Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mollwo, March, and Co. v. *the Court of Wards on behalf of the Estate of Rajah Pertab Chunder Sing, from the High Court of Judicature at Fort William in Bengal; delivered 27th July*, 1872.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

Sir Lawrence Peel.

THE action which gives occasion to this Appeal was brought by the Plaintiffs (the Appellants), merchants of London, against the late Rajah Pertab Chunder Singh, to recover a balance of nearly 3 lacs of rupees claimed to be due to them from the firm of W. N. Watson and Co., of Calcutta.

The Rajah having died during the pendency of the suit, the defence was continued by the Respondents, the Court of Wards, on behalf of his minor heir.

The Plaint alleged that the firm of W. N. Watson and Co. consisted of William Noel Watson, Thomas Ogilvie Watson, and the Rajah, and sought to make the Rajah liable as a partner in it.

It may be assumed, although the exact amount is a question in dispute in the Appeal, that a large balance became due from the firm to the Plaintiffs during the time when it is contended that the Rajah was in partnership with the two Watsons.

The questions in the Appeal depend, in the main, on the construction and effect of a written agree-

ment entered into between the Watsons and the Rajah; but it will be necessary to advert to some extrinsic facts to explain the circumstances under which it was made and acted on.

The two Watsons commenced business in partnership, as merchants, at Calcutta, in 1862, under the firm of W. N. Watson and Co. Their transactions consisted principally of making consignments of goods to merchants in England, and receiving consignments from them.

In January 1863 they entered into an agreement with the Plaintiffs regulating the terms on which consignments were to be made between them, and under which W. N. Watson and Co. were authorized, within certain limits, to draw on the Plaintiffs in London against consignments.

The Watsons had little or no capital. The Rajah supported them, and in 1862 and 1863 he made large advances to enable them to carry on their business, partly in cash, but chiefly by accepting bills, for which the Watsons obtained discount, and which the Rajah met at maturity. In the middle of 1863 the total amount of these advances was considerable, and the Rajah desired to have security for his debt, and for any future advances he might make, and also wished to obtain some control over the business by which he might check what he considered to be the excessive trading of the Watsons.

Accordingly, an Agreement was entered into on the 27th August 1863, between the Rajah of the one part, and "Messrs. W. N. Watson and Co.," of the other part, by which, in consideration of money already advanced, and which might be thereafter advanced by the Rajah to them, the Watsons agreed to carry on their business subject to the control of the Rajah in several important particulars which will be hereafter adverted to. They further agreed to, and in fact did, hand over to him "as security" the title-deeds of certain tea-plantations, and they also agreed that "as further security" all their other property, landed or otherwise, including their stock in trade, should be answerable for the debt due to him.

The 10th and 13th clauses of the Agreement were as follows:—

"10th. In consideration of the said advances made and the liability incurred as aforesaid by the

Rajah, and in consideration of any future advances which may be made by him, the firm agrees that he shall receive from them a commission of 20 per cent. on all net profits made by the firm from time to time, commencing from the 1st May, 1862, or until such time as the whole amount of the debt due to him shall be paid off, and the liability so incurred by him as aforesaid shall be wholly extinguished."

" 13th. The firm shall, in addition to the said commission, pay to the Rajah interest at the rate of 12 per cent. per annum upon all cash advances which have been or are to be hereafter made by him to the firm, and shall also pay to the banks all discount and interest now or hereafter payable on the said acceptances."

This Agreement is not signed by the Rajah, but he was undoubtedly an assenting party to it.

Subsequently to the agreement the Rajah made further advances, and the amount due to him ultimately exceeded three lacs of rupees.

In 1864 and 1865 the firm of W. N. Watson and Co. fell into difficulties. An arrangement was then made under which the Rajah, upon the Watsons executing to him a formal mortgage of the tea-plantations to secure the amount of his advances, released to them, by a deed bearing date the 3rd March, 1865, all right to commission and interest under the Agreement of August 1863, and all other claims against them.

In point of fact, the Rajah up to this time had never received possession of any of the property or moneys of the firm, nor any of the proceeds of the business, and did not in fact receive any commission. A sum of 27,000 rupees on this account was, indeed, on the 30th September, 1863, placed to his credit in the books of the firm in a separate account opened in his name, but the sum so credited was never paid to him, and was subsequently " written back " by the Watsons.

Some evidence was given as to the extent of the interference of the Rajah in the control of the business. It seems the Rajah knew little of its details, and it is unnecessary to go, with any minuteness, into the facts on this part of the case; for it was conceded that the Rajah availed himself only in a slight degree of the powers of control conferred upon him by the Agreement: in fact, that he did not

more, but much less, than he might have done under it, so that the question really turns on the effect of the contract itself. The subsequent acts of the Rajah do not in any way add to or enlarge his liability.

Before proceeding to the main questions which have been argued in the Appeal, it may be as well to clear the way for their consideration by saying that no liability can in this case be fastened upon the Rajah on the ground that he was an ostensible partner, and therefore liable to third persons as if he was a real partner. It is admitted that he did not so hold himself out; and that a statement made by one of the Watsons to the Plaintiffs, to the effect that he might be in law a partner, by reason of his right to commission on profits, was not authorized by the Rajah.

The liability, therefore, of the Rajah for the debts contracted by W. N. Watson and Co. must depend on his real relation to that firm under the Agreement.

It was contended, for the Appellants, that he was so liable.

1. Because he became by the Agreement, at least as regards third persons, a partner with the Watsons; and

2. Because, if not "a true partner" (the phrase used by Mr. Lindley in his argument), the Watsons were the agents of the Rajah in carrying on the business; and the debt to the Plaintiffs was contracted within the scope of their agency.

The case has been argued in the Courts of India and at their Lordships' Bar, on the basis that the law of England relating to partnerships should govern the decision of it. Their Lordships agree that, in the absence of any law or well-established custom existing in India on the subject, English law may properly be resorted to in mercantile affairs for principles and rules to guide the Courts in that country to a right decision. But whilst this is so, it should be observed that in applying them, the usages of trade and habits of business of the people of India, so far as they may be peculiar and differ from those in England, ought to be borne in mind.

The Agreement, on the face of it, is an arrangement between the Rajah, as creditor, and the firm consisting of the two Watsons, as debtors, by which

the Rajah obtained security for his past advances; and in consideration of forbearance, and as an inducement to him to support the Watsons by future advances, it was agreed that he should receive from them a commission of 20 per cent. on profits, and should be invested with the powers of supervision and control above referred to. The primary object was to give security to the Rajah as a creditor of the firm.

It was contended at the Bar that whatever may have been the intention, a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation, unless rebutted by other circumstances.

It appears to their Lordships that the rule of construction involved in this contention is too artificial; for it takes one term only of the contract and at once raises a presumption upon it. Whereas the whole scope of the Agreement, and all its terms, ought to be looked at before any presumption of intention can properly be made at all.

It certainly appears to have been at one time understood that some decisions of the English Courts had established, as a positive rule of law, that participation in the net profits of a business made the participant liable as a partner to third persons. (See this pointedly stated by Mr. Justice Blackburn, in Bullen v. Sharpe (L. R. 1 C. B. 109.) The rule had been laid down with distinctness by Eyre, C. J., in Waugh v. Carver (2 H. Bl. 285), and the reason of the rule the Chief Justice thus states: "Upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of Grace v. Smith, and I think it stands upon fair grounds of reason."

The rule was evidently an arbitrary one, and subsequent discussion has led to the rejection of the reason for it as unsound. Whilst it was supposed to prevail, much hardship arose from its application, and a distinction, equally arbitrary, was established between a right to participate in profits generally "as such," and a right to a payment by way of salary or commission "in proportion" (to use the

words of Lord Eldon) "to a given quantum of the profits."

This distinction was stated to be "clearly settled" and was acted upon by Lord Eldon in exparte Hamper (17 Ves., 412), and in other cases. It was also affirmed and acted on in Pett v. Eyton (3 C. B., 32) where Tindal, C. J., in giving the judgment of the Court, adopts the rule as laid down by Lord Eldon, and says, "Nor does it appear to make any dfference whether the money is received by way of interest on money lent, or wages, or salary as agent, or commission on sales."

The present case appears to fall within this distinction. The Rajah was not entitled to a share of the profits "as such;" he had no specific property or interest in them *quâ* profits, for, subject to the powers given to the Rajah by way of security, the Watsons might have appropriated or assigned the whole profits without any breach of the Agreement. The Rajah was entitled only to commission, or a payment equal in proportion to one-fifth of their amount.

This distinction has always been admitted to be thin, but it may be observed that the supposed rule itself was arbitrary in the sense of being imposed by law and of being founded on an assumption opposed in many cases to the real relation of the parties; and when the law thus creates a rule of liability and a distinction both equally arbitrary. the distinction which protects from liability is entitled to as much weight as the rule which imposes it.

But the necessity of resorting to these fine distinctions has been greatly lessened since the presumption itself lost the rigid character it was supposed to possess after the full exposition of the law on this subject contained in the judgment of the House of Lords in Cox *v.* Hickman (8 H. L., 268) and the cases which have followed that decision. It was contended that these cases did not overrule the previous ones. This may be so, and it may be that Waugh *v.* Carver, and others of the former cases, were rightly decided on their own facts; but the judgment in Cox *v.* Hickman had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this

kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. It appears to be now established that although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such perception alone, it may, as a presumption, not of law but of fact, be inferred; yet that whether that relation does or does not exist must depend on the real intention and contract of the parties.

It is certainly difficult to understand the principle on which a man who is neither a real nor ostensible partner can be held liable to a creditor of the firm. The reason given in Grace *v.* Smith, that by taking part of the profits he takes part of the fund which is the proper security of the creditors, is now admitted to be unsound and insufficient to support it; for of course the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make the mortgagee a partner.

Where a man holds himself out as a partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel.

Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract.

Numerous definitions by text-writers of what constitutes a partnership are collected at the end of the Introduction to Mr. Lindley's excellent Treatise on this subject. Their Lordships do not think it necessary to refer particularly to any of them, or to attempt to give a general definition to meet all cases. It is sufficient for the present decision to say, that to constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common.

It was strongly urged, that the large powers of control, and the provisions for empowering the Rajah to take possession of the consignments and their proceeds, in addition to the commission on net

profits, amounted to an agreement of this kind, and that the Rajah was constituted, in fact, the managing partner.

The contract undoubtedly confers on the Rajah large powers of control. Whilst his advances remained unpaid, the Watsons bound themselves not to make shipments, or order consignments, or sell goods without his consent. No money was to be drawn from the firm without his sanction, and he was to be consulted with regard to the office business of the firm, and he might direct a reduction or enlargement of the establishment. It was also agreed that the shipping documents should be at his disposal, and should not be sold or hypothecated, or the proceeds applied without his consent; and that all the proceeds of the business should be handed to him, for the purpose of extinguishing his debt.

On the other hand, the Rajah had no initiative power; he could not direct what shipments should be made or consignments ordered, or what should be the course of trade. He could not require the Watsons to continue to trade, or even to remain in partnership; his powers, however large, were powers of control only. No doubt he might have laid his hands on the proceeds of the business; and not only so, but it was agreed that all their property, landed and otherwise, should be answerable to him as security for his debt.

Their Lordships are of opinion that by these arrangements the parties did not intend to create a partnership, and that their true relation to each other under the agreement was that of creditor and debtors. The Watsons evidently wished to induce the Rajah to continue his advances, and, for that purpose, were willing to give him the largest security they could offer; but a partnership was not contemplated, and the agreement is really founded on the assumption, not of community of benefit, but of opposition of interests.

It may well be that where there is an agreement to share the profits of a trade, and no more, a contract of partnership may be inferred, because there is nothing to show that any other was contemplated; but that is not the present case, where another and different contract is shown to have been intended, viz., one of loan and security.

Some reliance was placed on the Statute 28 and

29 Vict., c. 86, which enacts that the advance of money to a firm upon a contract that the lender shall receive a rate of interest varying with the profits, or a share of the profits, shall not, of itself, constitute the lender a partner, or render him responsible as such. It was argued that this raised an implication that the lender was so responsible by the law existing before the passing of the Act. The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shown to be different from that which the legislature supposed it to be, the implication arising from the statute cannot operate as a negation of its existence. What may be the effect of the positive enactment contained in the 5th Clause of the Act, so far as regards England, it is not necessary for their Lordships to consider. The Indian Act, XV of 1866, passed after this contract was made, does not contain that provision.

It was strongly insisted for the Appellants that if "a true partnership" had not been created under the Agreement, the Watsons were constituted by it the agents of the Rajah to carry on the business, and that the debt of the Plaintiffs was contracted within the scope of their agency.

Of course, if there was no partnership, the implied agency which flows from that relation cannot arise, and the relation of principal and agents must on some other ground be shown to exist. It is clear that this relation was not expressly created, and was not intended to be created by the Agreement, and that, if it exists, it must arise by implication. It is said that it ought to be implied from the fact of the commission on profits, and the powers of control given to the Rajah. But this is again an attempt to create, by operation of law, a relation opposed to the real agreement and intention of the parties, exactly in the same manner as that of partners was sought to be established, and on the same facts and presumptions. Their Lordships have already stated the reasons which have led them to the conclusion that the trade was not agreed to be carried on for the common benefit of the Watsons and the Rajah, so as to create a partnership; and they think there is no sufficient ground for holding that it was carried on for the Rajah, as principal, in any other

character. He was not, in any sense, the owner of the business, and had no power to deal with it as owner. None of the ordinary attributes of principal belonged to him. The Watsons were to carry on the business; he could neither direct them to make contracts, nor to deal with particular customers, nor to trade in the manner which he might desire: his powers were confined to those of control and security, and, subject to those powers, the Watsons remained owners of the business and of the common property of the firm. The agreement in terms, and, as their Lordships think, in substance, is founded on the relation of creditor and debtors, and establishes no other.

Their Lordships' opinion in this case is founded on their belief that the contract is really and in substance what it professes to be, viz., one of loan and security between debtors and their creditor. If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character.

For the above reasons their Lordships think that the Judges of the High Court, in holding that the Rajah was not liable for the debts of the firm of W. N. Watson and Co., took a correct view of the case; and they will, therefore, humbly advise Her Majesty to affirm their Judgment, and to dismiss this Appeal with costs.

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