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HIGH COURT DIVISION.

LENNOX, J. JULY 24TH, 1920.

RE BILLETT AND DAVIDSON.

Deed—Conveyance of Land to Husband and Wife—Construction—Grantees Described as Joint Tenants and Parties of Second Part—Grant to and Habendum to Parties of Second Part without More—Death of Husband—Wife Taking Whole Estate by Survivorship—Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, sec. 13—Exception—Declaration under Vendors and Purchasers Act.

Application by Frances Billett, purporting to be owner in fee of certain land, for an order, under the Vendors and Purchasers Act, declaring that she can make a good and valid conveyance thereof.

The application was heard in the Weekly Court, Toronto.
J. M. Bullen, for the vendor.
J. R. Code, for the purchaser.

LENNOX, J., in a written judgment, said that the vendor claimed under a deed of conveyance of the land in question, dated the 31st October, 1919, wherein William Pilgrim was named as grantor and "Charles John Billett . . . and Frances Billett, wife of the said John Billett, *as joint tenants,*" were named as grantees, and described as parties of the second part. The grant was "to the parties of the second part in fee simple," and there was nothing about joint tenancy in the habendum. Charles John Billett died on the 15th February, 1920. Frances Billett claimed to be solely entitled as the surviving joint tenant.

Before the Married Women's Property Act and the Conveyancing and Law of Property Act, a deed to a husband and wife conveyed an estate having some of the characteristics of a joint tenancy; they took by entireties, and each was deemed to be

seised of the whole and neither of a part; but, as regards the wife, the estate had not all the incidents of a joint tenancy during the lifetime of the husband, except in the event of a dissolution of the marriage: Ward v. Ward (1880), 14 Ch. D. 506; Thornley v. Thornley, [1893] 2 Ch. 229. The provisions of the Married Women's Property Act put an end to the doctrine of entireties and quasi joint tenancy; and, since the 1st July, 1834, on a conveyance in fee simple to two or more persons, even if a married woman be one of them and her husband another, they "take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of such . . . assurance . . . that they are to take as joint tenants:" Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, sec. 13; In re Jupp (1888), 39 Ch. D. 148; Eversley's Law of Domestic Relations, 3rd ed., pp. 190, 191.

If the intention sufficiently appears on the face of the deed that the grantees are to take as joint tenants, they will take as joint tenants under the exception in the statute, and not as tenants in common under its general provision. It need not appear in either the habendum or the granting clause: if the intention that they are to take as joint tenants clearly appears anywhere upon the face of the deed it is sufficient. In this deed the intention does sufficiently appear, for, in express words, the grant is to the parties of the second part, who are thereinbefore described as joint tenants.

Reference to Re Fingerhut and Barnick (1910), 2 O.W.N. 372.

Since the decision in Re Shaver and Hart (1871), 31 U.C.R. 603, the scope of the statute has been broadened so as to include conveyances to husband and wife.

There should be an order declaring that Frances Billett and her husband became joint tenants of the land in question under the deed referred to, and that upon the death of her husband the whole estate in the land became vested in her in fee simple.

No order as to costs.

SUTHERLAND, J. JULY 29TH, 1920.

HOOD v. CALDWELL.

Company—Resolution of Directors Fixing Remuneration of President and Manager of Company on Commission-basis—Correctness of Minutes of Meeting—Conflicting Evidence—Finding of Trial Judge—Payments Made to President—Scope of Resolution—Action by Shareholders to Compel Repayment to Company—Knowledge and Acquiescence—Estoppel—Failure to Shew Misrepresentation on Sale of Shares—Receipt of Dividends—Offer at Trial to Return—Pleading—Amendment—Agreement with Vendors of Property to Company—Issue of Shares—Irregularity.

Action by eleven shareholders of the Wentworth Orchard Company Limited against that company and one Caldwell and one Nicholson, for: (1) rectification of the minute-book of the defendant company by striking out a certain resolution appearing therein; (2) repayment by the defendant Caldwell to the defendant company of $18,700 alleged to have been illegally paid to him by it under the authority of the said resolution; (3) an order setting aside an agreement dated the 8th April, 1912, whereby the defendants Caldwell and Nicholson, theretofore trading under the name of the Caldwell Orchard Company, sold to the defendant company their assets, in consideration of the issue to them of $50,000 worth of common stock in the defendant company; and (4) a declaration that the said $50,000 worth of common stock was irregularly issued.

The action was tried without a jury at Hamilton.

George Lynch-Staunton, K.C., and L. J. Counsell, for the plaintiffs.

W. M. McClemont, for the defendants Caldwell and the Wentworth Orchard Company Limited.

No one appeared for the defendant Nicholson.

SUTHERLAND, J., in a written judgment, said, after stating the facts, that a meeting of the directors of the defendant company was held on the 4th May, 1915, at which, as the minute-book shewed, "the question of providing for the management of the company was first taken up, and, upon motion by Messrs. Borer and Blagden, the president (A. C. Caldwell) was given complete charge of the management of the business, his remuneration to be 5 per cent. of the gross sales for the year."

Upon conflicting evidence, the learned Judge found that the minute of this resolution correctly recorded the action taken at the meeting.

For the years following its adoption, Caldwell was paid or drew the following sums: 1915-16, $1,720.36; 1916-17, $2,000; 1917-18, $6,170.25; 1918-19, $8,810.19: in all $18,700.80. In no case was the sum drawn exactly 5 per cent. of the amount of the gross sales except in 1918-19. In each of the three previous years it was substantially less than 5 per cent.

The learned Judge was unable to find that there was any actual misrepresentation on the sale of shares to the plaintiffs. They received their dividends from time to time and came into Court without having offered to repay these. No such offer having been made in their pleadings, it was only at the trial that counsel suggested that they would restore them, and asked, if necessary, for an amendment of the pleadings for that purpose. The learned Judge could not see his way to grant that application.

Upon a consideration of the facts, he was unable also to see his way to make an order for the rectification of the minute-book by striking out the resolution referred to. While it was contended that, in any event, it could, in view of its terms, apply for one year only, in reality it seemed to have been substantially acted upon for the subsequent years. There could be little or no doubt that the defendant Caldwell was the main, if not the sole, person through whose ability and efforts the substantial growth of the company was made. Where men actually had such knowledge as the plaintiffs had, or as must be imputed to them, of the company's operations, and seemed to have acquiesced in the payment to Caldwell, for the business year in which the resolution was passed and for each subsequent year down to 1919, of the substantial sums paid to him, which approximated to the 5 per cent., they could not now be heard to say that the moneys were not paid to him with their consent and concurrence. In addition to their pique and annoyance at finding that Caldwell had obtained control of the company by purchasing some of the shares of other holders, they had probably come to the opinion that 5 per cent. on the gross sales for his commission was more than he should receive or the company should pay. That was a matter for the company to deal with.

The plaintiffs were not entitled now to ask Caldwell to repay the $18,700 he had received. On the other hand, he might well be taken to have abandoned the difference between that sum and the 5 per cent. allowance.

In all the circumstances, it was now too late for the plaintiffs to ask to set aside the agreement of the 8th April, 1912, or for a declaration that the common stock was irregularly issued.

Reference to Oakes v. Turquand (1867), L.R. 2 H.L. 325; Scholey v. Central R.W. Co. of Venezuela (1868), L.R. 9 Eq. 266 (note); Morrisburgh and Ottawa Electric R.W. Co. v. O'Connor (1915), 34 O.L.R. 161.

The action should be dismissed, but without costs.

KELLY, J. JULY 30TH, 1920.

KEEFER v. MACDONELL.

Trusts and Trustees—Sale of Land—Satisfaction of Mortgage out of Purchase-money—Balance of Proceeds of Sale—Application by Trustee—Credit for Sums Expended—Small Balance Remaining Due—Limitations Act, R.S.O. 1914 ch. 75, secs. 46, 47—Interest—Action by Administrator of Estate of Cestui que Trust for Account—Costs.

Action by Francis H. Keefer, as administrator of the estate of Jemima Keefer, wife of Thomas A. Keefer, against Angus J. Macdonell, in his personal capacity and as executor of the will of Eleanor Macdonell, for a declaration that the defendant is and has always been since the 8th August, 1892, when an agreement was made between the defendant and Jemima Keefer, a trustee, under that agreement, for Jemima Keefer, and for an accounting of all moneys which should have been credited upon a mortgage for $2,500, dated the 9th August, 1892 (referred to in the agreement), from Jemima Keefer to Eleanor Macdonell, and that, upon payment of the amount, if any, which may be ascertained as still due upon that mortgage, the defendant be ordered to transfer to the plaintiff, as such administrator, the land and other property conveyed by Jemima Keefer as security for the $2,500, together with any judgment or other securities he may hold in lieu or in respect thereof.

The action was commenced on the 31st January, 1919.

The trial was at a Toronto sittings, without a jury.

A. J. McComber, for the plaintiff.

W. F. Nickle, K.C., and J. M. Farrell, for the defendant.

KELLY, J., in a written judgment, referred to the judgment of Latchford, J., in Macdonell v. Keefer (1918), 14 O.W.N. 25, and said that the findings therein made were in accord with the evidence in the present case, and were, so far as relevant, adopted.

After stating the facts, the learned Judge (Kelly, J.) found that the sale by the defendant to the plaintiff in 1894 of the lands covered by the mortgage of the 9th August, 1892, was an out-and-out sale by the defendant in pursuance of the powers he possessed under his trust (and not a sale by the mortgagee under the power in the mortgage), and that thereout the mortgage was paid off and discharged, and the personal liability of Jemima Keefer's estate for the mortgage-moneys came to an end—the result, so far as the estate was concerned, being just as if the defendant had been paid $3,500 in cash and thereout paid off and discharged

the mortgage. The adequacy of the consideration was not, upon the evidence, open to question.

The sale itself being regular, the defendant's disposition of the proceeds must be inquired into. In his statement of defence, he pleaded his willingness to render an account to the estate of Jemima Keefer of his trusteeship under the trust-agreement, and claimed credit for several items set out. He was entitled to credit three sums, aggregating $737.10, against the $1,000 balance of purchase-money which he received on the sale to the plaintiff, and was accountable to Jemima Keefer's estate for the balance—$262.90. This being part of the proceeds of the trust property, retained by the trustee, and not handed over or accounted for to the person or estate entitled to receive it, and not held separately or separately invested, he has remained accountable therefor and is not entitled to the benefit of the Limitations Act as a bar to an action to recover it: see the Act in force in 1894, 54 Vict. ch. 19, sec. 13, and secs. 46 and 47 of the present Act, R.S.O. 1914 ch. 75.

In Stephens v. Beatty (1895), 27 O.R. 75, it was held that where a small balance remained in the hands of a trustee that did not prevent the Statute of Limitations running in his favour. Here the amount was not so small as to entitle the defendant to the benefit of the statute. He was liable also for interest—the case falling within the principles laid down in Halsbury's Laws of England, vol. 28, p. 191, para. 386; but simple interest only: ib., p. 192, para. 388.

The distinction between the position and rights of the estate and those of Francis Henry Keefer personally should not be lost sight of. The argument that the latter in 1894 knew of and approved of the defendant's disposal of the $1,000, as now set up in the defence, was not an answer, even if that were the accepted fact, to the claim by Keefer as representative of Jemima Keefer's estate. He had no authority to alienate, waive, or compromise any of the estate's rights; he was not then the legal representative; he was not even an heir-at-law of hers. If the defendant relied on Keefer to indemnify him, the indemnity could only have been that of Keefer personally. He was not a party to this action in his personal capacity.

There should be a judgment in favour of the plaintiff, as administrator of Jemima Keefer's estate, against the defendant personally for $262.90, and simple interest at 5 per cent. from the 17th August, 1893.

A considerable portion of the time of the trial was devoted to important issues raised by the plaintiff on which he had not succeeded. He should be allowed only two-thirds of the costs of the action.