HUGH J. A. MACEWAN, ADMINISTRATOR OF THE ESTATE OF PETER MACEWAN, DECEASED (PLAINTIFF) .. } APPELLANT;

AND

THE TORONTO GENERAL TRUSTS CORPORATION, EXECUTORS OF J. J. CARTER, DECEASED (DEFENDANTS) ..... } RESPONDENTS.

1916
*Nov. 22, 23.
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*Feb. 6.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Contract—Consideration—Settlement of action—Statute of Frauds—Trade agreement—Restraint of trade—Crim. Code s. 498.

In 1905, M. and his two brothers entered into a contract with R. by which they gave him exclusive control of their salt works with some reservations as to local trade. R. assigned the contract to the Dominion Salt Agency, a partnership consisting of his firm and two salt manufacturing companies, which agency thereafter controlled about ninety per cent. of the output of manufacturers in Canada.

Held, that the contract was not *ex facio* illegal and as the Canadian output was exceeded by the quantity imported which may have competed with it, and the price was not enhanced by reason of this control by the Agency, the Court should not hold that it had the effect of unduly restraining the trade in salt or that it contravened the provisions of section 498 of the Criminal Code.

In 1914, M., as administrator of his father's estate, brought action against the estate of C. who, in his lifetime, had been president of the Dominion Salt Agency and president of and largest shareholder in one of the companies composing it. This action was based on an alleged agreement by C., in connection with the settlement of a prior action against the three partners in the Agency, by which he promised to pay five-sixteenths of the difference between the amount claimed and that paid on settlement. Evidence of the agreement was given by the plaintiff's solicitor in the former action and by defendants' solicitor also.

Held, reversing the judgment of the Appellate Division (36 Ont. L.R. 244), Fitzpatrick C.J. and Duff J. dissenting, that the settlement

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ.

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of the action was good consideration for C.'s contract; that his agreement was not a promise to answer for the debt of another and did not need to be in writing; that it was sufficiently proved; and that the evidence of the plaintiffs' solicitor in the former action was corroborated (R.S.O. [1914] ch. 76, sec. 12) by that of the solicitor for the defendants.

Per Anglin and Brodeur JJ.—The solicitor was not an interested party and corroboration was not required for that reason; if required for any other it was furnished.

The original agreement transferring the salt business to R. was executed by the three brothers "as representing the estate of M. deceased." The action which was settled was brought by the same three persons. After the settlement letters of administration to M.'s estate were taken out.

Held, that the present action was properly brought in the name of the administrator but, if necessary for defendants' protection, his two brothers might be added as plaintiffs.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial in favour of the plaintiffs.

The material facts are stated in the above headnote.

Garrow for the appellant. The settlement of the action was consideration for Carter's contract and fulfilled the condition which made it binding. Halsbury Laws of England, vol. 7, par. 719.

The contract was not a promise to answer for the debt of another. *Harburg India Rubber Comb Co.* v. *Martin*(2); *Brown* v. *Coleman Development Co.*(3); *Conrad* v. *Kaplan*(4).

The plaintiff as administrator had a right to bring this action. *Hill* v. *Curtis*(5), at pages 99 and 100.

There was no proof that the original contract unduly restrained trade. See *Hately* v. *Elliott*(6); *The Queen* v. *American Tobacco Co.*(7).

(1) 36 Ont. L.R. 244.
(2) [1902] 1 K.B. 778.
(3) 34 Ont. L.R. 210.
(4) 18 D.L.R. 37.
(5) L.R. 1 Eq. 90.
(6) 9 Ont. L.R. 185.
(7) 3 Rev. de Jur. 453.

Weir for the respondents. Carter only expressed an intention not understood to be binding. See *Farina* v. *Fickus*(1).

There was no corroboration of Proudfoot's evidence which not only the statute but the circumstances required. See *Hill* v. *Wilson*(2); *In re Hodgson*(3).

The administrator of the MacEwan Estate had no right of action. There was no privity between the estate and Carter. *Dunlop Pneumatic Tyre Co.* v. *Selfridge and Company*(4); *Purchase* v. *Lichfield Brewery Co.*(5); and plaintiff's brothers could not be added as parties to defeat the operation of the Statute of Limitations. *Campbell* v. *Smart*(6); *Clarke* v. *Smith*(7). See also *Walcott* v. *Lyons*(8).

As to the illegality of the contract see *Rex* v. *Elliott* (9); *Mason* v. *Provident Clothing Co.*(10).

THE CHIEF JUSTICE. (dissenting)—I have come to the conclusion that this appeal ought to be dismissed. I do not give much credit to what has been said concerning the late Mr. Carter being desirous as a man of honour and as a matter of business honesty to pay his share of the appellant's claim in the former action. I know nothing of Mr. Carter beyond what appears in the record, but I think it is clear that he was engaged in transactions of a dubious character and being a rich man was not only willing but anxious that they should not be brought into public prominence by being discussed in a court of law. Carter was president and manager of the Empire Salt Company, Ltd., one of the companies banded together in the Dominion Salt Agency of which

(1) [1900] 1 Ch. 331.
(2) 8 Ch. App. 888.
(3) 31 Ch.D. 177.
(4) [1915] A.C. 847.
(5) [1915] 1 K.B. 184.
(6) 5 C.B. 196.
(7) 2 H. & N. 753.
(8) 29 Ch.D. 584.
(9) 9 Ont. L.R. 648.
(10) [1913] A.C. 724.

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he was also president. Whether he had rendered himself liable under section 496 of the Criminal Code might depend upon whether the objects of this concern were *unduly* in restraint of trade, but that they were in restraint of trade there can be no doubt. *Herbert Morris Limited* v. *Saxelby*(1); *Andrew Miller and Co.* v. *Taylor and Co.*(2).

But though I think Carter had the best of reasons for wishing to have the action settled as he succeeded in doing, there is no reason on the face of things to suppose that he did not get it settled for the amount agreed upon after much negotiation between the solicitors for the parties.

It is suggested that he was willing to pay personally a further sum which would represent his share of the balance of the claim beyond the amount for which it was settled and that he entered into a binding contract with the plaintiff's solicitor to do so. It would, I think, require clear evidence to establish this and it seems to me that not only have we no such evidence but there is a good deal of evidence which would prevent a finding to this effect. That Carter would have been willing to pay whatever was necessary is possible, but that he intended to pay more than he could help is, I think, improbable.

The evidence of any member of the bar is entitled to be received with respect in the courts but it would be invidious to allow any personal considerations to enter into our estimate of such evidence. Whilst therefore accepting Mr. Proudfoot's account of what took place between himself and the late Mr. Carter as being in accordance with his belief, it is necessary to weigh the evidence and remember that he is speaking

(1) 32 Times L.R. 297. (2) 32 Times L.R. 161.

of what took place years ago and that his conclusion is far from being supported by the circumstances.

I agree with the reasons for the judgment of the Appellate Division in holding that the evidence is of too doubtful and uncertain a character to enable the court to find upon it any proof that a binding promise was ever made or intended to be made.

It seems to me most remarkable that Mr. Proudfoot should have omitted to inform his clients of such a promise and the fact that he allowed payment to stand over for years until after the death of Mr. Carter, the only person who could possibly have given any other explanation of the matter, renders it impossible to accept his recollection and understanding of the matter unaided as it is by writing of any sort or description.

DAVIES J.—A great many questions were raised and debated at bar upon the hearing of this appeal. Some of them related to the binding effect of the promise or contract sued on and alleged to have been made by the deceased, Carter, in his lifetime with Mr. Proudfoot, K.C., the solicitor of the appellant MacEwan, in order to effect a compromise of an action then pending in which Carter was interested, and as to the necessity of corroborative evidence of such promise, and whether if made it was a promise to answer for the debt of another within the Statute of Frauds, and lastly whether there was any consideration for the promise.

On all these questions I concur with the dissenting opinion of Mr. Justice Riddell of the Appellate Division and with the opinion of my brother Anglin J. in this court.

The only question upon which I entertained any doubt was whether the original agreement made between the MacEwans and one Ransford with respect

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to the control of their Salt Works in Goderich and for moneys alleged to be due under which agreement the compromised action had been brought, was an agreement in restraint of trade and contrary to the policy of common law and of the Criminal Code, section 498, and so unenforceable at law.

This question was not referred to by the Appellate Division in their judgment which was determined on the other questions raised.

It was, however, pressed forcibly in this court by Mr. Weir.

Mr. Garrow for the appellant contended that even if the original agreement was unenforceable as being in restraint of trade and contrary to public policy, the contract on which the present action was brought was not affected thereby, as the contract now in question was based upon an entirely distinct agreement or promise made by Carter.

But if I felt obliged to hold the original agreement unenforceable as being in restraint of trade, I would also feel myself compelled to refuse the aid of the court in enforcing the present agreement which, in my opinion, is based upon and depends absolutely upon the existence and enforceability of the original agreement the action with respect to which was compromised.

The substantial ground relied upon by Mr. Garrow was that this original agreement was not void on grounds of public policy and as being contrary to the 498th section of the Criminal Code.

The original agreement was made between the MacEwans representing the estate, and one Ransford, and was put in evidence.

It was to last for a period of five years and in consideration of the annual payment of $2,000 for the said

period, gave the sole and exclusive control of the Salt Works and Plant of the MacEwans at Goderich to Ransford, with a provision allowing the MacEwans to "manufacture salt and sell the same to supply what was known in business as the local retail trade of Goderich" but "at prices which they would be advised of from time to time by Ransford." A further provision was to the effect that the MacEwans agreed not "to be interested directly or indirectly in the manufacture or sale of salt in any other place or places in Canada" while the agreement lasted.

No evidence of any kind was given by the defendants (respondents) that competition had been unreasonably or unduly prevented or that trade had been unreasonably or unduly restrained in the article of salt in any way, or that the agreement was unreasonable in the interest either of the parties or of the public, or that MacEwan had any knowledge that Ransford was acting for a larger combination and not for himself alone, while the evidence of MacEwan and Ransford was in favour of the plaintiffs (appellants) upon these points.

The respondents relied upon the agreement as being sufficient in itself and as being *ex facie* one which the courts would hold to be an undue or unreasonable restraint of trade.

I am not able to accept that argument. The mere fact standing alone and without other evidence that for a consideration which it is not contended was unreasonable the owner of a salt mine or works and plant should agree to give the sole and exclusive control for a limited period to another person of those works and plant retaining only a right to manufacture for the local trade and sell to that trade at prices to be

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fixed by the purchaser of the control of the salt works, would not in my judgment justify the court in holding such an agreement illegal.

I think the question of illegality is one which as a general rule depends upon the surrounding circumstances and that in a case such as this at any rate where no evidence of these surrounding circumstances was given, this contract on the face of it cannot be held so unreasonable as between the parties, or so detrimental to the public, that the court would refuse to enforce it.

The latest authorities on the question fully support this position. They are: *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.*(1), which is a decision of the Judicial Committee of the Privy Council, and *North Western Salt Co.* v. *Electrolytic Alkali Co.*(2), a decision of the House of Lords. The headnote to this last decision states the facts as follows:—

> The plaintiff company was a combination of salt manufacturers formed for the purpose of regulating supply and keeping up prices, and it had the practical control of the inland salt market. The members of the company were entitled to be appointed as its distributors, *i.e.*, agents to sell on behalf of the company the salt which it had purchased from them. The defendants, who had not joined the combination, agreed to sell to the company for four years 18,000 tons of salt per annum, of which a certain proportion was to be table salt, at a fixed uniform price per ton, and undertook not to make any other salt for sale. They were to have the option of buying back the whole or a part of their table salt in each year at the plaintiff company's current selling price and were to be appointed distributors on the same terms as the company's other distributors. The defendants having sold salt in violation of this agreement, the plaintiff company sued them for breach of contract. The defendants did not by their defence raise the issue of illegality, but they sought to rely on certain facts and documents admitted in evidence at the trial upon other issues as shewing that the agreement was illegal as against public policy.

(1) [1913] A.C. 781. (2) [1914] A.C. 461.

The House of Lords, reversing a majority decision of the Court of Appeal, held that the agreement there in question and substantially stated in the headnote was not *ex facie* illegal.

Upon the authority of these two cases determined, one by the Judicial Committee and the other by the House of Lords, I have no hesitation in deciding that *ex facie* the original agreement in question here is not illegal. The speeches of the noble lords who determined the case of the *North Western Salt Company* (1) are most illuminating and instructive upon the question I am discussing. I will content myself with quoting a few extracts only, one from the Lord Chancellor Haldane, at p. 472:—

> In an appeal which recently came before the Judicial Committee of the Privy Council (*Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (2), my noble and learned friend Lord Parker delivered on behalf of the committee a judgment in which the law on these subjects was fully reviewed. Among other statements in that judgment there is one which bears closely on the question before us. After explaining the difference between a monopoly in the strict sense of a restrictive right granted by the Crown, and a monopoly in the popular sense in which what is meant is that a particular business has been placed under the control of some individual or group, he says (p. 796) that it is "clear that the onus of shewing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will be on the party alleging it, and that if once the court is satisfied that the restraint is reasonable as between the parties the onus will be no light one."
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> My Lords, I desire to adopt this proposition as applicable to the question before us.

Another from Lord Moulton at page 476:—

> It may be shortly put as follows: if the contract and its setting be fully before the court it must pronounce on the legality of the transaction. But it may not do so if the contract be not *ex facie* illegal, and it has before it only a part of the setting which it is not entitled to take, as against the plaintiffs, as fairly representing the whole setting.

(1) [1914[A.C. 461. (2) [1913] A.C. 781).

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The other extract, which I think very applicable to the appeal now under consideration, is from Lord Sumner at page 481. He says:—

> Whatever else can be made of it, if anything, this is certain, that we do not know half of the facts material to the case. For myself I should require to know much more of the conditions of the trade and of the effect of such arrangements as these before I could profitably express any opinion on the practical rights and wrongs of the sale of salt. In such a matter partial information is as bad as none.

For the above reasons and on the above authorities, I concur in allowing the appeal and restoring the judgment of the trial judge, Sutherland J.

DUFF J. dissented from the judgment allowing the appeal.

ANGLIN J.—The facts of this case appear in the judgment in the Ontario courts (1).

Mr. Proudfoot's evidence was accepted by the learned trial judge. While there are, no doubt, circumstances dwelt on by the Chief Justice of the Common Pleas which, as Mr. Justice Riddell puts it,

> would—or might be— suspicious in persons of less high standing than Mr. Proudfoot,

I cannot agree with the learned Chief Justice that they warrant rejecting his testimony or treating the definite promise made by Carter, to which he deposes, as an indefinite expression of mere intention, or as meant to create not a legal contract, but only the moral obligation of "a gentleman's bargain." I concur in Mr. Justice Riddell's interpretation of Mr. Proudfoot's testimony and, unless I should discredit him—which I am certainly not prepared to do—the conclusion seems to me inevitable that the late James I. Carter meant to enter into a legal contract—collateral to the

(1) 36 Ont. L.R. 244.

settlement of the then pending litigation, but for which that settlement and the fact that he would thereby be relieved from what he deemed a humiliating, if not a dishonest position formed the consideration—to pay to the estate of the late Peter MacEwan, represented by the three plaintiffs then before the court, five-sixteenths of the sum of $3,200 or $1,000.

The evidence of Mr. Proudfoot was not that of an opposite or interested party within R.S.O. c. 76, s. 12. Yet if, for any other reason, corroboration of it should be necessary or desirable I agree with Riddell J. that it is supplied by the evidence of Mr. Hanna.

For the reasons assigned by that learned judge and by Mr. Justice Sutherland, I am also of the opinion that the defendants' objections based on the Statute of Frauds and on the fact that the present plaintiff sues alone as administrator of his father's estate are ill-founded. If thought desirable for their protection by the defendants, the plaintiff's two brothers, who were joint plaintiffs with him in the former action, may be added as parties, as Mr. Justice Riddell has suggested.

Another defence, chiefly relied upon by the respondent in this court, which was pleaded and was noticed in the trial judgment, is that the contract on which the former action was brought was illegal and that its illegality so tainted the agreement now sued upon, made in consideration of the compromise and settlement of that action, that it cannot be enforced. The illegality of the original contract has never been determined. The question of its validity might have been settled in the former action, but not without considerable trouble. The rights of the parties could not be known without a judicial decision. For aught that appears the plaintiffs at that time *bonâ fide* forbore

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further litigating a doubtful question. The consideration moving from them was the abandonment not of a right, but of a claim. In relinquishing their right to litigate that claim they gave up something of value. *Miles* v. *New Zealand Alford Estate Co.*(1). Carter on his part escaped from an unpleasant position. There was, therefore, consideration for his promise and that consideration possibly was not illegal. Moreover, as his claim was presented at the trial the plaintiff did not invoke the alleged illegal contract.

On the other hand, what the defendant's testator agreed to do was to make good to the MacEwan estate a part of the moneys which it sought to recover under the very contract alleged to be illegal. Though in a sense collateral, was not Carter's agreement in fact tantamount to a security to the plaintiffs for a partial payment of the fruits of the impugned contract and therefore, if that contract was illegal, itself fatally tainted? *Everingham* v. *Meighan*(2), at pages 360 *et seq.* Did it not spring from, and was it not a creature of, the contract alleged to be illegal? *Fisher* v. *Bridges* (3), at page 649; *Clay* v. *Ray*(4). (But see 1 Smith's L.C. (1915), pp. 435-6; *Armstrong* v. *Toler*(5), at pages 271 *et seq.*).

In order that this defence should succeed, however, the illegality of the original contract must be established. It is attacked as a contravention of section 498 of the Criminal Code, the scope of which was somewhat considered in *Weidman* v. *Shragge*(6). The learned trial judge dealt with this branch of the present case in a single sentence. He said:—

> I am unable to find upon the evidence that the defence of the contract being void as against public policy was made out.

(1) 32 Ch.D. 266.
(2) 55 Wis. 354.
(3) 3 E. & B. 642.
(4) 17 C.B.N.S. 188.
(5) 11 Wheaton, 258.
(6) 46 Can. S.C.R. 1.

It is not adverted to at all in the opinions delivered in the Appellate Division.

The MacEwans by their contract with Ransford, in consideration of an annual payment of $2,000, gave him control of their salt works and plant at Goderich for five years and agreed not to be interested directly or indirectly in the manufacture or sale of salt elsewhere in Canada, to discourage the erection of other salt works at Goderich and to turn over to Ransford all orders or offers for the purchase of salt which they should receive, other than for retail sales, retaining, however, the right to supply "the local trade," but at prices of which Ransford should advise them. I am not prepared to pronounce this contract *ex facie* illegal. Although it was executed after the formation of the Dominion Salt Agency, the MacEwans were unaware that Ransford was making it in the interests of that company, to which he subsequently assigned it. If they knew at all of the existence of the Dominion Salt Agency, they did not know that "there was an attempt being made to round up the salt trade." This evidence given by Hugh J. A. MacEwan is uncontradicted. Moreover it has been shewn that during the period in question, while the Dominion Salt Agency may have controlled 90% of the output of salt by Canadian manufacturers, the importation of salt, duty free, exceeded that output, and for aught that appears to the contrary this imported salt competed with the domestic article. It is also proved that no enhancement in the price of salt resulted from the formation and activities of the Dominion Salt Agency. Under these circumstances I am not prepared to hold, reversing the learned trial judge, that it has been established that in making the agreement with Ransford the MacEwans contravened s. 498 of the Criminal

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Code. The purpose may have been to limit the facilities for producing, manufacturing, supplying and dealing in salt and to lessen competition therein, but that it was to do so "unduly" has not been shewn. *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.*(1), at pages 469, 471. Neither can I say without more evidence than the present record furnishes as to the circumstances under which the agreement was made and the situation of the salt trade at the time that the restriction imposed upon the McEwans' right to manufacture and deal in salt was greater than was reasonably necessary for the protection of Ransford in taking over the control of their Goderich works and agreeing to pay therefor the sum of $2,000 per annum, or that it was clearly injurious to the public interest. *Attorney-General of Australia* v. *Adelaide Steamship Company, Limited*(2), at pages 794-7; *Maxim Nordenfeldt Guns and Amunition Co.* v. *Nordenfeldt*(3); *Collins* v. *Locke*(4); *Dubowski & Sons* v. *Goldstein*(5), at page 484; *Underwood & Son* v. *Barker*(6), at pages 303, 305.

On the whole case I am of the opinion that the appeal should be allowed with costs in this court and in the Appellate Division and the judgment of the learned trial judge restored.

BRODEUR J.—I am of opinion that this appeal should be allowed for the reasons given by my brother Anglin.

Appeal allowed with costs.

Solicitor for the appellant: *Charles Garrow.*
Solicitor for the respondents: *A. Weir.*

(1) [1914] A.C. 461.
(2) [1913] A.C. 781.
(3) [1893] 1 Ch. 630; [1894] A.C. 535.
(4) 4 App. Cas. 674.
(5) [1896] 1 Q.B. 478.
(6) [1899] 1 Ch. 300.