

no. 52 of 1941, (10.)
IN THE HIGH COURT OF AUSTRALIA

AYRE

V.

BLANCHE & ORS.

PRAECIPE

~~TO SEARCH~~

REASONS FOR JUDGMENT

DELIVERED AT SYDNEY THURSDAY

23rd DAY OF APRIL 1942.

AYRE v. BLANCHE & OTHERS.

ORDER.

Order that the declarations in the acretal order of the 17th October 1941 be set aside. In lieu thereof Declare that the partnership be wound up in the following manner :- Its assets (other than the Deficiency Account of the defendant Eva Ayre which is to be regarded as cancelled) be realised and out of the ,proceeds the testator's estate first be paid the amount to the credit of his capital account at the date of his death and the balance distributed as to 2/3rds to his estate and 1/3rd to the said defendant; the plaintiffs to pay and discharge all the partnership debts out of his estate. The costs of all parties of this appeal, those of the respondent executors and trustees as between solicitor and client, to be paid out of the residuary estate of the testator.

AYRE

V.

BLANCHE AND OTHERS.

JUDGMENT.

RICH, J.

AYRE

V.

BLANCHE AND OTHERS.

Judgment.

Rich, J.

I have had the advantage of reading the judgment of my brother
Williams and agree with it.

The appeal should be allowed.

JUDGMENT

STARKE J.

Gordon Russell Ayre was a grazier who owned certain properties known as "Waverley" which included "Conoble" with the stock and plant thereon. About 1924 a property known as "Irish Lords" adjoining "Waverley" with the stock and plant thereon was purchased for his wife Eva Ayre. Ayre and his wife agreed that he should work "Irish Lords" for her and place the profits against purchase money. But it was found convenient and more economical to work "Waverley" and "Irish Lords" together. So a Deed of Partnership dated May 1925 was entered into between the husband and wife, which so far as is material provided:-

1. The said lands should, as from 1st July 1924 be worked together by them in co-partnership as graziers for such time as might be agreed upon by them.
2. The lands, plant and machinery which were the individual property of the husband and wife should remain their own individual property and should not become partnership assets but all such lands plant and machinery might be used for the purposes of the partnership.
3. Other than as aforesaid the capital of the partnership should consist of the live stock machinery plant and other effects owned by the husband and wife and then on the said properties and such other live stock machinery plant and other effects as either partner should with the consent of the other contribute to the partnership business.
4. The net profits of the business should be divided, two thirds to the husband and one

third to the wife, and losses including losses of capital should be borne in like proportion.

5. Usual books of account were to be kept and in each year during the continuance of the partnership an account should be taken of all capital assets and liabilities for the time being of the partnership and a balance sheet and profit and loss account prepared making due allowance for depreciation and for recouping lost capital and furnished to each ^{partner} who should be bound thereby unless some manifest error were discovered within three months in which case such error should be corrected.

At the time of the execution of the partnership deed there was owing in respect of the purchase of "Irish Lords" a sum of £38,649, being £21,365 in respect of the land, and £17,284 in respect of live stock plant and machinery. It was arranged that this sum of £38,649 should be regarded as an advance on account of the partnership to the wife and her share of the profits set off against it. It was also arranged that the capital of the partnership should consist of the live stock plant and machinery on the land. The sum of £17,284 was therefore treated as capital brought in by the wife.

A partnership deed often fixes the amount of the partner's capital and it is not uncommon in such cases that the capital accounts remain fixed and at the same figure during the partnership. Other methods may however be adopted wherein profits interest losses advances are not shown in capital accounts but in separate current or drawing or loan accounts and the balances carried into the balance sheet. In the present case the wife's capital account was debited with the sum of £21,365 and her profits and drawings were credited or debited as the case might be, to this account. At the death of the husband this account of the wife in the books of the partnership was in debit to the

extent of £834.10.9.

The husband died in 1938 and his will, which was made on the 18th January 1937, contained the following provision:-

6. WHEREAS I am carrying on business in partnership with my said wife as Graziers under the firm name of "Ayre & Co." AND WHEREAS under the terms of the said partnership the liabilities of the said partnership are borne as to two-thirds thereof by myself and as to one-third thereof by my said wife NOW I DIRECT AND DECLARE that my Trustees shall assume the whole of the liabilities of the said firm of Ayre & Co. (which liabilities shall be deemed to and shall include all moneys owing on any account whatsoever and all liabilities whether joint or several and whether any moneys or liabilities are secured by mortgage on my land and the lands severally owned by my wife or partly on my lands and partly on her lands or otherwise howsoever) and shall pay out of my estate as is hereinbefore provided my said wife's one-third of the liabilities as at my death and that my said wife her lands estate and effects shall be freed and discharged from the whole of the said liabilities and be fully indemnified in respect thereof AND I FURTHER DIRECT that my Trustees (~~G.R. Ayre -~~
~~Witnesses F. Wilkins N.E. Road~~) shall also release and discharge my said wife from payment of all moneys (if any) which may at my death be owing by her to the said firm on any account whatsoever.

By a decretal order of the Supreme Court it was declared that upon the true construction of this will the affairs of the partnership should be wound up on the footing that Eva Ayre the

wife of the testator became entitled on his death to a one third interest in the assets of the partnership excluding from such assets any indebtedness on her part to the partnership and making no deduction therefrom for any of the liabilities thereof and that the capital account of the testator in the partnership should be treated as a liability thereof and excluded for the purposes of ascertaining the share therein to which the wife (Eva Ayre) became entitled. But I cannot agree with the declaration that the trustees of the testator should treat his capital in the partnership as a liability within the meaning, and for the purposes of the above mentioned clause of the will, and excluded for the purpose of ascertaining the share to which his wife became entitled. The words of the clause in their natural and ordinary signification indicate liabilities of the firm to persons not partners therein. This, I think, is confirmed by the special provision that the testator makes in respect of moneys which may be owing by his wife to the partnership on any account whatsoever.

Another question is what sum should be treated as owing on the death of the testator by his wife to the partnership. In the partnership accounts her debit is shown as £834.10.9 but apparently this account was never furnished to, nor agreed to by her. And it is contended on her behalf that the proper amount is £18,118.10.9 or in other words that the sum of £17,284 should not have been offset against the amount owing in respect of the purchase of "Irish Lords" namely £38,649. The basis of the argument is that the wife's capital account in the partnership should have been credited with the sum of £17, 284 and remained at that figure during the partnership.

In my judgment that depends upon the terms of the partnership deed. The deed itself does not fix the amount of the partner's capital; all it provides is that the capital shall consist of the live stock etc. now on the lands and such other live stock etc. as either partner with the consent of the other contributes to the partnership business. Admittedly, I think, the method adopted in the partnership accounts shows quite accurately the financial position of the wife in relation to the partnership

in the event of winding up at any date. And the method now insisted upon is contrary, I think, to the arrangement between husband and wife. "Irish Lords" was purchased for the wife for £38,649 which was the provision intended for her though it was to be provided for out of profits. But if at the death of the testator the wife's capital account were stated at £17,284 and her current or drawings account at £38,649 then the testator would release and discharge the wife from payment of the latter sum which represented the provision made for her but nevertheless leave her entitled to the repayment of a capital sum of £17,284 rateably with the capital contributed by her husband, and to the division of the ultimate residue between his estate and hers in the proportion in which profits were divisible. The terms of the partnership deed do not contain any such provision nor is there any thing in the deed from which such a provision should be implied. It cannot therefore be said that the partnership accounts do not represent the rights of the partners under the partnership deed but further the accounts accord with, and properly state, as a matter of account, the arrangement made between the testator and his wife ~~for the acquisition of "Irish Lords"~~. The will of the testator only releases the wife from the payment of moneys that are due by her to the firm in accordance with her rights in the partnership.

Consequently the appeal should be allowed, ^{and} a declaration made in accordance with the foregoing opinion.

JUDGMENT.

McTIERNAN J.

The testator by his will expresses the intention that his bounty to his widow should in part take the form of exonerating her at the expense of his estate from debts and liabilities for which she would be responsible in the ordinary course of the winding up of the partnership consequent upon its dissolution by his death. The question to be decided is what constitutes "the whole of the liabilities of the said firm of Ayre & Co." and the moneys owing by Mrs Ayres to the firm at the testator's death, from which it was his intention that she should be freed. "The rule of construction, and the rule which, in modern times particularly, the Courts have always been anxiously inclined to follow, has been to adhere as rigidly as possible to the express words that are found, whether in wills or in deeds, and to give to those words their ordinary natural meaning, unless by so doing it appears from the context that you are using them in a different sense from that which the testator or the maker of the deed intended to use them, or unless by so using them you would be doing something which would lead to an inconsistency which could not have been the intention of the party making the instrument". (Grey -v- Pearson, 6 H.L.C., 61 at p. 78). The ordinary natural meaning of the words "liabilities of the firm" is the firm's liabilities to persons who are not members of the partnership. In my opinion the words are not, in the context of this will, capable of referring to the credit balance in the testator's capital account at his death. For the purposes of a balance sheet as at that date it is true that this credit balance would be rightly entered as one of the liabilities of the firm. But in his will the testator is stating how those liabilities of the firm, which ^{(as} he recites in the will,) are to be borne as to two-thirds by himself and one-third by his wife, ^{are} and as between her and his trustees to be settled. The words are not capable of meaning that it was his intention that his trustees should treat his capital on the footing that it was a partnership debt. "Neither partner has a personal demand upon the other for the repayment of his share of the capital employed in the business". Banfield -v- Loughborough, 8 Ch, App., at p. 3.

The next question is what were the moneys owing by Mrs Ayre to the firm at the testator's death from which it was his intention that she should be freed. In this case there is no difficulty, as there was about "the liabilities of the firm", in identifying the subject matter to which the testator is referring. The difficulty is in ascertaining what is the amount of the debt to which the will applies. The firm advanced £38,649 to Mrs Ayre at the formation of the partnership. Subsequently it made another advance to her to provide her one-third of the price of Rawdon. It was arranged that Mrs Ayre's share, ~~Ayre should have~~ one-third of the profits, should be applied in repaying the advance of £38,649, and this arrangement was extended to the subsequent advance. When the partnership was formed, ^a ~~the~~ balance of £38,649 was owing by her for the property "Irish Lords" and the stock, plant and machinery on it. She brought ~~into~~ the stock, plant and machinery which had a money value of £17,284. But Irish Lords, like Waverley, which was the testator's property, was not brought in, although the business of the partnership was conducted on these lands and subsequently on Rawdon also. From the beginning Mrs Ayre's capital account was credited with the ~~amount~~ amount of £17,284 which she invested in the business, ~~and~~ debited with the sum of £38,649 and credited with her one-third of the profits less any drawings ~~that~~ she made. The debit balance in her capital account as at the 30th June in each year of the life of the partnership was carried into the firm's balance sheet as at those days respectively, and entered there as an asset of the firm. If Mrs Ayre's capital account, as kept in the firm's books, be taken down to the date of the testator's death, it would show a deficiency of £834-10--9. But relying on the arrangement made for the repayment of the moneys advanced to her by the firm, Mrs Ayre claims that her share of profits only, not the capital which she brought in, should be set off against the advance. If the capital account had conformed to that arrangement its credit balance at the testator's death would, it is submitted, have been £17,284, and the balance of the moneys due to the firm £18,118-10--9. The question to be decided is not, ^{in what form} ~~how~~ the accounts should have been kept. It is what are the moneys owing by Mrs Ayre to the firm at his death from which the testator intended that she should be freed. These moneys are not

the debit balance in any particular or subsidiary account, but the final balance of her indebtedness. This is to be ascertained by balancing the books of the firm at the testator's death, that being the date of its dissolution. The balance of her debt to the firm as at that date could not be reached without setting off the capital standing to her credit in any account against the balance then due of the moneys advanced to her by the firm. In Question 1 the trustees ask : "Whether upon the true construction of the Will of the said

Testator and in the events which have happened the Plaintiffs as Executors and Trustees of the said Will would be justified in administering the Estate of the said Testator and (in conjunction with the Defendant Eva Ayre) winding up the affairs of the partnership ~~mentioned in paragraph Eight of the Affidavit of the Plaintiffs to be sworn and filed herein~~ on the footing -

- (a) that the capital account of the Defendant Eva Ayre in the said partnership was at the date of the death of the said Testator in credit to the extent of Seventeen thousand and two hundred and eighty four pounds (£17,284) and that the debt due by her to the said partnership amounted at such date to the sum of Eighteen thousand one hundred and eighteen pounds ten shillings and nine pence (£18,118-10-9) or
- (b) that no money stood at the said date to the credit of the said capital account of the Defendant Eva Ayre and that the debt due by her to the said partnership amounted at the said date to Eight hundred and thirty four pounds ten shillings and nine pence (£834-10--9)".

In my opinion the questions should be answered - 1(a), No: 1(b),

Yes.

The appeal should be allowed.

JUDGMENT.

WILLIAMS J.

This is an appeal against a decretal order made by Roper J. on 17th October 1941 upon an originating summons in which His Honour construed clause 6 of the will dated 18th January 1937 of the testator G.R.Ayre who died on 13th August 1938.

It appears that in June 1924 the testator purchased a grazing property known as Irish Lords for his wife, the agreement being that she should ~~buy~~ the land, stock and plant, and that he should work the property for her and place the profits against the purchase money so that in time she would become the unencumbered owner thereof.

On the 18th May 1925 the testator and his wife executed a deed of partnership by which it was agreed that an adjoining property called Waverley, which he owned, and her property, should be used to carry on a grazing business, the lands remaining in their sole ownership, so that the capital of the partnership was to consist of the live stock, plant, and machinery then on these lands. Clause 7 of the partnership agreement provided that the nett profits of the business should be divided as to 2/3rds to the testator and as 1/3rd to the wife, the partners to bear all losses including losses of capital in like proportions. The testator contributed £11,482 of the partnership assets, while his wife contributed £17,284 so that the agreement to share profits and losses had no relation to the amounts of capital they respectively contributed.

On the formation of the partnership it was agreed that the balance of purchase money then owing in respect of Irish Lords should be advanced to the wife by the partnership, and that her share of the profits of the partnership should be set off against the resulting debt by her to the partnership. The total purchase money so provided by the partnership was £38,649 being £21,365 in respect of the land and £17,284 in respect of the live stock, plant, and machinery.

There is evidence that, if strict accountancy principles had been followed, the wife's capital account should have been credited with £17,284 and she should have been shown as a debtor to the partnership for £38,649, but in the first accounts her credit on account of capital was set off against her indebted^{ed}ness of £38,649 and she was shown as being liable to the partnership for the balance £21,365, the entry

being shown in the earlier accounts on the assets side as Mrs Ayre Capital Account and from 1934^{onward} as "Mrs Ayre Deficiency Account Amount Overdrawn." From this amount was deducted her share in the profits less drawings each year in which there was a profit, and to it was added her share of the losses; so that, at the 30th June 1936, in the accounts preceding the date of the will, her deficiency account stood at £12,652-6-7. Subsequently this amount was reduced from time to time, until, in the balance sheet made up at the date of the testator's death, it had been reduced to £834-10-9.

It is suggested that, if the accounts had been kept in accordance with the agreement, her capital account at the date of death would have been in credit £17,284 and on the assets side she would have been shown as a debtor £18,118-10-9.

It is admitted the accounts accurately disclosed the nett position of each partner, but it is urged that, having regard to the agreement to repay the debt out of profits, it was improper to set off Mrs Ayre's credit for capital against the debt of £38,649. If the agreement had been to ^{re}pay the debt out of profits only, although the partnership was at will, there would be considerable force in this contention; but, while the intention gradually to liquidate the debt in this way is clear enough, the evidence does not establish that her personal liability was to be extinguished and the debt converted into a mere charge on her share of the profits of the partnership. Its indefinite character is shown by the fact that during the partnership Mrs Ayre drew nearly £7,000 out of the profits for her own use. As her share of profits or liability for losses did not depend in any way upon the amount to the credit of her capital account, it was immaterial whether she was shown in the books as being in credit in her capital account and in debit for an amount increased to the extent of this credit or in debit for the nett amount. No wrong therefore was done to her partnership rights by the way in which the accounts were kept. On the contrary, since the amount advanced by the partnership included the sum required to enable her to purchase the assets which constituted her capital, it is difficult to see how she could have any credit to capital until her share of profits had discharged the debt of £21,365, and it was correct in my opinion to show her as a debtor from the commencement.

By his will clause 4 the testator directed his executors to pay "the debts and liabilities of my wife hereinafter mentioned" out of his residuary estate and proceeded by clause 6 to deal specifically with his interest in the partnership, which, was, of course, dissolved on the date of his death. The clause is in the following terms:-

WHEREAS I am carrying on a business in partnership with my said wife as Graziers under the firm name of "Ayre & Co." AND WHEREAS under the terms of the said partnership the liabilities of the said partnership are borne as to two-thirds thereof by myself and as to one-third thereof by my said wife NOW I DO DIRECT AND DECLARE that my trustees shall assume the whole of the liabilities of the said firm of Ayre & Co. (which liabilities shall be deemed to and shall include all moneys owing on any account whatsoever and all liabilities whether joint or several and whether any moneys or liabilities are secured by mortgage on my land and the lands severally owned by my wife or partly on my lands and partly on her lands or otherwise howsoever) and shall pay out of my estate as is hereinbefore provided my said wife's one-third of the liabilities as at my death and that my said wife her lands estate and effects ~~be~~ shall be freed and discharged from the whole of the said liabilities and ~~shall~~ be fully indemnified in respect thereof AND I FURTHER DIRECT that my Trustees shall also release and discharge my said wife from payment of all moneys (if any) which may at my death be owing by her to the said firm on any account whatsoever.

It is clear that the testator intended that the partnership assets, excluding his wife's debt, were to be released, and that, out of the testator's share of the proceeds, all the debts owing to the creditors secured or unsecured were to be paid, but I cannot agree with His Honour's conclusion that the testator's credit to capital account was also to be treated as a debt or liability which was to be so discharged, thereby depriving his estate of the value of the capital he had contributed to the partnership. This conclusion is based on the view that, since the balance sheets treated the testator's credit to capital account as a partnership liability, it was one of the liabilities contemplated by clause 6. If His Honour is correct, the startling result would follow that, on the book figures of ^{the} 1936 balance sheet, the testator's

estate would have received about £35,00 and have had to discharge about £38,000 of liabilities. But the clause does not appear to me to be capable of such a construction. The language of the recital to clause 6 is only appropriate to describe debts owing to creditors because it refers to the ~~liabilities~~ liabilities as being borne as to 2/3rds by the testator and as one-third by his wife: and the right of the testator's estate to be repaid his capital could hardly be referred to as a liability 2/3rds of which it had to bear; whereas, although partners are jointly liable to the creditors for the partnership debts, as between themselves they are liable in the proportions fixed by the partnership agreement. It would be unusual to describe the testator's capital as being money owing on any account or to refer to an indemnity except in connection with debts to creditors. Moreover, it is also necessary to construe the clause in conjunction with the direction in clause 4 for payment of the wife's debts and liabilities, which occurs in a collocation of words, all relating to the discharge of outside liabilities.

The evidence proves that the testator received two copies of the balance sheet and profit and loss accounts every year; so that, at the date of the will, he must have been aware that, while his capital account was substantially in credit and was shown as a liability of the partnership, his wife only appeared on the assets side as a debtor. It is therefore reasonable to infer that the testator must have intended the provisions of clause 6 to be applied to accounts compiled in the same manner as they had been kept for ^{the} twelve years preceding his will, and that it never crossed his mind that his wife's rights would be ascertained by applying the clause to accounts reconstructed on another basis. If Mrs Ayre had an enforceable right to have this done it might be different; but in my opinion she had no such right. Supposing she had such a right and insisted upon it, she would be claiming something the testator never intended her to receive and she would probably have to elect whether to approbate or reprobate the will. Moreover, as the agreement was to apply the whole of her share of the profits to reduce the debt, her capital account would have to be reduced by the amount of her drawings, in the same way as the testator's drawings were charged against his capital account.

Apart from the will the proceeds of realization of partnership assets would have been applicable (1) to pay partnership debts (2) to repay the capital, and (3) to distribute the surplus $2/3$ to the testator's estate and $1/3$ to his wife; but the effect of clause 6 is to shift the whole burden of paying the debts on to the estate leaving the proceeds available (1) to pay the testator's Capital and (2) to make the above distribution.

The appeal should therefore be allowed.