Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Michael Kelly and another v. *Thomas Kelly, from the Court of Appeal for Manitoba (P.C. Appeal No. 76 of* 1912) ; *delivered the 16th December* 1912.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD MOULTON.

[DELIVERED BY LORD MACNAGHTEN.]

On the 13th of December 1909 Macdonald J. made a decree for the dissolution of the partnership of Kelly Brothers & Co. builders, contractors, and brick manufacturers as from the 1st of April 1909. The partners in the firm were the Plaintiffs Michael and Martin Kelly and their brother Thomas Kelly, who was Defendant in the Action. The business which began in a small way, though it ultimately became very prosperous, belonged originally to Michael and Thomas. In 1886 they took Martin into partnership with them. He received a one-fourth interest. The other two had three-eighths each. There were no articles nor was there any agreement in writing defining the terms of the partnership. Up to a short time before the institution of this action the three brothers worked together in perfect harmony. Then differences arose as to certain speculations and investments which Thomas claimed as his separate property while the other two maintained that they belonged to the firm having been made, as they alleged, with money of the partnership. The trial lasted 22 days. Every item in dispute was investigated in open Court and keenly contested. The view

of the learned Judge was that Thomas Kelly intended all along to keep the profits of these speculations and investments to himself as his separate property but that inasmuch as they were made by the use of partnership money without the consent of his co-partners he was accountable for them to the firm. The decree contained special directions with regard to all the items in dispute.

From this decree Thomas Kelly appealed to the Court of Appeal for Manitoba. The Court consisting of Richards, Perdue, and Cameron, JJ. by a majority reversed the decree appealed from so far as it was adverse to Thomas Kelly.

Richards, J., and Perdue, J., who formed the majority, both held that Thomas Kelly was justified in using the moneys of the firm for his own private purposes because his brothers who were illiterate persons and had absolute and unlimited confidence in him left the management and direction of the concern in his hands without in any way interfering with his discretion and so clothed him with authority to do what he pleased in dealing with the assets of the firm provided he did not draw upon its resources so as to hamper or embarass its operations.

The Manitoba Partnership Act is a reproduction of the Imperial Act of 1890. Section 24 of the Manitoba Act, which is word for word the same as Section 21 of the Imperial Act, declares that "unless the contrary intention appears, "property bought with money belonging to the "firm is deemed to have been bought on account "of the firm."

Perdue, J., disposed of an argument founded upon that section without much difficulty :—

"It appears to me," says the learned Judge, "that the "intention to be considered in the present case is that of "Thomas Kelly alone. It is admitted by all that he did "not consult his co-partners in making the purchases, and "that they had no knowledge of them until after the

" purchases had been made. Michael and Martin could not " therefore have exercised intention in respect of any of the " transactions. The properties were not bought to be used " in the trade. They were bought by one partner with the " intention of holding them as his separate estate. * * *"

Richards, J., who agreed with Perdue, J., did not go quite so far :—

"In my opinion," he observes, "the present case is " governed by the words in Section 24 of the Act, 'Unless " 'the contrary intention appears.' The contrary intention " to my mind is clearly shown. Whether it is sufficient " that such 'contrary intention' should be that only of the " partner drawing the firm's money for his private specu- " lations, or must be that of the entire firm, I do " not now propose to discuss, although the principle on " which *Re* Harris, 2 V. and B. 210, and *Ex-parte* Hinds, " 3 De G. Sm. 613, were decided would seem to be that in " such a case as the present the intent of the drawing " partner is sufficient. To my mind the facts show most " distinctly that Thomas was to be the sole arbitor, at least, " so far as concerned the withdrawing of profits for private " uses, and that this was fully understood and at least " tacitly assented to by both of the Plaintiffs. I therefore " am of the opinion that it has been shown that the intent of " all the parties was that Thomas should be at liberty to " use funds as he has done. I am unable to agree with the " learned trial Judge that he was in any way in a fiduciary " position towards the Plaintiffs with regard to these " drawings."

Cameron, J., the other member of the Court of Appeal took a different view. In the result he agreed with the trial Judge, though he did not agree with some of the views expressed by that learned Judge. His judgment as a statement of the relevant facts and a statement of the law applicable to those facts leaves nothing to be desired. Their Lordships concur in it entirely.

The learned Judge begins with a careful review of the facts from which the intention of the partners as to the terms of their partnership was to be gathered. His conclusion on this matter is expressed in the following paragraph :—

"It was a partnership at will, out of the profits of which " the partners were at liberty to draw monthly or twice a

"month, or oftener, if required or convenient, such sums as "might be severally necessary for their maintenance and "living expenses, such withdrawals to be approximately "according to the proportionate interest of each partner in "the partnership. The remaining profits, after such with- "drawals, were to be carried forward as dividends earned "but undivided, constant accretions to the resources or "capital account of the firm, without any provision being "made or contemplated as to the ultimate division and "distribution of these resources. That this organization "was throughout its existence indebted for its success to "the capacity and personal qualities of the Defendant is to "my mind beyond question. But that fact cannot alter the "relations of the partners, their rights and liabilities as to "each other, if the terms of the partnership were as I have "stated. The Defendant's leadership in the firm was "conceded by his brothers from the first, and there occurred "nothing to disturb their unbounded confidence until the "profitable real estate speculations became known. The "contention that the Defendant made the firm in the first "instance, furnished it with money, founded and carried on "that credit with its bankers that was absolutely necessary "for its existence as an operating concern, dealt with the "various problems arising out of securing government and "corporation contracts, and skilfully conducted the manage- "ment of the heavy contracts undertaken by the firm, is a "contention that I think can be fairly, if not unreservedly, "admitted. It can also be accepted that his conduct "towards his brothers was generous. But all these con- "siderations, accepted as established to the letter, cannot "alter in the slightest the legal relationships established "when once the three entered upon their business as "builders, contractors, and brick-makers, under the terms "of partnership I have above set forth."

"It may be the belief of the Defendant, looking at "matters in retrospect, that the rule as to drawings pro- "mulgated by him was not intended to apply to himself. "But if that was the fact the others did not know it. If "that was his intention he does not appear to have "communicated it to them, but, on the contrary, to have "acted in conformity with the understanding as I have "stated it. The Plaintiffs accepted the arrangement, acted "pursuant to it, and evidently regarded it as an agreement "binding on themselves and the Defendant. And that is "the conclusion to be drawn from the evidence as I read "it."

"Under these circumstances, was it open to the "Defendant, by virtue of the 'unfettered discretion

"'confided in him by his brothers, without their consent
"'expressed or implied, to divert moneys from the resources
"'of the firm and use it in private speculations? To borrow
"'from the language used in corporation law, would not such
"'action on his part be *ultra vires*, and in violation of his
"'obligations as a member of the co-partnership constituted
"'as this co-partnership was, in my view, as above set
"'out?'"

The learned Judge then goes through the various items in dispute, and shows, as indeed was demonstrated to their Lordships on the hearing of the Appeal, that all the important items in controversy were entered in the books of the firm, which were kept under the direction of Thomas Kelly and entered up from information supplied by him and by no one else, and also appear in certain annual statements signed by the three partners as part of the available resources of the firm. Finally, he comes to the conclusion that, with the exception of three items of comparatively trifling amount, as to which his opinion was that the proof was not sufficient, the special directions given by the trial Judge should stand.

Their Lordships think it would serve no useful purpose to repeat the argument of Cameron, J. It is, in their Lordships' opinion, in every respect satisfactory and conclusive.

Their Lordships will therefore humbly advise His Majesty that the Appeal should be allowed, the Order of the Court of Appeal discharged with costs, except so much of it as dismissed the Cross-Appeal of Martin Kelly, and the Decree of the Trial Judge restored, subject to the eleventh paragraph being varied by excluding from the stock speculations therein referred to those relating to the stocks of the Chicago Subway Company, the Hudson Bay Company, Limited, the Northern Pacific Railway Company, and the Louisville and Nashville Railway Company, and confining the declaration therein contained

to such speculations, investments, and ventures of the Respondent as were entered into by him with the monies of the partnership, and subject also to the variations contained in paragraph 2 of the Judgment of the Court of Appeal as to the costs of the issues raised by the Appellant, Martin Kelly, in relation to the Manitoba Construction Company's stock. Their Lordships will further advise His Majesty that it should be referred to the Master to enquire whether any, and if so, what, sums were either paid by the Respondent out of his own monies in respect of the properties in question in this action, or debited to his account in the partnership books in respect of those properties, and in taking the partnership accounts he ought to be credited with any sums found to have been so paid or debited.

As regards the costs of this Appeal, under the peculiar circumstances of the case, their Lordships do not propose that any Order should be made.

In the Privy Council.

MICHAEL KELLY AND ANOTHER

v.

THOMAS KELLY.

DELIVERED BY LORD MACNAGHTEN.

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