1923
*Nov. 9.
1924
*Feb. 5.

FRED BRISCOE CARSCALLEN, EXECUTOR OF THE ESTATE OF JOHN C. CARSCALLEN (DEFENDANT) ..... APPELLANT;

AND

ETHEL CARMICHAEL AND JESSIE MAIR, EXECUTRICES OF THE ESTATE OF THOMAS G. CARSCALLEN (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Partnership—Death of partner—Continuance of business—Distribution of profits—Burden of proof

The respective testators of the parties hereto were partners in business and the respondents' testator also carried on a separate business. The moneys received therefrom and from other sources outside the partnership affairs being deposited in the partnership account. In 1910 a settlement between the parties took place and the appellant's testator was paid $2,000 by cheque drawn upon the firm account. On appeal from a former report it had been held that, on the evidence then before the court, this sum was paid to equalize the interest of the partners in the firm's assets and that the balance of moneys in the firm's bank account after such payment was made belonged to the partnership; but the matter was referred back to the Master to permit the present respondents to adduce further evidence to controvert these conclusions.

Held that it must be regarded as *res judicata* that the sum of $2,000 was paid to equalize the interests of the partners in the then subsisting assets and that the moneys in bank after the settlement were partnership assets, unless the present respondents should prove on the reference back that any part of the moneys belonged to their testator.

Held also that the evidence on the reference back had not displaced the *prima facie* case on these points made by the appellant on the first hearing before the Master.

In the result the appeal was allowed to the extent of some $300 to which the appellant was entitled.

Per Duff J.—The appeal should be allowed *in toto*.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario restoring the local master's report which had been varied by a Judge in Chambers.

The facts are stated in the above head-note.

R. S. Robertson K.C. for the appellant.

H. S. White K.C. for the respondents.

*PRESENT:—Sir Louis Davies C.J., and Idington, Duff, Anglin and Mignault JJ.

THE CHIEF JUSTICE.—I concur with the reasons for judgment stated by Mr. Justice Anglin.

IDINGTON J.—I have an impression that the judgment of the learned Chief Justice of the Exchequer Division in disposing of the appeal from the Master's last report herein, presented the correct view to be taken herein, by any one recognizing the settlement of 1909 between the parties now deceased and respectively represented herein by appellant and respondents.

I should therefore have preferred that the appeal herein had been allowed entirely and the judgment of said Chief Justice restored.

I cannot say, however, that I have, in face of so many diverse judicial views as have been taken of the curiosities presented by the evidence, sufficient confidence in my said impression to entitle me to dissent from the unanimous opinion of the majority of this court, and others who have had to consider the case in course of nearly six years of litigation.

I see no useful purpose to be served by pursuing the matter further.

DUFF J.—I agree with the opinion expressed in Mr. Justice Magee's judgment that the respondents did not acquit themselves of the onus which I think quite clearly rested upon them, to show that the monies deposited in the bank to the credit of the firm, $2,703.74, on the first January, 1910, were not partnership monies. I do not mean by that that there appears to be upon a review of the evidence merely a balance of considerations in favour of the appellant upon this point, but that the respondents have quite failed to produce evidence adequate to support a judgment in their favour. I think Mr. Justice Magee's reasoning is convincing, and I concur in the conclusion at which he arrived, and should accordingly allow the appeal, substituting a judgment in the sense of that conclusion. The usual consequences as to costs should follow. I can only add that it seems to be regrettable that the extent and burden of the litigation should be so outrageously disproportionate to the amount involved; but for this, I am happy to say, no responsibility rests upon the professional representatives of the parties concerned.

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ANGLIN J.—With Mr. Justice Magee I am of the opinion that the bank accounts standing in the name of the firm of Carscallen Bros. at the date of the settlement of 1909-10 were *prima facie* firm assets and that the burden of proving that they were the individual property of Thomas G. Carscallen was on his representatives. I also agree with the view of that learned judge that the evidence in the record does not suffice to displace the presumption of firm ownership arising from the fact that these monies stood to the credit of the firm.

That the payment of $2,000 then agreed to be made to John C. Carscallen was designed to equalize the drawings of the two partners was his evidence before the master; that that payment was *prima facie* intended to bring about a condition of equality in interest in the assets of the firm was the holding of Mr. Justice Middleton in his reasons for judgment on appeal from the first report of the local master, or, as put in that learned judge's formal order, the declaration then made was

> that the settlement made on the 1st of January, 1910, was to equalize the interest of the partners in the then subsisting partnership assets.

In his reasons for judgment Mr. Justice Middleton also said that he did not agree with the master's acceptance of the plaintiff's contention that the sum of about $1,000 then in bank to the credit of the firm was vested in Thomas G. Carscallen as a result of the settlement. On the evidence, as it then stood, it was held that all the moneys in bank to the credit of the firm must be deemed firm assets. To that extent there is *res judicata.*

But a clause in the order referring the matter back to the master reserved

> liberty to the plaintiffs to establish the right, if any, of the late Thomas G. Carscallen to any of the money standing in the name of the partnership.

That could be done only by adducing further evidence. Mr. Justice Magee's observation as to the result of the first reference—that

> the whole attempt of the plaintiffs to prove ownership of the $2,703.74 by Thomas was abortive and the evidence offered taken as a whole was inept and inconclusive,

is I think equally applicable to the reference back. I agree in his conclusion thus expressed:

> The onus was clearly I think on the plaintiffs to disprove the firm's apparent ownership and this in the face of their testators' admitted heavy (?) drawings they have not done.

To bring about the result indicated by Mr. Justice Middleton as the purpose of the settlement, $2,000 was paid to John C. Carscallen out of the moneys standing to the credit of the firm—as that learned judge said in his judgment, "by the partnership." The statement in his later memorandum—

> I do not know if this was paid out of the partnership and do not determine this—

must have reference to the reservation of liberty to adduce further evidence on the reference back. The payment being made out of moneys standing to the credit of the firm was *prima facie* accepted by John C. Carscallen as a firm payment and not as a payment by Thomas C. Carscallen or chargeable to him personally. As put by Mr. Justice Magee,

> his acceptance of payment by firm cheques goes far to indicate that it was Thomas' undertaking the $2,000 should be paid by the firm and not by himself.

Again the evidence does not, in my opinion, displace the presumption that the payment was a firm disbursement or justify any other view being taken of it.

The master's second report contains these paragraphs:—

> 3. I find that the amount of $2,000 agreed to be paid the said J. C. Carscallen on the 1st January, 1910, and which was paid him was in full payment of his share of the profits of the undertaking business to that time.
>
> 4. That the only other assets of the partnership business he was entitled to share in at that time was the uncollected accounts of the business on the 1st January, 1910, amounting to $1,550.40 and the plant and chattels of the partnership property.

In his reasons for so reporting he says:—

> About 1910 some claim was apparently made by J. C. that he had not received his share of the profits of the business and after some negotiations and figuring his brother agreed to allow him $2,000 in payment of his share of the business to the 1st January, 1910, which was all the interest he could possibly have in the moneys deposited in the name of the firm. This amount was paid him and thereafter he could only be entitled to receive his half share of the profits of the undertaking business, being of course entitled to a half interest in the plant and chattels.

From these findings it is apparent that the residue of the moneys in bank at the date of the settlement, after deducting the $2,000 to be paid to John C. Carscallen, viz., $703.74, were treated by the master as the personal property of Thomas G. Carscallen and were not taken into account as partnership assets as, in my opinion, they should have been, and, as I incline to think, the order of Mr. Justice Middleton required unless new evidence given on the reference

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back should establish that they were the individual property of Thomas G. Carscallen. As already stated such evidence was not given.

In restoring the second report of the master, which had been varied by Mulock C.J.E., the Appellate Divisional Court proceeded on the view of the matter now under consideration taken by the master, as appears from the following passage in the judgment delivered by Mr. Justice Hodgins:—

> The Master has proceeded upon the idea, which is to my mind consistent with what occurred and with the evidence and accounts, that the settlement was payment in full up to the 1st January, 1910, of the respondent's testator's "share in the business" as it is put in his first judgment or as expressed in his formal report, "in the profits of the undertaking business to that time." The Master treating 1st January, 1910, as a starting point, has taken the whole accounts of the business since then and has allowed the respondents' testator one-half of everything realized except the residue of the moneys in the bank, which is now less than was shewn to be there on 1st January, 1910, charging him with what he had drawn or collected. Having regard to what is found respecting the bank accounts and to the evidence of Baker, the Master clearly meant and said that the cash in the banks was no part of the assets of the business on 1st January, 1910, but were wholly the property of the appellant's testator.

It would follow from what I have already indicated that in my opinion in respect of this item of the bank accounts the share of the appellant, executor of the late John C. Carscallen, should be increased, as Mr. Justice Magee would have directed on the hearing of the appeal from the order of Mulock C.J.E. varying the master's second report, by the sum of $351.87.

Incidentally I should observe that in dealing with this matter the majority of the learned judges in the Appellate Divisional Court would appear to have been under a misapprehension of fact, as is indicated in the following paragraph from the judgment of Mr. Justice Hodgins:—

> If the money in the bank when the settlement was made was $5,847.42 and the respondent's testator became by virtue thereof entitled to one-half of it, namely, $2,700 it is odd that he should have agreed to its being used the next year as a fund out of which the appellant's testator could pay the $2,000 and so reduce his share in that asset to $1,700.

The balance of money in the bank when the settlement was made was not $5,847.42, but $2,703.74; $5,847.42 was a sum stated by an accountant, Baker, who gave evidence on the second reference, to represent moneys deposited to the firm credit during the period 1906-9 derived from sources other than the partnership business. As Mr. Justice Magee says

The bank pass books shew moneys in the Merchants Bank on 1st January, 1910, to be in current account $1,634.63 and savings bank $1,069.11, or together $2,703.74.

Regarding the bank accounts as they stood at the date of settlement as the individual property of Thomas G. Carscallen, the master necessarily dealt with the payment of $2,000 to John C. Carscallen as having been made, not as a firm disbursement, but as a payment on acount of Thomas G. Carscallen and chargeable to him personally. In so doing I think he ignored the effect of the judgment of Mr. Justice Middleton directing the reference back. Proceeding on this basis the master took no account of the $2,703.74 in bank on the 1st of January, 1910, as a firm asset, as he should have done. On the other hand he did not charge the firm account with the $2,000 paid to John C. Carscallen, which also should have been done. Taking both these items into the account would mean that the balance of $14,456.68, found by the master to be the sum distributable, should have been increased by $703.74, and the share therein of John C. Carscallen should, accordingly, have been not $1,232.77, as reported, but $1,584.64. To this extent the defendant's appeal should be allowed.

MIGNAULT J.—I concur with Mr. Justice Anglin.

Appeal allowed with costs.
Judgment varied.

Solicitor for the appellant: *V. M. Wilson.*
Solicitor for the respondent: *D. H. Preston.*