1939

*Jan. 23, 24.
*June 27.
*Oct. 3.

EDWARD G. KINKEL AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

BERNARD N. HYMAN (PLAINTIFF)....RESPONDENT;

AND

PORCUPINE UNITED GOLD MINES, INC. (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Damages—Breach of agreement by defendants in not calling meeting at which a favourable vote on a certain question was necessary to enable plaintiff to exercise option given him conditionally by defendants—No evidence of reasonable probability of favourable vote, had the meeting been called—Value to plaintiff of option lost—Judgment for nominal damages.

Appeal—Jurisdiction—"Amount or value of the matter in controversy in the appeal" (Supreme Court Act, R.S.C., 1927, c. 35, s. 39).

Plaintiff sued to enforce rights claimed under an agreement made in 1934. In 1931 M. Co. had transferred to plaintiff 350,000 shares which it held in P. Co. It appeared that this transfer was made without the authority of the shareholders of M. Co. being given in accordance with the terms under which M. Co. held the shares. By the agreement now in question (of 1934) defendants, who were directors of M. Co., bought from plaintiff 240,000 shares of P. Co. at 7 cents a share and gave an option to plaintiff to repurchase 140,000 of said shares at 8 cents a share within nine months, but this option was "contingent upon the fact" that defendants were to call a meeting of the stockholders of M. Co. "within a reasonable time after the date of this agreement" and submit to that meeting the question of ratifying said transaction of 1931, and if at said meeting the holders of 51% of the shares of M. Co. did not vote for such ratification, "the option hereby given shall become and be deemed null and of no effect." It was also provided that when and as soon as defendants received proxies from stockholders holding 51% of the issued and outstanding shares of M. Co. for voting at the meeting, defendants would cause a meeting to be called to consider such ratification. No meeting was called nor was the option exercised within the nine months. The trial judge held that under the agreement the duty of obtaining proxies and calling the meeting fell primarily upon defendants and, as plaintiff could not exercise the option until the meeting was called and the requisite approval obtained, plaintiff was entitled to a declaration that the option was still in force and would remain so for a fixed period to enable the meeting to be held, and to that extent the agreement

*PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

might be reformed. On appeal by defendants, the Court of Appeal for Ontario held against the relief granted at the trial, but held that under the agreement defendants were obliged to call the meeting within the option period of nine months, that their failure to do so was breach of the agreement in a matter vital to its whole operation, that by such breach plaintiff had lost the chance of an approval of the holders of 51% of the shares within said nine months, and had lost the option, and gave judgment for damages with a reference to ascertain the amount. Defendants appealed.

Held: There was an obligation on defendants to call the meeting, as held in the Court of Appeal, but the judgment should have been for nominal damages only. Plaintiff had not developed at the trial any claim for damages on the basis of a breach of contract in not calling the meeting; there was no evidence that there was any reasonable probability that if the meeting had been called within the nine months a favourable vote of the holders of 51% of the shares could have been obtained; the plain inference from the evidence was that a favourable vote could not have been obtained. Further (*per* the Chief Justice and Davis J.), even had the meeting been called and a favourable vote obtained, plaintiff's option, in view of the evidence as to the market value of the shares, was not of any real value to him. (*Per* Rinfret, Crocket and Kerwin JJ.: *Chaplin* v. *Hicks,* [1911] 2 K.B. 786, and *Carson* v. *Willitts,* 65 Ont. L.R. 456, discussed; those cases afford no authority justifying the awarding of any more than nominal damages for the loss of a mere chance of possible benefit except upon evidence proving that there was some reasonable probability of the plaintiff realizing therefrom an advantage of some real substantial monetary value. *Sapwell* v. *Bass,* [1910] 2 K.B. 486 also cited).

There had been a motion to quash the appeal for want of jurisdiction. The plaintiff had claimed in his pleadings (*inter alia*) "$50,000 as damages for breach of contract," and the record contained an affidavit on behalf of defendants on information and belief that plaintiff's counsel intended to produce evidence, on the reference, to establish damages much in excess of $2,000. The Court (in a judgment given prior to judgment on the merits) held (Crocket J. not concurring) that defendants had not established that "the amount or value of the matter in controversy in the appeal exceeds the sum of $2,000" (*Supreme Court Act,* R.S.C., 1927, c. 35, s. 39) and in the absence of leave to appeal the appeal could not be entertained. (Having regard to circumstances in the case, opportunity was given to ask the Court of Appeal for such leave, which was granted).

APPEAL by the defendants (other than the defendant company; the individual defendants are hereinafter called the defendants) from the judgment of the Court of Appeal for Ontario which, on appeal to that Court by the defendants from the judgment of Kingstone J. at trial in favour of the plaintiff, also gave judgment for the plaintiff but for relief different in its nature from that allowed by the trial judge.

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In 1931 March Gold Inc. had transferred to plaintiff 350,000 shares of stock in Porcupine United Gold Mines Inc. (the defendant company). Apparently, through inadvertence, this transfer was made without the authority of the shareholders of March Gold Inc. being given in accordance with the terms under which March Gold Inc. held the shares. Defendants were directors of March Gold Inc. and wished to be in a position to meet any objections that might be made by shareholders to said transfer. The agreement now in question, of October 4, 1934, was made between plaintiff and defendants. It provided for plaintiff transferring to defendants 240,000 shares of stock of Porcupine United Gold Mines, Inc., at 7 cents per share (this was done), and for an option to plaintiff to repurchase 140,000 of said shares at 8 cents per share within nine months from the date of the agreement, defendants not to be required to deliver said stock within six months if for certain reasons they deemed it inadvisable to do so.

By clause 5 of the agreement the option was "further contingent upon the fact" that defendants were to call a meeting of the stockholders of March Gold, Inc., "within a reasonable time after the date of this agreement" and submit to said meeting the question of ratifying said transfer of 350,000 shares to plaintiff in 1931, "and that if at said meeting the holders of 51% of the shares of stock of March Gold, Inc., do not vote" to ratify said transfer made in 1931, then "the option hereby given shall become and be deemed null and of no effect."

By clause 6 it was provided that when and as soon as defendants or their agents and representatives received proxies from stockholders of March Gold, Inc., holding 51% of the issued and outstanding stock of that corporation, authorizing the voting of said shares at the meeting, the defendants would cause the Chairman of the Board of Directors of March Gold, Inc., to call a meeting of the stockholders to consider the sale and/or disposition of said 350,000 shares and the ratification of the contract made in 1931.

The provisions of the agreement and the facts of the case are more fully set out in the judgments now reported.

The plaintiff sued for enforcement of said option and certain further and alternative relief (including an injunction against selling, etc., the shares, and "$50,000 as damages for breach of contract").

The trial judge, Kingstone J., found that plaintiff had not, prior to the expiry of the nine months option period, notified defendants in any formal manner that he was exercising the option; that no meeting of the stockholders of March Gold, Inc., was called or held pursuant to clauses 5 and 6 of the agreement; that plaintiff could not exercise the option or right to repurchase until the meeting was called and approval of the transaction of 1931 obtained; that the duty of obtaining proxies and calling the meeting fell primarily upon defendants. He held that plaintiff was entitled to a declaration that the option was still in full force and effect and would remain so for a period of four months from the date of judgment to enable the meeting to be held, and to that extent there might be a reformation of the agreement; that plaintiff was entitled to an injunction against disposing of or dealing with the 140,000 shares until after the holding of the meeting.

The (individual) defendants appealed to the Court of Appeal for Ontario. That Court held that there was an obligation under clause 5 on defendants to call the meeting within a reasonable time; that such reasonable time was necessarily within the option period of nine months, and consequently there was breach by defendants of the agreement in a matter vital to its whole operation; that the result of such breach was that the plaintiff had lost the chance of an approval by 51% of the shareholders of March Gold, Inc., within said period of nine months; that the Court could not override the express terms of the agreement that the option expired at the end of nine months or extend this period; that there was no basis on which to reform the agreement; that therefore the judgment of the trial judge should be varied by declaring that defendants had committed a breach of agreement as aforesaid, whereby plaintiff's option to purchase 140,000 shares of Porcupine United Gold Mines, Inc., had been lost; that there should be a reference to the Master to enquire and report the damages thereby suffered by the plaintiff, the plaintiff to be at liberty to enter judgment on confirmation of the Master's report for the amount found. The injunction granted at trial was vacated.

The defendants appealed to the Supreme Court of Canada.

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There was a motion to quash the appeal for want of jurisdiction, on which questions arose as to whether the appeal had been brought within the statutory time and as to whether there was an "amount or value of the matter in controversy in the appeal" sufficient to give jurisdiction.

A motion had been made by defendants to the Court of Appeal for Ontario to allow the appeal and security thereon, and alternatively, if the Court should consider that the time for bringing the appeal had expired, for an order extending the time, and also alternatively, if the Court should consider that the amount or value of the matters in controversy in the appeal did not exceed $2,000, for special leave to appeal to the Supreme Court of Canada. On that motion, the Court of Appeal, having regard to certain proceedings and determinations in settlement of the minutes of judgment, held that time had commenced to run in this case, for the purpose of an appeal, from the date when the judgment was finally settled and entered, and on this basis the appeal was brought in time, and the security was allowed (1). This order did not deal with the question of the amount or value involved. A clause in an affidavit in support of the motion before the Court of Appeal was that

> The amount claimed by the statement of claim herein for damages for breach of contract is $50,000 and I am informed by counsel for the plaintiff and verily believe that he intends to produce evidence on the proposed reference to establish damages substantially in excess of $2,000. * * * Exhibit D * * * is a true copy of a memorandum * * * delivered * * * by the solicitors for the plaintiff setting out the heads of damage proposed to be established by him.

The Supreme Court of Canada heard argument on the motion to quash and also argument on the merits.

E. Bristol K.C. and *N. E. Phipps* for the appellants.

A. C. Heighington K.C. and *H. G. Steen* for the respondent (plaintiff).

J. E. Corcoran K.C. for defendant company, respondent.

Judgment was reserved. On a subsequent day the Court delivered judgment on the motion as follows:

"In the opinion of the majority of the Court (Mr. Justice Crocket not concurring in this) the appellant has

(1) [1938] Ont. W.N. 135; [1938] 2 D.L.R. 751.

not established that the "amount or value of the matter in controversy in" this "appeal exceeds the sum of $2,000" and, in the absence of leave, therefore, the appeal, for want of jurisdiction, cannot be entertained.

"It appears that an application for leave to appeal was made by the appellant to the Court of Appeal and it seems that this application was not dealt with by that court. We are not satisfied that the Court of Appeal would not have granted the application for leave if they had thought that an appeal *de plano* was incompetent. In the circumstances, we think the appellant should have an opportunity of renewing his application for leave to the Court of Appeal and, in the meantime and for that purpose, further proceedings in the appeal should be stayed."

Special leave to appeal was subsequently granted by the Court of Appeal for Ontario. The Supreme Court of Canada on a subsequent day delivered judgment on the merits.

The judgment of the Chief Justice and Davis J. was delivered by

DAVIS J.—The plaintiff (respondent) sought in this action specific performance against the individual defendants (appellants) of an alleged contract for the sale of 140,000 shares of Porcupine United Gold Mines, Inc., at 8 cents a share. The plaintiff alleged tender of the purchase price before action and pleaded his willingness and readiness to perform on his part the alleged contract for the purchase of the said shares. That was the main claim of the plaintiff in the action. After an extended trial the plaintiff failed on this claim. Alternatively, the plaintiff claimed cancellation of the alleged contract and the return to him of 240,000 shares of the same stock which he had previously sold and delivered to the individual defendants, on repayment by him of the amount received by him for those shares. The plaintiff failed at the trial on this claim as well. No appeal was taken by the plaintiff from the judgment at the trial in respect of these two claims. The result is that the action came to an end, in so far as these two claims are concerned, with the judgment at the trial.

The plaintiff, however, had made a further alternative claim in his prayer: a declaration that his right to repurchase the 140,000 shares under the contract, dated October

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4th, 1934, notwithstanding that it contained a limitation of time of nine months, had not been determined (the writ was not issued until November 24th, 1936) and was still in full force and effect and would so remain until a meeting of the shareholders of another company, March Gold, Inc., had been held. The plaintiff succeeded at the trial on this claim. The trial judge ordered the reformation of the said contract; extended for a period of four months from the date of the judgment the time for the running of the plaintiff's right or option for the purchase of the 140,000 shares; declared that it was the duty of the individual defendants under the terms of the contract to cause a meeting of the shareholders of March Gold, Inc., to be held for the purpose of considering the question of ratifying, confirming and approving a prior sale and transfer of 350,000 shares of the Porcupine United Gold Mines Inc. to the plaintiff which had been made by the directors of March Gold, Inc. on or about the 12th of June, 1931; restrained the individual defendants from transferring, disposing of or otherwise dealing in Ontario with the said 140,000 shares of Porcupine United Gold Mines Inc. until after the holding of the meeting of the shareholders of March Gold Inc. and restrained Porcupine United Gold Mines Inc. (which was a party defendant in the action) from accepting or recording any transfer of the said 140,000 shares of Porcupine United Gold Mines Inc. until after the meeting of the shareholders of March Gold Inc. had been held.

From that judgment the individual defendants (appellants in this Court) appealed to the Court of Appeal for Ontario, which Court unanimously disagreed with the conclusion of the trial judge on the last mentioned branch of the case, holding that the contract plainly contemplated and provided a fixed period of nine months, from its date, for the holding of a meeting of the shareholders of March Gold Inc. and the exercise of the option, if such right became available as a result of the vote at such meeting.

But the Court of Appeal, while holding that the contract had expired nine months from its date and that there was no ground upon which the Court was justified in extending the time, held that the plaintiff was entitled to damages against the individual defendants for their breach of the contract in failing to call a meeting of March Gold

Inc., and accordingly varied the judgment at the trial as follows:

(1) This Court doth order and adjudge that the plaintiff do recover from the individual defendants the damages sustained by the plaintiff as a result of the breach by the individual defendants of their obligation under clause 5 of the Agreement in question in this action to call a meeting of the stockholders of March Gold Inc. within the period of nine months from the date of such agreement during which the option granted to the plaintiff by the said agreement to purchase 140,000 shares of Porcupine United Gold Mines Inc., existed.

(2) And this Court doth further order that it be referred to the Master of this Court to ascertain the amount of the said damages, the costs of such reference to be in the discretion of the said Master.

From that judgment the individual defendants have appealed to this Court. No cross-appeal was taken and therefore the sole issue in the appeal is whether or not the plaintiff is entitled, upon the particular facts and circumstances of the case, to a judgment for damages with a reference to ascertain their amount.

It is unnecessary to review the evidence in detail. The essential facts are few and are not really in dispute. The plaintiff had, on or about June 12th, 1931, acquired 350,000 shares of Porcupine United Gold Mines Inc. by a sale and transfer to him of the said shares from the directors of March Gold Inc. Both companies had been incorporated and organized under the laws of the State of Delaware in the United States, but the former named company, Porcupine United Gold Mines Inc. (made a party defendant in this action), has an office within the province of Ontario, where the stock transfer books of the company are kept. The individual defendants in the action were directors of March Gold Inc. at the time of the said sale and transfer of the 350,000 shares of the Porcupine Company, and had, inadvertently it would appear, failed to obtain the authority of the shareholders of March Gold Inc. to the said sale and transfer of the said Porcupine shares to the plaintiff. These shares had been held by March Gold Inc. under the terms of an agreement of February, 1929, which had provided that the shares should be held

in trust for the sole, exclusive and continuing benefit of the shareholders of March Gold, Inc.

and could

not be sold or otherwise disposed of until and unless not less than 51% of the entire issued and outstanding stock of March Gold, Inc. vote its approval at a meeting of shareholders called by the Chairman of the Board of March Gold, Inc.

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It seems to have been agreed by the parties that this omission had the effect of leaving the directors open to an action by the shareholders of March Gold, Inc. for breach of trust in disposing of the shares in contravention of the terms of the said arrangement, and perhaps of leaving the plaintiff's title to the shares doubtful.

In order to avoid the risk of liability to their shareholders for the unauthorized sale of these shares, and to put themselves in a position where they could satisfy the demands of any shareholders of March Gold, Inc. who might attack the transaction, the directors in October, 1934, repurchased from the plaintiff 240,000 of these shares at the price of 7 cents a share. This number of shares was calculated to be sufficient to meet any demands of any shareholders of March Gold, Inc. who might complain of the earlier transaction. The purchase and sale of the 240,000 shares between the plaintiff and the individual defendants was in writing, dated October 4th, 1934, and was carried out. The contract, however, contained a provision whereby the plaintiff was given the right or option to repurchase 140,000 of the 240,000 shares of the Porcupine United Gold Mines Inc. at 8 cents per share,

provided that said stock is purchased within nine (9) months of the date hereof, and upon the further understanding and agrement that the purchasers (i.e., the individual defendants) shall not be required to deliver said stock to Hyman (the plaintiff) within six (6) months of the date hereof, if, in their discretion, they deem it inadvisable to sell or transfer said stock by reason of any possible claims that may exist in relation thereto in favour of March Gold, Inc. and/or in favour of its stockholders.

Whenever called upon after said six (6) months and within nine (9) months, the purchasers proportionally shall re-transfer and deliver to Hyman at Fort Erie, Province of Ontario, said shares of stock of Porcupine United Gold Mines, Inc., as aforesaid, in blocks of ten thousand (10,000) shares or more, as Hyman may require.

The contract contained the further express condition as to the right or option for the repurchase of the 140,000 shares:

This option is further contingent upon the fact that the purchasers (i.e., the individual defendants) are to call a meeting of the stockholders of March Gold, Inc., within a reasonable time after the date of this agreement and submit to said meeting of stockholders the question of ratifying, confirming and approving the delivery of said three hundred fifty thousand (350,000) shares of stock of Porcupine United Gold Mines, Inc., to Hyman, and that if at said meeting the holders of fifty-one (51%) per cent. of the shares of stock of March Gold, Inc., do not vote to approve, ratify and confirm the delivery of said Porcupine United

Gold Mines, Inc., stock to Hyman as aforesaid, that then and in that event the option hereby given shall become and be deemed null and of no effect; * * *

The contract continues (it is unnecessary for the purpose of this appeal to quote intervening provisions which have no application now):

> When and as soon as the purchasers (i.e., the individual defendants), or their agents and representatives, receive proxies from stockholders of March Gold, Inc. holding fifty-one (51%) per cent. of the issued and outstanding stock of such corporation, authorizing the respective attorneys therein named to vote said shares at a meeting of the stockholders of March Gold, Inc., called by the Chairman of the Board of Directors of the company, to consider the sale or disposition of said three hundred fifty thousand (350,000) shares of stock of Porcupine United Gold Mines, Inc., the purchasers will cause the Chairman of the Board of Directors of March Gold, Inc., to call a meeting of the stockholders of March Gold, Inc., at a fixed time and place, pursuant to the by-laws of such corporation, to consider the sale and/or disposition of said three hundred fifty thousand (350,000) shares of stock of Porcupine United Gold Mines, Inc., and the confirmation and ratification of the said contract between Hyman and others, on the one part, and March Gold, Inc., and others, on the other, dated on or about June 12th, 1931, and all amendments and supplements thereto.

It is admitted that the individual defendants were in a position, had they so desired, at any time during the nine months period to call a meeting of March Gold, Inc.

It is plain that the plaintiff's right to repurchase the 140,000 shares could not arise until a meeting was called of the shareholders of March Gold, Inc. and until fifty-one per cent. of the shares of the said company had been voted in favour of the approval, ratification and confirmation of the original sale of the 350,000 Porcupine shares by March Gold, Inc. to the plaintiff.

It is not disputed that no meeting of the shareholders of March Gold, Inc. was called.

We agree with the view taken in the Court of Appeal that upon the true construction of the contract the individual defendants were under an obligation to the plaintiff to call a meeting of the shareholders of March Gold, Inc. within the period of nine months fixed by the contract and sooner if they received sufficient proxies from the shareholders to vote in favour of the ratification of the original transaction. It is not disputed that the individual defendants did not receive such proxies, but it was none the less their duty to call the meeting. To that extent there was a breach of the contract.

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Was this a case for merely nominal damages or can it be properly said that it is a case for substantial damages? The Court of Appeal undoubtedly treated the case as one for substantial damages. The reasons for judgment of Masten J.A. were concurred in by the other members of the Court. That learned Judge of Appeal said:

> I would therefore vary the judgment of the learned trial judge by declaring that the defendants have committed a breach of the provisions of the agrement in the pleadings mentioned whereby the option of the plaintiff to purchase 140,000 shares of Porcupine United Gold Mines Inc. has been lost, and would direct a reference to the Master to inquire and report the damages thereby suffered by the plaintiff, the plaintiff to be at liberty to enter judgment on confirmation of the Master's report for the amount so found and the costs of the reference to be in the discretion of the Master.

The plaintiff in his prayer for relief in his statement of claim did claim, under paragraph (*f*), "$50,000 as damages for breach of contract," but did not in any way develop at the trial any claim for damages on the basis of a breach of the contract in not calling the meeting. His two main claims were specific performance or, in the alternative, an extension of time for the holding of the meeting. The whole action was developed and fought out at the trial on those two principal issues. There was no evidence that there was any reasonable probability that if a meeting had been called within the nine months, a favourable vote of fifty-one per cent. of the shareholders of March Gold, Inc. could have been obtained. No demand was made by the plaintiff within the nine months period for the calling of the meeting and it cannot be said to have been a deliberate and intentional disregard of the plaintiff's right. The plain inference from the evidence is that a favourable vote could not have been obtained.

Assuming in the plaintiff's favour that the meeting had been called within the nine months period and that fifty-one per cent. of the shares had voted in favour of the ratification of the transaction, and thereby the option had become open to the plaintiff, would he have exercised it? Was the right of any real value to him? If he could have bought the same shares on the market at the stipulated price, or at a lower price, the right would have been of no money value and the breach of the contract would not have involved any loss. This disregards the suggestion

that a favourable vote in ratification of the original transaction would have made the title to the plaintiff's remaining shares unquestionable, but nothing was made of that point either in the pleadings or in the evidence. The whole action in its several branches was based upon the refusal or failure of the individual defendants to resell to the plaintiff the 140,000 shares at the option price of 8 cents a share. Where there is a market in the shares, the proper measure of damages in general is the difference between the contract price and the market price of such shares at the time when the contract was broken, because if the purchaser has the money in his hands he may go into the market and buy. The evidence as to the prevailing market price of the shares in question during the nine months period is not as explicit as it might be but it is sufficient, I think, to indicate that if the plaintiff really wanted 140,000 shares at the time he could have bought them on the market at a price equal to, and perhaps considerably less than, the stipulated price. The agreement, to repeat, was October 4th, 1934, and the nine months would expire on July 4th, 1935. Moore, an attorney who had been practising in Buffalo since 1899, testified that

> When the option expired, Porcupine stock was selling around 5 cents a share.

Kinkel testified that on January 1st, 1935, or thereabouts, he sold 5,000 shares at 6 cents a share and that he bought 5,000 shares on November 17th, 1934, at 4½ cents a share, on June 5th, 1935, 4,000 shares at about 5 and 8/10 cents a share, and on June 7th, 1935, he bought 1,000 shares at 5 and 3/10 cents per share. He testified further that on December 28th, 1935 (nearly six months after the expiration of the nine months period) he bought a 1,000-share block at 3 cents a share. During 1936 the market appears to have improved. Kinkel says that the group of individual defendants bought 200,000 shares, paying 8 cents a share for 140,000 and 10 cents a share for 60,000 shares. The exact date is not made plain but I take it from his evidence it was somewhere around June, 1936.

Kinkel further testified that

> During the period of the nine months I naturally assumed that Mr. Hyman, making no effort to bring in proxies or give me his proxy, was not interested in acquiring the stock under those circumstances at 8 cents a share, and therefore made no effort to force him to get proxies.

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If the plaintiff had intended to establish a claim for substantial damages for the breach of the contract in not calling the meeting (which is the claim that the Court of Appeal allowed), he should have developed, if it were possible, that branch of the case at the trial by giving at least some evidence upon which it would appear likely that a favourable vote could have been obtained within the period of nine months, had a meeting been called, and that the option would have been of some real monetary value to him. But the plaintiff made no such case at the trial and under the circumstances I think, with the greatest respect, that the Court of Appeal should have given judgment for nominal damages only. The courts should insist upon as much certainty and particularity, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the breach complained of.

The question of jurisdiction to hear and determine this appeal was raised by counsel for the plaintiff (respondent) upon the ground that the "amount or value of the matter in controversy" in the appeal did not exceed the sum of $2,000 and that, in the absence of leave, the appeal should fail for want of jurisdiction. Since the issue of a memorandum by the Court on June 27th last, the Court of Appeal for Ontario has granted leave to appeal (September 15th) and we are therefore now in a position to dispose of the appeal.

In my opinion the appeal should be allowed and the judgment appealed from set aside and judgment should be entered in favour of the plaintiff (respondent) against the individual defendants (appellants) in the sum of $1.00 with costs of the action on the High Court scale without a set-off. The appellants (the individual defendants) should be allowed their costs in the Court of Appeal and in this Court against the plaintiff (respondent).

The appellants made the Porcupine United Gold Mines Inc. a party respondent to this appeal but made no claim for relief against it and at the conclusion of the argument we dismissed the appeal as against this respondent with costs.

The judgment of Rinfret, Crocket and Kerwin JJ. was delivered by

CROCKET, J.—This case having previously been fully argued both on the jurisdictional ground and on the merits, the court pronounced its judgment on the jurisdictional question on June 27th, holding that there was no jurisdiction to hear the appeal without a special order of the Court of Appeal and staying further proceedings in order to give the appellant an opportunity of renewing an application to the Court of Appeal for such special leave. Special leave to appeal having been granted in the meantime, we are now in a position without further argument to deal with the merits of the appeal.

The controversy involved in this appeal arises out of an agreement entered into between the respondent (Hyman) and the appellants (Kinkel et al.) on October 4th, 1934. This agreement was made to adjust some difficulties, which had resulted from the previous sale to Hyman by the appellants, acting as directors of March Gold Inc., of 350,000 shares of the stock of Porcupine United Gold Mines Inc., held by the former corporation and which sale had not been ratified by the stockholders of that corporation as required by its by-laws. By it Hyman agreed to sell to the appellants 240,000 shares of the stock of Porcupine United Gold Mines Inc., at 7 cents per share, with an option to him to repurchase 140,000 of them at 8 cents per share within nine months of the date of the agreement, and upon the further understanding and agreement that the appellants should not be required

> to deliver said stock to Hyman within six months of the date hereof, if in their discretion they deem it unadvisable to sell or transfer said stock by reason of any possible claims that may exist in relation thereto in favour of March Gold, Inc., and/or in favour of its stockholders,

and the appellants agreed whenever called upon after the said six months and within nine months to retransfer and deliver to Hyman said shares of stock in blocks of 10,000 shares or more as Hyman might require. This option was further conditioned upon the appellants calling a meeting of the stockholders of March Gold Inc. within a reasonable time after the date of the agreement for the purpose of ratifying the previous 350,000 shares

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sale to Hyman. The latter condition is fully set out in paragraph 5, the material portion of which reads as follows:

This option is further contingent upon the fact that the Purchasers are to call a meeting of the stockholders of March Gold, Inc., within a reasonable time after the date of this agreement and submit to said meeting of stockholders the question of ratifying, confirming and approving the delivery of said three hundred fifty thousand (350,000) shares of stock of Porcupine United Gold Mines, Inc., to Hyman, and that if at said meeting the holders of fifty-one (51%) per cent. of the shares of stock of March Gold, Inc., do not vote to approve, ratify and confirm the delivery of said Porcupine United Gold Mines, Inc. stock to Hyman as aforesaid, that then and in that event the option hereby given shall become and be deemed null and of no effect; and in the event that the holders of fifty-one (51%) per cent. of the shares of stock of March Gold, Inc., shall vote for the approval of the transfer and assignment of said three hundred fifty thousand (350,000) shares of stock of Porcupine United Gold Mines, Inc. by March Gold, Inc., to Hyman, then the Purchasers shall deliver the said one hundred forty thousand (140,000) shares of stock of Porcupine United Gold Mines, Inc. to Hyman as and when he exercises his option, as hereinabove provided, unless prior to the expiration date of said option there shall be pending in any Court an action by any person or corporation to determine the existing rights of March Gold, Inc. stockholders in and to said stock, or any part thereof, in which event the time of exercising said option shall be extended until the final determination favourable to the defendant or defendants therein, of any action in respect thereto.

Paragraph 6, which is the only other part of the agreement with which we are concerned, reads as follows:

When and as soon as the Purchasers, or their agents and representatives, receive proxies from stockholders of March Gold, Inc. holding fifty-one (51%) per cent. of the issued and outstanding stock of such Corporation, authorizing the respective attorneys therein named to vote said shares at a meeting of the stockholders of March Gold, Inc., called by the Chairman of the Board of Directors of the Company, to consider the sale or disposition of said three hundred fifty thousand (350,000) shares of stock of Porcupine United Gold Mines, Inc., the Purchasers will cause the Chairman of the Board of Directors of March Gold, Inc., to call a meeting of the stockholders of March Gold, Inc., at a fixed time and place, pursuant to the by-laws of such Corporation, to consider the sale and/or disposition of said three hundred fifty thousand (350,000) shares of stock of Porcupine United Gold Mines, Inc., and the confirmation and ratification of the said contract between Hyman and others, on the one part and March Gold, Inc., and others, on the other, dated on or about June 12th, 1931, and all amendments and supplements thereto.

The Appeal Court was of opinion that the two paragraphs were independent and consistent with each other and that effect must be given to both. It therefore decided that paragraph 5 imposed upon the appellants an obligation to call a meeting of March Gold, Inc., with-

in a reasonable time, that such reasonable time was necessarily within the period of nine months during which the option granted to the plaintiff existed and that there was a breach of the agreement on the part of the appellants in a matter vital to its whole operation, whereby Hyman had lost the chance of an approval of 51% of the shareholders of March Gold, Inc., within the period of nine months during which his option was in existence, and directed a reference to the Master to enquire and report the damages thereby suffered by the respondent Hyman.

While I agree with the Court of Appeal that there was a breach of the agreement on the part of the appellants in not calling a meeting of the shareholders of March Gold, Inc. within a reasonable time, whereby the respondent lost the chance of the 51% approval of the original sale, I am of opinion that the clear inference from the undisputed facts disclosed by the evidence is that if a meeting had been called within the nine months, the chance of ratification of the original sale, which was necessary to save the option, was practically nil and therefore of no real value to the respondent. Certainly the respondent produced no evidence to shew that there was any reasonable probability of his obtaining the desired ratification had such a meeting been called and made no attempt to develop on the trial this branch of his case, upon which the judgment now appealed against wholly turned. For this reason I am of opinion that the Court of Appeal should have entered a judgment for nominal damages only.

It is quite evident from the reasons of Masten, J.A., concurred in by Fisher and Henderson, JJ.A., that these learned Appeal Judges would not have ordered a reference had they not been of opinion that the chance of obtaining ratification of the original sale might possibly be found to be of substantial value and that this opinion was founded upon the decision of the Court of Appeal in England in *Chaplin* v. *Hicks* (1), which was followed by the Appeal Court in *Carson* v. *Willitts* (2).

With all respect, the present case, I think, is distinguishable from *Chaplin* v. *Hicks* (1). There the jury had actually found, in answer to the question put to them by the trial judge, that the defendant did not take reason-

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able means to give the plaintiff an opportunity of presenting herself for selection as one of a class of fifty ladies desirous of securing engagements as actresses, from whom twelve winners were to be chosen, to whom the defendant undertook to give three-year engagements (to the first four at £5 per week, to the second four at £4 per week and to the third four at £3 per week) and assessed the damages at £100. As Vaughan Williams, L.J., points out, the average chance of each competitor was one in four.

The judgment in that case really proceeded on the ground that difficulty or impossibility of ascertaining damages with certainty does not render damages unassessable and that in any such case it is for the jury to do the best they can in determining the amount, which they think will justly compensate the plaintiff for a breach of contract.

Vaughan Williams, L.J., in the course of his reported reasons, said:

> There are cases, no doubt, where the loss is so dependent on the mere unrestricted volition of another that it is impossible to say that there is any assessable loss resulting from the breach. In the present case there is no such difficulty.

He concluded:

> The jury came to the conclusion that the taking away from the plaintiff of the opportunity of competition, as one of a body of fifty, when twelve prizes were to be distributed, deprived the plaintiff of something which had a monetary value. I think that they were right and that this appeal fails.

The opinion of Fletcher Moulton, L.J., proceeded upon the same ground, though in the course of his reasons he said he could find no authority for the proposition that where the volition of another comes between the competitor and what he hopes to get under the contract, no damages could as a matter of law be given. I reproduce the following illuminating passages from His Lordship's reported reasons:

> Is expulsion from a limited class of competitors an injury? To my mind there can be only one answer to that question: it is an injury and may be a very substantial one. Therefore the plaintiff starts with an unchallengeable case of injury, and the damages given in respect of it should be equivalent to the loss. But it is said that the damages cannot be arrived at because it is impossible to estimate the quantum of *the reasonable probability* of the plaintiff's being a prize-winner. I think

that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case.

* * *

I cannot lay down any rule as to the measure of damages in such a case; this must be left to the good sense of the jury. They must of course give effect to the consideration that the plaintiff's chance is only one out of four and that they cannot tell whether she would have ultimately proved to be the winner. But having considered all this they may well think that it is of considerable pecuniary value to have got into so small a class, and they must assess the damages accordingly.

Farwell, L.J., after pointing out that in an action for unliquidated damages the assessment of the amount is ordinarily for the jury, and that the words "chance" and "probability" may be treated as being practically interchangeable, said:

The necessary ingredients of such an action are all present; the defendant has committed a breach of his contract, the damages claimed *are a reasonable and probable consequence* of that breach, and loss has accrued to the plaintiff at the time of action. It is obvious, of course, that the chance or probability may in a given case be so slender that a jury could not properly give more than nominal damages, say one shilling; if they had done so in the present case, it would have been entirely a question for them, and this Court could not have interfered. But in the present competition we find chance upon chance, two of which the plaintiff had succeeded in passing; from being one of six thousand she had become a member of a class of fifty, and, as I understand it, was first in her particular division by the votes of readers of the paper; out of those fifty there were to be selected twelve prize-winners; it is obvious that her chances were then far greater and more easily assessable than when she was only one of the original six thousand. If the plaintiff had never been selected at all, the case would have been very different; but that was not the case.

I may add that at the conclusion of his reasons Fletcher Moulton, L.J., referred to the decision of Jelf, J., in *Sapwell* v. *Bass* (1). In that case the plaintiff was a breeder of race horses and the defendant the owner of a renowned stallion and it had been agreed between them that the defendant's stallion should serve one of the plaintiff's brood mares in consideration of a sum of 315 guineas to be paid by the plaintiff at the time of such service. The defendant afterwards sold the stallion to a purchaser in South Africa and thus precluded himself from carrying out the contract. In an action for breach of contract,

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Jelf, J., who tried the case without a jury, held that the plaintiff was only entitled to nominal damages. Fletcher Moulton stated that in his opinion that decision was right on the facts of the particular case for the reason that there was *no evidence to shew* that the right was worth more to the plaintiff than the 315 guineas, which he would have had to pay for the service of the stallion, and that there was therefore *no evidence that the damages were more than nominal.*

In the Ontario case of *Carson* v. *Willitts* (1), which was an action for the breach by the defendant of a contract to bore three oil wells in a specified territory, it was adjudged at the trial "that the plaintiff do recover from the defendant damages," the ascertainment of which was referred to a Master. The Master reported that the plaintiff was entitled to $2,162, estimating the damages on the footing of what it would cost the plaintiff to put down two of the three wells he had refused to bore. On appeal from the Master's report to a judge in Weekly Court the latter held that the Master had proceeded on a wrong principle in assessing the damages. The order made on this appeal merely allowed the appeal and set aside the Master's finding and report. On appeal from this latter order it was held by Masten, Orde and Fisher, JJ.A. (Riddell, J.A., dissenting), that the order was erroneous because the judgment at the trial had awarded the plaintiff damages, which meant something more than nominal damages; that, no appeal having been taken from that judgment, the effect of the order was to reverse the trial judgment, and that the order allowing the appeal from the report should stand, but that there should be added to it a declaration as to the basis upon which the damages should be assessed. A declaration was accordingly added to the effect that what the plaintiff lost by the refusal of the defendant to bore the two additional wells was a sporting or gambling chance that valuable gas or oil would be found when the two wells were bored; that it might not be easy to compute what that chance was worth to the plaintiff but the difficulty in estimating the quantum was no reason for refusing to award any damages.

(1) (1930) 65 Ont. L.R. 456.

For my part, I can find no authority in either *Chaplin* v. *Hicks* (1) or *Carson* v. *Willitts* (2) justifying any court in awarding any more than a nominal sum as damages for the loss of a mere chance of possible benefit except upon evidence proving that there was some reasonable probability of the plaintiff realizing therefrom an advantage of some real substantial monetary value. Indeed the above quotations from *Chaplin* v. *Hicks* (1) and the decision in *Carson* v. *Willitts* (2) seem to me to point to the contrary.

As already intimated, the respondent's only chance of realizing any advantage from the option granted him by the appellants rested wholly upon the extremely doubtful ratification by a majority vote of the shareholders of March Gold, Inc. of the original sale to him of the 350,000 shares, and, there being no evidence upon which any finding could be made that such a vote was reasonably probable during the nine months fixed for the life of the option, I have been forced to the conclusion that the learned judges of the Court of Appeal were not warranted in awarding the respondent substantial damages which, under the decision in *Carson* v. *Willitts* (2) they must be taken to have done, and sending the case to the Master for the assessment of these damages. With the highest possible respect, I am of opinion that the Appeal Court's only justifiable course upon the evidence before it was to direct a judgment for nominal damages.

I would allow the appeal with costs and remit the cause to the Court of Appeal to enter judgment for the plaintiff against the individual defendants for nominal damages only in lieu of the provisions of the first paragraph of the formal judgment with such alterations in paragraph 2 as will give the plaintiff his costs of the action down to and including the trial on the High Court scale without a set-off. Paragraphs 3 and 4 will, of course, stand.

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The appeal was dismissed as against the respondent corporation with costs on the hearing, so that paragraph 5 of the existing order stands.

Appeal allowed with costs and case remitted to the Court of Appeal to enter judgment for the plaintiff against the individual defendants for nominal damages only. Appeal dismissed as against the respondent corporation with costs.

Solicitors for the appellants: *White, Ruel & Bristol.*

Solicitors for the respondent (plaintiff): *Symons, Heighington & Shaver.*

Solicitors for the respondent (defendant) corporation: *Godfrey & Corcoran.*