REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1907-1908.

[HIGH COURT OF AUSTRALIA.]

KELLY . . . . . APPELLANT;
DEFENDANT,

AND

TUCKER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 21, 24, 25; *Sept.* 12.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Partnership—Dissolution—At will or for single venture—Unequal contribution of capital—Repayment—Partnership Act 1891 (*Vict.*) (*No.* 1222), *secs.* 28, 30, 36, 39, 48.

A. and B. made a verbal contract whereby they agreed to enter into partnership in the business of buying racehorses in Australia, shipping them to South Africa, and there selling them; that A. should provide £800 as capital for the business; and that the profits should be equally divided between A. and B. A. provided the £800, and racehorses were bought and raced in Australia, but no horses were sent to South Africa. A. gave notice of dissolution of the partnership. In an action by A. for winding up the partnership he claimed a declaration that the £800 should be paid to him out of the assets of the partnership in priority to any payment to B. in respect of profits. Judgment was given declaring that the partnership was dissolved, and that A. was entitled to be allowed the whole of the £800, and ordering that, in the taking of the accounts, the sum of £800 should be allowed to A. as capital of the partnership business.

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Held, that there was evidence to justify a finding that there was an implied agreement that the £800 should be repaid to A. before there was any division of profits.

Held also (*Higgins* J. dissenting), that there was evidence to justify a finding that the adventure to South Africa was abandoned, and, therefore, that the partnership became one for an indefinite term and was determined by the notice.

Judgment of *Hood* J. affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court of Victoria by George Edward Tucker against John Joseph Kelly, the writ in which was issued on 29th September 1906 and served on 4th October 1906. By the statement of claim the plaintiff alleged as follows:—That, in November 1905, it was verbally agreed between the plaintiff and the defendant that they should enter into partnership in the business of buying some racehorses in Australia and shipping them to South Africa and there selling them, and that the plaintiff should provide £800 as the capital for the said business, and that the plaintiff and the defendant should both go to South Africa with the said horses for the purpose of so selling them, and that the profits should be divided equally between them; that no agreement was made as to the length of time during which the partnership business was to be carried on; that in pursuance of such agreement the defendant bought certain racehorses on account of the partnership, and the plaintiff paid to the defendant the sum of £800; that in December 1905 the defendant received £240 for and on behalf of the plaintiff in respect of a bet made and won by the defendant on behalf of the plaintiff, and the defendant paid the said sum into the partnership banking account which was in fact in the defendant's name; that about January 1906 it was verbally agreed between the plaintiff and the defendant that the said racehorses should not be shipped to South Africa and there sold, and the said racehorses had since been raced on account of the partnership; that in September 1906 the plaintiff became desirous of terminating the said partnership, and that disputes arose between the plaintiff and the defendant as to the basis upon which the affairs of the partnership should be wound up, the plaintiff affirming that the said

sums of £800 and £240 should be repaid to the plaintiff out of the assets of the partnership in priority to any payment to the defendant in respect of the profits, the defendant denying that the said sum of £800 should be so repaid, and at first admitting and afterwards denying that the said sum of £240 should be so repaid; that on the 24th September 1906, written notice was given to the defendant on behalf of the plaintiff dissolving the partnership as from the date of such notice, that the plaintiff by writing ratified and confirmed such notice, and that such writing was on 4th October 1906 served upon the defendant.

The plaintiff claimed:—

(*a*) A declaration that the partnership was dissolved on the 24th September 1906 or on the 4th October 1906, or alternatively an order for the dissolution of the partnership.

(*b*) An order that the affairs of the partnership be wound up.

(*c*) A declaration that the two sums of £800 and £240 should be paid to the plaintiff out of the assets of the partnership in priority to any payment to the defendant in respect of profits.

(*d*) All necessary accounts and inquiries.

(*e*) An order for the appointment of a receiver and manager.

(*f*) Such further order as may be necessary.

It is not necessary for this report to set out the defence.

The evidence, so far as is material, is set out in the judgments hereunder.

Hood J., who heard the action, gave a judgment declaring that the partnership was dissolved on 4th October 1906, that, on the taking of the accounts in the judgment directed, the plaintiff was entitled to be allowed the whole of the £800 mentioned in the statement of claim, but that the sum of £240 mentioned in the statement of claim should be deemed assets of the partnership. The judgment then went on to order accounts of the partnership dealings to be taken on that basis. On a subsequent day *Hood* J. appointed a receiver and manager of the partnership assets and property. The defendant appealed to the High Court from the judgment in the action, except so far as it applied to the £240, and from the order appointing a receiver and manager.

Hayes, for the appellant. *Primâ facie*, the £800 is capital of

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the partnership, and belongs equally to the partners. The £800 was not a loan to the partnership. *Hood* J. must have found that the partnership was one at will, but the evidence shows that it was a partnership for a single adventure to last until one visit had been paid to South Africa, when it would be dissolved: Sec. 36 of the *Partnership Act* 1891. That being so, a dissolution could not have been decreed until that event happened, unless the relations between the parties had become such that the partnership could not be carried on: See sec. 39 of the *Partnership Act* 1891. No case was made for a decree for dissolution, and if an amendment had been asked for, it would only have been on terms of the respondent paying all the costs. Secs. 28 (1) and 48 of the *Partnership Act* 1891 must be read together, and the effect is that on a winding up of the partnership the partners are entitled to share equally in the capital unless some other agreement is proved.

[HIGGINS J. referred to *Lindley on Partnership*, 7th ed., p. 385.

ISAACS J. referred to *Pollock on Partnership*, 6th ed., p. 131.]

The fact that the partners have contributed towards capital unequally does not affect the matter. *Story on Partnership*, 5th ed., par. 47. Here the effect of the respondent paying in £800 and the appellant nothing is that the respondent pays £400 for the appellant's skill.

[ISAACS J. referred to *Binney* v. *Mutrie* (1), and *Wilson* v. *Kircaldie* (2).]

It is admitted that if this was a partnership at will it was terminated by the first notice given.

[Counsel also referred to *Reade* v. *Bentley* (3).]

McArthur, for the respondent. The statement of claim does not allege that the partnership was for a single venture. Even if it was, there is abundant evidence to justify the Judge in saying that the trip to South Africa was abandoned, and that the partnership became one at will. As to what is reasonable notice to determine, see *Featherstonhaugh* v. *Fenwick* (4). The burden of showing there was more than a partnership at will is on the

(1) 12 App. Cas., 160.
(2) 13 N.Z.L.R., 286.
(3) 4 Kay & J., 656.
(4) 17 Ves., 298, at p. 308.

appellant: *Burdon* v. *Barkus* (1). Sec. 28 of the *Partnership Act* 1891 applies to a partnership while it exists, and regulates the duties and position of the partners during that time; while sec. 48 applies after the partnership is wound up. The skill of the partners or of one partner cannot be regarded as capital of the partnership. The position is the same as if £800 had been advanced to the partnership by the respondent, and it must be repaid to the respondent before there is any other distribution.

[HIGGINS J. referred to *Reid* v. *Hollinshead* (2), and *Kilpatrick* v. *Mackay* (3).]

In *Garner* v. *Murray* (4), it was assumed that, where there were unequal contributions of capital, the capital should be returned according to the amount contributed. See also *Nowell* v. *Nowell* (5); *Ross* v. *White* (6). According to the evidence the bargain was to share profits and not to share losses, although it may be implied that the losses were to be shared.

Hayes, in reply, referred to *Syers* v. *Syers* (7).

Cur. adv. vult.

Sept. 12.

GRIFFITH C.J. This action was brought by the respondent for a declaration that a partnership between him and the appellant had been dissolved in September 1906, or, alternatively, for a dissolution of the partnership, and for a declaration that two sums of £800 and £240 respectively should be paid to the respondent out of the assets of the partnership in priority to any claim made by the appellant in respect of profits, with consequential relief. The agreement for partnership, which was verbal only, was made in November 1905. As alleged by the plaintiff in the statement of claim, the agreement was that the parties should enter into partnership in the business of buying some racehorses in Australia and shipping them to South Africa and there selling them, that the plaintiff (the respondent) should provide £800 as the capital for the business, that both partners should go to South Africa with the horses for the purpose of so

(1) 4 DeG. F. & J., 42.
(2) 4 B. & C., 867.
(3) 4 V.L.R. (Eq.), 28.
(4) (1904) 1 Ch., 57.
(5) L.R. 7 Eq., 538, at p. 541.
(6) (1894) 3 Ch., 326.
(7) 1 App. Cas., 174.

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selling them, and that the profits should be equally divided. He alleged that no agreement was made as to the duration of the partnership. He also alleged that about January 1906, it was verbally agreed that the horses (which had then been bought) should not be shipped to South Africa, and that the horses had since been raced in Australia on account of the partnership. The appellant, who was a trainer, alleged in his defence that the objects of the partnership were to consist of buying racehorses in Australia, training and running them on race-courses for stakes, and in earning profits for the partnership by winning stakes and wagers by means of the partnership horses, and, if necessary or desirable, in shipping racehorses to South Africa and elsewhere for the purposes of sale. He also alleged that, in consideration of the respondent's contribution of £800 to the partnership, he was not to be bound to give any of his time to the partnership business, and that the appellant, in place of a money contribution, was to devote his whole time and attention to the partnership business, and that the capital, assets and profits of the partnership were to belong to the partners in equal shares. He further alleged that the partnership was not to be determinable at will, but was to continue for a reasonable time, or until reasonable notice had been given to determine it. On 24th September 1906 the respondent, treating the partnership as a partnership at will, gave notice of dissolution, and on 29th September he began his action. The writ was served on 4th October.

If the partnership was a partnership at will, or a partnership for an indefinite time, it is not disputed that the bringing of the action was a sufficient notice of intention to dissolve it within sec. 36 of the *Partnership Act* 1891 (No. 1222).

The action was tried before *Hood* J. without a jury. He declared that the partnership was dissolved on 4th October, *i.e.*, from the date of service of the writ, that the £800 should be allowed to the plaintiff, "as the capital for the said business," and that the other sum of £240 should be deemed partnership assets. This appeal was then brought. We have not been favoured with any statement of the reasons of the learned Judge. This is much to be regretted, especially as the evidence, which, so far as we can

judge from the notes, was very meagre and unsatisfactory, was conflicting.

But, since the learned Judge declared that the partnership was dissolved as from the date of service of the writ, he must, I think, be taken to have found as a fact that the partnership was one for an indefinite time. It is contended that this finding, as well as his finding as to the £800, was not supported by the evidence, to which I will briefly refer.

Both parties agreed that the original intention was to buy racehorses and take them to South Africa, and sell them there. It is common ground that, after the horses were bought, they were for some time raced in Australia by mutual consent. The departure to South Africa appears to have been delayed in consequence of a difficulty in obtaining a jockey to go with them, and that part of the project does not seem to have been revived up to September 1906, when the plaintiff gave his notice of dissolution. On these facts the first question is whether the learned Judge could find that there was an implied agreement which excluded the general rule laid down in sec. 28, sub-sec. (1) of the *Partnership Act* 1891 (assuming it to be *primâ facie* applicable) that "all the partners are entitled to share equally in the capital and profits of the business." Having regard to the original intention of the parties, which related mainly to a single adventure to terminate with the sale of the horses in South Africa, I think it is not unreasonable to infer that it was an implied term of the partnership agreement that the £800 should be repaid to the plaintiff before the profits of the joint adventure were divided. The plaintiff in his evidence said that the agreement was that they were to share the "profits." The sense in which spoken words are used is a question of fact for the tribunal which is the judge of fact. The word "profits" is certainly capable of bearing the meaning put on it by the plaintiff. I think, therefore, that a verdict by a jury, that there was an implied agreement that the £800 should not form part of the assets of the partnership so as to be divisible without repayment to the plaintiff, could not be impeached as being one which reasonable men could not have found. The learned Judge saw the witnesses and their demean-

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our, and I am not prepared to differ from his conclusion. If sec. 28 does not apply, *cadit quæstio.*

In this view, the other question—whether the partnership was in September 1906 a partnership for an indefinite time—is of only academical interest, for I have no doubt that, under the circumstances of this case, it was at the time of the trial "just and equitable that the partnership should be dissolved" (*Partnership Act* 1891, sec. 39 (*f*)), and the pleadings should, if necessary, be taken to have been amended accordingly. It is, however, contended for the plaintiff that, in the events that had happened, the adventure to South Africa ought to be considered as having been tacitly abandoned by mutual consent. In that view the partnership would clearly have become one for an indefinite time. On this point I think that it was open to a jury on the evidence to find either way. I am not, therefore, able to say that the learned Judge was wrong in the finding on which the judgment for dissolution was based. The appellant has therefore failed to show that the judgment was erroneous, and the appeal must be dismissed.

BARTON J. I concur, and I do not think it necessary to add anything.

ISAACS J. I agree that this appeal should be dismissed. The parties by their conduct had, in my opinion, quite abandoned all intention to persevere with the South African part of their undertaking. Whatever its original duration may have been, the partnership was on 4th October 1906, when the notice of dissolution was served, a partnership for an undefined term, and by force of sec. 36 of the *Partnership Act* 1891 was dissolved by the notice.

The only other question, and really the one substantial question as the facts now appear, is whether the appellant is entitled to share equally with the respondent in the assets of the firm without first crediting the respondent with £800 he provided in the first instance; or whether the respondent is entitled to be considered as having a claim against the firm of £800 advanced, which must be satisfied before the ultimately divisible residue is arrived at.

It is not necessary to determine the effect of secs. 28 and 48 of the *Partnership Act* upon each other or their operation upon the case, although considerable argument was addressed to us on this subject. The facts are clearly susceptible to the view that the £800 found wholly by the respondent was, on the true meaning of the original agreement, an advance to be accounted for before arriving at the profits to be divided. Apparently this was the opinion of Mr. Justice *Hood*, and I see no reason to differ from that conclusion.

With regard to the argument that a finding of the learned Primary Judge should not be reversed unless demonstrably wrong, I do not agree with it. That would improperly narrow the duty of the Court of Appeal. The proper rule is stated by the learned Chief Justice in *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (1).

HIGGINS J. On the main matter in contest—the rights of the parties in respect of the £800 contributed by Tucker—I concur with my learned colleagues. I think that there was sufficient evidence to justify the learned Judge below in coming to the conclusion that there was an agreement to give Kelly a share of the profits, and no more. It is, no doubt, our duty to "rehear" the case, and to reconsider the materials, as is laid down in *Coghlan* v. *Cumberland* (2); but, after performing this duty, I see no ground for holding that the learned Judge was wrong. I confess, however, that I have been somewhat puzzled by sec. 28 (1) of the *Partnership Act* 1891. It prescribes that, subject to any agreement expressed or implied, all the parties are entitled to share equally in the capital and profits of the business. No doubt, this is an Act to "amend" as well as to "declare" the law of partnership; but was it intended to amend the law in this respect? The text writers show that, in the ordinary course of accounting as between partners, each partner takes out his contributed capital before any distribution of the surplus. (*Pollock, Partnership*, 4th ed., pp. 69-70; *Collyer, Partnership*, 2nd ed., pp. 105-106; *Lindley, Partnership*, 6th ed., pp. 399-404; and see *Garner* v. *Murray* (3); *Kilpatrick* v. *Mackay* (4), and *Partnership Act* 1891, sec. 48 (*b*) (3).)

(1) 1 C.L.R., 243, at pp. 261, 277.
(2) (1898) 1 Ch., 704.
(3) (1904) 1 Ch., 57.
(4) 4 V.L.R. (Eq.), 28.

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In the treatise of Lord *Lindley*, this sec. 28 is not treated as obliterating, for purposes of distribution, inequalities in capital contributed (*Lindley on Partnership*, 6th ed., p. 356; 7th ed., pp. 385, 450.) *Primâ facie*, where one partner has skill, and the other has money, when the one departs with his skill, the other —one would think—should be able to depart with his money. But the difficulty occasioned by sec. 28 does not really arise for settlement in this case, as an agreement is found, express or implied, to the effect that Kelly should share profits only.

On the other point—the dissolution of the partnership by the plaintiff's notice, or else dissolution by the Court—I am unable to find any sufficient ground existing for dissolution at the date of the writ (29th September 1906). According to Tucker's own case as put in his statement of claim, there was a partnership agreement in November 1905 to buy racehorses in Australia and ship them to South Africa, and there sell them; about January 1906, it was verbally agreed that the racehorses should not be shipped to South Africa, and then sold; and, in September 1906, the plaintiff became desirous of terminating the partnership, disputes arose and the plaintiff gave written notice of dissolution on the 24th of September, and confirmed it by writing dated 28th September and served on 4th October. It was admitted by Mr. *McArthur* for the plaintiff—as, indeed, appeared from the statement of claim—that originally the partnership was to be for one trip at least to South Africa, and that, unless this stipulation were varied by agreement, the partnership could not be dissolved at an earlier stage at the will of one partner: *Reade* v. *Bentley* (1); *Partnership Act* 1891, secs. 4 (2), 36. But the plaintiff sought to meet this position by alleging a verbal agreement in January 1906 not to ship to South Africa. Now, such an agreement has not been proved, either as to January or to any other time; and, as it is the only ground on which the prayer for declaration of dissolution, or, in the alternative, for dissolution by the Court, is based, it seems to me that the prayer ought not to have been granted. I shall take the plaintiff's own evidence on the subject. We have not the advantage of His Honor's reasons for his judgment, but treating the plaintiff as entitled to the assumption that His

(1) 4 Kay & J., 656.

Honor found such facts in his favour as are necessary for the judgment pronounced, is there any evidence of the alleged agreement not to ship to South Africa? The plaintiff says:—

"On 27th January at Williamstown was the first race run by Mereworth. Kenny rode him. Kenny had no jockey's licence. Kelly got a permit for him for that day pending his application for a licence to the committee. Kenny applied for a licence and it was refused. Kelly and I spoke about going to South Africa, but we could not go till Kenny got a licence, and this was the sole reason why we waited before going to South Africa. We were waiting for a boy all the time and drifted on."

"Waiting" or "drifting on" does not involve an agreement not to ship for South Africa. I cannot see any evidence on which one could find that the idea of shipping to South Africa was abandoned at any time before the writ; and, if it was not abandoned, the partnership was not dissolved before the writ, and there was no ground for invoking the jurisdiction of the Court to dissolve it. As for the suggestion that the statement of claim might be amended by stating, under sec. 39, that circumstances have arisen which render it just and equitable that the partnership be dissolved, the case has not been fought on that issue, and there has been no opportunity to tender evidence thereon; and I cannot think it fair to the defendant to let the plaintiff shift his ground at this stage. Nor, indeed—even if I ignore the pleadings, and the conduct of the case up to the present—can I point to any fact which, at the time of the writ, rendered it "just and equitable" that the partnership should be dissolved.

Appeal dismissed with costs.

Solicitor, for appellant, *W. J. Woolcott*, Melbourne.

Solicitors, for respondent, *Ellison & Hewison*, Melbourne.

B. L.