

GUNTHER FRIEDRICH HUGO }
MARX (*Defendant*) }

APPELLANT; ¹⁹⁶⁴
*May 12, 13
Oct. 7

AND

MARGARETA GERTRUD MARX }
(*Plaintiff*) }

RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA,
APPELLATE DIVISION

*Partnership—Husband and wife—Whether partners in a bakery business—
The Partnership Act, R.S.A. 1955, c. 230.*

An action in which the plaintiff wife asked for a declaration that she was an equal partner with her husband in a bakery business was dismissed by the trial judge. The Appellate Division reversed this judgment and made the declaration; it held that all the elements necessary to establish a partnership were present and that if the relationship between the parties had not been that of husband and wife, "there probably would have been no argument that the appellant (now respondent) was not a partner." The husband appealed to this Court.

Held (Judson J. dissenting): The appeal should be dismissed.

Per Cartwright, Abbott, Martland and Spence JJ.: There was evidence from which the Appellate Division could conclude that the parties were carrying on a business in common with a view to profit. This inference was drawn by the Court from the facts in this particular case, which were of an unusual character, but which were not in dispute, in view of the findings of the trial judge, which were not disturbed by the Appellate Division. The Court had not erred in drawing that inference.

Per Judson J., *dissenting*: The Appellate Division was wrong in holding that all the elements necessary to establish a partnership were present in this case; significant facts indicated otherwise, and above all there was no evidence of any agreement that a partnership should subsist between this husband and wife. Also, it was error to draw any inference of partnership from the usual conversations about a business and its conduct that one would expect between husband and wife who were living and working together.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta, allowing an appeal from a judgment of Farthing J. Appeal dismissed, Judson J. dissenting.

W. J. Anderson, for the defendant, appellant.

M. E. Shannon, for the plaintiff, respondent.

Abbott J. concurred with the judgment delivered by

*PRESENT: Cartwright, Abbott, Martland, Judson and Spence JJ.

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CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Martland, but in view of the differences of opinion in the Courts below and in this Court I wish to add a few words.

It appears to me that the disagreement between the Appellate Division and the learned trial judge is solely on the question of fact, whether the existence of a contract of partnership should be implied from the findings of the learned trial judge as to the primary facts all of which were accepted by the Appellate Division. I do not have to decide whether, in a first Appellate Court, I would have been satisfied that the decision of the learned trial judge on this question ought to be reversed. I agree with my brother Martland that there was evidence from which the Appellate Division could decide as it did and, in my opinion, on the facts of this particular case we ought not to interfere with the unanimous decision of that Court.

I would dispose of the appeal as proposed by my brother Martland.

Abbott and Spence JJ. concurred with the judgment delivered by

MARTLAND J.:—The question in issue in this appeal is as to whether the appellant and the respondent, who are husband and wife, are partners in the bakery business carried on under the name of “Bowness Bakery Co.” at Bowness, Alberta. The definition of “partnership” in s. 2(c) of *The Partnership Act*, R.S.A. 1955, c. 230, is as follows:

“partnership” means the relationship that subsists between persons carrying on a business in common with a view to profit.

The Appellate Division of the Supreme Court of Alberta, by unanimous judgment, held that “all of the elements necessary to establish a partnership are present in this case and, if the relationship between the parties were not husband and wife, there probably would have been no argument that the appellant (now respondent) was not a partner.”

In my opinion there was evidence from which that Court could conclude that the parties were carrying on a business in common with a view to profit. This inference was drawn by the Court from the facts in this particular case, which are of an unusual character, but which were not in dispute, in view of the findings of the learned trial judge, which were

not disturbed by the Appellate Division. I am not prepared to say that the Court erred in drawing that inference.

In my opinion, therefore, the appeal should be dismissed with costs.

JUDSON J. (*dissenting*):—In this action a wife is suing her husband for a declaration that she is an equal partner with him in a bakery business in Bowness, Alberta. The trial judge dismissed the action. The Appellate Division reversed this judgment and made the declaration.

The trial judge’s reasons are founded upon a thorough review of the evidence. There is no doubt that the wife throughout her married life has helped her husband in the establishment and operation of several businesses, first in Germany before, during and after the war, and then in Alberta. The husband is the baker. The wife for many years worked almost as long hours as the husband and did everything she could to help in the business. Her efforts were fully recognized by the learned trial judge but he concluded that the explanation was not to be found in the existence of a partnership but because the parties were husband and wife.

The Appellate Division held that all the elements necessary to establish a partnership were present and that if the relationship between the parties had not been that of husband and wife, “there probably would have been no argument that the appellant was not a partner.” With respect, it seems to me that in so expressing themselves, they were considering a situation which would never have arisen between these two parties had they not been married and living together. It is the marriage and not business partnership that explains the relationship. It is inconceivable that any woman not a wife would have worked as this woman did without some business arrangement.

I do not agree that all the elements necessary to establish a partnership were present in this case. I do not propose to repeat the examination of the evidence which the learned trial judge made, but the following significant facts emerge. The husband made the financial arrangements to start the business and he registered it in his name. There is some suggestion that he deceived his wife when he talked about the registration with her. The bank account was in his name. He made all the banking arrangements. The money for the support of the matrimonial home came out of this bank

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account on the husband's cheque. There is not the slightest suggestion anywhere that the wife was the agent of the husband to do anything in the way of binding the business. Above all, there is no evidence of any agreement that a partnership should subsist between this husband and wife.

Partnership, it is needless to say, does not arise from ownership in common, or from joint ownership. Partnership arises from contract, evidenced either by express declaration or by conduct signifying the same thing. It is not sufficient there should be community of interest; there must be contract. (*Porter v. Armstrong*, [1926] S.C.R. 328 at 329, *per* Duff J.)

The dealings with real property and the income tax returns have some significance. One property was bought and put in the joint names of the husband and wife. Another property was bought and put in the wife's name but the husband refused to keep up the payments. The premises on which the bakery business is conducted are in the husband's name. No income tax return was filed by the wife as a partner or in any other capacity. The husband made his income tax returns as sole owner and paid tax on the total income.

It is error, in my opinion, to draw any inference of partnership from the usual conversations about a business and its conduct that one would expect between husband and wife who were living and working together.

I would allow the appeal and restore the judgment at trial. There should be no order as to costs in this Court or in the Appellate Division.

Appeal dismissed with costs, JUDSON J. dissenting.

Solicitors for the defendant, appellant: Anderson & Cooper, Calgary.

Solicitors for the plaintiff, respondent: Shannon, Rowbotham & Cook, Calgary.