[CIVIL JURISDICTION.]

BROWN *v.* MONTROSE.

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Oct. 28, 31—
Nov. 1, 8.

Dissolution of Partnership—Partnership Ordinance 1878, *ss.* 27, 84.

The Partnership Ordinance 1878 must be considered as merely a declaratory Ordinance, of which ss. 27 and 84 contain an insufficient and misleading declaration of what would at common law be sufficient to constitute a partnership. Further, that s. 84 does not apply to agreements that have been partly performed, but only where a failure to enter into a partnership has occurred.

This was an action heard on the 28th and 31st October, and 1st November, in which Leslie Brown, of the firm of Brown & Joske, merchants, of Suva, claimed a dissolution of partnership, and that accounts should be taken against Ernest Montrose, a French subject, in respect of a vanilla plantation near Suva, on the ground of neglect of partnership interests by the defendant and the consequent impossibility of properly carrying on the undertaking. The defence was that no partnership had been constituted between the parties, and that an unfair advantage had been taken of the defendant owing to his ignorance and dependent position; and the defendant asked by way of counter-claim that the agreement should be set aside, and that accounts should be taken between the parties on the basis of debtor and creditor.

Mr. Garrick for the plaintiff.

The Attorney-General (Mr. Udal) for the defendant.

From the evidence it appeared that in 1888 the defendant obtained a piece of ground near Suva on lease from the Government, upon which he commenced to form a vanilla plantation. In this he was subsequently assisted by the plaintiff who advanced him certain sums

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of money. Questions having arisen as to how much was due to the plaintiff in this respect, an arrangement was come to by the parties early in November, 1891, at which this sum was fixed at 170*l.* and a document in French was drawn up by the plaintiff embodying certain clauses which it was alleged formed an agreement for a partnership and which was signed by both plaintiff and defendant. This was subsequently embodied in a more formal document, drawn up in English by plaintiff's solicitor, but containing two additional clauses, and this document was on the 21st November executed by both parties in the office of the plaintiff's solicitor. This was the agreement upon which the plaintiff now founded his claim. Under this agreement further sums were advanced by the plaintiff to the defendant amounting to 105*l.* at the time of breaking off all relations with each other. It was also provided that the vanilla manufactured by the defendant should be handed over to the plaintiff for sale in reduction of his claim. It was disputed at the trial as to what extent this had been done. Since June last the defendant had carried on the plantation without any assistance from the plaintiff.

On the conclusion of the evidence for the plaintiff, the Attorney-General asked for a non-suit on the ground that the alleged agreement for partnership was void as it did not comply with the requisites of the Partnership Ordinance 1878, and contended that the position of the parties was only that of debtor and creditor, a position which the defendant was quite prepared to meet on proper accounts being submitted which he had in vain asked for. He argued that at most the alleged partnership was only an agreement for one year and as such was governed by s. 84 of the Partnership Ordinance 1878,

which only allowed an action for damages for any breach in such a case, and not an action founded on an existing partnership as alleged in the present case. If, on the other hand, the document did actually constitute the articles of partnership then it was void under s. 27, as, being a partnership where the capital exceeded 100*l.*, the articles of partnership did not contain the conditions and clauses laid down as necessary and compulsory by ss. 89, 91, 99, 100, and 102 as required by the terms of s. 27.

His Honour in declining to grant a non-suit, said with regard to the Attorney-General's first contention that, in his opinion, s. 84 of the Partnership Ordinance 1878 did not apply to agreements that had been partly performed, but only where a failure to enter into a partnership had occurred. Where a partnership had been entered into that section had no application, and could not therefore apply to the present agreement which had been worked under. He was unable to say that it was even an agreement to enter into partnership in so many words, but having been acted upon it might have that effect. The last two clauses were those which must be relied upon to constitute the partnership.

With regard to the Attorney-General's second contention his Honour after referring to s. 27, ruled that no articles of partnership existed in the present case, and the sole question therefore in regard to that section was as from its nature the partnership (if any) must exceed twelve months, what was the amount of the capital? Upon that point the document must speak for itself, and there was no evidence in the document to say what that capital was. His Honour said he failed to see how the sum of 170*l.*, advanced by the plaintiff, could be considered as part of the capital or

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assets, or anything but the liability of one of the parties. With regard to the subsequent advances the agreement provided that they were to be treated as a loan, and repaid as such before any division of profits. He was not prepared to say at present whether these advances were to be treated as capital or a loan. No risk appeared to have been intended by the plaintiff, who intended the amounts advanced to be repaid in full. It would seem that there was no capital at all brought in by the parties. Such an agreement might or might not constitute a partnership to be decided hereafter but it was not one coming under s. 27.

The Attorney-General then addressed the Court on the merits and submitted that an unfair advantage had been taken by the plaintiff of the defendant who, being a Frenchman, did not understand the full nature of the document he had signed, and stood in a dependent position towards the plaintiff, being his debtor at the time to a considerable extent. Under such circumstances it was the duty of the plaintiff to see that the defendant had independent advice before he executed such an one-sided agreement, more especially as at the time of his executing the document the plaintiff was well aware that Mr. Scott was acting as defendant's solicitor. He contended that under such circumstances the Court would set aside the agreement and relegate the parties to their former position of debtor and creditor. He referred to Kerr on *Frauds*, pp. 133, 137, 317, 319, and cited the recent cases of *Fry* v. *Lane* (1) and *James* v. *Kerr* (2) as to the necessity of independent advice being called in when the contracting parties stood in the relation of debtor and creditor, or other disqualifying position, to each other. He again referred to the legal

(1) L. R. 40 Ch. D. 312. (2) L. R. 40 Ch. D. 449.

aspect of the case, and argued that his Honour having found that no articles of partnership existed in this case s. 84 of the Partnership Ordinance applied, and the only remedy for the breach of an agreement for a partnership lay in an action for damages under that section, and that there was no such restriction as his Honour had intimated precluding the operation of the section from agreements partly performed. He contended, further, that the amount advanced by the plaintiff was only a loan and the action in its present form was wrong; but that if a partnership existed it must be held on the authority of *Syers* v. *Syers* (1) that such amounts were the plaintiff's capital, and as they amounted to over 100*l*. the provisions of s. 27 requiring that in such cases formal articles of partnership containing certain conditions should be drawn up, applied; and this not having been done, as his Honour had found, the defendant was entitled to judgment in the present action, whatever remedy the plaintiff might have against him as a creditor.

Mr. Garrick, in reply, contended that the document signed did not amount to articles of partnership, but only to an agreement for partnership which agreement had been acted upon; and cited Lindley on *Partnership*, p. 1017. The partnership having now been rendered unworkable by the misconduct of the defendant the plaintiff was entitled to a dissolution and to an account, and to directions as to what was to be done with reference to the carrying on of the plantation.

His Honour adjourned the case in order to allow of a settlement being arrived at; but, the parties not being able to come to terms, on the 8th November he gave judgment.

(1) L. R. 1 App. Cas. 174.

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H. S. BERKELEY, C.J. This is an action for an account and for a dissolution of partnership, in which the partnership is denied by the defendant, who asks by way of counter-claim for an account on the basis of creditor and debtor. The partnership is alleged to exist by virtue of an agreement dated 21st November, 1891, and it is now sought to be dissolved on the ground of the impossibility of carrying it on owing to the conduct of the defendant. The defendant now asks that this agreement should be set aside on the ground that he was induced to enter into it by the fraud and misrepresentation of the plaintiff, and that he never would have agreed to its terms except on the supposition that the rent due for the plantation, amounting to 30*l*., had been paid by the plaintiff. I hold that there is no evidence of any such sum having been allowed in fixing the amount of the defendant's indebtedness, or of any misrepresentation by the plaintiff in respect of it. With regard to the alleged exercise of undue influence or pressure, arising from the dependent position of the defendant upon the plaintiff, I consider that it was very insufficiently pleaded, but upon the facts before me I hold that there is no evidence of any improper influence being exercised by the plaintiff, but there is evidence of the defendant being quite capable of taking care of himself and this is particularly shown by his having declined to sign an earlier and more stringent agreement. The counter-claim cannot be sustained and must therefore be dismissed with costs.

The evidence with regard to vanilla in the hands of the plaintiff is not sufficient to enable me to deal with that now. It is in my opinion a transaction separate and distinct from the present proceedings, and it might

be that in respect of this matter the defendant might have his remedy later.

The agreement of the 21st November created in my opinion a partnership between the parties, and in it was an expressed intention to participate in profit, which intention always *primâ facie* indicates a partnership. [His Honour referred to *Walker* v. *Hirsch*. (1)] This intention, supplemented by the parties having dealt with each other for some months, is sufficient to establish a partnership as between themselves. That partnership must now be dissolved, for it is clear that the partners cannot continue as such, for the defendant has broken his engagement and neglected the plantation. The decree will follow that in the case of *Syers* v. *Syers (supra)*, and the sum of 170*l*. must be treated as the plaintiff's capital, brought into the partnership without interest. I am constrained now to take this view, against my former opinion, on the authority of *Syers* v. *Syers*, but the effect of this will not bring the case within the 27th section of the Partnership Ordinance, for I hold that the present partnership is one outside that Ordinance altogether, and one established by operation of the common law and the parties' own acts. I regard the Partnership Ordinance as being merely a declaratory Ordinance, and ss. 27 and 84 as containing an insufficient and misleading declaration of what would at common law be sufficient to constitute a partnership. Section 27 does not declare that no partnership where the capital exceeds 100*l*. *shall* be proved unless embodied in articles; but it uses the word "can" only. The Ordinance, therefore, contains an inaccurate statement and declaration of the law as it existed at the passing of the Ordinance; and, though not affecting this

(1) L. R. 27 Ch. D. 460.

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decision is likely to be misleading, and should therefore be repealed without delay. There will be a declaration that under the agreement of 21st November the plaintiff became entitled with the defendant to a half-share of the profits of the plantation, and a declaration that such partnership be dissolved; that the sum of 170*l.* be taken as capital brought into the partnership by the plaintiff without interest, and that the sum of 105*l.* be considered as a loan advanced for wages and labour by the plaintiff to the partnership. A sale of the plantation will be directed and a division of the assets in the usual manner, with liberty to apply for directions. The defendant must pay the costs up to and including the hearing.

Judgment for plaintiff with costs.

NOV. 3.

[CRIMINAL JURISDICTION.]

NAMOSI *v.* THE QUEEN.

Certiorari—Native Regulation II. of 1877, *s.* 9—*Warrant or Summons—Costs.*

A stipendiary magistrate, sitting in a Provincial Court, had sentenced a native Fijian to a month's imprisonment for disobedience to a "summons." On proceedings by *certiorari* being taken to quash the conviction on the ground that no imprisonment could be inflicted for disobedience to a summons in the first instance—the word "warrant" only appearing in the English version of the Native Regulation, though in the native version the words were "summons or warrant"—

Held, that, inasmuch as by Native Regulation punishment is awarded for disobedience to a "summons," the stipendiary magistrate had jurisdiction and, therefore, the *certiorari* must be superseded, but, under the circumstances, without costs.