BETWEEN

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... } PLAINTIFF;

1900
Nov. 15.

AND

ELLEN O'BRYAN; THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY (LIMITED); MOIR, SON & CO.; HUGH D. McKENZIE; CHARLES COCHRAN, AND J. NORMAN RITCHIE, ADMINISTRATORS OF THE ESTATE OF JAMES S. COCHRAN AND WILLIAM F. PICKERING, AND JOHN WHITE ..... } DEFENDANTS.

Subrogation—Essentials of—Volunteer—Evidence.

The doctrine of subrogation is part of the law of the Province of Nova Scotia.

2. Subrogation arises either upon convention or by law, but in the Province of Nova Scotia the creditor must be a party to the convention. It is not sufficient that it be with the debtor only.

3. Subrogation by operation of law is recognized not only by the civil law, but it has been adopted and followed by courts administering the law of England.

4. It is an incident of the doctrine of subrogation that an obligation extinguished by a payment made by a third party is treated as still subsisting for his benefit.

5. Where one is entitled to be subrogated to the rights of a judgment-creditor he is to be subrogated to all and not to part only of the latter's rights in such judgment.

6. In a proceeding in the Exchequer Court of Canada, if a conflict arises between the rules of evidence established by a provincial statute and those subsisting by virtue of a Dominion statute, the latter will prevail.

Semble, a mere stranger, or volunteer, who pays the debt of another without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and with-

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out being compelled to do so for the preservation of any rights or property of his own, cannot invoke the benefit of the doctrine of subrogation.

Argument of Counsel.

THIS case arose upon an information filed by the Crown for the purpose of expropriating certain lands in Halifax, N.S., for the use of the Intercolonial Railway.

The Crown tendered the parties entitled to the same the sum of $1,000 in full of compensation and damages, and this sum was agreed upon by the defendants as sufficient, but a dispute arose between them as to those really entitled to the compensation.

The facts are stated in the reasons for judgment.

November 1st, 1899.

H. Mellish for plaintiff;

W. W. Walsh, *H. McInnes*, and *J. A. Chisholm* for the defendants.

The trial of the case was begun at Halifax, N.S.; after hearing several witnesses the Judge of the Exchequer Court referred the case to a special referee for enquiry and report. The referee's report was filed on the 5th March, 1900. The effect of the report is stated in the reasons for judgment.

March 12th, 1900.

R. L. Borden, Q.C., on behalf of the defendants appealing, contended that the defendant White was not entitled to be subrogated to the rights of the defendant McKenzie by merely paying off the latter's judgment. There was no agreement between McKenzie and White for that purpose, and White was merely a volunteer. *Sheldon on Subrogation* (1); *Shinn* v. *Budd* (2); *Sanford* v. *McLean* (3); *Hoover* v. *Epler* (4).

(1) Pars. 2, 3, 240.
(2) 14 N.J. Eq. 234.
(3) 3 Paige 117.
(4) 52 Penn. 522.

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Argument of Counsel.

Under the law of Nova Scotia, subrogation cannot be effected by an agreement between the judgment-debtor and a third person discharging the judgment. The judgment-creditor must be a party to such agreement. (24 *Am. & Eng. Ency. of Law* 291).

When McKenzie gave a satisfaction piece to Horley, one of the judgment-debtors under his judgment, the judgment was thereby discharged against all the defendants, and no one could have any rights as creditor under it.

Then, again, White's evidence as to conversations with the deceased husband of the defendant O'Bryan is inadmissible. (*R. S N. S. 5th Ser. c.* 107.) The referee erred in admitting this evidence, which was offered to show that the deceased assented to an arrangement whereby White was to be subrogated to McKenzie's interests when he paid off the latter's judgment.

R. G. Code, for the defendants McKenzie and White, *contra*, contended that there was no discharge of all the judgment-debtors by reason of McKenzie signing a satisfaction piece to one of the judgment-debtors. It is a part of the doctrine of subrogation that an obligation extinguished by the payment of the third party is treated as still subsisting for his benefit. *Sheldon on Subrogation*, par. 1; *Brown* v. *McLean* (1); *Abell* v. *Morrison*. (2).

June 19th, 1900.

Judgment by consent allowing defendant O'Bryan $192.92 as her share of the compensation money, together with $35 as her costs.

THE JUDGE OF THE EXCHEQUER COURT now (November 15th, 1900) delivered judgment.

(1) 18 Ont. R. 533.

(2) 19 Ont. R. 669.

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The Crown in this case offers to pay to the defendants, or to such of them as are entitled thereto, the sum of one thousand dollars as compensation for the lands described in the information, and it is conceded by all parties that the amount is sufficient. The claim of the defendant, Ellen O'Bryan, to a first charge upon the same in respect of her right of dower in the lands in question is not disputed by any one; and a declaration has already been made that she is entitled to be paid the sum of one hundred and ninety-two dollars and ninety-seven cents in satisfaction of her right of dower.

For the balance of eight hundred and seven dollars and three cents there are on the present appeal from the report of the learned referee two claimants; the defendant John White, and the defendant company The British and Foreign Marine Insurance Company, Limited. If the latter should succeed against White, a question would arise between them and the defendants Moir, Son & Co., which by arrangement between themselves has been deferred and is not now in controversy.

The Crown acquired title to the lands in question on the 19th of August, 1898. The allegation in the fifth paragraph of the information that it was acquired on the 3rd of November, 1894, is an error that has been corrected by an admission of the parties interested, filed in this court on the 5th of July last.

The question, then, is as to the respective rights or interests of the defendant White, and The British and Foreign Marine Insurance Company, Limited, in the lands mentioned in the information on the 19th day of August, 1898.

One Edward O'Bryan, who died some years prior to 1898, had in his lifetime been seized in fee of these and other lands in the City and County of Halifax, subject to a number of judgments that had been

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recorded against them. At present we are concerned with two only of these charges upon the lands of the deceased, one a judgment in favour of Hugh D. McKenzie for $1,019.61, duly registered on the 20th of June, 1891; and the other in favour of The British and Foreign Marine Insurance Company, Limited, for $755.48, duly registered on the 3rd of May, 1892. The judgment that McKenzie held against O'Bryan was obtained upon a promissory note of which one Horley was the maker for O'Bryan's accommodation, and upon which McKenzie had also obtained a judgment against Horley. The debt due by O'Bryan and Horley to McKenzie was discharged by the defendant White, under circumstances to be referred to, and he claims to be subrogated to McKenzie's rights at the time in the judgment registered against O'Bryan's lands. On the 1st day of June, 1891, the City of Halifax, in consideration of $20,200, conveyed to O'Bryan the property and premises at Halifax known as "The City Market Property." On the 20th of the same month O'Bryan mortgaged the property to one Corbett to secure the repayment of the sum of $20,000. The deed, the mortgage, and McKenzie's judgment were all registered on the same day, the 20th of June, 1891. On the same day also an indenture by way of agreement under seal was made and executed between O'Bryan and Corbett by which the interest of O'Bryan in any money he might be entitled, on the sale of the said property, to receive after Corbett's claims were satisfied, was assigned to Corbett to pay the sum of $4,000, with interest, to the defendant White. This indenture was duly recorded on the 29th of June, 1891. White finding that the McKenzie judgment constituted a prior charge to the agreement by which he became interested in "The City Market Property" paid or discharged the judgment, under, he alleges, an agreement

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with O'Bryan that he, White, should in respect of such judgment stand in McKenzie's shoes. McKenzie was not a party to the agreement and at the time knew nothing of it. Being paid, he signed on the 11th of June, 1891, a satisfaction piece in respect of the judgment against Horley, whose goods were at the time under seizure. By an indenture bearing date of the 4th of May, 1898, but in fact executed and registered after the Crown had acquired title to the lands, the compensation for which is in question here, McKenzie assigned any interest that he had in the said judgment to the defendant White.

Now it is, I think, clear that White's position as to the compensation money, and his claim thereto, is not in any way assisted by this assignment. In determining who is entitled one must look at the state of the title and the condition of things as they existed on the 19th day of August, 1898, when the lands became vested in the Crown. If at that date White was not entitled, the subsequent assignment will not assist, though of course it does not prejudice, his claim.

With reference to the arrangement between White and O'Bryan, to which McKenzie was not a party, by which it was intended that White should have McKenzie's rights in the judgment against O'Bryan, it is contended that such an agreement made with the judgment-debtor only is sufficient. In support of that view reference is made to the *American and English Encyclopedia of Law*, (Volume 24, page 291,) where it is stated that such a convention or agreement may be made either with the debtor or creditor. But it will be observed that the cases, on the authority of which that proposition is made, were decided by the Supreme Court of Louisiana, and in that State as in the Province of Quebec, the rules of law as to subrogation form part of the Civil Code. (Civil Code, Lower

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Canada, Arts. 1154-1157; Revised Code Louisiana (1870) Arts. 2159-2162). By the laws both of the Province and State mentioned subrogation is either conventional or legal, and the convention may be either with the creditor or the debtor, under the circumstances mentioned in the Code. But in the latter case certain prescribed incidents are necessary to the validity of the proceeding. There is no similar law in force in the Province of Nova Scotia; and the requisites of a valid subrogation in such a case are wholly wanting here.

There is, however, a subrogation which takes place by operation of law, which is recognized not only by the Civil Law on which the Codes referred to are founded, but which has been adopted and followed by courts administering the common law of England.

With reference to this doctrine I cannot, I think, do better than to give at length an extract from the opinion of the Supreme Court of the United States delivered by Mr. Justice Miller in the case of *The Aetna Life Insurance Company* v. *Middleport* : (1)

"One of the principles lying at the foundation of "subrogation in equity, in addition to the one already "stated, that the person seeking this subrogation must "have paid the debt, is that he must have done this "under some necessity, to save himself from loss "which might arise or accrue to him by the enforce- "ment of the debt in the hands of the original cred- "itor; that, being forced under such circumstances to "pay off the debt of a creditor who had some superior "lien or right to his own, he could for that reason be "subrogated to such rights as the creditor, whose debt "he had paid, had against the original debtor * *
* * * * * *

(1) 124 U. S. R. at p. 547.

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"These propositions are very clearly stated in a use-
"ful monograph on the *Law of Subrogation*, by Henry
"N. Sheldon, and are well established by the author-
"ities which he cites. The doctrine of subrogation is
"derived from the civil law, and 'it is said to be a
"legal fiction, by force of which an obligation extin-
"guished by a payment made by a third person is
"treated as still subsisting for the benefit of this third
"person, so that by means of it one creditor is sub-
"stituted to the rights, remedies and securities of an-
"other..... It takes place for the benefit of a person
"who, being himself a creditor, pays another creditor
"whose debt is preferred to his by reason of privileges
"or mortgages, being obliged to make the payment,
"either as standing in the situation of a surety, or that
"he may remove a prior incumbrance from the prop-
"erty on which he relies to secure his payment. Sub-
"rogation as a matter of right, independently of agree-
"ment, takes place only for the benefit of insurers;
"or of one, who, being himself a creditor, has satisfied
"the lien of a prior creditor; or for the benefit of a
"purchaser who has extinguished an incumbrance
"upon the estate which he has purchased; or of a
"co-obligor or surety who has paid the debt which
"ought, in whole or in part, to have been met by
"another.'" *Sheldon on Subrogation.* (1)

"In par. 240 it is said: 'The doctrine of subrogation
"is not applied for the mere stranger or volunteer,
"who has paid the debt of another, without any
"assignment, or agreement for subrogation, without
"being under any legal obligation to make the pay-
"ment, and without being compelled to do so for
"the preservation of any rights or property of his
"own.'"

(1) Pars. 2, 3.

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"This is sustained by a reference to the cases of "*Shinn v. Budd* (1): *Sandford v. McLean* (2): *Hoover v.* "*Epler* (3). In *Gadsden v. Brown* (4), Chancellor John- "son says:—'The doctrine of subrogation is a pure "unmixed equity having its foundation in the prin- "ciples of natural justice, and from its very nature 'never could have been intended for the relief of those "who were in any condition in which they were at "liberty to elect whether they would or would not "be bound; and, as far as I have been able to learn its "history, it never has been so applied. If one with "the perfect knowledge of the facts will part with his "money, or bind himself by his contract in a sufficient "consideration, any rule of law which would restore "him his money or absolve him from his contract "would subvert the rules of social order. It has been "directed in its application exclusively to the relief of 'those that were already bound who could not but "choose to abide the penalty.'"

"This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere."

"Chancellor Walworth, in the case of *Sandford v. McLean* (5); said:—'It is only in cases where the "person advancing money to pay the debt of a third "party stands in the situation of a surety, or is com- "pelled to pay it to protect his own rights, that a court "of equity substitutes him in the place of the creditor, "as a matter of course, without any agreement to that "effect. In other cases the demand of a creditor which "is paid with the money of a third person, and without "any agreement that the security shall be assigned or "kept on foot for the benefit of such third person, is "absolutely extinguished.'"

(1) 14 N. J. Eq. (1 McCarter) 234.
(2) 3 Paige, 117.
(3) 52 Penn. 522.
(4) Speer's Eq. (So. Car.) 37, 41.
(5) 3 Paige, 122.

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"In *Memphis & Little Rock Railroad v. Dow* (1), "this court said ;—'The right of subrogation is not "founded on contract. It is a creation of equity ; is "enforced solely for the purpose of accomplishing the "ends of substantial justice, and is independent of any "contractual relations between the parties.'"

"In the case of *Shinn v. Budd*, (2) the New Jersey "Chancellor said : (3)

"'Subrogation as a matter of right, as it exists in "the civil law, from which the term has been borrowed "and adopted in our own, is never applied in aid of a "mere volunteer. Legal substitution into the rights "of a creditor, for the benefit of a third person, takes "place only for his benefit who, being himself a credit- "or, satisfies the lien of a prior creditor, or for the "benefit of a purchaser who extinguishes the encum- "brances upon his estate, or of a co-obligor or surety "who discharges the debt, or of an heir who pays the "debts of the succession." (Code Napoléon, book 3, "tit. 3 art. 1251 ; Civil Code of Louisiana, art. 2157 ; 1 "Pothier on Oblig. part 3, c. 1, art. 6, sec. 2.) 'We are "ignorant, say the Supreme Court of Louisiana, of "any law which gives to the party who furnishes "money for the payment of a debt the rights of the "creditor who is thus paid. The legal claim alone "belongs not to all who pay a debt, but only to him "who, being bound for it, discharges it.' *Nolte & Co.* "*v. Their Creditors* (4) ; *Curtis v. Kitchen* (5) ; *Cox v.* "*Baldwin* (6). The principle of legal substitution, as "adopted and applied in our system of equity, has, it "is believed, been rigidly restrained within these "limits.'"

(1) 120 U. S. 287.
(2) 14 N. J. Eq. (1 McCarter) 234.
(3) At pp. 236, 237.
(4) 9 Martin 602 ;
(5) 8 Martin 706 ;
(6) 1 Miller's Louis. R. 147.

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"The cases here referred to as having been decided "in the Supreme Court of Louisiana are especially "applicable, as the Code of that State is in the main "founded on the civil law from which this right of "subrogation has been adopted by the chancery courts "of this country. The latest case upon this subject is "one from the appellate court of the State of Illinois, "*Suppiger* v. *Garrels* (1); the substance of which is "thus stated in the syllabus:—

"'Subrogation in equity is confined to the relation "of principal and surety and guarantors, to cases "where a person to protect his own junior lien is com-"pelled to remove one which is superior, and to cases "of insurance. * * * Any one who is under no "legal obligation or liability to pay the debt is a "stranger, and, if he pays the debt, a mere volunteer.'"

The doctrine of subrogation by operation of law has also been adopted and acted upon by courts of the Province of Ontario. *Brown* v. *McLean* (2); *Abell* v. *Morrison* (3).

It is objected, however, to White's claim that McKenzie's judgment was paid; and that the discharge of Horley discharged O'Bryan. That must, I think, be conceded; but it is not conclusive against White, for it is an incident of the doctrine of subrogation that an obligation extinguished by a payment made by a third party is treated as still subsisting for his benefit. Then it is further objected to White's claim that he did not pay O'Bryan's debt to protect an interest in the property from the expropriation of which the right to compensation arises. He paid it to protect his interest in other lands of O'Bryan. But if he ought, under the circumstances disclosed in this case, to be subrogated by operation of law to McKenzie's rights under the

(1) 20 Bradwell Ill. App. 625. (2) 18 Ont. R. 533.
(3) 19 Ont. R. 669.

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judgment (and I think he ought to be) then he is, it seems to me, entitled to be subrogated to all and not to part only of the latter's rights and interests therein.

There is a question of evidence to which some reference ought perhaps to be made. All of White's testimony relative to the arrangement whereby McKenzie's rights and interests in the judgment against O'Bryan were to be reserved to White, was objected to as inadmissible in view of the provisions of Chapter 107 of *The Revised Statutes of Nova Scotia*, 5th Series, "Of Witnesses and Evidence". After consideration the learned referee admitted the evidence, and I think rightly. By the 21st section of *The Canada Evidence Act*, 1893 (1), it is provided that in all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, shall, subject to the provisions of that and other Acts of the Parliament of Canada, apply to such proceedings. By the 3rd section of the Act it is provided that a person shall not be incompetent to give evidence by reason of interest or crime. *The Nova Scotia Evidence Act* contains a similar provision (2); but it also contains a proviso (3) that in any proceeding brought by or against the executor or administrator of a deceased person, it shall not be competent for any other of the parties to such proceeding to give evidence of dealings, agreements or conversations with the deceased. The present proceeding, however, is not one by or against the executor or administrator of O'Bryan. That is one answer to the objection. Then the Canadian statute expressly provides that a witness shall not be incompetent by reason of interest, and there is no qualification or proviso. In a proceeding in this court the Act of Parlia-

(1) 56 Vict. c. 31. (2) R.S.N.S. 5th ser. c. 107, s. 15.
(3) Section 16.

ment and not the proviso contained in the Nova Scotia statute must be followed. The question is, however, of no considerable importance in this case, if White's right to compensation depends upon legal and not upon conventional subrogation.

In the opinion of the learned referee, White's proof of the amount of his claim against O'Bryan was unsatisfactory. He seems, however, to think that the was at least as much due to him as would exhaust the sum with which the court has to deal, and in that view I am inclined to concur. I think, however, that it would not be unreasonable, if the other claimants desire it, to send the matter back to the referee to take further evidence as to the state of the accounts between White and O'Bryan, it being understood of course that in respect of any such further proceeding the costs must abide the event.

If the other claimants do not desire this, there will be a declaration that the defendant White is entitled to the balance of the compensation money, that is, to the sum of eight hundred and seven dollars and three cents; and (with the exception of the defendant Ellen O'Bryan, as to whose costs an order has already been made) there will be no costs to any of the defendants, either against the Crown, or as between themselves.

Judgment accordingly.

Solicitors for plaintiff:—*W. B. Ross.*

Solicitors for defendants:—

Moir Son & Co.—*J. A. Chisholm,*
do do The British and Foreign Marine Insurance Co.—*W. H. Fulton,*
do do Hugh D. McKenzie:—*W. A. Henry,*
do do Ellen O'Bryan:—*W. W. Walsh,*
do added defendant John White:—*Drysdale & McInnes.*