

1898 JAMES H. WEST (PLAINTIFF).....APPELLANT;

\*Nov. 2,3,4.

AND

\*Dec. 14.

ELIJAH W. BENJAMIN (DEFENDANT)..RESPONDENT.  
ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Partnership—Settled accounts—Releases—Setting aside releases and opening accounts.*

One of two members of a firm not possessing business capacity the other managed and controlled all its affairs presenting at intervals to his partner statements of account which the latter signed on being assured of their correctness. In 1891 mutual releases of all claims and demands against each other, based upon statements so submitted by the active partner, were executed by each. In an action against the active partner to set aside these releases and open up the accounts.

*Held*, that all it was necessary to establish was, that in the accounts as settled there were such errors and mistakes as would inflict material injustice upon the plaintiff if the accounts should be held to be closed.

\*PRESENT :--Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

APPEAL from a decision of the Court of Appeal for Ontario varying the judgment at the trial which ordered a reference to take an account of the partnership affairs of the parties.

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The material facts of the case are fully set out in the judgment of the court.

*Aylesworth, Q.C.* and *Madden* for the appellant.

*Clute Q.C.* and *Masten* for the respondent.

The judgment of the court was delivered by :

GWYNNE J.—This was an action instituted by the plaintiff for taking the accounts of a partnership formed in September, 1875, by and between one Joseph Connolly, the defendant and the plaintiff, in which the plaintiff had one-half interest, and Connolly and the defendant one-fourth each. The defendant says in his evidence that articles of partnership were signed but that they have been burned. There is however no dispute as to the terms upon which the partnership was formed which may be taken from the statement of the defendant who says—that he was to have absolute control of the business of the firm, and of the books, and was to keep the books. He was to be, and in fact was the banker of the firm, and that the monies of the firm were until he purchased out Connolly in 1885, paid into the bank to the credit of Connolly & Benjamin, and afterwards into the defendant's own name, which continued until November, 1890, when, as he says, the plaintiff went in with the defendant's boys; further he says that he was to be accountable for all the moneys of the firm, that the proceeds of all sales of the goods of the firm were received by him or by Baxter for him; this Baxter was a person in the employment of the firm, not a professional bookkeeper, but whom the defendant employed to keep the books

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for him. He says that until January, 1883, no cash book was kept, but that until then cash received was entered in a day book. The defence set up to this action in the defendant's statement of defence is that as he alleges on several days between the 4th of February, 1882, and the 31st December, 1890, diverse settlements took place of all the partnership transactions between the plaintiff and the defendant, which as the defendant contends constituted, and were signed and accepted by the plaintiff as constituting, final and conclusive settled and stated accounts of the said transactions at the respective dates of such statements of account, and that thereby all right of the plaintiff to have the account now taken is barred, and as a separate defence the defendant pleaded a release bearing date the 23rd day of June, 1891. The question now is whether the documents or statements relied upon by the defendant as constituting settled and stated accounts are sufficient to bar the plaintiff's right to have an account taken of the partnership transactions. In the month of February, 1882, the defendant prepared or caused to be prepared by Baxter a statement purporting to show the money value of the capital stock of the firm at the formation of the partnership in September, 1875, and of the amounts alleged to have been received by the defendant on account of the firm up to the 31st December, 1881, thus—\$54,010.38 disbursed—\$64,964.94 received.

This statement assuming the defendant's statement of the amounts received and disbursed by him to be correct showed that upon the 31st December, 1881, there still remained due by the plaintiff on account of his share in the capital stock, the sum of \$6,405.44. This paper, the plaintiff having no experience in accounts and bookkeeping and having, as he says he then had, most implicit confidence in the defendant,

signed at the request of the defendant and upon his assurance and the assurance of Baxter, the bookkeeper employed by the defendant, that the statement was perfectly correct; and now although his confidence in the plaintiff is not as it then was he does not desire to question anything stated in that paper because that by reason of the complete control given to the defendant by the terms of the partnership and of his mode of keeping the accounts of the firm, and of the fact that he kept no cash book it would be futile for the plaintiff to attempt to prove any wrong in the statement so made by the defendant. He is therefore willing to let everything in it remain unquestioned, and that the account should be taken from the 1st of January, 1882, upon the basis that everything stated in that paper is correct. After the signing of the paper of the 4th February, 1882, the partnership continued as before but new articles dated the 14th April, 1882, were entered into whereby the partnership was continued as from the 1st of January preceding upon the old terms, and it was expressly declared that the defendant should have complete control as before—that he should have absolute power to buy, sell, collect, hire and discharge, and to do the full business of the firm, and he therein and thereby undertook to give half yearly a full account of all monies received and disbursed by him from the proceeds of the said business from the first day of January, 1882.

In the month of December, 1882, the defendant purchased from the plaintiff one-sixth part of his half share, thus reducing the plaintiff's interest to one-third share, and accordingly new articles were prepared and signed, bearing date the first day of January, 1883, providing for this change. By these articles the defendant retained as from the beginning absolute control over the business of the firm, and as to hiring

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and discharging all persons in the service of the firm, and the absolute right in himself to receive and disburse all the monies of the firm, and he continued under the obligation to render half yearly true accounts of all sums received and disbursed. In these articles, however, is introduced the following clause :

There is now due by the said firm to the said Elijah Wesley Benjamin *as per settlement*, the sum of \$1,932  $\frac{87}{100}$ , which sum is to be paid to the said Benjamin as soon as the company can get the money.

The settlement here referred to has been produced, and it is simply a debtor and creditor account between "E. W. Benjamin and the Hub Factory" wherein he charges himself with having received during the year 1882 certain sums, and he credits himself with having monthly disbursed certain specific sums for the firm, and he draws the balance upon such debit and credit items in his own favour to the amount of \$1,932  $\frac{87}{100}$ . This document is signed by the defendant and Connolly and the plaintiff. The plaintiff set his signature to it as he had done to that of February, 1882, relying upon the assurance of the defendant in whom he had then most implicit trust and confidence that it was quite correct and showed truly all the sums received and disbursed by the defendant and for which he was accountable. The account does not profess to show the stock in hand of the firm, nor the debts outstanding due to the firm upon open account or commercial paper, nor the debts due by the firm, so that it does not purport to be a stated account of the partnership affairs at the respective dates named. It is in fact an account rendered by the defendant in compliance with the obligation resting on him by the partnership articles to render half-yearly accounts of his receipts and disbursements for the firm; and by signing it, neither the plaintiff nor the defendant is concluded from showing errors. In

the month of April, 1885, the defendant purchased Connolly's interest in the firm and the business continued to be conducted by the plaintiff and defendant on the former terms until the 10th of February, 1888, when the plaintiff and defendant signed new articles of partnership in which there appears a recital that on the 1st of January of that year a settlement was effected between the plaintiff and defendant of their partnership business and transactions up to that date, and that upon such settlement they had agreed to grant to each other mutual releases of all debts and demands up to the said first day of January, and by the said articles it was again provided, as formerly, that the defendant should conduct the financial part of the business and should attend to the selling of the goods of the firm and the collecting of the firm's debts, and the signing of all bills, notes and cheques for and on behalf of the firm, and shall further exercise a general superintendence and management over the whole business. On the 23rd day of June, 1891, an instrument was executed by and between the defendant and the plaintiff in which after reciting that a settlement of their partnership affairs was that day made between the plaintiff and the defendant to the effect therein stated the parties thereto, in consideration of the sum of one dollar therein stated to have been paid by each to the other, executed mutual releases to each other of all actions, suits, claims and demands, excepting as therein excepted, from the beginning of the world to date.

Up to this time the plaintiff continued to have the utmost confidence in the defendant but subsequently that confidence was lost and the plaintiff believing the accounts so as aforesaid rendered by the defendant and so as aforesaid procured to have been signed by the plaintiff to be materially incorrect instituted the present action wherein the sole issue was whether or

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not the right of the plaintiff to an account against the defendant as the partner who has assumed the position of being responsible for all the accounts and all the receipts and disbursements of the firm was barred by the statements relied upon by the defendant as stated and settled accounts or by the releases set up and relied upon by the defendant which appear to have been executed upon no other consideration than the assumption of the correctness of the said accounts.

The conclusion arrived at by the learned trial judge was that it was established as a fact upon the uncontradicted evidence of accountants examined before him that a thorough examination of the partnership books disclosed that if the accounts relied upon by the defendant should be treated as settled the result would be a clear loss to the plaintiff of about seven thousand dollars. And further, he found as a fact that the plaintiff was a man without business capacity and had not capacity to understand the subjects necessary to be taken into account in arriving at a proper adjustment of the partnership accounts; and that all the statements of account relied upon by the defendant were signed by the plaintiff in reliance upon the representations of defendant that the statements so signed were correct statements of the accounts, and he made a decree referring it to the master to take the accounts.

Upon an appeal by the defendant, the Court of Appeal at Toronto set aside that decree and made a decree referring it to the master to inquire into and to report upon eleven items amounting in the whole to about \$1,900, and they adjudged that the plaintiff should pay to the defendant the costs of the appeal and of the action.

Now, part of the loss of \$7,000 mentioned in the decree of the learned trial judge and in the evidence of the accountants examined before him consisted of

\$2,800 distributed over forty items which the books of the firm showed that the defendant had received from debtors of the firm but that no charge to the defendant for such amounts had been entered in any book of the firm from which the statements of account signed by the plaintiff had been made up, and the items referred to the master by the Court of Appeal were eleven of those forty items. We do not think that the limitation of the inquiry to those eleven items can be maintained. The evidence given at the trial and adopted by the learned trial judge applied equally to the forty items as to the eleven, namely, that the books for which the defendant was accountable showed that the amounts had been received by him and did not show that he had charged himself therewith; and the learned trial judge has also found as a fact that the plaintiff signed the statements of account furnished by the defendant upon his assurance that they were correct; the defendant indeed admits this to be the fact. Then there is the evidence of the accountants who have examined the books which evidence the learned trial judge has adopted as uncontradicted, to the effect that the loss which would result to the plaintiff if those statements of accounts should be held to conclude him, would, as appearing on the books of the firm, result in a clear loss to him of about \$7,000. Now all that it was necessary to establish in order to set aside the releases pleaded, and to open the accounts was that in the accounts as taken there were such errors or mistakes as would inflict material injustice upon the plaintiff if the accounts should be held to be closed. The defendant has throughout retained in his own hands absolute control over the receipts and disbursements of the firm and has assumed absolute responsibility and account-

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ability for the manner in which the books have been kept.

In the face of the evidence as to what a thorough examination of the books of the firm discloses it would be manifestly unjust that the plaintiff should be bound by releases executed under the circumstances as found by the learned trial judge. We are of opinion therefore that the appeal must be allowed with costs and that the decree of the learned trial judge for a general account varied so as to open and take the accounts only from and including the first of January, 1882, should be restored. The decree will declare all the releases in the pleadings and evidence mentioned shall be set aside, and the plaintiff consenting that the matters stated in the document bearing date the 4th February, 1882, shall remain undisturbed, declare all statements of account subsequent thereto to be set aside and of no effect, and refer it to the master to take the accounts from and including the first of January, 1882. The decree will adjudge to the plaintiff his costs of the action to the hearing and will reserve all further costs until the account shall be taken, in the usual form.

*Appeal allowed with costs.*

Solicitors for the appellant: *Deroche & Madden.*

Solicitors for the respondent: *Herrington & Warner.*

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