Grant v. Matsubayashi and Tanabe

Between
Grant, and
Matsubayashi and Tanabe

[1922] B.C.J. No. 80

70 D.L.R. 553

British Columbia Court of Appeal
Victoria, British Columbia

Macdonald C.J.A., Galliher, McPhillips and Eberts JJ.A.

Heard: June 16 and 19, 1922.
Judgment: October 3, 1922.

1 **MACDONALD C.J.A.**:-- I agree with the result arrived at by my brother GALLIHER (without adopting his reasons) on the question of the appropriation of the several payments made after the defendants retired from the firm of Sun & Co. [31 BCR Page377]

2 I observe that these payments were made by cheque and were signed not in the style of the old firm, "Sun & Co.," but "The Sun Co." In other words, the goods bought after the dissolution of the 12th of February were bought by "The Sun Co." and paid for by that Company's cheques. Such payments would, I think, be in themselves appropriations to "The Sun Company's" indebtedness.

3 I would therefore allow the appeal in part.

4 GALLIHER J.A.:-- The learned trial judge has given no reasons for judgment, but we must assume that he has found as a fact that the plaintiff had no knowledge of the dissolution of partnership between the defendants on 12th February, 1921. With every respect, I do not think he was justified in coming to that conclusion. The defendants, Tanabe and the other partners, Fukunaga and Matsubayashi, have all given evidence, giving time and place where they swear to having notified Grant of the dissolution. There is also the clerk Teramoto, who gives evidence as to time, place and conversations. The plaintiff does not deny that conversations took place with these respective parties at the time and place stated, but does deny the nature of such conversations in some instances and in others varies it. These circumstances are all summarized in examination of plaintiff in rebuttal. Outside of such denial and variance there is nothing to indicate that the defendants and the clerk were not telling the truth, while on the other hand there are some facts and circumstances which I feel should be taken into consideration in weighing the testimony of the plaintiff. In the first place, when he started doing business with the Sun Company (composed of Fukunaga, Matsubayashi and Tanabe), he found Fukunaga in charge and did not know or concern himself as to who or whether there were other partners, as he puts it himself, he saw some $5,000 worth of stock on the premises

and he was doing business with the Company on the strength of that and not on who the partners might be. Later he discovered who the partners were and, according to his own admission, was aware that for some time before dissolution that there was dissension among the partners. Further, at the time of the [31 BCR Page378] dissolution, there was in stock some $7,000 worth of goods, with liabilities of about $2,000, a better standing than when he gave credit on the strength of the goods in stock in the first instance, when he did not know these men were partners. Moreover, when he says he did find out they had dissolved, he did not take the matter up with any of the partners and made no demand for payment on the retiring partners. Of course, this latter would not alter his rights against them, but it is a circumstance.

5 Again, the first cheque issued in his favour after dissolution, dated 23rd February, 1921, was signed "The Sun Co. S. Fukunaga," whereas prior to that they were signed "Sun & Co. S. Fukunaga." This might not have been noticed by him, but one would expect a wholesale business man to note the change, and no notice was taken of it. I am only putting these forward as circumstances upon which I conclude that the story of the Japanese is, as I view it, the correct one.

6 As to time and place, they are confirmed by the plaintiff himself (or rather their statements as to this are not denied) and it is only when we come to the conversations that we find any variance. With nothing to throw discredit on these witnesses, it does not seem likely that they all could have been mistaken as to what took place.

7 This disposes of anything supplied after dissolution and leaves only the question of $579.50, which was admittedly due plaintiff by the old firm at the time of dissolution. Whether this has been wiped out by subsequent payments will have to be determined as a question of law dependent on the rule governing appropriation of payments. Sufficient having been paid since by the remaining partner to liquidate the debt.

8 The creditor kept the old account on and continued it as a running account giving credits thereon for payments made. No appropriation was made of these payments at the time of payment by either debtor or creditor. Subsequently, some months after the dissolution, viz., in April or May, the creditor says he applied the subsequent payments to the later debt - he must have done this in his mind for the accounts rendered do not shew anything but a general credit on account, nor did he notify the [31 BCR Page379] partners of this. He did, however, in the particulars rendered, after writ issued, state that he had so applied them.

9 In The "Mecca" (1897), A.C. 286 at p. 294, Lord Macnaghten says:

> "But it has long been held and it is now quite settled that the creditor has the right of election 'up to the very last moment,' and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain."

10 I think we must hold that he was entitled to make the appropriations when he did. In the case of Hooper v. Keay (1875), 1 Q.B.D. 178, the facts, except in one important particular, are very similar to the facts here. I can find nothing in the evidence to shew that before action any account was rendered to any of the partners or to the new firm after dissolution, which shews a debit and credit account, and my recollection is that it was so stated at the argument before us.

11 In the Keay case, supra, where such account had been rendered and where the statement shewed debit and credit in one continuing account, as the books here do, it was held that appropriation should be made to the earlier and not the later items of the account. Blackburn, J., at p. 181:

> "Had this account been only in the plaintiffs' ledger, it would not have bound them, but they sent the copy to Keay."

12 And further:

> "In the present case the plaintiffs have blended the two accounts, and sent it in to Keay, striking a balance on the whole; consequently the subsequent payments ... which were made by the defendant Keay without appropriation by him, should be applied to the different items on the debit aide of the account in order of date."

13 Quain, J., at pp. 181-2

> "The two accounts have been blended by the plaintiffs, and this was communicated to the defendant Keay, consequently the general principle applies that the payments are to be appropriated in order of date to the items of credit, in order of date."

14 And in discussing the rule in Clayton's Case (1816), 1 Mer. 572 at p. 605, he continues:

> "'In [that case] there had been a change of parties and the account was apparently continued as if no alteration had happened; and it was, under the circumstances of [that case], reasonable to hold that the earlier items of debit were extinguished by the earlier items of credit.' In the present case the old and new accounts were made one by the plaintiffs to the knowledge of the defendant Keay, on the 23rd of October, 1874, and the subsequent payments must follow the same appropriation." [31 BCR Page380]

15 Field, J., at p. 182:

> "The facts of the present case are very clear; there was no appropriation by the payer, and the plaintiffs who received the payments appropriated them to the general account in their ledger. But not only did they do that, they also sent a copy of the account thus treated as one to Keay, so that the account became one by the consent of both parties; and there is no further room for any question as to the appropriation, because the law says that in such a case the payments or credits must be appropriated to the items of debt in order of date."

16 Had the account been rendered here as in the Keay case it would, I think, be a direct authority, but I deduce from that case that no account having been rendered here it was still open to the plaintiff to appropriate when he did. See also London and Westminster Bank v. Button (1907), 51 Sol. Jo. 466.

17 In my opinion the plaintiff is not estopped by filing his claim in bankruptcy. In the result I would allow the appeal and reduce the judgment below to $579.56.

18 McPHILLIPS J.A.:-- I agree in the proposed disposition of this appeal.

19 EBERTS J.A.:-- I agree.

Appeal allowed in part.

Solicitors for appellants: Saunders & Young.

Solicitors for respondent: Wilson & Drost.

Dominion Law Reports

CITED "D.L.R."

COMPRISING EVERY CASE REPORTED IN THE COURTS OF EVERY PROVINCE, AND ALSO ALL THE CASES DECIDED IN THE SUPREME COURT OF CANADA, EXCHEQUER COURT, THE RAILWAY COMMISSION, AND THE CANADIAN CASES APPEALED TO THE PRIVY COUNCIL

ANNOTATED

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Man.
K.B.
SMITH v. WHITE OWL DRUG CO.
Curran, J.

the lower salary and chance of a bonus to have these other clerks, who expressly refused that plan of hiring, ring in on the profit-sharing and receiving a share of the bonus based on their larger salary.

The plaintiff appears on ex. 1 as entitled to a bonus of $303.12. He says this amount was offered to him by E. H. Bate, but declined because Slaney told him his share should be about $600.

I find that the plaintiff has not been proved guilty of any act which would prejudice or deprive him of his right to this sum of $303.12, or to any larger sum that an examination into the accounts might show him to be entitled to.

I have said that the one-fifth share of net profit has been taken to amount to $15,900; but this is on the assumption that ex. 1 is a correct list of all entitled to share. That it contains the names of some who were hired on straight salary without right of profit sharing is clear because two of them, J. H. Boardman and Harold Snell, both went into the witness box on the plaintiff's behalf and stated that they had been paid bonus by Bate & Bate, the beneficial owners of the defendant company, although not entitled to it. Boardman got $154.06 and Snell $162.66. Slaney says the tea-room girls were all employed on straight salary and also a number of druggists who said they could not live on the bonus salary. All such should not be included in the list of those entitled to participate, yet the defendant has done so and proposes to pay bonus to each one regardless of the terms of hiring, and as a matter of fact has paid out a large amount of money for this purpose.

The defendant contends that all shares in the bonus forfeited in accordance with the second clause of ex. 2 belong to the company, and that such forfeitures do not affect the amount of the bonus to be shared in by the others. I do not agree to this contention, but hold that 20% or one-fifth of all such shares belongs to the bonus fund and should be shared in by those entitled to participate in that fund. My construction of the clause is that only those clerks who hired on a basis of salary plus bonus and who were in the defendant's service on December 31, 1920, were or are entitled to share in the bonus. I hold that none of those clerks who hired on a straight salary basis have any right of participation in the bonus and that 20% of the share of any clerk who had forfeited his or her right to participate under ex. 2 reverted to the common bonus fund to enure to the benefit of all who were entitled to participate.

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As I cannot ascertain who these clerks are, there will be a reference to the Master to ascertain: (1) Which of the clerks in the defendant's employ shown on the list ex. 1 are entitled to share in the distribution of the bonus: (2) By what sum the amount of such bonus of $303.12 due to the plaintiff will be increased by forfeited shares; and (3) What the plaintiff's share will be in view of the foregoing findings?

Of course, if the parties can agree upon the last of these points, a reference may not be necessary. I reserve further directions and costs until after the Master shall have made his report.

Judgment for plaintiff.

GRANT v. MATSUBAYASHI.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ. A. October 3, 1922.

PAYMENT (§IV—30) — APPROPRIATION — ACCOUNT — PARTNERSHIP — DISSOLUTION.

Payments by cheques signed in a new firm's name are of themselves appropriations to the latter's indebtedness, and cannot be applied to the running account of the old firm which has been dissolved.

APPEAL by defendant from judgment of Ruggles, Co. J., of May 22, 1922. Reversed in part.

F. C. Saunders, for appellant; *T. E. Wilson*, for respondent.

MACDONALD, C.J.A.:—I agree with the result arrived at by my brother Galliher (without adopting his reasons) on the question of the appropriation of the several payments made after the defendant retired from the firm of Sun & Co.

I observe that these payments were made by cheque and were signed, not in the style of the old firm, "Sun & Co.," but "The Sun Co." In other words, the goods bought after the dissolution of February 12, were bought by "The Sun Co." and paid for by that company's cheques. Such payments would, I think, be in themselves, appropriations to "The Sun Company's" indebtedness.

I would therefore allow the appeal in part.

GALLIHER, J.A.:—The trial Judge has given no reasons for judgment, but we must assume that he has found, as a fact, that the plaintiff had no knowledge of the dissolution of partnership between the defendants on February 12, 1921.

With every respect, I do not think he was justified in coming to that conclusion.

The defendants, Tanaba and the other partners Fukanaga

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and Matsubayashi, have all given evidence, giving time and place where they swear to having notified Grant of the dissolution. There is also the clerk, Feramoto, who gives evidence as to time, place and conversations. The plaintiff does not deny that conversations took place with these respective parties at the time and place stated, but does deny the nature of such conversations in some instances and in others varies it. These circumstances are all summarized in examination of plaintiff in rebuttal.

Outside of such denial and variance, there is nothing to indicate that the defendants and the clerk were not telling the truth, while on the other hand, there are some facts and circumstances, which I feel should be taken into consideration in weighing the testimony of the plaintiff.

In the first place, when he started doing business with the Sun Company (composed of Fukanaga, Matsubayashi and Tanaba) he found Fukanaga in charge and did not know or concern himself as to who or whether there were other partners, as he puts it himself, he saw some $5,000 worth of stock on the premises and he was doing business with the company on the strength of that and not on who the partners might be. Later, he discovered who the partners were and according to his own admission was aware that for some time before dissolution there was dissension among the partners. Further, at the time of the dissolution, there was in stock some $7,000 worth of goods, with liabilities of about $2,000, a better standing than when he gave credit on the strength of the goods in stock in the first instance, when he did not know these men were partners. Moreover, when he says he did find out they had dissolved, he did not take the matter up with any of the partners and made no demand for payment on the retiring partners. Of course, this latter would not alter his rights against them, but it is a circumstance.

Again, the first cheque issued in his favour after dissolution, dated February 23, 1921, was signed, "The Sun Co., S. Fukanaga," whereas prior to that they were signed "Sun & Co., S. Fukanaga." This might not have been noticed by him, but one would expect a wholesale business man to note the change, and no notice was taken of it.

I am only putting these forward as circumstances upon which I conclude that the story of the Japanese is, as I view it, the correct one.

As to time and place, they are confirmed by the plaintiff himself (or rather their statements as to this are not

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denied) and it is only when we come to the conversations that we find any variance.

With nothing to throw discredit on these witnesses, it does not seem likely that they all could have been mistaken as to what took place. This disposes of anything supplied after dissolution and leaves only the question of $579.56, which was admittedly due plaintiff by the old firm at the time of dissolution. Whether this has been wiped out by subsequent payments will have to be determined as a question of law dependent on the rule governing appropriation of payments, sufficient having been paid since by the remaining partner to liquidate the debt.

The creditor kept the old account on and continued it as a running account giving credits thereon for payments made. No appropriation was made of these payments at the time of payment by either debtor or creditor. Subsequently, some months after the dissolution, *viz.*, in April or May, the creditor says he applied the subsequent payments to the later debt. He must have done this in his mind, for the accounts rendered do not show anything but a general credit on account, nor did he notify the partners of this. He did, however, in the particulars rendered, after writ issued, state that he had so applied them.

In the *"Mecca"* case; *Cory Bros.* v. *Owners of S.S. "Mecca,"* [1897] A.C. 286, at p. 294, 8 Asp. M.C. 266, Lord Macnaghten says:—

"But it has long been held and it is now quite settled, that the creditor has the right of election 'up to the very last moment,' and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain."

I think we must hold that he was entitled to make the appropriations when he did. In the case of *Hooper* v. *Keay* (1875), 1 Q.B.D. 178, 24 W.R. 485, the facts, except in one important particular, are very similar to the facts here. I can find nothing in the evidence here to show that before action any account was rendered to any of the partners or to the new firm after dissolution, which shows a debit and credit account, and my recollection is that it was so stated at the argument before us.

In the *Keay* case, *supra*, where such account had been rendered, and where the statement showed debit and credit in one continuing account, as the books here do, it was held that appropriation should be made to the earlier and not

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the later items of the account. Blackburn, J., 1 Q.B.D., at p. 181:—"Had this account been only in the plaintiffs' ledger, it would not have bound them, but they sent the copy to Keay."

And further, at p. 181:—

"In the present case, the plaintiffs have blended the two accounts, and sent it in to Keay, striking a balance on the whole, consequently the subsequent payments which were made by the defendant Keay without appropriation by him, should be applied to the different items on the debit side of the account in order of date."

Quain, J., at pp. 181-2:—

"The two accounts have been blended by the plaintiffs, and this was communicated to the defendant Keay, consequently the general principle applies that the payments are to be appropriated in order of date to the items of credit, in order of date."

And in discussing the rule in *Clayton's* case (1816), 1 Mer. 572, 35 E.R. 781, he continues, quoting from *City Discount Co.* v. *McLean* (1874), L.R. 9 C.P. 692, at p. 698:

"'In [that] case there had been a change of parties and the account was apparently continued as if no alteration had happened, and it was, under the circumstances of [that] case reasonable to hold that the earlier items of debit were extinguished by the earlier items of credit.' In the present case, the old and new accounts were made one by the plaintiffs to the knowledge of Keay, on the 23rd of October, 1874, and the subsequent payments must follow the same appropriation."

Field, J., at p. 182, says:—

"The facts of the present case are very clear, there was no appropriation by the payer and the plaintiffs who received the payments appropriated them to the general account in their ledger. But not only did they do that, they also sent a copy of the account thus treated as one to Keay, so that the account became one by the consent of both parties and there is no further room for any question as to the appropriation, because the law says that in such a case the payments or credits must be appropriated to the items of debt in order of date."

Had the account been rendered here as in the *Keay* case, it would, I think, be a direct authority, but I deduce from that case that no account having been rendered here, it was still open to the plaintiff to appropriate when he did.

Sask.
K.B.

See also *London & Westminster Bank* v. *Button* (1907), 51 Sol. Jo. 466.

In my opinion, the plaintiff is not estopped by filing his claim in bankruptcy. In the result, I would allow the appeal and reduce the judgment below to $579.56.

MCPHILLIPS, J.A.:—I agree in the proposed disposition of this appeal.

EBERTS, J.A., would allow the appeal.

Appeal allowed.

STARR Co. of CANADA v. MERRILL.

Saskatchewan King's Bench, Bigelow, J. October 30, 1922.

ASSIGNMENT (§II—20)—EQUITABLE ASSIGNMENT—COMMUNICATION.

The mere writing of a letter assigning a fund, without proof of its communication to the assignee, is not sufficient to constitute an equitable assignment.

EXECUTION (§II—20)—PRIORITIES—ASSIGNMENT—CREDITORS RELIEF ACT—NOTICE OF MOTION.

Where money has been paid in Court under a garnishee summons, and afterwards the action is settled, notice of motion by an execution creditor, to subject the fund in payment of executions under the Creditors Relief Act, will not bind the fund in Court as against a valid assignment thereof before the order could be obtained. The proper practice to prevent the assignment is to obtain a stop-order.

[*Wayne* v. *Ballantyne* (1922), 63 D.L.R. 232, 15 S.L.R. 116, referred to.]

APPEAL from a Master's order in a garnishment proceedings. Reversed.

H. Ward, for Mackenzie, Thom, Bastedo & Jackson.

R. E. Turnbull, for the Dominion Bank.

BIGELOW, J.:—In this case $66.28 was paid into Court by the garnishee. The action was afterwards settled, and the plaintiff had no further interest in the fund in Court. It then became a fund belonging to the defendant under the Creditors Relief Act, R.S.S. 1920, ch. 54, sec. 8.

On October 7, 1922, a notice of motion was served in this action for an order that the monies paid into Court under the garnishee summons be paid over to the sheriff of the judicial district of Regina to be applied by him on any execution in his hands under the provisions of the Creditors Relief Act, and from the affidavits filed it appears that the Dominion Bank has an execution for $1,048. Said notice of motion is signed by "Turnbull & Turnbull, solicitors for the plaintiff"; but, at the hearing before the Master, Turnbull & Turnbull stated that they were appearing for the Dominion Bank and not the plaintiff.

Mackenzie, Thom, Bastedo & Jackson appeared on the