1948

*Mar. 16, 17, 18, 19, 22, 23
*June 25

DOUGLAS LAMONT ROSS (DEFENDANT) ..APPELLANT;

AND

MARIUS H. NECKER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

*Bankruptcy—Trustee—Sale of assets by trustee to one inspector—Securities pledged by purchaser—Money advances made by trustee—Bankruptcy Act, R.S.C. 1927, c. 11, s. 43, 103 (6)—Arts. 14, 1484 c.c.*

The respondent was the president of "La Société Générale des Ponts et Chaussées Limitée", which went into bankruptcy in 1930. The appellant, as trustee, sold the assets of the bankruptcy situated in Jamaica to respondent who was at the time one of the inspectors. The trustee had a general authorization from the inspectors, approved by the Court, to dispose of the assets in Jamaica as he might deem proper. Respondent pledged as security for the payment of the purchase price and for money advances made by the trustee, securities of which some "Rentes Françaises", valued at $22,076.91. Respondent having met with financial difficulties in Jamaica, the assets were liquidated and the operations came to an end. Respondent, then, instituted legal proceedings in which he asked that the agreement of sale be declared null and void and that appellant be condemned to remit the securities pledged. The Superior Court held the agreement null but refused to grant the other conclusions of the action. Both parties appealed and the Court of Appeal held the agreement to be null and void and also that present respondent was entitled to the securties pledged.

*PRESENT: Rinfret C.J. and Taschereau, Kellock, Estey and Locke JJ.

*Held:* As the trustee did not have the permission to do the particular thing which has been done and as the respondent-inspector did not have the prior approval of the Court to purchase (s. 43 and 103 (6) of the Bankruptcy Act), the agreement of sale is therefore null and void.

Art. 1484 of the Civil Code does not apply to the present case.

Appellant must remit the value of the securities pledged after deducting the amount of the advances made, but he cannot be held personally liable as he has acted only in his capacity of trustee.

APPEALS and CROSS-APPEALS from two decisions of the Court of King's Bench, Appeal Side, Province of Quebec (1), the first one confirming (Barclay and McDougall JJ.A. dissenting) the part of the judgment of the Superior Court, MacKinnon J., declaring the agreement of sale between the trustee in bankruptcy and one of the inspectors to be null and void, and the other decision reversing (Barclay and McDougall JJ.A. dissenting) the other part of the same judgment of the Superior Court, refusing to grant the other conclusions of the action viz: to remit to plaintiff the securities pledged.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

*John T. Hackett K.C.* and *L. P. Gagnon K.C.* for the appellant.

*Bernard Bourdon K.C.* for the respondent.

The judgment of the Court was delivered by

Taschereau J.:—The plaintiff-respondent Necker was the president of "La Société Générale des Ponts et Chaussées Limitée", which went into bankruptcy in January, 1930. The appellant Ross was appointed interim receiver, custodian, and finally trustee, and the respondent was appointed one of the inspectors. "La Société" which had its head office in the City of Montreal, performed road building contracts in the Province of Quebec, and had also been engaged in constructing roads and bridges in the Island of Jamaica.

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The Banque Canadienne Nationale had made to "La Society" substantial advances which were secured by Necker personally, who pledged some "Rentes Françaises", having a value of $22,076.91, and also by a transfer by the Company of all amounts that the Government of the Province of Quebec owed for work done by "La Société" in connection with the construction of "Le Boulevard Taschereau", between the southern end of the Jacques Cartier Bridge which spans the St. Lawrence River at Montreal, and the Village of Laprairie.

The financial situation of "La Société" in Jamaica was critical. An investigation of the Company's assets and obligations was made by Ross in January, 1930, and it was found that the financial needs of "La Society" in Jamaica were immediate. Ross, therefore, before he became trustee and while still only custodian, sent £1,000 to Jamaica on the 30th of January, 1930, and he authorized the representative of "La Société" in Jamaica, Mr. W. C. MacDonald, to open and operate a new account in which the money was deposited. Ross reported the whole situation to the inspectors, and on the 7th of March, 1930, they instructed him as follows:—

> To proceed to Jamaica as rapidly as possible, to there judge the situation by himself and take on the spot all decisions, steps and actions which in his absolute discretion may appear proper; specifically empowering him to enter into any and all agreements with the Government of Jamaica or any department thereof, or the Admiralty, with any and all Banks, Trust Companies, Corporations, partnerships, firms or persons whatsoever, whether by way of sale, purchase, guarantee, exchange, or otherwise whatsoever and on such terms, stipulations, conditions and for such considerations as he in his absolute discretion may deem advisable, and, but without in any way limiting the generality of the foregoing, specially to dispose of all or any part of the undertaking of the Société in Jamaica to such person or persons as he may deem proper for such consideration and terms as he may judge proper, further authorizing the said trustee to do all and every of these acts, things and deeds either personally or by representatives and attorneys duly appointed by him, and generally and without limitation to do, perform and execute or cause to be done, performed and executed in Jamaica and/or in reference to the Société's Jamaica contracts and undertakings and commitments every act, agreement and transaction that the company itself might do if not in bankruptcy either through its Board of Directors or in annual or special general meeting of shareholders.

This resolution of the inspectors was approved by the Court on the 8th of March, 1930, Mr. Justice Patterson giving the following order:—

DOTH GRANT said Petition, DOTH CONFIRM RATIFY AND APPROVE the above mentioned resolution of Inspectors, and DOTH AUTHORIZE the Trustee to proceed to Jamaica and to deal with and act in connection with the business, assets and affairs of the Company in the manner authorized by the said resolution, and that all such costs as the Trustee may incur shall form part of the expenses of his administration as such Trustee; the whole with costs to follow.

On the 10th of March of the same year, Ross and Necker left for Jamaica and on arriving there, Necker was obviously anxious that it should not be known that "La Société" was in financial difficulties or that Ross had been appointed trustee in bankruptcy. It was then decided that Ross would sell the Jamaica business to Necker and a contract was negotiated and executed in Jamaica the 26th of March, 1930. This contract stipulates that Ross agrees to sell and Necker agrees to purchase all the assets, claims, contracts, agreements of the Company in Jamaica, including any moneys owing to them or on deposit with any bank, together with the full right and benefit accruing under any contract, agreement or claim and all chattels, effects, chose in action, and things of the Company in Jamaica, for the sum of £6,000 sterling. It was further stipulated that the payment of this sum would not be required before the 31st day of December, 1930, and in the meantime, and until payment, Ross held a lien on all shares held by the purchaser in the Company. Necker agreed in addition, to assume and pay all liabilities of the Company in connection with the business in Jamaica, and was entitled to the absolute and exclusive use in Jamaica of the name "La Société Generale de Ponts et Chaussées Limitée".

In addition to the first advance of £1,000 already mentioned, Ross, in order to allow the Jamaica enterprise to meet its financial obligations, made further substantial advances until November, 1930, and with which I shall deal later more extensively.

When Necker came back from Jamaica in October, 1930, he signed with Ross a new agreement, always under the same authority. It had been agreed on the 26th of March, 1930, that Ross and Necker would execute any further document which might be required for more effectually giving effect thereto and, we read in the preamble of this new agreement of the 7th of October, 1930, the three following paragraphs:—

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Whereas said agreement of 26th March, was entered into on the expectation that the securities pledged by the Purchaser with the Banque Canadienne Nationale as collateral security would be shortly released, which expectation, however, has not materialized owing to the refusal of the Minister of Roads of the Province of Quebec to make the expected payment on account of the claim of La Société against the Government; and,

Whereas, furthermore, since that time the Vendor has made further advances and commitments for the benefit of the enterprise of La Société in Jamaica and for the benefit of the Purchaser; and,

Whereas it therefore becomes necessary both under the authority of the resolution of the Inspectors ratified and approved by the Superior Court on the 8th day of March, 1930, and under the terms of the agreement of the 26th day of March itself, to amplify, correct and more fully set forth the agreement between the Parties:

It was stipulated that the payment of the sum of £6,000 would not be required from Necker until the claim of Ross es qual. against the Quebec Government that was then before the courts, amounting to $720,000 and which had been transferred to the Banque Canadienne Nationale, should be settled either by final judgment or by amicable agreement and paid, and it was understood that this amount of £6,000 would become due and exigible only thirty days after payment of the said claim. It was also agreed that notwithstanding the fact that Necker was allowed control and possession of "La Société's assets in Jamaica, he would become owner and proprietor of these assets, only after paying the purchase price of £6,000 sterling, and after reimbursing all advances made by Ross es qual. whether prior or after the 7th of October, 1930. Necker also assumed and undertook to pay all the liabilities of "La Société" in connection with the Jamaica business, and Necker further transferred as collateral security to Ross es qual. the following assets:—

(*a*) All the rights, title and interest of the Purchaser in and to certain Railway equipment, situated in the Province of Quebec, or elsewhere, and now in the possession of the Vendor, in his quality of trustee.

(*b*) All his rights, title and interest in and to that certain Marmon convertible coupe, (serial No. E. 3 T. A. 95, motor No. T.15465) sold to the Purchaser under conditional sales contract and on which the Vendor has made certain advances to allow payments to be made to the Vendor of the said motor car,

(*c*) All the equipment and machinery brought from the P. Lyall & Sons Construction Company Limited, in liquidation, payment of which has been guaranteed by the Vendor.

(*d*) All the securities pledged by the Purchaser with the Banque Canadienne Nationale as collateral security; these securities being now pledged to the Vendor as sub-collateral security, it being agreed that if, as and when, the said securities or any portion of them are released by the Banque Canadienne Nationale, the said securities so released shall be transferred to the Vendor and the Purchaser hereby undertakes to instruct the Banque Canadienne Nationale accordingly, provided always that upon payment of the full sum of Six Thousand Pounds Sterling (£6,000) and upon the reimbursement of all advances made by the Vendor either as trustee or personally or both, the Vendor's lien shall become extinguished and all collateral security shall be returned to the Purchaser, but failing payment of the purchase price of Six Thousand Pounds Sterling (£6,000) and the reimbursement of advances made, as herein stipulated, the Vendor will be entitled without further notice to the Purchaser not only to retake possession of the Jamaica enterprise but to realize upon the collateral security and all other security mentioned in this contract to the extent of his claim against the Purchaser, either in his quality of trustee or personally as the case may be or both.

After the signing of this contract, Necker made several other trips to Jamaica, where he met with financial difficulties and others, and the assets were then liquidated and the operations came to an end.

In 1938, Necker instituted legal proceedings against the appellant in which he asked that the two contracts signed by the parties on the 26th of March, 1930, and the 7th of October, 1930, be declared illegal, null and void. He also prayed that defendant Ross be condemned to remit the "Rentes Françaises" which had been pledged to the Banque Canadienne Nationale and subsequently to him, that he be condemned equally to remit 500 tons of industrial rails as well as the Marmon automobile and the Gotfredson truck, and finally that if these securities were not remitted to him within fifteen days, that the defendant be condemned personally as well as in his quality of trustee, to pay the value of these securities forming a total sum of $88,364. The Honourable Mr. Justice MacKinnon who heard the case, decided that the two agreements were null and void, but refused to grant the other conclusions of the action.

Both parties appealed (1) from this judgment, Necker to obtain the conclusions that had been refused by Mr. Justice MacKinnon, and Ross appealed against that part of the judgment of the trial judge which declared null and

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void the two contracts entered into. Necker's appeal was allowed; the court ordered Ross to pay $22,076.91, the product of the sale of the "Rentes Françaises"; $2,500 value of the Gotfredson truck, and the value of the Marmon automobile, $1,500, less $1,354.50 amount disbursed by the defendant, leaving a balance of $165.50. Messrs. Justices Barclay and Errol McDougall were dissenting and thought the appeal should have been dismissed. Ross' appeal was dismissed, Barclay and McDougall, JJ. also dissenting. Ross es qual. now appeals to this Court from both judgments, and Necker entered cross-appeals to obtain a personal condemnation against Ross.

I will deal first with the validity of the two contracts that have been entered into.

It will be remembered that Necker was an inspector of the bankrupt estate, and that, under the contracts of the 26th of March and of the 7th of October, he was also the purchaser of the Jamaica assets. It is alleged that in view of section 103, para. 6, of the *Bankruptcy Act*, he did not have the capacity to purchase. This section reads as follows:

> No inspector shall, directly or indirectly, be capable of purchasing or acquiring for himself or for another any of the property of the estate for which he is an inspector, unless with the prior approval of the court.

It is further argued that the Resolution of the 7th of March, 1930, approved by Mr. Justice Patterson the next day, is not "prior approval of the court" within the meaning of the section. The approval has to be a specific approval.

It is also submitted that the trustee did not have the legal power to dispose of this Jamaica property in favour of Necker, because he had not obtained the required permission of the inspectors of the estate, as required by section 43 of the *Bankruptcy Act* which says:

> 43. The trustee may, *with the permission in writing* of the Inspectors, do all or any of the following things:—
>
> (*a*) sell all or any part of the property of the debtor, including the goodwill of the business, if any, and the book debts due or growing due to the debtor, by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels.

Paragraph 2 of the same section reads:

> The permission given for the purposes of this section shall not be a general permission to do all or any of the above mentioned things, but shall only be a permission to do the particular thing or things or class of thing or things which the written permission specifies.

Ross contends that under section 43(*a*) he did not need the ratification of the Court but only the authorization of the inspectors in order to have the capacity to sell this property to Necker and give him a good and valid title. It is to make absolutely sure that his powers were beyond question that he sought to obtain the approval of the competent Court. It is argued that the inspectors had authorized the trustee "specially to dispose of all or any part of the undertaking of "La Société" in Jamaica to such person or persons as he may deem proper, for such consideration and terms as he may judge proper." The inspectors learned what the trustee had done, asked for a copy of the contract, and it is submitted that tacitly at least, they approved this contract. At no time, was the contract of March the 26th or that of October the 7th, which was incidental to the first, criticized by the inspectors.

It would appear that the contract of the 26th of March was submitted to a meeting of the inspectors, on the 10th of April, 1930, but it was merely decided to forward copies of the agreement to the inspectors and to the members of the consulting committee "for their perusal". As to the agreement of October the 7th, it was first mentioned to the inspectors only at the meeting of July the 2nd, 1931, which is nine months after its signature. Nowhere does it appear that the *written permission* of the inspectors has been given to the trustee to sell this undertaking and, apart from this general authorization, there is no permission to do the *particular thing* which has been done, as required by section 43(2) of the *Bankruptcy Act*. The same remark may be applied as to section 103(6) and we see no *prior approval* of the Court authorizing Necker who was an inspector to purchase the Jamaica assets. The general authorization cannot be construed as being a permission to Necker to buy these assets of the bankrupt company.

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I entirely concur with what Mr. Justice MacKinnon says in his judgment:—

> It seems to the Court almost futile to argue that by the resolution of the Inspectors of the 7th of March, the defendant was authorized to sell all the assets of the Company in Jamaica to one of the Inspectors.

The prohibitions found in sections 43 and 103 of the *Bankruptcy Act* are imperative, and under the authority of our *Civil Code,* section 14, they import nullity, although such nullity be not therein expressed.

In *Montreal Trust Company* v. *Canadian National Railway Company* (1), Lord Russell of Killowen said:—

> Their Lordships, however, agree with the principle there laid down, that *prohibition* of a contract by statute *renders the contract void and of no effect.*

It has been argued that the law, as found in the *Bankruptcy Act,* derives from the *English Bankruptcy Act,* section 316, which is now section 347 and which reads as follows:—

> Neither the trustee nor any member of the committee of inspection of an estate shall, while acting as trustee or member of such committee, except by leave of the Court, either directly or indirectly, by himself or any partner, clerk, agent, or servant, become purchaser of any part of the estate. Any such purchase made contrary to the provisions of this rule may be set aside by the Court on the application of the Board of Trade or any creditor.

This section of course cannot apply to the present case for in that section it is clearly stated that only the Board of Trade or a creditor may attack a sale made in violation of the law. There is no such limitation in the *Bankruptcy Act.*

Section 1484 of the *Civil Code* has also been cited and an argument has been made to show that Necker himself cannot invoke and ask for the nullity of both contracts. This section 1484 is to the effect that certain persons cannot become buyers either by themselves or by parties interposed, and the article further says that the incapacity declared in the article cannot be set up by the buyer, but that it exists only in favour of the owner and others having an interest in the things sold. The appellant cannot invoke this article of the Code to support his contention. The Civil Code specially specifies who may attack the sale,

(1) [1939] A.C. 613 at 627.

and if it were not for the last paragraph of the article, all interested parties would be entitled to have the sale set aside.

Before examining the results that flow from the nullity of this agreement to sell, it must be remembered that "La Société Générale des Ponts et Chaussées Limitée" was indebted to the Banque Canadienne Nationale and this debt, up to $50,000, had been guaranteed by Necker personally. Moreover, Necker's guarantee was secured by a substantial amount of "Rentes Françaises", which were his personal property. To further secure the debt, "La Société Générale des Ponts et Chaussées Limitée", who was constructing for the Provincial Government of the Province of Quebec, the highway known as the "Boulevard Taschereau", transferred a claim which it had against the Quebec Government, and on the 27th of August, 1929, this transfer was accepted by the Honourable J. E. Perrault, then Minister of Highways.

The Provincial Government and "La Société Générale des Ponts et Chaussées Limitée" did not agree as to the final amount which was to be paid to the contractor, and after the matter had been fought before the courts, a final amount was determined and paid to the Banque Canadienne Nationale by the Quebec Government. After certain deductions had been made, a cheque for $57,277.97 was sent to the bank. On the 16th of March, 1936, the bank opened an account in the name of D. L. Ross es qual. and credited the account for that amount. At that moment "La Société Générale des Ponts et Chaussées Limitée" owed the Banque Canadienne Nationale $43,804.44, and the amount of the cheque received from the Provincial Government during the first days of March, 1936, was therefore sufficient to pay all the indebtedness of "La Société Générale des Ponts et Chaussées Limitée", to the Banque Canadienne Nationale.

The Banque Canadienne Nationale had opened an account in the name of "gérant in trust re H. Necker, Société Générale des Ponts et Chaussées Limitée", and being the holder of the "Rentes Françaises", credited the account with the interest in 1932, and on the 1st of December, 1932, sold 6,750 francs (rentes) which realized $5,267.43 making a total with interest of $6,102.88. In

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1933, $312.60 interest were added, and on the 30th of October, 1933, 12,000 francs (rentes) brought in an additional $15,676.86 so that on that date, after having deducted certain debits, this account had a credit of $22,076.91. *On the 30th of April,* 1936, after the amount of $57,277.97 had been received from the Provincial Government, the bank applied this amount of $22,076.91 to the debt owed by "La Société Générale des Ponts et Chaussées Limitée", which was then $43,804.44 leaving a balance due of $21,727.53. The interest amounting then to $13,995.06 was compromised at 50 per cent, leaving a balance to be paid of $28,725.06. This amount of $28,-725.06 was paid out of the proceeds of the Government cheque, and an amount of $28,552.91 was *paid to* Ross es qual.

It has been submitted and, I think established, that Ross es qual. has made substantial advances to Necker personally in an amount of $18,783.08. It was to allow Necker to continue the work in Jamaica and to obtain new contracts that these advances were made, and on many occasions he has acknowledged his personal liability, and his conduct and his dealings in Jamaica all tend to show that these advances were not made to the former bankrupt company but to him personally. After the first trip he made with Ross in Jamaica in March, 1930, the business became Necker's business, and it is because he has assumed personal liability for these advances, that he transferred to the appellant es qual. all, the assets which he is now claiming. The amount of these advances which has been established to my satisfaction at $18,783.08 has not been seriously challenged, and it was due by Necker to Ross es qual.

If there were no other features in this case, it would follow that Necker, if the contract is void *in toto,* would be entitled to claim $22,076.91, value of the "Rentes Françaises". He merely guaranteed the debt due to the bank by "La Société", and the "Rentes Françaises" were transferred only as collateral security. The money payable by the Provincial Government to the bank was an asset of the principal debtor, and when the bank was paid, the securities were freed. The payment by the Provincial Government discharged Necker as surety, and therefore,

the sum of $22,076.91 held in trust by the bank, in lieu of the "Rentes Françaises", is Necker's property. The bank, in view of the authorization given by Necker, had the right to sell some of the "Rentes Françaises", and receive payment of those which had matured, but it never applied this money to the debt due by "La Société". It was kept "in trust" in a special account, obviously because the bank expected that a sufficient amount would be paid by the Provincial Government to cover the total liability of the principal debtor. Ross es qual. having received this amount which was Necker's property, is paid and his claim against Necker is extinguished. Necker would also be entitled to claim $2,500 value of the Gotfredson truck, and the value of the Marmon automobile $1,500 less $1,334.50 paid by Ross es qual., being the balance of the purchase price, leaving an amount of $165.50, and making a grand total of $24,742.41. On these two last items, I fully agree with the Court of Appeal (1) that these two items are due to Necker, but any amount which have been credited to Necker in respect of these two automobiles, should be added to the amount of the advances, viz: $18,783.08, if they are not already included.

It is true that Ross es qual. never had the possession of the "Rentes Françaises", and Necker therefore cannot claim these "Rentes". As the learned trial judge said, the plaintiff cannot ask that defendant be condemned to return securities which never came into his hands. But I do not think that this reason is sufficient to dismiss this part of the action. Ross es qual. never had possession nor the control of the "Rentes Françaises", but he received the value of these "Rentes", and this is precisely what is claimed alternatively in the action.

It is arguable that the contracts are not null *in toto*, and that the guarantees held by Ross es qual. have been legally transferred, but I do not think it necessary to determine this point. Whether the contract is null *in toto* or only partially void, does not affect the result of the case. If the transfer is valid, the money received by Ross es qual. was paid to reimburse the advances made by him to Necker, and if it is invalid the same result follows.

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But Ross es qual. has been overpaid. He received $24,742.41 while he should have received only $18,783.08, amount of the advances made, leaving a balance of $5,959.33 which he owes es qual. to Necker with interest at the rate of 5 per cent since the service of the action. I do not think any valid reasons have been given to hold Ross personally liable as he has acted only in his capacity of trustee.

The appellant has lodged two appeals. The first one from the judgment of the Court of King's Bench No. 2107 (1), confirming the judgment of the trial judge, and the second one from the same court, No. 2111 (1), allowing the appeal of the present appellant. It follows that the first appeal from the judgment declaring null and void the alleged sale of the Jamaica assets should be dismissed with costs and that the second, in respect of the "Rentes Françaises" and the two automobiles, should be allowed in part with costs. The costs of printing the case and the factums for the purpose of these two appeals here, should be apportioned one-third in the first appeal, and two-thirds in the second. The judgment of the trial judge should therefore be modified by adding that the plaintiff will have judgment for the sum of $5,959.33 plus interest at the rate of 5 per cent since the service of the action. From this sum of $5,959.33, however, should be deducted any credit given to Necker for the two automobiles, if not already included in the sum of $18,783.08, and if the parties cannot agree as to the exact amount, the matter may be spoken to before the Court upon the application of either party. The plaintiff will be entitled to his costs in the Superior Court and to the costs of both appeals in the Court of King's Bench. The cross-appeals are dismissed with costs.

Solicitors for the appellant: *Hackett, Mulvena and Hackett.*

Solicitors for the respondent: *Beaulieu, Gouin, Bourdon and Beaulieu.*

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