1921
Nov. 15.
Dec. 15.

MARGARET A. JAMIESON AND THE TRUSTS AND GUARANTEE COMPANY (PLAINTIFFS).. } APPELLANTS;

AND

JOHN A. JAMIESON (DEFENDANT)..RESPONDENT.

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

Partnership — Death of partner — Continuation of business — Election by estate between profits and interest—Partnership property devised to partner—Sale in winding-up—"The Partnership Ordinance." N.W.T. C.O. [1915] c. 94, ss. 41, 44, 45.

J. and his son, the respondent, had been partners in farming operations. J. died and by his will directed payment of his share of the net profits to his wife, one of the appellants, during her lifetime. The respondent and others, executors to the will, neglected to apply for probate or to have a legal representative of the estate appointed with whom he could establish business relations. After the respondent had carried on the business of the farm for a considerable time, the widow brought action asking for the appointment of an administrator *cum testamento annexo*, a declaration that the partnership was dissolved by the death of J and a winding up including a charging of the respondent with the profits. The appellant, the Trusts and Guarantee Co., was named administrator and was later added as a party plaintiff; and both the appellants then filed a claim of election to take interest in lieu of profits, relying on section 44 of " The Partnership Ordinance". The referee named in the winding up proceedings found that there had been no profits from the operations of the farm since J's death.

Held, Duff J. dissenting, that the administrator had the right, under the above section 44, to claim interest from the testator's death on the amount of his share of the partnership assets as the business had been carried on by the respondent "without any final settlement of accounts as between the firm and the outgoing partner's estate" and as nothing in the will authorized explicitly the continuation of the business by the respondent.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

The will directed that at the widow's death a certain half of the partnership land should be conveyed to the respondent on condition of his releasing his interest in the other half and paying off half of the mortgage indebtedness. The respondent was willing to carry out the conditions and to meet his share of the partnership debts.

Per Davies C.J. and Idington and Anglin JJ.:—Notwithstanding the devise of it to respondent, this west half of the land was still liable to be sold to satisfy claims against the partnership.

Judgment of the Appellate Division (16 Alta. L. R. 241) reversed, Duff J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming the judgment of Walsh J. at the trial (2) and maintaining the appellant's application for confirmation of a referee's report and for judgment on further directions, in a partnership action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

J. A. Ritchie K.C. for the appellant.

Chrysler K.C. for the respondent.

THE CHIEF JUSTICE.—I concur with Mr. Justice Anglin.

IDINGTON J.—The late William Crawford Jamieson and his son, the respondent John Archibald Jamieson, had been for some time before the death of the former, on the 4th April, 1917, carrying on a general farm business in section 31, township 37 range 15, west of the 4th meridian in the Province of Alberta.

(1) 16 Alta. L.R. 241; [1921] 1 W.W.R. 1208. (2) [1920] 3 W.W.R. 576.

1921

JAMIESON v. JAMIESON.

Idington J.

The memorandum of agreement dated the 16th March, 1912, forming the said partnerphip, consisted of two paragraphs as follows:—

That the partnership heretofore existing between the above partners is this day dissolved, the said William C. Jamieson taking over the interest of the said Albert A. Jamieson and all his assets in the said partnership except the lands; and the said William C. Jamieson and John A. Jamieson taking over the interest of the said Albert A. Jamieson in the said lands, being section 31, in township 37 and range 15, west of the fourth meridian.

2. It is agreed between William C. Jamieson and John A. Jamieson that they shall continue in the partnership together under the terms of the existing partnership agreement between the three herein mentioned,—except that the said interest of the said William C. Jamieson in the chattels shall be two-thirds, instead of one third as heretofore; and the interest in the land shall be each an undivided one half interest; and the firm shall be known as "William C. Jamieson & Son."

There had been a firm partnership between the father, the said J. A. Jamieson and another son which explains the reference in the above paragraph no. 2.

The father by his last will and testament, dated the 18th February, 1915, appointed said respondent, John A. Jamieson, and the two other partners executors of said will and trustees of the estate and by paragraph three thereof provided as follows:—

3. I give devise and bequeath unto my said trustees and the survivors and survivor of them all my estate, real and personal, and wheresoever situate and being upon and subject to the following trusts; (A) During the lifetime of my wife Margaret to pay over to her my estate's share of net profits derived from the operation of the Bandeath Stock Farm being two thirds of the net profits of the said farm and to pay to her all net income of every nature, kind and description derivable from my estate. (B) at the death of my wife to convey unto my son, John A. Jamieson, the west half of section 31, township 37 range 15, west of the 4th meridian being that half of the Bandeath Stock Farm upon which the buildings are situated; this devise is made upon the conditions that the said John A. Jamieson do release at that time his undivided half interest in the east half of said section and also upon the condition that the said John A. Jamieson do assume and pay half of the principal and interest owing at the time of my death or subsequently accruing on any mortgage encumbrance upon the said section. (C) Also at the time of my wife's death to convert into

money the east half of said section and to convert into money unless a division is agreed on by all parties interested by two thirds undivided interest (the other one third being owned by my said son, John A.) in the stock and other chattel property on the said farm, and all my personal effects and to pay and to divide the same equally amongst my children then living except John A. the said children now being Jessie McTavish, wife of John S. McTavish, Isabella Jane, Florence Margaret Nellie, Charles, James and Albert, deducting however, from the share of my two sons, James and Albert, each the sum of $500 advanced to them in my lifetime and divide the sum of the two deductions, being $1,000, equally between my daughters Isabella Jane and Florence Margaret and Nellie. (D) To pay or deliver over unto any child or children of any of my children who should die before the time of distribution arrives the share of its or their parent *per stirpes*

The partnership was admittedly one terminable at will or death of either party.

Section 41 of "The Partnership Ordinance" of Alberta provides that:—

> On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interest as partners to have the property of the partnership applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the court to wind up the business and affairs of the firm.

Clearly that right came into force and became effective on the death of the father but nothing was done by the respondent son, John A. Jamieson, or others named as executors as above set forth, to procure probate of said will or to establish any business relation of any kind with the widow, one of the appellants, or any one else concerned as legatees or devisees for carrying on the business. Yet the said respondent John A. Jamieson, without consulting any such interested parties continued carrying on the said farm sending no accounts to any one until appellant Margaret Annie Jamieson, the widow of his father, instituted this action on the 14th of August, 1919.

1921

JAMIESON v. JAMIESON.

Idington J.

In the course of the trial thereof the appellant, the Trusts and Guarantee Company, Limited, by the direction of the court obtained, after renunciation by the executors, probate of said will, and was added party plaintiff with said widow.

A good deal of confusion of thought might have been avoided by bringing about this creating of a duly constituted representative of the estate before launching this suit.

For clearly to my mind the question raised herein, save as to the peculiar right of the widow, to which I will presently advert, must be determined by measuring the respective rights of the Trust Company as administrator and the respondent as a surviving partner.

The learned trial judge by his formal judgment expressly and properly, as I understand the law, declared as follows:—

> 1. This court doth declare that the partnership subsisting between the testator and the defendant, John Archibald Jamieson, was dissolved by the death of the testator.
>
> 2. And this court doth order and adjudge that the said partnership be wound up and that for such purpose it is hereby referred to the master in chambers at Calgary to take the usual and necessary partnership accounts.
>
> 3. And this court doth further order and adjudge that the master in taking such accounts shall distinguish between the operations of the partnership up to the date of the testator's death and the operations subsequent thereto.

By subsequent order Mr. Chadwick, a barrister in Calgary, was substituted for the master and discharged a somewhat difficult duty ably and well.

He took the accounts on the footing he was directed in way of distinguishing the operation of the partnership from subsequent operations.

In taking the accounts of the subsequent operations the appellants properly declined to consider profits and losses, but declared their right of charging the respondent, John A. Jamieson, with interest on the amount of the testator's share in the partnership assets used in carrying on the business after the death of the testator and the dissolution thereby of the partnership.

The relevant law is clear and express in sections 44 and 45 of "The Partnership Ordinance" of Alberta, which read as follows:—

> 44. Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets or to interest on the amount of his share of the partnership assets.
>
> 45. Subject to any agreement between the partners, the amount due, from surviving or continuing partners to an outgoing partner or the respresentatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

The Trust Company, the appellant, would have been grossly negligent in its discharge of duty if it had failed to make such a declaration when it was quite clear that respondent, John A. Jamieson, without the slightest foundation of right to do so, proceeded as he had done.

If he had any right to suppose he had been so authorized by his father's will, he should have got it probated first and then submitted his course of duty to the court failing to reach any basis of action between himself and those others concerned.

1921

JAMIESON v. JAMIESON.

Idington J.

The statutory enactment is a most righteous one intended to provide against just such lawless courses as he pursued and as a deterrent imposes the obligation of paying the profits or interest whichever may, in the judgment of those administering the estate of a deceased partner, elect.

The widow's election or non-election is not what is to be considered.

It is the interest of the estate which, for this purpose, is represented by the party acting as duly constituted executor or administrator.

I respectfully submit that the learned judge hearing the appeal from the report of the referee who followed the law as disclosed by the statute above quoted, erred in overruling his finding of $1,592.78, as due in that respect.

That part of the judgment appealed from maintaining that ruling, I hold should be reversed and the referee's finding restored

The next ground of appeal is against the ruling of the court below that the lands of the partnership should not be sold at present

During the argument I was inclined to think as the case was presented that possibly it was a mere temporary refusal with which we should not interfere but, enlightened by a perusal and consideration of the case and the many authorities cited in appellant's factum, I am clearly of the opinion that the appeal should be allowed on this point also.

The provision in section 41 of "The Partnership Ordinance" quoted above, expressly gives the power to the representative to apply to the court, as the Trust Company appellant did and got a judgment founding proceedings for that purpose.

I do not think, under such circumstances, that either the learned trial judge should have on the hearing of motion for further directions or the Appellate Division should have, unless to rectify mere error in the course of the trial or making of such a decree as I have above quoted from, change the clear effect of such a judgment.

But it is in effect said that the trustee is exceeding his rights and powers by insisting upon the sale of the lands because the testator had expressed in the clauses of his will above quoted another intention.

It is very difficult to understand how the testator came to make such a will without making provision for carrying it out. Clearly in law there is no power in the administrator of such a will to carry on the business of the firm, and the only chance the respondent, John A. Jamieson, ever had of doing so he renounced.

Had he taken probate of the will he might have been able to argue plausibly that the carrying on of the farm was part of the duty cast upon him as trustee, and if he had duly rendered accounts and done his best, though I do not think he should have succeeded in such contention in face of the enactments I have referred to above, and the peculiar wording, or want of wording, of the will, yet he would have had something more arguable than he has now.

Indeed, though his position in doing so would, in my opinion, be untenable, yet it would not have been so utterly hopeless as the present contention that he can hang on to the west half of the section and insist on the widow taking one third of the profits in that as fulfilment of the provision or supposed provisions, of the will.

1921

JAMIESON v. JAMIESON.

Idington J.

I most respectfully submit, and ask, can anything be more absurd in face of the large indebtedness, the absolute necessity to resort to the sale of lands to liquidate it, and the rights given by the Alberta statute to the widow who wishes to know exactly what she may get under the will and then elect to take her rights under said statute if more beneficial than to attempt to carry out part of such a will?

I am of the opinion that under such circumstances the court cannot sell part of the lands and thus protect John A. Jamieson in his supposed rights disregarding the rights of the widow and all other parties.

The learned judge who heard the motion, on further directions relied upon *In re Holland* (1).

I, with great respect, cannot see in the respective surrounding circumstances and devise or bequest there in question, and those herein involved and the nature of the devise or bequest in question here, the slightest resemblance.

The case of *Farquhar* v *Hadden* (2) referred to by the learned judge deciding *In re Holland* (1) has much more resemblance to this case.

Indeed if the litigation herein continues I imagine the resemblance will soon become identical.

The cases cited in argument in this latter case and of which one is again cited herein by appellants' factum, are much more in point on that aspect of the case.

I am, however, of opinion that the point taken therein of a condition precedent being created by the will before it became operative in the way applied below, supported by the cases of *Acherley* v *Vernon* (3); *Priestley* v *Holgate* (4); *In re Welstead* (5) is an effective answer to respondent's contention.

(1) [1907] 2 Ch. 88.
(2) [1871] 7 Ch. App. 1.
(3) [1739] Willes, 153; 125 E. Reprint 1106;
(4) [1857] 3 K. & J. 286; 69 E. Reprint, 1116;
(5) [1858] 25 Beav. 612; 53 E. Reprint, 770.

I need not elaborate for it seems to me self evident that on the facts presented herein none of the conditions have been or can be observed.

Hence the duty is obligatory on the court to direct the sale of all the lands as declared in the case of *Wild* v *Milne* (1).

It is not necessary to follow alternative suggestions and authorities relevant thereto cited in a well prepared factum.

I think the appeal should be allowed with costs here and in the court below, so far as relevant to the said several contentions.

I may be permitted to suggest that respondent, John A. Jamieson, can protect himself by being allowed to bid at the sale of the lands.

DUFF J. (dissenting)—The point of substance to be considered on this appeal turns upon the claim by the appellant against the respondent for interest. The deceased, William Crawford Jamieson, the father of the respondent and the husband of Margaret Annie Jamieson, one of the appellants, died in April, 1917, and the claim for interest arises in this way. At the time of his death W. C. Jamieson was carrying on the business of a stock farm in partnership with his son, the respondent, on section 31, township 37, west of the fourth meridian, each partner having an undivided one half interest in the land, William Jamieson's interest in the chattels being two thirds and that of the son one third. The partnership was a partnership at will. Prior to his death the father made a will by which he gave to his three trustees, who included his son, all his real and personal estate and among other things directed as follows:—

(1) [1859] 26 Beav 504; 53 E. Reprint, 993.

1921

JAMIESON v. JAMIESON.

Duff J.

During the lifetime of my wife Margaret to pay over to her my estate's share of net proceeds derived from the operation of the Bandeath Stock Farm, being two thirds of the net profits of the said Farm and to pay to her all net income of every nature kind and description derivable from my estate.

The will was not proved until December, 1919, when letters of administration with the will annexed were delivered to the Trust Company. During the *interregnum* the business was carried on by the son there being no profits for the years 1917-18. The action was brought by the widow in August, 1919 claiming an account and praying that the defendant should be charged with the profits made in the business since the testator's decease.

The claim for interest is based upon section 44 of "The Partnership Ordinance" of Alberta (C.O. 1915, ch. 94) which corresponds with section 42 of the English "Partnership Act." In so far as relevant it is in the following words:—

> Where any member of a firm has died or ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets *without any final settlement of accounts as between the firm and the outgoing partner or his estate*, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option or himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest on the amount of his share of the partnership assets.

I am unable to agree that this section has any application to the circumstances of the present case. Impliedly the will directs that the business of the stock farm shall be carried on. The testator's interest in the partnership passed to his executors and trustees of whom the respondent was one. But the intention of the testator was that the business of the stock farm should be carried on, and there was to be no interruption, no settlement at his death. The respond-

ent was entitled to insist upon this and if the representatives of the estate declined to participate, he was still entitled to have the business proceed as directed. The co-executors might, actuated by misgivings as to the personal responsibility they would incur in carrying on the business, be loath to assume the burden of administration and difficulties so arising might be so great as to compel the son to proceed without the assistance of co-executors or co-trustees; still he was entitled to do so. There was, if my reading of the will is right, no discretion vested in the trustees upon this point. If the son was willing to proceed then the course to be pursued by the estate, whoever the representatives of the estate might be, was marked out by the will.

Notice first then that section 44 operates where the surviving partner carries on without "any final" settlement of accounts as between the firm and "the outgoing partner or his estate." The presuppositions are that there is an "outgoing partner" and that it is a case in which it is the duty of the firm on the one hand to account and the right of the "estate" to demand an account on the other. Here there was in this sense no "outgoing partner". There was no duty on part of the son to account, no right on part of the estate to demand a settlement of accounts. The section therefore by its very terms excludes this case.

But the judgment of the Appellate Division may be rested on broader grounds. The enactment (sec. 44) did not change the law as it stood at the time the Act was passed The rule to which it gives statutory expression is fully explained and discussed at p. 673 of the 8th ed. of Lindley on Partnership. It is based upon the principle that where a wrongdoer has employed the property of another in trade his respons-

1921

JAMIESON v. JAMIESON.

Duff J.

ibility is to restore the property and to make the owner proper compensation for its detention. And it was considered to be just that where there were profits the wrongdoer should not be allowed to profit by his own wrong and where there were no profits that the owner should not be deprived of compensation; and consequently the rule was that the owner should have the right to claim at his option either the profits actually made or interest at the current rate. It is not of course permissible in construing a statute passed with the object of codifying some branch of the law as was the Partnership Act to resort to previous decisions for the purpose of controlling the construction of the language of the code; but it is permissible to refer to the principle which is the foundation of a statutory rule and to the applications made of that principle for the purpose of illustrating it.

It is a misapprehension to suppose that the executor derives his authority from probate. "The probate is" in the language of a work of long established reputation and weight (Williams on Executors, at p. 207)

> however merely operative as the authenticated evidence and not at all as the foundation of the executor's title; for he derives all his interest from the will itself and the property of the deceased vests in him from the moment of the testator's death;

and this passage is supported by unimpeachable authority; *Smith* v. *Milles* (1); *Comber's Case* (2). And upon these principles, it is settled law that the executor, before he proves the will,

> may do almost all the acts which are incident to his office except only some of them which relate to suits.

(1)]1786] 1 T.R. 475, at p. 480. (2) [1721] 1 P. Wms. 766.

Williams, Executors, p. 213; and such acts will stand good though the executor die without proving the will. *Brazier* v. *Hudson* (1). Indeed, it is clear that the respondent could not have refused to prove the will if the interested parties had required him to do so. *In re Stevens* (2). It is true no doubt that upon the grant of administration to the Trust Company the powers of the executors ceased; but that (the grant operated to vest a title in the administrator only as from its date) is a circumstance as I conceive of no relevancy to the present question. Technically the act of the respondent in dealing with the testator's interest in the partnership property would be the act of all the executors; and it must be assumed— there is no suggestion to the contrary— that the respondent acted without the dissent of his co-executors.

The respondent, who in substance carried out the will, acted as the will required him to act both as partner and as executor, cannot therefore be regarded either technically or otherwise as a wrongdoer within the principle upon which the statutory rule is founded.

The appeal should be dismissed with costs.

ANGLIN J.—Upon the material which the record contains—and there is nothing to warrant our surmising the existence of a state of facts other than it discloses— subject to the dominant rights of the creditors and apart from legal considerations, having regard to the provisions of the will of the late Wm. C. Jamieson, I would be inclined to regard the disposition made in this case in the provincial courts as doing substantial justice between the appellant Margaret Annie Jamieson and the respondent John Archibald Jamieson. But the Partnership Ordinance (s. 44) appears to present

(1) [1836] 8 Sim. 67.

(2) [1898] 1 Ch. 162.

1921

JAMIESON v. JAMIESON.

Anglin J.

an insuperable obstacle to maintaining the judgment of the Appellate Division. The business of the partnership formerly subsisting between the respondent and his deceased father was undoubtedly carried on after the death of the latter "without any final settlement of accounts as between the firm and the outgoing partner('s) * * * estate". It could not have been otherwise, no legal representative of that estate having been appointed. Under these circumstances the statutory right of the representatives of the deceased partner to elect either to claim profits or to claim interest appears to be absolute.

Assuming that by sufficiently distinct and definite directions in the will of a deceased partner the carrying on of the business by the surviving partner so as to bind the estate of the former, without concurrence of his personal representatives and without any accounting having taken place, could be authorized and the surviving partner thereby relieved of any obligation to the estate other than that of accounting for such profits as he might make out of the business, with respect, I do not find in the will before us anything which would suffice to sanction that being done or to exclude the operation of the statute or justify the court in declining to give effect to its explicit language. The widow, although she is a life beneficiary under the will and is also the assignee of nine of the twelve children of the testator including six of the seven, other than the respondent, who take under his will subject to her life interest (the children of the seventh, Isabella, who is dead, being minors), could not elect for profits so as to bind the personal representatives to forego the right of the estate to claim interest under the statute. On this branch of the case therefore the appeal must be allowed and the report of the master restored.

The west half of section 31, devised to the respondent after the widow's death, having formed part of the partnership assets, is liable to be sold to satisfy claims against the partnership. The other assets being apparently insufficient to meet the partnership debts, this land, notwithstanding the devise of it by the deceased partner to the surviving partner, must be so dealt with. Of course all that is devised to the respondent is his deceased partner's interest and that, it is needless to say, can be ascertained only when claims of creditors of the partnership have been satisfied. Moreover the devise to the respondent is no more specific than is the bequest of the proceeds of the east half of the section and of the testator's interest in the stock to seven others of his children *nominatim*. No doubt it is desirable to carry out the provisions of the will as far as possible. But the specifically devised assets are bound to contribute ratably towards satisfaction of the debts of the partnership which bear alike on the testator's interest in all the partnership assets. Nothing in the will exempts the respondent and imposes the exclusive burden of the debts on the other beneficiaries *inter se*.

Unless some real prejudice to the creditors might ensue, however, the master in carrying out the sale of the assets should, I think, offer the west half and the east half of section 31 as separate parcels so that the amount of the proceeds of each may be ascertained and the respective interests of the children *inter se* under the will may be protected.

The matter is not yet ripe for the exercise of the jurisdiction conferred by the "Married Women's Relief Act."

The appellants are entitled to their costs here and in the Appellate Division.

1921

JAMIESON v. JAMIESON.

Mignault J.

MIGNAULT J.—The respondent was in partnership with his father, the late W. C. Jamieson, for the purpose of farming and stock raising. The father died in April, 1917, leaving a will whereby he directed his executors to pay to his wife, one of the appellants, his estate's share of net profits derived from the operations of the stock farm, and also all net income of every nature, kind and description derivable from his estate, the west half of the farm, on the death of his wife, to become the property of the respondent. The executors neglected to apply for probate and subsequently renounced thereto, and, during the pendency of this litigation, the Trusts and Guarantee Co. Ltd., the other appellant, was appointed administrator with will annexed of the property of the deceased) and was added as a party plaintiff. After his father's death the respondent continued the business.

Mrs. Jamieson, the widow, brought this action in August, 1919, against the respondent, her son. She had previously acquired the shares in the estate of all her children, with the exception of those of the respondent and of one daughter, Isabella Jane Jamieson. All the children (some of them infants represented by the official guardian) were, during the suit, added as defendants.

Mrs. Jamieson's statement of claim alleged that the partnership had come to an end on the death of W. C. Jamieson, and asked, *inter alia*, that an administrator be appointed to the estate, that an account be taken of the profits of the continuation of the business by the respondent, and that the latter be charged with the profits, if any, made in the business since the testator's death.

After its appointment as administrator and its joinder as a party plaintiff, The Trusts and Guarantee Co. Limited, elected to charge the respondent with

interest in lieu of any profits on the deceased's share in the partnership. The widow had made a similar election some time previously, but I think that having in her action demanded profits on the deceased's share, she could not change her election and ask for interest. However the administrator, as representative of the deceased's estate, was not precluded from demanding interest in lieu of profits and its election stands.

The learned trial judge, in an order dated November 27th, 1919, declared that the partnership had come to an end on the death of W. C. Jamieson, and ordered that it be wound up, referring the matter to the master in chambers at Calgary to take the usual and necessary partnership accounts.

The master found that the share of the deceased in the partnership amounted to $11,987.38 and allowed interest at 5% from April 4th, 1917, to November 30th, 1919, to wit: $1,592.78. The latter amount is the chief bone of contention between the parties, for it is common ground that the operations of 1917 and 1918 gave no profits, and the appellants will be gainers if they can demand interest in lieu of profits.

The parties having appealed from the master's report, the learned trial judge decided that the will allowed the respondent to continue the partnership, subject to paying over to the widow the share of profits attributable to the deceased's share in the partnership, and that interest could not be claimed on the deceased's share. In so far as it granted interest the master's report was set aside. This judgment was affirmed by the Appellate Division.

Not without considerable reluctance, in view of the nature of the claim made against her son by Mrs. Jamieson, I have come to the conclusion that the will did not sufficiently authorize a continuation of the

1921

JAMIESON v. JAMIESON.

Mignault J.

business after the death of the testator, and I think also, under section 44 of "The Partnership Ordinance" (Alberta), that the administrator of the testator's estate is entitled to claim interest in lieu of profits on the share of the deceased. I would not have agreed to allow the widow to change the election she had already made to take profits, but she does not represent the estate and the administrator does, so that the latter clearly has the right of election given by section 44 to the respresentative of the deceased partner's estate.

The courts below made no order for the sale of the land and I would make none myself, the more so as the refusal to order the sale was not a final one, and it is still open to the parties to apply for it should circumstances, such as claims made by creditors, render it necessary. The majority of my colleagues think, however, that the land should be sold.

The widow also desired to avail herself of the "Married Women's Relief Act". The court below considered that the proceedings were not so constituted as to make it possible to deal with this question. In that I agree.

The appeal must be allowed to the extent of restoring the master's allowance of interest in favour of the administrator of W. C. Jamieson's estate. The appellants are entitled to costs here and in the Appellate Division.

Appeal allowed with costs.

Solicitors for the appellants: *Wright & Wright.*

Solicitors for the respondent: *G. F. Auxier.*