Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Binney v. *Mutrie and another, from the Supreme Court of British Honduras; delivered* 11*th December* 1886.

Present:

LORD HOBHOUSE.
LORD HERSCHELL.
SIR BARNES PEACOCK.

Of the three orders appealed against, the only important one is that of the 1st June 1885. It is in fact the only order in the case which decides anything between the parties, for the first order only directs generally that the accounts are to be taken. The order of the 1st June lays down a principle of division of the assets calculated to affect the rights of the parties materially.

The Court declares that the surplus assets remaining after payment of all partnership debts and liabilities ought to be divided rateably between the partners, according to the amount of the respective capitals standing to their respective credits at the date of the dissolution, that is, on the 31st January 1884.

Their Lordships take it to be clear that the claims of each individual partner against the partnership are not partnership liabilities within the meaning of the order. The order therefore directs exactly the same distribution of the assets among the partners, whether the accounts show a profit, a loss of capital, or an exact balance.

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But as by the partnership articles profits and losses are not to be shared in the ratio of the respective capitals, it is obvious that the distribution directed by the order cannot be according to the contract, except in the very improbable contingency of an exact balance.

The partnership commenced on the first of February 1879 and expired on the 31st January 1884. It was formed for the purpose of carrying on the business previously carried on by Binney and Mutrie, and with the capital employed in that business, but admitting Currie as a partner, and adding to the capital a debt due to him by the old firm. The second of the partnership articles provides that the business (by which the parties evidently mean profit and loss) shall be divided into 100 parts, of which Binney shall have 40, Mutrie 35, and Currie 25. By the eighth and ninth articles Mutrie and Currie agree to allow their shares of profits, after drawing sums of which the maximum is fixed, to accumulate for their benefit. And by the tenth article interest at the rate of five per cent. per annum is to be allowed on the amount of the credit of each partner from the 1st day of February in each year.

The amount of capital thus brought in by Currie was an ascertained sum, but the capital provided by the others, depending as it did upon the outstanding credits of the old firm, could only be the subject of estimate. It was so entered in the books, and the original estimates were altered on account of bad debts. It appears to be still the subject of dispute whether the altered amount entered in the books was so entered by agreement with Binney, and their Lordships do not propose to do anything to disturb a settled account if there is any. But so far as appears on the face of the accounts in this Record, they are founded on entries of capital

which are estimates only, and also on declared profits which are estimates only, and it is open to all parties to have them accurately taken in this suit. It is clear however that of the existing capital in February 1881 a very large portion was attributable to Binney, a small one to Currie, and a still smaller one to Mutrie, if indeed his portion was not to be represented by a minus quantity.

The accounts kept by Mutrie and Currie, the managing partners, appear to follow accurately enough the principle of the partnership articles. They credit to each partner on every 31st of January down to the year 1883 his share of the declared or estimated profits, and the interest on the capital standing to his credit on the preceding 1st of February. The sum so accumulated was treated as the capital of each partner for the ensuing year, and this their Lordships think was a mode of dealing which, if not compelled by the partnership articles, cannot at any rate be called in question now. As the outgoings were every year much less than the declared profits the capital of each was thus largely increased. The amount of the capital which each could claim to be paid out of the partnership funds on the 31st of January 1884 would be the amount properly credited to him on 1st of February 1883 with the year's interest added. The profits of that year never were or could have been made an accretion to the capital, because when the 1st of February came the partnership had ceased to exist, though in the accounts they have been added up together.

Their Lordships understand that all claims of persons external to the partnership have been satisfied. That being so, it is clear that the surplus assets should be first applied in paying to each partner his claims in respect of capital. The residue will be profits, and will be divisible as such. If the assets will not satisfy the sums

found due for capital, there is a loss which must be borne or made good by the partners in the proportions of 40, 35, and 25. And the possibility of such a loss may make it necessary to keep under the control of the Court a sufficient amount of the assets to secure Binney, who has a much larger claim than the others, the benefit of his lien on the assets for contribution. Perhaps the strict course would be to apply for a receiver, but it may be that the parties could agree on some mode of proceeding more convenient to all.

Their Lordships see no reason for reversing or varying the order of the 1st of July, which dismissed Binney's petition for payment of money out of Court, or that of the 28th July, which directed issues of the trial of certain questions of fact. But they ought now to indicate the order which in their opinion the Court should have made on the 1st June in lieu of the order actually made. It should run as follows:—

(*a*) Ascertain what amounts ought to be placed to the credit, or to the debit, of each of the three partners in respect of the capital of the partnership business on the 1st of February 1879.

(*b*) Declare that each partner is entitled to interest at the rate of 5 per cent. in each year on the capital standing to his credit on the 1st of February in that year.

(*c*) Declare that, according to the construction of the articles of partnership, whatever profits and interest were attributable to the share of any partner, and were not drawn out by him, are to be credited to him on the 1st of February in each year down to the 1st of February 1883, as part of his capital in the concern.

(*d*) Ascertain what amount of capital is to

be credited to each partner on the 31st of January 1884. according to the foregoing declarations.

(*e*) Declare that the surplus assets of the partnership after paying all debts and liabilities, including rent and such costs of this suit as are directed to be paid thereout, ought to be applied in payment of the sums due to each partner in respect of his capital ascertained as aforesaid with interest to the time of payment.

(*f*) Declare that if the assets of the partnership will not suffice to pay the amounts of capital ascertained as aforesaid, the deficiency is a loss of capital, and is to be borne or made good by the three partners, in the proportion of 40 shares by the Plaintiff, 35 by the Defendant Mutrie, and 25 by the Defendant Currie, and that, subject to this liability and to the claim of any of the partners against the entire assets to answer it, the assets are to be applied rateably in payment of the amounts of capital.

(*g*) Declare that the residue after payment of capital as aforesaid is divisible as profit into 100 parts, of which 40 are to be paid to the Plaintiff, 35 to the Defendant Mutrie, and 25 to Defendant Currie.

(*h*) Let all accounts be taken and inquiries made which are necessary for giving effect to the foregoing declarations or orders, but not disturbing any accounts which may have been settled or matters which may have been concluded between the parties, if any such there be.

Their Lordships see no reason to interfere with the decision of the Court as regards costs.

They will humbly advise Her Majesty in accordance with the foregoing opinion. With regard to this appeal, they think there has been some error on both sides, and they are not at all sure which party will benefit by the alteration made in the order. The costs should be paid out of the partnership funds.