Privy Council Appeal No. 31 of 1914.

Dame Alma de St. Aubin and another - - *Appellants,*

v.

George Azarie Binet - - - - *Respondent.*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY 1914.

Present at the Hearing:

LORD MOULTON. SIR CHARLES FITZPATRICK.
LORD SUMNER. SIR ARTHUR CHANNELL.

[*Delivered by* LORD SUMNER.]

Madame Georges St. Pierre sues in her maiden name of de St. Aubin for a declaration that an instrument, which she made in favour of the defendant, dated 27th August 1909, is void and should be annulled. Both before the Trial Judge and in the Court of King's Bench for the Province of Quebec (Cross, J. dissenting), she failed.

At Fraserville, in the district of Kamouraska, a business was carried on in the name of Georges St. Pierre et Cie., which belonged to this lady, but was managed for her by her husband. It is not clear what it was, though it is vaguely described as that of contractors. Monsieur St. Pierre held a power of attorney from his wife of limited scope, dated 20th

September 1884, and on 31st January 1892 she made a declaration, as a married woman with separate estate, that she was solely responsible for the purchases, sales and transactions of her husband on her behalf under the signature of "Georges St. Pierre et Cie."

On 11th February 1909 Georges St. Pierre et Cie. and six other firms or persons formed a company called the "Fraserville Navigation Company, Limited," of which Georges St. Pierre was to be sole manager, and it was duly incorporated. Its capital was five hundred shares of one hundred dollars each, and in the first instance $4,900 were subscribed, $2,000 by Georges St. Pierre et Cie., and the rest by four other parties. This company owned the S.S. *Canada*, and traded or tried to trade with her.

Within three or four months the Company was in want of money for the payment of sundry debts. Georges St. Pierre, as manager of the company, applied to the defendant on its behalf for a loan of $12,000 dollars, and in the result money was procured for its necessities in the following way. On 25th August 1909, the plaintiff's husband, signing on her behalf as Georges St. Pierre et Cie., made a promissory note at four months, payable to the order of the defendant, for $12,000, and the defendant endorsed it payable to the order of La Banque Nationale, which bank he had ascertained to be willing to discount paper endorsed by him. Both Georges St. Pierre et Cie. and the Fraserville Navigation Company had accounts with this Bank. On the same day the note was discounted and the proceeds were credited to the account of Georges St. Pierre et Cie., and were then all applied by various withdrawals to the purposes of the company. In a few weeks the money was exhausted. The defendant was informed that the money was

wanted for the purposes of the Company, but he took no part in its disbursement.

On the same 25th August 1909 the company passed a resolution granting to Georges St. Pierre et Cie. a lien on the *Canada* in consideration of the sum thus furnished to the company by that firm, and on the following day a mortgage of the ship for $12,000 was granted to the plaintiff personally, which she registered on 17th September, and subsequently transferred to the defendant, but not until 12th March 1910.

Having thus secured herself, the plaintiff proceeded to secure the defendant. She was principal debtor to the Bank as holder of her promissory note, and the defendant had endorsed it and had made himself liable to the Bank as her surety. Though the object of borrowing the money and its destination were known to all parties, this fact did not alter the relations between the plaintiff and the defendant, nor were they modified by the rights which the plaintiff had as a general creditor against the company. For the purposes of this case, as between the plaintiff and the defendant, the rules of law which govern the relations of co-sureties *inter se*, or the liabilities of sureties after dealings between principal debtor and principal creditor, are neither applicable nor afford any useful analogy.

On 27th August 1909 the plaintiff signed and gave to the defendant an instrument called a "vente à réméré." Its terms are in some respects special and must be scrutinised. Its nature and use are well-known. Though in form a contract of sale it operates when so intended as a security, and the contract is subject to be annulled by redemption. It is common ground, that in the present case it was only intended to be a security. The question here is for what was

it a security? and the answer to this question is the crux of this appeal. Upon it depend the plaintiff's claim to have the security annulled as spent and the defendant's claim to retain it and have the benefit of it as a continuing security.

The condition of redemption in this instrument of "vente" is thus expressed:—

"Enfin cette vente est faite avec réserve et "faculté de la part de la dite Dame venderesse "de rémérér les prémisses sus-vendues d'hui en "deux ans, en par la dite Dame venderesse "remboursant le dit acquéreur du dit prix de "vente avec intérêt au taux de six pour cent "par année."

The "prix de vente" is named in the earlier part of the instrument as $12,000.

The plaintiff, "la dite Dame venderesse," has never paid to the "acquéreur," the defendant, the named sum of $12,000, but she pleads that the "vente a réméré" was given to secure the defendant for his endorsement of the promissory note of Georges St. Pierre et Cie., that he is no longer liable for his endorsement of that or any note made by that firm, and that the liability being extinguished the security is discharged. This it is for her to make out. Some reliance was placed on an answer given by the defendant in re-examination.

"Q. Mais la garantie que vous donnaient "Georges St. Pierre et Cie. c'etait en garantie "des douze mille piastres qui étaient déposées "ou devaient être déposées pour la Fraserville "Navigation Company?

"A. C'etait en garantie d'un billet pour "mon endossement sur un billet et dont le "produit devait aller à la Fraserville Navigation "Company."

In their Lordships' opinion this answer carries matters no further. It is in accordance with the facts as far as it goes, but it did

not purport to be an admission of the plaintiff's contention, and even if it could be pressed so far as to make it a statement of the exact transaction, which the "vente a réméré" was to secure, it would at most be a layman's opinion on a legal question and a very uncertain one into the bargain.

The consideration moving from the defendant is stated in the instrument in a two-fold form, first as a purchase price of $12,000 *in presenti*, "argent courant que la dite Dame venderesse "reconnaît avoir reçues du dit Sieur G. A. Binet "dont quittance," and secondly as a promise by the defendant *de futuro* "à endosser les billets "de la dite Dame venderesse et leurs renouvelle-"ments, jusqu'à concurrence de la dite somme "de douze mille piastres, et ce jusqu'à l'expira-"tion du dit réméré, c'est-à-dire pendant deux "ans." Except perhaps for the expression "argent courant" there is nothing substantially mis-stated here. The plaintiff's contention is (i) that the obligation secured by the "vente a "réméré" was limited to her obligation towards the defendant, arising because he had become endorser and guarantor of promissory note of 25th August 1909, and of such other notes of her making as were "renouvellements" of it; and (ii) that on 2nd May 1910 a transaction took place, by which she was discharged from any obligation on any promissory notes of her making, and so, her obligation being discharged, there was nothing further for the defendant to guarantee, and her security so given him, to wit the "vente a réméré," was therefore spent. True, that the plaintiff's discharge was entirely at the defendants' expense, and that he had no intention of discharging her and no notion that he could be said to have done so. Still, if he did not appreciate the legal consequences of his act, that is his affair.

Their Lordships are not concerned to examine how far, if at all, the first of these propositions needs to be amended, for they are of opinion that both the Courts below were right in holding that the second proposition is wrong. The material facts are these. The promissory note of 25th August fell due on the 28th December 1909, and was renewed by another four months' note, made by Georges St. Pierre et Cie., endorsed by the defendant and delivered to the Banque Nationale as before. This note had to be met on 2nd May 1910. It was not convenient for the Fraserville Navigation Company to repay the plaintiff's loan. Its business was going from bad to worse. M. Binet, who had now become a shareholder, had lent it considerable sums and its steamer was mortgaged several times over. It was equally inconvenient for Georges St. Pierre et Cie. to meet the note, but fortunately the Bank was not pressing either the Company or the firm. St. Pierre went to the Bank with a blank form of promissory note, presumably to renew the note just maturing on behalf of the firm. The Bank Manager suggested that the name of the Fraserville Navigation Company should be substituted for that of Georges St. Pierre et Cie. as makers of the new note. St. Pierre signed as the Company's manager without objection, sending also for M. Hamel, the President of the Company, who came obediently and signed it with St. Pierre for the Company. St. Pierre says he did not know why he was asked to do this, but he can hardly have failed to see that the change was for the firm's benefit, and to understand the reason for it. The Bank Manager said that he made the suggestion to St. Pierre, and explained why, and the Trial Judge accepted his evidence. The reason was this. If the note was made by the firm, the Bank, on discounting it, would charge its amount to Georges St. Pierre

et Cie., and *pro tanto* would put the account in debit or at least diminish its credit balance, and so limit the amount of further accommodation that it could give to the firm. The Bank manager knew that the original advance had gone to the Company, and that no fresh advance was in contemplation. He knew that the defendant had endorsed so that the advance might be made on the credit of his endorsement, and he knew that the defendant held security from the plaintiff. In making his proposal he had no idea of altering the legal relationships or liabilities of the parties. He simply saw his way to enlarging the margin of credit of Georges St. Pierre et Cie., and so increasing his bank's turnover. No doubt the prospect of further credit attracted St. Pierre also. Accordingly the new note was made without the name of Georges St. Pierre et Cie. appearing on it, and the old one of 28th December 1909 was returned by the Bank to St. Pierre. The manager afterwards sent for the defendant and pointed out the change in the maker's name, and the defendant endorsed the new note without objection. It was afterwards renewed once or twice, and then the defendant had to meet it, for the Company had become insolvent.

In this transaction St. Pierre acted partly as the plaintiff's business manager and attorney, and partly as the Company's treasurer and gérant. In the first capacity he went to give a renewal note, and brought away the old one; he signed the new note in the second capacity. If the Trial Judge had expressly found as a fact that he assented to what was done as manager of Georges St. Pierre et Cie., that is as agent for his wife, and that his knowledge of what was done was his wife's knowledge, the finding would have been warranted by the evidence, and could not have have been impeached. The knowledge and assent obviously extended to the request

subsequently made to the defendant to endorse the new note, for without that endorsement the new note was valueless, and it was explained to him that the only change to be made was the substitution of the Company's name for that of Georges St. Pierre et Cie. In substance this finding is involved in the actual finding of the Trial Judge. It is certain that for more than six months St. Pierre had no idea that his wife's obligation or the defendant's rights upon the " vente a rémére " had been affected by what had passed. He wrote letters to the defendant on 30th July and 30th September 1910, which substantially recognised the original obligation as subsisting. He and his wife were parties to an "acte" on 15th December 1910, which formally recognised it. In fact, the plaintiff's present point was obviously suggested by her lawyer some time after that day and before 24th December, and was then put before the defendant to the latter's great surprise. Further, on 9th November 1910, the defendant again and for the last time, endorsed the Fraserville Navigation Company's note for $12,000 in renewal of the note of 2nd May, and if the Trial Judge had found as a fact that this was done in reliance on the representation in St. Pierre's letter of 30th September, that "notre billet de " $12,000" was a subsisting obligation, and that he wrote as manager of the business of Georges St. Pierre et Cie., the makers of the original note, and so estopped the plaintiff, the owner of the business and the principal of Georges St. Pierre, from denying that it subsisted, that finding also would have been unimpeachable.

What the Trial Judge actually found is thus expressed in the judgment of the Court on 26th June 1911 :—

" Considérant que le défendeur a endossé, tel que voulu " par l'acte, les billets au montant chacun de $12,000 de la

"demanderesse et leurs renouvellements, et en particulier "celui du 2 mai 1910, comme il avait endossé ceux du "25 août et du 28 décembre 1909 :

"Considérant que le billet du 2 mai 1910 n'a pas fait "novation entre le défendeur et la demanderesse des deux "précédents, mais il était un renouvellement des précédents "aux termes et dans le sens du dit acte du 27 août 1909 ". . . et considérant que l'endossement donné par le "défendeur au dit billet du 2 mai 1910 et aux renouvelle- "ments de celui-ci a continué d'être et est encore sous la "garantie prise par de dit défendeur par le dit acte du 27 "août 1909."

And these findings were affirmed by the Court of King's Bench in Appeal, by a majority of four judges to one, in the judgment of the Court on 23rd April 1913.

In face of these concurrent findings, the only questions of law open to the plaintiff are these : (*a*) was her liability to the Bank upon the note of 28th December 1909 discharged as against the defendant by the making and delivery of the note of 2nd May 1910 ? ; and (*b*) was the endorsement of that note by the defendant the endorsement of a "renouvellement" of the plaintiff's original note of 25th August 1909 for $12,000, within the meaning of the "vente a "réméré" ?

Upon the first question it is to be observed that no actual authority was ever given by the defendant for the return of the note of 28th December 1909 to its maker so as to discharge it, nor is there any finding that, as against him, it was discharged ; but it is not necessary to examine the effect of this, for their Lordships agree with the Courts below that the answer to the second question is "yes." It was argued that in the "vente a réméré" "renouvellement" meant and meant only a renewal of the first note in the strictest sense of renewal with the same names on the note. No doubt the word includes this, but the whole course of the case shows that,

as a matter of interpretation, it is not limited to this. The word, as a word, is apt to describe the note of 2nd May in its actual relation to its predecessors. The Bank Manager so uses it in his evidence on pages 121 and 123, and the objection then taken on the plaintiff's behalf is not that the word "renouvellement" is not apt to cover the substitution of the earlier note by the latter, but that the note speaks for itself and shows a change of maker whatever the legal effect of that may be. The plaintiff's own counsel in cross-examining the Bank Manager on page 125, calls the note of 2nd May 1910 a "renouvellement," and the judgment of the Court after the trial, and the notes of Mr. Justice Cimon, the Trial Judge, and of Mr. Justice Gervais in the Appeal Court, show that the word was, without question, considered apt and sufficient to describe the transaction of 2nd May, in spite of the change in the maker of the note. The original financial transaction was continued. The old advance remained outstanding. The new note was a "renouvellement" of the old ones. The real point debated was whether the plaintiff's liability terminated at that point of time, either because her note of 28th December 1909 was then discharged without any new liability being assumed, as the dissentient Judge thought, or because a true novation was brought about and the Fraserville Navigation Company's liability to the defendant was substituted for the plaintiff's with the consent of all parties, a contention which both Courts rejected.

Their Lordships are of opinion that the note of 2nd May 1910 being a "renouvellement" as that term is used in the "vente a réméré," the endorsement of it was such as the defendant was bound to give by his promise therein contained; that it was asked of him by the Bank Manager with the consent, previously given, of the

plaintiff's husband acting for her and within the scope of his authority as manager of her business; and that the defendant gave it on the faith of his being obliged to do so by the "vente "a réméré," and of his being secured thereby; that as, in consequence of this indorsement, he has had to pay the $12,000, which by endorsing the original note he enabled the plaintiff to obtain and by endorsing the subsequent notes he enabled the Company, for which she obtained it, to retain, he is entitled to the benefit of the "vente a réméré" by way of security for his reimbursement. They think, therefore, that the judgments of both the Courts below were right, and they will humbly advise His Majesty that this appeal ought to be dismissed with costs.

In the Privy Council.

DAME ALMA DE ST. AUBIN AND ANOTHER

v.

GEORGE AZARIE BINET.

DELIVERED BY LORD SUMNER.

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