

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Henry L. Sprague v. John R. Booth, from the Court of Appeal for Ontario; delivered the 30th July, 1909.

Present at the Hearing :

LORD MACNAGHTEN.

LORD DUNEDIN.

LORD COLLINS.

SIR ARTHUR WILSON.

[Delivered by Lord Dunedin.]

In January, 1902, the Respondent Booth, who was the owner of substantially all the stock of the Canada Atlantic Railway Company, entered into a contract with Arthur L. Meyer for the sale of the same. By the terms of the contract Booth became bound, on receipt of the purchase price of ten million dollars, on the 1st June, 1902, to transfer to Meyer the whole of the stock standing in his name. The contract further recited that, it being the intention of the Company as a Company to issue two sets of bonds for one million and ten million dollars respectively, secured by mortgages over different parts of the Railway in favour of Booth, who was a large creditor of the Company, Booth should, at the same time as he transferred the stock, also transfer the said bonds to Meyer, with the exception of bonds for

\$1,608,000, which were to be appropriated for payment and extinction of already existing bonds. Meyer became bound to pay for the expenses connected with the issuing of the said bonds. There was also a provision under which Booth might call upon Meyer for a temporary loan.

By subsequent agreement contained in correspondence in March, 1902, Booth gave up the right to ask for a loan, and in lieu thereof consented to receive a deposit of \$250,000

as security for the due carrying out of the terms of the said agreement by you, and in the event of any default being made in the payment of the money under the terms of the said agreement on the 1st June, 1902, or sooner, the said sum of \$250,000 shall thereupon be forfeited and remain my absolute property as liquidated damages for such default.

In the event of the payment of the price, the said sum was to be credited as part payment.

On the 15th March, 1902, the said sum of \$250,000 was paid by Meyer to Booth.

On the 28th April, 1902, Meyer assigned all his rights under the said contract and agreement to Seward Webb, and the said assignment was intimated to Booth.

Booth thereafter prepared to fulfil his part of the contract. He procured the mortgages to be executed by the Railway Company, and he was ready to get the President and Secretary of the Company to sign the bonds. Before, however, this was done, the signing of the bonds was stopped by Webb, who got back the printed bonds with a view to changing the form thereof. This happened on the 18th April, 1902. Soon after this, Webb got disgusted with the whole transaction, as it stood, and intimated that he did not intend to carry it out as it stood, but that he would submit a new proposition. Eventually, on the 29th May, he intimated that he had now no further proposition to make, but that he

surrendered all his rights back again to Meyer. Meyer now came to be represented by a Mr. Regensburger. This gentleman, knowing that the bonds had not been executed—they never having been handed back by Webb to Booth—proceeded to Ottawa on the 2nd June, having sent a formal letter calling on Booth to deliver the bonds, and having arrived there, took up the position that he did not need to produce the money as the bonds were not ready. Booth upon this wrote a letter on the 3rd June, holding that default had taken place, and intimating that he held himself free and entitled to keep the \$250,000. Nothing more happened, and the Railway was eventually sold to another purchaser.

On 17th November, 1905, Meyer assigned to Sprague, the Plaintiff and Appellant, all his rights under the contract, and upon this assignment Sprague now sues Booth for (1) the return of the \$250,000 and (2) damages for breach of contract.

The claim for damages was felt by the learned Counsel who appeared for the Appellant to be too hopeless to be seriously pressed. They, however, insisted on the claim for repayment of the \$250,000, upon the ground that there having been, as they alleged, default on both sides, the deposit had not been rightly forfeited, and could therefore be recovered as money had and received.

The nature and incidents of such a deposit are accurately discussed in the case of *Howe v. Smith*, L.R. 27 Ch. D. 89. Indeed in this case the document under which the deposit was made leaves nothing to be supplied, as it in terms provides for every event. If payment is made of the purchase money, it is to be credited to such payment; if default is made in the payment of the money, then the deposit is forfeited. The sole question therefore comes to be, was default

made in the payment of the purchase money on the 1st June 1902? Now, the Plaintiff does not pretend that the money was paid on the 1st June, or was ever paid at all, or offered to be paid. What he says is that, the bonds not being ready to be delivered, to his knowledge, he was absolved from tendering the money on the 1st June, and that therefore he was not in default.

There having been a formal assignment by Meyer to Webb, and no formal retrocession, it is perhaps doubtful whether Booth was bound to recognize Regensburger as acting for Meyer on the 1st June at all. But assuming that he was, it is clear that Meyer could have no higher rights than his assignor, Webb. Could Webb, then, have taken up the position taken up by Meyer? It is true the bonds were not ready, but the whole fault of the delay lay at Webb's door. By arrangement between the parties the prints of the bonds had been committed to Webb. Webb therefore could not have been heard to say that it was the fault of Booth that the bonds were not ready; and no more could Meyer, to whom, or his agents, the bonds had subsequently been handed by Webb.

It was said by Lord Blackburn in the case of *Mackay v. Dick & Stevenson* (6 App. Ca. 251, at p. 263) that—

Where, in a written contract, it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing.

When therefore the parties have agreed that the furnishing of the corpus of the bonds should be entrusted to Webb, and when Webb failed to produce the bonds in time to be signed by the 1st June, it seems to their Lordships that it stopped the mouth of Webb or his assignee from saying

that Booth was in default in not having signed the bonds. It therefore follows that the non-payment of the money was not excused by any default of Booth, and was therefore default on the part of Webb or his assignee. This result seems to follow equally whether time was or was not of the essence of the contract. If it was, the result must follow. If it was not, it might still be that, by offering the money, Webb or his assignee might have been entitled to be given specific performance on terms as to the actual date of payment, and delivery of the bonds. But to consider themselves absolved by the mere non-production of the bonds, the completion of which they themselves had by their conduct prevented, and then—without even proposing to offer the money—to treat this as a basis for repetition of the deposit and a claim of damages for non-performance was, in the opinion of their Lordships, out of the question.

Their Lordships are therefore of opinion that the Courts below took a right view of the true circumstances of the case, and will humbly advise His Majesty to affirm the decision appealed against.

The Appellant will pay the costs of the Appeal.

