

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Senécal (now by Order of Revivor his widow) v. Pauzé, from the Court of Queen's Bench for Lower Canada, Province of Quebec; delivered 27th July 1889.

Present :

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

In this case their Lordships are of opinion that the judgment of the Court of Queen's Bench ought to be affirmed.

It appears that, on the 31st of January 1880, one Pangman deposited with Senécal 54 debentures of the Laurentian Railway Company of the nominal value of \$500 each as collateral security for the payment of two promissory notes of the same date of \$1,000 each, payable the one 10 months and the other 12 months after date.

On the 11th of November 1880 Pangman died insolvent. His heirs renounced the succession, and the Respondent Pauzé, one of his creditors, was duly appointed curator to his vacant estate.

On the 6th of April 1882 Pauzé tendered to Senécal the sum of \$2,152, the amount then due in respect of the two promissory notes, and demanded a return of the debentures.

Senécal refused to comply with this demand ; Pauzé then brought the present action to recover the debentures, repeating his tender.

The Superior Court (Papineau, J.) gave judgment for the Plaintiff, and ordered Sénécal to restore the debentures, or in default to account for their par value. This judgment was however reversed by the Court of Review on the ground that the tender was insufficient. On appeal, the Court of Queen's Bench, Monk and Tessier, J.J., dissenting, set aside the judgment of the Court of Review, and restored the judgment of the Superior Court, with some variations of no great importance. From this decision Senécal appealed to Her Majesty in Council, and on Senécal's death in October 1887 his widow was substituted as Appellant in his place.

On behalf of the Appellant it was argued that the judgment under appeal ought to be reversed and the action dismissed on two grounds.

In the first place, it was contended that the tender was insufficient, and that, consequently, the action could not be maintained.

In dealing with this point Dorion, C. J., observes that this defence was not pleaded, and that the Court of Review decided a question which was not in issue. In these observations their Lordships concur.

The learned Counsel for the Appellant relied upon Article 1975 of the Civil Code of Lower Canada, which provides in reference to a thing pledged as security for a specific debt that " If another debt be contracted after the pledging of the thing, and become due before that for which the pledge was given, the creditor is not obliged to restore the thing until both debts are paid." In connection with this Article they pointed out that it was established in evidence, and not, in fact, disputed, that other

debts had been contracted and did become due during the currency of the promissory notes, and they argued that it was incumbent on Pauzé to tender a sum sufficient to cover the amount of this indebtedness, as well as the principal and interest secured by the promissory notes. In this view their Lordships cannot agree. As the learned Chief Justice observes, Pauzé complied strictly with the terms of the contract of deposit by tendering the amount due in respect of the promissory notes. Senécal, no doubt, might have claimed to hold the debentures until both debts were paid if he had been prepared to restore the debentures. It appears, however, that he had either parted with them already or was fully resolved at the time to treat them as his own property; he had no intention of restoring them in any event. In these circumstances, though he alleged that other sums were due to him from Pangman's estate, he did not set up by way of defence the right which Article 1975 gives to the holder of a pledge. Obviously he could not have done so honestly.

The first ground of appeal therefore fails.

In the next place it was contended that Pangman had come under a contract to sell 48 of these debentures for \$1,400 to one Greene, who was engineer-in-chief of the Laurentian Railway during its construction; that Greene had transferred his rights to Senécal for valuable consideration; and that Senécal was consequently entitled to hold all but six as his own, giving credit for their stipulated price. The balance of Senécal's claims on Pangman's estate might be set off against the remaining six debentures.

The facts upon which this contention was founded are as follows.

The Laurentian Railway Company was incorporated by Act 36 Vict., cap. 44, of the

Legislature of Quebec, for the purpose of constructing a railway about 15 miles long in the Province of Quebec. The Company was authorized to issue debentures, hypothecating its property and revenue to the extent of \$300,000. In 1876, Pangman being then President and one Bellefeuille being Secretary of the Company, debentures to that amount were issued in order to provide funds for the construction of the railway. The debentures were secured by a trust deed, which gave the holder or holders of debentures to the value of \$50,000 the right to set the trustee in motion in case of default on the part of the Company.

In 1878 the line seems to have been completed and in working order, but the receipts were certainly not more than sufficient to pay the working expenses, and the credit of the Company was at a very low ebb.

On the 13th of September 1878 the following document was signed by Pangman and the other persons whose names are subscribed to it:—

“ We, the undersigned, hereby agree to accept from N. H. Greene the amount set opposite our respective names, in full payment for all salaries and services in connection with the Laurentian Railway; we agree to deliver to said Greene all Laurentian Railway debentures received from said Company, and transfer all shares of stock in said Company held by us on payment of the respective amounts shewn opposite our respective names herein below:—

Names.	Amounts of Debentures.	Amount of Cash to be paid.	Signature.
J. H. Pangman -	\$ 24,000	\$ 1,400 00	J. H. Pangman.
Hon. J. A. Chapleau -	20,000	1,400 00	J. A. Chapleau.
P. S. Murphy -	16,000	1,600 00	P. S. Murphy.
E. L. de Bellefeuille -	16,000	1,000 00	E. L. de Bellefeuille.
N. H. Greene -	—	—	—

“ In the above arrangement I waive my claim for all other debentures that may be due me, as well as any claim for travelling expenses or otherwise, and do hereby transfer the same to Mr. N. H. Greene, without, however, any guarantee as to amount or legality of my aforesaid claim.

“ P. S. MURPHY,

“ 13th Sept. 1878.

“ Montreal, 13th Sept. 1878.”

At the trial Senécal's Counsel resisted, and resisted successfully, every attempt that was made on the part of the Plaintiff to explain the circumstances under which this document was executed, and the purpose for which it was placed in Greene's hands.

It does not appear that Greene took any action upon the document until March 1882.

On the 13th March 1882 a conditional agreement was made between the Laurentian Railway Company, of which Senécal was then President, and the Canadian Pacific Railway Company, for the purchase by the latter of the Laurentian Railway, in consideration of the Canadian Pacific Company redeeming the \$300,000 debentures of the Laurentian Railway Company.

About this time Greene seems to have called upon Murphy and Bellefeuille, two of the persons who subscribed the document of September 1878, to transfer their debentures for the sums therein mentioned. They both refused to do so, and no proceedings were taken to enforce the claim. About the same time Greene wrote upon the document an acceptance in the following terms, “ I “ accept the above agreement, N. H. Greene,” and upon the 10th of April 1882, by a memorandum on the document, he purported to assign for value his rights under it to Senécal.

The conditional agreement for the purchase of the Laurentian Railway was confirmed by the Act 45 Vict., c. 19, which received the Royal assent on the 12th May 1882.

Treating the document of September 1878 as an offer by Pangman to sell \$24,000 debentures of the Laurentian Railway Company to Greene for \$1,400, Dorion, C. J., observes that the acceptance by Greene was written long after Pangman's death, and never notified to Pangman, but only to the curator of his estate, after the institution of this action. His conclusion was that no contract binding the estate could then be formed, first, because Pangman was dead, and secondly, because his estate was insolvent.

The learned Counsel for the Appellant argued that no formal acceptance by Greene was required, because the agreement was proved to have been executed at his request. They contended that so long as the debentures, the subject of the agreement between Pangman and Greene, were in the possession of Pangman or his legal representatives, it was open to Greene or his assignee, at any time however remote, to enforce specific performance of the agreement, though admittedly at best a unilateral contract, and differing from a "simple sollicitation" merely by reason of its having been executed at Greene's instance.

Upon this point their Lordships do not think it necessary to express any opinion, beyond saying that the passages from modern French writers cited by the learned Counsel for the Appellant—passages which are certainly not easy of application or altogether free from perplexity—have not convinced them that there is any error or oversight in the conclusion of the learned Chief Justice, who prefaces his opinion by observing that "the law applicable to the facts established in the case does not admit of any controversy."

Their Lordships, however, are disposed to take a somewhat different view of the document in question.

Having regard to the condition of the Laurentian Railway Company at the time, the position of the persons who signed the document, the nature of their claims, and the terms of the document itself, and not perhaps quite overlooking the anxiety displayed by Senécal at the trial to exclude everything which could throw light upon the circumstances under which it was executed, their Lordships cannot resist the conclusion that the document of September 1878 is not to be regarded as an unilateral agreement binding the signatories for an indefinite time to sell their debentures to Greene at a certain price, but that it was an arrangement made between persons having a common interest in the Laurentian Railway Company for the purpose of defining and limiting their respective claims against the Company, and that it was placed in Greene's hands in order to facilitate some financial operation in regard to the railway which was then on foot or in the immediate contemplation of the parties, and intended for their common benefit.

If this be the true view it appears to their Lordships that it was not competent for Greene to make use of the document contrary to the real intention of the parties, and to treat it as an agreement for sale of which he might avail himself for his own benefit whenever he chose. The second ground of appeal therefore fails also.

It was contended, lastly, by the learned Counsel for the Appellant that the judgment under appeal is wrong in treating the debentures as worth their par nominal value.

It was said that the Respondent himself in these very proceedings originally estimated them at 50 per cent. of their nominal value, and that before the sale to the Canadian Pacific Company

they were certainly not worth so much. All this is very true. But the question is, not what they were worth then but what would be their value now. There seems to be no reason why they should be taken at less than their nominal value.

It is by no means clear that Senécal did not get their nominal value from the Canadian Pacific Railway Company. He was examined at the trial. He said he sold Pangman's debentures, either to the Laurentian Railway Company or to the Canadian Pacific; he could not remember which. When the sale was made, and what he got for them, he professed to be unable to state. He was asked in so many words whether he sold them for their nominal value. He did not answer in the negative. All he would say was, "I cannot tell for what price I sold them; I cannot say what I got for them. It was mixed up with other transactions."

Besides, if these debentures were now forthcoming they would either be a first charge on the undertaking of the Laurentian Railway or not. In the one case it is obvious that the Canadian Pacific Company would pay the par nominal value rather than submit to a sale of a property which their own Manager says it was necessary for them to buy in connection with their main line. On the other hand, if the effect of the Act 45 Vict., cap. 19, is that the charge on the railway is displaced, the rights of unpaid debenture holders against the Laurentian Railway Company, for what they might be worth, would still remain. There is no reason for assuming that the Laurentian Railway Company would expose themselves to legal proceedings rather than call on the Canadian Pacific Company to carry out the terms of their bargain with them and redeem their outstanding debentures.

In the result their Lordships are of opinion that the appeal fails on every ground.

They will, therefore, humbly advise Her Majesty that the appeal ought to be dismissed. The Appellant will pay the costs of the appeal.
