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*Oct. 20, 21.
*Nov. 10.

JAMES FARQUHAR (PLAINTIFF) . . . . APPELLANT;

AND

F. GORDON ZWICKER (DEFENDANT) . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract—Novation — Sub-contractor — Order from contractor on owner—Evidence.

T. was contractor for building a house and F. sub-contractor for the plumbing work. When F.'s work was done he obtained an order from T. on the owner in the following terms: "Please pay F. the sum of $705, and charge to my account on building, Lucknow Street." F. took the order to the owner who agreed to pay if the architect certified that the work had been performed. F. and T. saw the owner and architect together shortly after and on being informed by the latter that the account was proper and there were funds to pay it the owner told F. that it would be all right and retained the order when F. went away. F. filed no mechanic's lien, but other sub-contractors did the next day, and T. assigned in insolvency. In an action by F. against the owner:

Held, Davies J. dissenting, that there was a novation of the debt due from the owner to T.; that it was not merely an agreement by the owner to answer to F. for T.'s debt nor was the order to be treated as a bill of exchange and accepted as such.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment for the plaintiff at the trial and dismissing the action.

The facts are sufficiently stated in the above headnote.

Mellish K.C. for the appellant.

F. H. Bell, for the respondent.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

The judgment of the majority of the court was delivered by

IDINGTON J.—I think this appeal should be allowed with costs and the judgment of the learned trial judge be restored. Idington J.

Accepting as he did implicitly the appellant's version of the facts, in which finding I agree, the inferences to be drawn therefrom permit of holding what took place to be a novation.

It would have puzzled the appellant to have maintained an action against Thompson after leaving his order with the respondent and accepting in its stead his undertaking to pay the amount.

If Zwicker instead of Thompson had become insolvent shortly after what transpired, it would have been most unjust to have held Thompson liable.

What was intended by all the parties was that Zwicker should assume the debt and Thompson be no longer liable. Their language and their acts make this abundantly clear.

There was never any purpose or intention of appellant or the others that he should look to Zwicker as a surety to answer the debt, default or miscarriage of another; nor did any one expect him to treat the order as a bill of exchange and accept it in the sense of accepting such a bill.

He was to receive and accept it as a voucher for the purposes of the future adjustment of accounts between himself and Thompson, and so accepted and retained it.

The order might well be held also as an equitable assignment of part of the debt due or accruing due from respondent to Thompson and as having been

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assigned by appellant to and accepted by respondent as the consideration for his promise to pay the appellant the amount it represented.

The retention by respondent of the order is consistent with either of these conclusions and apparently inconsistent with any other except speculations receiving but little support in the evidence.

DAVIES J. (dissenting).—It is quite clear, I think, that unless the conversations between plaintiff and defendant can be so construed as to amount to a "novation" the action cannot be maintained. As I differ from my colleagues on the point I have gone again most carefully over the evidence and am more fully confirmed in the impression made on my mind by the oral argument that there never was any such clear and unequivocal promise made by the defendant as is necessary to found a novation upon. I cannot see when or how Thompson, the contractor, was released from his liability to Farquhar, his sub-contractor, nor am I able to understand on what evidence it can be held that Thompson released the defendant.

So far from the promise made by Zwicker to the plaintiff being a clear, absolute and unequivocal one to pay the money it seems to me to have been clearly a conditional one dependent upon the money being found to be due to Thompson, the contractor. The order drawn upon Zwicker by his contractor Farquhar reads: "Pay Farquhar Bros. $705 and *charge to my account on building* Lucknow St." The statement of plaintiff which the trial judge accepted and relied upon was that defendant after consulting with his architect told him "it was all right." Now, I can only understand that statement as at the utmost

amounting to a promise to pay the money in terms of the order, namely, out of the moneys coming to Thompson. As a fact, it appeared that there was not any money then actually due and payable by Zwicker to his contractor owing to the condition in which the work then was, and the architect on being asked the question how much money was due on the contract at the time Thompson and Farquhar applied to him for a certificate, answered: "Presuming the contract had to be completed which it was not there would be I think somewhere between $200 and $300 due, that is on the whole contract." The day following the giving of the alleged promise Thompson's sub-contractors filed mechanics' liens for the several amounts due them. Thompson assigned, and consequently the fund out of which the order requested defendant to pay plaintiff and which all parties clearly must have understood the promise such as it was to relate to, never existed.

Apart from the question of novation the action is clearly one which cannot be maintained because the promise was merely one to pay another man's debt and there was no consideration for it and it was not in writing. An attempt was made to shew some consideration by reference to a few words of conversation relating to the filing by plaintiff of a mechanic's lien and a postponement by him of doing so, but as all such conversation was subsequent to the alleged promise it was clear it could not be treated as the consideration for the promise, and even if so treated the absence of writing would be fatal. If authority was needed on this branch of the case I should think *Liversidge* v. *Broadbent*(1) conclusive.

(1) 4 H. & N. 603.

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On the whole, I would confirm the judgment of the Supreme Court of Nova Scotia agreeing, as I do substantially, with the reasons of Mr. Justice Meagher and would dismiss the appeal.

Appeal allowed with costs.

Solicitor for the appellant: *W. H. Fulton.*

Solicitor for the respondent: *F. H. Bell.*