[HIGH COURT OF AUSTRALIA.]

KILGARIFF . . . . . APPELLANT;
DEFENDANT,

AND

MORRIS AND ANOTHER . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1955.

MELBOURNE, *March* 8.

Dixon C.J., McTiernan and Williams JJ.

Money lenders—Money lender partner in firm—Advances to partnership funds over and above capital—For purposes of partnership—Non-compliance with statutory formalities applicable to money-lending transactions—Nature of advances by partner to partnership funds—Whether "loan" to other partners—Money Lenders Act 1912-1948 (*No.* 65 *of* 1912—*No.* 54 *of* 1948) (*W.A.*), *ss.* 2, 9—*Partnership Act* 1895 (59 *Vict. No.* 23) (*W.A.*), *ss.* 34, 57.

Section 9 of the *Money Lenders Act* 1912-1948 (W.A.) provides that no contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a money lender or for the payment by him of interest on money so lent and no security in respect of any such contract shall be enforceable in the absence of certain formalities. By s. 2 "loan" is defined to include advance, discount, money paid for or on account or behalf or at the request of any person and to include every contract which is in substance or effect a loan of money and "lend" and "lender" are defined to have a corresponding meaning.

Held that s. 9 did not apply to the case of money contributed by a partner, who was a money lender, to partnership funds for the purposes of the partnership by way of advances beyond the amount of capital he had agreed to subscribe.

A contribution by a partner to the funds of the partnership is not a loan to any or all of the partners. It creates no debt payable by the partners to the person standing in the situation otherwise occupied by a lender. The partners are not in a proper sense borrowers who immediately incur a debt which is repayable by them to a creditor.

Decision of the Supreme Court of Western Australia (*Wolff* J.) affirmed.

APPEAL from the Supreme Court of Western Australia.

On 2nd October 1953, Mark Solomon Morris and Fay Morris, as plaintiffs, brought an action in the Supreme Court of Western Australia against Raymond James Kilgariff, David Silbert and Albert Henry Allen. The defendants Silbert and Allen submitted to any order which the court might make.

The action was heard before *Wolff* J. who delivered judgment on 8th June 1954. The facts found and the decree made by the trial judge are sufficiently set out in the judgment herein.

The defendant Raymond James Kilgariff appealed from the decision of *Wolff* J. to the High Court. The defendants Silbert and Allen were not parties to the appeal.

T. J. Hughes and *J. W. Prickett*, for the appellant.

O. J. Negus Q.C. and *R. E. Jones*, for the respondents.

The following judgment of the Court was delivered by DIXON C.J.

This is an appeal from a judgment of *Wolff* J. in a partnership suit. The suit was brought by two partners named Mark and Fay Morris, Fay Morris being Mark's wife, against three partners, Kilgariff, Silbert and Allen. The business of the partnership was that of manchester specialists and drapers carrying on business as Raymarc & Co. at two addresses in Perth. The partnership was governed by a partnership deed made some time about, or possibly before, September 1950 between the partners other than Fay Morris. She became a partner as a nominee of her husband who had obtained a right to make a nomination under an agreement of 16th January 1952. That agreement redistributed the shares in the partnership. Mark Morris was a registered money lender and he was found by the judge to be carrying on the business of money lending alone and not as a partner with his mother or with any others. He advanced considerable amounts to the partnership; that is to say, he made advances over and above his share of the capital. The advances were made from time to time and amounted apparently to about £19,500. Interest was to be charged. In the agreement of 16th January 1952 a stipulation was made for fifteen per cent per annum.

The decree made in the suit declares, as the fact was, that the partnership had been dissolved by a notice given pursuant to the deed as from 12th March 1953 and that the plaintiffs were entitled to the benefit of the deed of partnership and to receive two-fifths of the profits and other moneys payable to the partners under the deed of partnership up to the date upon which Silbert, Kilgariff

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and Allen ceased carrying on the partnership business or a receiver, who had been appointed in another suit, so ceased. The decree then declared that the plaintiff Mark Morris made advances to or for the purposes of the partnership and that such advances included all moneys paid by him to the partnership as advances whether receipts were given in his own name or in the name under which he carried on the business of money lender. Then it declared that the provisions of the *Money Lenders Act* 1912-1948 (W.A.) were not applicable to these advances or to the transactions in which they were made. It went on to declare that under the *Partnership Act* 1895 (W.A.) the plaintiff Mark Morris was entitled to interest at the rate of six per cent per annum on all advances made by him to and for the purposes of the partnership beyond the amount of the capital he agreed to subscribe as from the date of making the advances. The decree ordered that an account of the partnership dealings and transactions be taken including the amount due from the firm to Mark Morris for advances and the interest. It went on to make provisions of an ordinary character for the inclusion of what was due to the plaintiffs under the partnership deed and ended by saying that the defendants should pay to the plaintiffs the amount certified to be due in due course of winding up within one month of the date of the Master's certificate.

Kilgariff now appeals from that decree, making as respondents the plaintiffs Mark and Fay Morris. The appeal, whilst formally directed to the whole of the decree, is actually against the paragraphs which relate to the advances and to the consequences of those advances; that is to say it challenges the provisions of the decree which declare that the *Money Lenders Act* is not applicable and that Mark Morris is entitled to interest under the *Partnership Act* at six per cent per annum on all the advances made by him to and for the purposes of the partnership beyond the amount of capital which he agreed to subscribe. It challenges the consequential order that the amount due to Mark Morris should be taken into the account.

The ground upon which this challenge is based is that the transactions by which the advances were made by Mark Morris to the partnership account were loans within the meaning of the *Money Lenders Act* and that the provisions of s. 9 of that Act were not complied with. Section 9 provides that no contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a money lender or for the payment by him of interest on money so lent and no security therefor shall be enforceable unless a note or memorandum in writing of the contract is

signed personally by the borrower and unless a copy is delivered or sent to the borrower within seven days of the contract. It further provides that no such contract or security should be enforceable if it is proved that the note or memorandum was not signed by the borrower before the money was lent or before the security was given, as the case may be. Sub-section (2) of s. 9 goes on to require that the terms of the contract shall show the date on which the loan is made, the amount of the principal of the loan, and either the interest charged on the loan expressed in terms of a rate per centum per annum or a rate per centum per annum represented by the interest charged as calculated in accordance with a schedule. There are other provisions to which it is unnecessary to refer relating to the delivery of the note or memorandum to the borrower. It is enough to say that if the transactions fell within s. 9 of the *Money Lenders Act* the requirements of that section were not fulfilled.

In the particulars in which objection was made to the decree it was in fact based upon the provisions of ss. 34 and 57 of the *Partnership Act* 1895. The material part of s. 34 says that " The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement . . . between the partners, by the following rules :— " The third of the rules provides that a partner making, for the purpose of the partnership any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of six per centum per annum from the date of the payment or advance. The material part of s. 57 provides that in settling accounts between the partners after a dissolution of partnership, " the following rules shall, subject to any agreement, be observed ". One of the rules, namely that contained in sub-par. (*b*) of s. 57, provides that the assets of the firm, including the sums contributed by the partners to make up losses or deficiencies of capital, " shall be applied in the following manner and order ". The first in order is the payment of ordinary debts and liabilities to persons who are not partners, and the second the payment to each partner rateably of what is due from the firm to him for advances as distinguished from capital.

The question in the case is whether the *Money Lenders Act* excludes the application of those provisions and so shows the decree to be wrongly based. In a sense the question depends upon the application of the definition of " loan ", which provides a meaning for the words " money lent " in s. 9. The definition in s. 2 of the *Money Lenders Act* says that " loan " includes advance,

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discount, money paid for or on account or behalf or at the request of any person. That really is the material part. The expressions "loan" and "lender" have a corresponding meaning. In our opinion it is not possible to bring the transactions we have described within the meaning of s. 9, helped though it is by the definition of "loan". The reason is that a contribution by a partner to the funds of the partnership is not a loan to any or all of the partners. It creates no debt payable by the partners to the person standing in the situation otherwise occupied by a lender. The partners are not in a proper sense borrowers who immediately incur a debt which is repayable by them to a creditor. In a very wide sense what is done may be considered an advance. But the word "advance", when used in the definition of "loan" occurs in a context which clearly shows that it is an advance made by one person to another and not an advance by way of a contribution to the funds of a partnership of which he is a member or, indeed, to himself and others in any circumstances. The law of partnership is well-known and advances or contributions made to the funds of a partnership in excess of the required capital by any member of the partnership stand upon a footing which is well understood. The result of such contributions is to create the rights and duties which are specified in ss. 34 and 57 of the *Partnership Act* and such transactions do not result in the kind of debt which is brought under the category of loan or lending by the provisions of the *Money Lenders Act*. It would, of course, be clear under s. 9, had it been otherwise, that the sums would not have been enforceable or recoverable. But the very words "no contract shall be enforceable" suggest the correctness of the view which we have adopted, viz., that the provision is dealing with debts incurred by one person or persons to another person or persons as a result of a contract of loan or something which is analogous to it.

It follows from what we have said that the judgment appealed from was correct in the respect in which it is challenged. For those reasons the appeal should be dismissed with costs.

Appeal dismissed with costs, including costs reserved by the orders of 19th October 1954 and 3rd January 1955.

Solicitors for the appellant, *Hughes & Prickett*, Perth, by *Maurice Blackburn & Co.*

Solicitors for the respondents, *Morris Crawcour & Solomon*, Perth, by *Phillips, Fox & Masel.*

R. D. B.