CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

JAMES MARWICK AND SIMPSON R. MITCHELL (DEFENDANTS) ..... } APPELLANTS;

AND

DAVID S. KERR (PLAINTIFF) ..... RESPONDENT.

1915
*Nov. 30.

1916
*Feb. 1.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Partnership—Shares in business—Associating third person—Goodwill—Accounting between partners—Art. 1853 *C.C.*

For a number of years the defendants had carried on, in partnership, the business of accountants and, as their operations expanded, they engaged assistants, who were called "junior partners," remunerating them by salaries and percentage rates on yearly profits and, in some years, with bonus additions. With the approval of the "junior partners," the defendants associated P. in a one-fourth share of the business and the firm name was changed for the new organization which was carried on according to terms mentioned in an agreement which recited that it had been agreed between the defendants "that those at present constituting the firm" and "those for the time being con-

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

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stituting the firm of W. B. P. & Co." should arrange a partnership, etc. Upon making this arrangement the defendants received £20,000 from P. and, some time afterwards, in similar circumstances, £1,000 was received by them from G. The defendants retained these sums, as their own, and did not inform the "junior partners" that they had been paid. In an action by a "junior partner" for an account and a proportionate share of this £21,000:—

Held, affirming the judgment appealed from (Q.R. 24 K.B. 321), that the moneys so received by the defendants were not paid for a share in the business to be taken wholly from their individual interests therein, but for a share in the assets and goodwill of the business itself; consequently, the plaintiff had an interest in the moneys so paid and was entitled to an account and a proportionate share thereof.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), affirming the judgment of Panneton J., in the Superior Court, District of Montreal, maintaining the plaintiff's action with costs.

The circumstances of the case are stated in the judgments now reported.

R. C. Smith K.C. and *F. H. Markey K.C* for the appellants.

Gordon MacDougall K.C. and *Adrian K. Hugesson* for the respondent.

THE CHIEF JUSTICE.—I can find no grounds for holding that the large sums paid to the defendants Marwick and Mitchell on what was practically the admission of fresh partners to the firm of Marwick, Mitchell & Co., of which they were the senior partners, were moneys to which they were entitled to the exclusion of the other partners in the firm. The presump-

(1) Q.R. 24 K.B. 321.

tion, it seems to me, is that these moneys were paid for an interest in the business and not in so much of the business as would be represented by the proportion of the interests of these two partners, large though that was. Indeed, I think, it was this largeness of their interest that must have led these two partners into the mistaken belief that the business was really their own and that they could make such dispositions as they pleased without being accountable to the junior partners in the concern.

The unfortunate secrecy which the two defendants preserved as to the moneys received by them prevented any possible acquiescence of the other partners in the arrangements made.

I think the appeal should be dismissed.

IDINGTON J.—The respondent sued appellants for an account of moneys received by them under circumstances which it is claimed rendered the moneys so received the property of the partnership of which they were all members.

The courts below have maintained a judgment for $6,950.73 in default of the accounting claimed.

The appellants carried on business at New York as chartered accountants, and prospered therein so much that they needed numerous assistants. Some of these assistants were encouraged to be zealous in their work by being called partners in the business and receiving a percentage of the profits and occasionally a handsome bonus in prosperous years.

In this way many were induced to join them not only in New York, but in many other places. The respondent acted in Montreal, for example, as a member of the firm.

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Yet it is said there never was, until the events I am about to refer to, any written agreement evidencing the terms of what constituted the partnership.

Considering the magnitude of the business, this single fact is a tribute to the trustworthy character of the mode in which they dealt with each other and also a significant measure of the trust reposed in the appellants by those they thus came in contact with.

This state of things with increasing prosperity continued until August, 1911.

But for the single fact that all concerned seemed agreed to call this arrangement a partnership and, throughout the transactions we have to consider, did so in a manner that renders it impossible herein to hold the business otherwise than as one of a partnership, I should have been disposed to hold that there never was, in fact, a partnership between the appellants and the respondent and those others like him allied with them.

It was quite competent for the appellants to have carried on their business in the firm name they adopted and, as between themselves and junior partners, to have engaged such juniors on salary, or salary plus a percentage of the profits, and even to have added thereto encouraging grants by way of bonuses and yet not to have given rise to the claim that in law there was any partnership or any right to any such accounting as claimed herein.

The business originally was that of appellants and they may have felt it always remained so.

Indeed, but for the terms of the documentary evidence I am about to refer to, it might have been arguable that it had continued as a business owned by appellants up to and including the months of August,

September and early part of October, which, in point of time, cover the events that must determine the right of the parties herein.

Had the business at the time first mentioned and in question been that of appellants it would have been quite competent for them to have sold out an interest therein to a third person.

That, however, is not the case.

In August, 1911, the appellants contracted with W. B. Peat & Co. by a written agreement, not on their own behalf, but on behalf of themselves and those then constituting the firm of Marwick, Mitchell & Co. to arrange a partnership on the terms mentioned therein. One of these was that

> W. B. Peat & Co. acquire one-fourth interest in the business and goodwill of Marwick, Mitchell & Co.

Another was that the firm should thereafter be known as that of Marwick, Mitchell, Peat & Co., and yet another that W. B. Peat & Co. were to find one-fourth of the capital of Marwick, Mitchell, Peat & Co., which was to be $250,000, of which W. B. Peat & Co. were to provide $62,500.

It transpired that the appellants received from W. B. Peat & Co. £20,000 as the price paid for such share of the goodwill in said business over and above the said sum of $62,500 contributed by W. B. Peat & Co. It is pretended that this sum, clandestinely paid appellants, was in respect of this share in the firm of Marwick, Mitchell & Co.

The conclusive answer to such contention is contained in the first clause of this memorandum of agreement, which reads as follows:—

> It is agreed between James Marwick and Simpson Roger Mitchell that those at present constituting the firm of Marwick, Mitchell &

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Co. on the one part and those for the time being constituting the firm of W. B. Peat & Co. on the other part to arrange a partnership on the following terms.

It is impossible properly to hold that such an express agreement can be cut down by anything Mr. Marwick may have said so as to read as if he and Mitchell were only dealing with and selling their own interest in the business.

It is very suggestive also that the price of the sale is not mentioned in the memorandum and that every clause thereof proceeds upon the basis of a dealing for and in respect of the entire business and its continuation for a period of ten years and with the contemplated extension thereof elsewhere, as well as in the United States and Canada where it had been previously carried on and was to be continued.

The agreement, so drawn up as to conceal the fact of appellants being paid anything, was submitted by the appellants to their partners, including the respondent, and made the basis upon which was framed, in October, articles of partnership between all the old partners and the new.

It is urged on behalf of the appellants that this new partnership agreement so modified the terms of the partnership that had hitherto prevailed as to give respondent and some of the junior partners an increased share in the profits, and diminished correspondingly the shares of appellants in the profits.

And it is further urged, with his usual force and ability, by counsel for appellants, that the new partnership agreement shews that this feature of it had, in effect if not in express terms, provided for the taking, of the quarter interest of the whole which Peat & Co. were to get, out of the seventy-five per cent.

share of the profits which previously appellants had enjoyed.

The argument is, however, on examination of the facts, more plausible than sound.

Experience teaches us that the junior partners, if men of merit, generally deserve and get as the years go on an increasing share of the profits and especially so in the cases of this kind where the prosperity of the business must depend almost entirely upon the mental and moral qualities and energy of the members of the firm, and is not much dependent upon the financial capital they possess.

In partnerships of the kind where the accumulations of capital held by the senior or other members are of necessity the dominant power or force in relation to which the division of profits is likely to take place the feature of experience I have just alluded to may not be so much in evidence.

Even there, however, the lessening vitality or deterioration of the older men, and growing power and influence of the younger men, often accounts for the changes found in the relative share of profits.

Again, this new term of partnership was to last for ten years and some of the elements that had entered into the division of profits enuring to the juniors were cut out.

It is impossible for us to say what the respondent and others might have done had they been dealt with frankly.

The respondent, and others in their position, were in law, and according to the principles of fidelity that must ever obtain between partners, entitled to a full disclosure of the bargain appellants made ostensibly

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on behalf of all the members of the old firm, and to share in the profits thereof.

There was another transaction of a similar nature in respect of which we did not hear much in argument, but which seems to require the same sort of relief for respondent as is applied by the judgment to both causes of action.

Some argument was made as to the basis upon which the sum named in the judgment was founded.

It seems this sum is only a maximum sum liable to be reduced upon a taking of accounts with which we have at present no concern. I think, therefore, we should not express any opinion at the present time in regard thereto.

The case as presented is not ripe for any such expression of opinion.

The appeal should be dismissed with costs.

DUFF J.—The appellants' contention is that the moneys received from Peat were received in payment of the purchase price of the fraction of their own interest in the partnership business, moneys consequently for which they would not be accountable to their partners, and the real question of substance on the appeal is whether, on the evidence before us, the proper conclusion is that the appellants are entitled, as against the respondent, to say that the arrangement between themselves and Peat was that Peat should purchase from them a share of their interest and that Peat, in fact, entered the firm and became a partner as the holder of the share so purchased and that no part of the interests of any of the junior partners contributed to make up the interest acquired by

Peat. I have come to a conclusion which is adverse to the appellants upon this question. My reason is this. The arrangement between the appellants and Peat was followed by the execution of the document which, on the face of it, professed to be a record of an agreement between Marwick, Mitchell & Co. and Peat & Co. for a partnership. The document declares among other things that Peat & Co. acquire a one-fourth share in the business of Marwick, Mitchell & Co. The agreement was necessarily provisional in this sense, that it was a transaction of a kind in respect of which Marwick and Mitchell would have no authority to bind the other members of their firm and before becoming legally effectual it required legal ratification by these other members. This document was, however, placed before the other members of the firm shortly after its execution and a fresh arrangement was made among the partners of Marwick, Mitchell & Co. embodied in the document, dated the 1st of October, in which the residue of the business, after allowing for the one-quarter interest acquired by Peat & Co. was dealt with, and the shares of the various partners in that residue declared.

Now, I do not think anybody would dispute—I did not understand Mr. Smith to dispute it—and, indeed, I think it would be hopeless to do so, that, on the natural reading of these documents, they provide, first, that Peat & Co. acquire a one-fourth interest in the business of Marwick, Mitchell & Co., not from Marwick and Mitchell but from the firm, and that the residue, the remaining seventy-five per cent., is held by the partners of the old firm of Marwick, Mitchell & Co., in the proportion stated. In other words, the

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agreement which Marwick and Mitchell professed to make with Peat on behalf of the firm is ratified by the firm by the transaction entered into on their behalf and that transaction, so ratified, is by the instruments in fact declared to be a vesting in Peat & Co. of a one-fourth interest in the business of Marwick, Mitchell & Co.

It seems to me that as the new agreement, embodied in the document of October, was an agreement made on the footing of the transaction with Peat being such as I have described, that transaction must be conclusively taken, as between the parties to this litigation, to have been of that character. It does not appear to me to be necessary to resort to the doctrine of common law lawyers known by the name of estoppel. In fact, by the document of August, Peat did acquire from the partnership a one-fourth interest in the partnership business subject to ratification by the partners. The transaction ratified by them was the transaction embodied in the document and it seems to be hopeless now to suggest that, apart from that transaction, there was another and a different transaction by which Peat acquired a one-fourth interest not from the firm but from Marwick and Mitchell.

ANGLIN J.—The sole question in this case, at its present stage, is whether it should be held that the one-fourth interest which Peat & Co. acquired in the business of Marwick, Mitchell & Co. was taken wholly from the individual interests in that firm of Messrs. Mitchell and Marwick, as they contend, or was contributed to by all the partners in the firm of Marwick, Mitchell & Co. as the plaintiff maintains.

I say "it should be held" advisedly, because owing to the secretive conduct of the defendants—admittedly a mistake if nothing worse—it is now extremely difficult, if not impossible, to learn with certainty the fact itself. For that the defendants are to blame and they have themselves to thank for having created a situation in which all presumptions must be made against them. The learned trial judge held that the proper conclusion from all the evidence was that the purchase of Peat & Co. was in fact from the firm and not from Messrs. Marwick & Mitchell as individual members of it. The documents submitted to and accepted by the plaintiff and the other junior partners as containing the basis upon which Peat & Co. entered into the new partnership and on which they themselves assented to the redistribution of shares then made certainly give the impression that it was a share in the business of the firm, its assets and goodwill, and not in Messrs. Marwick and Mitchell's individual interests therein that Messrs Marwick & Mitchell had agreed that Peat & Co. should acquire, and that it was from the firm, that is, from all the partners, that they should acquire that share. It is impossible now to say that the junior partners would have accepted the new partnership arrangement on any other basis.

The fact that under the new arrangement the proportionate share of the junior partners in the profits was increased and that of Messrs Marwick and Mitchell was decreased by an amount sufficient to cover the interest acquired by Peat & Co. might, at first blush, be taken to shew that Messrs. Marwick and Mitchell were the sole contributors to the 25% assigned to Peat & Co. But any such inference is un-

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warranted. It is impossible now to say what would have been the future interest of the junior partners in the firm had Peat & Co. not been taken in. It is equally impossible to say what would have been the attitude of the junior partners to the proposal actualy carried out had they been made aware of the payment of £20,000 by Peat & Co. to Messrs Marwick and Mitchell. Under these circumstances, notwithstanding the explicit evidence of Mr. Marwick as to the true nature of the consideration for which he received the £20,000 from Peat & Co. (which may be strictly true) I am not prepared to hold that the conclusion reached by the provincial courts, that that sum should now be regarded as money received by Messrs. Marwick and Mitchell for a share of a business, assets and goodwill in which the plaintiff and the other junior partners were interested, is erroneous. The same considerations apply to the payment of £1,000 made by Percy Garratt.

All questions as to what should be the *quantum* of the plaintiff's recovery remain open upon the accounting directed by the judgment appealed from. It is only in default of such accounting by the defendants that the sum claimed by the plaintiff has been awarded to him. The order for an accounting fully protects the defendants and they are not, in my opinion, entitled to have the court now enter upon the accounting which would be the only method of ascertaining whether the sum claimed by the plaintiff is or is not too large.

I would, for these reasons, dismiss this appeal.

BRODEUR J.—The appellants, the respondent and the *mis en cause* were carrying on business in co-

partnership as accountants in Canada and the United States. The appellants, Marwick and Mitchell, had started that business several years ago and acquired a large clientèle. The respondent was at first in their employ, but he was given, in 1905, outside of his salary an interest in the business to the extent of two and one-half per cent. on the profits.

In the summer of 1911, the profits of that business were then divided on the basis of 77½% to Marwick and Mitchell, the senior partners, and 22½% to their former employees and now called junior partners. As may be very easily understood, the affairs of the partnership were carried on under the management and control of the senior partners.

On going over to England, in the summer of 1911, Mr. Marwick met Sir William Peat, the head of the firm of W. P. Peat & Co., who were carrying on, in England, in the United States and in Canada, a similar and competitive business of chartered accountants.

They agreed to amalgamate their American business and a new partnership was to be formed comprising all the members of the two firms of Marwick, Mitchell & Co. and of W. B. Peat & Co.

The goodwill of Marwick, Mitchell & Co. was evidently more extensive since W. B. Peat & Co. agreed to pay, outside of their *mise de fonds,* a sum of £20,000. That sum of money was handed over to Marwick and Mitchell, the appellants. They failed to disclose that payment to their junior partners and now the respondent claims a share of that sum, and also of a sum of £1,000 that was paid by a junior partner, by the name of Percy Garratt, under almost similar circumstances.

The appellants plead that that money was given to

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them as a consideration for a part of the individual interest owned by Marwick and Mitchell.

The written evidence, however, and the new contract of partnership disclose on the contrary that what was acquired by W. B. Peat & Co. was one-fourth interest in the business and goodwill of Marwick, Mitchell & Co.

It is admitted by the appellants that Kerr, the respondent, was a member of the firm of Marwick, Mitchell & Co.

As such he was entitled to his share in the goodwill of that firm.

The appellants having disposed of a part of that goodwill for a sum of £21,000 they were bound not only to disclose that agreement to their co-partners, but to account to them for their share in that sum.

The action *en reddition de compte* is well founded and the judgment *a quo* having maintained it should be confirmed.

The appellants are ordered to render an account within a certain time and in default of doing it they are condemned to pay the respondent the sum of $6,980.73.

The latter figure is evidently based upon a calculation made by the respondent of his share in the business of Marwick, Mitchell & Co.

I have not considered at all the question whether this calculation is correct. That matter will have to be disposed of on the account itself when it is rendered.

Appeal dismissed with costs.

Solicitors for the appellants: *Smith, Markey, Skinner, Pugsley & Hyde.*

Solicitors for the respondent: *Lafleur, MacDougall, Macfarlane & Pope.*