WILLIAM A. WOOD.....APPELLANT; 1915

AND *Dec. 9.

JOHN GORDON GAULD AND OTHERS. RESPONDENTS. 1916

*Feb. 21

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Partnership—Dissolution — Death of partner — Survivor's right to purchase share—Good-will—Annual balance sheet.

If the intention that a surviving partner should have a right to take over the interest of a deceased partner clearly appears from the terms of the partnership agreement, though it is not formally expressed, that right exists. Brodeur J. dissented. Idington J. dissented on the ground that such intention was not clearly manifested.

The parnership articles provided that at the end of each partnership year an account should be taken of the stock, liabilities and assets of the business and a balance sheet struck for that year; that in case one partner died the co-partnership should continue to the end of the current financial year or, at the option of the survivor, for not more than twelve months from such death; that for twelve months from the death of his partner the survivor should not be required to pay over any part of the latter's capital in the business; and that any dispute between the survivor and representatives of the deceased as to the amount of debits against or credits to either in the balance sheet or the valuation of the assets should be referred to arbitration.

Held, Duff J. dissenting, that the value of the interest of the deceased partner was not to be determined by the account taken and balance sheet struck at the end of the financial year following his death, but the assets should be valued in the ordinary way.

Held, also, Davies and Duff JJ. dissenting, that the goodwill of the business was to be included in said assets, though it had never formed a part of them in the annual balance sheets struck since the co-partnership began.

Judgment of the Appellate Division (34 Ont. L.R. 278) reversed in part.

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*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), varying the decision on the hearing on an originating notice.

The facts on which the questions of law for decision depend are sufficiently stated in the above headnote.

Tilley K.C. and *Washington K.C.* for the appellant.

E. F. B. Johnston K.C. for the respondents.

DAVIES J.—I agree with the conclusions reached by Mr. Justice Middleton who heard this case in the first instance and am not able to agree with the First Appellate Division in the variations made by them in those conclusions.

The reasons given by Mr. Justice Middleton are quite satisfactory to me and I do not think I could hope to state them more clearly than he has done. I therefore concur in his judgment and in his reasons for the same.

In agreeing with his conclusion that the good will of the business is not to be taken into account in ascertaining the amount to be paid by Wood to the executors of Vallance, I am influenced largely by the decision reached in *Stewart* v. *Gladstone* (2) in 1879 That case was decided by a very strong Court of Appeal, Jessel M.R. and James and Bramwell, L.JJ. Of course the facts are not identical with those of the case before us, but reading the observations made by these learned judges in giving their judgments and applying the principle on which they acted to the facts of the case before us, I am forced to the conclu-

(1) 34 Ont. L.R. 278, *sub nom.* *Re Wood Vallance & Co.*

(2) 10 Ch. D. 626.

sion that it never was intended by the parties to this partnership that in the event which has happened of the death of one of the partners during the term of 5 years for which the partnership was entered into, and the purchase by the surviving partner of his deceased partner's interest the intangible and uncertain asset called good will should be valued and paid for.

The articles of partnership are not only silent with respect to good will, but the balance sheets of the partnership business and assets made during the years 1911-12 and 1913, when both partners were alive, do not include anything of the kind. In these balance sheets the partners gave their own meaning to the word "capital" as used in the partnership articles. "Capital" was the balancing item. It was the difference between the total assets and the total liabilities. The share of each partner in the net assets was shewn by that balancing item. Construing the somewhat ambiguous language of these partnership articles in the light of the very short term of five years during which the partnership was to last and all the other facts and the conduct of both partners I conclude on the authority of the case referred to that good will should not be included in ascertaining the amount which the surviving partner should pay.

IDINGTON J. (dissenting).—The rule 605 of the Consolidated Rules of Practice in Ontario, upon which the proceedings herein in question are founded, reads:—

605. (1) Where the rights of the parties depend—

(*a*) Upon the construction of any contract or agreement and there are no material facts in dispute;

(*b*) Upon undisputed facts and the proper inference from such facts;

Such rights may be determined upon originating notice.

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(2) A contract or agreement may be construed before there has been a breach thereof. (*New*).

Regard, however, may have to be had to the Rules Nos. 604 and 606 in case the proceedings, taken under the Rule 605, just quoted, give rise to the application of either or both.

I cannot find within the scope of the questions submitted and the admitted facts relevant thereto, any clear warrant for the court making such declarations as are to be found in the 2nd sub-section of clause No. 2 of the formal judgment appealed from. It seems to pass upon a question that is not presented in the submission.

It may well be that the parties when before that court desired its opinion on the question involved in the answer made. At present I see no reason why they might not have been well advised in thus enlarging the scope of the submission, if they did so, but for us having to pass thereon or pass it by, when no record is made of the fact, is, to say the least, embarrassing.

As a step in the reasoning involved in the construction of the document I can also understand the application of the proposition involved in the declaration, but am unable in that case to see why it should form part of the answers to the submission.

There is nothing in the opinion judgment explaining how it comes to be dealt with except as having been argued before that court; or in the factum of either party dealing with this adjudication. I think we must, under such circumstances, rigidly observe the questions submitted and the undisputed facts and inferences from such facts and answer accordingly. I,

therefore, express no opinion relative to this matter seeming to me beyond such questions.

By the notice of motion the following are the questions upon which the advice and order of the court are desired.

1. Whether William Augustus Wood, surviving partner of Wood, Vallance & Co., is entitled to take over the interest of the William Vallance Estate in the said co-partnership assets by paying to his estate the amount of his capital with interest and profits.

2. Whether the goodwill of the business of Wood, Vallance & Co. enures to the benefit of the estate of the said William Vallance, as well as to the surviving partner, the said William A. Wood.

3. Whether on a valuation of the assets of Wood, Vallance & Co. the value appearing in the balance sheet of 31st January, 1913, is binding on the executors of William Vallance, or whether the actual value of such assets is to be ascertained.

To answer correctly these questions we must consider the articles of partnership, which are admitted, and so far as ambiguous must have regard to the undisputed surrounding facts and circumstances, and if any assistance to be gained thereby also the conduct of the parties immediately after the time when the said articles became operative.

William A. Wood, the appellant, and William Vallance, who died on the 28th November, 1913, had been members of an old firm composed of themselves and the late George Vallance and George Denman Wood, carrying on a hardware business in Hamilton, under the name of Wood, Vallance & Co.

On the 31st January, 1910, said appellant and the late William Vallance agreed to enter into co-partnership for the purpose of continuing the said business and bound themselves by articles of partnership to do so for five years from that date.

By the said articles they agreed to take over and assume all the liabilities of the said firm and transfer

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to the new firm all their respective interests in the old firm. I assume, as seems throughout to have been assumed, that there were other transfers got from those representing the other members of the old firm, and the title completed as is implied in what is submitted herein.

The parties then by said articles declare they are respectively interested in the capital and assets as follows: That is to say, Wood to the extent of $577,524 and Vallance to the extent of $479,243.

Clause No. 5 provided for interest on capital of each partner being allowed at 6% per annum and that being paid or credited to him at the end of each succeeding year.

Clause No. 6 provided after payment of such interest that the profits should be apportioned equally.

Clause No. 7 that each should devote his time and attention to the business in the manner specified.

Clause No. 8 is as follows:—

> 8. At the expiration of each succeeding year of the partnership an account shall be taken of the stock-in-trade, assets and liabilities of the partnership, and an annual balance sheet shall then be made out to the thirty-first day of January in each year, which shall be attested by each of the parties hereto.

It is upon this clause and what followed it in way of its observance that the answer to the third question must turn. There were statements made out each year which were probably intended to comply, so far as they went, with the terms of this clause, but none of them were signed by either partner.

The form of attesting is not provided for. I assume a signing or other deliberate act of approval such as could reasonably be said to fall within the word "attest" as used in such connection should be held

sufficient. The mere tacit assent cannot be held as a compliance with the peculiar terms of this clause.

The existence of the statement and the fact that each partner was engaged actively in the business, and says nothing in way of objecting thereto, is very cogent evidence of assent, but falls short of what is expressly demanded. No one can ever be quite sure what the partner, so acting and refraining from acting, had in his mind. He may have desired to avoid needlessly doing anything to provoke a quarrel; or he may have been so anxiously desirous of peace that he was afraid to state his objections lest the doing so might lead to a quarrel, or rouse more or less of animosity either open or concealed; and to have recognized that so long as he had not "attested" the balance sheet, his rights of rectification would be preserved.

The fact, if it be a fact, that interest on capital was drawn on under such a basis and profits adjusted on such basis, may render it almost impossible to him acting in such a way, or his representatives, to dispute the correctness thereof, but as matter of law or inference of fact I cannot say so.

The results of payment and adjustment of profits may all need reconsideration. Except in one specified way, not followed, I fail to find undisputed fact.

The answer to the first part of the question then seems to me very obvious, but the alternative query of

> whether the actual value of such assets is to be ascertained,

in the view I take in answering the other questions, seems to need no further consideration.

When it is held as the Appellate Division held that

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appellant had no option to buy there obviously must be an ascertainment of the actual value of the estate.

I have come to the conclusion, contrary to impressions I had at the close of the argument, that the surviving partner is not entitled to take over the assets of the firm. There are certainly some contingencies provided for in clauses 9 and 10 of the articles which look as if it had been contemplated that the survivor was expected to do so. But in construing any agreement we must look at it as a whole and see that consistently with the whole, each provision therein is, if at all possible, given at least some due operative effect.

Let us look at clauses 9 and 10 and see if and how such effect can be given the provisions therein.

It is to be observed that there is no obligation imposed upon the survivor to take over the assets and pay therefor to the executors of the deceased his or their share of the value of same.

It was so easy to have provided either for that or the contingency of his electing to do so that the omission is not to be lightly supplied. Was such a palpable consideration of their situation not disposed of, designedly, in the way we find it ?

We must find an intention to provide finally for one or other of such contingencies, as sure to arise upon the happening of events within their view, as being implied in these articles, before we can give effect either to an obligation or alternative option to take over and pay.

Clause 9 is as follows:—

9. In the event of the death of any partner before the expiration of the term of these articles of partnership, the co-partnership hereby created shall not be dissolved or wound up, but shall be continued by the survivor during the current or financial year, that is until the thirty-first day of January following the date at which the

death of any partner occurs, or at the option of the surviving partner during a period not exceeding twelve months from the date of the death of any deceased partner. The surviving partner shall not be required to pay to the representative or representatives of any deceased partner any portion of his capital in the partnership until the expiration of twelve months from the decease of such partner. The capital of any deceased partner shall in the meantime remain in the business and shall bear interest at the rate of six per cent. per annum to the date of payment and the person or persons interested in such capital shall also receive the same share of the profits of the business up to the end of the current or financial year, that is until the 31st day of January following the date at which the death of such partner occurs as would be paid to such partner so dying as aforesaid, if he were still living.

There is herein an obligation to continue the business at least to the end of its financial year. All in that clause relative to doing so is clearly a merely prudent provision that would enable the parties concerned to ascertain definitely in the usual appropriate way at the end of the financial year, the condition of the business with regard to which ulterior steps of some kind must of necessity be taken.

Now in the option given the survivor to extend that period, is there any more implied ? I think there is evidently this much, that it seemed to be a thing not unlikely to happen that the survivor might desire to buy and be given every opportunity to arrange for his doing so, as what would probably best accord with the interests of those representing the deceased as well as the survivor. But can it be said the provisions of this clause go further ?

Giving thus due operative effect to all in the clause, relative to such probable contingencies does not seem necessarily to leave anything unfulfilled.

The provisions of the clause would be most helpful indeed to facilitate the parties in determining either to wind up the business or sell it out or in arranging that either or both should continue the business.

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That the year allowed to executors to wind up the estate would probably run concurrently with the year provided for by the clause in a certain event herein may also have been present to the minds of the partners. It seems to me they never intended to go further than make the suitable, but merely, tentative provisions I have indicated. It was because they could not that they omitted to provide any further.

And incidentally we see how he dying first had looked at the matter. His doing so, of course, should not affect our opinion of the true construction of the instrument, beyond making us pause to think before deciding.

Clause 10 is as follows:—

10. Should any dispute or difference arise between the said partners or between the surviving partner and the representatives of any deceased partner as to the amount which either partner is entitled to be credited with, or liable to be charged with, in making up any annual balance sheet of the co-partnership, or as to the valuation of any of the assets of the co-partnership, such dispute shall be referred to an arbitrator mutually chosen by the parties, or in the event of their failing to agree upon an arbitrator then to such arbitrator as a judge of the High Court shall, upon application of either of the parties, on one week's notice, in writing, to the other, appoint, and the award or decision in writing of the arbitrator so chosen or appointed shall be binding upon all the parties interested.

It is this clause that Mr. Justice Middleton found (and I was for a time much inclined to hold correctly so) the item that conclusively points to the taking over by the surviving partner of the business.

Let us read this clause carefully and there is absolutely nothing to be found in

the valuation of any of the assets of the co-partnership

being made a subject of reference as between the surviving partner and the representatives of the deceased

which is inconsistent with a denial of the surviving partner's claim as of right to take over the business.

That reference fits into the very case of stock-taking that existed in January, 1914; and indeed inevitably must fit into some January stock-taking following a death in the firm. The one stock-taking which of all the series it was most important to have accurately done was that following the death of a partner.

Indeed, as already suggested, it was the chief reason for postponing absolutely the dissolution of the firm till that had taken place.

I conclude that the appellant is not entitled to take over the business.

I agree that the goodwill is an asset of the business. And already I have expressed my opinion that the balance sheet of January, 1913, does not bind.

The appeal should be dismissed. Nothing was said in argument in regard to costs.

I doubt the propriety of encouraging, at the expense of any estate, appeals here, by making, even if we can, the costs of such an appeal payable out of the estate. In the peculiar circumstances and, having regard to the insignificance in the difference in the ultimate result of whether the costs come out of the estate or each pay his own, I think each should be left to pay his own costs of this appeal.

DUFF J.—I think there is sufficient in the articles of the partnership to evidence clearly the intention of the parties to the agreement that in the event of the death of one of the parties during the partnership term, the representatives of the deceased partner should be entitled to require the surviving partner to pay them

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a sum of money equivalent to the value of his interest in the business and that the correlative right of requiring them to accept such payment should be enjoyed by the surviving partner. The effect of the provisions of the partnership agreement touching the ascertainment of this sum I shall discuss in a moment.

The general effect of the contract in so far as it relates to the reciprocal rights of the surviving partner and the representatives of the deceased partner in the event mentioned is that a sum equivalent to the value of the deceased partner's interest (ascertained in the manner provided for in the deed) is treated, as between the parties (at the election of either of them) as a liability of the firm on payment of which the interest of the deceased partner's estate in the assets of the partnership is extinguished.

As to the mode of ascertainment, I think the effect of the deed is this; the partnership is deemed to have continued to the end of the financial year in which the death occurs (first sentence article 9); by the operation of article 8 an account and a balance sheet *as annual account and balance sheet* are then to be prepared (arbitration being provided for under article 10 in case of difference) and from this account and balance sheet the value of the interest of the deceased partner is to be determined.

This appears to me to be the effect of the deed. I am, however, unable, to see how for practical purposes the acceptance of Mr. Tilley's contention would affect the rights of the parties, that contention being that for the purpose of ascertaining the value of the interest you are to start with the account taken at the end of the last preceding year, derive from that the value of the deceased's partner's share at the date of

his death and add the profits for the year in which the death occurred. I cannot see the difference in practical effect because the profits for the last year could only be ascertained by striking a balance between the value of the net assets at the beginning and at the end of the financial year; and for the purpose of ascertaining the profits you must, therefore, value the net assets as at the end of the financial year, and in either case in the event of difference resort must be had to arbitration.

If the final account, of course, were to be treated as an account of a species different from the annual account under article 8 the point of construction might be of some importance; and (accepting Mr. Tilley's contention) the question would still remain open for consideration whether profits for the purpose of the final adjustment are necessarily to be computed upon the same principle as profits for the purpose of the annual account.

The point of substance is ultimately reducible to this: Is the account on the one construction to be taken or are the profits on the other construction to be determined on the same principle at the expiration of the last financial year for the purposes of the final settlement as during the previous years for the purpose of the annual accounting under article 8 ?

I think the question must be answered in the affirmative for this reason, namely, the method exclusively ordained by the articles for ascertaining the value of the interest of each for any of the purposes of the deed, for the purpose, for example, of computing interest payable under article 5 is to be found in article 8, which provides for an account and balance sheet made up through the co-operation of the parties

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at the end of each year, with a reference to arbitration in the event of disagreement, and it must, I think, be assumed that it is with reference to this provision that article 9 was framed.

The result is that for the purpose of ascertaining whether or not goodwill is to be valued as an asset for the partnership we must consider the effect of article 8. I think the evidence before us is conclusive against the respondent's contention as to the effect of this article. The accounts made up annually by the partners cannot be presumed to have been made up in total disregard of the effect of them in relation to a possible settlement under article 9 and the omission of goodwill conclusively shews, in my view, that the partners did not regard it as one of the subjects constituting the partnership "assets" for the purposes of article 8.

ANGLIN J.—With great respect for the learned judges of the Appellate Division, I am of the opinion that the partnership agreement makes it clear that it was intended that the surviving partner should have the option to continue the business of the firm and to become the purchaser of the interest of his deceased partner. The clause providing for retention of the deceased partner's capital in the business for one year and the provision for a valuation by arbitration of assets as between the surviving partner and the representatives of the deceased partner are, I think, inexplicable on any other assumption. They make it clear—at all events they raise a case of necessary implication within the meaning of the dicta of Esher M.R., and Kay L.J., in *Hamlyn & Co.* v. *Wood & Co.*

(1), at pages 491, 494—that the surviving partner should have an option to acquire the interest of a deceased partner, and that, as Mr. Tilley conceded, upon the surviving partner exercising his declared right to retain the capital of the deceased partner for a year after his death, the option to purchase became an obligation. To this extent I would allow this appeal, but upon the other questions I think it should fail.

There is nothing in the agreement which limits the interest of the deceased partner to such assets as the partners had seen fit for other purposes to treat as items of capital in their annual balance sheets. The agreement provides for a continuation of the partnership until the 31st January following the death of either partner. During the intervening period the deceased partner's estate is to receive interest under clause 5, by virtue of the continuation of the partnership, on the basis of the share of the deceased partner in the capital as ascertained and defined by the annual balance sheet made at the beginning of the financial year, and in addition, a share of profits on the same basis as the deceased partner would have received them had he been living. But, the partnership continuing, a new account of the stock in trade, assets and liabilities of the partnership and a new balance sheet were due under clause 8 of the agreement at the expiration of the partnership year on the 31st January, 1914. If the taking of that account and the making of that balance sheet should occasion disagreement, clause 10 provides for an adjustment by arbitration and, *inter alia,* for the valuation of the

(1) [1891] 2 Q.B. 488.

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assets of the co-partnership. For what purpose ? For none that I can believe the parties would have thus provided for, if it was intended that the value of the share of the deceased partner was for all purposes, including the fixing of his interest in the assets on dissolution, to be determined by the amount stated to have been his share of the capital in the last balance sheet prepared during his life time. I think it is clear that, from the 31st January, 1914, it was the surviving partner's capital as of that date, to be ascertained by agreement or by arbitration, involving a valuation of all the partnership assets, including goodwill as well as everything else which could be deemed an asset, which should thereafter bear interest at 6% and should be payable at the expiry of the year from the death of the deceased partner by the survivor to the representative of such deceased partner as the purchase price of his interest in the partnership. I find nothing in the agreement which warrants an inference that it was the intention of the parties that the survivor should receive as a present from the estate of his deceased partner the share of the latter in an asset such as the goodwill of the business with which we are dealing would seem to be, or in any other asset omitted from the balance sheet of 1913, which was prepared chiefly, if not solely, for the purpose of determining the basis upon which interest should be computed for the ensuing year under clause 5 of the agreement.

In view of the divided success there should be no costs of this appeal.

BRODEUR J. (dissenting).—The most important point we have to determine in this case is whether

the appellant, who is surviving partner of Wood, Vallance & Co., is entitled to take over the interest of his late partner, William Vallance, in the said partnership assets.

Mr. Justice Middleton, in the Supreme Court, held that the survivor was entitled to exercise that right of pre-emption. The first appellate division, however, held a contrary view.

The co-partnership agreement was made on the 31st of January, 1910, for a period of five years for the purpose of continuing the hardware business of Wood, Vallance & Co. The capital put in by Mr. Wood was $577,524.21, and the capital of the late Mr. William Vallance $479,243.32. Each partner was allowed interest upon the amount of capital from time to time at his credit in the books of the firm and the profits were apportioned equally between the partners. It was provided that an annual balance sheet should be made on the 31st of January each year which should be attested by each of the partners.

There is no provision as to the amount which could be paid weekly or monthly to the partners; but it is presumed that they were drawing money as they liked, affecting even to a certain extent their capital, since in the balance sheet of each year their capital was different, as appears by the following table:—

CAPITAL.

	Wm. Wood.	Wm. Vallance.
31st January, 1910	$577,524.21	$479,243.32
31st January, 1911	514,433.78	329,334.79
31st January, 1912	230,662.19	259,350.58
31st January, 1913	260,019.11	292,175.97

It is a rule of law that the capital put in by the partners should not be impaired. However, the figures which I have just given shew conclusively that

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the partners were drawing money out of their capital, and I may add also that the right to withdraw was implied from clause 5 of the partnership agreement which stated that

> each of the partners shall be allowed interest at the rate of six per cent. per annum upon the amount of capital which may from time to time be at his credit in the books of the said firm. * * *

The answer to the question which has been enunciated above turns mostly on the construction of clauses 9 and 10 of the partnership agreement.

In clause 9 it was provided that

> in the event of death of any partner the co-partnership hereby created shall not be thereby dissolved or wound up, but shall be continued by the survivor during the current or financial year, that is, until the thirty-first day of January following the date at which the death of any partner occurs, or at the option of the surviving partner during a period not exceeding twelve months from the date of the death of any deceased partner. The surviving partner shall not be required to pay to the representative or representatives of any deceased partner any portion of his capital in the partnership until the expiration of twelve months from the decease of such partner. The capital of any deceased partner shall in the meantime remain in the business and shall bear interest at the rate of six per cent. per annum to the date of payment. * * *

By clause 10 it was provided that if a dispute arose between the partners or between one partner and the representatives of any deceased partner as to the amount to which each partner was entitled or as to the valuation of any assets, said dispute should be referred to an arbitrator.

It seems to me that if the partner had intended to give to the other partner a right of pre-emption, there should have been a formal stipulation to that effect. But no such stipulation is contained in the contract and then the question arises as to whether there is an implied right for the surviving partner to take over the assets of the firm.

Lord Esher in *Hamlyn & Co.* v. *Wood & Co.*(1), at page 491, stated as to when and how terms not expressed in a contract may be implied:—

> I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation unless on considering the terms of the contract in a reasonable and business-like manner an implication *necessarily* arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned.

In this case, what is simply provided for is, according to my construction of the partnership agreement, that at the death of one of the partners the partnership should continue to exist until the 31st January then next, each partner being entitled to the same share of the profits and to the same interest on their respective capital. There is no allowance provided for in favour of the surviving partner. The latter, however, is empowered to have the partnership continued for a further period not exceeding a year from the date of the death of the deceased. In such a case, however, the profits would belong exclusively to the surviving partner and he would be bound to pay only the interest on the capital of the deceased.

The following provision in clause 9, which declares that

> the surviving partner shall not be required to pay to the representative or representatives of any deceased partner any portion of his capital

should not be construed as meaning that the surviving partner has the right to purchase the assets of the firm, but that during the period of a year the representatives of the deceased partner would not be en-

(1) [1891] 2 Q.B. 488.

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titled to draw, as used to be done formerly, any money out of the capital.

To construe this provision as creating a right of pre-emption would, according to my opinion, create an implication which would not necessarily arise. Those words have been put there simply for the purpose of preventing the representatives of the deceased from drawing on their capital the same as used to be done during the life of the two partners and that the capital should remain intact during that period. The parties had likely in contemplation hard times and they provided that the success of the business should not be impaired by any reduction of capital.

We are asked also to state whether the good will of the partnership would be considered as an asset.

This question does not become very important in view of the conclusion I have reached on the first question. If the surviving partner has no right of pre-emption, then it is very indifferent for both of them whether the good will should be included or not in the assets of the partnership. Clause 2 of the agreement defined what the capital of the partnership would be and they stated that it included their interest in the stock, trade, book debts and other assets.

Now, in the balance sheet which was prepared each year no mention is made of the good will. The good will is all the same an asset and sometimes a very good asset of the business. When you take a company like this one, which has been in existence for more than 60 years, it must be a very valuable asset. It is true that in their annual statement they were not including that good will and I understand it is not usually done in the inventory made by business firms. It is all the same an asset which could be disposed of when the winding-up took place.

Another question was whether in the valuation of the assets the value appearing on the balance sheet of the 31st January, 1913, is binding on the executors of William Vallance or whether the actual value of such assets is to be ascertained.

This balance sheet was evidently prepared every year with the concurrence and assent of both partners. It is true that it was not signed by them, but it was always considered as binding, since interest had to be paid on the capital shewn by that balance sheet. But when the business of the partnership is wound up, the assets have to be ascertained in the ordinary way.

The appeal should be dismissed with costs.

Appeal allowed in part without costs.

Solicitor for the appellant: *S. F. Washington.*
Solicitor for the respondents: *C. V. Langs.*