

CANADA / JUDGMENT

McDougall v. La Banque d'Hochelaga

(1907) 39 SCR 318

COURT

Supreme Court of Canada

DECIDED

17 October 1907

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McDougall v. La Banque d'Hochelaga Collection Supreme Court Judgments Date 1907-10-17 Report

(1907) 39 SCR 318 Judges Fitzpatrick, Charles; Girouard, Désiré; Davies, Louis Henry; Idington, John; MacLennan, James; Duff, Lyman Poore On appeal from Quebec Subjects Bankruptcy and insolvency Decision Content Supreme Court of Canada McDougall v. La Banque d'Hochelaga, (1907) 39 S.C.R. 318 Date: 1907-10-17 Edgar Mill McDougall and Others (Opposants) Appellants; and La Banque D'hochelaga (Contestant) Respondent. 1907: October 9; 1907: October 17. Present: Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington, MacLennan and Duff JJ. ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL. Liquidation of insolvent corporation—Distribution and collocation—Privileged claim—Expenses for preservation of estate—Fire insurance premiums—practice—Ex parte inscription—Notice—Arts. 371, 373, 419, 1043-1046, 1201, 1994, 1996, 2001, 2009 C.C. M. acquired the factory and plant of an insolvent company which had been sold under execution by the sheriff and, pending litigation during the winding-up of the company, operated and maintained the factory as a going concern. The sheriff's sale was set aside and M. then abandoned the property to the curator of the estate, and filed a claim, as a privileged creditor, for necessary and useful expenses incurred by him in preserving the property for the general benefit of the mass of the creditors, including therein charges for moneys paid as premiums on policies of fire insurance effected in his own name during the time he had held possession. Held, that, in the absence of evidence to shew that such insurances had been so effected otherwise than for his own exclusive interest, he could not be collocated by special privilege, on the distribution of the proceeds of the estate, for the amount of the premiums. When the appeal first came on for hearing upon inscription ex parte, on suggestion by one of the creditors, not made a party to the appeal, the court ordered the postponement of the hearing in order that all interested parties might be notified. APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, whereby the judgment of Mr. Justice Lemieux in the Superior Court, District of St. Francis, dismissing the contestation of the respondent without costs, was affirmed, Charbonneau J. dissenting. The appellants are the representatives of John McDougall who, in 1883, through a series of conveyances, acquired

certain lands and the factory, with its running plant and appurtenances, of the insolvent Pioneer Beet-root Sugar Company under a sheriff's sale at the instance of creditors at the time that the company was placed in liquidation. John McDougall thereupon went into possession and continued to operate the factory for his own benefit, and maintained the plant in order. He disposed of certain unnecessary or worn out material and, for a number of years, carried insurances against fire thereon, the policies of insurance being made payable to him personally. A number of suits were pending at the time of the purchase of the factory by him and other suits were instituted and numerous appeals asserted, some of which were prosecuted to final decisions in the Privy Council. After considerable litigation the sheriff's sale, under which McDougall claimed title, was finally set aside and he abandoned the property to the curator of the estate of the company in liquidation. , The property which had thus been preserved by him was sold for the benefit of the creditors generally, and McDougall filed a privileged claim, on the moneys realized, under the provisions of the Civil Code, for necessary and useful expenses alleged to have been incurred by him in the preservation of the property for the creditors generally. This claim was composed of items paid for school and municipal taxes, the expense of guarding the property and keeping it in repair, and also the sum of \$10,765.03 paid for the insurance premiums, the whole amounting to \$33,373.31. The effect of the judgment appealed from was that the present appellants, as representatives of John McDougall, were ordered to be collocated by privilege out of the proceeds of the estate of the company for \$22,610.28 from which were deducted sums received on sales of portions of the. machinery and plant sold by McDougall, leaving a balance of \$5,343.16 as the amount to be collocated to the appellants on their op-position⁵ and their claim for the moneys paid out as premiums for the insurances was disallowed. On an appeal by the present appellants this decision was affirmed by the judgment now appealed from. The appeal to the Supreme Court of Canada was inscribed *ex parte*, no *factum* having been filed by the contestant, La Banque d'Hochelaga, and first came on for hearing on the 15th May, 1907. On the case being called, Mr. Atwater K.C., on behalf of the Eastern Townships Bank (not a party, but a creditor of the insolvent company) by permission of the court suggested that, as the interests of the mass of the company's creditors would be involved in the result of this appeal, on the hearing *ex parte* there should be some protection afforded in respect to the unrepresented creditors who might be entitled to share in the distribution of the assets. Mr. Brosseau K.C., for the appellants, explained that the Banque d'Hochelaga alone had prosecuted the contestation of the opposition to the report of distribution in the courts below and, although notified of the present appeal, had not filed a *factum* or appeared at the hearing. The court ordered that the hearing of the appeal should be postponed until the October session and that, in the meantime, the appellants should have an opportunity of serving proper notices of the present appeal upon all interested parties. On 9th October, 1907, the appeal again came on for hearing *ex parte* after all interested persons had been duly notified Brosseau K.C., for the appellants. The insurances were both necessary and useful expenses, and the premiums were paid under the obligations resulting from the care required of a prudent administrator. The appellants should be collocated by special

privilege for the amounts thus expended. Had the insurance been paid and turned in to the estate, there could not be any question as to a privileged charge. The position is not altered by the fact that the insurances ceased when McDougall ceased to pay the premiums, nor by the fact that it is not the proceeds of the insurance policies on a fire loss which are now being distributed, but merely the proceeds of a sheriff's sale held at a time when the insurance policies had ceased to be in force. We refer to Marcadé, on art. 1375 C.N.; Massé & Vergé (Zachariae), vol. 4, p. 5, n. 3; Dalloz, Rép. "Obligations," No. 5395; Demolombe, vol. 31, No. 378; Colmet-Santerre, vol. 5, No. 362 (bis) ; Arts. 1994 (1) 1996 and 2001, 2009 (1) CO. The judgments of the Superior Court and of the Court of Review should be reversed and the appellants should be restored to the position, both as to rank and amount, given them by the prothonotary in the report of distribution. Brosseau K.C., for the appellants. The judgment of the court was delivered by Girouard J.—This appeal, which was heard ex parte, after due notice being given to all parties interested, should be dismissed with costs. In the first place, there is no legal proof of the insurance having been effected by the late Mr. McDougall, as the policies are not produced, which is the best evidence that could be adduced. The trial judge found and I quite agree with him. Even if such proof was in the record, can it be contended seriously that at any time the creditors could claim the indemnity either from McDougall or the insurance company? The trial judge was of the opinion that they could not and I think he was right. If McDougall was not the legal proprietor of the immovable in question, as all the courts ultimately decided, he was admittedly a creditor having an insurable interest, and that alone would be sufficient to prevent the creditors from recovering the amounts of the policies under article 1201 of the Civil Code. McDougall was so clearly the sole and legal holder of the policies, in his own exclusive interest, that immediately after the setting aside of the judicial sale by the courts in favour of the creditors, the latter could not claim the above policies or the indemnity they covered. Such is also the well settled jurisprudence in France. Sirey, Recueil, 1890, 2, 173, especially note 1. I am of the opinion that the appeal should be dismissed with costs. Appeal dismissed with costs. Solicitors for the appellants: Brosseau & Holt.

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