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leave to appeal." Applying these words here, the application should not be granted, if the judgment was plainly right or unattended with sufficient doubt to justify us in granting special leave to appeal in a case below the appealable amount. The point of law decided is that the words "within twelve months after default" are to have their natural meaning, and that does not seem to us to be attended with serious doubt. That being the only question in the case of sufficient importance to justify special leave, leave must be refused.

Leave refused.

Solicitor for applicant, *E. Pugh*, by *R. P. Hickson.*

C. A. W.

Cited *Symes* v *Bennett* (1990) 35 IR 171

[HIGH COURT OF AUSTRALIA.]

WILSON . . . . . APPELLANT;

AND

CARMICHAEL . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 19, 20, 21, 22.

Griffith C.J., Barton and O'Connor, JJ.

Partnership—Suit for winding up—Stay of common law action—Appeal—Question of fact—Power of High Court to make such order as the Supreme Court could have made—Variation of decree by consent.

In an appeal from the decision of a Judge of first instance on a question of fact, where the question turns on the credibility of witnesses, who have been subjected to cross-examination, and the Judge, having had the opportunity of seeing and hearing the witnesses, has deliberately come to a conclusion as to which side has given the correct version, the Court of Appeal will not disturb his finding unless it is clearly satisfied that the finding was wrong.

Where both parties to an appeal consent, the High Court may vary the decree appealed from so as to give the appellant part of the relief which he

seeks, and make such an order as would, if the parties had consented, have been made by the Court whose judgment is appealed from.

The appellant and respondent entered into a partnership for the purpose of acquiring certain agencies and floating a company to take them over and carry on the businesses. During the existence of the partnership the appellant made advances of money to the respondent for partnership purposes. The company was floated, and the appellant and respondent as vendors, transferred to it the various agencies in return for a large number of shares in the company. The appellant shortly afterwards brought an action at common law to recover from the respondent certain sums which he alleged to be due to him as a balance on accounts stated between them, for money had and received by the respondent to his use, the transactions out of which the claim arose being *primâ facie* in respect of matters within the partnership agreement.

Held, that the respondent was entitled to have the partnership wound up and accounts taken, and to an injunction restraining the appellant from proceeding with the common law action.

Decree of *A. H. Simpson*, Chief Judge in Equity, 15th September, 1904, varied by consent, and affirmed as varied.

APPEAL from a decision of *A. H. Simpson*, Chief Judge in Equity.

The appellant and respondent had for some time been co-operating in an endeavour to float a company in Australia for the purpose of acquiring and carrying on the agency of an American paper-manufacturing company and other agencies. For the purposes of the undertaking the appellant from time to time advanced considerable sums of money to the respondent, who devoted the whole of his time towards the work of securing the agencies and financing and floating the company. The company was formed, and the appellant and respondent received 6,660 shares in the company, which were transferred to them, but which stood in the register in the name of the respondent. Some differences arose between the parties, and the appellant brought an action at common law against the respondent claiming a considerable sum for money had and received by the respondent to the use of the appellant. The respondent then instituted a suit in Equity to have it declared that he and the appellant were in partnership, and to have the partnership wound up and accounts taken, and also for an injunction restraining the prosecution by the appellant of his action at law. The appellant then brought a cross suit to have it declared that he was entitled to half the shares allotted to them in

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the company, and for a division. The suits were consolidated and on 15th September, 1904, *Simpson* Chief Judge in Equity dismissed the appellant's suit with costs. By the decree it was declared that the appellant and respondent were partners in equal shares, and were equally liable to contribute to capital, and that the 6,660 shares were an asset of the partnership, and that respondent was entitled to receive out of the assets a salary at the rate of £8 per week between certain dates, and it was ordered that the matter be referred to the Master for the taking of an account, and that the appellant be restrained until further order from proceeding with the action at law, that a receiver of the dividends from the 6,660 shares in the company be appointed, the respondent undertaking not to vote in respect of the shares until further order, the further costs being reserved, with liberty to all parties to apply.

The facts are sufficiently stated in the judgment.

Dr. Cullen and *Loxton*, for the appellant. The Judge was wrong in finding that on the evidence there was a partnership.

[GRIFFITH C.J.—Was not it a question of fact depending almost wholly upon verbal evidence. Unless you can show that the finding is wholly inconsistent with the documentary evidence, this Court, sitting as a Court of Appeal, will not disturb it. The credibility of the witnesses was purely a question for the Judge.]

Assuming that the Judge was unable to rely on the verbal evidence of the parties, and that they cancelled one another, His Honor drew wrong conclusions from certain letters. [They then addressed themselves to the documentary evidence and referred to *Pooley* v. *Driver* (1); *Lindley on Partnership*, 6th ed., p. 18; *Hamilton* v. *Smith* (2); *Wyld* v. *Hopkins* (3); *Southampton Dock Co.* v. *Southampton Harbour and Pier Board* (4); *Venning* v. *Leckie* (5); *French* v. *Styring* (6); *South-Eastern Railway Co.* v. *Brogden* (7).]

Gordon K.C. (with him *Rich*) for the respondent, were not called upon to argue the point as to the existence of a partnership.

(1) 5 Ch. D., 458.
(2) 5 Jur., N.S., 32.
(3) 15 M. & W., 517.
(4) L.R., 11 Eq., 254.
(5) 13 East., 7.
(6) 26 L.J., C.P., 181.
(7) 3 Mac. and G., 8.

If there was a partnership, the decree was a proper one, and the respondent was entitled to an account, and to have the common law proceedings restrained: *Southampton Dock Co.* v. *Southampton Harbour and Pier Board* (1). The remedy in Equity is the more convenient.

(He was stopped on that point.)

[GRIFFITH C.J.—A question arises on the evidence whether the liability of Carmichael was not taken over by the company, and whether, therefore, an account taken in their absence would not be futile.]

The evidence negatives that, and even if it did not, that was a point that should have been raised by the appellant in his pleadings. It was assumed in the Court below that the taking of accounts would result in a liability on the part of either the appellant or the respondent. The appellant should have asked to amend before judgment, if he wished to have the company joined; he cannot take advantage of the point now: *Borough of Randwick* v. *Australian Cities Investment Corporation* (2). It would be a plea of novation, and an answer to either a common law action or a suit in Equity: *Pollock on Contracts*, 7th ed., p. 204. There is no evidence of the consent of the company to take over the liability.

As to the appellant's suit for division, the Judge was right in ordering that the shares, as partnership property, should remain in *statu quo* until after the taking of accounts. The respondent is prepared to consent to an order by this Court that the shares be divided for the purpose of enabling the appellant to vote, but not so as to allow him to dispose of them, and defeat the respondent's lien.

Dr. Cullen in reply. The point as to novation is open to the appellant now.

There are no facts alleged in the pleadings which show that the respondent has any lien on the shares. The statement of claim negatives it.

The appellant will consent to a variation of the order so as to direct a transfer of the scrip to him, to be placed with a receiver subject to the declaration of a lien.

(1) L.R., 11 Eq., 254. (2) (1893) A.C., 322.

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Griffith C.J.

GRIFFITH C.J. This is an appeal from the Chief Judge in Equity, turning almost entirely upon questions of fact. The learned Judge below had the advantage of hearing the parties, who gave their evidence orally, and the evidence of another witness who may be regarded as an independent witness, and whom the Judge regarded as an accurate witness and a witness of truth. Weighing the evidence of these parties, he arrived at the conclusion that there was in point of fact an actual partnership subsisting between the appellant and the respondent during the period in question. An appeal is made to us on the ground that the finding is erroneous in point of fact. In a case where a Judge of first instance has had the opportunity of seeing the witnesses, where it turns on the matter of credibility, where they have been cross-examined, and where he has deliberately come to a conclusion as to which side has given the correct version, it is very difficult to induce a Court of Appeal to differ from the decision of the Judge of first instance. Apart from this rule, in the present case I think it would be very hard to differ from him. If the learned Judge had come to any other conclusion I think we should have had great difficulty in agreeing with him.

The appellant contends that there never was a partnership between him and respondent. It has been well said that it is better to rely upon contemporary writings relating to any understanding or agreement than upon the accuracy of memory of a person verbally recalling it, especially where the feelings of the persons have been heated by controversy. We find that in February, 1902, a company was incorporated expressly for the purpose of taking over the business alleged by the respondent to have been carried on by the appellant and the respondent. The appellant's case is that there never was a business, yet in February, 1902, a company was formed for the purpose of taking it over, and of paying for it with 6,660 shares fully paid-up in a joint stock company. This is an agreement which is signed by both the parties, appellant and respondent being described in it as "vendors."

The agreement runs:—"The vendors shall sell and the company after incorporation shall purchase—

Firstly, the benefits and advantages of the said agency (that

is the agency of the American International Paper Co. which the vendors had acquired);

Secondly, all the plant, machinery and office furniture acquired by the vendors in connection with the said agency;

Thirdly, all the book debts due and other debts due to the vendors in connection with the said business, and the full benefit of all securities for such debts;

Fourthly, the full benefit of all pending contracts and engagements to which the vendors are or may be entitled in connection with the said business;

Fifthly, all cash in hand at the bank and all bills and notes of the vendors in connection with the said business;

Sixthly, all other property which the vendors are entitled to in connection with the said business."

And, in face of that, we are asked to believe by one of the signatories to that document that there never was any business, and that the whole transaction was illusory, that he had nothing to do with the concern, but only lent money to the other party. That may be true, but in face of such a document it would be hard to accept the story; and, after the learned Judge, having heard the evidence, has come to the conclusion that the facts set out in the document are substantially true, it is almost hopeless to ask a Court of Appeal to reverse it. If, then, there was a partnership, either party is entitled to have the accounts of the partnership taken, and the right continues until an end is put to it by release, or by settled accounts, or by the lapse of such time as may induce the Court to refuse to interfere. I do not know of any other answer, and none of these things are shown in the present case. The decree declaring a partnership and directing a partnership account to be taken is clearly right. One of the incidental results of such an order is a stay of proceedings of actions brought by one party against the other in respect of matters which *primâ facie* form part of the partnership agreement.

One matter may be referred to which the learned Judge has not mentioned particularly. One term of the partnership was that the respondent should be entitled to be credited with a salary of £8 per week between specified dates; and, at one part of

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the argument, we had some difficulty in understanding how an agreement of that kind could be held to be continued after the business of the partnership had been transferred to the company, and when the partnership no longer existed except for the purpose of being wound up. But the circumstances under which the company was formed must be looked at, its object being really to take over the business of a partnership. It had no assets, no capital, no means of carrying on its business, and, in order to get started, it had to get the assistance of Messrs. Dalton Bros., who stipulated that until it was a paying concern the remuneration of the managing director, the respondent, should be arranged between him and the appellant. Under the circumstances there is nothing absurd in supposing that the appellant, who came into the business without contributing anything, should agree that his co-partner should be credited with a salary of similar amount to that which he himself received. That difficulty is therefore removed.

The agreement for the formation of the company, provided that as part of the consideration for the transfer of the going concern 6,660 shares should be allotted to the vendors or their nominees. The provision was not that they should be allotted to the vendors severally, that is, 3,330 each. It is apparent, therefore, that under that agreement the shares were to be held by both subject to the terms of the old partnership, and not separately by the individual members of it. Therefore it seems difficult to come to any other conclusion than that they were partnership assets. The respondent brought the first suit. It was the usual partnership suit claiming a stay of proceedings, and the appellant brought a cross suit claiming a division of the 6,660 shares.

The two suits were heard together, and it appeared that the 6,660 shares are partnership assets, each partner accordingly being entitled to a lien on the partnership property for the balance due to him after the taking of the partnership accounts. It would be unnecessary, if that balance would in any event be a very small one, to make an order that the whole partnership property should be subject to the lien. The learned Judge below made no order on that point except by the appointment of a receiver of the shares.

On the appeal before us it appears that the whole of the decision of the learned Judge was quite right, and the appeal consequently fails, but, as the respondent's counsel has offered to consent to a variation of the decree which will give the appellant something of what he wants, and the appellant is willing to accept it, and as we have jurisdiction to make any order which the Court below might have made, and there can be no objection to our making it by consent now, we therefore order, by consent, that the decree be varied by omitting the order for the appointment of a receiver of dividends and of the 6,660 shares, and substituting a direction that the parties shall severally execute a proper transfer each of 3,330 shares to the other party, with a declaration that the shares so transferred shall be subject to a lien for the balance, if any, found on taking accounts to be due to the transferee by the other party; the appointment of the receiver of the shares so held in severalty and the dividend thereon to be in the same terms as declared in the decree.

With that variation in the Judge's order the appeal is dismissed. The appellant must pay the costs of the appeal.

BARTON J., and O'CONNOR J., concurred.

Order accordingly.

Solicitors for the appellant, *Minter, Simpson & Co.*
Solicitors for the respondent, *Norton, Smith & Co.*

C. A. W.