

1893 GEORGE W. STUART (PLAINTIFF).....APPELLANT ;
 *Dec. 1, 2, AND
 1894 CHARLES F. MOTT (DEFENDANT).....RESPONDENT.
 *May. 1. ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Res judicata—Different causes of action—Statute of Frauds.

S. brought a suit for performance of an alleged verbal agreement by M. to give him one-eighth of an interest of his, M.'s, interest in a gold mine but failed to recover as the court held the alleged agreement to be within the Statute of Frauds. On the hearing M. denied the agreement as alleged but admitted that he had agreed to give S. one-eighth of his interest in the proceeds of the mine when sold, and it having been afterwards sold S. brought another action for payment of such share of the proceeds.

Held, reversing the decision of the Supreme Court of Nova Scotia, Fournier and Taschereau JJ. dissenting, that S. was not estopped by the first judgment against him from bringing another action.

Held, also that the contract for a share of the proceeds was not one for sale of an interest in land within the Statute of Frauds.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) reversing the judgment at the trial for the plaintiff.

The facts of the case are sufficiently set out in the above head-note.

Osler Q.C. and *Newcombe* for the appellant.

Borden Q.C. and *Mellish* for the respondent.

THE CHIEF JUSTICE.—I have come to the conclusion that the judgment of Mr. Justice Townshend who tried

*PRESENT:—Sir Henry Strong C.J., and Fournier, Taschereau, Gwynne and King JJ.

NOTE.—A report of this case has already appeared at page 153 but is now re-published with the judgment of the Chief Justice.

this action without a jury ought not to have been reversed, and that the appellant (the plaintiff below) was entitled to recover in respect of the contract upon which he sued.

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The case is a peculiar one. It is a second action between the same parties relating to the same subject matter. In the former suit the plaintiff alleged that for certain valuable considerations, being the same which he now alleges and proves were the considerations for the promise in respect of which he now seeks to recover, the defendant agreed to give him a one-eighth share in an undivided fourth part of which the defendant was the owner in a gold mine in Nova Scotia. In that cause each party was a witness in his own behalf. The plaintiff there swore that the promise already stated was made by the defendant and that it was so made in consideration of the plaintiff putting in the mine certain useful and valuable machinery at less than it was worth; of the refusal by the plaintiff at the defendant's express request of an offer of a lucrative position in Mexico; the giving by the plaintiff, who was an experienced practical miner, of his time, skill and advice in the management and working of the mine, and in defending the title to the property which was at that time in litigation; and the lending to the defendant money to assist in carrying on the operations of the mine. The plaintiff further proved that he had performed all these valuable considerations. The defendant in his examination swore that he never promised to give the plaintiff any share in the mine itself or to account to him for any share of the profits, but he admitted that he did promise the plaintiff that if and when the mine was sold he would pay him the same share, (one-eighth of the defendant's fourth share) of the proceeds as the plaintiff claimed in the mine itself. The learned judge by whom the first cause,

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which was a suit in equity before the passage of the Nova Scotia Judicature Act, was heard considered that the Statute of Frauds was a defence so far as specific performance of the agreement to convey a share in the mine was concerned, but made a decree for an account of the profits adopting to this extent the plaintiff's account of the bargain. The decree was reversed on appeal by the court in banc upon the ground that the evidence was insufficient to establish a partnership and that judgment was affirmed by this court.

The trial of the present action took place before Mr. Justice Townshend, without a jury. The plaintiff gave evidence precisely to the same effect as that which he had given in the first suit. The defendant did not offer himself as a witness on his own behalf. The plaintiff also proved, as he had done in the former litigation, the performance of the considerations before mentioned, and this was confirmed by the evidence of disinterested witnesses in such a way as to leave no doubt that the defendant did get the benefit of everything that the plaintiff relies on as forming part of the considerations for the contract which he alleges. The evidence of the defendant in the former cause, in which he admitted having made a promise to give the plaintiff the one-eighth of the price obtained for his share in the case of a sale of the mine, was put in and proved. In this evidence, however, the defendant stated that his promise was entirely gratuitous. There can be no doubt on the evidence that the plaintiff did put up for the purposes of the mine machinery worth at least \$1,000 and did render valuable service to the defendant such as he says was to be part of the consideration, and did also lend the defendant money for working the mine, all of which must have been mere spontaneous and gratuitous acts on his part if we are to believe the defendant's statement.

Upon this evidence the learned judge thought that he was at liberty to infer a contract such as the plaintiff claimed the performance of and gave judgment accordingly for the plaintiff. This judgment the Supreme Court of Nova Scotia on appeal have reversed, and from their judgment the present appeal has been taken.

I see no difficulty in point of law in sustaining the judgment of Mr. Justice Townshend as regards the existence of such a contract as that learned judge considered to be established. The question is purely one of evidence. There was clear and undoubted proof that the plaintiff had furnished valuable machinery and rendered services to the defendant, all of which he must be deemed to have done gratuitously unless some contract to pay for it is to be inferred. It was not even suggested that there was any reason, arising from any relationship between the parties or otherwise, why the plaintiff should have done all which he undoubtedly did do as voluntary acts of beneficence towards the defendant. It was therefore perfectly reasonable and quite in accordance with what is done every day by juries to imply from this that the plaintiff was to be paid or in some way remunerated. The ordinary implication would of course be that payment upon the principle of a *quantum meruit* was what the plaintiff was entitled to. But then both the plaintiff and defendant agree in stating that there was an express promise, differing, however, as to whether it was a voluntary promise or mere announcement of an intention to make a present, or to pay for the machinery furnished and the services rendered by a share in the proceeds of the mine. Under these circumstances I do not see that a jury, if the action had been tried by such a tribunal, could have been held to have acted so unreasonably that their verdict must necessarily have been set aside if

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they had coupled the consideration, which is proved beyond doubt or question, with the promise which the defendant admits he made. This and no more is what Mr. Justice Townshend did. Why then should his finding be interfered with any more than the finding of a jury would have been? I can see no reason why it was not just as open for the judge as it would have been for the jury to infer a contract from the circumstances and admissions proved before him, and for that reason I am of opinion that his judgment ought to have been upheld.

Two points of law were raised. First, it was said that the judgment in the first suit was an estoppel. But one of several answers which suggest themselves is sufficient to dispose of this. We cannot say that there was *res judicata* inasmuch as the present demand did not arise until the sale of the mine had been completed, and this was not effected until after the final judgment in appeal by which the first suit was disposed of, was pronounced. Then it was said that the Statute of Frauds was a defence. The answer to this is that the agreement which is now sought to be enforced was not, as in the former case, one conferring an interest in land but exclusively relating to an interest in money; it is true this money is to arise from the sale of land or of a mining interest, but that on authority can, I conceive, make no difference after the land or money interest has been actually sold. It is not sought to enforce any trust or contract to sell the land; that would have been a different case; here the sale has taken place and the only question is as to a share of the price received.

There are many American cases in point. *Trowbridge v. Wetherbee* (1) is an express authority showing that in a case like the present to enforce a pro-

(1) 11 Allen (Mass.) 361.

mise to pay money out of the proceeds of the sale of land brought after the sale has taken place the Statute of Frauds has no application. The cases of *Graves v. Graves* (1); *Hall v. Hall* (2); and *Gwaltney v. Wheeler* (3); also apply strongly in the plaintiff's favour (4).

I am of opinion that the appeal must be allowed and the judgment of the trial judge restored with costs.

FOURNIER J.—I am of opinion that the appeal should be dismissed.

TASCHÉREAU J.—I think that the plaintiff's action was rightly dismissed. He is estopped from taking the position he would now take. I would dismiss the appeal.

GWYNNE J.—I am of opinion that this appeal should be allowed with costs and that the judgment of the court of first instance in favour of the plaintiff should be restored. The only real defence to the action urged before us was that the plaintiff's cause of action was estopped and barred by a judgment rendered in favour of the defendant in a former action at suit of the plaintiff which, as was contended, operated as *res judicata* upon the matter of the present action; but, concurring herein with the learned judge of first instance, I am of opinion that there is nothing in the former action which operates as a bar or estoppel in the present.

KING J.—I concur in the allowance of this appeal.

Appeal allowed with costs.

Solicitors for appellant: *Henry, Harris & Henry.*

Solicitors for respondent: *Lyons & Lyons.*

(1) 45 N.H. 323.

(2) 8 N.H. 129.

(3) 26 Ind. 415.

(4) See also *Smith v. Watson* 2 B. & C. 401.