[HIGH COURT OF AUSTRALIA.]

HUGHES . . . . . APPELLANT;
DEFENDANT,

AND

FRIPP AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1922.

MELBOURNE, *May* 15, 16; *June* 2.

Knox C.J., Higgins and Starke JJ.

Partnership—Death of partner—Dissolution of partnership—Account of profits—Will—Beneficiary entitled to income—Profits, whether income or corpus—Partnership Act 1915 (*Vict.*) (*No.* 2704), *secs.* 31, 37, 47—*Supreme Court Act* 1915 (*Vict.*) (*No.* 2733), *secs.* 68 *et seqq.*

The testator, until his death, carried on a business in partnership with another person. The partnership was originally constituted by deed for a term of five years from 1st June 1904, which was subsequently extended to 1st June 1914, after which date the partners continued to carry on the business as a partnership at will without a new agreement. The deed provided that in each month of June during the partnership and upon its determination from whatever cause, and also whenever either partner should require it to be done, a full and general account and statement should be made out of all the partnership assets and liabilities so as to show the financial position of the partnership at the date thereof and the amount of profits which had arisen from the business during the time over which such account should extend. Until 31st May 1917 it was the practice of the firm to close the financial year on 31st May and to produce a balance-sheet on that day; but in May 1918 the partners agreed verbally that the date of closing the financial year should be altered from 31st May to 30th June in each year. The testator died on 4th June 1918. Under his will his trustees might, if they had thought fit, have continued the partnership business, but they had not done so.

Held, that after 1st June 1914, the partnership being one at will, the rights and duties of the partners remained the same as under the deed of partnership,

that the partnership was dissolved by the death of the testator, that an account of the profits should have been taken as at the date of his death, and that the testator's share of the profits up to that date should be treated as corpus of his estate and not as income payable to a beneficiary entitled under the will to the income of the estate.

Ibbotson v. *Elam*, (1865) L.R. 1 Eq., 188, and *Browne* v. *Collins*, (1871) L.R. 12 Eq., 586, distinguished.

Decision of the Supreme Court of Victoria: *In re Tompsitt*; *Fripp* v. *Hughes*, (1921) V.L.R., 275; 42 A.L.T., 191, affirmed.

APPEAL from the Supreme Court of Victoria.

Henry Thomas Tompsitt died on 4th June 1918, and at the time of his death he carried on in partnership with Samuel Fripp the business of wholesale druggists under the name of Rocke, Tompsitt & Co. An originating summons was taken out by the executors of Tompsitt's will for the determination of the question (*inter alia*): As to the sum of £6,000 which after 30th June 1918 was ascertained to be the testator's share of the profits of the firm of Rocke, Tompsitt & Co. for the thirteen months ending on 30th June 1918, should the whole thereof, or should a part thereof proportionate to the period from the testator's death to 30th June 1918, or should some other and what part thereof be treated as income payable to the defendant Mabel Hughes, or how otherwise should such sum be dealt with as between those beneficially interested under the will? The defendants to the summons were Mabel Hughes and Edward George Owen, who was sued as representing all persons beneficially interested under the will other than the plaintiffs and Mabel Hughes.

The originating summons was heard by *McArthur* J., who answered the question by saying that the whole of the sum referred to should be treated as income payable to Mabel Hughes. On appeal the Full Court, by a majority (*Schutt* and *Mann* JJ., *Irvine* C.J. dissenting), held that the question should be answered as follows: That so much of the sum of £6,000 as represents the testator's share of profits from the business of Rocke, Tompsitt & Co. from 1st June 1917 to the date of the death of the testator should be treated as part of the estate of the testator as existing at his death and that so much of the said sum of £6,000 as represents profits from the said business from 5th June 1918 to 30th June 1918 should be treated as income

H. C. OF A. 1922. HUGHES v. FRIPP.

payable to the defendant Mabel Hughes: *In re Tompsitt*; *Fripp* v. *Hughes* (1).

From that decision Mabel Hughes now appealed to the High Court.

The other material facts are stated in the judgments hereunder, where the nature of the arguments sufficiently appears.

Ham (with him *Tait*), for the appellant.

Weigall K.C. (with him *Russell Martin*), for the respondent trustees.

A. H. Davis (with him *Kelly*), for the respondent Owen.

[During argument reference was made to *Brown* v. *Gellatly* (2); *Ibbotson* v. *Elam* (3); *Browne* v. *Collins* (4); *Gow* v. *Forster* (5); *Jones* v. *Ogle* (6); *Partnership Act* 1915 (Vict.), secs. 31, 37, 40, 42, 46, 47; *Theobald on Wills*, 7th ed., pp. 184, 559.]

Cur. adv. vult.

June 2.

The following written judgments were delivered:—

KNOX C.J. This was an appeal from an order of the Supreme Court of Victoria in Full Court varying an order made by *McArthur* J. on an originating summons for the determination of a question arising in the administration of the trusts of the will of Henry Thomas Tompsitt deceased. The relevant facts were as follows:— From the year 1904 up to the time of his death the testator carried on in partnership with the respondent Fripp the business of a wholesale druggist. The partnership was originally constituted by deed dated 16th December 1904 for a term of five years from 1st June 1904. This term was subsequently extended to 1st June 1914, and after the last-mentioned date the partners continued to carry on the business as a partnership at will on the terms of the original deed of partnership so far as those terms were not inconsistent with a partnership at will.

(1) (1921) V.L.R., 275; 42 A.L.T., 191.
(2) (1867) L.R. 2 Ch., 751.
(3) (1865) L.R. 1 Eq., 188.
(4) (1871) L.R. 12 Eq., 586.
(5) (1884) 26 Ch. D., 672.
(6) (1872) L.R. 8 Ch., 192.

By clause 8 of the deed it was provided that in the month of June 1905 and in every subsequent month of June during the partnership, and upon the determination from whatever cause of the partnership, and also when either partner should require it to be done, an account should be made out of all the partnership assets and liabilities so as to show the financial position of the partnership at the date thereof and the amount of profits which should have arisen from the business during the time over which such account should extend. In the view which I take of the case it is not necessary to refer in detail to the other provisions of the deed.

Until 31st May 1917 it was the practice of the firm to close the financial year on 31st May and to produce a balance-sheet as on that day, but in May 1918 the partners agreed verbally that the date of closing the financial year should be altered from 31st May to 30th June in each year in order to bring the year into harmony with the accounting period of the Income Tax Department.

The testator died on 4th June 1918 having made his will, whereby he appointed the respondents Fripp and Derham executors and trustees thereof, and a codicil thereto. The relevant provisions of the will may be summarized as follows:—After certain specific bequests testator devised all his real estate and the residue of his personal estate to his trustees, upon trust to convert the same and, in the first place, to set apart out of the proceeds of such sale and conversion a sum of £50,000 and to stand possessed of the said sum and the investments representing it upon trust to pay the interest, dividends and income thereof to his daughter, the appellant, during her life, and subject thereto on certain trusts not material to this case. After giving certain pecuniary legacies testator directed his trustees to stand possessed of his residuary estate upon the same trusts (with some immaterial variations) as were contained in his will with respect to the said sum of £50,000. The will contained a power to postpone the sale and conversion for so long as the trustees should think fit, and a power to continue at the risk of the estate any business in which testator might be engaged at his death, with a proviso that the trustees might leave the management of the business to the respondent Fripp. Testator also gave power to his trustees to wind up any such business either immediately on his

H. C. OF A. 1922. HUGHES v. FRIPP. KNOX C.J.

death or at such time as they might think proper, and power to sell the testator's share in the business to the respondent Fripp and to make such sale to take effect as from the date of testator's death or any subsequent date. The trustees were also empowered (*a*) until the estate should be fully realized and invested to make such payments as they should think fit to or for the benefit of the appellant or her children out of (*inter alia*) the profits of the business or the corpus of the estate either by way of advance to be repaid or as additional benefits, and (*b*) to permit any part of the estate to remain, for so long as they should think fit, in the same state of investment as the same should be in at testator's death.

After testator's death an account of the partnership business was made up for the thirteen months from 1st June 1917 to 30th June 1918; and the share of the testator or of his estate in the profits made during that period was ascertained to be £6,000.

The question raised by the originating summons was whether this sum or part of it should be treated as income payable to the appellant. *McArthur* J. decided this question in favour of the appellant; but the Full Court on appeal, by majority (*Schutt* and *Mann* JJ., *Irvine* C.J. dissenting), overruled this decision, holding that so much of the sum of £6,000 as represented testator's share of the profits of the business from 1st June 1917 to the date of his death (4th June 1918) should be treated as part of testator's estate as existing at his death, and that so much as represented profits from 5th June 1918 to 30th June 1918 should be treated as income payable to the appellant. It is against this decision that this appeal is brought.

In my opinion the decision of the majority of the Full Court was correct. At the date of testator's death the partnership between him and respondent Fripp was a partnership at will, and was determined by the death of the testator. In these circumstances the provisions of clause 8 of the deed of partnership required that an account should be taken of all the partnership assets and liabilities including an account of the profits of the business during the period from 1st June 1917 to 4th June 1918, and the value of the share of the testator in the business ascertained by that account, including his share in the profits earned during that period, became a debt

owing by the partnership to the testator, and so part of the corpus of his estate at his death.

Mr. *Ham*, for the appellant, relied on the decisions in *Ibbotson* v. *Elam* (1) and *Browne* v. *Collins* (2) as laying down a rule of general application that the share of a deceased partner's estate in profits earned by the partnership business during a period extending from a date before his death until a date after his death, and not ascertained until the later date, is income of his estate. In my opinion these decisions establish no such general rule.

In *Ibbotson* v. *Elam* (1) the partnership agreement provided for the continuance of the partnership during a fixed term notwithstanding the death of any partner before the expiration of that term and for an annual division of profits, and the deceased partner by his will directed his trustees to permit his widow to receive from his death the net annual income actually produced by his trust property however constituted or invested. The decision was expressly rested on the provisions of the partnership agreement and the will, and is not in point in the present case. In *Browne* v. *Collins* (2) the will contained a direction that from the day of testator's decease the annual income arising from his residuary personal estate, including his share in the partnership, should belong to a specified person, and that for that purpose the net profits arising from the partnership should be deemed annual income and go and be paid accordingly to the tenant for life. I think also that it is to be inferred from the report of that case that the partnership continued notwithstanding the death of one partner. Either of these circumstances is sufficient to distinguish that case from the case before us; and, moreover, it is quite clear that in neither case did the partnership agreement contain a provision requiring an account of the partnership assets and liabilities to be taken on the death of a partner.

I agree with the majority of the Full Court in thinking that the gift of income contained in the will is a gift of income of "the estate" of the testator, and that the whole value of his share in the partnership business on 4th June 1918, including all profits earned up to that date, was included in his estate.

(1) (1865) L.R. 1 Eq., 188. (2) (1871) L.R. 12 Eq., 586.

H. C. OF A. 1922.

HUGHES v. FRIPP.

KNOX C.J.

In the view which I take of the case it is unnecessary to express any opinion on the contention submitted by Mr. *Davis* that, even if the amount now in question were income and not corpus, it did not pass to the appellant under the will.

In my opinion the appeal should be dismissed.

HIGGINS J. The appellant, the daughter of the testator, is entitled under his will for life to the " interest dividends and income " of the estate, after certain sums have been set apart. The case has been argued by counsel for the daughter on the assumption that what is given is the interest, dividends and income of the estate as unconverted (there is a trust to sell, call in and convert the estate); and I propose to act on this assumption as it puts the daughter's claim in the most favourable light. The estate included a share in a partnership business with Mr. Fripp. There was a deed of partnership, providing for a five years' term as from 1st June 1904; and a further deed extending the partnership for five years as from 1st June 1909. Since 1st June 1914 the partnership was continued without a new agreement; and under sec. 31 (1) of the *Partnership Act* 1915 the rights and duties of the partners remained the same so far as consistent with the incidents of a partnership at will. By clause 8 of the deed of 1904 it was provided that " in the month of June 1905 and in every subsequent month of June during the partnership and *upon the determination, from whatever cause, of the partnership,* and also whenever either partner shall require it to be done, a full and general account and statement in writing shall be made out of all the partnership assets and liabilities . . . and such general account shall . . . show . . . the exact financial position of the firm at the date thereof and the amount of profits (if any) which shall have arisen from the business of the partnership during the time over which such account shall extend." Under clause 9 the profits are to be shared by the partners in the proportions $\frac{4}{5}$ths (Tompsitt) $\frac{1}{5}$th (Fripp); and under clause 7 a private ledger of the partnership is to show (*inter alia*), as to each partner, " all *moneys found due* " to him on any general balance being taken as his share of the profits of the partnership. After the making of any general account under clause 8 the private ledger is

to be balanced, and "the private ledger balance account" is to show each partner's share of the capital and of the profits or losses of the business for the partnership year or *fraction of a year* then ended. According to the affidavit of Fripp, it was the custom to close the financial year on 31st May in each year, and to produce a balance-sheet as on that day; but about 1st May 1918 the partners agreed verbally that the date for closing the financial year should be altered from 31st May to 30th June in each year "in order to bring it into harmony with the accounting period of the Income Tax Department." But the testator died shortly after the agreement, on 4th June 1918. In the September following, accounts were made up as to 30th June 1918; and they showed the testator's share of the profits as from the last annual balancing, 31st May 1917, to be £6,000. The daughter claims that this sum of £6,000 ought to be paid to her as entitled to the income of the estate. It is conceded by counsel for the respondent Owen, who represents the beneficiaries entitled to share in the corpus of the residue, that the statute as to apportionment of periodical payments (*Supreme Court Act* 1915, secs. 68 *et seqq.*) does not apply to this case; but it is contended that the partnership was dissolved by the death of the testator (*Partnership Act*, sec. 37), that accounts should be made up as to the date of death (4th June 1918), and that the testator's share of all the profits up to that date should be treated as corpus of the estate, not as income payable to the daughter.

The learned Judge of first instance (*McArthur* J.) gave his decision in favour of the daughter, treating the cases of *Ibbotson* v. *Elam* (1) and *Browne* v. *Collins* (2) as applicable. In the former case (3) the Master of the Rolls (Lord *Romilly*) said that "the whole of the profits must be considered as accruing at the time when under the articles they were to be ascertained and divided, and that they are consequently income of the testator's estate, and payable to the widow" (the tenant for life). In effect, the profits were to be treated as if they were a dividend declared by a company after the death of a testator who has given all dividends in the company to a specified person. The Chief Justice of Victoria concurred with the primary

(1) (1865) L.R. 1 Eq., 188. (2) (1871) L.R. 12 Eq., 586.
(3) (1865) L.R. 1 Eq., at p. 194.

H. C. OF A. 1922.

HUGHES v. FRIPP.

Higgins J.

Judge; but *Schutt* and *Mann* JJ. both took the view that so much of the £6,000 as represented profits of the firm up to 4th June 1918 should be treated as corpus of the testator's estate, and that the balance should be treated as income payable to the daughter. The appeal to this Court is brought by the daughter, Mrs. Hughes, who seeks to have the order of *McArthur* J. restored. There is no appeal by Owen or by the trustees.

In my opinion, the daughter is not entitled to any of the profits attributable to the period from 1st June 1917 to 4th June 1918—the date of the testator's death.

Under clause 8, as above stated, a general account has to be taken, not only annually while the partnership continued, but "upon the determination from whatever cause of the partnership"; and on the death of Tompsitt the partnership was determined. Not only is dissolution of a partnership by death the general rule in the absence of express provision, but this deed expressly recognizes death of either partner as dissolving the partnership (clause 12, clause 17). On the death of Tompsitt a general account had to be taken showing the profits arising from the partnership as from 1st June 1917 up to 4th June 1918 (clause 8), and Tompsitt's share of those profits are treated as "moneys found due to him" which he (or his executors) can draw out at will (clause 7). This debt due to his estate from the partnership is an asset of the estate, and part of the corpus; it is not income of the estate.

In the case of *Ibbotson* v. *Elam* (1) the agreement expressly provided for a five years' term certain whether any of the partners died during the five years or not; and the profits were to be divided annually, and not otherwise. A partner died during the term, 26th May 1864, and the last accounts before his death had been taken to 1st July 1863. Under his will his widow was entitled as from his death to receive the annual income produced by the trust property in whatever condition it stood from time to time; and the widow was held entitled to receive all the profits attributable to the testator's share as from 1st July 1863. As the Master of the Rolls put the question (2), "the whole of the profits must be considered as accruing at the time when under the articles they were to be ascertained

(1) (1865) L.R. 1 Eq., 188. (2) (1865) L.R. 1 Eq., at p. 194.

and divided"; the share of the profits did not accrue due before the annual division. In *Browne* v. *Collins* (1) *Wickens* V.C. found that the partners were not entitled under their agreement to any profits until the half-yearly balancing date. A partner had died on 28th August 1869, between two balancing dates, 31st March 1869 and 30th September 1869. By his will the partner empowered the trustees to permit his partnership moneys to continue as at his decease, and directed that the annual income should belong to his residuary personal estate, and that the net profits should be deemed annual income and be paid to the tenant for life. The executors after the death carried on the business in conjunction with the surviving partner (2); and the Vice-Chancellor declared that the tenant for life was entitled to the testator's share of the profits since 31st March 1869. In neither of these cases did any right to profits accrue due to the testator since the last annual (or half-yearly) balances; but in the present case such a right accrued on the death of Mr. Tompsitt—4th June 1918. Here, under the express terms of the partnership deed, the profits of each of the partners, as up to 4th June 1918, accrued due as at that date.

I hope it will be understood that, in coming to this conclusion, I do not treat the deed of partnership as if it were part of the will, or as qualifying the duty of the executors of the will. But in applying the words of the will to the facts, in finding what is income of the estate under the will, one has to consider the rights of the estate as against the surviving partner; and we find that the surviving partner owes to the estate the profits made up to 4th June. This debt owing to the estate is one of the assets of the estate; and the daughter is (on the assumption which I have stated) entitled to any income arising from such an asset, but not to the asset itself.

There is, in the will, a provision empowering the trustees—not directing them—to continue at the risk of the estate any business in which the testator might be engaged at his death, whether in partnership or not, for such period as they might think fit, &c.; and there might be a difficulty about the position if the trustees had exercised this power. Perhaps they ought to be treated as if in continuing the business they were, in effect, prolonging the testator's

(1) (1871) L.R. 12 Eq., 586. (2) (1871) L.R. 12 Eq., at p. 590.

H. C. OF A. 1922.

HUGHES v. FRIPP.

Higgins J.

partnership. But, apart from the difficulty of reconciling this idea with dissolution by death, there is not in the affidavit in support of the summons any allegation that the power was exercised, or even that the business was continued in any form. *McArthur* J. in his judgment states that the business was carried on continuously since the death by the surviving partner (and trustee) Fripp " in conjunction with his co-trustee " Derham ; but such a fact is not supported by the affidavits, and, as now appears, was not admitted at the trial. There must have been some misapprehension of what counsel for the trustees said at the trial.

In my opinion, the judgment of the Full Court of Victoria should be affirmed, and the appeal dismissed.

STARKE J. By his will the testator Henry Thomas Tompsitt, after certain gifts, devised and bequeathed all his real and the residue of his personal estate of or to which he should be seised, possessed or entitled, unto trustees upon trust to sell and convert, and upon trust in the first place to set apart out of the proceeds of such sale and conversion the sum of £50,000 in certain investments, and pay the interest, dividends and income thereof to his daughter, the appellant, Mabel Hughes, during her life, and, subject thereto, upon certain other trusts immaterial to the present case. The testator further directed his trustees to " stand possessed of my estate after setting apart the said sum of £50,000 " (and certain legacies) " upon the same trusts and with the same powers and directions as are herein contained with respect to the said sum of £50,000 " except a certain direction with respect to his daughter's husband. The testator empowered his trustees to postpone the sale and conversion of his real and personal estate for so long as they should think fit and also to continue at the risk of his estate any business in which he might be engaged at his death, whether in partnership or not, for such period as they should think fit, and to employ in the said business the whole or any part of his capital which should be invested therein at his death, and also such further part (if any) of his estate and effects or the proceeds thereof as to his trustees should seem proper.

At the time of his death the testator was possessed of a share in a business, known as Rocke, Tompsitt & Co., carried on in co-partnership with Samuel Fripp. The partnership in its inception was for a fixed term, which had been extended until 1st June 1914. But from that date the partnership was continued without any express new agreement. The rights and duties of the parties therefore remained the same as they were at the expiration of the extended term, so far as was consistent with the incidents of a partnership at will (*Partnership Act*, sec. 31). The partnership agreement under which the business had been carried on until 1st June 1914 provided that in every month of June during the partnership, and upon the determination from whatever cause of the partnership, and also whenever either partner should require it to be done, a full and general statement of all partnership assets and liabilities should be made out, showing the financial position of the firm at the date thereof, and the amount of profits (if any) which had arisen from the business during the time over which the account should extend. The practice of the partners had been to take this account as on 31st May in each year, but in 1918 they arranged to take it as on 30th June in each year, so as to bring it into line with the accounting period for the purposes of income tax. The testator died on 4th June 1918.

No account was taken as on the day of the death of the testator; but in September 1918 a balance-sheet and profit and loss account for the period from 1st June 1917 to 30th June 1918 was prepared by the surviving partner, and accepted by the executors and trustees of the testator. The share of the profits to which the testator or his estate was entitled during this period was ascertained at the sum of £6,000.

Both *Irvine* C.J. and *McArthur* J. state that the partnership business was carried on after the death of the testator by Fripp, the surviving partner, in conjunction with the executors of the testator; but this statement appears to have been made under some misapprehension of fact, and the facts deposed to in the affidavits do not support it.

Counsel who appeared for the appellant admitted that he could not controvert a statement, made at the Bar by counsel for the

H. C. OF A. 1922.

HUGHES v. FRIPP.

Starke J.

executors and trustees, to the effect that they did not elect to postpone the conversion of the partnership business or to continue that business at the risk of the testator's estate, or to employ therein the whole or any part of his capital. The executors of the testator simply stood on their rights as such executors against the surviving partner. The *Partnership Act* 1915, in secs. 42, 43, 46 and 47, indicates the extent of those rights. Ultimately, I understand, some arrangement was made with the surviving partner whereby he acquired the business formerly carried on in partnership with the testator, but this fact has no bearing upon the question which now falls for decision.

That question is whether the ascertained profits of the business during the period from 1st June 1917 to 30th June 1918 (£6,000) or any part thereof should be treated as part of the corpus of the estate of the testator, or as income passing to the appellant, Mabel Hughes, under the gift contained in the will. The Apportionment Act (*Supreme Court Act* 1915, secs. 68 *et seqq.*) may be laid aside, for it does not apply to the profits of an ordinary partnership (*Jones* v. *Ogle* (1)). What, then, was the estate of the testator the income whereof he directed should be paid to the appellant during her life? The authorities are not very decisive upon the matter; but, apart from some express direction in the will of the testator, the question must be determined, in the case of partnership profits, in accordance with the rights of the partners under the partnership agreement or with the course of business followed by them.

Primâ facie the estate of a testator at the time of his death comprises every asset to which he was entitled at that instant of time. If the profits of a partnership have been ascertained and declared before a testator's death, or ought, according to the agreement or course of business of the partners, to have been ascertained before, but are not in fact ascertained till some time after, the testator's death, then those profits are treated as part of the corpus of the testator's estate. The reason, I apprehend, is that as the right of the testator to the profits had accrued at the time of his death, then the profits must be treated as having fallen into the hands of the testator, and so to form part of the corpus of his estate. If, on the

(1) (1872) L.R. 8 Ch., 192.

other hand, the right of the testator to the profits of a partnership business accrues, according to the agreement or the course of business of the partners, at some time subsequent to his death, then those profits have not fallen into the hands of the testator at the time of his death, and cannot be treated as an asset or as part of the corpus of his estate. The following authorities illustrate these propositions: *Browne* v. *Collins* (1); *Ibbotson* v. *Elam* (2); *De Gendre* v. *Kent* (3); *Bates* v. *Mackinley* (4); *Lindley on Partnership*, 7th ed., p. 683; *White and Tudor's Leading Cases in Equity*, 8th ed., vol. I., p. 877; *Seton on Decrees*, 7th ed., p. 2134.

In the present case the partnership agreement provided for an account of all partnership assets and liabilities and of the amount of the profits (if any) which had arisen from the business upon the determination, from whatever cause, of the partnership. The death of Tompsitt determined the partnership, and in my opinion his right to profits earned before his death accrued, by force of this provision and of the provisions of clause 7 of the partnership agreement, at the moment of death. Consequently such profits became, in my opinion, part of the testator's estate, though in fact the amount could not be ascertained until some time after his death.

The same result may, I think, be reached in this case, by a consideration of the rights of the representatives of the testator against the surviving partner on the dissolution of the partnership by reason of the death of Tompsitt. These rights are thus expressed in sec. 47 of the *Partnership Act* 1915: "Subject to any agreement between the partners the amount due from surviving . . . partners to . . . the representatives of a deceased partner in respect of the . . . deceased partner's share is a debt accruing at the date of the dissolution or death." In the present case there was no agreement such as existed in *Ibbotson* v. *Elam* (2) which affected these rights. The share of the deceased partner in the business could not be ascertained without an account of the profits at the moment of dissolution or death. If the debt results, either wholly or in part, from these profits, then the right to the latter must

(1) (1871) L.R. 12 Eq., 586.
(2) (1865) L.R. 1 Eq., 188.
(3) (1867) L.R. 4 Eq., 283.
(4) (1862) 31 Beav., 280.

H. C. OF A. 1922.

HUGHES v. FRIPP.

Starke J.

accrue at that instant of time. Therefore the profits become, in the debt, an asset of the testator's estate and part of the corpus of his estate.

In my opinion the judgment of the majority of the Full Court, declaring that so much of the sum of £6,000 as represents the testator's share of the profits of the partnership business from 1st June 1917 to the death of the testator should be treated as part of the estate of the testator as existing at his death, is correct. It is proper to observe that I so limit my opinion because no other part of this judgment was challenged or made the subject of argument before this Court.

The appeal ought to be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Rigby & Fielding.*

Solicitors for the respondents, *Derham, Robertson & Derham*; *Strongman & Crouch.*

B. L.