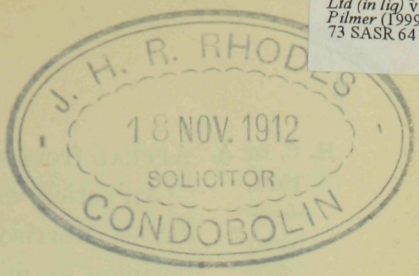

REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1911-1912.

[HIGH COURT OF AUSTRALIA.]

LANG . . . . . APPELLANT;
DEFENDANT,

AND

JAMES MORRISON & COMPANY LTD. . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 20, 21, 22, 27.

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

Contract—Offer—Acceptance—Offer made to one and accepted by others—Undisclosed principal—Partnership.

An offer from A. to B. accepted by B. and C., or accepted by B. as agent for B. & C., is not an acceptance of the original offer, but is a new offer by B. and C. to make a contract on the terms of the original offer, and none of the parties are bound by the new offer until it is accepted.

In an action by the plaintiffs to recover damages for breach of contract from the three defendants, who, it was alleged, were partners, and as such had entered into a joint adventure with the plaintiffs:

Held, on the evidence, that the existence of the partnership was not established, and that, even if the partnership existed, it had not been formed at the time when the contract was alleged to have been made.

Decision of the Supreme Court of Victoria (*Madden* C.J.) reversed.

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APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court of Victoria by James Morrison & Co. Ltd., an English company carrying on business as merchants in London, against John Walter McFarland, Thomas Selwyn Lang and William James Keates, who, it was alleged, were at all material times partners carrying on business under the names or styles of Thomas McFarland & Co. and McFarland, Lang & Co. The nature of the action and the material facts are set out in the judgments hereunder. Before the action was heard J. W. McFarland and Keates became insolvent, and the action proceeded against their assignees and Lang. The action was heard before *Madden* C.J., who gave judgment for the plaintiffs for £2,292 2s. 7d. Against this judgment Lang now appealed to the High Court.

Cohen (with him *Hogan*), for the appellant. The letter from the respondents to Thomas McFarland & Co. of 12th July amounts to an acceptance of the offer made by the letter of 17th April, and at that time there is no suggestion that the appellant was a member of the firm of Thomas McFarland & Co. At the latest the offer made by the letter on 17th April was accepted by the respondents' letter of 19th July. Even if a concluded bargain was not made until 26th August, when the word "Forward" was cabled to the respondents, the evidence does not support a finding that the appellant was then a partner in Thomas McFarland & Co. or was a principal on whose behalf that bargain was entered into. If the letter of 19th July constitutes a new offer made by the respondents to J. W. McFarland, who alone was then Thomas McFarland & Co., and if the cablegram of 26th August is to be regarded as having been sent on behalf of J. W. McFarland, Lang and Keates, no contract is thereby constituted. *Boulton* v. *Jones* (1); *Kemp* v. *Baerselman* (2). If the appellant became a partner of J. W. McFarland after the contract was entered into, there was no privity of contract between the appellant and the respondents: *Beale* v. *Mouls* (3); *Young* v. *Hunter* (4); *Hardman* v. *Booth* (5). In the case where the personal

(1) 2 H. & N., 564.
(2) (1906) 2 K.B., 604.
(3) 10 Q.B., 976
(4) 4 Taunt., 582.
(5) 32 L.J. Ex., 105.

qualifications of one of the parties is relied on, an offer to that party can only be accepted by him. At most the appellant had an interest in J. W. McFarland's share in the ventures, but he was in no contractual relation with the respondents. (He also referred to *Lindley on Partnerships* 7th ed., pp. 234, 236; *Leake on Contracts* 5th ed., p. 17; *Helsby* v. *Mears* (1).

Schutt (with him *Braham*), for the respondents. There was no concluded contract until 26th August. The evidence supports the finding that there was a partnership between J. W. McFarland, Lang and Keates, and that the contract was made by J. W. McFarland on behalf of the partnership. The case is then one of a contract made on behalf of undisclosed principals; and a contract made by an agent on behalf of an undisclosed principal can always be enforced against that principal. *Armstrong* v. *Stokes* (2); *Kendall* v. *Hamilton* (3); *Leake on Contracts* 5th ed. p. 338; *Beckham* v. *Drake* (4).

[GRIFFITH C.J.—An offer of personal services cannot have an undisclosed principal behind it.]

If in a contract for personal services another person has authorized the person who is to give the services to enter into the contract, the other person is liable on the contract. The services might still be rendered. The rule as to undisclosed principals applies to contracts which involve personal skill: *Spurr* v. *Cass* (5). [He referred to *Cothay* v. *Fennell* (6); *Phelps* v. *Prothero* (7); *Robson* v. *Drummond* (8).] Even if the appellant was never a partner he is still liable if he authorized the contract to be made on his behalf. If he became a partner after the offer was made and before it was accepted he is liable.

Cohen, in reply.

Cur. adv. vult.

Sept. 27.

GRIFFITH C.J. This is an appeal from a judgment of the learned Chief Justice of Victoria in favour of the respondents in

(1) 5 B. & C., 504.
(2) L.R. 7 Q.B., 598, at p. 603.
(3) 4 App. Cas., 504, at p. 514.
(4) 9 M. & W., 79, at p. 91.
(5) L.R. 5 Q.B., 656, at p. 658.
(6) 10 B. & C., 671.
(7) 24 L.J.C.P., 225, 16 C.B., 370, at p. 390.
(8) 2 B. & Ad., 303.

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an action brought originally by them against three persons, J. W. McFarland, T. S. Lang (the appellant), and one Keates. McFarland and Keates became insolvent, so that the effective judgment is against the appellant. The plaintiffs, who were merchants in London carrying on the business of receiving and disposing of frozen meat from abroad, by their statement of claim alleged that the three, McFarland, Lang and Keates, during the period material to be considered, carried on business in Melbourne under the name or style of Thomas McFarland & Co. and also under the name or style of McFarland, Lang & Co. It appears that in the year 1897 the firm of Thomas McFarland & Co. was registered in Victoria under the *Registration of Firms Act* 1892, which requires the registration of firm names, as carrying on the business of stock and station agents and meat exporters, the sole member of the firm being Thomas McFarland. On 13th Sept. 1905 a change in the constitution of that firm was registered by J. W. McFarland, who was registered as the sole member of the firm. The plaintiffs had some dealings with him while he carried on that business. On 10th June 1907 J. W. McFarland, Lang & Keates entered into partnership. An indenture of partnership was drawn up which provided, amongst other things, that the business of the partnership should be that of stock and station agents, live stock exporters and general commission agents. The business of exporting meat was not part of the business of the partnership, and it appeared that Lang and Keates had refused to have anything to do with that business. Lang was to bring in all the capital of the firm, £1,500, and the partners were to share equally in the profits and losses. That partnership was duly registered under the *Registration of Firms Act* on 28th August 1907.

The statement of claim, after setting out that the three defendants carried on business under the two firm names, alleged an agreement in writing constituted by a letter of 17th April 1907 from the defendants to the plaintiffs, a letter of 19th July 1907 from the plaintiffs to the defendants, and a cablegram of 26th August 1907 from the defendants to the plaintiffs, by which it was agreed, in brief, that the defendants should during the ensuing exporting season—that is, I believe, the spring and summer

months—engage in the business of buying cattle, sheep and lambs in Melbourne, freezing their carcases, and shipping them to London to be sold by the plaintiffs, that for those purposes the plaintiffs should open a credit at the Union Bank in Melbourne to be operated upon by the defendants to the extent of £10,000, and that, after allowing certain charges to the plaintiffs and the defendants respectively, any profits or losses arising from the business should be equally divided.

Before referring to the letters I would remark that the plaintiffs had had dealings with J. W. McFarland, as Thomas McFarland & Co., in the business of meat exporting, and knew he he was still a member of that firm.

The letter of 17th April, the first one relied upon, contained a proposal from Thomas McFarland & Co., that is, J. W. McFarland alone, to the plaintiffs, giving in outline the way in which he suggested that the proposed business should be carried on. On 12th July the plaintiffs acknowledged that letter in these terms: —"Re your letter dated April 17th we have agreed to give the proposal mentioned a trial but as there are one or two points we wish to go into further we must delay writing you full particulars until next mail." It was suggested by Mr. *Cohen* that that was an acceptance of the terms of T. McFarland & Co.'s proposal. I do not construe it in that way. It seems to me that the words "we have agreed to give the proposal mentioned a trial" mean with the context "we, the directors of the company, have agreed amongst ourselves to take up your proposal, but we have not not yet settled the terms." Then on 19th July followed a letter from the plaintiffs in which they discussed the matter at length and said: "Referring to your letter dated 17th April, as advised in our last, we are quite willing to give the proposal a fair trial, *i.e.*, to go on equal risks for a season and see how it works." The proposal made by J. W. McFarland as T. McFarland & Co. did not limit the matter to one season, but proposed an arrangement of indefinite duration. The plaintiffs then went on to prescribe a number of conditions necessary for the working of the contract, to which it is not necessary to refer in detail, and concluded by saying—"Upon receipt of this letter, if in order, kindly wire us the word 'Forward' when we will start cabling you and also

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establish a credit as you desire." It was contended that that letter of itself constituted a complete acceptance of the offer made by T. McFarland & Co. It is clear that it did not. It proposed various modifications, and the concluding words I have just read show clearly that it was not intended to be an acceptance until the word "Forward" had been cabled.

On 27th August J. W. McFarland sent by cablegram in the name of Thomas McFarland & Co. the word "Forward." That was entered by the plaintiffs in their books, and with it what they understood to be the translation of it, thus—"'Forward' means that he has received our letter of 19th July and we can start working." The result was that on those documents there was on that day a complete contract between J. W. McFarland trading as Thomas McFarland & Co. and the plaintiffs the terms of which were to be collected from those three documents.

Some discussion took place as to whether the relation between J. W. McFarland, trading as Thomas McFarland & Co., and the plaintiffs was that of partners, or that of principal and agents. It is not necessary to assign the transaction to any particular formal category, but the real substance of the transaction was that the plaintiffs and Thomas McFarland & Co. agreed to enter into a joint adventure. They were not partners as against third parties, but each party had certain rights against the other. So far the case is clear.

The plaintiffs contend that, before the cablegram of 27th August was sent, J. W. McFarland had taken Lang and Keates into partnership with him, and that he sent the word "Forward" on their behalf as well as his own. Upon that point there was a great conflict of evidence, to which I will refer later. Suppose, however, that fact were established, it would not establish the contract alleged. An offer from A. to B. accepted by B. and C., or accepted by B. as agent for B. and C., is not an acceptance of the original offer, but is a new offer, an offer by B. and C. to make a contract on the terms of the original offer, and neither party is bound by the new offer until it is accepted. That is clearly established by *Boulton* v. *Jones* (1). Now it is not suggested that the plaintiffs were ever informed of Keates' in-

(1) 2 H. & N., 564.

clusion in this new firm. It is suggested that they were informed of Lang's inclusion by a letter dated 13th August 1907 from J. W. McFarland to them. He said in the name of Thomas McFarland & Co. "We wish to inform you that we have taken Mr. T. S. Lang into partnership, but that we intend continuing the export business under the old name." That statement, so far as it was relevant, was untrue. J. W. McFarland had taken Lang and Keates into partnership with him in another branch of business and under another firm name, but they had nothing to do with Thomas McFarland & Co. as meat exporters. On 20th September the plaintiffs acknowledged that letter in this way "We note that you have taken Mr. T. S. Lang into partnership, but that the export department will be carried on under the old name." Nothing was said about Keates. It seems to me that those two letters are ambiguous. They are not, at any rate, enough to establish a case of substitution, even if the facts were as they are alleged. When J. W. McFarland said "We have taken Mr. T. S. Lang into partnership," he says he meant he had taken Lang into partnership in another business. He said he meant what he said in one sense, and, if the plaintiffs understood it in another sense, curious questions might arise. But the letters are still ambiguous, and not enough to establish a case of substitution; certainly not in any contract made on 26th August, for at the earliest the plaintiffs would not have assented until the day on which the letter of 13th August was received by the plaintiffs, about a month after it was sent. Moreover, the contract supposed to have been substituted was a contract with different persons, and not with the three persons now sued. So that the plaintiffs have not established the case made in the statement of claim.

But a contract may be implied from a course of dealing. I think that if, for instance, J. W. McFarland had died and his business had been carried on by his executors or by persons who had bought the business, and they had accepted orders from the plaintiffs intended to be carried out on the terms of the contract made with Thomas McFarland & Co., a contract of agency would be implied to be performed on the terms of those letters. That would cover some but not all of the transactions in question in this action, but the damages would be quite different from those

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awarded. Then the form of action would have been for damages arising out of breach of the express directions, and there could not have been any claim against the persons who carried on that business founded on the want of skill which J. W. McFarland was understood to have, and which undoubtedly was the basis of the contract between him and the plaintiffs. Moreover, the case made for the plaintiffs was not that there was a series of implied contracts, but that there was one continuous contract extending throughout the exporting season or until the £10,000 credit was exhausted. There is no case of holding out by Lang himself.

I will assume, however, that a new case is open and that the plaintiffs are entitled in this action to establish that at sometime, no matter when, J. W. McFarland was, in performance of his contract with the plaintiffs, acting as agent for the defendants in such a sense as to make them liable. Then it is necessary to consider what the evidence was. There was a great conflict of evidence. The story told on behalf of the plaintiffs was flatly contradicted by Lang. On an appeal from a Judge of first instance on a question of fact a Court of Appeal is in a somewhat difficult position. The rules are well known and are laid down in *Coghlan* v. *Cumberland* (1) in the Court of Appeal in England and in this Court in *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (2). When a case depends entirely upon the credit due individual witnesses who contradict one another, a Court of Appeal is very reluctant to differ from the Judge of first instance who had the advantage of seeing and hearing them; but when the evidence is in writing and there is no question of the credibility of witnesses or of the weight to be given to their statements, then a Court of Appeal is bound to exercise its own judgment, and the test is not whether there was any evidence to go to a jury, but whether, on consideration of the whole evidence, the plaintiff has established his case.

Now the Court is, of course, not bound by any errors of fact into which the learned Judge of first instance has fallen. The case that is set up is that before 26th August 1907 McFarland, Lang and Keates formed a new partnership, or, in other words, agreed to become members of the firm of Thomas McFarland &

(1) (1898) 1 Ch., 704.

(2) 1 C.L.R., 243, at p. 247.

Co. of which Lang and Keates were not previously members. J. W. McFarland was called as a witness, and he said that when he received the plaintiffs' letter of 19th July he discussed the matter with Lang and Keates, either at the same time or at different times. He said:—"I think it was at different times. I am sure I did discuss it with Lang. He said—'Do you think it a safe business?' I—'After years of experience in it, I think it is.' He—'What is the most you can lose?' I—'I hope to make £1,000.' He—'If the worst comes to the worst £500 ought to cover all the losses.' We agreed to cable that we would go on with the business on the plaintiffs' terms. I cannot remember anything else about it," It appears that about that time J. W. McFarland was very ill and was so for several days. It does not appear where the conversation took place, at his office or where he was lying in bed. The whole matter is extremely vague, and depends on the statement "we agreed to cable that we would go on with the business on the plaintiffs' terms." It is suggested, of course, that the word "Forward" was sent by J. W. McFarland as agent for Lang and Keates, but it would appear from what I have already read that the three partners never even met to discuss the terms of the contract, which is very singular. It is also singular that no one knows what the terms of the new partnership were to be, except what could be conjectured from that conversation. The point, however, is not that it does not appear what the terms of the new partnership were, but that it does not appear from the evidence that they ever were settled at all. This alleged change in the constitution of Thomas McFarland & Co. was never registered. It appeared further that J. W. McFarland had sworn in the Court of Insolvency that Lang was never a partner with him in Thomas McFarland & Co. As to the way in which business was carried on after this new partnership was formed, these three persons occupied the same room, but they kept separate banking accounts. Neither Lang nor Keates operated on the account of Thomas McFarland & Co. They kept separate books, and the books were kept by different persons, except a press copy book which was used to keep copies of letters and invoices. Neither Lang nor Keates ever took any part in the business of the new firm except that on two occasions Lang signed letters in

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the name of Thomas McFarland & Co. He says they were dictated to a typewriter by J. W. McFarland who had to go away and requested him to sign them. Lang also signed a cablegram with the firm name under the same circumstances. The business carried on between Thomas McFarland & Co. and the plaintiffs was never discussed with Lang or Keates. Only one transaction was the subject of discussion, and that is one which took place during the absence of Lang from Victoria, when J. W. McFarland had misappropriated £279 of the moneys upon which he could draw under the contract with the plaintiffs, and applied it to the purposes of the firm of McFarland, Lang & Co. The defendant Lang denies the whole story. He says he never entered into the partnership and never had anything to do with it. Against all those facts I have referred to there is one solitary bit of evidence which can be relied upon to corroborate the present story of J. W. McFarland, not that which he swore to in the Court of Insolvency. That is, that it appears that on 10th September J. W. McFarland went to the Union Bank, which was the bank of both firms, and entered his name in the signature book. It was already there and why he went then does not appear. What was written in the book on that occasion, as appears from an examination of the book itself, which we have seen, is "Thomas McFarland & Co., Frozen Meat Exporters, 12 Temple Court, Collins Street, Melbourne" with the ordinary signature "Thos. McFarland & Co."; whether "J. W. McF." now in the book was then there or not does not appear. The next entry in that book was made on 16th September. On 28th September Lang went to the bank and signed his signature "Thos. McFarland & Co." under J. W. McFarland's signature, and on 8th October Keates went and did the same thing. No explanation of this transaction is given by J. W. McFarland; why it was done, why Lang and Keates respectively signed the book, why J. W. McFarland signed on 10th September, if the partnership, as we are told now, was formed in August, is nowhere explained. Lang said in his evidence:—"I went to West Australia on 30th September 1907. Before I left I went to the Union Bank and I signed my name as McFarland, Lang & Co. on 28th September. I also signed one as for Thomas McFarland & Co. McFarland

told me to go there and sign as the bank wanted my signature. I went alone. I do not remember anything said or read to me. When I signed I did not observe that it was stated opposite the signature that I was a partner in Thomas McFarland & Co." The names of the three persons now alleged to be members of the firm of Thomas McFarland & Co. are now written in the bank's book, but it is clear that they were not written there when J. W. McFarland went and signed his name there on 10th September. When they were written does not appear. Lang says they were not put there when he signed opposite to where they now are. That is the only isolated fact I can find to corroborate the story told by J. W. McFarland as against the course of dealing between the parties and the sworn testimony of the appellant.

Now in order to establish that there was a partnership it is necessary to prove that J. W. McFarland carried on the business of Thomas McFarland & Co. on behalf of himself, Lang and Keates, in this sense, that he was their agent in what he did under the contract with the plaintiffs—not that they would get the benefit, but that he was their agent. That appears from *Ex parte Tennant*; *In re Howard* (1), particularly the judgment of *Cotton* L.J. (2). Upon the evidence in the case it appears to me that at best, taking the plaintiffs' version of it, it is equally consistent with a partnership, and with a subsidiary agreement, namely, to give Lang and Keates an interest in J. W. McFarland's share in the joint venture. It is analogous to a sub-partnership, but that is not sufficient to establish privity of contract between Lang and Keates and the partners in the joint venture. On that subject the decision of *Jessel* M.R. in *Alfaro* v. *De La Torre* (3) may be read with advantage. Upon the whole I am of opinion that the great weight of the evidence is that, if any agreement was made, that was the agreement, and not an agreement for another partnership. But I think it right to say that the great preponderance of the evidence is that there was no complete agreement at all.

For these reasons I think the plaintiffs failed to establish their claim, and that they must have redress against the person to

(1) 6 Ch. D., 303. (2) 6 Ch. D., 303, at p. 317. (3) 34 L.T., 122.

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whom they gave credit, and not against persons with whom they subsequently thought they could establish a contract.

BARTON J. read the following judgment:—

The first question raised on the appeal is at what date there came into existence a complete contract between the respondent company and the firm of Thomas McFarland & Co. As to this I feel no difficulty. It is quite clear that the appellant's contention that a contract arose on the respondents' letter of 12th July 1907 cannot be sustained. Thomas McFarland & Co.'s offer of 17th April no doubt included most of the essentials of the subsequent agreement; but that it contemplated contractual relations extending over more seasons than one is evidenced by its last paragraph; "profit or loss to be equally divided between us at the close of each season." Now the respondents' short letter of 12th July says: "*Re* your letter dated April 17th we have agreed to give the proposal mentioned a trial, but as there are one or two points we wish to go into further we must delay writing you full particulars until next mail." To give the proposal a trial certainly does not mean the making of a contract to extend over several seasons. The expression of a desire to go further into one or two points shows that the proposal as a whole was not finally accepted, and that there were matters on which an understanding must precede finality. Emphasis was laid in argument on the words "we have agreed." If the appellant's construction of them were correct, the rest of the letter would so restrict their effect as to render them of small consequence. But I think their real meaning is, "we as a company have agreed among ourselves to give your proposal a trial," and this does not carry the matter any further.

Then the appellant says, if the letter of 12th July does not clinch the bargain that of 19th July does. Here, again, I fail to agree with the appellant. This letter explains that of 12th July thus: "As advised in our last, we are quite willing to give the proposal a fair trial, *i.e.* to go on equal risks for a season and see how it works." This of itself is enough to constitute a counter-offer. But the letter of 19th July contains several points on which the respondents require an understanding before final agreement. Of these it is enough to mention three. One is that

quantities of frozen meat shipped "must be within 5 per cent. of the quantity stated"—*i.e.*, stated in the respondents' Monday cables (see letter of 17th April). Another is that in offering 28/42 lambs, if it cannot be arranged to make them half of each grade, that is, half 28/36 and half 37/42, "an average of the parcel must be stated"; an obvious essential to the giving of that information to prospective buyers without which successful sales could not be expected. A third is that in offering weights of 42/50, which must be sold separately from others, "the average must always be cabled, as it is the first thing the buyers ask when parcels are put before them"; a step as plainly necessary as the last. It is clear that the respondents were not willing to come to terms unless these and other stipulations were accepted, and it is futile to say that these were merely proposed methods of carrying out a contract already concluded. The letter winds up thus: "Upon receipt of this letter, if in order, kindly wire us the word 'Forward,' when we will start cabling you and also establish a credit as you desire." The cabling of the word "Forward" was clearly laid down as the signal of the acceptance by Thomas McFarland & Co. of a contract embodying their own proposals of 17th April together with those on the part of the respondents contained in their letter of 19th July. The word was cabled by Thomas McFarland & Co. on the 26th August, and it is from that date that the contract must be taken as established. This is none the less the position because the respondents translate the word "Forward" as intimating that he, *i.e.*, McFarland, who as far as they knew then constituted the firm of Thomas McFarland & Co., had received their letter of 19th July, and that they could start working. In that sense the word amounts to an acceptance. Nor is it any less the position because, in anticipation of an assent by cable, the respondents on the 9th August wrote that on the 8th they had mailed to Thomas McFarland & Co. through the Union Bank a fresh credit for £10,000. The contract, then, is constituted by the communications between these parties up to and including the cable of the 26th August, which must be taken as the date of the contract.

The appellant contended, however, that the communications referred to amounted to an agreement for a partnership between

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the respondent company and the firm of Thos. McFarland & Co., and that therefore the present proceedings were misconceived, and the claim should have been for a dissolution of partnership and an account. I am unable to say that the writings disclose a partnership. The agreement was for the periodical purchase in Victoria by Thos. McFarland & Co., with moneys of the respondents credited to them for the purpose, of live stock to be exported as frozen meat to the respondents in London. The respondents were to sell the meat. For trouble and expense to be incurred, Thos. McFarland & Co. were to draw $1\frac{1}{2}\%$ on the proceeds of sales, and the respondents on their part 1%, and subject to these allowances the profits and losses were to be equally divided at the close of the season. It is not because of this equal division that we are to say there was a partnership. The entire capital to be employed belonged to the respondents, and the live stock to be purchased, slaughtered, frozen and shipped, and sold in England, was, when bought, the property of the respondents. In such circumstances the mere fact that profits and losses were to be divided did not carry the transaction beyond the sphere of a joint adventure. Thos. McFarland & Co. reckoned on being sufficiently remunerated for their labours by the anticipated half of the surplus expected on the sales.

Apart from these two points, which were raised by the appellant at the outset, the case for the respondents as plaintiffs is based on the contention that, by certain conversations between McFarland and Lang and McFarland and Keates in Melbourne before the sending of the cabled word "Forward," a partnership in the business of frozen meat exporters was constituted, by reason of which the appellant became liable as a partner for the damages consequent on the breach of the contract for one season between the respondents and Thos. McFarland & Co. The learned Chief Justice of the Supreme Court, who tried the case, has found that the appellant became a partner in that firm before the date of the sending of the cabled word "Forward," despatched on 26th August 1907. In a conflict of evidence between McFarland, who was called for the respondents, and the appellant, his Honor has accepted the version of McFarland, and has

held that it establishes the partnership contended for. The appellant contends here that, even if the finding of fact be accepted, it does not warrant the conclusion of law. He says that though he was from the 10th of June 1907 a member of the firm of McFarland, Lang & Keates, who were stock and station agents, live stock exporters and general commission agents, according to their partnership deed, yet that firm had nothing to do with the business of exporting frozen meat, and made no contract with the respondents. So far the evidence supports him. But he goes on to say that there is nothing in the conversations relied on to establish that he was on 26th of August 1907, or indeed at any time, a partner of McFarland in the firm of Thos. McFarland & Co., frozen meat exporters, or that he became in any way liable under the contract between that firm and the respondents.

The gist of the conversations, as deposed to by McFarland, is that on or shortly after the receipt of the respondents' letter of the 19th July he showed it to the appellant at the office, no one else being present, as he thinks. He told Lang that it was in answer to a letter written to the respondents before the appellant came into the business (meaning presumably the business of McFarland, Lang & Co.) In that letter, he said, he had stated the outlines he would work on, and the respondents had agreed to give the plan a trial in the manner proposed. There was a discussion as to the prospects of profit or of loss. McFarland expected to make £1,000 out of it—that is no doubt for the season. McFarland said he would have of course to control "the frozen meat branch." He said "I will have to handle this borrowing business, I am the only one in the firm who understands that": and the appellant replied, "I agree to that." He also said "I will have to carry on under the old firm's name, it is the only name it can be carried on under, as my brands are registered under that name and the name being known on the London market." The upshot of this conversation is stated by McFarland in these words: "We agreed to cable that we would go on with the business on the plaintiffs' terms." And the cable message "Forward" was sent on 26th August.

McFarland thinks his conversations with Lang and Keates

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were at different times. Still he says he did not formally invite Lang to take part in the frozen meat venture till 23rd August. He seems to believe that he spoke to Lang first. His conversation with Keates, as he describes it, is even less definite than his outline of the interview with Lang. He says the appellant was not then present, it was at Keates's home at Essendon. He told Keates he had received the letter from respondents, and as the "horse business" (no doubt the business of McFarland, Lang & Co.) was not going to "pan out" as they hoped, they had better go into this affair. Keates said he would look into the matter in the morning. The next morning Keates saw the letter at the office. McFarland says—"I explained the frozen meat business to him and asked was he agreeable. To the best of my knowledge and belief he said he was. This would be about the 22nd or 23rd of August. At any rate it was before the sending of the cable message.

McFarland does not venture to say that the matter was ever discussed by the three of them together, nor is there any evidence that it was ever discussed between the appellant and Keates. He admits having previously sworn in the Insolvency Court, "I don't think Lang was in the firm when the first arrangement was made with Morrison & Co." Still, the learned Chief Justice, who heard both his evidence and that of the appellant, and had much better opportunities of comparing them as witnesses than we have, accepted McFarland's version and rejected that of the appellant, and I do not suggest that we should be justified in interfering with his conclusion of fact. McFarland is on the face of the notes of his evidence an unsatisfactory witness, but in the box the appellant may for aught we know have been less satisfactory still. But the question remains whether McFarland's evidence, being accepted, is sufficient to warrant the conclusion that before or on 26th August there was a partnership of Thos. McFarland & Co., consisting of himself, the appellant and Keates? That is the partnership on which the respondents rely. I do not now consider the question whether, if Lang had become a partner on 23rd August, he would have been bound under the contract between McFarland and the respondents. That may be so. But I cannot reach that point because the evidence does not wear the complexion of a partnership.

There is an entire absence of proof that the three even met together to discuss such a proposal. McFarland seems to have proposed to each of the others separately that he should join in the venture. Neither by conversation nor by inference from any fact in the case is it shown that the appellant and Keates agreed together, and with McFarland, to join him in the firm of Thos. McFarland & Co. Had a consensus of the three been proved, yet it is not in respect of a partnership in relation to the respondents. There is not a word of evidence to show that there was any settlement of the terms of the suggested partnership. As to Lang, the gravamen of the matter is, "We agreed to cable that we would go on with the business on the plaintiffs' terms." (That, by the way, is not the message sent, for the cable telegram does not disclose Lang either as a partner of McFarland or as a co-contractor with him.) As to Keates, the substance is, "I explained the frozen meat business to him and asked was he agreeable. To the best of my knowledge and belief he said he was." I certainly do not find it possible to infer a partnership from such evidence as was given. What it proves is no more than this, that McFarland agreed with the appellant that he should join him in the risks of the venture as regards McFarland's own interest in the contract with the respondents, and that a similar arrangement was made separately with Keates. As the appellant and Keates are not shown to have made any agreement with each other, it is not easy to say in what proportion either the appellant or Keates was to share profits and losses with McFarland in respect of that person's interest in the main contract. As an agreement for a joint adventure but not a partnership the case closely resembles in principle that put by *Gibbs* J. in *Young* v. *Hunter* (1) in these words:—"I am by no means of opinion that there may not be a case where two houses shall be interested in goods from the beginning of the purchase, yet not both be liable to the vendor; as if the parties agree amongst themselves that one house shall purchase the goods, and let the other into an interest in them, that other being unknown to the vendor: in such a case the vendor could not recover against him, although such other person would have the benefit of the goods." The

(1) 4 Taunt., 581, at p. 582.

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plain position appears to me to be this. On the facts, apart from any implication of law, the respondents made their bargain with McFarland and with him alone. That is what they understood. See, *e.g.*, the meaning they put upon the word "Forward." Did what passed between McFarland and the appellant give the respondents the right to sue the appellant when they discovered it? I think not. The appellant cannot under the circumstances, and in the absence of a partnership, be regarded as an undisclosed principal. It is not a case of principal and agent at all. That being the position, there is no privity of contract between the present parties entitling the respondents to recover from the appellant, who contracted only with McFarland and in respect of McFarland's interest only.

There was much discussion as to the appellant's action in signing his name in the bank's signature book as a member of the firm of Thomas McFarland & Co. He appears to have been a man of no business capacity or experience—a mining prospector before he joined the firm of McFarland, Lang & Co., in which he soon lost all his capital. He says that in signing the book he did not suppose that he was representing himself to be a member of Thomas McFarland & Co., and that he signed because McFarland asked him to do so; and that when he signed he did not observe that opposite the signature his name was inscribed as a member of the firm of Thomas McFarland & Co. However that may be, the signature was not inscribed until 28th September, and is not evidence that he was a partner before 26th August. *Young* v. *Hunter* (1), already cited, was a case in which some of the defendants, a firm who had not originally been parties to the contract, which was one for the purchase of goods for shipment, had been afterwards allowed by the original purchasers to have a share in the venture. The plaintiffs knew nothing of these defendants who contested the action, but sold only to the original purchasers, who had suffered judgment by default; and it was contended (unsuccessfully) that the defendants who resisted were sleeping partners of the defendants who succumbed. On this *Heath* J. said, and it is his entire judgment (2):—"The proposition of the plaintiffs' counsel, that if it be shown that at any one

(1) 4 Taunt., 581.

(2) 4 Taunt., 581, at p. 582.

period of the transaction there were a partnership subsisting, it was therefore to be inferred that there had been a partnership in the particular original purchase, is wholly unfounded."

There is one more matter to which I ought to refer. It was argued, though rather faintly, by the respondents that some strength was given to the case for a partnership at the material time by two passages in the correspondence. The first is in a letter from Thomas McFarland & Co. to the respondents, dated 13th August 1907, and is as follows :—" We wish to inform you that we have taken Mr. T. S. Lang into partnership, but that we intend continuing the export business under the old name." The other passage is in the respondents' letter of 20th September 1907, which is in answer to the letter just quoted. It is in these words :—" We note that you have taken Mr. T. S. Lang into partnership, but that the export department will be carried on under the old name." McFarland says as to this that it meant merely that he had taken the appellant into the firm of McFarland, Lang, & Co., and that Lang had not at that time anything to do with the frozen meat trade. I do not see how the two extracts can help the respondents. If McFarland is believed, he was not referring to the firm of McFarland & Co., but if he meant to do so, his statement was a misrepresentation. But, however intended, if it misled the respondents, they cannot rely on it, in the face of the rest of the evidence adduced by them, as showing that the appellant was a member of Thomas McFarland & Co. on 13th August or before 23rd August; nor can it be argued to amount to a communication to them of the existence on 26th August of a certain fact relevant to this case, since at the time the statement was made to them it was not a fact in respect of the firm of Thomas McFarland & Co., and it is not pretended that McFarland was on 13th of August the agent of the appellant to bind him by any statement in respect of that firm.

I am of opinion for the reasons given above that the appeal must be allowed.

O'CONNOR J. I agree.

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Appeal allowed. Judgment appealed from reversed so far as it is adverse to the appellant. Judgment for the defendant Lang with costs, including costs of discovery. Omit order to deliver up the bonds. Respondents to pay the costs of the appeal.

Solicitors, for the appellant, *Lamrock, Brown & Hall.*
Solicitors, for the respondents, *Braham & Pirani.*

B. L.

[HIGH COURT OF AUSTRALIA.]

HOLLINGSWORTH . . . . . APPELLANT;
PLAINTIFF,

AND

HEWITT . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 17.

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

Defamation—Defamation (Amendment) Act 1909 (*N.S.W.*) (*No.* 22), *sec.* 11*—*Order against newspaper proprietor to supply name of writer of defamatory article.*

A plaintiff is not entitled as of course to be supplied by the proprietor of a newspaper with the name and address of the writer of an article under sec. 11

*Sec. 11 of the *Defamation (Amendment) Act* 1909, is a follows :—

"The proprietor of any newspaper may upon the written request of any person who has commenced an action in respect of any defamatory article, letter, report, or writing in any newspaper supply to such person affected thereby the name and address of the person who supplied such article, letter, report, or writing to such newspaper, and in default of compliance with such request any person affected thereby may apply to a Judge of the Supreme Court who may if he sees fit, after hearing such proprietor, direct that such name and address be so supplied."