PIERRE REMY PLISSON (PLAINTIFF) ..... } APPELLANT; 1905 *Oct. 27. *Nov. 27.

AND

JAMES M. DUNCAN (RECEIVER) ....RESPONDENT;

AND

JOHN F. DIEMERT.....DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Receiver—Management of business—Supervision and control—Laches.

The receiver of a partnership who is directed by the court to manage the business until it can be sold should exercise the same reasonable care, oversight and control over it as an ordinary man would give to his own business, and if he fails to do so he must make good any loss resulting from his negligence.

The fact that the receiver is the sheriff of the district does not absolve him from this obligation though the partners consented to his appointment knowing that he would not be able to manage the business in person.

The Chief Justice and Maclennan J. dissented, taking a different view of the evidence.

APPEAL from a decision of the Supreme Court of the North-West Territories affirming, by an equal division of opinion, the judgment of Mr. Justice Newlands, who granted the application of the receiver to be discharged.

The plaintiff (appellant) and the defendant were in partnership, at Francis, as hotel-keepers, and the former brought an action against the latter for dis-

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

1905

PLISSON v. DUNCAN

solution of the partnership, an account, and the appointment of a receiver. By an order made by Mr. Justice Newlands, with the consent of the interested parties, bearing date the 4th day of July, 1904, the respondent, Duncan, who is the sheriff of the Western Assiniboia Judicial District, was appointed as such receiver to collect, get in, and receive the debts and other assets, property, and effects belonging to the partnership business carried on by the plaintiff and the defendant, Diemert, and to carry on and manage the said hotel business at Francis.

The respondent entered into possession of the hotel business and put one Neil N. McLean in charge to manage the same. The parties to the action settled it, and the receiver proceeded to have his accounts as such passed. Upon the passing of the accounts it appeared that the management of the hotel business by the receiver had not proved financially successful, and that there was a deficit of $1,367.16. The plaintiff and the defendant, who appeared by counsel on the passing of the receiver's accounts before Mr. Justice Newlands, claimed that the deficit was due to the neglect of his duties by the receiver and that the latter should be held responsible for and charged with this deficit.

On the 29th March, 1905, Mr. Justice Newlands gave judgment, holding that the receiver was not responsible for the deficit above referred to, and further that he, the receiver, was entitled to be indemnified by the parties to the suit against all debts incurred by him during the time that he was in charge of the business. The ground on which this judgment was based was that both parties assented to the appointment, knowing that the sheriff could not attend personally to the business, and that

he visited the hotel and examined affairs there as often as his official duties permitted. Both parties appealed to the court *en banc.*

The Supreme Court of the North-West Territories, *en banc,* was evenly divided, Chief Justice Sifton and Mr. Justice Harvey agreeing with the judgment appealed from, while Mr. Justice Wetmore and Mr. Justice Prendergast were of opinion that the judgment of Mr. Justice Newlands should be reversed. In the result, the appeal was dismissed and from that decision the present appeal to the Supreme Court of Canada was taken.

On the appeal being called,

Chrysler K.C., for the respondent, moved to quash on several grounds, namely, that the decision appealed from was not a final judgment in the action to dissolve the partnership, that it was a matter for the discretion of the provincial courts, that it was a domestic matter to be dealt with by the courts below, and that the formal orders of Mr. Justice Newlands and the court *en banc* were not in the printed case. The court ordered the hearing to proceed on the merits, reserving judgment on the motion.

Ewart K.C., for the appellant.

Chrysler K.C., for the respondent.

THE CHIEF JUSTICE (dissenting).—In this case the majority of the court have come to the conclusion that the appeal should be allowed with costs of this court and of the court of appeal and the receiver and manager be declared liable for and charged with the deficit of $1,367.16, and that he should be ordered to deliver

1905

PLISSON v. DUNCAN

The Chief Justice.

up possession at once of the partnership estate and effects which came to his hands by virtue of the order of the court of 4th July, 1904, and thereupon should be discharged.

I cannot concur in that judgment and would dismiss the appeal. Mr. Justice Maclennan has written a dissenting opinion in that sense in which I concur.

The respondent's motion to quash is dismissed with costs, as we intimated at the hearing. There is no room for doubting our jurisdiction to entertain the appeal.

GIROUARD J.—The appeal should be allowed with costs.

DAVIES J.—This was an application by the receiver and manager of an insolvent estate for the passing of his accounts as filed. The court made a declaration that he should not be held liable for a deficit which the accounts shewed during the management of the estate by him and that he should retain possession of the property until the plaintiff's creditor paid over to him the amount of this deficit, $1,367.16.

This judgment was maintained by a majority of the court of appeal.

At the hearing counsel for the plaintiff (appellant) contended that the liability of the receiver and manager should not only be declared to cover the deficit, but that it should also extend to such profits in addition as should have been made by the business if it had been reasonably and properly managed.

We are now relieved from giving consideration to this latter contention because counsel consent that judgment should be given on the assumption that no such profits were actually proved in this case, and the

question before us is therefore reduced to one of the liability of the receiver and manager for the actual deficit which occurred during his management, namely, $1,367.16.

I concur generally in the judgment given by Wetmore J. and concurred in by Prendergast J. as to the responsibility of a receiver and manager of a business entrusted to his care.

The deficit in this manager's accounts was, in my judgment, shewn to be the direct result of his wilful default in leaving the business for months together to take care of itself without his own or any other supervision or control. No accounts were apparently kept, by the person appointed to manage the hotel, with the hotel guests or lodgers or generally of the hotel business. No attempt was made to keep separate the receipts from the lodgers or guests at the hotel and those from the casual patrons of the eating room. In fact all receipts were supposed to have been put in the bar-room till or money register. Even the hotel register which might have aided in ascertaining the times during which the several boarders lodged at the hotel was not forthcoming. The hotel manager was called to explain the accounts and generally to account if possible for the deficit. His explanations such as they were only served to make matters look worse than they did on the face of the accounts and deservedly called down upon the witness a severe rebuke from the trial judge for the manner in which he was giving his evidence. My only surprise is that under the circumstances as stated in the evidence the deficit was so small.

If under such circumstances as those described in this case a paid receiver and manager of a business is not to be held liable for the deficit in his accounts I

1905

PLISSON v. DUNCAN

Davies J.

do not know under what circumstances he should be. Surely it is not necessary to prove personal wrongdoing or peculation on his part in order to make such liability attach. Creditors of an estate, the running business of which is placed by a court in the hands of a receiver and manager, are entitled to exact from him such reasonable care, supervision and control as an ordinary man would give to the business were it his own. The trust was voluntarily accepted by the receiver and manager. The fact that he was also sheriff did not absolve him from the ordinary responsibilities of a position of trust which he chose to accept. He continued the business for about five months, for the three latter of which he neither gave any personal attention to it nor took any steps to preserve a business supervision or control over it. No accounts were rendered during this time shewing how the business was progressing nor did the manager cause any inspection whatever of it. The natural results of such culpable negligence ensued. The man in charge handed in certain moneys and substantially said, there is a deficit but I can give no explanations. It is said, however, that the onus rests upon the creditors to prove how the loss occurred and to shew that it was caused by the direct action or default of the receiver and manager. I do not think so. Surely every intendment must be made against a trustee or manager presenting accounts such as those in this case, and asking that they be passed and he discharged. Reasonable care and ordinary business control and oversight are required from the receiver and manager. If he brings them to the discharge of his duties he may well claim to be absolved from losses which nevertheless occurred. If he fails to do so he cannot complain if he is held answerable for losses which are the legi-

timate result of his negligence, and which, in my opinion, the evidence shews the $1,367.16 loss was.

The appeal should be allowed with costs of this court and of the court of appeal and the receiver and manager be declared liable for and charged with the deficit of $1,367.16, and he should be ordered to deliver up possession at once of the partnership estate and effects which came to his hands by virtue of the order of the court of 4th July, 1904, and thereupon should be discharged.

IDINGTON J. concurred in the reasons stated by Davies J.

MACLENNAN J. (dissenting).—After a careful perusal of the evidence in this case I am unable to see that we ought to interfere with the judgment.

The appellants have tried out their case to the best of their ability, and have adduced all their evidence; but I think it amounts to no more than a strong suspicion that money may have been received which has not been accounted for, or that goods may have been given away without payment, or without a proper price having been charged and collected therefor, or that McLean may have received some money which he has not paid over to the receiver. But mere suspicion, however strong, will not do. I do not find that there is any particular sum, large or small, which was, or ought to have been received, but not accounted for. Without that, how is it possible to charge the receiver with any such sums? That difficulty was seen by the learned dissenting judges; and what they do is to express an opinion that the matter should be tried again, that it should be referred to the clerk, or some other officer, to take an account of what the profits

1905

PLISSON v. DUNCAN

Maclennan J

of managing the business should be without any negligence on the part of the receiver. But that is the very thing which has already been done, and in which the plaintiffs have failed. They do not pretend that they have discovered any new evidence, and I see no ground on which the case should be sent back for a new trial as suggested by the learned judges.

McLean ought no doubt to have kept more exact accounts, and the receiver failed to exercise all the supervision which his duty required. But I think it is not proved that any specific sums were lost, or not accounted for, with which the receiver ought to be, but has not been charged. If that had been done the learned judge would have charged the receiver with them. If he had omitted to do so that could be corrected on this appeal. But the evidence is no more than general evidence of mismanagement, without proving the loss of any sum or sums of money resulting therefrom.

The learned judge might have deprived the receiver of his remuneration, but he has not done so, and I do not understand that the appellants ask for that.

I think the appeal should be dismissed.

Appeal allowed with costs.

Solicitors for the appellant; *Johnston & Ross.*

Solicitors for the respondent; *Balfour & Martin.*