O. L. KNUTSON (DEFENDANT) ..... APPELLANT;

AND

THE BOURKES SYNDICATE AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

1941
* March 19, 20.
* June 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Money had and received—Demand (in good faith) of further payment than what is owing—Circumstances of practical compulsion—Payment under protest—Right of payer to recover back.

Defendant held certain lands subject to an option and an agreement of sale thereof to plaintiffs. Under the written terms, upon payment of the consideration therein set out, plaintiffs were to get title to the lands freed from a certain interest therein held by another person, which interest defendant had later acquired. Defendant, claiming that there had been an understanding that plaintiffs would assume the discharging of said interest, insisted, when plaintiffs were making payments, upon additional payments being made to him to cover it. Plaintiffs, who had entered into an agreement requiring for its fulfilment a transfer of the lands to a company, and were concerned to protect their position and secure title, made the additional payments, but, so they alleged, under protest; and sued to recover them back.

Held, that defendant had no right to said additional payments; that they were made under protest and under circumstances of practical compulsion; and (even though defendant's demand was made in the belief that he had a right to them) the plaintiffs were entitled to judgment for repayment of them with interest. *Shaw* v. *Woodcock,* 7 B. & C. 73; *Smith* v. *Sleap,* 12 M. & W. 585; *Parker* v.

* PRESENT:—Duff C.J. and Rinfret, Crocket, Kerwin and Taschereau JJ.

(1) [1923] S.C.R. 681. (2) [1932] A.C. 318.

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Great Western Ry. Co., 7 M. & G. 253; *Wakefield* v. *Newbon*, 6 Q.B. 276; *Close* v. *Phipps*, 7 M. & G. 586; *Fraser* v. *Pendlebury*, 31 L.J., N.S., C.P. 1; *Great Western Ry. Co.* v. *Sutton*, *L.R.* 4 H.L. 226, and *Maskell* v. *Horner*, [1915] 3 K.B. 106, cited.

APPEAL by the defendant Knutson from the judgment of the Court of Appeal for Ontario (1) allowing, as against said defendant, the appeal of the plaintiffs from the judgment of Greene J. dismissing the action. The action was brought to recover repayment of certain sums which plaintiffs claimed had been unlawfully demanded and received by defendant and had been paid by plaintiffs under protest and without prejudice to their rights under certain agreements. In the Court of Appeal it was adjudged that plaintiffs recover the said sums with interest.

The material facts of the case are sufficiently set out in the reasons for judgment in this Court now reported and in the reasons for judgment in the Court of Appeal.

The appeal to this Court was dismissed with costs.

H. F. Parkinson K.C. for the appellant.

J. R. Cartwright K.C. for the respondents.

THE CHIEF JUSTICE—I think the appeal should be dismissed. The law is stated by Willes J. in *Great Western Railway Co.* v. *Sutton* (2):—

> I must say I have always understood that when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received. This is every day's practice as to excess freight.

I agree that in the circumstances this principle applies.

I prefer to reserve my opinion in respect of the rights of a person who has paid taxes under an invalid assessment. In such cases there may be special considerations to be taken into account which do not arise here.

The judgment of Rinfret, Crocket, Kerwin and Taschereau JJ. was delivered by

KERWIN J.—This action, brought by all the members, except O. L. Knutson, of Bourkes Syndicate, against Knutson and one Nils Olson, was dismissed by the trial

(1) [1940] Ont. W.N. 442; [1940] 4 D.L.R. 641.
(2) (1869) L.R. 4 H.L. 226, at 249.

judge. The Court of Appeal for Ontario gave judgment for the plaintiffs against Knutson, who now appeals. The action is to recover certain payments made by the Syndicate to Knutson and claimed to have been made under such circumstances that they were not voluntary. As these payments were made to Knutson alone and Olson received no benefit from them, the action as against the latter stands dismissed, and we are not concerned with his position in the matter except as it is necessary to state it for a proper understanding of the point to be determined.

As administrator of an estate, Olson was the registered owner of certain lands recorded in the Office of Land Titles at Haileybury, subject to a caution registered by F. L. Smiley (now His Honour Judge Smiley of the County Court of Carleton), who claimed by the caution to be entitled to a fifteen per cent. interest in the lands. On July 4th, 1936, in consideration of one thousand dollars, Olson granted by an agreement under seal to H. Fred Knutson (a member of the Syndicate and a brother of the defendant O. L. Knutson) an option to purchase these lands free of encumbrance, including the caution. Judge Smiley agreed to this option agreement. H. Fred Knutson was acting on behalf of the members of the Bourkes Syndicate and subsequently executed a declaration of trust to that effect, a syndicate agreement having in the meantime been drawn up and executed.

On September 16th, 1936, an agreement under seal was entered into between Olson, H. Fred Knutson and the Syndicate. That document recites the intention of the Syndicate to sell all its right, title and interest under the option agreement to a company to be formed, the registration of the caution, and that Judge Smiley was entitled thereunder to an undivided fifteen per cent. interest in the lands. In it Olson agreed

> as soon as possible to obtain and deliver to the said Company to be formed a properly executed transfer in fee simple under The Land Titles Act (Ontario) of the lands mentioned in the said option agreement, *together with a withdrawal of the said caution.*

H. Fred Knutson and the Syndicate agreed to pay Olson, upon the delivery of the transfer, the sum of five thousand dollars and to cause to be issued and delivered to him a specified number of shares of the capital stock of the proposed company. It was agreed that until a proper transfer

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should be delivered, the five thousand dollars paid, and the shares issued and delivered, the option agreement should remain in full force and effect.

By an agreement dated April 13th, 1937, Olson sold and the defendant O. L. Knutson bought the same lands subject to the rights of the other parties to the option agreement of July 4th, 1936, and to the agreement of September 16th, 1936. In this document reference is made to the Smiley caution and it is stated that it was understood and agreed that O. L. Knutson was purchasing Olson's interest in the lands subject to any claim of Judge Smiley. On April 26th, 1937, O. L. Knutson secured a transfer to himself of Judge Smiley's interest.

One would have no difficulty, on perusing these documents, in concluding that the Syndicate was entitled to a transfer of the interests of Olson, O. L. Knutson and Judge Smiley in the lands, upon payment to O. L. Knutson (who had purchased Olson's interest) of the sums, and the transfer of the shares, mentioned in the agreement of September 16th, 1936. There is a dispute as to what occurred when that agreement was drawn and executed but there can be no doubt that O. L. Knutson knew that the Syndicate relied upon the written agreement and always took the position that it was entitled to the transfer of the lands from Olson (or O. L. Knutson) without it paying anything to Judge Smiley for his interest.

Notwithstanding the terms of the agreement of April 13th, 1937, between Olson and O. L. Knutson, the latter relied, as he testifies, upon assurances given him by Olson and H. Fred Knutson that the Syndicate would take care of the Smiley fifteen per cent. interest, and he, having become the owner of that interest, insisted upon being paid an additional fifteen per cent. of the amount that was due under the option agreement of July 4th, 1936, and also upon being paid an additional fifteen per cent. of a further sum when the transaction was finally closed. On the first occasion, the solicitor for the Syndicate made a definite protest, which was written and read at the time of the payment. The position taken by the Syndicate continued unaltered to the knowledge of O. L. Knutson who declined, before the last payment was made, to permit the additional fifteen per cent. to be deposited in trust until the

dispute could be settled. In the meantime, again to the knowledge of O. L. Knutson, the Syndicate had agreed to transfer the lands in question to the new company.

The trial judge has given O. L. Knutson a certificate of character, and, as he had the advantage of seeing Knutson in the witness box, I accept that finding. In my view, however, both payments were made under protest and under circumstances of practical compulsion,—the first to preserve the Syndicate's rights under the option agreement, and the second to secure property of which, in equity, the Syndicate had become the owner upon the execution of the agreement of September 16th, 1936, subject only to its carrying out its part of the bargain.

The judgment below is based upon a previous decision of the Court of Appeal in *Pillsworth* v. *Town of Cobourg* (1). That type of case raises a problem which does not here exist and I prefer to postpone dealing with it until the occasion arises. The appeal may be disposed of on the principles deducible from the following authorities.

In the King's Bench, in *Shaw* v. *Woodcock* (2), Bayley J. states:—

> If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment made by compulsion and may be recovered back. There is no authority to shew that the two things mentioned in argument are required in order to make the payment compulsory. That being the general rule of law it is quite clear that the sum paid to obtain possession of these policies was not a voluntary payment, and that it may be recovered back, unless the assignees had a a right to receive the money.

The two things mentioned in argument and referred to by Bayley J. were, first, that the payment must be made in order to get possession of goods for which the owner has an immediate pressing necessity, and the second was that the claim of lien must be clearly void. Holroyd J. states:—

> Upon the question whether a payment be voluntary or not, the law is quite clear. If a party making the payment is obliged to pay, in order to obtain possession of things to which he is entitled, the money so paid is not a voluntary, but a compulsory payment, and may be recovered back; and if the plaintiff below, therefore, was compelled to make the payment in question in order to get the policies of insurance, whether there was a pressing necessity or not, he has a right to recover it back.

(1) (1930) 65 Ont. L.R. 541. (2) (1827) 7 B. & C. 73.

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In *Skeate* v. *Beale* (1), the Queen's Bench determined that duress of goods was not a ground for avoiding an agreement. In *Smith* v. *Sleap* (2), the Exchequer decided, on February 5th, 1844, that the defendant, who was holding a document and was paid a certain sum without any right to it, could be compelled to repay. On February 12th, 1844, the Common Pleas in *Parker* v. *The Great Western Railway Company* (3), held that certain payments for the carriage of goods, not being voluntary but made in order to induce the railway company to do that which it was bound to do, could be recovered. Then came the decision in the Queen's Bench in *Wakefield* v. *Newbon* (4), which was an action by a mortgagor against the mortgagee's solicitors to recover a sum of money which the defendants had exacted from the plaintiff by refusing to redeliver his title deeds after a reconveyance to him of the mortgaged property on payment of principal and interest, unless the plaintiff would also pay the amount of the defendants' bill of costs. Speaking for the Court, Lord Denman referred to "the principle that money extorted by duress of the plaintiff's goods, and paid by the plaintiff under protest, may be recovered in an action for money had and received" as having been laid down in the Common Pleas, in the Exchequer, and in the Queen's Bench, and stated that the principle must be taken as well-established and generally recognized. Referring to the doctrine in *Skeate* v. *Beale* (1), Lord Denman remarked that "perhaps it was laid down in terms too general and extensive."

On June 4th, 1844, again in the Common Pleas, judgment was delivered in *Close* v. *Phipps* (5), which was a case where the solicitor of a mortgagee, with a power of sale, refused to desist from selling unless the mortgagor would pay expenses with which he was not properly chargeable. Sergeant Talfourd, who was to have supported a rule for a non-suit, admitted that he could not do so after the decision in the *Parker* case (3), and Chief Justice Tindal, speaking for the Court, said that he thought that the instant case was quite as strong as the *Parker* case (3). This decision was followed in *Fraser* v. *Pendlebury* (6), where the action was brought against the mortgagee, and it was held that the payment was not

(1) (1840) 11 A. & E. 983.
(2) (1844) 12 M. & W. 585.
(3) (1844) 7 M. & G. 253.
(4) (1844) 6 Q.B. 276.
(5) (1844) 7 M. & G. 586.
(6) (1861) 31 L.J., N.S., C.P. 1.

voluntary. "There is no difference whether the duress be of goods and chattels or of real property or of the person" (*per* Byles J. at p. 4).

The *Parker* case (1) was approved in *Great Western Railway Co.* v. *Sutton* (2). In *Maskell* v. *Horner* (3), the Court of Appeal determined that a payment under protest made to avoid a distress threatened by a party who can carry the threat into execution is not a voluntary payment and may be recovered if the circumstances justify it in an action for money had and received, as effectively as if the chattels had been in fact seized.

Here the evidence is plain that the payments were made under protest and that they were not voluntary in the sense referred to in the cases mentioned. The circumstance that O. L. Knutson thought that he had a right to insist upon the payments cannot alter the fact that under the agreement of September 16th, 1936, it is clear that he had no such right. In order to protect its position under the option agreement and to secure title to the lands which it was under obligation to transfer to the incorporated company, the Syndicate was under a practical compulsion to make the payments in question and is entitled to their repayment. The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Parkinson, Gardiner & Willis.*

Solicitor for the respondents: *A. V. Waters.*

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(1) (1844) 7 M. & G. 253. (2) (1869) L.R. 4 H.L. 226.
(3) [1915] 3 K.B. 106.