer for a debt of G. which the Statute of Frauds required to be in writing but was a new and independent contract entailing liability on the company when performed.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick affirming the judgment at the trial in favour of the defendant company.

The facts are sufficiently stated in the above head-note

P. J. Hughes for the appellant. The company made a new contract with appellant and not one to answer for a debt of another. See *Guild* v. *Conrad* (1), *Conrad* v. *Kaplan* (2), *Leake on Contracts* (7 ed.) 165.

Stevens K.C. for the respondent referred to *Fitzgerald* v. *Dressler* (3), *Williams* v. *Leper* (4).

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

(1) 63 L.J.Q.B. 721.
(2) 18 D.L.R. 37.
(3) 7 C.B.N.S. 374.
(4) 3 Burr. 1886.

THE CHIEF JUSTICE.—For the reasons stated by my brother Duff, in which I fully concur, I would allow this appeal with costs.

IDINGTON J.—The respondent, having a right to cut timber on a basis of paying therefor according to terms set forth in the agreement giving such right, entered into a written contract with one Grandmaison to cut about five million feet thereof; haul the logs so cut to a point or points on certain rivers, and then to drive such logs as were floating on the said respective streams to certain other points. Said Grandmaison sub-let the work to the extent of about a million feet to the appellant by another written contract embodying all the terms of the first, so far as fitting such a sub-contract, but on such terms as apparently to produce a profit to Grandmaison. Idington J.

In the contract between him and respondent there was nothing binding the latter to make advances to aid the contractor, though evidently such was contemplated as likely to become necessary, and advances were made from time to time.

The last of said advances was $12,000 with which Grandmaison absconded.

The respondent then availed itself of the power given it in the contract to stop operations thereunder, and to take possession of the logs cut and all the equipment used up to that time in the execution of the contract by Grandmaison.

This unexpected condition of things led appellant, accompanied by three of the assistants he had helping him to carry out his sub-contract, to go to Van Buren where respondent's headquarters were, to find out what was to be done by each of the parties hereto under the circumstances.

The president of respondent, on its behalf, and appellant verbally agreed that appellant should go on and complete the work he had agreed with Grandmaison to do. It is upon that verbal agreement that this action is brought. The said parties differed very widely in the terms thereof.

The appellant's story practically amounted to a substitution of respondent for Grandmaison, as appellant's paymaster, under the sub-contract, including both what had

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been done and that already named but not done, for that which yet remained to be done.

The respondent contended that it incurred no such liability but only to pay for cost of work to be done and a *per diem* wage to the appellant.

The jury was asked to find which story was true and adopted the appellant's version, the result of which was a verdict for plaintiff, now appellant, of $10,000.

The objection was taken throughout, in pleadings and at the trial, that this agreement so far as relative to the work done up to the making thereof, was void under the Statute of Frauds because it was not reduced to writing.

That view was upheld by the learned trial judge who dismissed the action on that ground. And on appeal therefrom to the Appeal Division of the Supreme Court of New Brunswick, the majority of that court, consisting of the Chief Justice thereof and Mr. Justice Grimmer, dismissed the appeal.

Mr. Justice Crocket, dissenting therefrom, held that the appeal should be allowed.

The learned trial judge, and Chief Justice Hazen who wrote the opinion which prevailed in appeal, seem, I most respectfully submit, to attach too much importance to the persistent contention of counsel for appellant that, short of an actual novation of contract, whereby the original debtor would be absolutely discharged, no contract involving an obligation for the payment of the debt of another could be maintained unless reduced to writing.

I cannot assent to such a proposition. There are numerous cases—indeed too numerous to mention—conflicting entirely therewith.

If there happens to be an actual novation of contract of course that ends all doubt or difficulty. But by no means do the cases resting thereon decide that there must be novation of contract before liability can arise on a verbal contract which involves the obligation of payment of another's debt.

The question raised herein I submit is whether or not this case falls within the true meaning of the decision in

the case of *Sutton* v. *Gray* (1), where Lord Esher expresses himself, on page 288, as follows:

> If he is totally unconnected with it except by reason of his promise to pay the loss, the contract is guarantee; if he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemity, not of guarantee, and section 4 does not apply.

Even this, from so careful an authority in the use of language, may be interpreted too widely.

The case of *Davys* v. *Buswell* (2), illustrates how far it was attempted to be strained.

In these cases, as authorities on which they respectively rest or were sought to be rested, there are cited the leading cases which turned on the distinction between the words of the statute being a special promise to answer for the "debt, default or miscarriage of another" and the manifold ways in or by which a contract of indemnity may be called into existence, and yet not be that kind of special promise, within the Statute of Frauds.

In this case now in hand we will be, I submit, if we allow this appeal, far within the line drawn in *Couturier* v. *Hastie* (3), or *Sutton* v. *Gray* (1), just cited, and not invading the law as laid down since.

I therefore think this question, upon the Statute of Frauds as defence, should be decided accordingly.

There are other features of the case, such as the liens against the logs in question, that might, I suspect, have been made more effective in answering the objections resting upon said Statute of Frauds than was done at the trial.

The Woodman's Lien Act was cited to us on the argument and there were men engaged in the appellant's part of the work who were entitled under said Act to have made, at the time the agreement in question was entered into, good their claim under said Act. And I find three of these men were those who accompanied appellant to Van Buren on the occasion when the agreement in question was entered into, and returned satisfied with the assurance given appellant by respondent's president to help complete the work appellant had undertaken.

(1) [1894] I Q.B. 285. (2) [1913] 2 K.B. 47.
(3) 8 Ex. 40.

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One of these at the trial swore that $850 was still due him for such services.

Another giving evidence put his claim yet due for similar services at $1,783.

Such possibilities, including that of appellant's own claim (for subsection 2 of section 2 of the Act, seems wide enough to support a fairly arguable claim on his behalf in that regard) may have been discarded for good reasons arising out of the local jurisprudence in applying the Act.

But whether such claims are absolutely well founded in law or not, they, or the possibilities thereunder, were likely to have presented to a business man's mind the actual situation in such a way as to render the assumption of Grandmaison's indebtedness not such an improbable thing as the learned trial judge and the learned Chief Justice in appeal seem to have thought.

And if the claims against appellant by his men were such as could have been registered under the said Act at the time this agreement was entered into, then there existed another possible feature of this case bringing it absolutely within the decision in the case of *Fitzgerald* v. *Dressler* (1).

Perhaps it is in principle within the ruling in that case. I need not, for obvious reasons, already stated, follow that line of thought.

I cannot find the answers of the jury so inconsistent and conflicting as is urged upon us as to render the verdict worthless. Indeed the outstanding features of the case, that the contract of respondent with Grandmaison was for a higher figure than the basis of appellant's with him, and the profit implied therein stood against any probable loss in the assumption thereof instead of the original liability to Grandmaison under his contract especially in light of the one-sided kind of contract that was giving respondent every possible means of protecting itself, guided by an experience of forty years as its president claimed to have had.

Once the $12,000 was got back from Grandmaison, and that no doubt counted on, respondent does not seem to have made any such improbable sub-contract with appel-

(1) 7 C.B.N.S. 374.

lant as the learned trial judge and the majority in the court below seemed to hold the jury had found.

It is only as to the probabilities, or improbabilities if you please, that any of these features are worthy of consideration and that only before the jury.

There is no plea of fraud presented. And the alleged want of consideration presented as an argument here and below, has nothing to rest upon as a matter of law if the story found true by the jury is correct, or the finding of the jury. Elementary English law does not, unless in case of fraud, require or enable the courts to pass upon the measure of consideration if there is in truth a consideration as herein is presented.

In deference to the argument presented I have made many of the foregoing suggestions. I feel myself, however, so much in accord with the reasoning in Mr. Justice Crocket's judgment that I adopt same and need not proceed further than to say I would allow the appeal with costs throughout.

DUFF J.—Grandmaison had a contract to cut and drive the respondent company's logs and the appellant had a sub-contract with Grandmaison for the execution of part of this work. Grandmaison, on becoming insolvent, absconded, while the appellant's sub-contract remained unexecuted in part. Under some arrangement with the respondent the appellant finished driving the logs he had cut under his sub-contract. The jury found that the appellant's account of this arrangement was the true one; but the Appeal Division have held that accepting that account, the arrangement amounted to a guaranty of the obligations undertaken by Grandmaison under the sub-contract with the appellant and that the arrangement, not being evidenced in compliance with the 4th section of the Statute of Frauds, was unenforceable. The evidence of the appellant accepted by the jury was to this effect:—

Grandmaison has gone away; you will keep on with the work exactly the same as you were to do with Grandmaison; you will finish your contract. Put your wood where you expected to put it with Grandmaison at the mouth of Little Forks. I will pay you. You are not dealing with

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Grandmaison any more, you are dealing with us. Make your drive and I will pay you. I will pay you your contract as Grandmaison was supposed to pay you at the mouth of the brook.

I concur with the conclusion of Crocket J. that the evidence interpreted in light of the situation establishes the existence of a new and substantive undertaking by the respondents and not a contract of suretyship.

Grandmaison by the terms of his contract agreed to complete the work in the spring of 1921, and payment for it was due on the 1st April, 1921, but the contract expressly declared that cash or supplies and equipment to the estimated value of the work done might be advanced as the operation progressed and that such advances should be used only for the purposes of carrying out the contract, and that any diversion of them should be deemed an act to defraud the company. It was further provided that the company might "stop operations" at any time should the contractor be indebted to it in excess of the value of the work done or if the contractor should fail to fulfil any of the conditions of the contract. Up to the 1st of April the respondent had advanced $81,000 to Grandmaison, including the sum of $12,000 advanced on the 31st March with which Grandmaison absconded leaving New Brunswick and going to Quebec where he deposited part of the money in his son's name in a bank. This the respondents treated as a breach of the contract and they accordingly took possession of the logs cut by Grandmaison himself as well as by his sub-contractors, including the appellant.

Obviously in these circumstances it became impossible for the appellant to carry out his sub-contract with Grandmaison without the consent at least of the respondents. The terms of the appellant's sub-contract were virtually the same, *mutatis mutandis,* as those of Grandmaison's contract with the respondent. The contract price was payable by Grandmaison on the 1st June, 1921, as an entirety although the contract contemplated advances in cash and supplies if necessary during the course of its execution. These, however, Grandmaison was under no legal obligation to make. The appellant no doubt immediately, as a result of the respondent's act in taking possession of the

logs, acquired a right of action against Grandmaison on the principle of *Inchbald* v. *Neilgherry Coffee Co.* (1); that is to say, he became entitled to treat the contract as at an end and sue for work and labour done instead of suing for damages for breach of contract. *Lodder* v. *Slowey* (2).

He also became entitled to sue for damages for breach of Grandmaison's implied undertaking not to prevent or hinder the performance of the work he had contracted to do. *United States* v. *Peck* (3); *Mackay* v. *Dick* (4).

In these circumstances it is quite clear of course that the appellant and the respondents might have arranged that the appellant should proceed with the execution of his sub-contract with Grandmaison, and that, treating that contract as still on foot, the respondent should become responsible to the appellant for the performance of Grandmaison's obligations under it. But on the other hand the respondents were entitled to stipulate that the appellant in driving their logs should do so only under the arrangement with them, and not as a sub-contractor with Grandmaison, and indeed they might very well consider it in the circumstances important that they should not in any way recognize any of Grandmaison's sub-contracts. It is agreed on both sides, notwithstanding differences in other vital matters, that the appellant was to "have nothing more to do with Grandmaison," that he was to deal exclusively with the respondents; in other words, it was the basis of the arrangement between the appellant and the respondents that Grandmaison's contract was to be treated as rescinded.

Such being the facts, it seems clear that the undertaking by the respondent to pay was an independent undertaking and not a contract of suretyship. A contract of guaranty necessarily presupposes the existence of a principal obligation. As the sub-contract with Grandmaison was treated as rescinded, there remained in the contemplation of the parties no obligation under that contract to pay the contract price in whole or in part, in other words, no principal obligation to which a contract of guaranty could attach.

(1) 17 C.B.N.S. 733.
(2) [1904] A.C. 442 at p. 452.
(3) 102 U.S.R. 64.
(4) 6 App. Cas. 251.

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Anglin J.

The appeal should, for these reasons, be allowed and judgments given with costs in all courts for the amount of the verdict.

ANGLIN J.—The jury was quite within its right in accepting the plaintiff's version of his arrangement with the defendant company rather than that of its president. Nor do I find any such inconsistency in the answers of the jury as would justify setting them aside. Mr. Justice Crocket has, in my opinion, satisfactorily dealt with these aspects of the case.

While I am also prepared to accept the conclusion of that learned judge that the Statute of Frauds is inapplicable, I am not satisfied with the soundness of the view, on which I understand him to base that conclusion, that the defendant's ownership of the logs and its interest in the Grandmaison contract for taking them out suffice to exclude the application of the statute under the test stated in the note (*l*) to *Forth* v. *Stanton* (1). The evidence discloses no liability on the part either of the defendant or of his property for any sum due by Grandmaison to the plaintiff except such as arises from the express promise sued upon. *Davys* v. *Buswell* (2). If the plaintiff had a lien on the defendant's logs which he had taken out for Grandmaison the case would fall within the test under consideration and the statute would not apply. But a case of lien was neither presented nor established.

Assuming that the contractual liability of Grandmaison to the plaintiff continued and that it was that liability that the defendant undertook to meet in consideration of the plaintiff completing his contract, I would feel obliged to hold the statute applicable notwithstanding the absolute and unconditional promise to pay made by the defendant. *Beattie* v. *Dinnick* (3). On such an assumption I think the plaintiff's case could be put more strongly on the ground that the immediate and main object of the agreement between Morin and the defendant company was to have the logs, cut by the former and of which the latter

(1) [1871] 1 Wm. Saun. 233. (2) [1913] 2 K.B. 47.
(3) 27 O. R. 285

had taken possession, driven to the mouth of the river and thus made available for its purposes, and that payment of any debt of Grandmaison to Morin was a mere incident or ulterior consequence of the arrangement. *Harburg India Rubber Co.* v. *Martin* (1); *Sutton* v. *Grey* (2); *Emerson* v. *Slater* (3).

But, as is pointed out by my brother Duff, the effect of the jury's finding accepting the plaintiff's version of his agreement with the president of the defendant company is that the contract of the latter with Grandmaison and that of Grandmaison with the plaintiff were treated as having been abandoned. Grandmaison had absconded; the defendant company had taken possession of the logs; the plaintiff had no money to complete his drive, even if the defendant would have allowed him to do so under his contract with Grandmaison; without its consent he could do nothing further. On the other hand, no debt was due to Morin by Grandmaison; under the terms of the contract between them none could be due for several months after the completion of the drive. I agree with my learned brother that the defendant company did not undertake to become responsible to Morin for the fulfilment of Grandmaison's obligation under his contract, but, on the contrary, they insisted on Grandmaison's contract and subcontract being entirely superseded and entered into an original and independent undertaking to pay the defendant certain moneys, regardless of any liability of Grandmaison, in consideration of the plaintiff undertaking to drive the logs cut by him to the mouth of the river. I agree with Crocket J. that this formed an independent consideration sufficient to support the defendant's promise to pay Morin.

I also incline to agree with my brother Duff that there was no principal obligation of Grandmaison in the nature of a debt within the fourth section of the Statute of Frauds which the parties contemplated should be guaranteed by the defendant. Both contracts with Grandmaison were

(1) [1902] 1 K.B., 778, 786.
(2) 60 L.T., 354, 355; [1894] 1 K.B., 285, 288.
(3) 22 How. (U.S.) 28, 43.

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treated as having been abrogated and the basis of the new arrangement was that Morin should have nothing more to do with him.

BRODEUR J.—I entirely concur with the opinion expressed by Mr. Justice Crocket in his dissenting judgment in the court below, and it would be useless for me to add anything to what he has so ably said on the question of law as well as on the interpretation of the findings of the jury.

As it is said in Halsbury, vol. 15, p. 462,

> the true test whether the Statute of Frauds applies is to see whether the person who makes the promise is, but for the liability that attaches to him by reason of the promise, totally unconnected with the transaction, or whether he has an interest in it independently of the promise.

If the promise is made by a person connected with the business, then the Statute of Frauds does not apply. This principle has been enunciated in several decisions. *Couturier* v. *Hastie* (1); *Sutton* v. *Gray* (2).

In the present case, I am not surprised as to the defendant company making the agreement alleged by the plaintiff and undertaking that the latter should complete his contract and that he would be fully paid for all the work which he had done; otherwise the defendant might be exposed to very serious damages. It must have made some sales of the lumber which was being cut during the winter on its timber limits. There were some liens on this timber. It could not take possession of the logs without discharging these liens. Law suits could have been brought by different persons and could have stopped the driving of the logs during the short time which is available for that purpose. It could experience a great deal of trouble in finding the large number of men necessary to complete delivery of the logs, since all this organization had been made through its principal contractor who had absconded. Then instead of acting as a madman, as it has been suggested, I find that it has acted very wisely in simply continuing the sub-contracts which had been made by Grandmaison.

(1) 8 Ex. 40. (2) [1894] 1 Q.B. 285.

For these reasons, I am of opinion that the verdict of the jury in favour of the appellant should stand and that the judgment of the court below should be reversed with costs throughout and that the plaintiff's action should be maintained.

MIGNAULT J.—I have no difficulty in reconciling the answers made by the jury to the questions put to them, and may simply refer to the judgment of Mr. Justice Crocket on this point.

In my view, following the breach by Grandmaison of the contract between him and the respondent and of the sub-contract between him and the appellant, both these contracts were treated by the appellant and the respondent as being at an end. The arrangement made by them, whether the plaintiff's or the respondent's evidence be accepted, was an entirely independent contract, and in no way a promise to answer for Grandmaison's debt. The jury believed the appellant's testimony as to this arrangement, and I agree with the reasons of my brothers Duff and Anglin for considering it entirely outside the Statute of Frauds.

I would allow the appeal with costs throughout and give judgment to the appellant for the amount of the jury's verdict.

Appeal allowed with costs.

Solicitor for the appellant: *J. E. Michaud.*

Solicitors for the respondent: *Stevens & Lawson.*