Privy Council Appeal No. 60 of 1934.

George Bernard Dupigny and Another - - - - - *Appellants*

v.

F. Pinard and Company - - - - - - - - *Respondents*

FROM

THE WEST INDIAN COURT OF APPEAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH JUNE, 1935.

Present at the Hearing:

LORD BLANESBURGH.
LORD RUSSELL OF KILLOWEN.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

This appeal came before their Lordships' Board in peculiar circumstances. It is an appeal from an order of the West Indian Court of Appeal which dismissed an appeal from a judgment of the Supreme Court of the Leeward Islands Dominica Circuit. The judgment in question was entered in an action tried before the acting Chief Justice of the Leeward Islands and a special jury; but the record contains none of the evidence which was given by the various witnesses at the trial. The explanation of this exceptional state of affairs is that the appellants base their appeal upon the contention that the findings of fact by the jury did not establish any ground of liability of the appellants to the plaintiffs, and that accordingly the trial judge was wrong in law in ordering judgment to be entered against the appellants.

Such being the contention of the appellants the omission of the evidence from the record is explained and justified. In a trial before a judge and jury, all facts, the proof of which is essential to the establishment of legal liability on the part of a defendant, must be either admitted or proved, and if in dispute they must be found by the jury, either as answers to specific questions, or as flowing from those answers or as involved in a general verdict for the plaintiff. Upon the facts so admitted or proved, the judge has then to determine as matter of law whether judgment should be entered for the plaintiff or defendant.

The facts relevant to this appeal may now be stated.

There lived formerly at Roseau, Dominica, one Wilson Dupigny who carried on business as a merchant and druggist under the style " Wilson Dupigny ". He died on the 17th December 1909 leaving him surviving his wife Mary Emma Dupigny and seven children, viz., (1) Camilla Dupigny (2) Joseph Dupigny (3) Wilson Patrick Leonard Dupigny (hereinafter referred to as Leonard Dupigny) (4) Lilian Dupigny (5) the appellant Mrs. Sutherland (6) Agnes Dupigny and (7) the appellant George Bernard Dupigny. By his will, which was duly proved on the 3rd February 1910, he appointed his wife and Leonard Dupigny his executors, and devised and bequeathed his residuary estate (which included the business) to his wife and his seven children and their heirs and assigns for ever in equal shares as tenants in common. The will provided that in the event of any of his said children dying without leaving lawful issue their shares and if one his or her share should revert to the others of his said wife and children. At the time of his death at least one of the said children (viz. the appellant George Bernard Dupigny) was an infant. The testator's widow died on the 2nd December 1912 having devised and bequeathed all her property to Camilla Dupigny. Agnes Dupigny died on the 31st January 1923 unmarried, and without leaving lawful issue. Leonard Dupigny died on the 14th August 1926, intestate and letters of administration to his estate were granted to his widow Lucy Anne Dupigny on the 6th September 1926. Camilla Dupigny died on the 17th November 1928 unmarried, and without leaving lawful issue. The appellant George Bernard Dupigny attained his majority on the 21st April 1912. These facts are alleged and admitted in the pleadings in the action now in question.

The following facts are also admitted either expressly or inferentially in the pleadings, viz., that the testator's business was carried on after the testator's death under the name " Estate Wilson Dupigny ", the management being in the hands of Leonard Dupigny so long as he lived, and in the hands of his widow after his death.

The writ of summons in the action was issued on the 1st June 1929. The plaintiff was originally described as Alice Sylvia Pinard trading as F. Pinard & Company. At the trial this was amended by order of the Judge so that the action became one in which the plaintiffs were " F. Pinard and Company ". The defendants were the three surviving children of the testator and the administratrix of Leonard Dupigny. They were described as " trading in co-partnership in the name of Estate Wilson Dupigny ". The said Lilian Dupigny died after the issue of the writ and disappears from the case. The indorsement of the claim is for moneys lent and the price of goods supplied to the defendants as persons who since the testator's death have carried on business in co-partnership under the trade name of " Estate Wilson Dupigny ".

The statement of claim is framed upon the same footing; but the difficulty of a claim upon the footing of a partnership commencing on the death of the testator is apparent in view of the fact that the children were not then all sui juris.

The administratrix of Leonard Dupigny put in no defence. The appellants delivered a joint defence in which they denied that they had ever been partners in the business or that they had ever carried it on. They alleged that it had been carried on by Leonard Dupigny after the death as if he were sole owner, and after his death by his administratrix. They denied that they had ever consented to the carrying on of the business.

Such being the rival contentions of the parties the action proceeded to trial.

After a trial lasting some 10 days the Judge on the 23rd September 1933 summed up the case to the jury. Criticism might be directed against the summing up in several respects, but for the present purpose its importance lies in the questions which were put to the jury. One would have expected to find one or more questions framed for the purpose of ascertaining whether or not the appellants had at the relevant times been carrying on the business either personally or through the agency of some one else; and whether or not the moneys had been lent and the goods had been supplied to them personally or to the agent on their behalf. At one stage the Judge had in his summing up stated that one question which he would leave to the jury would be: " Did Miss Pinard on behalf of F. Pinard & Co. loan money from time to time to the defendants as a business? " Such a question (hereinafter referred to as the suggested question) though inartistically framed, might if answered in the affirmative have amounted to a finding of partnership. It was not however put to the jury. The only questions left to the jury and the answers to them were as follows:—

Questions.	*Answers.*
1. Did Miss Pinard from time to time on behalf of F. Pinard & Co. loan money for the purpose of assisting the business of Wilson Dupigny?	1. The jury find that from time to time Miss Pinard on behalf of Pinard & Co. loaned money to Mr. W. P. L. Dupigny and that some of these loans went to the assistance of Estate Wilson Dupigny.
2. Was she given to understand and did she understand that these loans were for the purpose of carrying on the business and to help it from time to time?	2. Miss Pinard was given to understand and she understood that some of those loans were for the purpose of carrying on the business of Estate Wilson Dupigny and to help it from time to time.
3. Has the money so advanced or any part thereof been repaid?	3. The moneys so advanced and which actually went to the assistance of Estate Wilson Dupigny, as vouched for, including those admitted by the defendants have not been repaid.
4. Does the plaintiff recover the amount claimed on the pleadings?	4. Plaintiff to recover the amounts as covered by the finding of the jury.

A discussion ensued upon the jury's findings, which was adjourned, the jury being discharged. Arguments were heard on the 25th September 1933. The Judge decided that upon the jury's answers there must be judgment for the plaintiffs, but that the amount for which judgment should be entered must be a matter of enquiry. By agreement the question of quantum was referred to the Bishop of Roseau. Pending his report no order was drawn up. As the result of the Bishop's report the figures were agreed at £1,849 4s. 3d. A draft order was accordingly prepared and initialled as approved by counsel for the plaintiffs and the appellants, and on the 25th October 1933 an order (following the terms of the draft) was passed and entered. It runs thus: —

> This action having on the 12th, 13th, 14th, 15th, 18th, 19th, 20th, 21st, 22nd, 23rd, 25th day of September, 1933, been tried before His Honour Bernard H. A. F. Berlyn, Acting Chief Justice of the Leeward Islands with a special jury of the Dominica Circuit, and the jury having on the 23rd day of September, 1933, found a verdict for the plaintiffs without fixing the amount to be recovered: and His Honour the Acting Chief Justice having with the consent of all parties herein referred the issues herein to His Lordship the Right Reverend James Moris, C.SS.R., Lord Bishop of Roseau, for an account to be taken and enquiry made as to the amount to be recovered, by the plaintiffs on the findings of the jury. And all parties having agreed to be bound by the findings of the said Referee and the said Referee having on the 11th day of October, 1933, heard counsel for the plaintiffs and defendants and having on the 17th day of October, 1933, presented his findings to the Court; And His Honour the Acting Chief Justice having thereupon directed that judgment be entered for the plaintiffs for £1,849 4s. 3d. and their costs of action: Therefore it is adjudged that the plaintiffs recover against the defendants £1,849 4s. 3d. and their costs of action to be taxed.

The appellants appealed to the West Indian Court of Appeal upon the grounds (amongst others) that no verdict for the plaintiffs had been returned by the jury, and that on the pleadings and on the answers returned by the jury to the questions put to them, judgment could only have been given for the appellants.

The appeal was dismissed, the judgment of the Court being delivered by the Chief Justice of Trinidad. This judgment appears to rest on two grounds. (1) That at the trial counsel for the defendants had " admitted their liability for certain of the items "; that the first question left to the jury and the suggested question must be read together; and that therefore what was left to the jury was " to say whether the plaintiffs advanced the money claimed to the defendants in connection with the business", and that the jury had answered this " somewhat vaguely " by saying that some moneys were so lent and remained unrepaid, but did not fix the amount. (2) That the order of the 25th October 1933 was, though not so expressed in fact, a judgment by consent, that it

contained an " express agreed recital " that the jury had found a verdict for the plaintiffs the truth of which recital the appellants could not dispute, and that the parties definitely agreed to be bound by the Bishop's conclusions.

Their Lordships feel no doubt that the grounds upon which the appeal was dismissed are incapable of being supported. The order was in no sense of the word a consent order. The Judge had decided adversely to the appellants that upon the jury's findings the plaintiffs were entitled to judgment against them for an amount to be quantified by the referee. The only consent was, upon the footing of an existing adverse decision as to liability, that the quantum should be ascertained by a particular referee. The approval of the draft order was merely a recognition that an order in terms of the draft would correctly represent the order which the Judge had made. Nor can the first question actually put to the jury and the suggested question be read together. There is no possible justification for this. But if it is to be taken that the question left to the jury was such as is indicated by the Court of Appeal, the answer given, far from being (as the Court of Appeal seem to think) that the money was " so lent " (i.e. lent to the defendants), is in fact that the money was lent to Leonard Dupigny. Finally the Court of Appeal rely upon the fact (as alleged by them) that " Counsel for the defendants had in open Court admitted their liability for certain of the items ". This is a complete misconception of what took place. The shorthand notes are included in the record. In the first place no admission of any kind was made on behalf of the appellant Mrs. Sutherland: and in the second place the admissions made on behalf of the other appellant, were not in any sense admissions on the footing of the existence of a partnership, but on the footing of the existence of other special grounds of liability affecting the four items in question.

Their Lordships now proceed to consider whether upon the findings of the jury judgment was rightly entered against the appellants, or whether the appeal should have succeeded.

As before stated the only facts upon which legal liability against the appellants can be established are those which have been found by the jury either expressly or by implication, or which have been admitted. In the present case no admission has been made of any fact involving liability except the admissions on behalf of one appellant in regard to four items. The case accordingly stands thus:—the plaintiffs have alleged liability on the part of the appellants, and the only facts which have been established are those which the jury have found, viz., (1) that money was loaned to Leonard Dupigny some of which went to the assistance of the business " Estate Wilson Dupigny "; (2) that Alice Sylvia Pinard was given to understand and understood that some of those loans were for the purpose of carrying on the business, and (3) that the moneys so advanced which went to the assistance of the business had not been repaid.

The second finding would appear quite irrelevant to any question of liability to the plaintiffs on the part of the appellants; the first and third findings merely establish liability on the part of Leonard Dupigny and his estate, but of no one else. There has been a complete failure on the part of the plaintiffs to establish any fact upon which in law any liability to the plaintiffs could attach to the appellant Mrs. Sutherland, or (except as to four items) to the other appellant. The fact that moneys were advanced to Leonard Dupigny (the legal personal representative of his father) for the purpose of being used by him, and were used by him, for the benefit of a business in which the appellants were beneficially interested under the father's will, can of itself create no liability to the lender on the part of the appellants, and is no justification in law for judgment being entered against them.

This is not a case for a fresh trial. The plaintiffs have failed to make out their case against the appellants and the matter should be dealt with accordingly.

As against the defendant Lucy Anne Dupigny, in as much as she has not appealed, the judgment necessarily stands notwithstanding that she was only sued as administratrix of her husband but for a sum reduced by the amount covered by the admissions of the defendant George Bernard Dupigny. As against the appellant Mrs. Sutherland the judgment must be wholly set aside, and the action dismissed with costs. As against the appellant George Bernard Dupigny the judgment entered against him should be restricted to the total of the four admitted items, viz., £79 13s. 9½d., but their Lordships think without costs.

This appeal should accordingly be allowed and the judgment of the 25th October 1933 amended so as to produce the results hereinbefore indicated. As so amended it should omit all the words subsequent to the words "Dominica Circuit," and in lieu of the omitted words there should be substituted the following:—"It is adjudged (1) that the plaintiffs recover against the defendant Lucy Anne Dupigny the sum of £1,769 10s. 5½d. and their costs of action to be taxed; (2) that the plaintiffs recover against the defendant George Bernard Dupigny the sum of £79 13s. 9½d.; and (3) that as against the defendant Beatrice Alexandrina Bertha Sutherland the action be dismissed with costs to be taxed." Their Lordships will humbly advise His Majesty accordingly.

The respondents must pay the costs of the appellants of the appeal to His Majesty in Council, and to the West Indian Court of Appeal.

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In the Privy Council.

GEORGE BERNARD DUPIGNY
AND ANOTHER

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DELIVERED BY LORD RUSSELL OF KILLOWEN.

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