JAMES WORTHINGTON (DEFENDANT)... APPELLANT; 1883

*Mar. 19.

AND

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ANGUS PETER MACDONALD (PLAINTIFF) AND RANDOLPH MACDONALD (DEFENDANT).. ..... } RESPONDENTS.

*Jan. 16.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Articles of partnership, construction of—Partners, rights of.

The respondents having on hand large contracts to fulfil entered into partnership with the appellant under the style of *J. W. & Co.* The respondent *A. P. M.* subsequently filed a bill in Chancery against *W.* (the appellant) and his two sons co-partners, asking for a decree declaring him and his two sons entitled to receive credit to the amount of $40,000, the estimated value of certain plant, etc., used in the construction of the works done by the partnership. The article in the deed of partnership executed before a notary public in the Province of *Quebec*, under which the respondent claimed to be entitled to credit of $40,000, is as follows:—

"The stock of the said partnership consists of the whole of the plant, tools, horses and appliances now used for the construction of said works by the said parties of the first part *A. P. M. & Sons;* also all quarries, steam tugs, scows; and also all the rights in said quarries that are held by the said parties of the first part, or any of them, the whole of which is valued at the sum of $40,000, and is contained in an inventory thereof hereunto annexed for reference after having been signed for identification by the said parties and notary; but whereas the said plant, tools, horses, appliances, steam tugs, scows, quarries and other items had been heretofore sold by the said party of the first part to the firm of *M. & W.*, of the city of *Montreal*, hardware merchants, to secure them certain claims which they had against the said *A. P. M. & Co.*, for moneys used in the construction of the works referred to, to the extent and sum of about $24,000 and interest; and whereas the said *J. W.* has paid said amount of

* PRESENT—Sir W. J. Ritchie, C. J.; and Strong, Fournier, Henry and Gwynne, JJ.

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$24,000 and redeemed said plant, tools, horses and appliances and quarries, steam tugs and scows, &c., and now stands the proprietor of the same under a deed of conveyance; it is hereby well agreed and understood that the said plant, tools, horses and appliances that are or may be put on the said work shall be and continue to be the entire property of the said *J. W.* until such time as he shall have realized and received out of the business and profits of the present partnership a sum sufficient to reimburse him of the said sum of $24,000 and interest so advanced by him as aforesaid, as also any other sum or advances and interests which shall or may be paid or advanced to the present firm or partnership, after which time and event the whole of the said stock shall become the property of the said firm of *J. W. & Co.*, that is to say: That one-half thereof shall revert to and belong to the parties of the first part, and the other half to the said party of the second part, as the said *J. W.* has a full half-interest in this contract and all its profits, losses and liabilities, and the said *A. P. M.*, *W. E. M.* and *R. M.*, parties of the first part, jointly and severally, the other half-interest in the same."

There was evidence that the plant had cost originally $57,000, and that it was valued in the inventory at $40,000 at the r quest of the appellant; it was also shown and admitted that the profits of the business were sufficient to reimburse the appellant the sum of $24,000 and other moneys advanced, and that there was still a large balance to the credit of the partnership.

Held,—(*Henry* and *Gwynne*, JJ., dissenting,) that the plant, &c., furnished by the respondents having been inventoried and valued in the articles of partnership at $40,000, the respondents had thereby become creditors of the partnership for the said sum of $40,000, but as it appeared by the said articles of partnership, that the said plant was subject at the time to a lien of $24,000, and that said lien had been paid off with the partnership moneys, the respondents were only entitled to be credited, as a creditors of the partnership, with the sum of $16,000, being the difference between the sum paid by the partnership to redeem the plant and the value at which it had been estimated by both parties in the articles of partnership.

APPEAL on behalf of *James Worthington*, one of the defendants in a suit of *Macdonald* v. *Worthington*, instituted in the Court of Chancery of *Ontario*, from the

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judgment of the Court of Appeal for *Ontario* (1) which reversed the decree pronounced by the Court of Chancery, said decree having dismissed the plaintiff's bill with costs and said judgment in appeal having reversed said decree and granted the plaintiff a decree referring it to the master to take the usual partnership accounts, &c.

The bill in this cause was filed on 27th October, 1880, by *Angus Peter Macdonald* as plaintiff against the defendants *Worthington* and *Macdonald*. By articles of agreement bearing date the 29th March, 1875, the plaintiff and the defendants the *Macdonalds* entered into a partnership with the defendant *Worthington;* the 4th article of partnership, the only material one in this case, is given at length in the head-note. The bill was filed to have it declared that the plaintiff and the defendants *Macdonald* are under the agreement in question entitled to a credit of $40,000 in the books of the firm of *Macdonald* and *Worthington*, being the alleged value of the plant formerly owned by the plaintiff and the defendants the *Macdonalds*.

The bill asked that it should be declared that according to the true construction of the agreement the *Macdonalds* were entitled to this credit and in the alternative that if necessary the contract should be reformed by inserting a provision giving to the plaintiff and the defendants the *Macdonalds* credit for the said sum of $40,000.

The cause came on for trial before his lordship, Vice Chancellor *Proudfoot*. The Vice-Chancellor was of opinion that according to the true construction of the contract the plaintiffs are not entitled to the credit of the $40,000 claimed by them. After hearing the evidence for the plaintiff his lordship was also of opinion

(1) 7Ont. App. R. 531.

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that there was no evidence upon which the court would be justified in rectifying the contract.

The cause was heard in appeal before the Court of Appeal for *Ontario* and the said court granted a decree rectifying the agreement in question by inserting a provision to the effect that the plaintiff and the defendants *Macdonald* are entitled to a credit of $40,000, the value of the said plant. From this decision the present appeal was brought.

Mr. *C. Robinson*, Q.C., and Mr. *J. R. Metcalfe* for appellant, and Mr. *D. McCarthy*, Q.C., and Mr. H. *Cameron* for respondents.

The points relied upon and authorities cited by counsel sufficiently appear in the judgments hereinafter given.

RITCHIE, C.J.:—

The Bill in this cause was filed on 27th October, 1880, by *Angus Peter Macdonald*, as plaintiff, against the defendants *Worthington* and *Macdonald*. By articles of agreement bearing date the 29th March, 1875, the plaintiff and the defendants the *Macdonalds* entered into a partnership with the defendant *Worthington*. The fourth article of the partnership deed being as follows:—

ARTICLE FOURTH.

The stock of the said partnership consists of the whole of the plant, tools, horses and appliances now used for the construction of said works, by the said party of the first part; also all quarries, steam tugs, scows; and also all the rights in said quarries that are held by the said party of the first part, or any of them, the whole of which is valued at the sum of forty thousand dollars, and is contained in an inventory thereof hereunto annexed for reference after having been signed for identification by the said parties and notary; but whereas the said plant, tools, horses and appliances, steam tugs, scows, quarries and other items had been heretofore sold by the said party of the first part to the firm of *Morland & Watson*, of the City of *Montreal*, hardware merchants, to secure them certain claims

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which they had against the said *A. P. Macdonald* & Company, for moneys used in the construction of the works referred to, to the extent and sum of about twenty-four thousand dollars and interest; and whereas the said *James Worthington* has paid said amount of twenty-four thousand dollars and redeemed said plant, tools, horses and appliances and quarries, steam tugs and scows, &c., and now stands the proprietor of the same under a deed of conveyance; it is hereby well agreed and understood that the said plant, tools, horses and appliances that are or may be put on the said work shall be and continue to be the entire property of the said *James Worthington* until such time as he shall have realized and received out of the business and profits of the present partnership a sum sufficient to reimburse him of the said sum of twenty-four thousand dollars and interest so advanced by him as aforesaid, as also any other sum or advances and interests which shall or may be paid or advanced to the present firm or partnership, after which time and event the whole of the said stock shall become the property of the said "*James Worthington* & Company," that is to say: The one-half thereof shall revert to and belong to the party of the first part, and the other hal to the said party of the second part, as the said *James Worthington* has a full half-interest in this contract and all its profits, losses and liabilities, and the said *A. P. Macdonald, W. E. Macdonald* and *Randolph Macdonald*, parties of the first part, jointly and severally the other half-interest in the same.

The bill was filed to have it declared that the plaintiff and the defendants *Macdonald* are, under the agreement in question, entitled to a credit of $40,000 in the books of the firm of *Macdonald & Worthington*, being the alleged value of plant formerly owned by the plaintiff and the defendantst he *Macdonalds*.

The bill asks that it should be declared that according to the true construction of the agreement, the *Macdonalds* are entitled to this credit, and in the alternative that, if necessary, the contract should be reformed by inserting a provision giving to the plaintiff and the defendants, the *Macdonalds*, credit for the said sum of $40,000. The cause came on for trial before his lordship, Vice-Chancellor *Proudfoot*. The Vice-Chancellor was of opinion that according to the true construction of the contract, the plaintiff is not entitled to the credit of the $40,000

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claimed by them. After hearing the evidence for the plaintiff, his lordship was also of opinion that there was no evidence upon which the court would be justified in rectifying the contract.

The cause was heard in appeal before the Court of Appeal for *Ontario*, and the said court upheld the decision of the Vice-Chancellor, so far as the construction of the contract is concerned, but reversed his decision on the other branch, and granted a decree rectifying the agreement in question by inserting a provision to the effect that the plaintiff and the defendants *Macdonald* are entitled to a credit of $40,000, the value of the said plant. From this decision the present appeal is brought.

I do not think, in this case, any question of reforming the contract arises. I think the clear intention of the parties to be gathered from the deed and the surrounding circumstances and acts of the parties was, that this plant was to be taken into the partnership as capital and the amount was carefully fixed and inventoried for that purpose after full discussion, it being *Macdonalds'* interest to get its value established at a high, and *Worthington's*, on the contrary, at a low rate.

I can discover nothing whatever to indicate that Mr. *Worthington* was to have a bonus for entering into the co-partnership, nor that the plant was to be a present to him, on the contrary the care that was taken to estimate and fix the value of the plant, and to have it duly inventoried in accordance with the principles of the law regulating partnership matters in the Province of *Quebec*, in reference to capital contributed by individual partners which consume by use or deteriorate by keeping, or which are contributed at a fixed valuation, shows conclusively that the plant, less the amount due *Morland, Watson & Co.*, was to be treated as put in by the *Macdonalds*, to be accounted for to them on the final winding up of the partnership accounts.

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It is, in my opinion, now a mere question of the taking of a partnership account, *Macdonald* being, in my opinion, entitled to a credit on account of the plant, but not to the amount of $40,000 as claimed.

The value of plant was arbitrarily fixed and inventoried at $40,000, in my opinion, for the express purpose of establishing that sum as the amount to be taken into the capital account of the partnership.

This plant was subject to a payment to *Morland, Watson & Co.* of $24,000 advanced by them to *Macdonald*, and they held the property in security for the re-payment of such advances.

This sum *Worthington* agreed to advance to discharge *Morland, Watson & Co's.* claim, to be repaid by the partnership out of the profits to be made from the contract. *Worthington* did advance this amount and was repaid in the manner contemplated, and when so repaid to that extent, the partnership, not the individual partners, was interested in the plant as a partnership capital asset, which both parties in effect contributed, having been to that extent paid for by the earnings to which each were equally entitled. This left the difference between the $24,000 thus paid and the $40,000, or $16,000 as capital put into the partneship to be credited to the individual partner by whom it was contributed, who, clearly was *Macdonald*, to whom the plant belonged, minus the amount of *Morland's* claim which the firm discharged, and for which *Macdonald* would be no more entitled to be credited than *Worthington*, the amount having been paid by earnings of the concern in which they were equally interested.

The judgment, therefore, of the Appeal Court was, in my opinion, wrong in adjudging that *Macdonalds* were entitled to a credit of $40,000 instead of for $16,000, being the full amount of any individual interest they

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had in the plant, and, therefore, the only amount they contributed to the capital or for which they are entitled to a credit.

STRONG, J.:—

The contract of partnership between the parties to this cause was entered into at *Montreal* in the Province of *Quebec*, and was in the form of a notarial deed duly passed before a Notary Public. The parties were all resident at *Montreal*, and as nothing appears in the evidence to the contrary we must presume that they were also domiciled there. The rule *locus regit actum* therefore applies to the contract and the construction of it, and the rights of the parties thereunder are to be governed by the law of *Quebec*. That law is, however, according to the general rule, to be presumed to be the same as the law of *Ontario*, the *lex fori*, except in so far as it is established by the evidence to be different from it (1). Whether the evidence does sufficiently show what the law of *Quebec* applicable to this contract is, is a matter of some doubt (2). Two witnesses were called for this purpose, who appear to be competent to prove that law as experts. One of them is Mr. *Normandeau*, the notary who prepared the deed, the other was the late Mr. *Ritchie*, a distinguished advocate and Queen's counsel of the *Quebec* bar, practising at *Montreal*. They do not state what the law of the Province of *Quebec* upon the points involved is, but merely refer to the Civil Code of *Lower Canada*, as containing in the title on partnership, the law which regulates the rights of parties under contracts like the present. The authorities before cited seem to show that it is not sufficient proof of foreign law thus to produce a Code or Statute, without showing by the evidence of experts, what the

(1) Westlake, Int. Law, 323.
(2) *Baron de Bodes Case*, 8 Q. B. 250; *Sussex Peerage Case*, 11 C. & F. 141, 117.

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written law so referred to actually establishes. But it may be that, as this court is an Appellate Court having to determine the law of *Quebec* on appeals from that Province, we ought to follow the example of the House of Lords, which in an appeal from *Scotland* will take judicial notice of the law of *England*, and will not consider itself bound by the evidence of that law given to the courts in *Scotland* (1). I am of opinion, however, that we need not now decide this preliminary question, for after the best consideration I have been able to give this case, it does not appear to me that it makes any practical difference whether we apply the law of *Quebec* or the English law prevailing in the Province of *Ontario*, inasmuch as the legal results must be the same under either system. I will then first consider the questions presented for our decision according to the principles of English law. In taking partnership accounts, Lord *Hardwicke* lays it down that: "Each is entitled to be allowed as against the "other everything he has advanced or brought in as a "partnership transaction" (2). This is of course only meant to be applied *primâ facie*, and is a rule liable to be excluded by the agreement of the parties, which agreement again may be shown either by the express terms of the contract or by implication. There is here no dispute so far as certain material facts are concerned. The *Macdonalds* had these two contracts with the government. They admitted the appellant to a partnership with them for the purpose of carrying out the works to be performed under the contracts. The shares of the partners in profit and loss were accurately ascertained by the articles to be equal as between the appellant on the one side and the *Macdonalds*, father and sons, on the other. The only question is whether the plant, which

(1) See *Douglas* v. *Bruce*. 2 Dow. & C. 171.

(2) *West* v. *Skip*, 1 Ves. Sr. 242; Lindley on Partnership, 4 ed. 973.

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was valued, in a inventory intended to be annexed to the deed, at $40,000, and which was requisite for carrying on the works, and which at the time of the formation of the partnership, was the property of the *Macdonalds*, is to be regarded as having been contributed by them to the new firm as a bonus or capital for which they were not to be entitled to any credit in account, or whether it is to be considered as having been sold by them to the firm for $40,000, and that as a consequence they are entitled to receive credit in taking the accounts for this $40,000. *Primâ facie*, if there had been no valuation and no agreement as to the value or price of this plant, I take it to be clear that it would have remained the property of the *Macdonalds*. There is, however, an express provision in the 4th article of the partnership deed, that it shall become partnership property, and the shares which the partners are to have in it are expressly defined. This was an unnecessary provision, as the law would have implied precisely what the articles state, namely, that in this as in all other partnership assets, the shares are as between the appellant, on the one hand, and the three *Macdonalds* on the other hand, to be equal. The 4th article declares that this plant "is valued at the sum of $40,000 and is "contained in an inventory thereof hereunto annexed "for reference after having been signed for identifica-"tion by the said parties and notary." The question is then reduced to this: does this valuation taken in connection with the surrounding circumstances, and with the presumption that all parties are to be entitled to an allowance in account for what they bring into the partnership, except in so far as they are expressly excluded from the right to such an allowance, indicate that the *Macdonalds* were to be entitled to a credit for the amount of this valuation. And I am of opinion that upon a fair interpretation of these articles of part-

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nership, this is the true construction of this fourth article. The plant in question was indispensible for the purposes of the new firm, to enable them to continue their works, and if they had not purchased the old plant of the *Macdonalds*, they must have procured it elsewhere. If no provision had been made that the property in the plant should vest in the firm, it would have remained the property of the *Macdonalds*, and though they might have permitted the firm to use it, at the termination of the partnership they would have been entitled to the exclusive possession of it. Then, for what purpose can it be suggested that this valuation was affixed to the plant, if it was not to show that the amount of the valuation was to be considered a contribution by the *Macdonalds* to the capital of the firm? The only answer given to this is, that we are to assume that the *Macdonalds* intended to give the appellant a bonus of $20,000 to come into the partnership. Nothing in the articles themselves warrant any such assumption, the probabilities, as forcibly pointed out in the judgment of the learned Chief Justice of the Court of Appeal, are all against it, and from the history which we have in the evidence of the negotiations which preceded the conclusion of the agreement, such a proposition never appears to have been made by either party. Then the bargaining which took place between the parties preceding the passing of the deed respecting the amount of the valuation, which was first placed by the *Macdonalds* at $57,130, was objected to by the appellant, and afterwards reduced to $40,000 to meet his views, can be explained in no other way but upon the hypothesis that a sale of the plant by the *Macdonalds* to the firm was what was intended by both parties. It has been argued that by the agreement thus construed, the appellant would be placed under a great disadvantage, and would, in effect, be paying a

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premium for his admission to the partnership. That no such consequence follows is, I think, manifest from the consideration that the plant being obviously requisite for carrying on the works, the same amount of capital as that for which it was purchased from the *Macdonalds* would have been, in any event, necessarily expended in acquiring it. The fourth article of the partnership deed must therefore be construed upon the principle of the maxim "*Œstimatio facit venditionem*," a rule which has an extensive application in French law, with which alone the notary who prepared the deed was familiar, and which is particularly applied to cases like the present, when capital brought into the partnership by one of the partners, not in money but in property, which is handed over in specie, is inventoried and valued (1), in which case, says *Troplong*, the valuation is taken to show that the intention of the contracting parties has been to render the partnership a debtor for the valuation affixed in the inventory instead of for the things themselves. If, however, I am wrong in the conclusion that the respondents are entitled to this credit, upon the construction of the articles, or rather as a matter of account not excluded by the articles, I entirely agree with the learned Chief Justice of the Court of Appeal that the evidence is amply sufficient to entitle the respondents to a rectification of the deed. The barganing which took place prior to the execution of the articles respecting the valuation, the respondents holding out for the higher amount of their original valuation and the appellant insisting on an abatement, clearly shows that they placed themselves towards each other, as regards this plant, in the attitudes of sellers and buyer, and can only be accounted for on that supposition, and excludes the inference that the plant was to be a gratuitous contribution to the capital by the

(1) Troplong Contrat de Société, Nos. 595, 596.

respondents. A difficulty about rectification, however, arises from this deed having been a notarial instrument executed in the Province of *Quebec*, which, according to the law of that Province, must remain in the repository of the notary, and cannot be altered except upon a peculiar proceeding known to the law there called, "*Inscription de faux*" or improbation. The original cannot, therefore, be produced for the purpose of rectification, and I do not see how a rectification of the mere notarial copy can be substituted for it. I observed that the order of the Court of Appeal says nothing about rectification, although the judgment of the learned Chief Justice certainly points to that as the proper relief to be given.

In the view I take, however, the order of the Court of Appeal is perfectly correct in directing, not a variation of the deed, but that the master, in taking the account, should give credit to the respondents for the amount of the valuation. I do not, however, agree that the amount for which credit should be given should be the full amount of the inventory value without any deduction by way of debit. Considering, as I do, that this was in effect a sale of this property by the respondents to the partnership firm to be regarded for this purpose, according to the mercantile notion, as a distinct legal entity from the individual partners composing it, we find that the price was $40,000, but then, on account of this price, a sum of $24,000 has already been paid by the partnership. This $24,000 was the amount for which *Morland, Watson & Co.* held a charge upon the plant, at the date of the partnership agreement, to secure which amount—and in order, I suppose, to get over the difficulty occasioned by the impossibility, according to the law of *Quebec*, of validly hypothecating movables—a formal sale of the plant had been made to them upon the terms that they should re-sell it

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to the respondents upon their debt of $24,000 being paid off. This $24,000 was in the first place paid by the appellant, and for this amount he was afterwards recouped by the partnership. It is clear, therefore, that of the original price of $40,000 which the partnership was to pay as the price of this plant, $24,000 has actually been paid, leaving a residue of $16,000 only unpaid, and the respondents have, therefore, only a right to a credit for this amount, for it cannot, of course, be pretended, in the face of the valuation, that the $40,000 was to be allowed over and above the $24,000 due to *Morland, Watson & Co.* The order of the Court of Appeal should, therefore, be varied by inserting $16,000 instead of $40,000, or by adding a direction to the master to charge the respondents with the amount paid out of the partnership assets to *Morland, Watson & Co.*

If we are to consider the law of the Province of *Quebec* as governing the case, either because it is sufficiently in evidence from Mr. *Ritchie* having deposed that it was contained in the Code, or for the reason that the *Ontario* courts ought to take judicial notice of that law, inasmuch as the Code derives its force from and is in effect part of a statute of the late Province of *Canada*, or for the reasons already referred to, that this court should follow the precedent afforded by the practice of the House of Lords in Scotch appeals, I think it will make no difference in the result. The general provisions of the Code as to the interpretation of contracts contained in the articles 1013 to 1021, inclusive, with a few exceptions not applicable here, lay down the same rules as those which apply to the construction of contracts according to the law of *England.* In taking the account at the dissolution of the partnership and making the partition of the property of the partnership (art. 1898) each partner is entitled to be credited with what he has brought into the partnership, unless his right to such

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a credit is excluded by agreement, or (according to some authors, whose opinions are again controverted by others) (1), by a presumption which is to be made in the particular case of one partner alone putting in capital and contributing nothing else, and the other only contributing his services,—a case with which we have nothing to do under the facts now before us.

And according to the interpretation placed on art. 1846, property contributed to the partnership at a fixed valuation (as in the present case), is considered to be sold to the partnership upon an application of the rule *æstimatio facit venditionem*, which is well explained by *Troplong* in No. 595 of his Contrat de Société. The law of *Quebec*, if we ought to apply it, which, however, I doubt, would therefore lead to the same result in all respects, with the single exception of relief by way of rectification, as the English law.

I am of opinion that the order of the Court of Appeal should be varied by reducing the amount for which the respondents are entitled to credit for $16,000, and that subject to this variation the order should be affirmed.

I think there should be no costs on either side, either here or in the Court of Appeal, both parties having failed in establishing the propositions for which they contended.

FOURNIER, J. :—

A. P. McDonald, l'Intimé, ayant un contrat avec le gouvernement pour des travaux sur le canal de *Lachine* s'élevant à au delà d'un million de dollars, et éprouvant des difficultés sérieuses à se procurer les moyens pécuniaires pour en poursuivre l'exécution, fit des démarches

(1) See in favour of this view Troplong société Nos. 122, 125; Delangle No. 699; Duvergier société No. 204; and against it Duranton 717, No. 408 *et seq.*; Pardessus vol. 4, No. 990; Allauzet Droit Commercial, ed. 5, vol. 2, No. 421 *et seq.*

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pour trouver un associé qui pût faire les avances de fonds nécessaires. Après quelques tentatives inutiles auprès de capitalistes étrangers, il s'adressa, à la suggestion de *C.J. Brydges*, à l'Appelant et entra en négociations avec lui pour la formation d'une société pour la continuation des travaux en question. Les conditions d'arrangement furent débattues avec soin, et surtout celle relative à l'évaluation du stock d'outillage (plant) qui fait l'objet de la difficulté en cette cause.

L'Intimé qui avait déjà dépensé tant en travaux préparatoires qu'en travaux d'exécution de ce contrat une somme de $190,000, avait un grand intérêt à conserver son contrat.

Dans le cours de ses travaux, l'Intimé ayant été obligé d'emprunter une somme de $24,000 de MM. *Morland Watson* et Cie, marchands de *Montréal*, leur fit une vente de son outillage sous forme de nantissement et de sûreté collatérale pour le remboursement de la somme empruntée. D'après ses conditions avec *Morland, Watson* et Cie, l'Intimé avait le droit de rentrer en possession de sa propriété en les remboursant ; mais lors de ses négociations avec l'Appelant, il n'était pas en état de le faire. C'est ce qui l'amena à faire avec ce dernier les conditions consignées dans l'art. 4 de l'acte de société ainsi conçu (1).

On voit que la première partie de cet article contient la déclaration que le fonds social "The Stock of the said partnership" consiste dans tout l'outillage alors employé dans la construction des dits travaux par la partie de première part au dit acte, l'Intimé et ses deux fils associés ; il en est de même des carrières, remorqueurs, etc, et aussi des droits dans les dites carrières possédées par la dite partie de première part, le tout désigné dans un inventaire signé par les deux parties et le notaire, et évalué à $40,000.

(1) See Page 330.

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En déclarant que cet outillage composait le fonds social, était-ce l'intention des parties que cette mise de l'Intimé entrât dans la société pour devenir un objet commun, ou bien cette mise devait-elle être prélevée par l'Intimé avant partage des bénéfices ?

Ordinairement ceux qui contractent une société s'expliquent sur la proportion et la nature de leurs mises respectives On ne peut présumer que les apports sont égaux que dans le cas où les parties ont gardé le silence à cet égard. Dans le cas actuel, l'Intimé *McDonald* a-t-il suffisamment déterminé son apport au fonds social pour conserver le droit de le reprendre à la dissolution de la société ? Il semble avoir pris toutes les précautions nécessaires à cet effet.

Le contrat de société dont il s'agit ayant été passé dans la province de Québec, doit, suivant la maxime *locus regit actum*, être régi par les principes du C.C. de cette province. L'art. 1846 contient au sujet des choses mises dans la société une disposition particulière à laquelle les parties, d'après leurs procédés, paraissent s'être conformées. Il y est déclaré que celles qui sont mises dans la société sur estimation arrêtée, sont aux risques de la société. Or, celle-ci n'est tenue aux risques que parce qu'elle devient propriétaire en vertu de l'estimation. L'associé qui a contribué de cette manière au fonds social devient créancier de la somme fixée par l'estimation qui détermine le montant de son apport. Comme il s'agissait dans le cas actuel d'un outillage susceptible de diminuer de valeur par l'usage, on comprend tout l'intérêt que l'Intimé avait à le faire entrer dans la société à une valeur déterminée. Cette précaution prise, il ne compromettait nullement sa position en déclarant que le fonds social se composait de l'outillage en question, car il en avait fait une vente en faveur de la société au prix de l'estimation arrêtée qui servirait au moment de la liquidation à régler ses

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droits. La preuve en cette cause fait bien voir que c'est réellement la transaction qui a été faite.

Cet outillage avait coûté $57,000 et ce n'est qu'après de longs débats qu'il fut convenu d'en porter l'évaluation à $40,000, non à $57,000. Pourquoi s'arrêter à ce chiffre si le stock en question devait devenir propriété commune des associés et si l'Intimé devait en faire le sacrifice. Le but évident de la part de celui-ci était d'obtenir crédit pour son stock avant partage, de même que le but de l'Appelant en le faisant réduire de $57,000 à $40,000 était de diminuer le montant des prélèvements à faire sur les bénéfices lors de la liquidation. Cette première partie de l'art. 4 me semble avoir simplement mis à la disposition de la société le stock en question, sans que l'on puisse en induire une renonciation de la part de l'Intimé au droit d'en être crédité lors de la dissolution de la société. Le soin tout particulier qu'il a pris de faire déterminer son apport confirme cette interprétation, qui d'ailleurs est conforme non-seulement à l'art. 1846, C. C, mais aussi à la doctrine exposée par les commentateurs sur l'art. 1851 C. N. qui contient les mêmes dispositions que l'art. de notre code.

Laurent (1) s'exprime ainsi au sujet des choses apportées dans la société sur estimation.

Enfin les choses sont encore aux risques de la société, quoiqu'elle en ait la jouissance, *lorsqu'elles ont été mises dans la société sur une estimation.* Nous avons dit, ailleurs, que l'estimation vaut vente quand les parties contractantes ont intérêt à ce qu'il en soit ainsi; on suppose dans ce cas que leur intention est de transporter la propriété des choses qui doivent être restituées par celui qui les reçoit. L'article 1851 interprète en ce sens l'estimation que font les associés des choses dont ils mettent la jouissance dans la société, sauf à eux à déclarer que l'estimation ne vaut pas vente. Comme la loi parle de *choses* en termes généraux, il faut décider qu'elle s'applique aux immeubles aussi bien qu'aux meubles.....

Comment l'estimation doit-elle se faire? L'article 1851 suppose que l'estimation est portée dans un inventaire.

(1) 26 vol., n° 276.

Tous les auteurs s'accordent à dire que ce n'est pas là une condition ; elle n'aurait pas de raison d'être. Il suffit que l'estimation se fasse d'un commun accord, n'importe dans quelle forme ; elle doit se faire de commun accord, parce que c'est sur l'intention des parties contractantes que la loi se fonde pour décider que l'estimation vaut vente. (1)

Quel est le droit de l'associé ? L'article 1851 répond que si la chose a été estimée, l'associé ne peut répéter que le montant de son estimation. Il est réputé vendeur et, à ce titre, il est créancier du prix.

Troplong. Droit civil expliqué—Société civile—parle de l'effet de l'estimation dans les termes suivants (2) :

La quatrième et dernière exception a lieu, quand la chose dont la jouissance a été mise dans la société a éte estimée (3, *Pothier* 126). C'est le cas d'appliquer la maxime ; *estimatio facit venditionem.* L'estimation fait supposer (à peu près comme dans le cas de l'article 1551 du Code civil) que la pensée des contracteurs a été de rendre la société débitrice de la prisée, et non pas de la chose même.

Duranton (3), après avoir posé le principe que les choses dont la jouissance seulement a été mise dans la société à la charge de l'associé, passe en revue les différentes exceptions qu'il reçoit soit à raison de la nature des choses, soit à raison de l'intention exprimée ou présumée des parties. A la quatrième exception en parlant des choses mises sur estimation, dit :

4o. Lorsque les choses, même autres que celles qui se consomment par le premier usage, et quoique simplement mises dans la société pour la jouissance, ont été mises sur une estimation portée par un inventaire, ou dans l'acte même de la seciété, il est clair que la perte de ces choses concerne aussi la société, et non l'associé.

Dans ce cas l'associé ne peut répéter que le montant de l'estimation.

Après avoir expliqué qu'il n'y aurait pas de distinction à faire dans le cas où il s'agirait d'immeuble, et le cas ou il s'agirait de simples meubles il fait la remarque que,

(1) *Pont*, p. 282, Nos. 399-401, et les auteurs qu'il cite.

(2) No. 595.

(3) Vol. 17, au No. 409.

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Les détériorations et la simple dépréciation concernent la société, et non l'associé, puisque celui-ci a conféré la propriété de la chose à la société par cette estimation, quoiqu'il ait entendu n'y mettre seulement que la jouissance du montant de l'évaluatien, c'est-à-dire, dans l'espèce, le droit d'en faire le prélèvement lors du partage.

Mc Donald en faisant entrer son outillage dans la société sur estimation se réservait donc en réalité le droit de prélever le montant de l'estimation lors du partage. Il agissait en cela d'après l'usage assez général des sociétés de commerce dans lesquelles les mises sont rarement confondues quant à la propriété. Le plus souvent chaque associé retire annuellement les intérêts de la mise lorsque la société a suffisamment de fonds pour ses opérations.

Je ne vois pas qu'il puisse y avoir doute sur l'intention des parties en faisant l'estimation du *plant ;* mais dans le cas où il y en aurait, il faudrait d'après l'autorité de *Duranton* (1) chercher à découvrir l'intention probable des parties ; et, pour la connaître, il y a lieu à considérer l'importance relative des mises. Comme illustration de la solution qu'il donne dans le cas en faveur de la reprise de l'apport il offre le cas suivant :

Supposons d'abord (dit-il), que tous les associés aient fait une mise en derniers ou autres biens en déclarant qu'ils mettaient ou promettaient de mettre dans la société, l'un tel objet, l'autre telle autre chose, un troisième telle sommes, sans autres explications, c'est-à-dire sans déclarer que c'est en propriété ou en jouissance seulement que consistent les mises. Si l'acte de société déclare que les contractants auront chacun telle part (égale ou inégale, n'importe) *dans les profits* ou *dans les pertes* il nous paraît évident que l'on a voulu s'associer que pour le profit ou la perte ; que la jouissance seulement, et non la propriété des mises, a été commune, et d'après cela, que chacun doit, à la dissolution de la société, retirer son apport, soit en nature, si la chose exist encore dans la société, soit la valeur si elle a été vendue ou consommée, ou si elle a péri pour le service de la société.

Il y aurait encore bien moins de doute si les objets mis par chacun des associés avaient été estimés et que les mises fussent évidemment inégales.

(1) Vol. 17, p. 437, N° 408.

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Cette dernière observation s'applique tout particulièrement au cas actuel,—*McDonald* et ses fils ayant apporté $40,000 au fonds social, tandis que *Worthington* ne s'oblige qu'à faire des avances au montant de $24,000 dont il devrait être remboursé sur les profits de la société.

A la page 439, *Duranton* cite encore le cas suivant pour faire voir que les parties ont entendu que la jouissance seulement des capitaux serait commune et qu'il y aurait lieu à leur prélèvement.

Mais supposons que Paul et Pierre aient contracté société pour cinq ans et qu'il ait été convenu que Paul y verserait 30,000 francs et Pierre seulement 10,000 fr. avec son industrie ou son travail ou simplement qu'il fournirait son industrie ou son travail ; s'il a été dit dans le contrat que chacun des associés aurait telle part (égale à celle de l'autre ou non, n'importe) dans les profits ou dans les pertes, il n'y a pas non plus de difficulté dans ce cas, car il est évident que les parties ont entendu que la jouissance seulement des capitaux serait commune, puisque c'est dans *les profits ou dans les pertes* qu'elles ont réglé les parts, et que le fonds des mises n'est point un *profit* : il y aura donc lieu au prélèvement des sommes mises par chacun d'eux, ou par l'un d'eux seulement, et les bénéfices s'il y en a se partageront suivant les proportions convenues (1).

Les autorités ci-dessus citées auxquelles il est facile d'en ajouter un grand nombre d'autres établissent positivement le droit de l'associé de prélever le montant de l'estimation des choses qu'il a apportées au fonds social. Ainsi, d'après l'article 4 de l'acte de société, et conformément aux autorités l'Intimé a droit d'être crédité pour sa mise. Il en devrait être de même d'après l'autorité de *Duranton* et les exemples qu'il en donne, lorsque les circonstances font voir que l'intention des parties a été de ne mettre en commerce que la jouissance et non la propriété des capitaux. L'acte de société et la preuve ne permettent pas de douter que l'intention de l'Intimé était d'être crédité pour le montant de l'estimation.

(1) Marcadé, vol. 7, art. 1851—Alauzet, Droit commercial—Bedarride, des Sociétés, 1, 2, 3.

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Mais d'après l'article 4 et les circonstances dans lesquelles a été formé le contrat de société en question, si l'Intimé avait ou non le droit de faire les stipulations qu'il a faites au sujet de son stock, il ne faut pas oublier qu'il existait sur ce stock en faveur de *Morland. Watson & Co*, un droit de gage au montant de $24,000, Pour retirer ce stock des mains de ces derniers, il fut convenu par le dit acte que l'appelant ferait les avances de fonds nécessaires—c'est ce qu'il a fait en payant la somme de $24,000 au moyen de laquelle il est alors devenu lui-même et devait devenir propriétaire de ce stock sous les modifications mentionnées en l'art. 4, jusqu'à ce qu'il eût retiré des profits de la société une somme suffisante pour se rembourser des $24,000 et intérêts par lui avancés ainsi que de toute autre somme qu'il aurait pu avancer pour la dite société. La société ayant réalisé des bénéfices, l'appelant a été remboursé de ses avances à même les bénéfices de la société. Que devient dans ce cas le stock qui était jusqu'alors conditionnellement sa propriété ? L'article 4 déclare qu'il a cessé de lui appartenir pour devenir la propriété de la société. Quel est le véritable sens de cette disposition ? Après la déclaration faite au sujet de l'évaluation du stock indiquant clairement l'intention de l'Intimé d'en obtenir crédit, peut-on raisonnablement croire qu'il s'est désisté de ses prétentions et que dans cette dernière partie de l'art. 4, il fait enfin le sacrifice de son stock en l'abandonnant à la société ? Mais cet abandon de sa part était déjà fait par suite de l'effet légal de l'estimation ; au lieu du stock il n'avait plus qu'une créance, le montant de l'estimation. Ce n'est pas l'Intimé mais bien l'appelant qui, devenu temporairement propriétaire du stock en question, par l'acquittement de la créance de *Morland, Watson & Co.*, s'en dessaisit en faveur de la société sur remboursement de ses avances comme il

était tenu en vertu du dit art. 4. Ce droit de propriété de la société n'a rien de contraire à la première partie de l'art. 4 qui reconnaît à l'Intimé une créance de $40,000 en échange de ses droits dans ce stock. Par le remboursement des avances faites par l'appelant elle en est irrévocablement devenue propriétaire, mais elle n'en est pas moins débitrice de l'estimation, c'est à-dire que dans le cas de liquidation elle doit tenir compte à l'Intimé de son apport.

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Mais quel doit être le chiffre réel de cet apport, sera-t-il de $40,000 comme l'a déclaré la Cour d'Appel, ou bien n'est-il pas, dans les circonstances où il a été fait, sujet à une diminution ? On sait que le stock était grevé d'une dette de $24,000, acquittée temporairement par l'appelant. Dans ce cas l'estimation de l'apport ne devrait-elle pas être diminuée d'autant ? Je le crois.

Aubry et Rau. (1), Cours de droit civil français :

D'un autre côté, chaque associé a le droit de reprendre en nature, avant tout partage, les objets qu'il n'avait mis en commun que pour la jouissance. Si ces objets ont péri ou ont été détériorés sans la faute des autres associés, celui qui les a apportés n'a droit à aucune indemnité. (Art. 1851, al. 2.) Il en est cependant autrement, lorsqu'il s'agit, soit de chose dont on ne peut user sans les consommer naturellement ou civilement, soit de chose qui, d'après une convention expresse, ou d'après leur nature et le but de la société, étaient destinées à être vendues. Dans ces deux cas l'associé a droit au prélèvement de la valeur au moment de la dissolution de la société, des choses qui ont péri, et à une indemnité à raison des détériorations qu'auraient subies celles qui existent encore. (Art. 1851, al. 2.) Du reste, les propositions qui précèdent, sont étrangères à l'hypothèse où des objets quelconques, mis en commun pour la jouissance seulement, ont été apportés sur estimation. Dans ce cas l'associé qui les a apportés, a toujours droit au prélèvement de l'estimation, et ne peut jamais répéter que ce prix. (Art. 1851.)

D'après l'art. 1851 (1846) l'apport en jouissance est attributif de propriété au profit de la société dans les cas suivants : 1. Apport de choses qui se consomment ; 2. De choses qui se détériorent en

(1) Vol. 4, p. 572.

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Ce qui est précisément le cas dans la présente cause. Voir d'après les auteurs quel est l'effet de cette estimation et le droit qui en résulte pour la partie qui l'a stipulée, etc, *Aubry* et *Rau*, Cours de droit civil français (1).

Marcadé et *Pont*, Explication du code civil (2):

4. Des choses mises dans la société sur une estimation portée dans un inventaire.—De ces choses encore, il est vrai de dire que, quoique apportées pour la jouissance, elles deviennent la propriété de la société par l'intention présumée des parties. L'estimation qui en est faite constitue en quelque sorte une vente qui rend la société propriétaire, à la charge de payer, quand elle prendra fin, le prix arbitré entre elle et l'associé au moment où elle s'est formée.

A la page 283, No. 401:

Les conséquences à déduire de là ont été déjà souvent formulées. D'une part, la propriété résidant désormais sur la tête de la société, il s'ensuit que l'extinction ou la perte de la chose ne rompt pas le contrat (art. 1867, § 3). D'une autre part l'associé n'étant plus qu'un simple créancier, non de la chose même qu'il est censé avoir vendue. mais de la valeur, il en résulte que, quoi qu'il arrive et soit que la chose existe encore en nature à la dissolution, soit que, pour une cause quelconque, elle n'existe plus, il ne pourra jamais avoir droit qu'au prélèvement du prix.

L'apport social est sans doute matière de convention. Il peut être en propriété ou en jouissance seulement. Cette dernière espèce a lieu en quatre cas principaux réglés par l'art. 1846.

Pothier, Contrat de société, (3) d'où l'Article 1846 a été extrait presque textuellement, après avoir parlé de l'apport de corps certains et déterminés, des choses qui ne se consomment pas par l'usage, dit:

Au contraire, si ces choses qu'un associé a mises dans la société, étaient des choses qui se consomment ou se détériorent en les gardant, ou qui fussent destinées à être vendues, et qui eussent été mises dans la société sous une certaine estimation portée par quelque inventaire, l'associé, qui les y a mises pour que l'associé en eût seulement la jouissance, est créancier, non des choses mêmes,

(1) Vol. 4, p. 572. (2) Vol. 7, IX, 398, p. 282.
(3) N° 126.

mais de la somme à laquelle monte l'estimation qui en a été faite, et les choses sont aux risques de la société et non aux siens.

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C'est à ce dernier avis que je m'arrête comme étant le plus propre à concilier les diverses parties de l'article 4 de manière à donner à chacune d'elle un effet plus conforme à l'intention des parties.

En conséquence je suis d'avis que le jugement de la Cour d'Appel d'Ontario devrait être réduit de la somme de $40,000 à celle de $16,000

HENRY, J.:

The respondent in this case filed a bill in the Court of Chancery in *Ontario* against the appellant asking for a decree declaring him and his two sons, *W. E.* and *Randolph*, entitled to receive credit to the amount of $40,000, the estimated value of certain plant and effects transferred by *Morland, Watson & Co.*, to the appellant, to be used in the execution of a contract in the Province of *Quebec*, taken by the appellant, in which he was interested to the extent of one moiety, and the respondent and his sons to the extent of the other moiety, under certain articles of agreement entered into between them before a notary; or, if found necessary, for a decree to reform the contract.

The fourth article of the contract under which the respondent seeks to recover is as follows:

[The learned judge read art. 4 of the agreement *ubi supra*.]

It is shown and admitted that out of the business funds of the partnership the appellant was repaid the $24,000 and interest advanced by him, and in that event the plant, &c., by the terms of the agreement, became the property of the partnership, but the respondent claims that it virtually became the property of him and his sons. It cannot be denied, for it is patent on the face of the agreement, that the appellant, in the

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words of the article I have quoted, was to have "a full half interest in this contract and all its profits, losses and liabilities." If, therefore, there was a loss he was to bear one-half of it, and, in case of a profit, he was to benefit in it to the extent of one-half. Out of the sum of the profits he was entitled to receive one-half, but the plant, &c., being under a lien, he and his co-partners each paid one-half of what was sufficient to redeem it. Had it not been redeemed by the partnership funds it would have been the sole property of the appellant. If the property in the plant had remained in *Morland & Watson*, and had been purchased from them by the partnership as it was by the appellant, it would be owned by the members of the co-partnership according to their several interests. This is exactly what the agreement provides to be the result in case of the purchase by the firm from the appellant.

If the law in *Quebec* prohibited parties from entering into such an agreement as to the ownership of the plant, &c., after the payment of the $24,000 and interest to the appellant as that shown by the article, we would hen have to consider the interests, according to law, of the several co-partners. To admit and give effect to the contention and claim of the plaintiff we should be compelled to award to him and sons property to the value of $40,000, for the purchase of which the appellant had at least paid one-half the purchase money. By the law in *Quebec* the respondent and his sons had virtually no interest in or title to the property in question, except the right to the use of it under certain limitations before the purchase of it by the appellant. The respondent and his sons were in straitened circumstances and unable to proceed with their contract, or to redeem the property from *Morland & Watson*, when the appellant came to their relief as far as necessary to enable them to continue it, and not only to recoup the losses

they appear to have previously sustained, but to participate in future net profits. Equity and law would at least require them, under the circumstances, to repay to the appellant the moiety he contributed out of the partnership funds towards the repayment of the $24,000 and interest he advanced to *Morland & Watson*. The respondent might as well have claimed any other property purchased by the firm, and for which the appellant contributed half the cost. The agreement, however, is too plain and comprehensive to admit of a doubt that after the appellant was paid out of the partnership funds the amount he paid *Morland, Watson & Co.*, with interest, he was to own one-half the property. This shows that the $40,000 named as the assets of the partnership was really not *Macdonalds* but had to be purchased by the partnership. The parties by this agreement declare that to be the destination of it in the most unequivocable and plain terms, and I cannot see how any one could fairly read it any other way. The property being valued at $40,000 was held for $24,000. The interest in it of the respondent and his sons was but $16,00, putting the case most favorably for them. They paid the half of the $24,000, and for that they claim to charge the appellant in account for $40,000, when their whole interest could not amount to over about $28,000; but the agreement entered into by them shows they were willing to take one-half interest in lieu of any claim they had. On that claim, I am of opinion, our judgement should be for the appellant. If the parties had made no special agreement as to the advance by the appellant of the $24,000 to pay off the claim of *Morland & Watson*, he, having paid that sum, would have been a creditor of the partnership to that amount, and he having one-half interest in the partnership, and that sum having been repaid to him by the partnership, his equitable interest in the stock, plant, &c, would be

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$12,000, and that of the respondent and his sons $28,000, and not $40,000, as his claim. By the agreement entered into, however, a different result is provided. It is there agreed that he is the sole owner of the stock, plant, &c., and that if he should be repaid the amount advanced by the partnership, it was agreed that he shall be the owner of the half interest in it and the respondent and his sons of the other half. To adjudge any other interest in the latter, or to allow them to rank on the partnership funds for anything beyond their half interest in the stock, plant, &c., would be in direct opposition to the provision made in the agreement and would be giving the respondent and his sons an interest contrary thereto. We need not inquire into their reasons, but several good ones are suggested by the circumstances at the time, why the *Macdonalds* entered into those stipulations? It is enough that they are easily understood and they negative the claim of the respondent The respondent, however, claims that the articles do not contain the agreement really entered into and seeks to have it reformed.

The reformation of a contract by a Court of Equity requires the exercise of the most extreme care and caution, and "to substitute a new agreement for one which "the parties have deliberately subscribed, ought only "to be permitted upon evidence of a different intention "and of the clearest and most satisfactory description," as held by Lord *Chelmsford* in *Fowler* v. *Fowler* (1).

In *McKenzie* v. *Coulson* (2), Vice-Chancellor Sir *W. James* said:

> Courts of equity do not rectify contracts. They may and do rectify instruments purporting to be made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to shew that there was an actual concluded contract antecedent to the instrument, and which is sought to be rectified; and that such contract is inaccurately represented in the instrument.

(1) 4 DeG. & J. 264. (2) L. R. 8 Eq. 753.

And again:

It is impossible for this court to rescind or alter a contract with reference to the terms of the negotiations which preceded it * * * Men must be careful if they wish to protect themselves, and it is not for this court to relieve them from the consequences of their own carelessness.

Mr. Justice *Story*, in his treatise on equity jurisprudence (1), says:

Relief will be granted in cases of written instruments, only where there is a plain mistake clearly made out by satisfactory proof.

He also says:

It forbids relief where the evidence is loose, equivocal, or contradictory, or it is in its texture open to doubt or to opposing presumptions. The proof must be such that will strike all minds alike as being unquestionable and free from reasonable doubt.

Lord *Thurlow*, in one case, said that—

The evidence must be strong, irrefragable evidence (2).

I am of opinion, for the reasons I have stated, that the appeal should be allowed, the judgment of the Appeal Court of *Ontario* reversed, and the decree of the Court of Chancery confirmed with costs.

GWYNNE, J.:—

The plaintiff and his sons, the defendants, *Edwin Macdonald* and *Randolph Macdonald*, being in partnership together as contractors, and having contracts with the Dominion Government for the construction of certain public works situate within that portion of the Dominion of *Canada* constituting the Province of *Quebec*, became indebted to *Morland, Watson & Co.*, and to divers other persons for monies advanced to the plaintiff and his said sons to enable them to proceed with the performance of the said contracts.

To secure their debt to *Morland, Watson & Co.* they

(1) Sec. 157.

(2) See also *Shelburne* v. *Inchequin*, 6 Ves. 333 and 334.

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executed, in accordance with the law of the Province of *Quebec*, a bill of sale of the plant which they had for carrying on such works. By force of the law prevailing in the Province of *Quebec* this bill of sale vested in *Morland, Watson & Co.* the absolute property in all the plant so sold to them, that law recognizing no mortgage of chattel property. It was intended, however, that to enable the plaintiff and his said sons to carry on the works which they had contracted to execute, they should have the use of the plant so sold by them to *Morland, Watson & Co.* A clause was therefore introduced into the bill of sale of the plant, to the effect that in order to secure repayment of the advances made and to be made by *Morland, Watson & Co.*, they should have the possession and control of all the property and effects mentioned in the bill of sale, by the agency of some person employed by them, but paid by the plaintiff and his sons. Accordingly, *Morland, Watson & Co.* appointed one *McCracken*, a person in the employment of the plaintiff, as their agent, and delivered the said chattels to him to retain possession for them of all the said plant and effects while the plaintiff and his sons should have the use of them to enable them to proceed with the execution of the said works. In the month of January, 1875, the plaintiff and his sons being then indebted to *Morland, Watson & Co.* in the sum of $24,000 for monies advanced upon the security of the said bill of sale, the time for re-payment of which had arrived, and being also largely indebted to divers other persons, and being so straitened in their circumstances that without considerable pecuniary assistance they could not fulfil their contracts, became anxious to obtain the assistance of a man of capital and credit to join them as a co-partner; and this, their desire, having been communicated to the defendant, *Worthington*, through a mutual friend of his and of the plaintiff,

negotiations for the formation of such a co-partnership were entered into between the plaintiff and *Worthington*. Such negotiations resulted in an agreement that a partnership should be formed between the plaintiff and his sons and *Worthington* in the event of their being able to procure the cancellation by the Government of the contracts then in existence, under which the plaintiff and his sons were carrying on the said works, and a new contract for the completion of the same to be given to the new firm, which should be known by the name of *James Worthington & Co.* It was a term in the negotiations that the defendant *Worthington* should procure to himself an assignment and transfer from *Morland, Watson & Co.* of all the plant and effects so as aforesaid sold and conveyed to them by the bill of sale executed by the plaintiff and his sons.

The government having agreed to cancel the old contracts, and the defendant, *Worthington*, having procured a deed to be executed by *Morland, Watson & Co.*, whereby all the plant and effects so as aforesaid sold and conveyed to them, were sold and conveyed to, and vested in the defendant *Worthington*, partnership articles, by notarial deed, in accordance with the law of the Province of *Quebec*, where the works were situate and where the contract of partnership was entered into, were drawn up and executed in due form of law by and between the plaintiff and his sons, of the one part, and the defendant *Worthington*, of the other part, bearing date the 29th day of March, 1875, whereby, after reciting the previous contracts under which the plaintiff and his sons had been carrying on the said works, and that they had been cancelled and a contract for the completion of the same had been given by the government to *James Worthington & Co.*, bearing date the same 29th day of March, it was declared and agreed that the above plaintiff and his sons

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described therein as parties of the first part to the said instrument had agreed to contract a partnership with the defendant *Worthington*, described therein as the party thereto of the second part, for the prosecution and completion of the said works, under the name, style and firm of *James Worthington & Co.*, under and subject to the conditions thereinafter set forth, the 4th article of which conditions was as follows:

[The learned judge then read article 4 (1).]

Now, it is to be observed that this article, in very plain terms and in strict accordance with the law prevailing in the Province of *Quebec*, recites the fact to be, that by a deed executed by *Morland, Watson & Co.* to the defendant *Worthington*, the latter had become and then was the proprietor of all the plant, property and effects which had been sold to *Morland, Watson & Co.* by the plaintiff and his sons, and it is declared to have been well agreed and understood that the same and all other plant, &c., &c., which might be put on the said works should be and should continue to be the entire property of the defendant *Worthington*, until he should be repaid, out of the profits of the partnership then formed, the said sum of $24,000 and interest, paid by him to *Morland, Watson & Co.*, and all other sums which he should or might advance to or for the said firm, and that upon such re-payment the said plant, property and effects, which are enumerated in an inventory and valued therein at $40,000, and for the purpose of identification signed by the parties and the notary, should then, and not sooner, become the property of the members of the firm of *James Worthington & Co.*, in equal moities, one of such moities to be the joint property of the plaintiff and his sons and the other the property of the defendant *Worthington*. In this manner and upon this sole condition, namely, re-payment to *Worthington* of his

(1) Ubi supra.

advances out of the business and profits of the firm of *James Worthington & Co.*, in which the defendant *Worthington* is declared to have a full half interest, does the property which the defendant *Worthington* had purchased from *Morland, Watson & Co.*, and which was then his property and not the property of the plaintiff and his sons, become the property of the co-partnership.

The works in respect of which the co-partnership was formed having been completed, the plaintiff has filed his bill, claiming that in the taking of the partnership accounts he and his sons are entitled to receive credit to the amount of $40,000, the estimated value of the said plant and effects so as aforesaid assigned and transferred by *Morland, Watson & Co.*, to the defendant *Worthington*, before the profits of the said partnership, if any there be, divisible between the plaintiff and his sons of the one part, and the defendant *Worthington* of the other part, can be ascertained in the same manner as if the said plant, property and effects had been brought into the co-partnership as the capital and property of the plaintiff and his sons, and no special provision in respect thereof had been inserted in the articles of co-partnership; and he alleges that it was never contemplated or intended that the defendant *Worthington* should have a half interest in the said property without first giving credit to the plaintiff and his said sons, for the said sum of $40,000; and that the defendant *Worthington* has no right whatever to make such claim without first giving such credit, and the plaintiff contends that such is the true construction of the articles of partnership of the 27th March, 1875, as the same are framed, or if not, that the said articles should be reformed and rectified so as to conform with such contention of the plaintiff, which, he alleges, was the true intention of all the parties to the said articles

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of co-partnership, and such in substance is the first and main part of the prayer of his bill.

The defendant *Worthington*, by his answer, utterly denies the plaintiff's contention, and upon oath alleges that during the negotiations which he had with the plaintiff, with a view to the formation of the said co-partnership, the plaintiff and his said sons were in great financial embarrassment, and unable to complete the works mentioned in the plaintiff's bill, and in consequence of such embarrassment became obliged either to abandon the said works and forfeit their outlay in the performance of the contracts, or else to obtain the assistance of some person of capital and credit to carry out and complete the same; and he alleges that being a person of capital and credit sufficient to complete the works, and after repeated offers by the plaintiff to give to him one-half interest in the said contracts and in the said plant and stock in consideration of his assistance, he, the said defendant, agreed to the formation of the said co-partnership, and that the same was entered into by the defendant *Worthington* upon the express condition and understanding with the plaintiff and his said sons, that all the plant and stock set forth in the inventory annexed to the articles of co-partnership should be brought into the partnership upon the defendant *Worthington* being reimbursed all his advances in acquiring the same from *Morland, Watson & Co.*, and otherwise, and that thereupon he should own and have one undivided half interest in the said plant and stock, and that such undivided half interest and property of him the said *Worthington* therein, was the consideration of his agreeing to enter into the said co-partnership and to pay off and discharge the said liabilities of the plaintiff and his sons to *Morland, Watson & Co.* and others, their creditors, and to assist them with his capital and name and credit, to carry on and complete the

said works, and that it was fully understood by the plaintiff and his said sons, that the said plant and stock were to become assets of the said co-partnership firm in manner and for the consideration aforesaid, and that it never was contemplated or intended that the defendant *Worthington* should be chargeable with or accountable for, or that the plaintiff and his said sons were to get credit for the said sum of $40,000, as alleged in the plaintiff's bill. The learned Vice-Chancellor *Proudfoot*, before whom the case was tried, was of opinion that the articles of partnership were not open to the construction that was contended for by the plaintiff, that he was to get credit for the $40,000 on the taking of the partnership accounts, the effect of which credit, if given, would be to make *Worthington* to pay something over $12,000 as consideration for his being admitted as a partner, without his having any share or property in the plant and stock in which he is, by the articles, expressly given a half interest upon the purchase, by the co-partnership firm, of such plant and stock, by payment to *Worthington*, out of the business and profits of the firm, of the amount advanced by him to acquire such plant and stock from *Morland, Watson & Co.*, and as to that part of the bill which prayed for a rectification of the articles, he was of opinion that in the face of the clear denial by the defendant, upon his oath, of the plaintiff's allegations, no case for the rectification of the instrument had been made out; in fact, he was of opinion, that the whole dealing of the parties seemed to support the defendant *Worthington's* allegation of the intention of the parties rather than that of the plaintiff, and being of opinion that the plaintiff had failed to establish the case made by his bill, he made a decree dismissing the plaintiff's bill. The learned judges of the Court of Appeal for *Ontario* concurred with the learned Vice-Chancellor in the opinion that

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it was impossible to construe the articles of co-partnership otherwise than as an agreement, that upon the defendant *Worthington* being paid by the partnership the amount paid by him to *Morland, Watson & Co.* for the said plant and stock, one-half of such plant and stock and only one-half should belong to the plaintiff and his sons, and the other half to *Worthington*; but while admitting that the rule as to the rectification of instruments upon the ground of mistake was that the mistake must be mutual, and that the evidence in support thereof should be of the clearest and most satisfactory nature, they were of opinion that the evidence adduced in this case not only preponderated in favor of the plaintiff's contention, but that it was, in truth, of such weight and cogency as to exclude all reasonable doubt that the agreement, as stated by the plaintiff, was the true agreement entered into between the parties, and they, therefore, reversed the decree of V. C. *Proudfoot* and made a decree for rectification of the articles of partnership, by the insertion of a clause giving to the plaintiff and his sons credit in the accounts of the firm for the said sum of $40,000, the value of the plant, materials and appliances mentioned in the inventory annexed to the articles of partnership. The learned Chief Justice of the Court of Appeal who delivered the judgment of the court admitted, in his judgment, that the effect of the judgment would be to make *Worthington* pay over $12,000 for admission into the co-partnership; and in arriving at the conclusion which he announced as the judgment of the court, he rested that judgment upon the discussion, which, during the negotiations for the partnership, he considered to have been proved to have taken place between the parties as to the value of the plant. "This matter as to the value of the plant," (he says in his judgment) "is a piece of conduct on the part of *Worthington*

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"which he regarded as a piece of evidence of the "greatest weight, inasmuch as he thought it was consistent with no other theory than that the *Macdonalds* "were to be entitled, as between themselves and the "firm, to be credited with the agreed value of the stock "as so much capital brought in by them to the partnership."

To alter the articles of partnership which have been deliberately signed and sealed by all the parties thereto, by the insertion therein of a clause having an effect so diametrically opposite to that which, in the opinion of the courts, the articles, as executed, in plain terms express, and which terms, as the defendant *Worthington* swears, correctly express not only his intention but that of all the parties to the articles at the time of their execution, appears to me to be the making of a wholly new contract for the parties and not the rectification of an instrument purporting to express the contract which was entered into between the parties, by the insertion therein of a clause clearly established to have been omitted by mutual mistake.

If, as appears to me to be very clear, the language of the articles of partnership is so plain as to exclude, as both of the courts below have held, any other construction than that the plaintiff and his sons were to have one clear half interest in the plant, stock, &c, if and when—and only when—the co-partnership firm should, out of its business and profits, pay and reimburse to *Worthington* the amount advanced by him to purchase them from *Morland, Watson & Co.*, until which time they were, by the law of the Province in which the plant was, and in which the contract was entered into, the exclusive property of *Worthington*, it is, in my judgment, impossible to conceive how, in view of the care and attention attending the preparation of the contract and the reading of it over by the notary

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to the parties, clause by clause, before execution, a contract having an effect so diametrically opposed to that which the plaintiff now contends was the real intention and agreement of all the parties thereto could have ever been assented to and signed by the plaintiff.

The enquiry into the value of the stock and plant by *Worthington*, and the difference of opinion and discussion in relation thereto, upon which the judgment of the Court of Appeal for *Ontario* is rested, took place at the very commencement of the negotiations between the parties, and had relation, as I think plainly appears, to a very rational desire in *Worthington* to know the real value of the security which, by becoming purchaser of the plant and stock by a conveyance thereof executed by *Morland, Watson & Co.*, he should have for his advances, in case the works which were the subject of the contemplated partnership should prove to be unprofitable. It was very natural, as it appears to me, that he should be satisfied that the value set upon the security should not be in excess of its real value, fairly estimated, and that he should have an opportunity of considering whether the probable advances which he might be called upon to make should be in excess of the fair value of the proposed security. The scheme of the partnership was that *Worthington* should, as the first step to be taken, acquire by purchase from *Morland, Watson & Co.*, the absolute property in the plant and stock, to which, in case the proposed partnership should prove to be unprofitable, he should look as his sole security for the advances which he was to make in carrying on the works; but in the event of the partnership works proving to be profitable, the scheme was that the partnership firm of *James Worthington & Co.* should reimburse *Worthington* his advances and so acquire the plant and stock which then, and then only, were

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to cease to be the exclusive property of *Worthington* and to become the property of the firm, *Worthington* himself thus paying half of the monies applied to such purpose. Now, the inventory having been made and the value of the plant and stock arrived at, for the purpose of satisfying *Worthington* as to the value of the security he should have for his contemplated advances, and the articles of partnership, providing that the firm, upon reimbursing him his advances, should become the owners of the plant which should thus become partnership property, as the inventory had to be referred to for the purpose of identifying the articles which should thus become partnership property, it was not at all extraordinary that the notary should have referred to them in the manner in which he has in the articles, or that he should have mentioned in the articles the value at which the plant and stock so to become the new stock of the partnership were valued in such inventoy.

Inasmuch as the first step towards the formation of the partnership was to make *Worthington* proprietor of the plant and stock of which the *Macdonalds* had the use only by their agreement with *Morland, Watson & Co.*, they were the parties chiefly interested in having provision made in the articles for divesting *Worthington* of the property in the plant and stock acquired by him by conveyance from *Morland, Watson & Co.*; it was natural, therefore, that they should be anxious as to the provision made in the articles, as to the plant, upon the co-partnerthip paying *Worthington* the amount of his advances, and thus, as it appears to me, is naturally explained the anxiety upon this head alleged to have been exhibited at the time of the signature of the articles by one of the plaintiff's sons, who, in the language of the notary (whose version of the matter, though not very clear, is safer to

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rely upon than that of the plaintiff's son himself) enquired of him whether the clause in the articles as to the plant was plain enough that it was for the benefit of the partnership. Now, in the articles it is very clearly expressed that upon payment of his advances to *Worthington* by the partnership firm out of its business and profits, the plant and stock, &c., shall belong to the co-partners in equal shares; that is to say, one-half to the *Macdonalds*, and the other half to *Worthington*, who, in such case, should pay for his half $12,000 or one-half of whatever the amount of his advances over and above that sum was; and it seems to me so much more reasonable and so much more in accordance with the undisputed facts of the case that *Worthington* should pay such sum, as the articles executed by the parties make him pay, for a half interest in deteriorating property of the then estimated value in the whole of $40,000, and which at the close of the works for which the partnership was formed, appear to be worth only about $20,000, than that he should pay so considerable a sum to enable the plaintiff and his sons to acquire a right to obtain a credit in the taking of the partnership accounts of $40,000 to *Worthington's* prejudice, while neither in the articles nor in the negotiations leading to the formation of the partnership, does anything signifying such an intention appear, that I entirely agree with the learned Vice-Chancellor *Proudfoot* in the opinion that no case for rectification of the articles has been made. I can attach no such weight as the Court of Appeal has done to the enquiry and discussion as to the value of the plant and stock, which appear to me to have been quite consistent with *Worthington's* declaration of the intention of the parties. But, however difficult the court might find it to be to ascertain with certainty the object with which the valuation of the plant was made and referred to in the articles of

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co-partnership, it is impossible, in my opinion, consistently with the practice of the court and the doctrine upon which it proceeds in rectifying signed agreements upon the ground of mutual mistake of the parties thereto, to introduce into the articles of partnership in this case, signed and executed as they were with great deliberation, a provision of the nature asked by the plaintiff, in the face of the peremptory denial of the defendant, that any such intention or any such agreement as is averred by the plaintiff was ever entertained or concurred in by him, or thatany such intention was ever expressed to be entertained by the plaintiff, and when we find the terms of the partnership which the parties had agreed expressed in the articles of partnership in such a clear, explicit and unequivocal manner as to exclude all idea of such intention having been entertained, and to make it impossible to conceive how the partnership articles could have been signed by the plaintiff and his sons, if, in truth, such an intention had been entertained.

A view has been suggested, however, by a majority of this court, which was not suggested by the plaintiff in his bill, and which, in my judgment, is directly at variance with the case as made in the bill, and which was not suggested on the plaintiff's behalf in the argument of his learned counsel before us, namely, that in the taking of the partnership accounts *Macdonald & Sons* should have a credit given to them for $16,000 instead of the $40,000, as claimed by themselves. We have no authority whatever, in my judgment, to justify us in directing, by an order of this court, a thing to be done in the interest of the plaintiff, as if agreed upon by the parties to the partnership articles which the plaintiff himself, by his bill, admits and shows never was agreed to, and which is different from what he says was, in fact, agreed to.

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All that we have to do, in my judgment, is to determine what is the true construction of the contract entered into between the parties, as appearing in the articles of partnership deliberately executed in notarial form; and whether or not, by mutual mistake something has been inserted therein or omitted therefrom which makes the instrument purporting to express the agreement to appear to be different from what the agreement and contract of the parties in fact was, and from what was the real intention of both parties that the instrument should express.

It was not contended before us that the true construction of the articles of partnership, as executed, is, that the *Macdonalds* are entitled to have credit for $16,000 instead of the $40,000, as claimed in the bill. The sole contention was, that in respect of the plant in question they were entitled to have credit for $40,000, as in fact agreed upon by the parties, and not for any other and different sum. A decree that in the taking of the partnership accounts they shall have credit given to them for $16,000 cannot, in my judgment, be supported upon the basis that such credit is warranted by the express terms of the contract, as executed. Such a direction is, in my judgment, in direct conflict with the express terms of the contract, apparently prepared with great care and deliberation, and of this opinion were both of the courts below.

Then, under the other branch of the prayer of the plaintiff's bill, namely, that the instrument purporting to express the contract of the parties may be rectified by the insertion therein of a provision, as if omitted by mutual mistake, we cannot give any such direction. For a direction that a credit shall be given to one of the parties to a contract, which neither party pretends ever was agreed upon and which is at variance with what the plaintiff avers was agreed upon,

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certainly cannot be justified upon the ground of a mutual mistake in the omission of such a provision from the instrument purporting to express the contract of the parties. If, then, a direction that the *Macdonalds* shall, in the taking of the partnership accounts have the credit of $16,000, is neither warranted by a true construction of the contract as signed, and there is no agreement alleged by the plaintiff to have ever been made that they should have credit for such amount, while the plaintiff does allege an wholly different agreement, which the defendant peremptorily and unequivocally denies upon his oath, I am unable to understand upon what principle the direction can be supported. I entirely concur with the Court of Appeal for *Ontario*, that unless the plaintiff and his sons are entitled to the credit for the whole of the $40,000, as claimed by their bill, they cannot have credit given to them for a part of such sum, and I entirely concur with the judgment of the learned Vice-Chancellor *Proudfoot*, that they are not entitled to credit for the $40,000 or any part thereof, either upon the construction of the articles of partnership or upon any other ground whatever.

It was not contended, in the argument before us, nor in any stage of this cause, that, nor from anything that I have heard does it appear that there is any difference between the law of the Province of *Quebec* and that of the Province of *Ontario*, affecting the principles governing the construction of written contracts, or governing the rectifying or re-modelling instruments purporting to express, but which by mutual mistake fail to express what the parties in reality intended to express; and if there be any difference in the proceedings of the courts of these Provinces for effecting the latter purpose, which would present a difficulty to the courts in *Ontario* rectifying an instrument executed in

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notarial form in the Province of *Quebec*, that difficulty is quite unimportant as regards the case before us

The proper decree to be made, in my opinion, is, that upon taking of the accounts of the co-partnership (which may be taken under a decree, if the plaintiff desires it) the plaintiff and his sons are not entitled to be credited with the said sum of $40,000, as claimed by the plaintiff, but that he and his sons together are entitled to one moiety of the plant and stock, and the defendant, *Worthington*, to the other moiety thereof; and that the appeal should be allowed with costs, and that the plaintiff shall pay to the defendant *Worthington*, all his costs incurred in the case in the Court of Chancery, and that further considerations and further costs should be reserved.

Order of Court of Appeal varied.

Solicitor for appellant: *J. R. Metcalfe.*

Solicitors for respondents: *Bain, McDougall, Gordon and Shepley.*