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* Oct. 21, 22.
* Dec. 15.

GEORGES BUSSIERES (PLAINTIFF) ..... APPELLANT;

AND

THE CANADIAN EXPLORATION LIMITED (DEFENDANT) ..... } RESPONDENT;

AND

LAMAQUE GOLD MINES LIMITED (MIS-EN-CAUSE)

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Mines and minerals—Mining prospector—Locating mining properties and staking them for employer—Profit-sharing contract—Remuneration being salary, expenses and percentage of the net profits of the sale of properties—Sale by employer to a company for fully paid no par value shares of that company—Right of the employee to percentage of such shares—Valuation of such shares—"Profits."

The appellant, a mining prospector, was employed by the respondent, a mining company engaged particularly in the exploration of mining properties, to locate mining properties and to cause them to be transferred, after staking, to the respondent; he was to be paid a salary of $150 a month and his expenses and in addition he was to be entitled to 10 per cent of the net profits which the respondent might make from the sale or exploitation of the staked claims which it should acquire through his efforts. By the express terms of the contract between the parties, the engagement of the appellant "at the service of" (au service de) the respondent was to be monthly but either one of the parties to the contract could put an end to it by notice of fifteen days. The appellant during a period of about two years staked some forty or more claims in the name of himself or others and transferred or caused the same to be transferred to the respondent. He was paid his salary of $150 a month and his expenses. The respondent later sold forty mining claims to Lamaque Gold Mines Limited, (the mis-en-cause) for the sum of $5,000 and 150,000 fully paid no par value shares of the capital stock of that company. The sale was completed and the cash and share consideration received by the respondent. Within a year of the acquisition of the 150,000 shares and before the financing of the Lamaque Company had been completed and its shares made available to the public, the respondent, without the knowledge of the appellant, sold to its own shareholders (there were only sixteen of them) at the price of 7 cents a share all the 150,000 shares of the Lamaque Company that it had acquired. The respondent arrived at this price of 7 cents a share by taking the actual cost of the shares to be the total expenditures of the respondent in all its mining operations up to that date which (including the salary and expenses of the appellant) had amounted to about $15,500, and deducting therefrom the $5,000 cash received from the Lamaque Company. A few months thereafter, at the time of the institution of this action, shares of the Lamaque Company, although not listed on the market, were being traded in by the public at various prices around $2

* PRESENT:—Duff C. J. and Cannon, Davis, Kerwin and Hudson JJ.

a share. The appellant, putting a value of $3 a share, claimed from the respondent the sum of $45,500, being 10 per cent of the thus estimated net profits of the sale. The respondent alleged in its defence that the shares had only realized their actual cost and that there was no profit in the transaction. The appellant admitted at the trial that eight of the forty claims had not been staked by him, and that twenty-two of the other claims had been staked and transferred by him but had been allowed to lapse by the respondent and subsequently were revived by a new staking on the part of the respondent itself. The trial judge held that the appellant was entitled on the basis of only ten out of forty claims, and awarded him 10 per cent of one-quarter of the 150,000 shares, i.e., 3,750 shares, subject to payment by the appellant to the respondent of 10 per cent of one-quarter of the total net expenditures of the respondent ($15,535.03 less the $5,000 cash payment), i.e., $262.50, and condemned the respondent to deliver to the appellant within fifteen days 3,750 shares of the Lamaque Company provided the appellant paid the respondent the sum of $262.50 and, in default of the respondent delivering said shares, the respondent was condemned (on a valuation of $2 per share) to pay to the appellant $7,237.50 with interest and costs. The respondent appealed from that judgment to the Court of King's Bench and the trial judgment was modified by awarding the appellant only $702.85 with interest and costs. The majority of that Court held that the appellant was entitled to money profits but not to profits in kind (i.e., in shares of the Lamaque Company) and arrived at the money profits in the same manner as the trial judge had but they put a value of 25 cents instead of $2 on the shares of the Lamaque Company. The appellant appealed to this Court, asking that the trial judgment be restored.

Held that the appeal should be allowed and the judgment of the trial judge restored, the latter having made a practical application of the profit-sharing terms of the contract to the particular facts of the case; but the judgment of the trial judge should be varied by limiting the recovery by the appellant to the money value of the shares awarded the appellant as fixed by the trial judge, i.e., $7,237.50. The appellant was entitled to the valuation of $2 a share taken by the trial judge and the price of 25 cents a share adopted by the majority of the appellate court was not a public price. The appellant, as between himself and the respondent, was entitled to have the shares valued on the basis of the public sales of the Lamaque shares.

Per Duff C.J. and Davis and Hudson JJ: There is no precise legal meaning to the word "profits" that can be applied in every case: the construction to be given to the word must be governed by the facts and circumstances of each particular case. *In re The Spanish Prospecting Company Limited* ([1911] 1 ch. 92), ref.

Per Cannon and Kerwin JJ.: It was open to the appellant to adduce evidence of the value of the shares down to the date of the hearing and to claim the highest value shown by such evidence. Such value would represent the damages foreseen or which might have been foreseen when the agreement with the appellant was made. Article 1074 C.C.; *Senécal* v. *Pauzé*, 14 A.C. 637; *Siscoe Gold Mines Limited* v. *Bijakowski* [1935] S.C.R. 193. *Senécal* v. *Hatton* (10 L.N. 50) discussed.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, modifying the judgment of the Superior Court, Chase Casgrain J., and condemning the respondent to pay the appellant the sum of $702.85 with interest and costs, instead of the sum of $7,237.50 with interest and costs as awarded by the trial judge.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

Aldéric Laurendeau K.C. for the appellant.

Antonio Perrault K.C. for the respondent.

The judgment of Duff C.J. and Davis and Hudson J.J. was delivered by

DAVIS J.—The appellant (plaintiff) is a mining prospector and the respondent (defendant) is a mining company engaged particularly, as its name implies, in the exploration of mining properties. The facts are not now in dispute. The appellant was engaged by the respondent to locate mining properties and to cause them to be transferred, after staking, to the respondent. He was to be paid a salary of $150 a month and his expenses and in addition he was to be entitled to 10 per cent of the net profits which the respondent might make from the sale or exploitation of the staked claims which it should acquire through his efforts. By the express terms of the contract between the parties, the engagement of the appellant " at the service of " (au service de) the respondent was to be monthly but either one of the parties to the contract could put an end to it by notice of fifteen days. The appellant during a period of about two years staked some forty or more claims in the name of himself or others and transferred or caused the same to be transferred to the respondent. He was paid his salary of $150 a month and his expenses; there is no dispute as to that. The respondent later sold forty mining claims to Lamaque Gold Mines Limited (the mis-en-cause), for the sum of $5,000 and 150,000 fully paid no par value shares of the capital stock of that company. The sale was completed and the cash and share consideration received by the respondent. It may be observed in passing that

the respondent and two other mining companies, The Teck-Hughes Gold Mines Limited and Read-Authier Mine Limited, became virtually a promoting syndicate of the Lamaque Gold Mines Limited (hereinafter for convenience referred to as the Lamaque Company).

Within a year of the acquisition of the 150,000 shares and before the financing of the Lamaque Company had been completed and its shares made available to the public, the respondent, without the knowledge of the appellant, sold to its own shareholders (there were only sixteen of them) at the price of 7 cents a share all the 150,000 shares of the Lamaque Company that it had acquired. The respondent arrived at this price of 7 cents a share by taking the actual cost of the shares to be the total expenditures of the respondent in all its mining operations up to that date which (including the salary and expenses of the appellant) had amounted to about $15,500, and deducting therefrom the $5,000 cash received from the Lamaque Company. What was in form a sale of these shares to the respondent's own shareholders was in substance a distribution of what was regarded as a realized profit on the company's capital assets. A few months thereafter, at the time of the institution of this action, shares of the Lamaque Company were being traded in by the public at various prices around $2 a share. Mr. Wilcox, the secretary-treasurer of the respondent, denied that Lamaque shares had sold at any time as high as $3, but he thought it possible that they went above $2.50. He says the shares were never listed on the market but were " sold over the counter. What we call the gutter market.

The appellant was aware of the fact that forty mining claims had been sold by the respondent for $5,000 and 150,000 shares of the Lamaque Company and demanded from the respondent 10 per cent of the net profits on the sale. He did not know then of the sale of the shares at 7 cents a share. The respondent took the position in its defence of the action that the shares had only realized their actual cost and that there was no profit at all in the transaction.

It is perfectly plain that a device so crude and transparent as that adopted by the respondent cannot defeat the appellant's just claim to the fruits of his contract.

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The appellant admitted at the trial that eight of the forty claims had not been staked by him. As to twenty-two of the other claims the appellant said that they had been staked and transferred by him but had been allowed to lapse by the respondent and subsequently were revived by a new staking on the part of the respondent itself. The trial judge however on conflicting testimony ruled all these twenty-two claims out, leaving the appellant entitled on the basis of only ten out of forty claims, and awarded the appellant 10 per cent of one-quarter of the 150,000 shares, i.e., 3,750 shares, subject to payment by the appellant to the respondent of 10 per cent of one-quarter of the total net expenditures of the respondent ($15,535.93 less the $5,000 cash payment), i.e., $262.50, and condemned the respondent to deliver to the appellant within fifteen days 3,750 shares of the Lamaque Company provided the appellant paid the respondent the sum of $262.50 and, in default of the respondent delivering said shares, the respondent was condemned (on a valuation of $2 per share) to pay to the appellant $7,237.50 with interest and costs.

The respondent appealed from that judgment to the Court of King's Bench but there was no cross appeal by the appellant. The Court of King's Bench (Galipeault and Walsh JJ. dissenting) modified the trial judgment by awarding the appellant only $702.85 with interest and costs. The majority of that Court held that the appellant was entitled to money profits but not to profits in kind (i.e., in shares of the Lamaque Company) and arrived at the money profits in the same manner as the trial judge had but they put a value of 25 cents instead of $2 on the shares of the Lamaque Company. The appellant appeals to this Court, asking that the trial judgment be restored. There is no cross appeal by the respondent.

It is contended before us that the parties were in partnership and that the appellant's only remedy is dissolution and taking of the accounts. But it is well established that the mere sharing in profits by a servant or agent does not necessarily create the relationship of partnership. Where a salary is paid to a person by another in addition to a share of profits it is strong evidence that the relation between the two is that of master and servant rather than that of partners. Where as here there is no sug-

gestion that the appellant was to contribute in any way to the losses, if any, of the respondent and the contract is obviously one of service on a monthly salary basis, it cannot be said that the contract created a partnership between the parties. Then it is contended that the appellant was an employee of the respondent and as such was bound by whatever his employer did, that was not fraudulent, and in consequence is bound by the sale of the 150,000 shares at the price of 7 cents each. That is an untenable proposition. Upon the facts of a case such as this, an employer could not bind an employee by a sale such as that put through here.

We are of opinion that the learned trial judge made a practical application of the profit-sharing term of the contract to the particular facts of the case. There is no precise legal meaning to the word "profits" that can be applied in every case. The construction to be given to the word must be governed by the facts and circumstances of the particular case. The question of profits was rather fully discussed in *In re The Spanish Prospecting Company, Limited.* (1) Fletcher Moulton, L.J. said in part at pp. 100 and 101,

> Profits may exist in kind as well as in cash. For instance, if a business is so far as assets and liabilities are concerned in the same position that it was in the year before with the exception that it has contrived during the year to acquire some property, say mining rights, which it had not previously possessed, it follows that those mining rights represent the profits of the year, and this whether or not they are specifically valued in the annual accounts.

Business men dealing fairly and in a practical way with a profit-sharing contract such as we have in this case would find very little difficulty in adjusting and settling the matter but when courts are asked to work out the problem in a strictly legal manner the problem presents real difficulty. The learned trial judge in our view dealt with the matter, in the circumstances of the case, in a practical way.

We are of opinion that the appellant was entitled to the valuation of $2 a share taken by the trial judge. The price of 25 cents a share adopted by the majority of the Court of King's Bench was not a public price. It was a prearranged option price agreed upon by the promoting syndicate (composed of the respondent, The Teck-Hughes

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Company and the Read-Authier Company) before the incorporation of the Lamaque Company for the purchase of 1,800,000 treasury shares of the Lamaque Company as part of the general financing and promotion of the new company. That price cannot fairly be taken as the basis upon which the appellant's rights are to be arrived at. The appellant, as between himself and the respondent, is entitled to have the shares valued on the basis of the public sales of the Lamaque shares. It is contended that the evidence of public sales is unsatisfactory in that they were isolated transactions in more or less small amounts and outside a listed exchange. But it comes with ill grace, we think, from the respondent, in view of the way it dealt with the 150,000 shares, to hew too closely to the line in determining the amount of the real profit made by it through the sale of the mining claims staked for it by the appellant under the contract.

Objection was taken to the form of the judgment at the trial as not being susceptible of execution under the Quebec practice. But, quite apart from the objection, there may have been substantial changes in the market value of the mining shares in question since the date of the delivery of judgment at the trial two years ago, and the most convenient and we think proper course under the circumstances is to vary the trial judgment by limiting the recovery to the money value of the shares as fixed by the trial judge.

We would therefore allow the appeal and direct judgment to be entered in favour of the appellant in the sum of $7,237.50 with interest from the date of the judgment at the trial, and costs throughout.

The judgment of Cannon and Kerwin JJ. was delivered by

KERWIN J.—The agreement between the parties provides that for the work to be done by the appellant, a prospector, for the respondent company, the latter

s'engage à donner au dit Georges Bussières, en plus de son salaire, dix pour cent du bénéfice net qu'elle réalisera sur la vente ou l'exploitation des claims qu'elle acquerra de lui ou par son entremise.

The position accepted by both parties before this Court is that the dispute as to "dix pour cent du bénéfice net" relates to ten mining claims only out of the forty mentioned

by the appellant in his declaration. It is evident that the appellant must abide by the trial judge's finding that the total expenses in connection with the forty claims are the expenses to which the appellant must contribute his quarter share; and, since the respondent has not appealed from the judgment of the Court of King's Bench, the real question before us is the manner in which and the date at which the value of certain shares must be ascertained.

These shares are shares of Lamaque Gold Mines Limited which the respondent received, together with $5,000 in cash, from the Lamaque Company in 1933 as the consideration for the sale to the Lamaque Company of the forty mining claims. The respondent had already paid the expenses in connection with these claims and, after deducting the $5,000, recouped itself for the balance of the expenses by dividing the 150,000 shares of the Lamaque Company among its own shareholders at seven cents per share. The respondent had therefore contended in the courts below that there was no net profit and, therefore, nothing to which the appellant was entitled, but, in view of the fact that the Court of King's Bench disregarded this contention and found the value of each share to be twenty-five cents, it is not open to the respondent to argue that each share is not worth at least that much.

However, the right of the appellant was to receive ten per cent of the shares "en nature" and ten per cent of the $5,000 less his one-quarter share of the expenses. I am of opinion that this is the proper construction of the clause in the contract, particularly considering the nature of the work for which the appellant was engaged and also the fact that it might reasonably be inferred that the parties were contracting on the basis of the mining claims being disposed of in quite a usual manner, i.e., for shares in a company in existence or to be formed; and therefore within the very terms of article 1020 of the Civil Code.

By transferring the Lamaque shares to its shareholders the respondent has rendered itself unable to fulfil its obligation and it must, therefore, pay the value of these shares. It seems futile to suggest that the value is seven cents per share and, with respect, I am unable to agree with the majority of the Court of King's Bench that such value is twenty-five cents per share. The method of arriving at

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the former has been explained above. As to the latter, it is sufficient to point out that that price was fixed by an agreement of December 15, 1932, giving the Teck Hughes Gold Mines Limited the option to purchase a certain number of shares of no par value of a company not yet then formed but which in fact turned out to be Lamaque Gold Mines Limited. To me that cannot possibly be any evidence of the value of the shares. And in any event, I can discover no principle upon which the appellant is limited to the value of the shares either at the time the respondent obtained them or at the time it divided them among its own shareholders.

In June, 1934, the appellant demanded his proportion of the net profits and in August, 1934, served his action. Evidence was produced to warrant the trial judge's finding that on and about such latter date the value was two dollars per share, and while I quite recognize the difference between isolated sales of a few shares and the disposal of a large number, no evidence was given by the respondent to show any other value at the times just mentioned. In my view it was open to the appellant to adduce evidence of the value down to the date of the hearing and to claim the highest value shown by such evidence. Such value would represent the damages foreseen or which might have been foreseen when the agreement with the appellant was made. Article 1074, Civil Code; *Senécal* v. *Pauzé;* (1) *Sisco Gold Mines Limited* v. *Bijakowski.* (2)

Respondent referred to the decision of the Privy Council in *Senécal* v. *Hatton* (3), affirming the judgment of the Court of Queen's Bench for the province of Quebec. In that case the trial judge had condemned the defendant Senécal to pay the par value of certain bonds in his possession, to which the Court found the plaintiff was entitled. The Court of Queen's Bench while maintaining the plaintiff's action decided that he was entitled not to the nominal value of the said bonds but " considering that it is proved in the cause that the said bonds were at the time the appellant got the same, of the value of 25 per cent of the face or nominal value of the said bonds," gave judgment

(1) (1889) 14 A.C. 637. (2) [1935] S.C.R. 193.
(3) (1886) 10 Ln. 50; M.L.R. 1, Q.B. 112.

for an amount representing twenty-five per cent of the par value of the bonds. Chief Justice Dorion does state at page 116:—

Senécal was bound to deliver the bonds, but he was not bound as the alternative to pay the nominal value. What he was bound to do was to pay the market value at the time the bonds were acquired by him. This is the doctrine of all the authors who have written upon failure to fulfil obligations.

But Mr. Justice Ramsay, at page 119, states:—

the right of respondent on his own showing is to have 35 debentures or their value—their greatest value—which seems to me to be 25 cents in the dollar.

Mr. Justice Cross stated that he would be in favour of allowing a higher value in default of the surrender of the bonds "on the principle that Senécal was bound to produce the bonds or give the highest price they were shown to be worth," but he did not dissent from the views of his colleagues as to what the evidence indicated.

In the Privy Council it is stated, at page 51 of the report—

It has been contended that the Court of Queen's Bench was wrong in valuing the debentures at 25 cents to the dollar. It appears to their Lordships that there was evidence upon which the Court were fully justified in arriving at that conclusion. There was evidence that on the 29th of November, 1882, similar debentures were sold at 25 cents to the dollar.

November 29th, 1882, was certainly subsequent to the date the appellant in that case had received the bonds and in any event there was apparently no cross-appeal by the respondent. I believe their Lordships were not laying down any rule contrary to that set forth in the *Pauzé* case. (1) See Mignault, Vol. 5, p. 421. I take it that the appellant before us is entitled to be allowed, in lieu of the transfer to him of the number of shares to which he is entitled, the highest value that the evidence discloses the shares were worth down to the date of the hearing.

As to the defence of prescription, it is necessary to state only that in my opinion articles 2262 and 2267 of the Civil Code do not apply but rather article 2260 as this is a contract for an indeterminate time.

The appeal must be allowed. The judgment of the Superior Court

Condamne la défenderesse à lui remettre, dans les quinze jours de la date du présent jugement, contre paiement de la somme de $262.50, 3,750

(1) (1889) 14 A.C. 637.

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actions de la Lamaque Gold Mines Limited et, à son défaut de ce faire dans ledit délai à lui payer la somme de $7,237.50, avec intérêt de dépens.

Without determining the question raised as to the form of the judgment, I would, in view of the time that has elapsed since the date of that judgment substitute one for payment by the respondent to the appellant of the sum of $7,237.50 with interest and costs.

Appeal allowed with costs.

Solicitors for the appellant: *Laurendeau & Laurendeau.*

Solicitors for the respondent: *Perrault & Perrault.*