H. C. OF A. 1910.

FEDERAL GOLD MINE LTD. v. ENNOR.

ment must be set aside, this appeal must be allowed, and judgment must be entered for appellants.

Appeal allowed. Judgment entered for appellants.

Solicitors, for appellants, *Haynes, Robinson & Cox*, for *Keenan & Randall.*

Solicitor, for respondents, *Mayhall.*

H. V. J.

[HIGH COURT OF AUSTRALIA.]

KINGSMILL AND ANOTHER . . . APPELLANTS; DEFENDANTS,

AND

LYNE . . . . . RESPONDENT. PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1910.

PERTH, *October* 21, 25, 26.

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

Trust—Partnership—Sale by mortgagee of partnership property — Purchase by member of partnership—Uberrima fides.

K., M. and L. were partners in the pastoral industry, and had mortgaged their land to the Bank of New South Wales as collateral security for a cash credit in a current account secured by a joint and several guarantee. The bank closed the account and demanded payment of the advances. L. communicated with K. and M., and offered to pay one-third of the overdraft if they would each pay one-third, but they refused. The property was advertised for sale by auction under the mortgage. K. and M. purchased the land. L. sought a declaration that they must be taken to have purchased as trustees for the partnership.

Held, in the absence of any evidence of collusion or conspiracy with the bank, that K. and M. were acting within their rights and there was no trust.

Decision of the Supreme Court of Western Australia reversed, and decision of *McMillan* J. restored.

H. C. OF A. 1910.

KINGSMILL v. LYNE.

APPEAL from the Supreme Court of Western Australia.

The respondent brought an action against the appellants for a declaration that the appellants were trustees for him and themselves of certain land which had been purchased by public auction at a mortgagee's sale. At the hearing *McMillan* J. gave judgment for the defendants and the Full Court reversed that decision.

The facts appear from the judgments hereunder.

Draper, for the appellants. The defendants were perfectly justified in purchasing the partnership land at the mortgagee's sale by auction, and no suspicion or trace of misconduct can attach to them in doing so. *Perens* v. *Johnson* (1) is clearly distinguishable.

Keenan K.C., and *Hearden*, for the respondent. The partnership was a contract *uberrimae fidei*, and it was the duty of each respondent to disclose all facts within his knowledge material to the partnership interests. On the evidence that high standard of good faith and honour has not been exhibited by the appellants to the respondent which the law requires. It is not necessary to establish fraud, but it is sufficient to show that in their dealings with the respondent the appellants were not actuated by that standard of honour which, between partners, must prevail if their transactions are to receive the sanction of a Court of justice. [They referred to *Perens* v. *Johnson* (1); *Blisset* v. *Daniel* (2); *Jack* v. *Smail* (3); *Featherstonhaugh* v. *Fenwick* (4).]

Draper, in reply, referred to *Heslin* v. *Fay* (5).

Cur. adv. vult.

The following judgments were read:—

GRIFFITH C.J. This is an action brought by the respondent October 26.

(1) 3 Sm. & G., 419.
(2) 10 Ha., 493.
(3) 2 C.L.R., 684.
(4) 17 Ves., 298.
(5) 15 L.R. Ir., 431.

H. C. OF A. 1910.

KINGSMILL v. LYNE.

Griffith C.J.

against the appellants for a declaration that they are trustees for him and themselves of certain Crown lands held under lease which they acquired as purchasers at a mortgagee's sale held by public auction. Before referring to the supposed equitable doctrine on which the action is founded, I will state the facts so far as they appear to be relevant.

On 6th December 1906 a deed of partnership was entered into between the three parties. After reciting that Lyne, the plaintiff, had acquired a title to about 2,000 acres of conditional purchase land, 3,000 acres of grazing lease land, and 160 acres homestead, which were subject to a mortgage for £300, and that he (Lyne) had agreed to sell the land to the defendants and himself for £300, which was to be applied to paying off the mortgage, it was agreed that the three should become partners in the business of pastoralists on certain terms which were stated. Kingsmill was to pay into the partnership account at the Bank of New South Wales, Perth, £200, Maley was to pay to the credit of the same account £100, and the £300 was to be applied to paying off the existing mortgage. The partnership was to be for five years. Lyne was to execute transfers of the conditional purchase lands to Kingsmill and himself as trustees to the partnership, and of the grazing lands to all three as trustees of the partnership, and was to hold the homestead lease himself as trustee. The homestead lease, I understand, was not transferable under the Land Acts. Lyne was to be manager of the partnership business at a salary of £156 a year. The Bank of New South Wales were to be the partnership bankers, and the partners were to execute a joint and several guarantee to the bank, with a limit of £1,000, for the purpose of providing money to work the business. The £300 was duly paid to the credit of the account, and on the same day, 6th December, a joint and several guarantee was signed by the parties for £1,000 and also a mortgage of the 3,000 acres to secure the advance. The operations of the partnership then began. On 15th April 1907 a mortgage was executed over the conditional purchase lands to secure the sum advanced. Advances were made by the bank under the guarantee, which at the end of 1907 amounted to about £750. Lyne had previously agreed with Maley to give him a second mortgage over his interest in the

land to secure a private debt due by him to Maley, and in November 1907 Maley called for the mortgage, which, after some difficulty, Lyne agreed to give; but as the documents of title were in the hands of the bank as mortgagees, it was necessary that they should be produced at the Lands Office for the purpose of registering the second mortgage which Maley was to take. Accordingly, on 26th November 1907 Maley wrote to the bank requesting them to lodge the leases at the Lands Office to enable the mortgage to be registered. The letter was as follows:—

"Please lodge at the Lands Office leases *re* Quarram Estate to enable me to register mortgage from C. J. Q. Lyne to myself over his interest in the above leases. It is clearly understood and agreed that nothing herein contained shall in any way prejudice the securities you hold in connection with the said leases which are paramount and the first charge on the entire estate of the partnership between myself, Walter Kingsmill and C. J. Q. Lyne, my security from the said C. J. Q. Lyne being always subject to your security at any time hereafter."

On 30th November the bank closed the partnership account and demanded payment of the advance. It is convenient to state at this point that up to that time the partners had not been working harmoniously together, and probably the bank was very well aware of that fact. When the account was called up and credit was stopped and payment demanded, Lyne asked the bank for an explanation. In reply the manager wrote to him on 11th December a letter as follows:—

"I have your letter of the 9th instant. In reply I have to state that the bank called up the advance in terms of the guarantee. Independently of that, however, your having given a mortgage over your interest operates as a bar against further advances by the bank, so that practically you have determined the position."

Whether the view the bank took of the position was right may be doubtful, having regard to the terms of Maley's letter, in which he distinctly agreed that the bank should have priority in the future as well as in the past; but it seems to me to be quite immaterial. The bank was within its rights in closing the account whenever it thought fit. If it were not satisfied with

H. C. OF A. 1910.

KINGSMILL v. LYNE.

Griffith C.J.

the account, if it thought the business was not likely to be a prosperous one or thought there would be any trouble with it, it was perfectly within its rights in saying it would not grant further credit. However, a few days later the second mortgage was paid off by Lyne, but the bank did not re-open the account and would not allow any further drawing upon it. On 30th April the bank made a formal demand on all the partners for the amount due, with a notice of intention to sell under the mortgages if payment were not made. The plaintiff then communicated with his two co-partners and offered to pay one-third of the overdraft if they would each pay one-third. They did not do so. The property was advertised for sale by auction under the mortgages, and on 2nd July it was sold. Before that time the defendants Kingsmill and Maley had agreed that they would join in bidding for the property, and they appointed an agent to attend the sale and gave him a limit of £1,250. The plaintiff also attended the sale, and he said that he had made arrangements by which he could find on that day £1,000—I take it for the purpose of buying the property. But he did not bid, and the defendants became the purchasers at the price of £850.

The plaintiff on these facts claims that the defendants must be held to have purchased as trustees for the partnership. I find it rather difficult to know exactly on what basis his claim is put. The statement of claim contains a long series of allegations in the nature of evidence, but there are only two distinct allegations in the nature of conclusions of fact, paragraph 22, which is: "The plaintiff says the defendant Wesley Maley and the defendant Walter Kingsmill and each of them and both of them were guilty of want of good faith in regard to the several transactions set out in paragraphs 4 to 21 hereof inclusive," and paragraph 28, which is: "The plaintiff says that the said sale set forth in paragraph 26 (*i.e.* the sale by the bank) was contrived by the defendant Wesley Maley and the defendant Walter Kingsmill and each of them and both of them for the purpose of ousting him from the partnership and the benefits thereof and for the purpose of making themselves the sole proprietors of the several parcels of land set out in paragraph 2 hereof." With regard to paragraph 22 it was contended in particular, both before the Supreme Court

and this Court, that the stoppage of credit by the bank on 30th November 1907 was at the instigation of the defendants and with the object of breaking up the partnership and allowing them to become the sole owners, to the exclusion of Lyne. The case was tried before *McMillan* J., who, after a most careful examination of all the evidence, came to the conclusion that the plaintiff had failed to establish any case upon the facts. The Full Court, *Burnside* and *Rooth* JJ. came to a contrary conclusion. Their view may be summarized in two extracts from their judgments. *Rooth* J. after referring to the well known doctrine of equity that partners must not obtain private advantage at the expense of the firm, and are bound to exercise the utmost good faith towards one another, said :

"These being the principles to be applied to transactions between partners, can it be said that in this case this high standard of good faith and honour has been exhibited by the defendants towards the plaintiff which the law requires. In my judgment it has not. The circumstances leading up to and surrounding the sale and purchase of this property negative the presence of such feelings."

He did not, however, point out any material evidence beyond that to which I have referred. *Burnside* J. said :—"In my opinion it is not necessary to establish fraud at all. It is sufficient to say that, in the dealings between the plaintiff and the defendants, the defendants were not actuated by that standard of honour which, between partners, must prevail if their transactions are to receive the sanction of a Court of Justice."

I confess that I do not know of any code in which that standard of honour is laid down. Before this Court two matters only were substantially relied upon: First, that the stoppage of credit was instigated by the defendants ; and, secondly, that the bank was induced by the defendants to sell the mortgaged property instead of compelling payment by the debtors. As to the suggestion that the stoppage of credit was instigated by the defendants, if that fact was material, the onus of proof of it was upon the plaintiff. He not only did not prove it, but he failed to give any evidence whatever in support of it. The only evidence on the subject is a letter from the bank manager, dated 17th

H. C. OF A. 1910.

KINGSMILL v. LYNE.

Griffith C.J.

December, in reply to one from Lyne inquiring whether the stoppage had been instigated by his co-partners. The manager says :—

"I have your letter of the 13th inst. The bank's demand for payment of the account was made solely by reason of mortgage given by you over your interest. Neither of your co-debtors have done anything in the matter and I shall be glad to see the account paid off without further delay."

That is absolutely the only evidence in the case as to the allegation that the stoppage was at the instigation of the defendants; but the case was put in this way :—The defendant Maley, who was called as a witness, denied that he had instigated the stoppage, or had had any communication with the bank manager on the subject. It was not suggested that the defendant Kingsmill had any. *McMillan* J. did not consider Maley a satisfactory witness. He said, however, that although he was not a satisfactory witness, he believed he was telling the truth.

Then it was argued: This is an unsatisfactory witness; the bank has given a reason which is not satisfactory, therefore that reason cannot be true; there must be some other reason; another very probable reason is that Maley may have instigated the stoppage of credit; Maley says he did not, but Maley is a person unworthy of credit; therefore it should be inferred that Maley did. Of course an argument of that kind will not bear statement. There is absolutely no evidence in support of the allegation. As to what effect it would have if established it is not necessary to express an opinion. There is not a scintilla of evidence to support it. With regard to the point that the bank was induced by the defendants to sell the mortgaged property instead of enforcing payment of the debt by the individual partners, again there is absolutely no evidence to support the allegation. The only evidence on the point is to the effect that they did so by advice of their solicitors. The substantial case must rest, as said by *McMillan* J., on the failure of the defendants to pay each his share of the overdraft when called upon. *McMillan* J. put it thus :—

"I am quite satisfied on the facts that both Mr. Maley and Mr. Kingsmill knew what the result of these proceedings would be,

and that if they had wished to do so they could have prevented the sale and could have continued the partnership. They could have done this by paying the overdraft and by finding further capital. Undoubtedly it would not have been enough to satisfy the bank because some moneys must have been forthcoming to complete the necessary improvements and purchase stock. They both of them saw that the destruction of the partnership assets was impending, and they accepted the position as one by which they would be relieved from the necessity of continuing to work with one whose management and general conduct they had rightly or wrongly become dissatisfied. That is, I think, the only way in which the case can be put against them, because, in my opinion, there is nothing which would justify me in coming to the conclusion that the sale of the property was brought about by the defendants' action in collusion with the bank. It is then contended that the plaintiff is still entitled to succeed in this action because the defendants could have saved the situation and refused to do so, and it is said that this is such bad faith that it entitles the plaintiff to relief in a Court of Equity. In my opinion the obligation of good faith does not compel a partner to do at his own cost something that he is not bound to do under the partnership articles even if it would save the partnership business."

I entirely concur with the view expressed by the learned Judge. A partner is not under any obligation to bring in more money than he has agreed to bring in. A man does not enter into a venture of that sort without first calculating the cost and reckoning how much he can afford to invest in it. If he is called upon to invest some further sum afterwards which he is not prepared to find, except at great inconvenience, I do not know of any law compelling him to do so. He is entitled to say *non haec in foedera veni*. There is nothing wrong that I can see in two solvent partners desiring that the joint property should be applied in payment of the joint debts before their separate property is taken for that purpose. The choice said to be before them was to allow their individual property to be taken under a judgment or to allow the joint property to be sold to pay the joint debt. I do not see any reason why the joint debt should not be paid out of the joint assets, or know of any principle of

H. C. OF A. 1910.

KINGSMILL v. LYNE.

Griffith C.J.

equity which forbids that to be done. It is not suggested that one partner may not buy at a sale of the partnership property at auction by a mortgagee. What then is there left to support the plaintiff's case? If there were any evidence of collusion or conspiracy between the bank and the defendants to exclude the plaintiff from the property the case might be different, but there is not a scintilla of evidence to support such a suggestion. The bank were clearly acting within their rights, and the defendants were not guilty of any breach of any duty with which I am acquainted. The case therefore entirely fails on the evidence. If all the facts were proved as alleged I am still, as at present advised, not aware of any doctrine of equity which would support the plaintiff's claim. The judgment of the Supreme Court must therefore be discharged and the judgment of *McMillan* J. restored.

BARTON J. I am of the same opinion. I do not think it necessary to go any further into the case than his Honor the Chief Justice has done. The matter is a very plain one, and I am quite in agreement with the judgment of *McMillan* J., which I think was right and ought to be restored. If it has any fault, it is perhaps that it analyses and weighs with too anxious care some matters which were only indirectly connected with the real issue, but which appeared to be relied upon by the now respondent. I am of opinion that this appeal should be allowed.

O'CONNOR J. I am of the same opinion. I had a difficulty all through the case in ascertaining the definite ground of equity upon which the plaintiff claimed relief. Mr. *Keenan*, in the course of his argument, certainly put forward one definite ground, and apparently it was on that he relied in the Court below. It is stated in these words by *McMillan* J.:—"The case for the plaintiff on these facts is that the defendants conspired together from the beginning to oust him from the partnership and acquire his share." Undoubtedly that is a very definite ground, and if it were established it would amount to such bad faith between partners as would entitle the Court to interfere. But I agree with the learned Judge of first instance that there is no evidence

to support any such case. The plaintiff endeavoured to support it by evidence of two incidents: first, that the action of the bank which brought about the catastrophe to all parties concerned was caused entirely by the action of the defendants behind the plaintiff's back. If that were a sufficiently definite ground for the interference of a Court of Equity, the onus is on the plaintiff to establish it; and whatever reason the evidence may afford for conjecture on the point, it certainly is not of such a character as would enable an inference reasonably to be drawn that the defendants had in bad faith to their partner acted in the way alleged. In the view I take of the facts, I agree with *McMillan* J. that the decision of the bank to take the action they did and to sell the property was not induced by the action of the defendants, but by the advice of the bank's solicitor. Finally, it was put that the defendants might have saved the situation if they had come forward and between them paid the debt. That involves the proposition that it is the duty of partners, under circumstances such as these, to save the partnership business by increasing the capital which they have agreed to put into the concern. As to that contention I agree with the learned Judge of first instance that the law imposes no such duty upon partners. For these reasons I think that the view which has been taken by *McMillan* J., who had the advantage of hearing the evidence and seeing the parties in the witness-box, is the view which ought to be adopted. The Supreme Court, no doubt, went very fully into the whole facts, but I prefer to follow the conclusions of *McMillan* J. I agree therefore that the decision of the Supreme Court must be set aside and Mr. Justice *McMillan's* decision restored.

Appeal allowed. Order repealed from discharged. Judgment of McMillan J. restored. Respondent to pay the costs of appeal to the Full Court and of this appeal.

Solicitors, for appellants, *Parker & Parker.*

Solicitors, for respondent, *Keenan & Randall.*

H. V. J.