ROBINSON F. BRIGGS (PLAINTIFF).....APPELLANT; 1902

AND

SAMUEL NEWSWANDER AND OTHERS (DEFENDANTS)..... } RESPONDENTS;

*Mar. 10.
*May 15.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Contract—Mining Claim—Agreement for Sale—Construction—Enhanced Value.

By agreement in writing signed by both parties B. offered to convey his interest in certain mining claims to N. for a price named with a stipulation that, if the claims proved on development to be valuable and a joint stock company was formed by N. or his associates, N. might allot or cause to be alloted to B. such amount of shares as he should deem meet. By a contemporaneous agreement, N. promised and agreed that a company should immediately be formed and that B. should have a reasonable amount of stock according to its value. No company was formed by N., and B. brought an action for a declaration that he was entitled to an undivided half interest in the claims or that the agreement should be specifically performed.

Held, reversing the judgment of the Supreme Court of British Columbia, that the dual agreement above mentioned was for a transfer at a nominal price in trust to enable N. to capitalize the properties and form a company to work them on such terms as to allotting stock to B. as the parties should mutually agree upon; and that, on breach of said trust, B. was entitled to a reconveyance of his interest in the claims and an account of moneys received or that should have been received from the working thereof in the meantime.

APPEAL from a decision of the Supreme Court of British Columbia affirming the judgment at the trial in favour of the defendants.

The result of the appeal depended on the construction to be placed on two agreements for the transfer

*PRESENT:—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills JJ.

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of mineral claims from Briggs to Newswander. The agreements were executed on the same day and the substantial portions thereof are stated in the above head-note. They are fully set out in the judgment of the court published herewith :—

J. Travers Lewis for the appellant cited *Peacock* v. *Peacock* (1); *Bryant* v. *Flight* (2); *Taylor* v. *Brewer* (3); *The Queen* v. *Doutre* (4); *Davies* v. *Davies* (5); *Re Vince* (6); *Guthing* v. *Lynn* (7); *Leeds* v. *Amherst* (8); *Chattock* v. *Muller* (9); *Hart* v. *Hart* (10); and *Gaskarth* v. *Lowther* (11).

Davis K.C. for the respondents. The agreement is illusory, vague and uncertain. The plaintiff has not chosen to make a definite agreement which can be enforced and he now wishes the court to make one for him. This the court will not do, on the authorities referred to by Mr. Justice Irving in his judgment. It is impossible for the court to say, assuming that the plaintiff is entitled to anything, what he is entitled to. The plaintiff has chosen his own forum and the difficulty arises that the plaintiff along with the defendant Newswander, having fixed upon the tribunal which is to decide what number of shares are to be considered "reasonable," "according to the value thereof," that tribunal to consist of the two parties themselves, there was no provision made for a disagreement. It is expressely provided that the number of shares must be agreed upon "amicably," and as they have not been able to agree amicably upon any given number or shares, the plaintiff has no right of action.

(1) 2 Camp. 45.
(2) 5 M. & W. 114.
(3) 1 M. & S. 290.
(4) 6 Can. S. C. R. 342.
(5) 36 Ch. D. 359.
(6) [1892] 1 Q. B. 587; 2 Q. B. 478.
(7) 2 B. & Ad. 232.
(8) 20 Beav. 239.
(9) 8 Ch. D. 177.
(10) 18 Ch. D. 670.
(11) 12 Ves. 107.

The two agreements taken together shew clearly that the plaintiff really had no legal rights against the defendants but, in consideration of his not worrying them by litigation, the defendants were to give him $500 and, in case they formed a company and issued shares, would give him whatever amount of shares was satisfactory to them. It was intended that Newswander should feel morally bound to give the plaintiff some shares, but the amount of such shares was to be mutually agreed upon by all parties.

The judgment of the court was delivered by:—

SEDGEWICK J.—The plaintiff was the owner of two adjoining mineral claims called the "Two Kids" and "Monarch" located by him on the 17th of July, 1899, and situated in the Ainsworth Mining Division of British Columbia. The defendant Newswander, acting for himself and his co defendants who resided in France, wrongfully entered upon the ground of the plaintiff and staked it, on the 9th of December following, in the name of the defendants, Doras and Darginac, as the "Dublin" and "Cork" mineral claims. The property appearing to be valuable, the defendant Newswander was desirous of acquiring it on behalf of himself and his two colleagues. Negotiations were thereupon entered into which resulted in the contemporaneous execution of the following agreements:

THIS AGREEMENT made the twelfth day of June, one thousand nine hundred, between Robinson P. Briggs, of the City of Kaslo, free miner, of the first part, and Samuel Newswander, of the said City of Kaslo, merchant, of the second part.

Whereas the party of the first part is the owner of the mineral claims hereinafter mentioned and has agreed to sell the same to the party of the second part;

Now this indenture witnesseth that the party of the first part agrees to sell to the party of the second part, and the party of the second part agrees to purchase the mineral claims "Monarch," "Two Kids"

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and "Victor," situate on the south fork of Kaslo Creek, being re-locations of the ground formerly located in the name of "Essex" and "Ben Hur" mineral claims, at and for the price or sum of five hundred dollars ($500.00), payable as follows: One hundred dollars ($100.00) on account of purchase money to be paid on the execution of this agreement and the balance of the said purchase money to be paid within one (1) month from the date hereof.

Should the ground covered by the said mineral claims prove on development to be valuable, and a joint stock company be formed by the party of the second part or his associates, the party of the second part may allot or procure to be allotted to the party of the first part such amount of the shares in the said company as to the party of the second part may seem meet, but it is distinctly understood that the party of the first part shall have no right of action to demand allotment of shares as aforesaid, and it shall be entirely optional on the part of the party of the second part whether or not he allot to the party of the first part any shares therein.

The party of the second part shall be entitled at the time of payment of the balance of said purchase money to conveyance of said mineral claims free from all encumbrance except against the mineral claims "Two Girls" "Cork" and "Dublin."

Time is to be considered of the essence of this agreement.

In witness whereof the parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of J. J. FLEUTOT. } ROBINSON P. BRIGGS. (seal.) SAM NEWSWANDER. (seal.)

Know all men by these presents that I, Samuel Newswander, of the City of Kaslo, B.C., free miner's license No. B27,068, issued at Kaslo, B.C., May 30, 1900, in consideration of the transfer of the title to me of the full interests in the "Monarch" mineral claim and the "Two Kids" mineral claim by Robinson P. Briggs, of Kaslo, B.C., free miner's license No. B27,208, issued at Kaslo, B.C., May 30, 1900, promise and agree that a corporation shall be immediately and legally formed to do business under the laws of British Columbia to take over the above named mineral claims, and that the said Robinson P. Briggs shall have a reasonable amount of the stock of said corporation according to the value thereof, and it is hereby agreed that no action shall be instituted by the said Briggs to defraud the said Newswander of the title to the said claims, and that the number of shares shall be amicably determined between the parties hereto.

Dated at Kaslo, B.C., June 12th, 1900. Made in duplicate.

ROBINSON P. BRIGGS.

F. CONRUYT SAM. NEWSWANDER.

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It is not disputed that both agreements are to be read together and that the second agreement, in so far as the question here is concerned, has to be interpreted according to its terms. The defendant Newswander and those associated with him proceeded to exploit and develop the claims which turned out to be very valuable but not even the approximate value, when this action was instituted, was ascertained. The plaintiff, however, swore they are worth $100,000, while the defendants gave most unsatisfactory evidence upon the question. During the defendants' operation of the work they allowed the property located as the "Monarch" and the "Two Kids" to lapse and, having paid the full amount due to the Crown by way of rental, obtained, under the British Columbia Mineral Act, a Crown grant of the property in their own names,—their title, whether under the legal mineral claim acquired by them from the plaintiff or under their own illegal location, being thereby converted into an estate in fee simple. There was never any attempt on the part of the defendant Newswander or any one else to form a corporation for the purpose of taking over the property in question, and no excuse or suggestion has ever been made why that course was not followed except the alleged intention on the part of the defendants to destroy any interest which the plaintiff Briggs might have in the property under the agreement.

Subsequently this action was brought in which the plaintiff claimed a declaration that he was the owner of an undivided one-half interest or share in the "Dublin" and "Cork" mineral claims and entitled to a decree vesting the same in him and for an account of his share of the moneys accruing from the working of the mines by the defendants.

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The defendants denied liability but paid $700 into court and it appeared in the evidence that this $700 together with the $500 originally paid making the sum $1,200 was the amount spoken of during the negotiations above referred to as the sum for which Briggs, the plaintiff, was willing at that time to sell his absolute interest.

The case was tried before Mr. Justice Irving who dismissed the action upon the ground that inasmuch as the agreement did not make provision for the exact proportion or interest which the vendor was to receive, leaving that question to be "amicably determined between the parties hereto," he knew of no standard by which the court could say what was a reasonable amount of shares to be given, and it was ordered that the money paid into court should be returned to the defendants. Upon the appeal Mr. Justice Martin delivered the unanimous judgment of the court, confirming the judgment of the trial judge as follows:—

> It might be that if the construction of the agreement depended solely upon the words "the said B. shall have a reasonable amount of stock, etc." that a conclusion favourable to the plaintiff could be arrived at. But the manner in which the number of shares is to be allotted is provided by the agreement which declares that it "shall be amicably determined between the parties hereto." The difficulty arises from the fact that no such determination can be come to, and under such circumstances, the parties having selected their own forum, it is difficult to see upon what ground the court can interfere. No authority has been cited which would justify this court substituting itself for that "amicable" tribunal of interested parties which the agreement empowers to determine the vexed point, nor is there any legal machinery, which can be resorted to, to compel the parties to act in concert. The cases cited by plaintiff's counsel do not go to the length necessary to support the contention advanced and no valid reason appears for departing from the view taken by the learned trial judge.

I am of opinion that there is manifest error in this disposition of the case. The courts below seem to

have entirely overlooked the principles relating to express and resulting trusts that are applicable here. The true construction of the dual agreement of the 12th June, 1900, is, that it was a transfer by the plaintiff, Briggs, to the defendant, Newswander, of the properties in question for the nominal consideration of $500 as earnest money, in trust, expressly for the purpose of enabling Newswander to capitalize such properties and to create and finance a company to take over and work them on such terms as to stock allotment to the vendor as might thereafter be determined between the parties interested, which parties would necessarily then include the prospective company so to be created.

The breach complained of by Briggs is the defendant Newswander's refusal and failure to incorporate any company for the purpose of implementing the express trust which he had undertaken, and as a breach, on the threshold, of the fundamental trust which formed the master-motive of the transaction.

The first effect of that breach of trust was that a resulting trust in favour of the Plaintiff, Briggs, was at once created, a trust further emphasized and the breach of the express trust further aggravated by the fact that the defendants have since tortiously converted the property to their own use by Crown-granting the identical areas in their own names as the "Cork" and "Dublin" claims and repudiating any further responsibility to the plaintiff, Briggs.

In strict law, under these circumstances, the plaintiff Briggs is entitled, upon payment back of the $500 received by him, to a re-conveyance of the areas in question, the transfer describing them not as the "Monarch" and "Two Kids" but as the "Cork" and "Dublin" claims, *eo nomine*.

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If there was such vagueness and uncertainty in the trust instruments as the court below found there was in that case, under the law as I understand it, the result would be, not that the defendants could retain the property of which they had the legal estate, but that there was a resulting trust to the plaintiff. In other words, the very grounds upon which the court gave judgment for the defendants were, as a matter of law, the grounds upon which they should have given judgment for the plaintiff. I need not refer to cases in which these elementary principles of resulting trust are illustrated. The rule is stated in Lewin on Trusts (10 ed.) at page 155:—

> The general rule is, that wherever, upon the conveyance, devise, or bequest, it appears that the grantee, devisee or legatee was intended to take the legal estate merely, the equitable interest, or so much of it as is left undisposed of, will result, if arising out of the settlor's realty, to himself or his heir, and if out of personal estate, to himself or his executor.

And in H. A. Smith's Principles of Equity, he states:—

> Where a trust is evidently intended to be created the person in whose hands the legal estate is transferred cannot hold it beneficially (p. 36). Thus where a bequest is made to a person "upon trust," and no trust is declared (i) or the trusts declared are too vague to be executed (k), or are void for unlawness (l), or fail by lapse (m) the trustee can have no pretence for claiming the beneficial ownership, the whole property being clearly impressed with a trust. In such cases, therefore, the trust will result to the settlor or his representatives, the heirs as to realty, the next of kin as to personality and the trustee cannot defeat the resulting trust by parol evidence in his favour (n).

I may, however, refer to the case of *Chattock* v. *Muller* (1), in which case the defendant purchased an estate, having agreed with the plaintiff that if he made the purchase he would cede part thereof to the plaintiff. In an action for specific performance of the agreement, the court directed a reference to chambers

(1) 8 Ch. D. 177.

to ascertain what portion the plaintiff was entitled to and decreed that the defendant should convey such portion to the plaintiff. During the argument of that case, Malins V.C., said:—

It may be that as the plaintiff has been lulled into false security by the defendant's conduct, the proper relief would be to give the plaintiff the whole estate.

And in delivering the judgment of the Court, he said:—

But it was strongly argued by Mr. Glasse and Mr. Kakewich, for the defendant, that the plaintiff cannot have a decree because there was no certainty as to what part of the estate the plaintiff was to have, or as to the price to be paid for it. In a case like this, where the defendant has acquired the estate or part of it by a fraud on the plaintiff, I think that the court would be bound, if possible, to overcome all technical difficulties in order to defeat the unfair course of dealing of the defendant, and I should not, in my opinion, be going too far if I compelled the defendant to give the whole estate to the plaintiff at the price given for it, rather than that he should succeed in retaining it on account of any uncertainty as to the part which the plaintiff is entitled to have. But I think the memorandum in the handwriting of the defendant, which was given to the plaintiff at the interview of the 20th of June, relieves the court in this case from any difficulty.

In the case of *The Duke of Leeds* v. *The Earl of Amherst* (1) Sir John Romilly, advances the following proposition:—

I take it that the general wisdom of mankind has acquiesced in this:—That the author of a mischief is not the party who is to complain of the result of it, but that he who has done it must submit to have the effects of it recoil upon himself. This, I say, is a proposition which is supported by the Holy Scriptures, by the authority of profane writers, by the Roman Civil Law, by subsequent writers upon civil law, by the common law of this country, and by the decisions in our own courts of equity.

See also *Booth* v. *Turle* (2); and *Re Duke of Marlborough* (3).

(1) 20 Beav. 239. (2) L. R. 16 Eq. 182.
(3) [1894] 2 Ch. 133.

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The offer to pay $700 as satisfaction of the plaintiff's claim seems grossly inadequate. The plaintiff, Briggs, was possibly willing when the agreement was made to sell out on that basis but the defendant was not. He constituted himself the trustee and agent of Briggs to develop the property and the plaintiff is entitled to any enhanced value which the subsequent development and outlay gave to it.

There is some question as to the proportion of interest which the court should declare the plaintiff entitled to. As I have said, according to the rigorous rules and demands of a court of equity, in dealing with breaches of trust such as this, the result might be that the whole property should revert to the vendor, he returning the purchase money and they being allowed for repairs but not for improvements.

An abuse of trust, said Lord Ellenborough, in *Taylor* v. *Plumer* (1), can confer no rights on the party abusing it, nor on those who claim in privity with him.

Lewin on Trusts (10 ed.) at page 1093 :—

If the trust estate has been tortiously disposed of by the trustee the *cestui que trust* may attach and follow the property that has been substituted in the place of the trust estate, so long as the metamorphosis can be traced.

In cases of actual fraud the court refuses any allowance for improvements but usually allows for repairs.

If, (said the Lord Chancellor in *Kenney* v. *Browne* (2),) a man has acquired an estate by rank and abominable fraud, and shall afterwards expend his money in improving the estate, is he therefore to retain it in his hands against the lawful proprietor? If such a rule should prevail it will certainly fully justify a proposition which I once heard stated at the Bar of the Court of Chancery, that the common equity of this country was, to improve the right owner out of the possession of his estate.

According to my first conception of this case, if the defendant Newswander had as a fact formed a company,

(1) 3 M. & S. 562 at p. 574. (2) 3 Ridg. P. C. 462 at p. 518.

as agreed, and if the mining areas had then been taken over by such company, the plaintiff would have been entitled in that event to, at least, one half of the company's shares, fully paid up, for the agreement of the 12th of June, fairly construed, embodied also a partnership agreement whereby Briggs supplied the property and the defendant Newswander, on his part, agreed to furnish the funds necessary to work it, by organizing a company to finance or capitalize the undertaking and, in the absence of a definite agreement as to proportionate interest, the partners must stand on an equal footing.

In the present case there were two parties to the agreement, Briggs and Newswander, and the latter did not purport to contract as an agent for his co-defendants in this action. Upon consultation, however, with my brother judges I have been convinced that giving him a moiety of the property would not be equitable. The pleadings as well as the evidence disclose that the agreement was in fact made between Briggs on the one part, and the three defendants on the other, and that will justify us in assuming that the four contracting parties are each entitled to an equal share.

Now the "Partnership Act" of British Columbia, R.S.B.C. (1897), ch. 150, sec. 25, enacts as follows:—

> The interest of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules:—
>
> (1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

That creates a statutory rule for the determination of the respective interest of the parties in the present case. But that provision in the Act is a mere statement of what has always been the English law.

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In *McIlquham* v. *Taylor* (1), the agreement in question was as follows:—

The said (defendant) H. E. Taylor, will within twelve calendar months from the date hereof pay the sum of £1,000 to or hand over to or otherwise transfer into the names of the said (plaintiffs) James McIllquham and James Mitchell one thousand pounds worth of fully paid up shares in a company to be formed by the said H. E. Taylor, within the said twelve months as aforesaid, for working the said mines and premises, the capital of such company not to exceed £12,000.

In the judgment of the trial court, Stirling. J., at page 58, says:—

I think that the shares which the defendant undertook to transfer were to be shares in a company in which the shareholders all stood on a footing of equality. If the case were one of partnership it would come within the Partnership Act, 1890, which provides in section 2, sub-section 1, in accordance with the law as it was before the Act, that, subject to any agreement express or implied between the partners, all the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm. Therefore partners, in the absence of express stipulation, stand on equal footing. In the same way, upon an agreement for a partnership, if the shares are not defined, the partners must come in on equal terms.

The result is that the plaintiff is entitled to maintain the present action and to have judgment declaring him entitled to a one-quarter interest in the "Dublin" and "Cork" mineral claims referred to in the pleadings and to a proper conveyance of the same, also to have an account taken of moneys received or entitled to be received by the defendants from the operation of such mineral claims, deducting therefrom all moneys rightfully expended by them, the plaintiff to be charged with the original purchase money received by him, and that one-quarter of the sum found due upon taking of such account shall be paid by the defendants to the plaintiff, the whole payment to be a charge upon the interest of the defendants in the mineral claims in

(1) [1895] 1 Ch. 53.

question, all parties to have leave to apply as occasion may require to the court below or a judge thereof for such further directions and relief as may seem right.

The plaintiff will be entitled to his costs of the trial and of the appeal to the full court in British Columbia as well as to the costs of the reference hereby ordered and of this appeal.

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Appeal allowed with costs.

Solicitors for the appellant: *Taylor & Hanington.*

Solicitors for the respondents: *McAnn & Mackay.*