

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Blaine and others (in their capacity as Trustees of The Guardian Insurance and Trust Company, of Port Elizabeth, Limited), Plaintiffs and Appellants, v. Holland and others (in their capacity as Executors Testamentary of the Estate of the late Charles Lovemore), Defendants and Respondents, from the Supreme Court of the Cape of Good Hope; delivered 16th February 1889.*

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Present :

LORD WATSON.

LORD FITZGERALD.

LORD MACNAGHTEN.

SIR WILLIAM GROVE.

[*Delivered by Lord Watson.*]

In the view which their Lordships take of the facts of this case, it is not necessary to determine whether or how far the Roman Dutch law, with respect to the constitution of partnership obligations to third parties, differs in principle from the law of England.

The late Charles Lovemore and Joseph Walker, on the 1st September 1881, entered into a written agreement with James Somers Kirkwood, who was at that time sole proprietor of several farms and portions of farms in the Sunday River valley, extending in the aggregate to 12,773 morgen, or upwards of 26,000 acres. The instrument sets forth that Kirkwood was desirous to associate himself with other persons

who might be willing to join in carrying out a scheme for disposing of his property to a Company to be formed, for the purpose of acquiring it, in pursuance of which scheme it was essential that irrigation works should be constructed, additional lands bought, and other necessary arrangements made. Lovemore and Walker agreed to take part in the adventure, each of them becoming the purchaser of two sixteenth shares of the whole lands of which Kirkwood was then registered owner (with the exception of his dwelling-house and offices and 200 acres), at the price of 2,000*l.*, one half of which was instantly paid, and the other half was to be provided for on mortgage of the property, upon its contemplated sale to new proprietors. It was arranged that Kirkwood was himself to retain one half of the property, and that the remaining four sixteenth shares should be offered to such persons as might be agreed on by the contracting parties. It was also arranged that, in the meantime, the property should continue to be held in the name of Kirkwood, in trust for those interested. The only provision with regard to contribution of funds for carrying out the scheme occurs in the 8th article of the agreement, which is in these terms:—"Any land acquired, or which may hereafter be acquired, not already specified in this agreement, shall be bought or acquired for the benefit of the whole of the parties to this agreement, who shall be liable for the cost thereof *pro rata*, according to the value of each share held in the said property."

It appears that of the four sixteenth shares reserved for future disposal two sixteenths were, in January 1882, allotted to Donald MacDonald, and one thirty-second share each to William Selwyn, Mrs. MacAlister, and David Don. Kirkwood re-acquired Mrs. MacAlister's share,

and he subsequently gave off shares of his interest to four other persons. Improvements were made upon the property, and additional lands were from time to time purchased, the titles being taken in the name of Kirkwood, but the associates ultimately failed in their attempts to form a Company, or otherwise to dispose of their property to advantage.

Kirkwood, who took the active management of the adventure, borrowed from the Appellant Company three several sums of 2,000*l.*, on the 2nd February 1882, the 20th October 1882, and the 3rd September 1883; and, on each occasion, he granted a mortgage bond in return for the advance. These bonds are all in similar terms, with this difference only, that the second and third of them include lands which had in the interval been acquired by the adventurers. Besides the usual conveyance of the lands in security, the bonds contain a clause expressly binding Kirkwood personally, and all his property, both such as he was already or might in future be possessed of, heritable and moveable, without any exception. The moneys advanced by the Appellant Company were admittedly applied for the purposes of the adventure.

The evidence appears to their Lordships to establish the fact that Kirkwood, in negotiating these loans, had no authority from Charles Lovemore, or any of his associates, to pledge their personal credit. He had the leading interest in the adventure, and was willing to incur the individual responsibility which he expressly undertook, and he had their authority to pledge the lands in which they were interested, but not to bind them personally. The Appellants now seek to recover 6,000*l.*, the whole amount of the loans, with interest, from the representatives of Mr. Lovemore, on the ground that it is a partnership debt for which all the *socii* are liable, *singuli in solidum*, and

that they only consented to advance the money, on production of the partnership agreement, and in reliance on the credit of the individual partners, as well as on the mortgaged property.

In the matter of these loans the Appellants were throughout represented by their Secretary, Francis Henry Carpenter, who transacted personally with Kirkwood. Both of these gentlemen have been examined as witnesses; and the accounts which they give of what passed between them on the occasion of the first loan differ in no material respect. There was no personal conference on the occasion of the second and the third loans, which were admittedly made on the same footing as the first. Carpenter at first refused to lend, whereupon Kirkwood stated that a syndicate had been formed, and showed him the agreement of 1st September 1881. Having examined the document, Carpenter agreed to advance 2,000*l.* on the terms offered, which were those expressed in the mortgage bond. He says, no doubt, "I only lent the money in consideration of the existence of a syndicate;" which probably means nothing more than this, that the existence of such a body afforded a guarantee that the value of the property would be improved, and that it would ultimately be disposed of at a price sufficient to cover his advances. The agreement itself does not disclose any partnership, although it might have been carried out by the parties so as to give rise to partnership obligations and liabilities. Carpenter was informed that the money was needed in order "to acquire some more property upon which the intake should be," and that it had been decided "that the means should be obtained by borrowing money on the property;" or, in other words, he was made aware that the loan was required in order to supply the rateable contributions which the

individual adventurers, each for himself, had agreed to make, and that they had resolved to raise it by pledging their interest in the property. The production of a document which expressly provides that the adventurers shall contribute *pro ratâ* to the stock of the adventure can convey no assurance that each of them has authorized the person who produces it to subject him in liability, not for his own contribution merely, but for all the money which his co-adventurers had undertaken to contribute.

The case does not rest there, because the evidence warrants the conclusion that Carpenter did not, as the Appellants allege (for he does not say so himself) lend the money, in reliance on the personal responsibility of any one save Kirkwood. In December 1882, shortly after the second advance of 2,000*l.* was made, Kirkwood applied by letter to Carpenter for a further advance of 5,000*l.* on the same security, offering as an inducement "the personal guarantee," not of all the adventurers, but of "several of my friends who are interested in the success of the undertaking." That was a very plain statement of Kirkwood's understanding that no one was personally bound except himself; and if Carpenter had viewed the previous transactions in a different light, at that time, it is impossible to suppose that he would have abstained from telling Kirkwood that he had already got the security which was then offered as additional. He did not do so, but lent another 2,000*l.* nine months afterwards, on a bond in the same terms as before. No attempt is made, in the evidence, to explain his silence in December 1882, and again in September 1883, which appears to their Lordships to be incapable of any reasonable explanation, except on the footing that he assented to Kirkwood's statement, which plainly implied

that his co-adventurers were under no personal responsibility for the loans.

Being of opinion that the Appellant Company agreed to advance, and did advance, the money now sued for, on the security of the lands, coupled with the personal responsibility of Kirkwood alone, their Lordships will humbly advise Her Majesty to affirm the judgement of the Court below, and to dismiss the appeal. The costs of the appeal must be paid by the Appellants.

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