ADDISON McPHERSON (PLAINTIFF).....APPELLANT; 1927

*Feb. 8, 9.
*April 20.

AND

JOHN L'HIRONDELLE (DEFENDANT)....RESPONDENT.

AND

THE SOLDIER SETTLEMENT BOARD OF CANADA .....} (DEFENDANT)

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Contract—Want of consideration—Alleged declaration of trust—Written words of confirmation or acknowledgment—Statute of Frauds, ss. 4, 7.

Plaintiff transferred land (including mines and minerals; except coal, which was reserved from his title) to the Soldier Settlement Board, which sold it to defendant. Plaintiff claimed against defendant an undivided one-half interest in the mines and minerals (except coal) in the land, under an alleged oral agreement with defendant, which, he alleged, was subsequently confirmed and acknowledged in writing. This writing was a power of attorney (prepared by plaintiff's solicitor on plaintiff's instructions) whereby defendant on his account authorized plaintiff "to * * * dispose of my undivided one-half interest (the other undivided one-half interest belonging to the said [plaintiff]) in the mines and minerals, including petroleum and natural gas" in said land. Defendant, a man of little education, said he understood that the parenthetical clause referred to plaintiff's interest in another parcel of land, and that the project authorized by the power of attorney was the sale by plaintiff of the oil rights in both parcels together, the one belonging to defendant and the other to plaintiff, and defendant denied any agreement such as plaintiff alleged. Plaintiff, in the alternative, claimed that defendant should be deemed to hold in trust for his benefit an undivided one-half interest in the mines and minerals.

Held, plaintiff could not succeed on his alleged contract, as there was no consideration, and s. 4 of the *Statute of Frauds* was not complied with; the words in parenthesis in the power of attorney did not constitute a sufficient memorandum or note within s. 4; nor did said words operate as a declaration of trust; moreover, s. 7 of the *Statute of Frauds* was not complied with.

Mere words of confirmation or acknowledgment cannot make a valid contract of that which is ineffective as a contract for lack of consideration, and an incomplete voluntary transfer will not be construed as a declaration of trust unless it appear that there is an intention to declare a trust, and not merely to make a transfer (*Heartley* v. *Nicholson,* L.R. 19 Eq. 233, *Richards* v. *Delbridge,* L.R. 18 Eq. 11, at p. 15, and other cases, cited).

Judgment of the Appellate Division, Alta. (22 Alta. L.R. 281), affirmed.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1) allowing the defendant L'Hirondelle's appeal from the judgment of Simmons C.J. (2) in which he adjudged that the defendant L'Hirondelle should account to the plaintiff for a portion of the purchase money payable by one Herron under Herron's contract of purchase of certain land, the portion to be accounted for representing a one-half interest in the mines and minerals in and under the south-west quarter of section 17, township 20, range 2, west of the 5th meridian. The material facts of the case are sufficiently stated in the judgment now reported. The plaintiff's appeal to this Court was dismissed with costs.

W. F. O'Connor K.C. for the appellant.

H. P. O. Savary K.C. for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The plaintiff was the owner of three parcels of land in Alberta, first, the S.W. $\frac{1}{4}$ of section 17, township 20, range 2, west of the 5th Meridian, including the minerals therein; secondly, the S.E. $\frac{1}{4}$ of section 18 in the same township and range, but without the minerals; thirdly, 240 acres in section 8 immediately to the south of the first parcel above described, including the minerals. The property was subject to a mortgage in favour of the Associated Investors of Rochester, N.Y., for $4,500, upon which there was due $4,751.60, and there were also unpaid taxes. The controversy is with regard to the first parcel. The mortgage company was pressing for payment, and the plaintiff approached the defendant, who was a neighbour and connected with him by marriage, and suggested that he should acquire the first and second parcels through the Soldier Settlement Board, which had been recently constituted and was exercising the powers conferred by the *Soldier Settlement Act*, ch. 71 of the Dominion, 1919. The defendant made application to the Board for the purchase and secured an agreement, dated 24th December, 1920, whereby the Board agreed to sell these two parcels to the defendant, under the provisions of the Act, and according

(1) 22 Alta. L.R. 281; [1926] 3 W.W.R. 481.

(2) [1926] 2 W.W.R. 465.

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to the stipulations of the agreement, subject to the reservations, limitations and conditions contained in the original grant from the Crown, for the sum of $5,000 to be paid, $500 down, and the balance in 25 equal, consecutive, annual instalments of $319.30 each, consisting of principal and interest calculated annually at 5%. In the meantime the Board had negotiated with the plaintiff for the acquisition of the title, and had advanced to the plaintiff's solicitor the amount necessary to discharge the mortgage and taxes, and, on 18th January, 1921, the plaintiff executed a transfer of the land to the Board for the consideration of $5,000, the receipt of which was thereby acknowledged. At the same time the plaintiff, through his solicitors, informed the district office of the Board that he wished to reserve for himself the oil and mineral rights, but the answer was that the district superintendent had no authority under the Board's regulations to accept title from a vendor subject to any personal reservations, and that, if Mr. McPherson wished to retain the oil and minerals, it would be necessary to submit the case to the head office for consideration in a formal manner. The plaintiff did not pursue the matter with the head office, and his transfer expressly included the mines and minerals in the S.W. $\frac{1}{4}$ of s. 17, and the right to work the same, except the coal, which, according to his title, belonged to the Canadian Pacific Railway Company. It would seem that the defendant entered into and remained in possession under his agreement until 2nd March, 1926, when, by the consent of the Board, he made an agreement with Wm. Stewart Herron, whereby he assigned all his right, title and interest in the land, and the benefit of all covenants, terms and conditions contained in his agreement with the Board, for the price or sum of $20,800, to be paid, with interest, in the manner and at the time stipulated by the agreement. Then, on 3rd March, 1926, the plaintiff registered with the registrar of the Southern Alberta Land Registration District a caveat in which he stated that he claimed:

an undivided one-half interest in mines and minerals, including petroleum and natural gas (excepting coal reserved to the Canadian Pacific Railway Company) in and under the South-west Quarter of Section Seventeen (17), Township Twenty (20), Range Two (2), West of the Fifth (5th) Meridian in the Province of Alberta, containing one hundred and sixty (160) acres more or less, under and by virtue of an agreement with

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JOHN L'HIRONDELLE, of near Black Diamond Post Office in the Province of Alberta, farmer, whereby I was to become the owner of an undivided one-half interest of the said mines and minerals in and under the said land, which said agreement was confirmed and acknowledged by the said John L'Hirondelle by an instrument in writing dated the 24th day of February, 1926, the said John L'Hirondelle claiming interest in the said mines and minerals in and under the said lands under an agreement with The Soldier Settlement Board of Canada, which agreement included the purchase by the said John L'Hirondelle of the mines and minerals (excepting coal reserved to the Canadian Pacific Railway Company) in and under the said land, standing in the register in the name of The Soldier Settlement Board of Canada.

With the caveat was filed the plaintiff's affidavit, in which he stated that he had a good and valid claim upon the land.

The defendant then caused notice to be served upon the plaintiff, requiring him, under the provisions of the Land Titles Act, to take proceedings to verify his caveat, and thereupon the plaintiff commenced this action, in which the statement of claim was filed on 16th March, 1926.

By the statement of claim, the plaintiff alleged that:

By an agreement made between the Defendant John L'Hirondelle and the Plaintiff herein the said Defendant agreed to transfer and convey to the Plaintiff an undivided one-half interest in the mines and minerals in and under the said lands including petroleum and natural gas and excepting coal, which said agreement was confirmed and acknowledged by the said Defendant by an instrument in writing dated the 24th day of February, 1926.

After the evidence had been taken at the trial, the plaintiff amended by adding another paragraph, in which he alleged in the alternative that, by an instrument in writing of 24th February, 1926, the defendant made a declaration that he was the owner of an undivided one-half interest in the mines and minerals, and that the other undivided one-half interest was the property of the plaintiff. The plaintiff had claimed, by his original pleading, a declaration that he had an undivided one-half interest in the mines and minerals as against the defendant, and that the registered caveat should be continued. By his amended pleading, he claimed in the alternative a declaration that the defendant should be deemed to hold in trust for his use and benefit "an undivided one-half interest in whatever right, title or interest may be hereafter acquired by the said defendant in the mines and minerals," and that the defendant should be deemed to hold in trust for the plaintiff an undivided one-half interest in the money or other consideration received by the defendant on account of any sale of the mines and

minerals. The plaintiff was ordered to give particulars, and in response stated that the agreement referred to in the 4th paragraph of the statement of claim was an oral agreement entered into during or about the months of December, 1920, and January, 1921, and that it was afterwards confirmed by an instrument in writing of 24th February, 1926, and he stated the consideration for the agreement to be:

> money advanced by the Plaintiff to the said Defendant, and the promise of money afterwards advanced to the said Defendant, and the allowing of the said Defendant by the Plaintiff to forthwith occupy and live on the Plaintiff's farm adjoining the land hereinbefore mentioned, and further, the arranging for the sale, and the sale by the Plaintiff, of the South-west quarter of Section Seventeen (17) in Township Twenty (20) Range Two (2) West of the Fifth Meridian in the Province of Alberta, so as to enable the said Defendant to purchase the said land and against which the caveat mentioned in the Statement of Claim was filed.

The defendant, by his defence, denied the alleged agreement, and he moreover alleged that there was no consideration for it, and that there was no memorandum of it to satisfy the *Statute of Frauds*.

The action was tried before Simmons C.J., of the Trial Division of the Supreme Court of Alberta, on 19th May, 1926. The two witnesses upon the disputed facts were the plaintiff and the defendant; the former testified that, after he had transferred to the Board, the defendant told him that they would hold the mineral rights together "fifty-fifty"; and, in another place, that they would have the oil rights together. He admits that the agreement was oral, but he produced, by way of corroboration, a power of attorney from the defendant to himself, dated 24th February, 1926, which is the instrument referred to in his pleadings, by which the constituent appoints the plaintiff

> for me and in my name, place and stead and for my sole use and benefit to sell, lease, or otherwise dispose of my undivided one-half interest (the other undivided one-half interest belonging to the said Addison McPherson) in the mines and minerals, including petroleum and natural gas, in and under the south-west quarter of Section Seventeen (17) in Township Twenty (20), Range Two (2), West of the Fifth Meridian in the Province of Alberta.

The power of attorney was prepared by the plaintiff's solicitor under his instructions in the defendant's absence and without his knowledge, but the defendant signed it after it had been read and explained to him by the solicitor. The defendant, who is a half-breed with very little educa-

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tion, says, however, that he understood the clause in parenthesis to refer to the plaintiff's interest in the 240 acres which the plaintiff had retained, and that the project which he thought he was authorizing by the power of attorney was the sale by the plaintiff of the oil rights in both parcels together, the one belonging to the defendant and the other to the plaintiff. The plaintiff does not deny that such a sale was in contemplation or had been discussed, and there is a memorandum in evidence, prepared by him, and which was used on the day the power of attorney was signed, when he persuaded the defendant to sign it, in which the plaintiff figures the value of his 240 acres at $2,500 per acre, and suggests particulars for an agreement of sale. The defendant denies that he ever promised the plaintiff any interest in the minerals, and it is, I think, a reasonable inference from the evidence that the plaintiff was using the defendant, who was a returned soldier, in order to effect a sale of the two quarter-sections to the Board, so as to save the 240 acres which he retained, and which were also covered by the mortgage to the Associated Mortgage Investors Company. The defendant testifies that it was not until after he had sold to Herron that he knew or learned that the plaintiff claimed an interest in the minerals. No proof was adduced of the considerations for the agreement alleged by the plaintiff's particulars.

The learned Chief Justice expresses his finding (1) in the following language:

> Upon the controversial aspects of the case as between the plaintiff and the defendant L'Hirondelle, I am satisfied that the oral agreement alleged by the plaintiff was made by the defendant, and that the document executed on February 24, 1926, takes the same out of the *Statute of Frauds* which is pleaded in evidence against the plaintiff, but although the plaintiff alleges certain considerations passing I am satisfied no such consideration passed and that there was no consideration for the declaration of trust.

And his conclusion (2) is that:

> It would appear that the defendant, L'Hirondelle, has an interest in the purchase moneys accruing due to the Board under the Herron purchase and the plaintiff is apparently entitled to a declaration that the defendant, L'Hirondelle, should account to him for a portion of said purchase money representing one-half interest in the mines and minerals which passed under the plaintiff's transfer, to the Board.

(1) [1926] 2 W.W.R. 465, at p. 467.

(2) [1926] 2 W.W.R. 465, at p. 468.

The defendant appealed, and the Appellate Division (1) found in effect that there was no agreement between the parties respecting the minerals, no consideration for any such agreement, no completed gift, and no evidence of intention to declare a trust; the learned judges, five of them, were unanimous in allowing the appeal.

Now it will be perceived from the foregoing narrative that the plaintiff, who is now the appellant, launched his case upon an oral agreement to transfer and convey an undivided half-interest in the mines and minerals. That is what he averred and deposed to by his caveat, and what he alleged in his statement of claim and particulars. It is obvious that the claim so stated cannot succeed, because the contract which was pleaded was without consideration according to the evidence and the concurrent findings, and moreover because the fourth section of the *Statute of Frauds* was not complied with. The words in the brackets of the power of attorney, "(the other undivided one-half interest belonging to the said Addison McPherson)," do not set out the names of the parties, the terms, or the consideration of the contract; nor indeed do they suggest the existence of any contract, and they in no wise constitute a sufficient memorandum or note of a contract within the meaning of the section. The learned Chief Justice seems, however, to regard these words as expressing a declaration of trust, although, according to the caveat and the statement of claim, they were intended to confirm or acknowledge the alleged agreement for the transfer of an undivided one-half interest in the minerals. The clause evidently must have been introduced for a purpose which is not made clear on the face of the instrument, and, seeing that the power of attorney was written for the plaintiff and under his instructions, it is, I think, fair and probably not far from the truth to admit the motive and intention which he attributes to it; at all events the plaintiff cannot complain if his allegations be accepted. But mere words of confirmation or acknowledgment cannot make a valid contract of that which is ineffective as a contract for lack of consideration, and an incomplete voluntary transfer will not be construed as a declaration of trust unless it appear that

(1) 22 Alta. L.R. 281; [1926] 3 W.W.R. 481.

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there is an intention to declare a trust, and not merely to make a transfer. *Heartley* v. *Nicholson* (1); *Lee* v. *Magrath* (2); also the judgment of Parker J., in *In re Innes* (3). Moreover,

> If it (the settlement) is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument could be made effectual by being converted into a perfect trust.

Richards v. *Delbridge* (4), a decision of Jessel M.R., following *Milroy* v. *Lord* (5). The clause in question is not evidence of an intention to declare a trust; it is, by interpretation, more apt as matter of description, or perhaps to acknowledge a title by some means already vested, and it contains no word or accent pointing to the assumption by the defendant of the duties, obligations or character of a trustee. Moreover, of course, as said by the Appellate Division, there is no compliance with the 7th section of the *Statute of Frauds*. The appellant's case is thus confronted with insurmountable difficulties and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Burns & Mavor.*

Solicitors for the respondent: *Savary, Fenerty & McLaurin.*