CELIA MYLIUS (DEFENDANT).....APPELLANT; 1894

AFD *May 21.

MARGARET JACKSON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Pleadings—Sufficient traverse of allegation by plaintiff—Objection first taken on appeal.

The plaintiff by his statement of claim alleged a partnership between two defendants, one being married whose name on a re-arrangement of the partnership was substituted for that of her husband without her knowledge or authority.

Held, reversing the judgment of the court below that a denial by the married woman that "on the date alleged or at any other time she entered into partnership with the other defendant" was a sufficient traverse of plaintiff's allegation to put the party to proof of that fact.

Held also, that an objection to the insufficiency of the traverse would not be entertained when taken for the first time on appeal, the issue having been tried on the assumption that the traverse was sufficient.

APPEAL from the judgment of the Supreme Court of British Columbia, whereby the judgment pronounced by the trial judge against the appellant for the sum of $12,043.25 was affirmed, the amount, however, to be reduced to $5,270.00.

The respondent brought an action against the defendant, A. J. Jackson, her son, and the appellant to recover money lent and advanced to them as trading partners.

On the 22nd day of April, 1891, the defendant A. J. Jackson, by deed entered into a trading partnership with P. E. Mylius (the appellant's husband) for the term of five years. Shortly afterwards, a re-arrange-

*PRESENT:—Sir Henry Strong C. J., and Fournier, Taschereau, and King JJ.

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ment of the partnership affairs was apparently attempted by the substitution of the appellant's name in place of her husband's in the partnership but without her knowledge or authority.

At the time of the alleged contract the appellant had no separate property. The appellant by her statement of defence denied "that on the 22nd of April, 1891, or at any other time she entered into partnership with the defendant, A. J. Jackson, as alleged in paragraph two of the statement of claim."

The action came on for trial before the Honourable Mr. Justice Crease, without a jury, at the city of Victoria, when judgment was delivered in favour of the plaintiff, judgment having been previously signed against the defendant, A. J. Jackson, in default of appearance.

The present appellant then appealed to the full court and they reduced the amount of judgment to $5,270.

The decision of the full court was based upon the ground that the appellant had admitted the partnership in her pleadings and that as there was no evidence to the contrary, effect must now be given to that admission.

Belyea for appellant.

Chrysler Q.C for respondent.

THE CHIEF JUSTICE.—(Oral.) I think the appeal should be allowed upon the ground that the alleged partnership has not been proved.

At the trial it was assumed by the learned judge and by the counsel on both sides that the partnership alleged by the statement of claim was sufficiently denied by the defence. The traverse in the statement of defence is in these words:

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The defendant denies that on the 22nd of April, 1891, or at any other time she entered into partnership with the defendant A. J. Jackson, as alleged in paragraph two of the statement of claim.

The words "or at any other time" ought to be sufficient to save the pleading from the objection of "negative pregnant" even if taken at the earliest possible moment. But I think it would be monstrous that such an objection should prevail after a trial at which the parties and the judge all took it for granted that the partnership was sufficiently denied, when taken for the first time after judgment in appeal, and then not urged by the plaintiff but emanating from the court who held that the partnership, notwithstanding all that had taken place at the trial, was admitted on the pleadings.

I am of opinion therefore that the case is one in which the traverse of the allegation of a partnership was sufficient to put the plaintiff to the proof of that fact. Then, the proof in that respect wholly fails; there is no evidence that Mrs. Mylius ever entered into partnership with Jackson. Her husband may have agreed that she should be a partner but that cannot possibly bind her, and therefore, altogether aside from the question whether the appellant had separate property at the time of the alleged partnership, and upon the simple ground that a partnership has not been proved, the appeal must be allowed, the judgment below reversed, and the action dismissed with costs.

Appeal allowed with costs.

Solicitor for appellant: *A. L. Belyea.*

Solicitor for respondent: *H. B. W. Aikman.*