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*Oct. 23, 24.
*Oct. 27.

HENRY DONKIN (DEFENDANT) ..... APPELLANT;

AND

CLARENCE EDWARD DISHER (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Master and servant—Profit-sharing—Partnership — Evidence — Statutes—R.S.B.C. 1911, *c.* 153, *s.* 3; *c.* 175, *s.* 4—*Words and phrases —"Partnership."*

The "Master and Servant Act," R.S.B.C. 1911, ch. 153, by sec. 3, respecting profit-sharing by servants, declares that no agreement of that nature shall create any relationship in the nature of partnership. Section 4 of the "Partnership Act," R.S.B.C. 1911, ch. 175, provides rules for determining partnership and, by sub-secs. 2 and 3, declares that the sharing of gross profits does not, of itself, create a partnership, that the receipt of a share of the profits of a business is *primâ facie* evidence of a partnership, that the receipt of such share or of a payment varying with the profits does not, of itself, make the person receiving the same a partner, and that a contract to remunerate a servant by a share of the profits does not, of itself, make him a partner. The plaintiff, an employee of the defendant, by the terms of his engagement was to receive as remuneration for his services a one-half share of the profits of defendant's business and conversations took place regarding an arrangement whereby plaintiff might have a "share in the business," but no definite agreement was made. Plaintiff, claiming to have become a partner, wrote a letter to defendant asserting that he had an undivided interest in the business and asking him to execute articles of partnership. Defendant replied to this letter in an evasive and temporarizing manner and the business continued to be conducted without any change. Later on, the defendant served upon the plaintiff a notice of dissolution of partnership and, in the notice as well as in the correspondence, made use of the word "partnership" in referring to the relations between them.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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Held, reversing the judgment appealed from (18 B.C. Rep. 230) that, under the statutes referred to, the onus was upon the plaintiff to shew that he had been admitted as a partner in the business in the strict legal sense and that the indefinite use of the term "partnership" in the correspondence and notice did not, in the circumstances, amount to evidence of an agreement that there should be a partnership.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment of Morrison J., at the trial(2), and maintaining the plaintiff's action.

The plaintiff's action sought a declaration of partnership, in the circumstances stated in the head-note. The learned trial judge held, on the evidence, that, as a matter of fact, the defendant had not agreed to admit the plaintiff as a partner in his business and dismissed the action with costs. By the judgment appealed from the action was maintained; it was held that the defendant's correspondence and the notice of dissolution amounted to an admission of an existing partnership, and the usual accounts and inquiries were directed.

Lafleur K.C. and *R. M. MacDonald* for the appellant. We submit that the judgment of the learned trial judge was right, and that no agreement constituting a partnership had ever been arrived at between the parties. The respondent submitted terms in the document he had prepared, but they were never assented to, and the appellant plainly stated that he would not assent to them. On the terms proposed by respondent, one-half of the capital and assets which the appellant had in the business would have been

(1) 18 B.C. Rep. 230. (2) 3 West. W.R. 1008.

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handed over to the respondent, who never put a dollar of capital into the business. The verbal and only agreement between the parties was that the respondent was to receive remuneration by percentage of profits. The terms of any further arrangement were left to future settlement; there can be no completed *vinculum juris* until terms have been agreed upon. *Blackwoods, Ltd.* v. *Canadian Northern Rway. Co.*(1), at page 103.

The terms of an alleged agreement must be certain for the court must know what it is to enforce: *Taylor* v. *Brewer*(2); *Pearce* v. *Watts*(3). A final acceptance of terms must be distinguished from a preliminary negotiation as the basis for a formal agreement which alone is to be binding. Reference to a proposed formal document is not conclusive: *Rossiter* v. *Miller*(4); *Winn* v. *Bull*(5). To found estoppel, a representation must be of an existing fact, not of a mere intention: 13 Halsbury, "Laws of England," p. 377. Such a representation must be clean and unambiguous: 13 Halsbury, "Laws of England," p. 379. Such representation must not be induced by the party complaining: 13 Halsbury, "Laws of England," p. 381. It is necessary to estoppel by representation that, in acting upon it, the party to whom it was made should have altered his position to his prejudice: 13 Halsbury, "Laws of England," pp. 383, 384.

As respondent was an employee remunerated by an interest in the profits, the provisions of sections 3

(1) 44 Can. S.C.R. 92.
(2) 1 M. & S. 290.
(3) L.R. 20 Eq. 492.
(4) 3 App. Cas. 1124.
(5) 7 Ch. D. 29.

and 4 of the "Master and Servant Act," R.S.B.C. 1911, ch. 153, are applicable, and his arrangement is to be deemed to be within the provisions of the Act, unless "this may otherwise be inferred."

S. S. Taylor K.C. for the respondent. The evidence shews that during 1910 it was definitely arranged that partnership should be entered into for 1911 and that a definite partnership agreement was entered into in 1911, which is sustained by the appellant's actions and conduct; by the evidence and by all the surrounding circumstances; also by statements which the appellant had prepared at the time, which statements would be inconsistent with any other condition.

The evidence concerning the months of June to September, 1912, contained in the letters of the appellant, his telegrams, his notice of dissolution of partnership given under the "Partnership Act," and his admission to the manager of the Seattle agency of Libby, MacNeill & Libby, together with the evidence of the respondent, shews conclusively that a partnership existed from January 1st, 1911. The evidence on discovery of the appellant is consistent only with the existence of a partnership. See "Partnership Act," ch. 175, R.S.B.C. 1911, sec. 4.

The evidence, moreover, is sufficient to meet the requirements of the "Master and Servant Act," R.S. B.C. 1911, ch. 153, sec. 3; it is explicit and direct and conclusively supports the partnership arrangement.

THE CHIEF JUSTICE.—Both parties agree that, previous to 1911, they stood towards one another in the

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relation of master and servant. It is also admitted that, at the end of 1910, a new agreement was made applicable to the coming year. The dispute is as to the terms and legal effect of that agreement. The appellant says that it was made merely for the purpose of increasing the share in the profits which the respondent had been receiving out of the business as his remuneration for services rendered, that is to say, it was merely intended to modify the then existing agreement which was, undoubtedly, one of profit-sharing. On the other hand, the respondent submits that the relation of master and servant ceased at the end of 1910, and that he then became a partner in the business on the basis of a half-interest in the profits and that, with respect to the capital, stock-in-trade, etc., the appellant became a creditor of the new firm. The burden of proof was on the plaintiff and I do not think that he has satisfied it. Where there is doubt the conduct of the parties at the time is the best evidence of their intentions; especially when the version of the respondent involves a fundamental change in the relations of the parties.

In fact, no change was made in the management of the business or in the relations of the parties towards one another or towards their clerks; no new books of account were opened; the bank account was kept in the same way; cheques, drafts and notes were signed in the old name by the respondent as attorney and not as a partner. In fact, the conduct of the parties at the time corroborates entirely the appellant's position.

I will add nothing to what my brother Duff says as to the two letters relied upon in the Court of Appeal. He conclusively establishes that, read in the light of

all the surrounding circumstances, their probative effect is of little value. Neither party was very disingenuous and, in that respect, honours are easy between them.

I would maintain the appeal with costs.

DAVIES J. agreed with Anglin J.

IDINGTON J.—I think that the learned trial judge correctly interpreted the language and conduct of these parties and defined their relations founded thereupon and applied the appropriate remedy for such relief as respondent was and is entitled to.

With great respect, I do not think the correspondence relied upon by the Court of Appeal can, when read in light of the acts of the parties both before and after the same, justify the variation of the trial judgment.

The word "partnership" is capable of many meanings and we ought not to fix upon it, as used by these parties, the one legal technical meaning it may bear when obviously the parties have not reached that stage in their protracted negotiations, where such technical meaning would represent their understanding.

The appeal should be allowed here and below, and the judgment of the learned trial judge be restored.

DUFF J.—It is a little important in considering this appeal to note what the foundation of the respondent's claim exactly is. The claim is based upon an oral contract of partnership alleged to have been made between the appellant and the respondent in the latter part of the year 1910 under which, accord-

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ing to the respondent, the two parties actually carried on business under the name of H. Donkin & Co. from the 1st of January, 1911, until the 21st of September, 1912. The learned trial judge found that no such partnership existed. His judgment was reversed by the Court of Appeal, which held that certain correspondence which passed between the parties in January and February, 1912, contained an admission by the appellant of the existence of the partnership alleged by the respondent of such weight as to dispense with the necessity of considering the oral evidence upon which the judgment of the learned trial judge was founded. Reading this correspondence in light of the conduct of the parties, especially the conduct of the respondents, I am not able to agree with the conclusion at which the Court of Appeal arrived touching the effect of it, and I think, after an examination of the evidence as a whole, that there is no sufficient ground for disturbing the findings of the learned trial judge, but that, on the other hand, the evidence preponderates in favour of his view.

Prior to the year 1910, the respondent had been for some years in the employ of the appellant, who had been carrying on business in Vancouver under the name of H. Donkin & Co. The respondent was first remunerated by a salary alone, but later received a share of the profits as well. The agreement, as he now alleges, made in 1910, was to the effect that a partnership was formed between himself and the appellant to take over the business, including all the assets of H. Donkin & Co., and carry on that business during the year 1911 without change in the firm name, the partners sharing the profits equally. There was, he says, a valuation of the assets of H. Donkin & Co.,

and it was a part of the arrangement that the appellant was to be paid from these assets according to this valuation. The appellant denies that any agreement for partnership was entered into. He admits that a fresh agreement was made in 1910; he says it was limited to a single point, viz., that, beginning with the 1st of January, 1911, the appellant should receive half the net profits of the business as his remuneration. Disher's status as an employee was, he says, to remain unchanged.

There is a good deal in the evidence, no doubt, to shew, and I think it is probable, that Disher proposed to the appellant that he should be admitted as a partner in the strict sense, that is to say, that he should cease to be an employee and become joint owner of the business with Donkin. I think it is also likely that Donkin did not expect to retain Disher permanently in association with him without ultimately effecting some re-adjustment of their relations by which Disher should become entitled to a proprietary interest in the business. There is no doubt that the question of partnership in this sense was considered by Donkin. He appears, however, to have found it very difficult to overcome his objection (a very substantial one in the circumstances) that, Disher being engaged extensively in speculations, the suggested arrangement might expose the business to disorganization at the instance of Disher's creditors in the event of his speculations proving unfortunate. He had under consideration apparently an alternative plan of incorporating a company to take over the business.

The learned trial judge, as I have already said, ac-

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cepted the appellant's evidence upon these points. The correspondence which influenced the judgment of the Court of Appeal, does not appear to me to be inconsistent with the view of the learned trial judge that Donkin had not assented to Disher's proposal that he should be admitted to the status of a partner. On the contrary Donkin's letter of the 12th of February, upon which the learned Chief Justice based his conclusion, appears to me to fit in with the theory that Donkin had not yielded to Disher's efforts to induce him to make the proposed change better than with the alternative theory that more than a year before Disher had become owner of a half-interest in the business and that, during the intervening period, they had been carrying on that business together as partners. On the latter hypothesis there are many things in Donkin's letter which would be both unmeaning and foolish. Then if we consider the conduct of Disher himself, it does not appear to be that of a person who had been recognized as having the status of a partner in this concern for more than a year. If his situation had been such as he describes, he would not, I think, have waited until Donkin had actually left Vancouver with the expectation of being absent several months before insisting that he should be recognized as a partner in the firm's dealings with their bankers or that the terms of the partnership should be definitely reduced to writing. Donkin's letter of the 12th of February ought to have apprised him of the fact that Donkin was not recognizing him as co-proprietor of the business and yet there is no answer to that letter and, on Donkin's return to Vancouver, not a word is addressed to him by Disher on the subject. One ought, perhaps, to note the use of the word

"partnership" in Donkin's letter of the 12th of February. I entirely agree with the learned trial judge that the term "partnership" is often loosely used as descriptive of such arrangements as that which Donkin admits he had with Disher. But the letter appears to me to make it abundantly clear that, in using the term, Donkin had no idea that he was employing a word which implied co-proprietorship. I see no reason to disagree with the view of the learned trial judge that Disher was not deceived by the use of this phraseology. It is perhaps needless to refer to the point taken, not very seriously I thought, by Mr. Taylor that by force of the provisions of the British Columbia "Partnership Act," section 4, chapter 175, (1911) R.S.B.C., the arrangement with regard to profits is *primâ facie* evidence of the existence of partnership. These provisions of the "Partnership Act" must be read with section 3, chapter 153, R.S.B.C. (1911), "Master and Servant Act," which plainly enacts that, in the circumstances existing in this case, the onus rests upon the employee who alleges that he has been admitted as a partner in the strict sense.

The appeal should be allowed.

ANGLIN J.—Upon conflicting evidence the learned trial judge found that the arrangement made between the parties to this action, about the end of the year 1910, was not a partnership, but an agreement whereby the plaintiff, while remaining an employee of the defendant, should for the future be entitled to receive, as his remuneration, a 50% share in the profits of the defendant's business instead of the salary of $1,200 a year and a 10% share of the profits, which

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he had theretofore been paid. That conclusion was reversed by the British Columbia Court of Appeal solely on the ground that a letter written by the defendant, in reply to a letter sent him by the plaintiff asserting that he "had an undivided half-interest" and asking the defendant to execute partnership articles, affords convincing evidence of "a partnership such as the plaintiff alleges," because, instead of writing a "frank, fair letter" denying that "there was any partnership," the defendant wrote a "temporizing" and "indefinite" reply. Far from being able to find in the letter so much relied upon conclusive proof of the partnership alleged by the plaintiff, giving due weight to the circumstances under which it was written, I am, with respect, of opinion that it affords no evidence of any real value against the defendant. He was then *en route* to the Orient on a trip of several months' duration. He had already travelled from Vancouver to Montreal. He had left the care of his business in the hands of the plaintiff, who had a comprehensive power of attorney. It was of vital importance to him at that moment that the plaintiff should not be antagonized, as he probably would have been, by such a distinct and emphatic repudiation of his partnership pretensions as the learned appellate judges seem to have thought it was the defendant's paramount duty to have made.

The arrangement now claimed by the plaintiff is in itself improbable. That provided for in the document which he had prepared and to which he sought to procure the defendant's signature on the eve of his departure differed very materially from what he now asserts to have been the agreement. That document provided for an arrangement still more improbable.

The conduct of the plaintiff in obtaining, in January, 1912, a written opinion from his own solicitors as to the liability of one partner and his share in the partnership property for the debts of the other partner, and procuring a confirmation of that opinion from the defendant's solicitors for the purpose of satisfying the defendant is scarcely consistent with their having been a concluded agreement for partnership in December, 1910, or January, 1911, as he now asserts. The fact that no partnership books or accounts were opened, although the plaintiff claims that the partnership was in operation for over a year, is also significant. The sending by the defendant to the plaintiff contemporaneously of two notices, one terminating the partnership, the other dismissing the plaintiff as an employee, was merely a precautionary measure and affords no evidence for or against the pretensions of either party. Apart from the letter of the defendant the case depends upon a weighing of conflicting oral testimony in the light of the circumstances. The learned trial judge would appear to have thought the defendant a more credible and reliable witness than the plaintiff and did not find in the rest of the evidence enough to turn the scale in the plaintiff's favour.

We are in precisely the same position as the learned judges of the Court of Appeal were to determine what inferences should be drawn from what the defendant wrote. I gather from their opinions that, but for this letter, they would not have differed from the conclusion reached by Morrison J. on the oral testimony. It is, therefore, with less than usual reluctance that I would reverse the judgment in appeal and restore that of the trial judge, with which on the whole case I agree.

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The appeal should be allowed with costs in this court and in the Court of Appeal.

Brodeur J.

BRODEUR J.—We have to decide whether there was a partnership between the parties; or whether their relations were those of master and servant. The plaintiff, respondent, claims that he was a partner and the appellant on the contrary says that the respondent was entitled to a share in the profits of his business, and that he was not a partner in the ordinary sense of the word.

For some years previous to the 1st of January, 1911, the respondent was in the appellant's employ as salesman. At first his services were paid on straight salary, but later he got also a share of 10% and of 20% in the profits of the business. It was later on agreed that from the 1st of January, 1911, he would get 50% of the profits.

The appellant, who was doing business under the firm name of H. Donkin & Co., as a commission agent, had not a very large capital invested in his trade and he did not require also much money to run his affairs; but in order that the business should become the property of the two parties it was necessary that the capital invested should be determined and that the new partner should either acquire a share of that capital or should invest a similar amount or that some other agreement should be made to put them both on the same footing.

Even in assuming that the agreement reached by the parties was in the nature of a partnership, it was necessary that there should be an agreement as to the contribution of each of them to the partnership. The

respondent stated under oath that no contribution was to be put in by him, but that the capital then invested in the business by the appellant should stay and that he would be creditor for the amount that was to be ascertained as being the capital invested. No figure, however, is agreed upon. In the course of the year 1912, the respondent had a partnership agreement prepared by his solicitors and the capital that was fixed at $40,000 was declared to belong to the two alleged partners. It was never agreed as to what should be done with regard to the contribution of each party and specially as to the disposal of the capital invested in the firm business of the respondent.

But the appellant denies entirely the respondent's statement that they reached an agreement as to a contract of partnership. Their minds never met as to the contribution and as to the amount thereof and how it would be. The evidence is conflicting on those points and the story as given by the appellant was accepted by the trial judge.

It is true that in some letters and another document the appellant used the word "partnership" to qualify their relations. But he had in his mind the share profit arrangement agreed upon and he never pretended to be sure that such a word would cover their agreement or not. We should take the agreement as it has been proved and established and the evidence does disclose simply a profit-sharing arrangement that the appellant is willing to carry out.

The "Master and Servant Act," R.S.B.C. (1911), ch. 153, enacts in sections 3 and 4 the following:—

> It shall be lawful in any trade, calling, business, or employment for an agreement to be entered into between the workman, servant, or other person employed and the master or employer, by which agreement a defined share in the annual or other net profits or pro-

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ceeds of the trade or business carried on by such master or employer may be allotted and paid to such workman, servant or person employed, in lieu of or in addition to his salary, wages or other remuneration; and such agreement shall not create any relation in the nature of a partnership, or any rights or liabilities of co-partners, any rule of law to the contrary notwithstanding; and any person in whose favour such agreement is made shall have no right to examine into the accounts, or interfere in any way in the management or concerns of the trade, calling or business in which he is employed under the said agreement or otherwise; and any periodical or other statement or return by the employer of the net profits or proceeds of the said trade, calling, business or employment on which he declares and appropriates the share of profits payable under the said agreement shall be final and conclusive between the parties thereto, and all persons claiming under them respectively, and shall not be impeachable upon any ground whatever.

Every agreement of the nature mentioned in the last preceding section shall be deemed to be within the provisions of this Act unless it purports to be excepted therefrom, or this may otherwise be inferred.

There is then, under the provisions of those sections, a presumption that an employee who receives as remuneration a share in the profits is not a partner. The relations of partners in such a case are not to be inferred from the fact that the employee gets such a remuneration. Of course, that presumption can be destroyed if a formal agreement to the contrary is proved. But in this case there never was such an agreement. That is the finding of the trial judge and we should accept it.

For those reasons I am of opinion that the appeal should be allowed with costs and that the judgment of the trial judge should be restored.

Appeal allowed with costs.

Solicitors for the appellant: *MacNeill, Bird, MacDonald & Darling.*

Solicitors for the respondent: *Taylor, Harvey, Grant, Stockton & Smith.*