

CANADA / JUDGMENT

Vaughan v. Richardson

(1892) 21 SCR 359

COURT

Supreme Court of Canada

DECIDED

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Vaughan v. Richardson Collection Supreme Court Judgments Date 1892-10-10 Report

(1892) 21 SCR 359 Judges Ritchie, William Johnstone; Taschereau, Henri-Elzéar; Strong, Samuel Henry; Patterson, Christopher Salmon; Gwynne, John Wellington On appeal from New Brunswick Subjects Transportation Decision Content Supreme Court of Canada Vaughan v. Richardson (1892) 21 SCR 359 Date: 1892-10-10 Hannah Vaughan and Clarence Aubrey Vaughan, Executrix and Executor of Henry Vaughan, Deceased (Defendants) Appellants And Edward C. Richardson and James M. Barnard, Junior, (Plaintiffs) Respondents 1892: May 12, 13; 1892: Oct. 10. Present:—Strong, Taschereau, Gwynne and Patterson JJ. (Sir W. J. Ritchie C.J. was present at the argument but died before judgment was delivered.) ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK. Ships and shipping — Disbursements — Freight — Bill of exchange — Guarantee—Misrepresentation—Pleading. On a ship under charter being loaded it was found that a sum of £173 was due the charterer for the difference between the actual freight and that specified in the charter party and, as agreed, a bill for the amount was drawn by the master on the agents of the ship, and, also, a bill of £753 for disbursements. These bills not being paid at maturity notice of dishonour was given to V., the managing owner, who sent his son to the solicitors who held the bills for collection to request that the matter should stand over until the ship arrived at St. John where V. lived. This was acceded to and V. signed an agreement in the form of a letter addressed to the solicitors, in which, after asking them to delay proceedings on the draft for £753, he guaranteed, on the vessel's arrival or in case of her loss, payment of the said draft and charges and also payment of the draft for £173 and charges. On the vessel's arrival, however, he refused to pay the smaller draft and to an action on his said guarantee he pleaded payment and that he was induced to sign the same by fraud. By order of a judge the pleas of payment were struck out. On the trial the son of V. who had interviewed the solicitors swore that they told him that both bills were for disbursements, but it did not clearly appear that he repeated this to his father. V. himself contradicted his son and stated that he knew that the smaller bill was for difference in freight, and there was other evidence to the same effect. His counsel sought to get rid of the effect of V.'s evidence by showing that from age and infirmity he was incapable of remembering the circumstance, but a verdict was given against him. It was admitted that

if there had been any misrepresentation by the solicitors it was innocent misrepresentation only. Held, affirming the decision of the court below, that the defence of misrepresentation set up was not available to V. under the plea of fraud, and, therefore, was not pleaded; that if available without plea it was not proved; that nothing could be gained by ordering another trial as, V. having died, his evidence would have to be read to the jury who, in view of his statement that he knew the bill was not for disbursements, could not do otherwise than find a verdict against him. Held, further, that the delay asked for by V. was sufficient consideration to make him liable on his guarantee, even assuming that he would not have been originally liable as owner of the ship. Appeal from a decision of the Supreme Court of New Brunswick[1] refusing to set aside a judgment for the plaintiff and order a non-suit or new trial. The following statement of the facts of the case is taken from the judgment of Mr. Justice Fraser in the court below:— This is an action brought to recover from the defendant £173 9s. 1d. sterling, the difference of freight coming to the plaintiffs under the charter party of the ship Eurydice, of the burden of 1,247 tons register, of which the defendant was a part owner. The charter party was made on the 13th October, 1881, between S. Vaughan & Co., agents for the owners of the ship, of the first part, and the plaintiffs, who were merchants at Savannah, doing business by the name and style of Richardson & Barnard, of the second part. The voyage was to be from Savannah to Liverpool, Havre or Bremen direct, as might be ordered on signing bills of lading. The parties of the second part agreed to pay the party of the first part for the charter or freight of the vessel during the voyage, the sum of thirty-five shillings per net register ton. The captain was to sign bills of lading at any rate of freight as and when presented on gross receipts without prejudice to the charter party, any difference between charter party and bills of lading to be adjusted at Savannah before the vessel sailed; if in vessel's favour, to be paid in cash at the current rate of exchange, less insurance, if in charterer's favour to be secured by captain's bill, payable ten days after arrival at the port of discharge; sufficient cash for ship's disbursements to be advanced by the charterers (if desired by master) at current rate of exchange at port of loading, charging 2 1/2 per cent commission, and current rate of insurance, to be secured by captain's bill, payable ten days after arrival at port of discharge. The vessel was loaded at Savannah, and was ordered to go to Bremen or Bremerhaven. The amount of the disbursements account was £753 5s. 4d. sterling, and the difference of freight coming to plaintiffs as charterers was made up and agreed upon at Savannah at £173 9s. 1d. sterling, the difference of freight being in their favour. Robert M. Vaughan, the son of the defendant, had been sent by him to Savannah to look after the vessel, and had, it appeared, a full power of attorney to act for the defendant. Instead of the account for disbursements and the difference of freight being secured by the captain's bills payable ten days after arrival at the port of discharge, by arrangement between Robert M. Vaughan and the plaintiffs, the captain gave two bills, of date the 20th March, 1882, on S. Vaughan & Co., of Liverpool, for the £753 5s. 4d. sterling, and £173 9s. 1d. sterling, respectively, and each payable sixty days after sight. S. Vaughan & Co. were, as already stated, the agents who acted for the owners in the making of the charter party. Simon Vaughan of this firm was, as appeared by the evidence, a part owner

of the vessel, and was managing owner of her down to the 12th June, 1882. S. Vaughan & Co. acted as defendant's agents at Liverpool and as agents for the ship, and did all the business connected with her. The bill of exchange for £173 9s. 1d. sterling is in the words and figures following:— Accepted 5th April, 1882, payable at Messrs. Barnett, Hoares.& Co., London, on the 7th June, 1882. (Sgd.) S. Vaughan & Co. Savannah, Ga., 20th March, 1882. Exchange for £173 9s. 1d. Payable in London. Sixty days after sight of this first of exchange (second and third of same tenor and date unpaid) pay to the order of Richardson and Barnard one hundred and seventy-three pounds nine shillings one penny sterling, value received, for necessary difference in freight of my vessel at this port, for which, besides the responsibility of the owners, my vessel and freight are hereby hypothecated. (Signed) W. W. Sprague, Master of ship "Eurydice." To Messrs. S. Vaughan & Co., Liverpool, Eng. The bill of exchange being accepted was duly protested for non-payment and being dishonoured notice of dishonour was, inter alia, given to the defendant on the 17th June, 1882, by the plaintiffs through their attorneys in this suit, Messrs. Seely & McMillan. The notice of dishonour was addressed to the defendant, as follows: "To Henry Vaughan, part owner and managing owner of the ship Eurydice." The defendant who, all through these transactions, owned 20-64 shares of the ship, became managing owner on the 12th June, 1882. The firm of S. Vaughan & Co. failed after the acceptance and before the maturity of the two bills. Finding that the bills were about to be dishonoured the plaintiff, Richardson, came on to St. John and retained the firm of Seely & McMillan, of that city, attorneys-at-law, to give notice of dishonour of the bills to the defendant, and to collect the amount of them from him. The notices of dishonour were given as already stated for the £173 9s. 1d. bill, and also for the disbursement bill, £753 5s. 4d. The defendant upon receiving notice of dishonour of the bills sent his son, Lorenzo H. Vaughan, to Seely & McMillan who said they had the bills of exchange which had been protested for non-payment and that they were for disbursements, and asked him what arrangements would be made about the matter, when he said his father would like the matter held over until he could communicate with the other owners, and on that understanding an agreement was drawn up, taken by him to his father, signed by him and returned to Seely & McMillan. The agreement is as follows: — St. John, N.B., June 19th, 1882. To Messrs. Seely & McMillan, Attorneys for Richardson & Barnard: Dear Sirs,—I ask you to delay proceeding on the captain's draft, ship Eurydice, for £753 5s. 4d until the vessel's arrival here, and on such arrival here, or in case of her loss or of any delay happening to her, I guarantee immediate payment of the said draft, with cost of protest, re-exchange, interest, and charges of sending notices. And I also guarantee payment of a draft for £173 9s. 1d. drawn by the master of the same vessel, with above charges. Henry Vaughan. Witness: L. H. Vaughan. In one of the counts in the declaration this agreement is set out and the defendant is sought to be made liable on the £173 9s. 1d. sterling bill by virtue of the agreement. Application was made to Mr. Justice King to set aside certain of the pleas and his order made thereon was the subject of an application to the Supreme Court to rescind such order. Richardson v. Vaughan[2]. The ship Eurydice arrived in Saint John about the 1st August, 1882, and on that day the defendant paid the £753 5s. 4d. bill, but declined to pay

the bill for £173 9s. 1d., saying to Mr. McMillan that he was consulting Mr. C. A. Palmer about it, and afterwards Mr. Palmer said he would accept service of a writ for defendant when this suit was commenced. The principal objections to the right of the plaintiffs to maintain action were that what took place at Savannah, i. e., the taking of the captain's draft, payable at 60 days after sight, instead of ten days after the arrival of the vessel at the port of discharge, as per the terms of the charter party, relieved the owners of the vessel from liability, and left the whole liability against the captain upon the draft; that there was no consideration for the defendant's alleged promise to pay in his letter to Seely & McMillan; that there was no evidence to show that the plaintiffs agreed to give time; that Seely & McMillan had no authority to make the agreement, and no assent of plaintiffs to the agreement to give time; that the direction of plaintiffs to the master to remit the whole of the freight to S. Vaughan & Co., and the remittance of the freight accordingly, amounted to payment; that there was improper rejection of evidence in refusing to allow a witness to state what S. Vaughan & Co. said to him as to the receipt of the freight, and misrepresentation by McMillan to Lorenzo Vaughan before the agreement of the 19th June was signed, in stating that both of the bills (the £173 9s. 1d. bill, as well as the £753 5s. 4d bill) were for disbursements. The trial of the action resulted in a verdict for the plaintiffs and a motion to set the same aside and order a non-suit or new trial was refused. The defendant having died in the meantime the action was revived in favour of his executors who appealed to the Supreme Court of Canada. Barker Q.C. and Palmer Q.C. for the appellants. The defendant was prejudiced on his trial by the striking out of the pleas of payment. *Wallingford v. Mutual Society*[3]. On the merits the verdict was not justified by the evidence which proved misrepresentation. Hazen and Currey for the respondents referred to *Harris v. Venables*[4]; *Alliance Bank v. Brown*[5]; *Callisher v. Bischoffsheim*[6]. STRONG J.—The facts are fully set forth in the judgment of Mr. Justice Fraser who tried the cause, and to this I refer for a statement of them. It does not seem to be at all material to consider what was the effect of the agreement entered into by Robert Vaughan, as the agent of his father, with the respondents at Savannah, in pursuance of which the two bills, the payment of which was guaranteed by Henry Vaughan, were drawn by the captain on the firm of S. Vaughan & Co., of Liverpool, the larger one for disbursements for the ship and the smaller one, the recovery of which is sought in this action, for the difference between the chartered freight payable to the owners of the *Eurydice* and the freight to be received for the cargo at Bremerhaven. I incline to think that S. Vaughan & Co. must be taken to have accepted this bill, not as owners of the ship but as agents of the respondents and for their accommodation. I do not, however, enter into any further consideration of this question for I agree with Mr. Justice Fraser that, even assuming Mr. Henry Vaughan not to have been liable at all for the payment of the bill for £173 9s. 1d. drawn against the difference of freight, he would still, though an entire stranger to that transaction, have been liable on the guarantee. This bill had been placed in the hands of Messrs. Seely & McMillan at St. John, the attorneys for the respondents, with instructions to collect it. Mr. Henry Vaughan, in order to obtain time and in consideration of delay which was in fact granted, gave the guarantee contained in his letter to Messrs. Seely & McMillan of the 19th

June, 1882. There was clearly consideration for this guarantee, and conceding that Henry Vaughan was a mere surety he would therefore be liable upon it unless the appellants can show some good defence to the respondents' action. It is contended that such a defence is made out. It is said that Mr. McMillan made a representation, not, it is conceded, intended to be fraudulent but which was untrue in fact, which induced Henry Vaughan to give the guarantee. The first question upon this head is: Has this defence been properly pleaded? The only plea upon the record which can be referred to as setting up this defence is that of fraud. It is, however, clear, as was admitted by the learned counsel for the appellants on the argument of the appeal, that no fraud, that is moral fraud such as the plea must be construed to allege, was proved. What, if anything, was proved was innocent misrepresentation on the part of Mr. McMillan in representing to Lorenzo Vaughan, the son of Mr. Henry Vaughan, that the smaller bill was drawn not against the difference of freight but, like the larger one, on account of disbursements for the ship. It would be necessary then, in the first place, in order to let in this defence, to permit the appellants to add a plea to the record. This, in my opinion, ought not now to be done after the great delay which has taken place and at this stage of the litigation, especially as such an amendment does not seem to have been applied for at the trial. No doubt any misrepresentation on the part of the creditor or his agent which may mislead a surety and induce him to enter into a contract of suretyship constitutes a good defence provided it is properly pleaded. But not only has this defence not been pleaded but it does not appear from the evidence at the trial that it would be sustained in point of fact even if it were pleaded. Mr. Henry Vaughan in his evidence states that he knew that this bill for £173 9s. 1d. was not drawn for ship's disbursements but was drawn on account of freight, and that he signed the guarantee knowing and believing this. It is suggested that Mr. Vaughan, who has since died, was at the time of the trial, from age and infirmity, incapacitated from giving a reliable account of the circumstances under which he was induced to sign the guarantee, but should we grant a new trial his evidence must be read to the jury who in the face of it could hardly find otherwise than for the plaintiffs. Moreover, there is another circumstance mentioned in the following passage from the judgment of Mr. Justice Fraser which confirms Henry Vaughan's evidence in this respect. The learned judge says: If anything further were wanting to show that the defendant had previous to the agreement full knowledge that the smaller bill was for difference of freight it would be this, that Robert M. Vaughan in his evidence states that he sent from Savannah to the defendant at St. John the plaintiffs' letter relating to the remittance of the difference of freight to S. Vaughan & Co., and this letter would explain to him why the whole freight was to be remitted to S. Vaughan & Co. Referring to the deposition of Mr. Robert M. Vaughan I find this statement of Mr. Justice Fraser as to the purport of his evidence entirely borne out. Mr. Robert M. Vaughan appears to have assented somewhat reluctantly to the proposition that the provision of the charter party as to payment of freight should be so far derogated from that the whole freight should be remitted to S. Vaughan & Co. at Liverpool, and that the captain should draw on that firm against it in favour of the respondents as the respondents desired, but that he at last did so on the understanding that a letter explaining

the transaction should be given to him; that such a letter addressed to the captain of the vessel was accordingly written and signed by the respondents, and that this letter, which appears to have been lost, was given to him. And upon being asked by one of the learned counsellors the appellants: What was done with that letter? the witness answers: "It was sent to Mr. Henry Vaughan, St. John." Further, it is by no means clear from the evidence of Mr. Lorenzo Vaughan, who says that it was to him that Mr. McMillan made the representation that this bill was on account of the ship's expenses, that he communicated such representation to his father. Mr. Lorenzo Vaughan's evidence on this point is as follows:—"In answer to a letter received from them" Messrs. Seely & McMillan), "I called; they said they had the bills of exchange which had been protested for non-payment, and that they were for disbursements, and they asked me what arrangements would be made about the matter, and I said my father would like the matter held over until he could communicate with the other owners. On that understanding the agreement was drawn up and my father signed it and it was returned to them." It is somewhat ambiguous from the statement of the witness whether he means to say that the agreement was signed by his father on the understanding referred to, or whether he is only then referring to the agreement being drawn up. Conceding, however, that Mr. Lorenzo Vaughan meant to say that his father did sign the guarantee on the understanding that the smaller bill was for disbursements and not for difference of freight he is directly contradicted by Mr. Henry Vaughan himself, who says in answer to his own counsel that his son when he came back from seeing Seely & McMillan told him (the defendant) what Seely & McMillan had told him (the son); and being further asked "what was it?" the defendant answered, "the large bill was for disbursements and the other for difference of freight. They chartered the ship." In the face of this evidence already on record, from which it appears that the defendant admitted that he knew that the bill was for freight, a statement which derives confirmation from the evidence of Robert Vaughan as to his disposition of the letter to Captain Sprague before referred to, it would not, in my opinion, be proper to send the case down to another trial in order that the issue on this defence of misrepresentation, which is not at present upon the record, might be tried. More especially is this so when we find the only evidence in support of it at the former trial, that of Mr. Lorenzo Vaughan, contradicted and neutralized by that of the original defendant himself. With this evidence before them no jury could be expected to do otherwise than to find a verdict for the respondents. The appeal must be dismissed with costs. TASCHEREAU J.—No appeal lies, in my opinion, from the order striking out the 2nd, 3rd, 6th and 12th pleas, and did an appeal lie I would not interfere with the ruling of the court below on such a question. On the merits I am of opinion that there is no ground for directing a non-suit, or for disturbing the verdict entered for the plaintiffs. I have nothing to add to Mr. Justice Tuck's and Mr. Justice Fraser's opinions in the court below. GWYNNE and PATTERSON JJ. concurred in the judgment of Mr. Justice Strong. Appeal dismissed with costs. Solicitor for appellants: C. A. Palmer. Solicitors for respondents: Straton & Hazen.

[1] 28 N. B. Rep. 364.

[2] 24 N. B. Rep. 75.

[3] 5 App. Cas. 693.

[4] L. R. 7 Ex. 235.

[5] 10 Jur. N. S. 1121.

[6] L. R. 5 Q. B. 449.

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