

Privy Council Appeals Nos. 119, 118 and 120 of 1922.

Sir Charles Ross - - - - - *Appellant*
v.
The Canadian Bank of Commerce - - - - - *Respondents*

Same - - - - - *Appellant*
v.
The Northern Canada Supply Company, Limited - - - - - *Respondents*

Same - - - - - *Appellant*
v.
The Taylor Hardware Company, Limited - - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 1ST MAY, 1923.

Present at the Hearing :

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD PARMOOR.
LORD PHILLIMORE.
LORD CARSON.

[*Delivered by* THE LORD CHANCELLOR.]

Ross v. The Canadian Bank of Commerce.

This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario, affirming a judgment of the High Court Division of the Supreme Court. The High Court Division had given judgment in the action for the plaintiffs, who are the respondents to the present appeals. That decision was affirmed by the Appellate Division.

The action was brought by the present respondents upon a number of promissory notes given to them by the Patricia

Syndicate by C. A. O'Connell, who is described in the promissory notes as the trustee of the Patricia Syndicate. The action was brought, not only against the Patricia Syndicate, but also against the present appellant, Sir Charles Ross ; and the question in the action was whether Sir Charles Ross was or was not liable on the promissory notes. Mr. Justice Rose, in a full and careful judgment, held him to be liable, and that decision was affirmed by the Appellate Division without any written reasons being given.

The facts may be stated quite shortly. Mr. O'Connell took an option in respect of certain mining properties at Boston Creek. The terms on which he took that option were clearly stated in an agreement dated the 20th July, 1917, the short effect of which was as follows. He took an option to buy the mining properties in consideration partly of the payment of \$125,000 in cash and partly of the transfer of shares of the value of \$208,333 in a company to be formed. He was to be entitled to take immediate possession of the mining claims with the right to carry on mining operations upon them, and to dispose of the ore got or the metal obtained from the ore ; but the profits derived from those operations, after deducting certain charges, were to be paid to the owners of the property on account of the cash purchase price until the whole should have been paid. When the cash purchase price had been paid, he was to form the company and was to procure the allotment to the property owners of the agreed number of shares ; and the balance of the consideration obtained from the company would, of course, belong to him. Mr. O'Connell put this matter before Sir Charles Ross, who (to use a neutral term for the moment) agreed to go into the matter with him and in fact provided the deposit on the option, a sum of \$2,000 in cash. The terms upon which Sir Charles Ross went into the matter rested for a time upon a verbal agreement ; but fortunately they were ultimately put into writing, and in fact they were put into writing twice over. The first written agreement between the parties was dated the 9th April, 1918. That agreement recited that O'Connell was the record owner of an option upon certain mining property situated at Boston Creek and being operated under the name of the " Patricia Syndicate " ; that O'Connell had been engaged in the development of the mining properties in question with moneys advanced by Sir Charles Ross ; and that the development and advancement of moneys had been made under a verbal agreement and understanding as to the present and future proportionate ownership of the option for the properties ; and then followed the clauses of the agreement entered into by the parties. By clause 1 Sir Charles Ross, having already advanced \$75,000, was to advance a further sum of \$25,000 when required to do so by O'Connell. By clause 2 it was declared that Mr. O'Connell assigned and transferred to Sir Charles Ross 50 per cent. of all the interest which Mr. O'Connell had or might have in and to the option, and in and to all rights he had or might have in the business so conducted under the name of the Patricia Syndicate. By clause 3

it was provided that should Sir Charles Ross advance moneys in excess of the \$100,000 specified it should be in the form of a loan to the business known as the Patricia Syndicate, and should be repaid or secured before either of the parties drew from the said business any other sums as profits or by way of the purchase of such treasury stock as was thereafter provided for. Then by clause 4 it was provided that a corporation should be formed for the carrying on of the said business either under the option or under the ownership of the mining properties (should the option be taken up), and that both the parties should assign their interests in the Syndicate and the option on the mining properties to the Corporation, upon the terms that of the total stock of the Corporation (which was fixed at two million dollars) \$1,000,000 should go to Sir Charles Ross, \$416,667 to O'Connell and \$208,333 to the vendors as part of the purchase money for the property, the remaining \$375,000 being at the disposal of the directors. Then clause 5 is in these words: "The purpose and intent of this agreement is to make definite the terms and conditions under which the parties hereto have been carrying on the above described business, and to carry into effect a verbal agreement to which reference has been heretofore made." Apparently Sir Charles Ross was not satisfied with the terms of that agreement, and a substituted agreement was made on 2nd May, 1918. The recitals differed somewhat from those in the April agreement, but the operative clauses were in substance the same. In particular the provisions of clauses 3 to 5 of the agreement of April were reproduced with nothing more than verbal alterations in the agreement of May.

What, then, was the effect of these agreements? It appears to their Lordships to be this: that both before and after the agreements these two persons joined together to form the Patricia Syndicate; that the purpose of the Patricia Syndicate was to carry on the business of developing the mines; and that both parties agreed when the process of development had been completed to transfer the property to a company and to take their profit in the form of shares in that company. That was a combination for the purpose of making profits, even although the receipt of the profits might be deferred until the company had been formed. It appears to their Lordships to be immaterial whether the combination is called a partnership or a joint adventure. Probably it was a partnership. But in any case it was a combination, and it was part of the terms on which the combination was made that a business should be carried on and liabilities should be incurred; and if in the course of carrying on that business liabilities were incurred, either by the combination or the partnership or the Syndicate (whichever it is called) or by a member on its behalf, within the limits of the adventure, then those liabilities bound both members of the Syndicate and not only the one by whom the liability was actually incurred. To put the matter shortly, the Syndicate was composed, not of Mr. O'Connell

alone, but of Mr. O'Connell and Sir Charles Ross, and the liabilities incurred on behalf of the Syndicate were the liabilities of both of them. That view is confirmed by a number of expressions in a long correspondence. It is needless to refer to all such expressions, and it is sufficient to refer to a letter of 10th June, 1918, written by Mr. O'Connell to Sir Charles Ross, in which the writer said this :

“ I am writing the Manager of the Bank of Commerce ”—that is the respondent Bank—“ this morning advising him that the mill will doubtless be started on the 11th instant, and that I will call on him on or before the 15th instant with regard to our account. I am of the opinion that we will be accorded the accommodation that we desire and may have to give the note or other security of the Syndicate as security. As I told you in Ottawa, I have not yet made known that you are the principal shareholder of the Syndicate ; and provided the Manager wishes to know who my partners are, may I have your permission to reveal your connection ? If you consent to this will you please wire me the following :—‘ Arrangement satisfactory,’ and I will understand that you consent to this as outlined above. This only if asked for by the Bank Manager. I do this, for I know full well your very large interests and their critical stage.”

That appears to their Lordships to be a very clear statement that Sir Charles Ross was a partner and, indeed, the principal partner in the Syndicate, and a request for his permission to inform the manager of the Bank of that fact. He gave that permission. He telegraphed on June 13th “ Arrangement satisfactory.” No clearer evidence could be obtained that he was in fact a partner in the adventure. In a letter of the 18th June, 1918, Mr. O'Connell wrote : “ As I stated in my letter, I was not asked by the Manager of the Bank the names of my partners, and the accommodation was granted as on the note or notes of the Syndicate,” and so on. But ultimately, on the 22nd June, 1918, Mr. O'Connell as trustee for the Syndicate wrote to the Manager of the Bank in these terms : “ I have to advise you that the majority of the stock of the Patricia Syndicate is owned by Sir Charles Ross, Bart., of Quebec, and as he has had large business dealings with your bank, your Head Office is no doubt informed as to his financial standing.” The effect of all these documents is beyond question. These two gentlemen were partners, and the only partners, in the Patricia Syndicate. Mr. O'Connell on behalf of the Syndicate incurred these liabilities to the Bank, and it follows that both partners are liable.

Those being the facts, it is really unnecessary to go through the authorities which have been cited on behalf of the appellant, or to consider what kind of interest in profits makes a man liable as a partner. The case is governed by the law as laid down by Lord Cranworth in the well-known case of *Cox v. Hickman* (8, H. L. Cases, 268), where he says at page 306 :—

“ But the real ground of the liability is that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations and entitled to its profits or to a share of them. It is not strictly correct to say that his right to a share in the profits makes him liable to the debts of the trade. The correct mode of stating the

proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf, *i.e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders by whom the liabilities have been incurred, and under whose management the profits have been made."

It appears to their Lordships impossible for the appellant to escape from the expressions in his own agreements and his own letters. It is clear that he acted in the relation of principal or one of the principals towards the person, O'Connell, who acted ostensibly as the trader by whom the liabilities were incurred. It is by O'Connell, on behalf of both of them, that these liabilities were incurred, and, therefore, the judgment against the appellant ought to stand.

For these reasons their Lordships are of opinion that the appeal fails, and they will humbly advise His Majesty that it should be dismissed with costs.

Ross v. The Northern Canada Supply Co., Ltd.

Ross v. The Taylor Hardware Co., Ltd.

These appeals, which have not been argued, and the result of which is admitted to depend upon the result of the appeal in *Ross v. The Canadian Bank of Commerce*, should also be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

SIR CHARLES ROSS

^{v.}

THE CANADIAN BANK OF COMMERCE.

SAME

^{v.}

THE NORTHERN CANADA SUPPLY COMPANY,
LIMITED.

SAME

^{v.}

THE TAYLOR HARDWARE COMPANY,
LIMITED.

DELIVERED BY THE LORD CHANCELLOR.

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