Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of MacDougall v. *Prentice, from the Court of Queen's Bench for Lower Canada (Province of Quebec); delivered 25th March* 1885.

Present:

LORD BLACKBURN.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

The Appellant in this case who was the Plaintiff below, and the Respondent who was Defendant, were partners in business. The Plaintiff brought his action on the 18th April 1872 for an account of the partnership affairs, and for the purpose of recovering from the Defendant 80 shares in the Canada Lands Purchase Company or the value of such shares, which the Plaintiff put at 240,000 dollars. Upon the partnership accounts, apart from the shares in question, the Plaintiff has been found indebted to the Defendant in the sum of 16,188 dollars, and there is now no controversy upon that point. The appeal relates only to the rights of the parties with regard to the shares.

The partnership was formed in February 1869. One portion of its business was the purchase and sale of mineral properties and the formation of companies, and the profits arising from this source were to be divided in the proportion of three fourths to the Defendant and one fourth to the Plaintiff. In 1870 the partners

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agreed to purchase the property of the Montreal Mining Company, with the intention of forming a new Company to work the mines. The contract was effected partly in Canada by the Plaintiff and partly in London by the Defendant, but it was completed in London in the name of the Defendant and by the Defendant with the assistance of a Mr. MacEwan, who provided the requisite deposit on condition that he should have an equal share in the profits.

The partners then set to work to form a Company who should provide the purchase money and take the property off their hands. After some abortive negotiations, the money was provided by a Mr. Sibley and some others to whom the Defendant transferred the benefit of his contract. They projected a Company which the Plaintiff in his declaration calls the Canada Lands Purchase Company; and it was proposed that the whole property should be represented by 1,600 shares, and that the Defendant should be entitled to one tenth of the whole.

In point of fact this Company never was formed, nor were any specific shares, or so far as appears any scrip, in it issued. But there was a considerable amount of dealing with the interests which the parties had bargained for, and those interests are for the sake of convenience called shares, each share representing one 1,600th part of the whole. Such are the 80 shares for which the Plaintiff sued, being half of the 160 apportioned to the Defendant.

On the 30th December 1870 the Defendant sold 80 of the shares to Mr. Learned for the sum of 10,000 dollars American currency, equal to 9,000 Canadian currency, which the Defendant received and did not at that time carry into the partnership accounts. In consequence of this transaction, or at least very soon after it, the Plaintiff made a claim to one half of

the profits arising from the purchase and the sale to Sibley and his colleagues. At the end of June 1871 he filed a bill against the Defendant in the Supreme Court of New York County, within whose jurisdiction it seems that Sibley resided and the Company was being formed.

It is very difficult to understand the exact ground taken by the Plaintiff in this suit. In his declaration he alleges that the Defendant had employed him as broker to negotiate a purchase; that the Defendant had sold the property purchased, and had realized as profits the sum of 22,500 dollars, of which the Plaintiff claimed half. It is impossible to identify these allegations with any part of the story appearing in the Record. It further appears from the oral evidence that the Plaintiff went on to attach the unsold 80 shares, but there is no documentary evidence of such an attachment. It is not however necessary to have accurate knowledge of these matters, because the parties settled the litigation by an agreement, the construction of which is the main question on this appeal.

The agreement was effected by three instruments of simultaneous date. The first is a transfer in the following terms:—

"Know all men by these presents that I Edward Alexander Prentice of the city of Montreal in the Dominion of Canada have, in consideration of the sum of one dollar of lawful currency of Canada to me in hand paid by Hartland S. MacDougall of the same place, and for divers other valuable considerations moving from him to me, do by these presents grant bargain sell and assign to him the said Hartland S. MacDougall his heirs and assigns, all and singular the right title and interest which I the said Edward Alexander Prentice now have in and to the undivided one-tenth interest in all the property mentioned in the bond made by the Montreal Mining Company to me, a copy of which bond is hereto annexed marked 'A,' said interest in said property being now held in trust for me by Alexander H. Sibley, Eber B. Ward, Edward Learned, Peleg Hall, and Charles A. Trowbridge, trustees, as by reference to the indentures copies of which are hereto annexed marked 'C and D' will more fully appear, my

interest at present remaining in said property being an undivided one-twentieth interest therein.

"To have and to hold the same unto the said Hartland S. MacDougall his heirs and assigns, as fully and effectually as I by virtue of the said indenture or in any other manner whatsoever hold the same, and I do hereby covenant with the said Hartland S. MacDougall that I have good right to transfer and assign the said interest, and that I will execute such further assurances thereat as may be requisite.

"In witness whereof I have hereunto set my hand and seal this third day of March 1871.

"EDW. ALEX. PRENTICE. (L.S.)"

The second is in the form of a letter from the Plaintiff to the Defendant:—

"Edward A. Prentice, Esq.

"63, Wall Street, New York.

"Dear Sir, 3rd March 1871.

"In consideration of your assignment to me this day of your remaining interest in the property formerly belonging to the Montreal Mining Company and now held by Alex. H. Sibley and others trustees, I hereby agree that my interest therein to the extent of one half of that conveyed by the said assignment or one fortieth of the whole interest originally held by you shall be liable in said proportion for any damages which may result to you by reason of any suit which Mr. Alexander McEwen of London England may institute against you for failure to secure his interest, or any expenses which have been already incurred in the negotiation of the sale of the property by you.

"Yours truly,

"H. S. MACDOUGALL."

By the third instrument the Plaintiff purports to assign half his interest to Mr. Ashworth in trust for Miss Auldjo, his assignment being in the same form as the Defendant's assignment to himself. It is agreed that Miss Auldjo was a mere nominee of the Defendant.

The general effect of the three instruments is that, as between the Plaintiff and the Defendant, the former becomes the owner of half the then unsold shares, while the latter remains the owner of the other half; that the Defendant also remains the owner of the price of the sold shares, and that the Plaintiff undertakes that his interest shall meet MacEwan's claim in some

proportion, the extent of which has been disputed. Why the parties went through the process of assignment with warranty of one-twentieth interest to the Plaintiff, and immediate reassignment of one-fortieth by him to the Defendant through the form of assignment with warranty to Ashworth and Miss Auldjo, is not clear, but it probably was intended to throw difficulties in the way of MacEwan who was then pressing his claims.

In June 1871 MacEwan commenced a suit in New York against both the partners and against Sibley and his co-promoters, claiming the whole of the unsold shares as his half of the profits of the transaction, and on the 9th of the following December he obtained a decree for his whole claim. The partners threatened an appeal, but abandoned it on MacEwan giving back eight shares. After this had been done, all the profits remaining to the partners were these eight shares, and the price of the 80 shares sold. The partnership was dissolved on the 2nd November 1871, a little earlier than McEwan's decree, but that dissolution cannot alter the results of the contract of March 1871. On the 30th January 1872 the eight shares were placed in the names of Messrs. Shanley and Crawford in trust for the Plaintiff and Defendant. They are now represented by 288 shares in the Silver Mining Company of Silver Islet, and eight shares in the Ontario Mineral Lands Company, still standing in the same names.

It has been stated that both in the writ of 1871 and in this suit the Plaintiff claimed half the interest in the profits of the transaction. The same claim has been advanced on this appeal. But both the Courts in the colony treated it as a partnership transaction, and their Lordships are clear that it was such; that the partnership was both entitled to the profits and

liable to MacEwan's claim. The agreement of March 1871 gave to the Plaintiff the same proportion to which he was entitled under the partnership deed.

By decree dated the 31st May 1881 the Superior Court ordered the Defendant to pay the Plaintiff 63,811 dollars, unless he preferred within 15 days to transfer to the Plaintiff 40 of the 80 shares sued for. The Court considered that by the agreement of March 1871 the Defendant had absolutely contracted to transfer 40 shares to the Plaintiff, and, having failed to put him in possession of them, must make good their value. It fixed the value as upon the day when the action was commenced, at the rate of 2,000 dollars a share, and set off against the 80,000 dollars so obtained the sum found due from the Plaintiff upon the general account.

The Defendant appealed to the Court of Queen's Bench, who made their decree on the 23rd January 1884. They reversed the decree below, directed that the shares held in trust should be divided between the Plaintiff and Defendant in the proportion of one part to the former and three to the latter, and dismissed the other conclusions of the Plaintiff's action. The decree recites that the Plaintiff is entitled to claim his share of the 9,000 dollars the price of the 80 shares sold by the Defendant, and that such share with interest from the 30th of December 1870 are more than compensated by the 16,188 dollars due upon the accounts.

From the Judges' Reasons it appears that they agreed in thinking that the Plaintiff was entitled under the terms of the agreement of March 1871 to 40 shares, which however, putting the returned eight shares out of consideration, were reduced to 20 by MacEwan's claim, and that for these 20 the Plaintiff, not being able to get them, was entitled to compensation. They also

agreed that his compensation should not exceed the quarter of the 9,000 dollars, but in their reasons for this opinion they differed. Chief Justice Dorion, looking upon the transaction of that day as a *partage* or a division between partners, thought that the shares must be valued as upon the 3rd March 1871, and were not shown to have been of any greater value than on the 30th December when the sale of the 80 shares took place. The other Judges, whose opinion is delivered by Mr. Justice Ramsay, agreed that the transaction of March 1871 was a *partage*, but they considered that the eviction of a partner from his share necessitated a new *partage*, so that the sole remaining property was to be re-divided according to the partnership deed.

From this decree of the Queen's Bench the Plaintiff appeals, contending both that it ascribes to him too small a number of shares, and that it has put them at too low a value. He maintains that the smallest number of shares to which the agreement of March 1871 entitles him is 40; that if that agreement is held inoperative he is entitled to half the firm's share of profits, and to be indemnified by the Defendant against MacEwan's claim; and that the compensation for the shares which he cannot get should be assessed by taking the value of the shares either on the 9th December 1871, the date of MacEwan's decree, or at the institution of MacEwan's suit, or at the institution of this suit.

It has been already stated that the shares were a partnership asset, and MacEwan's claim a partnership liability, which is inconsistent with the Plaintiff's claim to half profits and indemnity. As to the other questions, their Lordships do not find it necessary to decide upon the arguments which were pressed very fully at the bar with reference to the local law by which

the contract of March 1871 ought to be construed, and with reference to the rules of law which regulate warranties upon sales and upon partitions of common property. They think this unnecessary, because the case is governed by a special contract made with knowledge of the causes from which the disputes have sprung, and containing within itself the grounds on which they must be settled.

Their Lordships view the agreement of March 1871 as calculated to effect three main objects between the parties: first, to divide the 160 shares as a partnership asset would be divided according to the terms of the partnership deed; secondly, in effecting that division to attribute to the Defendant's three fourths the whole of the 80 unsold shares; and thirdly, to stipulate that the loss arising from McEwan's claim should fall on the partners rateably according to their shares. There is no reason to suppose that the Defendant's sale of the 80 shares was in excess of his power as a partner, but the Plaintiff, whether with reason or without, was contending that the shares were not a partnership asset, and in abandoning that claim he stipulated to have a full quarter of the shares as such. Thus, as between the partners, the Plaintiff took his whole interest in shares, giving up his antecedent right to participate in the 9,000 dollars; and the Defendant took to the purchase effected by himself, giving up his antecedent right to have three fourths of the shares.

Then comes MacEwan's claim and sweeps away all the unsold shares. The Defendant now cannot give the Plaintiff any shares; but why? Not only on account of MacEwan's success, but by the conjoint effect of that and of his own previous sale. If he had not sold the 80 shares, there would have been 80 to answer MacEwan's

claim and 80 to divide. Perhaps the position of the parties is kept more precisely in view by dropping the convenient designation of shares and taking up the more abstract and more accurate terms in which they speak of their interests. There were then no separate shares in existence capable of being specifically transferred; the interests in existence were subject to be bought and sold, but were only claims to aliquot parts of an undivided whole. Thus the Defendant assigns to the Plaintiff all his interest in the undivided one-tenth interest in all the property taken from the Montreal Mining Company, "my interest at present remaining in "the said property being an undivided one-"twentieth interest therein." And the Plaintiff agrees that his interest just acquired by the Defendant's assignment, "to the extent of one "fortieth of the whole interest originally held by "you," shall be liable in that proportion to MacEwan's claim. It is not said how the Defendant's interest was reduced from a tenth to a twentieth, but it cannot be doubted that the parties were referring to the Defendant's sale of the other twentieth; and when the whole interest of the partnership was shown by MacEwan's suit to be only a twentieth instead of a tenth, and so the Plaintiff's intended portion was reduced from a fortieth to an eightieth, he became entitled, under the agreement, to have that eightieth made good to him in specie so far as the partnership assets sufficed for it.

This view of the contract tends to support Chief Justice Dorion's opinion as to the eight shares. He says,—"In the view that we take "of this case, that the transfer of the 3rd "March 1871 constituted a division of common "property, these eight shares should be returned "to the Respondent (*i.e.*, the Plaintiff), and "thereby reduce his claim for indemnity to

" 12 shares instead of 20." Then he goes on to mention reasons which make him think it more equitable to make the decree in the form in which it stands. The reasons point to a desire to alleviate the Plaintiff's loss.

Now before pursuing this question further, or deciding the precise mode of apportioning what remains of the shares, their Lordships ask what practical difference will be made by giving the Plaintiff more shares than he takes under the decree. That depends upon the value at which the shares are assessed for compensation to him. His original agreed quantity is 40; of these 18 go to make good MacEwan's claim, and he is not to be compensated for them. The agreed quantity is thus reduced to 22, and the Plaintiff is entitled to compensation for so many of them as he does not get *in specie*. Then the question is, on what basis of value?

Their Lordships cannot accept the view of the Superior Court, that the date of the action is the proper time for ascertaining the value; a view which, if tenable, would give to the Plaintiff the power of taking property of a highly speculative and fluctuating character at flood tide, and there fixing the value as the thing he had been deprived of. Nor can they agree with the argument at the bar, that on the 3rd March 1871 the Defendant sold 40 shares with warranty of title to the Plaintiff, that MacEwan's suit was an eviction of the Plaintiff from that property, and that its value must be ascertained either at the commencement of that suit or at the date of the decree in it. It is difficult to say that the transaction was a sale, or that the form of sale with warranty was anything more than a form adopted not to express the exact transaction between the partners but with some other view, or that there was eviction from a property which never was or could be possessed

by the assignee. No doubt MacEwan's suit intercepted the claim of the Plaintiff to have shares from the Company; but as between the Plaintiff and Defendant that suit is the very thing which is contemplated by their agreement, and is the subject of special stipulation which does not contain any provision for indemnity to the Plaintiff if thereby he failed to get the 40 shares designed for him.

The fact is that the agreement never took effect at all so as to vest in the Plaintiff any right to a share in the property, or any possession of such a share. Half the Defendant's nominal interest of one tenth really belonged to McEwan, though that result was not then ascertained. The other half had disappeared by the sale of the 30th December 1870. The breach complained of was simultaneous with the agreement itself. It seems to their Lordships impossible to say that the value of the property which the Defendant purported to assign, but owing to prior events well known to both parties did not assign, is to be ascertained at any later time than the 3rd March 1871. Some strong reasons might be advanced for taking the value on the 30th December when the 80 shares were sold, but their Lordships will not pursue that view because it would produce the same result as a valuation on the 3rd March.

C. J. Dorion's view is that the shares should be valued on that day, and he goes on to find that the Plaintiff, whose business it was to show that the shares were of greater value on that day, has not done so. Their Lordships agree with this finding. From the evidence of Sibley, and of Learned the purchaser of the 80 shares, it is clear that the value of the property was a fanciful one, and subject to abrupt changes. It was not in the market at all. All sales were the result of personal negotiations. Sibley tells us that in

March 1871 he bought a few shares at 600 dollars per share, and the next day was offered 1,000. When prices can vary 66 per cent. in 24 hours no inference can be drawn as to the prices of one day from those even of the next. And here the evidence does not approach to the 3rd March by, it may be, three to four weeks. Sibley and Learned are both asked the price on that day. Sibley only says that, "in March," the shares could realize from 500 to 600 dollars. Learned says that he is as unable to give the value of the shares at that as at the present time, inasmuch as it is very fluctuating, and that "two or three months" after his purchase from the Defendant he sold several parts for 500 dollars each. Shanley one of the trustees says, "I "would not have held stock at any time in this "Company for a week, if I had owned any at "any time. If I could have got 10,000 dollars "for 80 shares I would have taken it and have "been glad to get it." He is speaking of 10,000 dollars American currency equal to 9,000 Canadian currency. That is all the evidence bearing on the point.

There is then no difference in point of money whether the Plaintiff receives compensation by way of sharing directly in the 9,000 dollars as the price of shares sold for the partnership, or by way of damages at the rate of 112. 5 dollars per share for those shares which by the terms of his contract he ought to have received, but has not received. If he were to receive more shares, and to be compensated for fewer, there would be a difference. But the difference would not be in his favour, because, even if the shares are worth anything at all, it is not suggested that they are worth anything like 112. 5 dollars. The Appellant has objected to the decree, not on the ground that it gives him too few shares in specie, but on other grounds which have

all failed. The only alteration which their Lordships think might possibly be made in the decree is one so slight that it would amount to an affirmance of the decree, with a small variation adverse to the Appellant's interest. As between a decree so framed, and such a possible alteration, their Lordships do not feel called on to decide. It is better to dismiss the Appeal.

Their Lordships will humbly advise Her Majesty in accordance with the foregoing opinion. The Appellant must pay the costs of the Appeal.