

STEPHEN BOLESлав ROMAN }  
 (Defendant) ..... }

APPELLANT;

1969  
 \*Feb. 6, 7  
 Feb. 21

AND

JOHN DAVID CRIGHTON (*Plaintiff*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Damages—Joint action brought by plaintiff and executors of estate for return of shares—Executors successful at trial—Plaintiff failing in two Courts before succeeding in Supreme Court—Separate actions for damages for wrongful detention between date of original judgment and date when shares received—Claim for difference between price received and highest price at which shares traded during period—Executors' action successful on appeal—Whether Plaintiff's position differentiated from that of executors—Whether defendant entitled to relief under s. 35 of The Trustee Act, R.S.O. 1960, c. 408.*

The plaintiff C instituted an action, in which he had as his co-plaintiff a trust company in its capacity as executor of the estate of F, against the defendant R. In this joint action the plaintiffs claimed, *inter alia*, the return to each of them of certain shares of stock. At trial the executors' claim for delivery of the shares was allowed but the corresponding claim of C was dismissed. From the trial judgment R and C appealed to the Court of Appeal which dismissed both appeals. On appeal to this Court, R's appeal was dismissed and C's appeal was allowed.

Following the decision of this Court in the joint action, both plaintiffs in that action commenced separate actions claiming damages for the wrongful detention of their shares between the date of the original judgment at the trial and the date when the shares were actually delivered. As R had been held to be a trustee of the shares for the plaintiffs, the damages claimed were the difference between the price actually realized by them for their shares and the highest price at which the shares were traded during the period. The executors of F proceeded with their action but, by consent, C's action was stayed pending the outcome of the F action. The latter action was dismissed at trial but an appeal was allowed by the Court of Appeal and the damages as claimed were awarded to the executors. An appeal from the Court of Appeal's decision was dismissed by this Court.

C then proceeded with his action which was dismissed after a trial without a jury. The trial decision was reversed on appeal and R then appealed from the judgment of the Court of Appeal to this Court.

The points in issue were: (i) whether the fact that C did not obtain a judgment in his favour with respect to the shares he claimed until his case had reached this Court differentiated his position in this case from that of the executors of F's estate in their case, and (ii) whether, assuming C to be entitled to damages on the same basis as were the executors of F, the appellant should be relieved from paying them under the provisions of s. 35 of *The Trustee Act*, R.S.O. 1960, c. 408.

\* PRESENT: Cartwright C.J. and Martland, Ritchie, Hall and Spence JJ.

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*Held:* The appeal should be dismissed.

On both of the points in issue the Court agreed with and adopted the reasons of the Court below. C was entitled to damages on the same basis as were the executors of F, and R was not entitled to relief under s. 35 of *The Trustee Act*.

APPEAL from a judgment of the Court of Appeal for Ontario<sup>1</sup>, allowing an appeal from a judgment of Stewart J. Appeal dismissed.

*Joseph Sedgwick, Q.C.*, for the defendant, appellant.

*Terence Sheard, Q.C.*, and *Rodney Hull*, for the plaintiff, respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal by the defendant, Roman, from a judgment of the Court of Appeal for Ontario<sup>1</sup> dated February 23, 1968. The judgment appealed from reversed the judgment of Stewart J. who had dismissed the action with costs after a trial without jury. The judgment appealed from awarded the respondent \$31,105.90 damages, suffered as a result of the wrongful detention of 7,143 shares of Consolidated Denison Mines Limited.

The action was tried on an agreed statement of fact and for the purposes of this appeal a brief summary thereof will be sufficient.

On August 4, 1955, the plaintiff Crighton instituted an action, in which he had as his co-plaintiff The Toronto General Trusts Corporation in its capacity of executor of the Estate of the late William Ray Featherstone, deceased, against the defendant Roman. This action may for convenience be termed the joint action and in it the plaintiffs claimed, *inter alia*, the return to each of them of 25,000 shares of the capital stock of North Denison Mines Limited held by the defendant Roman and later represented by 7,143 shares of Consolidated Denison Mines Limited.

The joint action came on for trial before Judson J., then a member of the Supreme Court of Ontario. By his judgment, (delivered on February 5, 1958), the claim of the executors of Featherstone for delivery of the shares was allowed but the corresponding claim of the plaintiff Crighton was dismissed.

<sup>1</sup> [1968] 1 O.R. 769, 67 D.L.R. (2d) 669.

From this judgment Roman and Crighton appealed to the Court of Appeal for Ontario which dismissed both appeals. They then appealed to this Court which by a judgment dated October 4, 1960, dismissed Roman's appeal from the judgment in favour of the executors of Featherstone and allowed Crighton's appeal. The judgment was entered on November 23, 1960, after a motion before the Court to settle its terms. (This judgment is reported *sub. nom. Crighton v. Roman, Roman v. Toronto General Trusts Corp.*<sup>2</sup>). Paragraphs 2 and 3 of the formal judgment read as follows:

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2. AND THIS COURT DID FURTHER ORDER AND DECLARE that the respondent (defendant) Stephen Boleslav Roman is a trustee accountable to the appellant (plaintiff) John D. Crighton for twenty-five thousand (25,000) fully paid shares in North Denison Mines Limited or the equivalent thereof, being seven thousand, one hundred and forty-three (7,143) fully paid shares of Consolidated Denison Mines Limited found to be in the hands of the respondent (defendant) Stephen Boleslav Roman at the time of trial of this action, AND DID FURTHER ORDER AND ADJUDGE that the respondent (defendant) Stephen Boleslav Roman do forthwith deliver to the appellant (plaintiff) John D. Crighton the said shares or the equivalent thereof, being seven thousand, one hundred and forty-three (7,143) fully paid shares of Denison Mines Limited;

3. AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the respondent (defendant) Roman do account for and pay to the appellant (plaintiff) Crighton all dividends upon the shares so ordered to be delivered, including the amount of Ten thousand, seven hundred and fourteen Dollars and fifty cents (\$10,714.50) declared and paid prior to the date of this judgment;

During the period between the decision of the Court of Appeal in the joint action and the final judgment of this Court two dividends aggregating \$1.50 per share were paid on the shares of Consolidated Denison Mines Limited and the judgment of this Court directed that Roman, who was found to have been a trustee and who had received these dividends, should account to Crighton for them. This he did on January 30, 1961. In compliance with the judgment of this Court, Roman delivered to Crighton, certificates for 7,100 shares on December 8, 1960, and for the balance of 43 shares on December 20, 1960.

Following the decision of this Court in the joint action, both plaintiffs in that action namely, The Toronto General Trusts Corporation as executors of Featherstone, and Crighton, commenced separate actions claiming damages for the wrongful detention of their shares between the date of the

<sup>2</sup> [1960] S.C.R. 858, 25 D.L.R. (2d) 609.

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original judgment at the trial namely, February 5, 1958, and the date when the shares were actually delivered. As Roman had been held to be a trustee of the shares for the plaintiffs, the damages claimed were the difference between the price actually realized by them for their shares and the highest price at which the shares were traded during the period namely, 16 $\frac{5}{8}$  on June 16, 1958. The executors of Featherstone proceeded with their action but, by consent, Crighton's action was stayed pending the outcome of the Featherstone action.

By a unanimous judgment of the Court of Appeal for Ontario delivered by Schroeder J.A. damages as claimed were awarded to the executors of Featherstone (the judgment is reported in [1963] 1 O.R. 312). This decision was appealed to this Court which, in a judgment delivered by my brother Martland, agreed with and adopted the reasons of Schroeder J.A. See [1963] S.C.R. vi, 41 D.L.R. (2d) 290. Following this decision, Crighton proceeded with his action which is now the subject of this appeal.

There are two points only in issue in this appeal. The first point is whether the fact that Crighton did not obtain a judgment in his favour with respect to the shares he claimed until his case had reached this Court differentiates his position in this case from that of the executors of the Featherstone Estate in their case. The appellant claims that it does and that Crighton is entitled to no damages. The respondent claims that it does not and that he is entitled to damages on the same basis as the executors of the Featherstone Estate were found to be. If the respondent's contention on this point is upheld, there is no dispute as to the amount of damages awarded by the Court of Appeal.

The second point is whether, assuming Crighton to be entitled to damages on the same basis as were the executors of Featherstone, the appellant should be relieved from paying them under the provisions of s. 35 of *The Trustee Act*, R.S.O. 1960, c. 408. The appellant claims he should be so relieved whereas the respondent says there is no ground for relieving him. This contention was not raised by the defendant in the action brought by the executors of Featherstone; it was not dealt with by Stewart J. as that learned Judge had held that the action failed; it was rejected by the Court of Appeal.

It should be noted that there was no conflict of view between any of the judges who dealt with Crighton's claim against Roman in the joint action as to whether Roman originally held the shares as trustee for Crighton as well as for Featherstone. The difference of opinion between the majority in this Court on the one hand and Kerwin C.J. and the judges in the Courts below on the other hand was as to whether Roman had received a valid release or assignment of Crighton's beneficial interest in the shares.

On both of the points in issue in this appeal which are set out above I find myself so fully in agreement with the reasons of Laskin J.A. that I am content to adopt them and do not find it necessary to add anything to what he has said.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the defendant, appellant: Smith, Rae, Greer, Toronto.*

*Solicitors for the plaintiff, respondent: Strathy, Archibald, Seagram & Cole, Toronto.*

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