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*Dec. 14.
*Dec. 26.

ALEXANDER McNEIL (DEFENDANT) . . APPELLANT;

AND

WILLIAM S. FULTZ AND PATRICK E. CORBETT (PLAINTIFFS) . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Breach of contract—Breach of trust—Assessment of damages—Sale of mining areas — Promotion of company — Failure to deliver securities—Principal and agent—Account—Evidence—Salvage—Indemnity for necessary expenses—Laches—Estoppel.

The plaintiffs transferred certain mining areas to the defendant in order that they might be sold together with other areas to a company to be incorporated for the purpose of operating the consolidated mining properties, the defendants agreeing to give them a proportionate share of whatever bonds and certificates of stock he might receive for these consolidated properties upon the flotation of the scheme then being promoted by him and other associates. In order to hold some of the areas it became necessary to borrow money and the lender exacted a bonus in stock and bonds which the defendant gave him out of those he received for conveyance of the properties to the company. After deducting a ratable contribution towards this bonus, the defendant delivered to the plaintiffs the remainder of their proportion of stock and bonds, but did not then inform them that such deductions had been made, and they, consequently, made no demand upon him for the balance of the shares and bonds until some time afterwards when they brought the action to recover the securities or their value.

Held, affirming the judgment appealed from, that whether the defendant was to be regarded as a trustee or as the agent of the plaintiffs, he was not entitled, without their consent, to make the deductions, either by way of salvage or to idemnify himself for expenses necessarily incurred in the preservation of the properties; and that, under the circumstances, their failure to demand delivery of the remainder of the securities before action did not deprive the plaintiffs of their right to recover.

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*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan, and Duff JJ.

If the defendant is to be considered a trustee wrongfully withholding securities which he was bound to deliver, he is liable for damages calculated upon the assumption that they would have been disposed of at the best price obtainable. If, however, he is to be regarded as a contractor who has failed to deliver the securities according to the terms of his agreement, he is liable for damages based on the selling price of the securities at the time when his obligation to deliver them arose. *Nant-Y-Glo and Blaina Ironworks Co.* v. *Grave* (12 Ch. D. 738); *The Steamship Carrisbrooke Co.* v. *The London and Provincial Marine and General Ins. Co.* ((1901) 2 K.B. 861) and *Michael* v. *Hart & Co.* ((1902) 1 K.B. 482) followed.

APPEAL from the judgment of the Supreme Court of Nova Scotia(1) which affirmed the judgment of the Chief Justice of Nova Scotia ordering judgment to be entered for the plaintiffs for $1,350, with interest and costs.

The circumstances of the case and the questions at issue on this appeal are stated in the judgment now reported. The learned Chief Justice, at the trial, without entering into any consideration of the facts proved in evidence, merely directed a reference. Upon this reference it appeared that the price paid for the mining properties in question was $444,444 in bonds and stock of the company formed for the operation of the mines, which, at ninety cents in the dollar, amounted to the value of $400,000. The referee reported that the price obtained for the three areas in dispute was $27,000, in bonds and stock of the company, from which the plaintiffs claimed the right of deducting $1,000 as the plaintiffs' proportion of the expenses incurred in order to obtain money he was compelled to raise by way of the loan for the benefit of the plaintiffs as well as of all others interested in the scheme. The Chief Justice refused to allow

(1) See *Fultz* v. *Corbett*, 1 East. L.R. 54.

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this deduction, found that the price of the areas in dispute was $27,000 and directed that the plaintiffs should have judgment against the defendant for $1,350 with interest from the 1st of April, 1903, with costs. The judgment appealed from affirmed this decision.

Nesbitt K.C. and *Gormully K.C.* (*Terrell* with him), for the appellant.

Mellish K.C. for the respondents.

The judgment of the court was delivered by

DUFF J.—In the year 1899 the defendant (being, with others, interested in some coal lands near Port Hood, C.B.) acquired on behalf of himself and some associates three licenses to search for coal in three several submarine areas in the vicinity of those lands. The licenses were acquired under an arrangement with the defendant's associates, including one Buckley, the plaintiffs' predecessor in title, by which the licenses were to be held in the name of the defendant in trust for all concerned, Buckley being entitled to an undivided one-sixth share of the whole.

Subsequently it was agreed between the defendant and his associates that, in the event of a consolidation and sale of coal areas near Port Hood, then in contemplation, being carried out, the submarine areas in which Buckley was interested should be included in it at the price of $27,000 to be paid in the securities of a company to be formed to acquire the consolidated properties.

The consolidation and sale, promoted by the defendant and some associates, were effected and the

whole property was transferred to the Port Hood Coal Co., Limited.

The learned judges of the court below, agreeing with the trial judge, the Chief Justice of Nova Scotia, have found that the consideration for this transfer consisted of bonds of the company of the face value of $444,444, these being regarded by the promoters concerned as equivalent to $400,000 in cash, which the sale of the bonds at 90 cents on the dollar was expected to realize; with a bonus of shares in the capital stock of the company of a like face value which were not regarded as likely to be immediately saleable.

Notwithstanding some obscurity in the evidence relating to the transaction, I am not satisfied that this finding ought to be disturbed.

I think, moreover, that the fair inference from McNeil's evidence is that, by the arrangement between McNeil and his co-promoters, providing for the distribution of these securities and shares, the owners of the areas in question were to receive the equivalent of $27,000 cash; that is to say, bonds of the face value of $30,000 and shares of a like value. The plaintiff being the owner of an undivided one-sixth share of this property would seem on the face of this state of facts to be entitled to receive a like share of the securities; that is to say, bonds of the value of $5,000 and shares of the same value. They did, in point of fact, receive bonds of the face value of $3,500 and shares of an equivalent amount; and the question of substance raised by this appeal is whether or not the defendant is accountable for the difference.

It is plain that the defendant had no general authority to deal with the plaintiffs' property.

The plaintiffs acquired Buckley's interest after

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the negotiations looking to the consolidation and sale were under way; and—if not in express words, at least by their conduct—approved of the disposal of that interest for the sum of $27,000 payable in bonds and shares of the purchasing company. But there is no evidence that the defendant was, at any time, authorized to transfer that interest on terms less advantageous to the plaintiffs.

It is argued that the parties had in contemplation bonds and shares of the face value of $27,000 only; and the evidence is not explicitly directed to point whether, as between the plaintiffs and the defendant, the price was to be securities of the face value of the sum mentioned, or securities which should be equivalent to that sum in cash.

I pass without further comment the inherent weakness of the suggestion that a price expressed in bonds and shares in the capital stock of a company to be formed should be fixed without reference to their saleable value or to the total amount of the capital stock or of the bond issue. It is sufficient, on this point, to say that it is not disputed that McNeil was bound to account for the securities actually allotted and received by him in respect of the areas in question; and my view of the evidence being, as I have said, that the bonds and shares which, under the arrangement among the promoters, were to be allotted in respect of these areas, were to be the equivalent of $27,000 in cash, it follows that McNeil is accountable on that basis unless, at all events, it should appear that the agreement was not in point of fact as between him and his co-promoters carried out. On this the evidence is not explicit; but the information being in McNeil's keeping, I think the court below was justified in in-

ferring, in the absence of any denial by him, that it was carried out. McNeil admits that the division of the securities was made under his direction and he is, I think, accountable on the assumption that those to which the plaintiffs were entitled came into his hands.

But the contention is made on the defendant's behalf that he was entitled to retain out of the plaintiffs' securities a proportionate part of them as a contribution to a bonus which, it is said, it became necessary to give, in the circumstances to be presently mentioned, after the purchase price of the consolidated properties had been fixed and the allotment in respect of the areas in question agreed upon.

The facts on which this contention is based are said to be these.

At one stage of the transaction it became necessary to borrow money to meet payments required to be made to prevent the lapse of one or more options under which some of the lands affected by the consolidation were held; the failure to make these payments, it is said, would have been fatal to the success of the scheme, including the sale of the areas in which the plaintiffs were interested.

The defendant succeeded in obtaining the necessary loan; but, it is said, the lenders exacted as a bonus, the delivery to them of bonds of the face value of $12,500; and—it is argued—this bonus, being in the nature of a salvage payment of which the defendant's property got the benefit, that property ought, with the other properties benefited, to supply its proportional contribution. The argument is ingenious; but the principles of the maritime law governing the liability to contribution by way of general average in respect of properties sacrificed or moneys expended

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for the common safety have obviously no application to the case of a trustee or agent dealing with property under a strictly limited authority and in constant communication with his *cestuis que trustent* or principal. Nor is there, in my opinion, any room in this case for the application of the principles under which a trustee is entitled, out of the trust property, to indemnity for moneys expended in preservation of it.

The bonus was, in my opinion, simply an item in the expense of flotation the burden of which, in the circumstances disclosed by the evidence, the promoters had no right to cast upon the owners of the properties transferred. McNeill admits that out of the sum of $400,000 paid by the company, the sum of $200,000 was allotted to the promoters alone in respect of profits and expenses of flotation; and with the exception of those interested in the areas referred to, there is no evidence that it was suggested that any owner of any of the consolidated properties should contribute to this bonus out of the proceeds of the sale of his property.

McNeill had plainly no authority from the plaintiffs to charge against the proceeds of the areas in question any such contribution; and in view of the share of the purchase price allotted by the promoters to themselves, it is highly unlikely that, with a knowledge of the facts, they would have assented to such a charge had it been proposed. The deduction is one which, in my opinion, cannot, in the absence of evidence of the plaintiffs' consent, be justified.

The plaintiffs are, therefore (subject to the question, which I will deal with, whether or not by laches they have lost their right), entitled to recover the difference between that which the defendant received and that which he accounted for; that is to say, bonds of the face value of $1,500 and shares of a like amount.

The judgment of the court below is also impugned on the ground that, while the court has given judgment against the defendant for the cash value of the bonds and shares unaccounted for, calculated upon the basis of their selling value at the date of the defendant's default, he can be properly called upon only to deliver these bonds and shares in specie; and in default (since no demand was made for the delivery of them before the commencement of the action) to pay damages based upon their value at that date. On this point also, I think, the judgment below is right. The evidence of the plaintiffs, which the court below seems to have accepted, is that they were told that the bonds and shares delivered to them were all that had been received by the defendant on their account; and the fair inference is that they made no demand because they were ignorant of the facts. On the other hand the defendant was under an obligation to account to the plaintiffs at once for that which he received as trustee for them. Treated as a trustee wrongfully withholding property which he was bound under his trust to deliver to his *cestuis que trustent,* he is liable to make reparation for the loss suffered by the trust by reason of his breach of trust; and (every presumption being made against him as a wrongdoer), that loss must be calculated on the assumption that the securities would have been sold at the best price obtainable. *Nant-Y-Glo and Blaina Ironworks Co.* v. *Grave*(1) at page 750; *The Steamship Carisbrook Co.* v. *The London and Provincial Marine and General Ins. Co.*(2), at page 866; and in appeal, *Michael* v. *Hart & Co.*(3), *per* Collins L.J., at page 488.

(1) 12 Ch. D. 738. (2) (1901) 2 K.B. 861.
(3) (1902) 1 K.B. 482.

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Treated simply as a contractor who had agreed to deliver the bonds he is clearly liable to pay damages for the breach of his contract based upon the selling price of the bonds at the time when the obligation to deliver arose. Mayne on Damages, at page 195.

There remains the contention that the plaintiffs by their laches have lost their right to relief. The defence is not raised by the pleadings; and it may be that the state of the pleadings accounts for the fact that the evidence does not clearly shew when the plaintiffs first became aware of their rights. The evidence, as I have said, does, I think, fairly lead to the conclusion that at the time of the delivery to them of the shares and bonds which they received they were told and believed that the defendant was giving them all he had got on their account.

In the absence of evidence shewing when they became aware of the facts there seems to be no basis of fact to support the defence suggested.

Appeal dismissed with costs.

Solicitor for the appellant: *James Terrell.*

Solicitor for the respondents: *W. H. Fulton.*