IN THE HIGH COURT OF AUSTRALIA

McDONALD

*v.*

WILSON

# REASONS FOR JUDGMENT

*Judgment delivered at* SYDNEY

*on* 20th NOVEMBER, 1953.

H. E. Daw, Gov. Print., Melb.

C.12280/45

McDONALD

v.

WILSON

ORDER

Appeal dismissed with costs.

McDONALD

v.

WILSON

JUDGMENT

DIXON C.J.
WEBB J.
TAYLOR J.

McDONALD

V.

WILSON

DIXON C.J.
WEBB J.
TAYLOR J.

JUDGMENT

This is an appeal from a decree of the Supreme Court of New South Wales in its equitable jurisdiction dismissing a suit in which the appellant, as plaintiff, claimed a declaration that he was the absolute owner of three trotting horses known respectively as "Billy's Hope", "Kevalto" and"Jack Hope". Soon after the commencement of the suit a receiver was appointed and during the period which intervened after his appointment and before the hearing, the first two named horses were sold by him, whilst the third, "Jack Hope", was profitably raced. The matters in dispute at the time of the hearing were, therefore, the ownership of "Jack Hope" and of the moneys then in the hands of the receiver.

By his statement of claim the appellant alleged that he purchased "Jack Hope" about Easter 1947, "Billy's Hope" during the month of April 1947 and "Kevalto" about October of the same year. He further alleged that about April of that year he and the respondent agreed that the latter should train and race trotting horses owned by the former from time to time, that he should receive on behalf of the plaintiff all prize money won by the said horses and that he should register the said horses and each of them with the New South Wales Trotting Club Limited in his own name. In return for

his services the respondent, it was alleged, was to receive the sum of £5 per week and all expenses and fees connected with the feeding, transport, training and racing of the said horses, together with 25% of all prize money won by them.

These allegations were denied by the respondent, but for a proper understanding of the facts it is, perhaps, desirable briefly to consider the manner in which the association between the parties developed.

The respondent was employed at the Riverstone Meat Works but in his leisure time he pursued the activity of training trotting horses near his home at Schofields. He was not a man of substantial means, as was the appellant, and until the advent of the horse "Jack Hope" he appears to have attained only indifferent success as a trainer. The parties met late in 1946 and, according to the appellant, within a few months after they met the respondent borrowed from him two different sums of money for purposes associated with his racing activities. The appellant says that during the course of the conversations relating to these transactions he told the respondent that he was, in effect, prepared to give him a helping hand and told him that "if he kept his eye out for one or two good horses, that he thought were real good horses" he would purchase them for him to train and race. Thereafter the appellant alleges that on Easter Saturday 1947 he went, at the request of the respondent, to Goulburn to see the horse "Jack Hope". There he met the defendant and was introduced to one Edgerton, the owner of the horse, who intimated that he was prepared to sell it for £350. "Jack Hope" won its race that day and subsequently to the race arrangements were made to purchase it for the sum of £300. We say, merely, that arrangements were made for its purchase because there is a direct conflict of evidence as to whether the purchase was made by the appellant with his own moneys or by the respondent partly with moneys lent to him by the appellant for that

purpose and partly with moneys provided out of his wife's savings bank account. The appellant asserts that he purchased the horse while the respondent maintains that the horse was sold to him and in this/is corroborated by Edgerton. On this occasion a sum of £50 was paid towards a deposit of £100 on the sale and it is common ground that this sum was provided by the appellant. The balance of the deposit also appears to have been provided by the appellant a day or two later. The parties are, however, again in conflict as to how the balance of the purchase money was provided and paid. The appellant asserts that the balance of £200 was paid by him to Edgerton in a train, in the presence of a number of people, on the way to a race meeting at Maitland. This is said to have occurred some eight or ten weeks after the purchase of "Jack Hope" at Goulburn. The respondent, however, maintains that the sum of £200 was paid to Edgerton at his home out of moneys which had been borrowed from one Toms and then paid into his wife's savings bank account and subsequently withdrawn from that account in order to make the payment in question. The evidence in the respondent's case dealing with this incident is to the effect that this payment was made early in June 1947. This is the substance of the respondent's evidence on this point and his evidence is corroborated by that of his wife and Edgerton. The evidence of Edgerton's brother and that of Toms also tends to corroborate the respondent's evidence on this point, but the learned trial judge does not appear to have been prepared to accept the evidence of the last two mentioned witnesses on the point. It is clear from the evidence, however, that the horse, after its purchase, was registered with the New South Wales Trotting Club in the respondent's name, that, a few days after the purchase of the horse at Goulburn, a receipt in writing acknowledging the receipt from the respondent of the sum of £100 as a deposit on the purchase of the horse was given by Edgerton to the respondent and that this receipt

made no mention of the appellant's name and that, apparently, the respondent thereafter acted quite freely and independently in determining what racing engagements should be made for the horse.

The horse "Billy's Hope" was acquired a few weeks after the purchase of "Jack Hope", the appellant alleging that he was asked by the respondent to buy it for the sum of £150. This horse was in training with the respondent at this time and the appellant says that the respondent informed him that it was owned by the respondent's brother, Arthur Wilson, and that the respondent's request was prompted by the fact that he and his brother had quarrelled over the form displayed by the horse. The appellant further says that he told the respondent that he was prepared to buy the horse for £150 but he does not claim to have advanced any money for this purpose; the arrangement, according to him, was that the purchase money should be paid out of future prize moneys won by the appellant's horses. The respondent denies that any such arrangement was made and his brother gave evidence to the effect that he was not the owner of "Billy's Hope" at any time and says that he lent the sum of £150 to the respondent to enable him to purchase that horse from its owner, one, Birch. This version of this transaction is corroborated by the documentary evidence relating to the transfer to the respondent of the certificate of registration relating to this horse.

According to the evidence of the appellant shortly before or about the time of the purchase of this horse a conversation took place between him and the respondent relating to training fees and prize money. At this time the respondent had in his stable another horse of the appellant called "Mark Minton". The appellant asserts that on this occasion the respondent said that he had so many horses in his stables that he was financially unable to carry on; he was, it

was said, not in a position to purchase feed for them all. At this stage the respondent is alleged to have said that if the appellant would pay him £5 a week and pay for the keep of the horses and for their fodder, shoeing and other attention he would be pleased to train the appellant's horses. The appellant, however, says that he told the respondent that he did not think the suggested remuneration sufficient and that as an incentive he proposed to give to the respondent additionally 25% of all prize money won by his horses. In his evidence the respondent appears, first of all, to have agreed that this conversation took place but subsequently he claimed that it was his suggestion that the appellant should pay for the upkeep of the horses and that in return he, the appellant, should receive 75% of the prize money won by the respondent's horses. On this aspect, at least, the respondent's evidence is open to grave doubt but the manner in which his evidence on this point was given cannot be regarded as a decisive factor on this appeal, for the validity of any criticism of the manner in which it was given was, particularly in view of the many features of the case, essentially a matter for the learned trial judge.

"Kevalto" was purchased about November 1947 for the sum of £150. Again, the appellant says the arrangement was that this sum should be paid out of future prize money won by his horses and, as on the previous occasions, the certificate of registration of this horse was transferred to the respondent. The vendor of this horse, one Walker, was called as a witness and it is, perhaps, not without significance that he denies that he agreed to accept payment of the purchase money out of future winnings of the appellant's horses.

We have attempted only to give some general indication of the issues involved in this case before proceeding to the reasons which prompted the learned trial judge to dismiss the suit. Indeed, it would not be of assistance to

traverse every detail of the evidence which his Honour thought "produced a puzzling and difficult set of issues of fact". Nevertheless the appellant's case was, in our opinion, doomed to failure when the learned judge found, and on the evidence, we should think, rightly found, that the appellant's explanation of why all three horses were registered in the name of the respondent was quite unconvincing, that at Goulburn the respondent was represented to Edgerton as the purchaser of "Jack Hope" and that the balance of the purchase money for this horse, namely £200, was not paid in the manner and at the time asserted by the appellant, but was paid at the respondent's home by money shown to have been withdrawn from his wife's savings bank account two days before. His Honour was not impressed by the evidence that this sum found its way into Mrs. Wilson's bank account as the result of a loan from Toms but acceptance of this evidence was by no means a condition precedent to his Honour finding as he did and it is beyond question that an amount of £200 was deposited in Mrs. Wilson's savings bank account on 3rd June, 1947, and that a similar sum was withdrawn two days later. It is possible, of course, that the sum which was then withdrawn was utilized by the respondent and his wife for some other purpose, but a finding to this effect would not be justified on the evidence and among the very many uncertainties arising from the oral accounts of the transactions between the parties it is a factor which tells heavily against the appellant. Indeed, once it appears that the balance of £200 was paid in the manner deposed to by the respondent serious fault must be found with the appellant's assertion that this sum was paid to Edgerton out of his own moneys whilst en route to Maitland. Moreover, the reflection on this part of his evidence must cast considerable doubt on his recollection and account of the other features of the first and subsequent transactions.

Counsel for the appellant, however, contended that the respondent's case was highly improbable whereas that of the appellant was not and that this was a circumstance to which the learned trial judge paid little or no attention. In our view, however, there is no substance in this criticism. A full consideration of the evidence leaves us with the conviction that there are at least as many improbabilities in the appellant's version of the various transactions and attendant circumstances as there are in the version deposed to by the respondent and the witnesses called in support of his case. Notwithstanding this fact, however, the plaintiff's case was as his Honour says strongly supported by a number of witnesses some of whom impressed him favourably. In particular his Honour referred to the witnesses Baumgartner, Smith, Arndell and Casey and also to the appellant's son K. A. McDonald and his brother W. T. McDonald. Baumgartner said that on an unspecified occasion the respondent brought a number of horses, including two of those in dispute, to the witness's property of Cross Roads, near Liverpool, and that after they had been placed in a paddock, presumably for agistment, he asked the respondent which horses belonged to him and which to the appellant. In reply, he says, the respondent said that the appellant owned "Billy's Hope", "Kevalto" and "Jack Hope". It may be not unimportant to observe that "Jack Hope" was not one of the horses which had been brought to Baumgartner's property. Smith says that in the course of a casual conversation with the respondent at an agricultural show in 1949 he remarked to the respondent that the appellant was very fortunate in having bought a horse like "Jack Hope" for £350. The respondent, he says, said that the appellant had only paid £300 for it. The witness Arndell, a horse trainer, deposed to a conversation which he says took place at Harold Park Racecourse about September 1951. On this occasion he says that he asked the respondent how much he wanted for

"Jack Hope" and that the respondent replied that he was not for sale and that "the old fellow who owns him thinks the world of him and money would not buy him". Casey, who apparently has acted as an honorary supervisor of trotting events at the Sydney Sports Ground, says that on one occasion he rang the respondent and complained that none of the three horses in dispute had been brought to the Sports Ground as arranged, whereupon the respondent is alleged to have said that the appellant would not allow him to bring them out and that he could not do anything about it unless Casey got in touch with the appellant and obtained his permission. Finally, K. A. McDonald says that on occasions the respondent referred to the horses in dispute as "his father's horses" whilst W. T. McDonald gave evidence of a similar nature.

Concerning this body of evidence his Honour said:

> "An explanation of why the defendant should have made such statements may be that the plaintiff had a great interest (in a non-proprietary sense) in the horses in question and that the defendant who is a man of little education but of some shrewdness and ability in the appraisal and training of trotting horses, and to whom the plaintiff was a generous patron; to humour the plaintiff and to protect himself from enquirers seeking information as to the horses for betting purposes was prepared to and did represent the plaintiff's interest as a proprietary one. This is not the explanation given by the defendant who simply denies having made the relevant portions of the statements attributed to him by the witnesses".

Counsel for the appellant, however, complains that his Honour, having been favourably impressed by these witnesses and unfavourably impressed by the evidence of the parties themselves and by that of witnesses who could not be said to be independent should have relied upon this evidence and resolved the matters in issue in favour of the appellant. It was, it is contended, an unsound approach on the part of his Honour to seek an explanation for conduct on the part of the respondent which he believed took place and which the defendant simply denied and, accordingly, concerning which he proffered no explanation.

But in substance the contention of counsel for the appellant, if accepted, would lead to the rejection of his Honour's finding as to the manner in which the balance of purchase money for "Jack Hope" had been paid for such a finding would be quite inconsistent with the conclusion that the appellant was the owner of that horse. In our opinion his Honour's comment on the conduct of the appellant in making or assenting to statements tending to show that he was not the owner of the horses in question was perfectly legitimate. But it was not a comment which influenced the finding in the respondent's favour that the balance of the purchase money for "Jack Hope" had been paid in the manner asserted by him; that finding was made quite independently upon evidence which, in part, was not in dispute and which, in part, was accepted by his Honour and led him without doubt to the conclusion that "Jack Hope" had been, substantially, purchased out of money belonging to the respondent or his wife and not out of moneys provided by the appellant. Such a conclusion led inevitably to the rejection of the appellant's assertion, which was a vital factor in his case, that he had, as the purchaser of "Jack Hope", provided and paid the balance of purchase money to Edgerton.

In these circumstances we can see no reason why his Honour's ultimate conclusion should have been materially affected by evidence of somewhat vague and indefinite admissions alleged to have been made by the respondent from time to time. The evidence was by no means conclusive and, in a case of this nature, is quite open to the comment which his Honour made. It would, of course, be an entirely different matter if this were the only evidence in the case to which any credence could be attached but this was not the position in which his Honour found himself. As his Honour says he was left with no doubt that the balance of purchase money for "Jack Hope" was not paid in the manner or at the time alleged by the appellant but on the contrary was made in the manner and at the time

alleged by the respondent. If, being of this firm opinion, his Honour had, on the strength of the alleged admissions of the respondent, found that the appellant was the purchaser of "Jack Hope" how could the former's evidence on this point have been explained? Any attempted explanation would be open to much weightier criticism than can be directed to his Honour's comments concerning the respondent's alleged admissions.

There are, as his Honour says, many unsatisfactory features in both the case of the appellant and the case of the respondent but once the finding is reached that "Jack Hope" was purchased substantially out of moneys belonging to the respondent or his wife and that the purchases of the other two horses were not made on terms that any part of the purchase money should be paid out of future winnings, the learned trial judge, in our opinion, had no alternative but to dismiss the suit. It may be said with some force that many features of the respondent's case were unsatisfactory but such a comment can avail the appellant nothing, particularly when evidence, both oral and documentary, indicate clearly that vital issues should be resolved against him and when his own evidence and that called to support his case fails, by reason of its deficiencies and unsatisfactory nature, to discharge the onus which he carried. In the circumstances we are of the opinion that the decree dismissing the suit should stand and accordingly that this appeal should be dismissed.