Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Arthur Gilbert Hordern and another v. *Samuel Hordern and another, from the Supreme Court of New South Wales; delivered the 7th June*, 1910.

Present at the Hearing:

LORD MACNAGHTEN.

LORD COLLINS.

LORD SHAW.

SIR ARTHUR WILSON.

[*Delivered by Lord Shaw.*]

The Appellants are the residuary legatees under the Will and Codicil of Mr. Anthony Hordern, who died on the 17th September, 1886. The executor appointed by Anthony was his brother, Mr. Samuel Hordern. The two brothers had carried on a large and apparently very successful business as drapers at Sydney, under Articles of Partnership dated the 12th September, 1878. The business was conducted under the

[28] P.C.J. 278.—L & M.—100—10/5/10. Wt. 98.

Firm name "Anthony Hordern and Sons," and the term of partnership was for thirty years from the 30th June, 1878.

No question arises in this case on the construction of these Articles, except clause 17 thereof, which provides for the case of the death of either partner. The words relevant to the issue in this case are these :—

> "Then within thirty days next after notice of such death shall have been received by the surviving partner . . . . a general account in writing shall be made and taken of the partnership goods, wares, stocks, credits and effects, belonging, due or owing to the said co-partnership; also all debts due or owing by the said partnership, including all principal and interest due to the said partners; and in taking such account such stock and other assets as shall not consist of money shall be valued either by mutual agreement or valuation in the usual way, nothing being charged for good-will; and the surviving . . . . . partner shall and will pay or cause to be paid unto the executors or administrators of the so deceased partner . . . . . his full share"

in the proportions and by the instalments set forth in the Articles.

Immediately upon the death of Mr. Anthony Hordern, the Respondent Samuel, his brother, appears to have addressed himself to the duties devolving upon him as executor, and, as a large item in the estate of his deceased brother was his share in the assets and stock of the going business of Anthony Hordern and Sons, to have taken expeditious steps to have these assets valued, so as to enable him to perform his double duty, first as executor of his brother, and secondly as carrying out the provisions of the Articles of Partnership. In the words of the carefully-considered Judgment of the Chief Judge in Equity in this case, he

> "took an account of the assets in the business in the same way as the half-yearly balance sheets had for

> several years been taken while both parties were alive, the only difference being that the Defendant Samuel Hordern, after consulting with a Mr. Cornwell—an intimate friend of the testator in whom the testator placed implicit confidence—on Mr. Cornwell's nomination, appointed Mr. Thomas Alcock, a gentleman of wide business experience and of the highest character, to check the valuation on behalf of the testator's estate. The result of the stock-taking was that the sum of £158,232 15s. 10d. was found to be the value of the testator's share in the business, excluding the good-will, and this sum has been paid to the estate in eight half-yearly instalments, with interest at six per cent."

It should be added to this statement that Mr. Alcock was engaged, mostly in connection with the valuation of the very heavy stock of soft goods in the establishment, for about a week or ten days, and that in connection with the hardware department, Mr. Ross, who still survives, was called in and took values, he being engaged for a day and a-half at the task.

Although twenty-three years have elapsed since the transaction took place, and Mr. Alcock himself, and no doubt many of the employees, have since died, Mr. Samuel Hordern, the executor, Mr. Ross, the valuer, and one or two of the heads of departments in the establishment, still survived at the date of the trial of the action; and they gave what was manifestly the best account they could give after the lapse of so many years, of what actually took place. To counter-balance the lack of material caused by death and the lapse of time, there are several circumstances in connection with the business which simplify the matter. The business was large and its profits were great, mounting, as was shown, in some cases to as much as £9,000 per month; but it was a ready-money business, and presented none of the familiar difficulties

as to the assortment and valuation of debts. Further, it was a business in which, by the system of regular sales, the stocks were substantially cleared, so that the practical trouble as to deterioration in quality or from fashion was absent and the valuation thus simplified. Lastly, the balance-sheets, books, invoices and price-lists were all available and in order, so that by far the most trustworthy basis for the valuation of a stock to be quickly turned over was ready to hand.

It should be further noted that no reflection upon the conduct of Mr. Samuel Hordern appeared throughout the proceedings, and Mr. Buckmaster, in his careful argument for the Appellants, stated with perfect candour and propriety that no suggestion whatever of this kind formed part of the Appellants' case. It was further admitted that Mr. Ross and the late Mr. Alcock were suitable and proper men in point of experience to be employed for the task of valuation, and that, like Mr. Samuel Hordern himself, they had acted to the best of their ability and with complete integrity. Finally, no suggestion was made that the heads of departments and other employees who had been trusted by the Messrs. Hordern were not competent to assist and be consulted by valuators who were going through the stock.

It appears to their Lordships that, when the facts above briefly narrated are kept in view, the so-called question of law which arises in this case is not one which it is seriously difficult to answer. The contention is two-fold—first, that the valuation was no valuation because it was imperfectly conducted; and secondly, that, looking to the two-fold capacity in which Mr. Samuel Hordern, the surviving partner, stood, there was such a conflict of duty and interest on his part that

nothing less would have sufficed than an exhaustive valuation conducted by arbiters appointed, one on behalf of the executory estate, whose interest was to have the stock priced at a high figure, and the other on behalf of Mr. Samuel Hordern, whose interest was, or—for that is not suggested—might conceivably have been thought to be, to get the stock priced at a small figure. These are the arguments.

1. As to the valuation being imperfect, their Lordships are clearly of opinion that all the exceptions taken to it fail. The phrase in clause 17 of the Articles of Partnership may, no doubt, be difficult to construe—the phrase, namely, that the valuation is to be "in the usual way," and their Lordships obtained no assistance upon that subject from the Appellants, who judiciously declined to interpret the phrase. What the Valuators appear to have done was not, however, the cursory thing suggested in argument; it is certainly not substantiated that the Valuators merely took things for granted. One witness, for instance, Mr. Green, speaking after the long interval of years, remembers that in the coloured-dress department, of which he was head, Mr. Alcock, accompanied by Mr. May, made enquiries of himself, and, being asked, "You said the stock was shown to Mr. Alcock which he asked to see?" answered, "Yes; he turned it over and looked at the length and the quality; I told him the price." Many other instances of the same kind occur, showing that, while the heads of departments and others, all of whom are admitted to have been perfectly honest and capable, were consulted, the valuation was made on the spot with all the advantages of the prices in the books, etc., and with information supplied from time to time as to selected or sample goods in the various branches of the

establishment. One witness in the silk department is cross-examined on behalf of the Plaintiffs and Appellants, and he gives support to the view presented by Counsel as to the elaboration of a valuation such as that which is argued for. He says that on the stock in the silk department he would have taken four months to accomplish the task of valuing. This may no doubt be true; but, if so, it is very plain that such a valuation, which applied to all the departments, would occupy many months and possibly some years, and accordingly is not the valuation which was prescribed by the Articles of Partnership, because, as already pointed out, the valuation "in the usual way" was to be made within thirty days of the death of the predeceasing partner. On the whole, their Lordships are perfectly satisfied that the mode adopted by Mr. Samuel Hordern was the sensible mode, and that, for aught yet seen, the results were proper and were just to both parties.

2. The account just given seems to show *a fortiori* that the argument as to a formal arbitration, with its elaboration and possible delay, is not well founded, and cannot have been the thing which was in the view of the parties to, or the meaning of their language in, the Articles of partnership.

If these two points fail, then the real contention of the Appellants, and that which gives a meaning to this litigation, is seen to be unfounded. That contention was to the following effect:—A wrong system of valuation was adopted and there was therefore no valuation at all: Accordingly, clause 17 of the Articles of Partnership has not been complied with: and the surviving partner has not bought, as he alone could have bought. The extraordinary conclusion is then come to that clause 17 of the contract of partnership entirely

disappears; that the surviving partner is therefore in the position of not having bought, or even being entitled to buy, the predeceasing partner's share of stock—although, as above explained, the Respondent has already paid, after valuation, for his deceased brother's share; that the business accordingly has for all these years been conducted as a going concern for the benefit of both parties to the litigation; and that as a consequence—and this is the kernel of the matter—the provision of clause 17 of the Articles that the stock and assets were to be taken over exclusive of the good-will of the business is an inoperative provision, and must be read out of the contract; and therefore good-will must be paid for now. The writ in this action is framed on this theory: and their Lordships regret to observe that it is accompanied by the statement that Mr. Samuel Hordern has, from the 17th September, 1886, carried on and is still carrying on the said business in breach of his duties as surviving partner and as executor and trustee. In their Lordships' opinion there is no real foundation for any such pleadings. The valuation of the stock was only an incident in the arrangements for carrying out the contract of purchase. That purchase the Articles of Partnership had prescribed should take place on the occasion of a partner's death, not as a matter of option, but as a matter of definite and binding agreement. If error crept into the method or results of the valuation, that error would fall to be corrected by a Court of Law, so as to enable the agreed-on purchase to be complied with. But the view is wholly false, that such an error destroyed the contract of purchase. In *Vyse* v. *Foster* (7 English and Irish Appeals, 334) Lord Cairns observed:—

> "It appears to me beyond all doubt that these partnership articles constitute a contract in the

> clearest and most distinct sense of the term, a contract between persons who were entirely *sui juris*, and who were able to decide among themselves what should be their rights and in what relations they or their representatives should stand towards each other after their death. And I read the contract, as I have already said, as being a clear and absolute contract for purchase; not an optional, but a complete contract, binding all parties, for the purchase of the interest of the testator on the 1st of July by those partners of his who might survive him in the concern. It is true that the terms of that contract provided for payment at certain intervals. The contract might have been made conditional upon those payments being made at those particular times; it might have been said that the surviving partners should have a right to become proprietors of the whole of the trade, provided they gave a bond, provided they gave promissory notes, provided the payments in respect of the capital of the testator were made at the particular times indicated. But the contract does not run in that way, but it is an absolute contract of purchase, containing stipulations of the ordinary kind for the payment of the price. My Lords, I cannot read those stipulations as to time as being of the essence of the contract, and therefore I cannot admit that the argument of non-payment *ad diem* of these sums would of itself put an end to the contract."

In their Lordships' opinion the same principle applies to the case of non-compliance with certain particulars as to valuation of the assets to be purchased.

The distinction between a case where a transaction fails because an operation in the nature of a valuation upon which the conclusion of the transaction depended fails, and a case like the present, in which the transaction of sale and transfer of the business is already concluded by the contract and the detail of a particular method of fixing the price may have to be in some respect altered, is brought out in the Judgment of Lord Hatherley in *Dinham* v. *Bradford*, 5 Chancery

Appeals, 523. In that case two partners made an agreement containing a provision that on the determination of the partnership one partner should purchase the share of the other at a valuation to be made by two persons, one appointed by each partner; no umpire was provided, and difficulties accordingly arose. It was held, however, that the Court should carry the partnership agreement into effect by ascertaining the value of the share; and Lord Hatherley observed, "If the valuation cannot be made *modo et forma*, the Court will substitute itself for the arbitrators." On the principle of that Judgment, with which their Lordships are in agreement, the attempt which has been made by the Appellants to get rid of the stipulation in Article 17, under which the stock was to be valued exclusive of good-will and become, on payment of the deceased partner's share, the property of the surviving partner, cannot succeed. Such an attempt if successful would upset the partnership deed in a vital particular, and is not justifiable in law.

It is no doubt true that the conflict between duty and interest may arise, but it is also true that that conflict is brought about entirely by the action of the late Mr. Anthony Hordern, who appointed Mr. Samuel Hordern his executor in the full knowledge that he would have to exercise on survivance the rights, and come under the obligations, stipulated in regard to the surviving partner by the Articles of Association. The idea that, in consequence of that possible conflict, Mr. Samuel Hordern's duty was to decline the trust reposed in him by his brother is out of the question. With regard to what actually occurred in this case, their Lordships are clearly of opinion that Mr. Samuel Hordern did what was manifestly in the interest alike of the executory and of the partnership by adopting the course which he

pursued. With regard to the legal situation of parties placed in such a position and the position of the Court in regard thereto, it is not necessary to add anything to the few sentences of Lord Cairns in *Vyse* v. *Foster:*

> "I apprehend it to have been perfectly clear that the testator could not by appointing one of his partners as his executor annul that partnership contract which he had deliberately entered into. I cannot admit that it was necessary for the person so appointed executor to disclaim the executorship in order to save his contract. In the view at least of a Court of Equity, I apprehend that the contract remained in full vigour even although there might, from the peculiar position of the executor as a surviving partner, be reasons for watching narrowly the course which he would take with regard to the fulfilment of the contract."

It will be seen from the view expressed as to the substantial accuracy of the method of valuation adopted in the present case, that had the Judgment of the Court below merely dismissed the suit, much could have been said in justification of that course. The Judgment, however, may be taken as having opened the door for the rectification of possible errors in the results arrived at. Their Lordships, however, think it right to put on record (1) that it was admitted by both of the Appellants' Counsel that the true object of the Appeal was to secure the upsetting of Clause 17 and the inclusion in, instead of the agreed-on exclusion from, the valuation of a price for goodwill. Since this object is now definitely defeated by the Judgment now pronounced, it may be hoped that the litigation may not be further pursued. But (2) if further procedure in regard to the valuation does take place, their Lordships approve of the principles in regard thereto laid down in the Judgment under appeal. The valua-

tion already made will stand in all its unassailed particulars, and where its particulars are assailed the proof of error therein must be of a clear and conclusive character.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed with costs.

In the Privy Council.

ARTHUR GILBERT HORDERN
AND ANOTHER

v.

SAMUEL HORDERN
AND ANOTHER.

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