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SECOND APPELLATE DIVISION. JUNE 15TH, 1914.

HEUGHAN v. SHORT & BINDER.

6 O. W. N. 545.

Bills of Exchange and Promissory Notes—Presentment to Hold Indorser—Waiver—Assignment for Benefit of Creditors—Accommodation Note.

SUP. CT. ONT. (2nd App. Div.) *held*, that a holder must present a note for payment, even if he has reason to believe that it will be dishonoured.

Esdaile v. *Sorrerby*, 11 East 117; *Count* v. *Thompson*, 7 C. B. 400; *Tindale* v. *Brown*, 1 T. R. 167: followed.

Held, that a mere assignment of debtor's estate does not relieve from duty of presentment to hold prior endorser; and the fact that assignment has been caused by a person who, being endorser, is creditor and also president of debtor company, is no evidence of implied waiver.

Held, that the general principle being that "Acts done before maturity in order to constitute waiver must have been such acts as were calculated to mislead the holder and to induce him to forego taking the usual steps to charge the endorser," no waiver was established on the evidence.

Hill v. *Heap*, Dowling and Ry. 57, followed.

Held, that under sec. 85 of Bills of Exchange Act, presentment is necessary unless dispensed with under sec. 92, that onus of proving waiver is on plaintiff, and that evidence shewed that note was not an accommodation note.

Appeal from a judgment of His Honour Judge MacBeth, of Middlesex County Court, dismissing an action on a promissory note.

The appeal was heard by HON. SIR WM. MULOCK, C.J. Ex., HON. MR. JUSTICE MAGEE, J.A., HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

R. H. Bartlett and T. W. Scandrett, for appellants.

R. G. Fisher, for defendant Bender, respondent.

HON. SIR WM. MULOCK, C.J.Ex.:—The action was brought by the plaintiff, a holder in due course of a promissory note, dated at London, March 25th, 1913, payable 30

days after date, to the order of George D. Binder, for $355 "at our office, rear Richmond street," made by the Dominion Chicle Co., Ltd., and endorsed by the defendant Binder and H. E. Short.

When due the note was not presented for payment, nor was notice of the dishonour given, and in consequence the trial Judge dismissed the action; hence this appeal.

The plaintiff alleges waiver of presentment and notice of dishonour, and this is the only question with which we have to deal.

The determining facts, which are not in dispute, are as follows:

On the 29th of March, 1913, the company made an assignment of its assets for the benefit of its creditors to the Canada Trust Company, which latter company thereupon took possession of the company's place of business and assets, and in the course of a month or thereabouts sold the same, possession of the premises also passing to the purchaser.

So far as appears from the evidence this sale may not have taken place until after the maturity of the note and it does not appear whether or not in the meantime the premises were occupied, or whether on the day of the maturity of the note they were locked up. The defendant Binder was a creditor of the company and also its President. In the latter capacity and by virtue of his position as creditor he executed the assignment and subsequently was appointed one of the inspectors.

As endorser he claims to have been discharged because of the plaintiff's failure to present the note for payment or give notice of dishonour. The plaintiff, however, contends that the conduct and relations of the defendant to the debtor company constituted a waiver of the plaintiff's duty to present the note for payment or give notice of dishonour.

It was argued for the plaintiff that all the assets of the company having passed to the assignee the note if presented would certainly have been dishonoured and that therefore presentment would have been a mere idle form. I do not think the assignment warrants that inference. Solvent companies may assign for the benefit of creditors and an assignee may find himself in a position to meet the assignor's liabilities as they fall due, but even if the holder of a note

has reason to believe that it will be dishonoured on presentation, he must nevertheless present it in order to hold the endorser liable.

As said by Lord Ellenborough, C.J., in *Esdaile* v. *Sorrerby,* 11 East. 117: "It is too late now to contend that the insolvency of the drawer or the acceptor dispenses with the necessity of a demand for payment or of notice of dishonour." Neither knowledge nor the probability, however strong, that a note will be dishonoured excuses failure to present for payment or to give notice of dishonour: *Caunt* v. *Thompson,* 7 C. B. 400; *Tindal* v. *Brown,* 1 T. R. 167.

But the plaintiff says that the defendant has by his conduct as a creditor and his position as former President brought the case within *Hill* v. *Heap,* Dowl. & Ry., p. 57. In that case the drawer of a bill had given orders to the drawee not to pay it if presented and communicated these orders to the plaintiffs, which was interpreted by the Court in effect as saying to the plaintiffs "you need not trouble yourselves to present that bill for payment for it will not be paid if you do," and the Court held that the defendant's conduct had rendered the act of presentment useless. But in the present case the trial Judge has not, nor could be properly have drawn any such inference from the conduct. or position of the defendant Binder. He swore that when five days before the assignment he was asked by Short to endorse the note in question, the latter assured him that the note would be met at maturity, that relying on this assurance he endorsed it and was not aware of its non-payment until sometime after its maturity.

Further, he made no representation to the plaintiff indicating any intention to waive his rights in regard either to presentment or notice of dishonour. The general principle is that acts done before maturity in order to constitute waiver must have been such acts as were calculated to mislead the holder and to induce him to forego taking the usual steps to charge the endorser; Parsons on Notes & Bills, 2nd ed., p. 592. There are no such acts in this case.

The mere assignment of a debtor's estate does not relieve the holder of a note of the duty of presentment for payment in order to hold prior endorsers, and I fail to see how the added circumstances of the assignment being caused by a person who being endorser is a creditor and also President of the debtor company can be construed as evidencing an

implied waiver of such person's rights as endorser. It had no relation to his position as endorser and cannot be regarded as evidence of an intention of waive.

Adopting the plaintiff's contention the only effect of the defendant's action was to transfer the company's estate to the assignee and put it out of the power of the company itself to pay the note at maturity. Nevertheless the assignee, as representing the company, or Short, might have paid it, and the mere strong probability (which for argument's sake may be admitted), that under the circumstance of the assignment brought about by the defendant, the note would not be paid when presented, did not excuse non-presentment.

By sec. 85 of the Bills of Exchange Act, presentment was necessary unless dispensed with as provided under sec. 92.

Waiver is the only ground relied on, and the onus was on the plaintiff to establish it. This she has failed to do, and I therefore think the appeal should be dismissed with costs.

HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE SUTHERLAND, agreed.

HON. MR. JUSTICE LEITCH:—This is an appeal from the County Court of the County of Middlesex. The action was tried on the 23rd day of December, 1913, by His Honour Talbot MacBeth, without a jury. The learned trial Judge reserved judgment and on the 6th day of January, 1914, gave written reasons for his judgment dismissing the plaintiff's action with costs as against the defendant Binder. The plaintiff now appeals.

The action was brought against the defendants, Binder and Short, as endorsers of a promissory note for $355 dated 25th March, 1913, made by the Dominion Chicle Co., Ltd., payable to Binder, thirty days after date at the company's office. The action went to trial against the defendant Binder alone. The question in this appeal is as to whether or not Binder is released, under the circumstances, from liability by the non-presentment of the note by the plaintiff for payment and by her omission to give notice of dishonour. Short, who is the plaintff's nephew, induced the plaintiff to advance the money on the note. One cannot but sympathize

with the plaintiff, but no matter what one's sympathies are, the Law Merchant should not be disturbed. On the 29th March the Chicle Co. made an assignment to the Canada Trust Company for the benefits of creditors, and at a meeting of the company's creditors, held on the 11th April, the plaintiff filed a claim for a large amount, including the amount of the note sued upon, and upon which Binder was an endorser. There is no evidence that Binder had any notice or knowledge of the plaintiff's claim. Binder filed a claim for a large amount, but the amount of the note in question was not included and formed no part of his claim. The assignee took charge of the Chicle Company's premises. The note in question fell due on April 27th. The plaintiff did not present the note for payment at the company's office or anywhere else, or to any person. The learned trial Judge finds that the plaintiff could, without difficulty, have presented the note at the maker's office so as to enable her to give notice of dishonour under sec. 89 of the Act. This she neglected to do. The learned trial Judge finds that the note in question was not made for Binder's accommodation, nor was there any evidence of waiver or presentment, express or implied. Plaintiff seeks to hold Binder, as an endorser of the note, but she does not allege or prove presentment or notice of dishonour, nor does she allege or prove anything dispensing with or rendering unnecessary such presentment and notice of dishonour.

The learned trial Judge referred to secs. 92, 184 and 186 of the Bills of Exchange Act. The fact that Binder made an assignment as President of the Chicle Company for the benefit of creditors was no excuse, under the circumstances, for the neglect to present the note and give notice of dishonour. *Esdaile* v. *Sowerby*, 11 East, 114.

I think this appeal should be dismissed, but under the circumstances, without costs.

MEREDITH, C.J.O. SEPTEMBER 21ST, 1914.

TORONTO v. CONSUMERS' GAS CO.

7. O. W. N. 58.

Municipal Corporations—Rights over Highways — Construction of Sewers—Removal and Replacement of Mains of Gas Company Cost of—By whom Borne — Estoppel — Public Utilities Act, 3 and 4 Geo. V. c. 41, s. 51—Municipal Act R. S. O. 1914 c. 192, s. 325—Act of Incorporation of Defendants—11 Vict. c. 14 —Soil Occupied by Pipes—"Land"—Moneys Paid under Protest—Action for—Appeal.

WINCHESTER, Co.J., (26 O. W. R. 23) *held*, that the right of a gas company to lay mains in a highway was subject to the paramount right of the municipality to utilize such highway for public purposes, such as the construction of sewers, and when by reason of the carrying out of such public purposes it becomes necessary to relay the mains of the company, the work is to be done at their expense.

New Orleans Gas Light Co. v. *New Orleans Drainage Commission*, 197 U. S. 453, referred to.

SUP. CT. ONT. (1st App. Div.) *held*, that the soil occupied by the pipes of the appellants was land and that appellants were entitled to damages under sec. 325 of the Municipal Act for its injurious affectation by reason of the exercise of the powers of the municipality.

Consumers Gas Co. v. *Toronto*, 27 S. C. R. 453, followed.
Judgment of WINCHESTER, Co.J., (26 O. W. R. 23), reversed.

I. F. Hellmuth, K.C., and W. B. Milliken, for appellant.

G. R. Geary, K.C., for respondent.

Appeal by the defendant from the judgment of the County Court of the county of York dated 5th March, 1914, 26 O. W. R. 23, pronounced by the Senior Judge of that Court after the trial of the action before him sitting without a jury on the 22nd December, 1913.

The action was brought to recover the expense incurred by the respondent in lowering a 20-inch gas main belonging to the appellant laid on Eastern Avenue, one of the public highways of the City of Toronto, at or near the intersection of that street with Carlaw Avenue, another of the public highways of the city, which was necessitated by the construction by the respondent in the public interest of a sewer on Carlaw Avenue.

HON. SIR WM. MEREDITH, C.J.O.:—It is conceded by the appellant that the lowering of the gas main was necessary to enable the sewer to be constructed and that if the appellant

is liable to pay the expense incurred in lowering the gas main the respondent is entitled to recover the amount sued for, and the action is really brought for the purpose of obtaining a judicial determination as to whether the cost of such a work is to be borne by the appellant or by the respondent.

When the appeal was opened and the fact that the case is a test one was mentioned, it was suggested that it was undesirable that the parties should be concluded by a judgment of this Court from which there is no appeal and it was agreed by counsel that the case should be treated as if the action had been removed into the Supreme Court.

If it were not for the decision of the Supreme Court of Canada in *Consumers Gas Co.* v. *Toronto,* 27 S. C. R. 453, and the provisions of section 325 of the Municipal Act, R. S. O. 1914, ch. 192, I should be inclined to agree with the conclusion of the learned Judge of the County Court. It was, however, held in that case that the soil occupied by the pipes of the appellant is land taken and held by the appellant under the provisions of its Act of Incorporation (11 Vict. ch. 14) and by section 325 it is provided that "where land is expropriated for the purposes of a corporation or is injuriously affected by the exercise of any of the powers of a corporation or of the council thereof, under the authority of this Act or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corporation shall make due compensation to the owner or the land expropriated, or where it is injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom. . . ."

The sewer in the laying down of which it became necessary to remove the pipes of the appellant was constructed under the authority of paragraph 7 of section 398 of the Municipal Act, which empowers the councils of all municipalities to pass by-laws "for constructing, maintaining, improving, repairing, widening, altering, diverting, and stopping up drains, sewers or watercourses; providing an outlet for a sewer or establishing works or basins for the interception or purification of sewage; making all necessary connections therewith, and acquiring land in or adjacent to the municipality for any such purposes."

The land of the appellant, i.e., the soil in which its pipes were laid, was injuriously affected by the exercise of the

power of the respondent or its council in the construction of the sewer, the laying of which necessitated the removal of the pipes, and the appellant was entitled to compensation for the damages necessarily resulting from the exercise of that power, and it follows that the appellant cannot be required to repay to the respondent the expense incurred in taking up and relaying the pipes.

The appeal should be allowed with costs and the judgment appealed from reversed and in lieu of it judgment should be entered dismissing the action with costs.

MACLAREN, MAGEE, and HODGINS, JJ.A., concurred.

MIDDLETON, J. SEPTEMBER 22ND, 1914.

ANTISEPTIC BEDDING CO. v. LOUIS GUROFSKI.

7 O. W. N. 95.

Principal and Agent—Insurance Broker — Fire Insurance Obtained for Principal—Payment of Premiums to Agent—Premiums paid by Broker by System of Credits—Set-off Assented to by Payee Equivalent to actual Payment—Validity of Policies.

F. Arnoldi, K.C., for plaintiffs.

C. A. Moss, K.C., for defendant.

MIDDLETON, J.:—The action is brought to recover from the defendant the amount of the loss sustained by the plaintiff company by reason of the destruction of their property by fire on the 22nd of June, 1912. The plaintiffs allege that the defendant was employed by them as an insurance agent or broker to place insurance upon the property afterwards destroyed, and that, by reason of the breach of his duty, the insurance was not valid.

The defendant had acted as agent or broker in the effecting of insurance on behalf of the plaintiffs for some years. A change had taken place in connection with the premises and the defendant wrote the plaintiffs suggesting that, as a result of this change, it would be advisable to have the insurance re-adjusted. In consequence of this, instruc-

tions were given to the defendant to place an insurance, to the extent of $2,500, upon the stock and $1,100 on the fixtures: $3,600 in all.

In pursuance of this arrangement, Gurofski made application and placed the insurance with five companies: The National Protector Insurance Company Limited, of Liverpool; The Security Mutual Fire Insurance Company, of Chatfield, Minnesota; The North American Mutual Fire Insurance Company, of Mansfield, Ohio; The Colonial Assurance Company, of Winnipeg; and the National Assurance Company, of Elizabeth, New Jersey.

The premiums upon these policies amounted in all to $110, and the plaintiffs paid this amount to Gurofski, partly in cash, partly by a note which was paid in due course, and partly by a refund of premiums, to which they were entitled upon the surrender of the earlier policies. The policies were all sent to Gurofski and by him handed over to the plaintiffs, who for some time assumed that everything was in a satisfactory position.

The policy of the Security Mutual bears date January 19th, 1913; the other four policies bear date December 16th, 1912.

The first intimation that the plaintiffs had concerning the policies was the receipt of two letters from the North American Mutual Life Insurance Company, dated March 18th, 1912. These were a circular letter, explaining the necessity for the making of a further call, and an assessment notice calling for payment of $3.12, being an assessment with respect to losses incurred long before the issue of the policy. Concerning this, some conversation is said to have taken place between Mr. Goodman, the more active member of the plaintiff's firm, and the defendant's brother, Joseph. Mr. Goodman saw the defendant, certainly on one occasion, that no attention be paid to this notice, as the assessment would be charged up to the defendant and attended to in due course. This conversation is emphatically denied by Mr. Joseph Gurofski; and I think that if there was any such conversation at all, it is clear that Mr. Joseph Gurofski could not, and would not, have undertaken any liability with reference to the premium. I am inclined to think that it was a mere chance remark upon the street, to which neither party at the time attached any importance whatever.

On the 15th April, 1912, a notice was sent to the plaintiffs by W. L. Pettibone & Co., Newark, purporting to be agents for the Security Mutual, notifying the plaintiffs that the premium on the policy of that company was unpaid and that unless paid by April 20th, the policy would be cancelled and liability for loss under the policy would thereupon cease. To this is appended a postcript: "This is to confirm our notice of the 15th ultimo that this policy has been cancelled on our books." The earlier notice, if there was one, has not been produced. This notification was followed by letters of May 2nd, asking for return of the policy or payment of the full premium, if re-instalment was desired, and of May 17th, demanding return of the policy or cheque by return mail. As both these letters refer to the letter of April 15th, as the notice of cancellation, I think it should be found that that was the first notice actually sent.

On the 25th of May, Charles E. Ring & Co., acting for the National Protector Insurance Company and the Colonial Insurance Co., wrote two letters to the plaintiffs advising them that the premiums on the policies in these two companies remain unpaid, and that unless paid on or before the 30th May, the policy would be cancelled and all liability under it would then cease, and demand would be made for the earned premium to that date.

On receipt of some one or more of these notices, Mr. Goodman saw the defendant, certainly on one occasion, probably on more than one occasion, and was informed by him that the premiums had been duly paid and that the policies were all right.

To understand the situation, it is now necessary to ascertain exactly what had been done by the defendant. He was not an agent for any of the insurance companies. This fact was thoroughly understood by the plaintiffs. It was also known that, owing to the nature of the property to be insured, the risk could not be placed with any of the ordinary companies, but would have to be placed with companies of a class that were ready to accept risky policies; none of these companies having its head office in Ontario.

The Insurance, Brokerage and Contracting Company was a company formed for the purpose of negotiating insurance of this class. Its career had been suspended by a winding-up order; but Mr. Gurofski, C. E. Ring, and one Carroll had purchased the assets of the company in liquidation from the

liquidator, assuming and undertaking to pay all the then outstanding liabilities. This arrangement had been sanctioned by the Court, and the winding-up order had been vacated. All the stock had been transferred to a nominee of Gurofski, who held it upon trust to be distributed among the three adventurers when the advances made by Gurofski for the payment of liabilities should be recouped.

Prior to this, Mr. Ring had been carrying on business under the name of C. E. Ring & Co. He was agent for three of the insurance companies, and he had business connection with brokers or agents representing the other companies. When the Insurance Brokerage Company was re-organized, Mr. Ring was made its general manager. It was not thought desirable to change the agency for these companies from Ring to the Brokerage Company; so Ring retained the agencies, but his business was carried on in the Brokerage Company's office, and the earnings were to be treated as assets of the Brokerage Company, and he was to receive for his remuneration a salary payable by the Brokerage Company.

For the purpose of placing the Brokerage Company upon its feet, the defendant Gurofski made, as contemplated, considerable advances to it, and at the time of the transaction in question, the company was indebted to him in a large amount of money.

When Gurofski received these applications from the plaintiffs for insurance, he turned them over to the Brokerage Company, and Mr. Ring issued policies in the companies for which he was agent, and transmitted the application with respect to the Security Mutual to Mr. Pettibone. The premiums upon these policies were throughout carried into accounts current. Ring charged them to the Insurance Brokerage Company, and credited them in his books to the insurance companies. The Insurance Brokerage Company gave Ring credit and debited Gurofski. Gurofski credited the Insurance Brokerage Company upon its account current and kept the money, as the balance was largely in his favour. The insurance companies for which Ring was agent, on his instructions, charged the premiums to Ring in their books. Substantially the same thing took place with regard to the other policies, save that in the case of the one affected through intermediate brokers, the chain was longer.

After these transactions were put through the books, Gurofski made further advances to the Insurance Brokerage

Company, amounting to $1,300. This money was paid by way of loan and not by way of accounting for any of the premiums received by him in respect of business which he had turned over to the company.

The Brokerage Company was just kept floating by the money received by it, including the advances made by Gurofski, and it only had a small current balance at its credit at any time. For Gurofski's protection, it had been arranged that no money should be paid by it without his signature to the cheque, so that Gurofski knew that the company was not in fact paying over to Ring & Co. the amounts due for premiums.

In all these transactions, the credit given for the premiums was in accordance with the understanding between the different parties. The case is not one where there was any dishonest attempt to appropriate moneys; the course of dealing was in accordance with the well-understood relationship of all the parties. In this, of course, I do not include the plaintiffs. They were no parties to what was taking place. They paid their money to the insurance broker, got the policies and rested content.

When, in May, Ring & Co. wrote the letter above referred to, there had been a falling out between Ring and Gurofski. The re-organized Insurance Brokerage Company had not been a success. It went again into liquidation. Ring repudiated all liability with respect to the premiums that had not actually reached his hand, and sent out the notices in question to free himself from liability to those who had given him credit. They, in their turn, did not seek to hold him liable, if he could bring about the cancellation of the outstanding policies.

Reverting now to the position of the plaintiffs, these repeated notices that the premiums which had been paid to Gurofski had not reached the companies, caused them anxiety, and, although satisfied at first, the plaintiffs became restless afterwards and quite dissatisfied with Gurofski's explanation. Some days prior to the 22nd of June, they consulted their solicitor. The situation was placed before the Crown Attorney, and he apparently advised prosecution of Gurofski for having stolen the premiums. An information was laid before the police magistrate early on the 22nd. Later on in the same day the fire occurred, which resulted in practically a total loss of the property insured.

Upon claim being made against the insurance companies for the amounts which each was called upon to pay upon adjustment, as might be expected, the insurance companies refused to pay. Subsequently, the National (New Jersey) settled its liability—$812.39, according to the adjustment—for $700. The plaintiffs now look to Gurofski to make good the loss they have sustained by reason of the fact that the policies are not, it is said, binding upon the companies.

An agent who receives money to be paid for his principal has no authority to set this off against a debt due from the payee to him. His duty is to pay; but if the payee assents to the set-off, it becomes payment. There is no necessity for the form of handing over the money and then handing it back. The assent to the set-off dispensed with this.

Here the set-off was assented to by the agent of the insurance company, and the amount of the premium was carried into the running accounts between the parties. The insurance companies parted with the policies, being content to carry the premiums into the running account between the different agent and sub-agents.

The plaintiff having paid the premium and the policies having been delivered, under the circumstances they were valid policies, and the defendant has been guilty of no default.

The action fails and must be dismissed. Though I have much sympathy for the plaintiffs, I can find no reason for withholding costs.

After I had prepared the above judgment in this case, in June last, application was made to me for leave to recall Mr. Ring for the purpose of shewing that credit was given by the firm of Ring & Co. to the insured and not to the intervening insurance brokers, either the brokerage company or Gurofski. I do not know, in the view I have taken of the case, that this is really material. No doubt the premiums were charged by Ring to the customer. This course was adopted by him, he says, on the advice of his solicitor, so that he would be able to look to the customer direct if the agent did not pay over the premium. I cannot regard this as being the real situation. It was an endeavour to have two strings to his bow. The real essence of the matter was, I think, as outlined in my judgment. I do not think that the new evidence in the result modifies the decision arrived at. I prefer the evidence given before a mark at which to aim had been clearly apparent.

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EXIT O. W. R.

For years have the cases,
From near and from far;
Been promptly reported,
In O. W. R.

The daily companion,
Of both Bench and Bar,
Was cited and quoted,
As O. W. R.

But notes are now gratis,
Though not on a par;
With cases verbatim,
In O. W. R.

This ends our story,
Adieu Bench and Bar;
We now discontinue,
The O. W. R.

2nd March, 1915.

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