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HIGH COURT DIVISION.

MIDDLETON, J. SEPTEMBER 23RD, 1918.

*BLANCHARD v. JACOBI.

Duress—Action on Cheque—Signing Cheque to Obtain Release from Custody—Arrest in Foreign Country—Fraud—Defence to Action.

Action upon a cheque made by the defendant in favour of the plaintiff on the 17th January, 1918, for $3,075. Payment of the cheque was, at the instance of the defendant, refused by the bank upon which it was drawn, the defendant asserting that it had been obtained from him by duress.

The action was tried without a jury at a Toronto sittings.

Casey Wood, for the plaintiff.

A. C. McMaster and O. King, for the defendant.

MIDDLETON, J., in a written judgment, said that the defendant went to Boston, Massachusetts, to make an arrangement with a company there, in regard to a matter of business between that company and the defendant's firm in Toronto. The company had a claim against the defendant's firm, the amount of which was disputed. On the 17th January, 1918, the defendant arrived in Boston, and called on the company's manager. No arrangement was made—the defendant and the company's manager could not agree upon a sum. The manager at once called in a sheriff's officer, who placed the defendant under arrest, upon process obtained earlier in the day and before any meeting had taken place. The defendant failed to obtain bail, and finally sent for the manager and offered his cheque for the sum demanded.

* This case and all others so marked to be reported in the Ontario Law Reports.

The manager refused to accept a cheque, and asked for cash, which the defendant could not pay at the moment. The plaintiff, who was the attorney for the company, then intervened, and offered to take the defendant's cheque and give his own cheque to the company for the amount which the company was willing to accept, less the plaintiff's collection-fee. This satisfied the company; the defendant drew his cheque—that now sued on—in favour of the plaintiff, and was released from custody.

The next day, the plaintiff gave the defendant a receipt for his cheque, "which when paid will be in full settlement and discharge" of the company's claim. The plaintiff's cheque in favour of the company, though dated the 18th January, was not cashed until the 23rd January, when it had become known that the defendant's cheque was dishonoured.

The learned Judge referred to the Massachusetts law as to arrest as found in the statutes and interpreted by cases, the expert evidence being contradictory and counsel agreeing that the Judge should supplement it by his own reading of the statutes and cases.

Reference to Cassier's Case (1885), 139 Mass. 458; Barrell v. Benjamin (1819), 15 Mass. 354; Peabody v. Hamilton (1870), 106 Mass. 217; Paine v. Kelley (1907), 197 Mass. 22; Sweet v. Trimbell (1896), 166 Mass. 332

Under legal advice the plaintiff had avoided any active inducement of the defendant to come to Massachusetts to adjust the claim, thinking this would avoid the fraud referred to in the cases. That view was not to be accepted. The plaintiff in his reply held himself out as ready to negotiate with the defendant if he came to Boston. He acted fraudulently when he formed the plan to arrest, and, concealing this, permitted the defendant to walk into the net spread for him, and swore to all that was necessary to accomplish the arrest before he entered upon any discussion. The intent to secure arrest, while arranging an interview to negotiate settlement, was the gist of the fraud, and inquiry as to who suggested the interview or the place of interview was quite beside the mark. The procuring of the defendant's attornment to the jurisdiction of the Courts of the Commonwealth by the attendance to discuss settlement constituted the fraud: Stein v. Valkenhuysen (1858), E.B. & E. 65.

Grainger v. Hill (1838), 4 Bing. N.C. 212 (referred to as law in Massachusetts in the cases cited), shews that it is not necessary to set aside the process or shew that the action has terminated in the defendant's favour before suing.

Duke de Cadaval v. Collins (1836), 4 A. & E. 858, also aids the defendant here. Where there was an arrest of a forei ner

upon a false affidavit, money paid for his discharge was recovered as paid under duress. No distinction is to be observed as to the fraud being in the false statement as to debt existing, and fraud and false statement in any other requisite to the issue of process, or in the concealing of the true facts and circumstances connected with the defendant's movements and intentions.

The duress which gives a right to recover money paid affords ample defence to an action upon the cheque here given.

Action dismissed with costs.

MIDDLETON, J. SEPTEMBER 24TH, 1918.

*LONDON AND WESTERN CANADA INVESTMENT CO. v. DOLPH.

Fraud and Misrepresentation—Agreement to Purchase Interest in Land—Material Misrepresentation by Vendor—Equity of Purchaser to Rescind Agreement—Assignment of Agreement by Vendor to Third Person—Chose in Action—Assignment Subject to Equity—Defence to Action by Assignee on Agreement—Costs.

Action by the assignees of an agreement for money due thereon.

The action was tried without a jury at a Toronto sittings.

J. W. Bain, K.C., and J. S. Duggan, for the plaintiffs.

J. E. Jones, for the defendant.

MIDDLETON, J., in a written judgment, said that Sylvester Moyer agreed with the defendant to sell him a one-fifth interest in certain lands, for $3,200. The lands had been conveyed to the plaintiffs and the agreement assigned to them.

Two defences were raised. The defendant paid $1,000 on account of the purchase-price and covenanted to pay the balance in three instalments. He now said that "as a condition precedent to his advancing the $1,000, and upon the signing of the alleged agreement, it was understood that the limit of the defendant's liability was the advance of the said $1,000." This was not true in fact and meaningless in law.

Moyer and Dolph were friends, and Dolph gave Moyer $1,000 to invest for him; and Dolph then said he would not put in any

more money. Moyer was to invest as he pleased. Moyer then said he had bought a parcel for $16,000, and put the $1,000 into it, and sent Dolph the agreement calling for $2,200 further, in instalments. Moyer had no right to call for this, and Dolph was under no obligation to sign. He kept the agreement, satisfied himself, and signed. He could not now be heard to say that he did not promise to pay as he covenanted, and it was absurd to say that the $1,000 was paid as a condition precedent to an understanding that he was not to comply with his covenant. This defence failed.

More serious was the second defence. Moyer said the parcel cost $16,000, so Dolph was obtaining his one-fifth at cost. The price was $15,000, and this was known to Moyer, though he pretended he only afterwards found it out.

Moyer, after assigning the agreement, was now attempting to aid Dolph in resisting payment, and proclaimed his own fraud to assist his friend and defeat his assignees. He made a weak and manifestly untrue explanation of his conduct.

The misrepresentation made was material, and gave Dolph an equity entitling him to rescind the contract; and the assignees of the contract took subject to this equity.

If for any reason the right to rescind had been lost so that the claim would be for deceit, this would not attach to the contract in the hands of the assignees: Stoddart v. Union Trust Limited, [1912] 1 K.B. 181; but the reasoning of that case was based upon the distinction between the right to rescind and the right to claim damages. See also T. & J. Harrison v. Knowles & Foster, [1918] 1 K.B. 608.

An assignee of a chose in action takes subject to all rights of set-off and other defences available against the assignor; but, after notice of an assignment of a chose in action, the debtor cannot, by payment or otherwise, do anything to take away or diminish the rights of the assignee as they stood at the time of the notice. That is the sole exception: per James, L.J., in Roxburghe v. Cox (1881), 17 Ch.D. 520, 526.

This, however, does not prevent the assignor from disclosing his own earlier fraud, nor does it preclude the defendant from relying upon it.

The action failed; but, under the circumstances, there should be no costs. So far as the defendant knew when sued, he had no real defence, and only found out Moyer's unworthy conduct pending suit. Moyer's unjust attempt to make $200 relieved the defendant from $2,200, and defeated the plaintiffs to that extent.

MIDDLETON, J. SEPTEMBER 24TH, 1918.

STERLING BANK OF CANADA v. THORNE.

Bills of Exchange—Acceptances—Renewal of Earlier Instruments—Agreement—Sale of Patent Right—Bills of Exchange Act, secs. 14, 131, 145—Bills not Addressed to one of the Acceptors—Change in Address—Discount of Bills by Drawers—Adoption of Change—Bank—Holder in Due Course—Evidence—Ratification—Estoppel—Altered Bill—Title of Bank—Suspicion—Inquiry.

Action upon acceptances of two bills of exchange, both dated the 30th August, 1912.

The action was tried without a jury at a Toronto sittings.
Casey Wood, for the plaintiffs.
Gideon Grant, for the defendants.

MIDDLETON, J., in a written judgment, said that at the trial he allowed an amendment to be made to include earlier bills of which the bills sued on were renewals.

An agreement, bearing date the 22nd January, 1912, between the Interior Construction Company Limited, and Kilpatrick (one of the defendants), which was said to be the origin of the series of notes and bills, was put in. By this agreement, the company sold to K. for $7,000 its right to manufacture and construct and to deal in certain building material within certain territory; and it was further agreed that K. should have all formulæ, processes, patents, and copyrights necessary to enable him to use the things purchased.

Two notes were said to have been given in payment of this $7,000; and it was suggested that these were given for a patent right so as to render them void save as against a holder in due course, under sec. 14 of the Bills of Exchange Act; but there was no evidence properly identifying the notes in evidence with the notes given under the agreement. The notes were dated the 5th January, 1912, and the agreement was more than two weeks later.

On the 22nd June two bills were drawn by the company payable in 30 and 60 days, each for $3,500. The proceeds of these were used to take care of the note held by the plaintiffs and (by a proper inference) that held by the Bank of Hamilton

These drafts, as drawn, were addressed to Kilpatrick and Mills only, and were sent through the bank for acceptance. Some one added Thorne's name as drawee, and the three accepted. After

acceptance, the company discounted, and this was an adoption by the company of the change made in the address. The acceptors were bound by their acceptance, and could not dispute it against the plaintiffs, holders in due course.

The defendants sought to escape liability upon the contention that Thorne could not be liable, as the bill was not addressed to him, and Kilpatrick and Mills could not be liable, as they accepted on the assumption that Thorne was a party. Thorne became a party when the drawer ratified the addition of his name, and also he was estopped from denying that he was a party when he signed the acceptance of a bill to which his name appeared as a drawee.

Kilpatrick and Mills would in any event be liable, as it was not shewn that they accepted on the faith of Thorne's name. Probably it was added by them or at their instance with the view of continuing Thorne's liability; and, if so, they could not set up their own act to defeat the plaintiffs' claim.

Later on, these acceptances not having been honoured, the drafts originally sued on were drawn on the 30th August, each $3,500, payable 30 and 60 days. These were put through the bank before acceptance to take care of the maturing or matured bills as a discount. They were drawn in the same way on Kilpatrick and Mills only, and sometimes amended by adding Thorne as drawee, and accepted by all three. The bank acquired title before acceptance, and no ratification of the change by the drawer could be shewn. As there was clearly liability on the earlier acceptances, it was not necessary to discuss the question thus raised.

The alteration of a bill (by sec. 145 of the Bills of Exchange Act) does not void it "as against a party who has himself made, authorised or assented to the alteration," and the defendants here assented to the change. By the same section a holder in due course may enforce payment of an altered bill according to its original tenour, when the alteration is not apparent on the face of the bill.

Though the addition of Thorne was plainly not in the handwriting of the scribe who penned the note, there was nothing on the face of the acceptance to shew that the change was not made before the bill was issued.

If Thorne was not a party to the bill, then sec. 131 made him liable. Thorne signed, and he was either liable as acceptor or under sec. 131 as an endorser. The section was intended to change the law, and the earlier cases are no longer of authority.

The status of the plaintiffs as holders in due course was attacked, but without sufficient reason Unquestionably they advanced the money, but it was said that the manager ought to

have made inquiry—he ought to have been suspicious—he ought to have gone into the transaction with the company and ascertained its true nature. Mala fides could not be established in this way, and it was not credible that the advance was made with any suspicion that the notes were not genuine and representing a real debt.

There was no evidence to shew that the defendants did not in truth owe the money as between themselves and the drawer of the bill. Thorne and Mills might be sureties only for Kilpatrick, but all this was left to surmise.

There should be judgment for the plaintiffs as prayed.

FALCONBRIDGE, C.J.K.B. SEPTEMBER 28TH, 1918.

McTAVISH v. CORBET FOUNDRY AND MACHINE CO. LIMITED.

Contract—Delivery of Company-shares—Breach—Delay—Action by Assignee of Purchaser—Right to Sue—Conveyancing and Law of Property Act, sec. 49—Addition of Assignor as Plaintiff—Readiness to Deliver Stock—Damages—Interest—Costs.

Action by the assignee of one Cole for damages for breach of a contract for the delivery of shares of the capital stock of the defendants, an incorporated company.

The action was tried without a jury at Owen Sound.

A. L. Fleming, for the plaintiff.

G. W. Mason and J. G. Barlow, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the assignment to the plaintiff of the rights of J. H. Cole was made in good faith. Cole had a quasi equity of redemption in the proceeds, but the assignment was not champertous. The plaintiff, under sec. 49 of the Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, had the right to sue: see Colville v. Small (1910), 22 O.L.R. 1, and cases cited; Burlinson v. Hall (1884), 12 Q.B.D. 347; Tancred v. Delagoa Bay and East Africa R.W. Co. (1889), 23 Q.B.D. 239.

At the trial, Cole stated his willingness to be added as a party plaintiff; and the plaintiff should have leave to add him, if so advised.

The amount of stock to be delivered to the plaintiff was ascertained in November or December, 1916. Cole was demanding the stock from January, 1917. It was necessary for the company to obtain supplementary letters patent, and there was unreasonable delay in procuring them, not owing to bad faith on the part of the defendants, but to lack of diligence and mistakes in preparing material for the application, giving notice of meetings, etc.

The defendants were now ready and willing to deliver the stock; the plaintiff insisted that he was not bound to accept it, but should have money damages.

There was no satisfactory evidence of depreciation in value; the plaintiff ought to take the stock; and the defendants ought to pay some interest by way of damages.

The plaintiff should have judgment for delivery of fully paid-up preference stock to the amount of $16,000.

Taking the offer of the manager of a bank as some basis for the approximate value of the stock, the plaintiff should have interest at 5 per cent. on $4,000 from the 15th January, 1917, until judgment, and should also be paid his costs of the action.

PATTERSON v. TORONTO GENERAL TRUSTS CORPORATION—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—SEPT. 28.

Discovery—Examination of Persons for whose Benefit Action Defended—Rule 334.]—Appeal by the defendants from an order of the Master in Chambers for the examination for discovery of certain persons for whose immediate benefit it was said this action was defended. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the Master in Chambers was right in holding these persons examinable under Rule 334. Nothing in the actual decisions in Stow v. Currie (1909), 14 O.W.R. 223, or Trusts and Guarantee Co. v. Smith (1915), 33 O.L.R. 155, conflicted with this view. See also Argles v. Pollock (1917), 12 O.W.N. 158. Appeal dismissed with costs to the plaintiff in any event of the action. J. H. Fraser, for the defendants. T. R. Ferguson, for the plaintiff.

HUTCHINSON v. CITY OF TORONTO—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—SEPT. 28.

Appeal—Leave to Appeal from Order of Judge in Chambers—Rule 507—Order Striking out Jury Notice—Discretion—Rule 398—Materials.]—Motion by the plaintiff (under Rule 507) for leave to appeal from an order of ROSE, J., in Chambers, striking out a jury notice. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the learned Judge had exercised his discretion under Rule 398. It was argued that his discretion was not judicially exercised, as he had not the proper material before him; but all the material which he needed was the pleadings, and they were before him. Motion refused with costs to the defendants in any event of the action. T. R. Ferguson, for the plaintiff. Irving S. Fairty, for the defendants.