

The Commercial Credit Company of Canada, Limited - - *Appellants*

v.

Fulton Brothers - - - - - - *Respondents*

FROM

THE SUPREME COURT OF NOVA SCOTIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 20TH JULY, 1923.

Present at the Hearing :

VISCOUNT HALDANE.

LORD SUMNER.

LORD PARMOOR.

LORD PHILLIMORE.

[*Delivered by* LORD SUMNER.]

Among the many questions which have been discussed in this case there is one which lies at the threshold of them all. The appellants, plaintiffs in the action, are assignees of an agreement made between one Watt and the Automotive Supply Company, Limited, both of Halifax, Nova Scotia, and they sue to enforce the rights, which that agreement purported to reserve to Watt. The first question is whether that agreement is valid or enforceable at all, it being admittedly one to which the Bills of Sale Act of Nova Scotia applies.

Watt's business was to sell Stewart motor trucks, which were supplied to him by the Stewart Motor Corporation, and about the time in question, namely, March, 1920, a course of business existed under which he sold them to the Automotive Supply Company on deferred payment terms. He financed his transactions by forthwith assigning his reserved interest to the appellant Company and discounting his drafts with them. The part played by the Automotive Supply Company was an independent one in law rather than

in fact. It was a Company formed by Watt to acquire a retail business, which he had purchased. He was its President and held 92 per cent. of the shares, and the remaining 8 per cent. were held by his two employees, a book-keeper and a mechanic, to whom he gave their holdings. Watt in his turn was closely associated in this series of transactions with the appellant Company. In that now in question, and apparently in others, the bargain between Watt and his Company was expressed on a printed form supplied by the appellants. The agreement was assigned on the same day on which it was made, and when it was subsequently registered as a bill of sale, the appellants' forms and, inferentially, their clerks were employed. Some weeks after the transaction now in question the Automotive Supply Company, to whom Watt had delivered possession of the truck, sold it in the course of their business to the present respondents, who were purchasers for value without notice, and they paid for it and took it away. This action was brought to recover from them the truck or its value in detinue or conversion, the Automotive Supply Company having failed to comply with the terms of the original agreement, subject to which alone the property would pass to them.

The Nova Scotia Bills of Sale Act requires that the transactions to which it applies shall be written in a certain form and registered under certain formalities. It does not require that the agreement shall be wholly expressed in a statutory form, but only that it shall be evidenced by an instrument in writing, showing the terms of the agreement, and shall be duly signed, and "shall have written or printed therein the post-office address," in this case, of Watt. This is section 8, sub-section 1. Sub-section 2 prescribes that within ten days of the delivery of the chattel "a true copy" of such instrument shall be filed, accompanied by an affidavit of one of the parties, stating among other things that the copy "truly sets forth the terms, nature and effect of the agreement between the parties." Sub-section 6 expressly provides that, if a copy is not filed as required by sub-section 2, the agreement shall as against the purchasers of the bargainee be "null and void." There is no such express provision in the case of Sub-section 1.

The general framework of the instrument, which bears date the 22nd March, 1920, is that the names of the parties of the first part, "hereinafter called the manufacturer," and of the parties of the second part, "hereinafter called the dealer," are filled in, blanks being provided for the purpose, and it witnesses that "the manufacturer" agrees to sell and "the dealer" agrees to purchase a motor vehicle, particulars of which are inserted in a printed form of schedule, which has columns headed by titles and is crossed by lines filled in with written words and figures. Then follow seven paragraphs of terms and conditions, under which the ownership of the motor vehicle and all its equipments and attachments remains with the manufacturer till payment is made in full. One is that the dealer agrees to provide a proper

storage place for the vehicle and its attachments, and will not remove it or them without the manufacturer's previous consent in writing; another is that on payment in full the title forthwith vests in the dealer, and that the manufacturer upon default in the observance of any condition is to be entitled to retake possession. Part payment of the price by, and delivery of possession to, the dealer in fact took place, apparently at the same time as the date of the agreement.

In the original instrument the address of Watt was not filled in along with his name in the blank space left for the name of the manufacturer, but after the name of the Automotive Supply Company there was added "9, Blower Street, Halifax." The words accordingly ran thus, the writing being the part indicated by italics.

. . . "between *W. Walter Watt*, hereinafter called the manufacturer and *Automotive Supply Co., Ltd.*, of (address) 9, *Blower Street, Halifax*, hereinafter called the dealer, witnesseth . . . "

This agreement was duly signed by both parties, but no address was added to either signature. A form of assignment was endorsed on the back of the same sheet of paper as that on which this agreement was printed, and, when Watt executed this assignment on March 22nd, 1920, in favour of the appellants, he wrote beneath his signature the words "Blower Street, Halifax, N.S." It is suggested that this was Watt's post-office address, as it certainly was of his Company. Jensen, the book-keeper and secretary of this Company, says in his evidence that the post-office address of Watt was 9, Blower Street and 124, Hollis Street. Watt only gives the latter address, and Jensen adds that Watt did not keep his own business and that of the Company separate. It has not been found in the Courts below in favour of the appellants that Blower Street truly was a post-office address of Watt, though the judgment of the Chief Justice of Nova Scotia takes this to have been the fact; and their Lordships are not prepared to assume that it was. The Trial Judge would, however, appear to have assumed that it was an address available to Watt as a matter of practice, for in finding for the appellants he says: "the words can be read as giving the address of the bargainor Watt. The address 'of Blower Street' can be read as being applicable to both the parties named, and, if the words can be so read, the maxim *ut res magis valeat quam pereat* obliges us to read them in that way." With this their Lordships are unable to agree. Whatever may be the case with the construction to be put upon the conduct of parties, it is not easy to see how the words of an instrument in writing, as to which a statute makes a plain and imperative requirement, can be construed in one sense rather than in another merely in order to apply the words of the statute in such a manner as will support the interest of the person or his assignee, who is bound to carry out the statutory form, against the interest of an innocent party, who is a stranger

to the whole transaction and is the person entitled to the protection of the statute. In any case it seems to their Lordships that the attribution to Watt of the words "9, Blower Street, Halifax" in this agreement is grammatically impossible as a construction, for it would treat the whole sentence as if the word "both" were inserted between the words "Automotive Supply Co., Ltd." and "of (address)." The appellants, in printing the form with the singular "address" in this position, instead of the plural "addresses," have in fact assisted to make compliance with the statute unlikely, for the insertion of the bargainer's post-office address, the only one that is indispensable, is rather discouraged thereby than provided for, nor can the defect be supplied by the fact, if fact it be, that 9, Blower Street was Watt's own post-office address and not merely that of his Company.

Two further answers to this point were attempted: Firstly, that the affidavit made for the purposes of registration, which gives Blower Street, Halifax, as Watt's address, may supply the omission in the written instrument, and, secondly, that, as the section does not in terms say that an instrument which does not comply with its requirements shall be null and void, there is no reason why the Courts should pay any attention to it. The answers are, to the first, that what is required is the insertion of the address in the instrument evidencing the agreement and not its insertion in some other instrument, and that to make this omission good by extrinsic evidence is to prevent the instrument itself from being completed as the statute requires; and to the second, that a Court has no power to ignore what a statute commands, whether the statute expresses or does not express the penalties for failure to obey it. Sub-section (1) lays down an exclusive rule of evidence. The Court is not called on to say that the agreement is void, but that it is not duly proved, and not being proved is inadmissible and must be ignored. It only becomes necessary to say that the agreement itself shall be null and void when, as in the case of sub-section 2, the Act provides that, unless certain formalities subsequent to and outside of the agreement itself are duly gone through, the agreement, however fully evidenced, and not merely the registration of it, shall be void. The Act might have let the agreement stand, if duly evidenced, even though not duly registered. A stricter course was taken, and though admissible in evidence as duly embodied in writing, it is nullified in the absence of due registration, no doubt in order to induce the publication of such bargains.

When the instrument came to be registered, a copy was used, as to which the question is whether it was a "true copy." Let it be added, a true copy "within the meaning of sub-section 2." Though importance is sometimes attached to such a qualification, it is doubtful if it makes any difference. The person who made the copy appears to have been more than commonly indifferent to accuracy and careful to save himself trouble. Instead of

taking the instrument and copying it, he took a printed form and filled it up, and unfortunately the printed form was not the same form, and the filling in was not the same filling in as in the case of the original. Hence the question arises, whether the resulting copy (for it was sufficiently like to be a copy) was a true one within the meaning of the sub-section.

Between the instrument itself and the copy there are several differences, and between the Bill of Exchange, which is on the same piece of paper as the main contract, and is detachable from it by perforations, and the copy of it, which is similarly made part of the copy of the main contract, the number of discrepancies is surprising. Their Lordships, however, only rely on two principal differences; not that an accumulation of small divergencies, each unimportant in itself, may not in some cases prevent the copy from being a true copy, but merely because in the present instance these two suffice. The Bill of Exchange may well be regarded as being only part of the performance of the contract, which is itself the Bill of Sale; for the schedule of payments in the contract provides for the giving of a draft on account of the price. The differences found in the so-called copy of the Bill of Exchange, which are many and remarkable, accordingly only serve to support the inference of the unreality of the whole transaction, on which Ritchie J. relied, and do not go to the untruth of the material copy, the copy of the agreement. Similarly the original contract describes Watt as "hereinafter called the manufacturer"; in the copy he is "hereinafter called the principal." It is certain that he was not a manufacturer, and it is doubtful if he was a "principal," for, according to the treasurer of the Stewart Motor Corporation, his business was that of distributing agent of Stewart Motor Trucks in the Maritime Provinces of Canada. The expression, however, is merely descriptive, and is adopted in the appellants' printed form to save the repetition, clause by clause, of the actual name, "Walter W. Watt." This difference may therefore be put on one side.

The two points to which their Lordships attach importance are these. Each agreement, the original and the copy, purports to describe a particular chattel, to which the bargain applies. In the original that chattel is a motor vehicle described by its serial number, and also by its "type," viz., "model 10, 3½-ton Special Equipped Stewart," and its price is "including accessories." The copy describes it by the same serial number, and the same number of model, and by the name "Stewart," but in the copy it is said to weigh 3¼ tons, which feature alone constitutes its "type of body," and the "goods and chattels" which are sold are thus described without any mention of the inclusion of equipments or accessories at all, though the price is the same as that, which in the original bargain is the price "including accessories." The accessories are of some importance, for the original invoice from the Stewart Motor Corporation to Watt shows that they consisted

of "cord tyres ; electric equipment ; a hubodometer ; stake body and cab ; windshield." It follows that, if anyone, proposing to purchase of the Automotive Supply Company the vehicle, which Watt had delivered to them, were to search the register, he would find a "true" copy that would leave him in doubt, to say the least of it, whether the registered transaction referred to this particular vehicle or not, and in no doubt at all that, at any rate, it did not include the accessories—the "hubodometer," the "stake body" and so on. It is to be observed that the Act avoids the transaction, when a true copy is not filed, not as against purchasers, who are deceived by the copy or who even actually inspect it, but as against all purchasers as such, whether they ever see the copy or not.

In the second place the original instrument contains a series of "terms and conditions" which the parties mutually covenant to observe. Two of these terms are much shorter in the original than in the copy. In one the dealer, that is the Automotive Supply Company, binds itself to agree to indemnify any bonding Company from its liability on any bond of indemnity that it may have given to Watt ; in the other the dealer agrees that any dealing on its part contrary to the terms of the agreement shall be construed as being and is admitted to be criminally actionable under the Criminal Code. It is true that the added terms which impose further burdens on the dealer do not directly affect the title of Watt or the infirmity of the title of an intending purchaser ; but, as avoidance is independent of actual inspection of the copy, this does not seem to matter. The discrepancy is one which clearly militates against the truth of the copy, and even if the test of untruth be the materiality of the discrepancy their Lordships do not see how a term which the parties have thought fit to insert in the original in one form can be deemed to be so far immaterial, that its expression in the copy in another form and with another legal effect can be dismissed as immaterial. What the parties think fit to stipulate with one another in their contract they themselves make a material part of their contract. Something more produces just as untrue a copy as something less, for it is not the same as the true contract, but is different.

In a question of statutory form like the present the authority of decided cases is not lightly to be departed from. In Nova Scotia there appears to be no decision that is in point, and in considering the English authorities the distinction should be borne in mind between decisions on the Bills of Sale Act, 1878, which required due registration and avoided instruments not expressed in accordance with section 8, and decisions on the Amending Act of 1882, which avoided instruments, "unless made in accordance with the form prescribed therein." It has been said (per Kay, J., *Sharp v. McHenry*, 38 Ch. D. 427), that a copy is true if it is true in all essential particulars, so that no one can be misled as to the effect of the instrument, but that if the true effect is mis-stated it is immaterial whether it is mis-stated in favour of one party or

of the other. This proposition, which has often been quoted, would appear to be fatal to the copy now in question, at any rate in respect to the two main matters above set out, and yet, strict as it is, even it may be unduly favourable to departures from literal accuracy, for Lord Macnaghten says, (*Thomas v. Kelly*, 13 A.C. 506), speaking of the statutory form, that he was inclined to doubt whether a Bill of Sale would not be void though it did not alter the legal effect at all or mislead anybody, but simply did not agree with the prescribed form, and he adds "certainly it is if it departs from the statutory form in anything which is characteristic of that form." An expression used by Lush J. in *Burchell v. Thompson* [1920], 2 K.B. 80, was relied on by the learned Chief Justice of Nova Scotia. It was that the criterion is "whether or not the copy differs from the original to such an extent that it would mislead any person of ordinary intelligence as to the effect of the original." This phrase, which did not purport to be an exact or exhaustive summary of the decisions, was used in a case where Sankey J. considered the variance to be a mere clerical error, and Lush J. deemed it to be unimportant. The Court of Appeal took the opposite view of the error itself. Scrutton, L.J., confined the matters in which error is unimportant to those "which do not in any way affect the purpose for which a true copy is required"; and Atkin, L.J., observes that "as in the original the words are material, they ought to have been in the copy." Their Lordships can find nothing in the decided cases to warrant the view that such discrepancies between the original and the copy as exist in the present case and are above described can be reconciled with the truth of the copy. Who can say that if the copy had been inspected in order to find out the true position of the Automotive Supply Company, the intending purchaser would not have been misled? The Act promises him, if he chooses to make use of it, a true copy, not a puzzle. He is to inspect it, not to recover the original by a process of conjectural emendation. The vehicle might not be the same vehicle at all, and whether the terms of the copy were substantially the same in effect as well as in language as the original would be a question, if ever the original was produced, to be resolved by lawyers and not by plain men of business.

For these reasons their Lordships are of opinion that the instrument was inadmissible as not embodying the particulars which the statute requires, and that, the registration not being effected by a true copy, the agreement purporting to be thus registered is null and void under the Act as against the respondents. These conclusions make it unnecessary and therefore undesirable to express any opinion on the other points discussed in the judgments of the learned members of the Supreme Court of Nova Scotia, and their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

THE COMMERCIAL CREDIT COMPANY OF
CANADA, LIMITED,

v.

FULTON BROTHERS.

DELIVERED BY LORD SUMNER.

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