

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of John  
Brown v. William Brown and Stephen  
Brown, from the Supreme Court of New  
South Wales; delivered the 15th December,  
1908.*

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Present at the Hearing:

LORD ROBERTSON.

LORD ATKINSON.

LORD COLLINS.

[*Delivered by Lord Collins.*]

This is an appeal from a judgment of the Supreme Court of New South Wales, and raises the question whether the Respondent William Brown is a trustee of the business of J. and A. Brown, or whether he is merely a partner in the said business.

This point was treated as one of law arising upon the pleadings, and was set down for hearing before the issues of fact.

The Plaintiff, William Brown (the first Respondent), brought the action against his brothers, John Brown (the Appellant) and Stephen Brown (the second Respondent), for a declaration that he was entitled to an equal share in the management of the business of the above-named firm of J. and A. Brown with his brother John Brown, and that John Brown might be restrained from attempting to exclude him from an equal share in the management of the said business.

He cited in paragraph 9 of his claim a deed of the 1st February 1896, made between Alexander Brown the younger, now dead (therein

called the Assignor), of the one part, and the Plaintiff, William Brown, and the Defendants, John and Stephen Brown (therein called the Assignees), of the other part, by which deed, after reciting that the Assignor was entitled to certain interests under the wills of the late James Brown and Alexander Brown (who had been the original partners in J. and A. Brown), and was also entitled to certain interests in the business of J. and A. Brown, and that the Assignor had agreed to sell his said interests to the Assignees, and that upon the treaty for the sale it was agreed that the Plaintiff should be substituted for and take the place of the Assignor as a partner in the said business of J. and A. Brown—it was witnessed that the Assignor, in consideration of 10,000*l.* paid to him, assigned and conveyed to the Assignees all his interests under the said wills of James Brown and Alexander Brown and all his interest in the said business of J. and A. Brown To have, hold, and receive the said premises unto the Assignees, their executors, administrators, and assigns absolutely as tenants in common and not as joint tenants, and it was agreed and declared that the Plaintiff should take the place of the Assignor in the partnership of J. and A. Brown, and be entitled to the same rights and privileges as partner as the Assignor had theretofore been entitled to. The Plaintiff then went on (paragraph 10) to aver that since the date of the last-mentioned indenture the Plaintiff and the Defendant John Brown had been managing the business of J. and A. Brown on behalf of themselves and the Defendant Stephen Brown, and that the Defendant John Brown had for some time past been attempting to exclude the Plaintiff from taking any part in the management of the said business, and claimed the right to have the sole control thereof.

John Brown, by his defence and counterclaim, denied the Plaintiff's allegation of joint management, and averred that, from the date of the deed last above-mentioned until June 1905, he had had the sole management and control of the said business on behalf of himself and the Plaintiff and the Defendant Stephen Brown, with the concurrence of the Plaintiff and the Defendant Stephen Brown. By paragraph 3 of his defence he submitted that the Plaintiff had by his said concurrence waived and abandoned his rights (if any) to be an active partner in the management and control of the business, and that the said concurrence amounted to a variation of the terms of partnership so as to make him (John Brown) sole managing partner.

The Plaintiff, in paragraph 3 of his replication and defence to the counterclaim, denied that he had at any time waived or abandoned his rights to be an active partner in the management and control of the business, and submitted that, even if he had purported to abandon any such rights, such abandonment would have been of no avail, inasmuch as he submitted that he was a trustee of the said business, and the said business was not a mere partnership. It is this submission that raised the point of law which has been decided in the Plaintiff's favour, and it is against that decision that the Defendant John Brown now appeals. His contention is that, on the true construction of the documents in the pleadings mentioned, the Plaintiff was merely a partner with a share in the management of the business, and that it was therefore competent for him to waive or abandon his rights as such.

Such rights as the Plaintiff has in the partnership depend upon the deed of the 1st February 1896. It is upon this deed that his claim to

be a trustee was based in argument, and the trust of which the learned Judge in the Court below holds him to have become a trustee is that contained in the will of his uncle, Alexander Brown, called in these proceedings "the testator." The question, therefore, seems to be: Can there be found in the deed of the 1st February 1896 any appointment of the Plaintiff as trustee of his uncle's, Alexander Brown's, will? It will be noticed that, in the clause of appointment and substitution, the word "trustee" nowhere appears, and it is expressly to the rights and privileges "as partner" in the said partnership of J. and A. Brown that the Plaintiff is substituted for Alexander Brown the younger.

Their Lordships are of opinion, therefore, that the effect of the deed of the 1st February 1896 was not to constitute the Plaintiff a trustee of the will of Alexander Brown, the testator, but merely to substitute him for Alexander Brown the younger as a partner with a share in the management. It is no doubt true that Alexander Brown the younger was at the time of the assignment of the 1st February 1896 joint trustee with the Defendant John Brown of the will of Alexander Brown, the testator. He had been substituted into that office, pursuant to a power contained in the said will, by a deed of the 19th July 1886, whereby Alexander Brown the elder and the Defendant John Brown, the original trustees of the said will, had jointly, in conformity with the power in the will thereto enabling them, appointed him trustee in lieu of Alexander Brown the elder, who thereupon retired from the trust. But the words of the will creating the trust and conferring the power of substitution, and the words used in effecting the substitution of Alexander Brown the younger for Alexander Brown the elder, differ in so marked a manner

from those employed when the Plaintiff was admitted to a share in the management, that it is difficult to resist the conclusion that the difference was deliberate, because the object sought to be attained was different. In the deed of the 1st February 1896 the appointment which is said to constitute the Plaintiff a trustee of Alexander Brown's (the testator's) will does not purport to be made jointly by the Defendant John Brown and Alexander the younger, who were the proper persons to make such appointment if it was intended to constitute him a trustee of Alexander Brown's (the testator's) will, but purports to be made by Alexander Brown the younger, the Assignor, alone, and the assignment of his interests made by the latter is to all the Assignees as tenants in common, and not *quâ* the trust property to John and William alone as joint tenants. It seems clear, therefore, that after the deed of February 1896 John Brown remained sole surviving trustee of Alexander Brown's will, and that the Plaintiff was never appointed at all in conformity with the power.

Their Lordships will therefore humbly advise His Majesty that the Order of the Supreme Court should be set aside with costs, to be paid by the Respondent William Brown, and that instead thereof it should be declared that the Respondent William Brown is not a trustee of the business of J. and A. Brown, but only a partner therein.

The Respondent William Brown must pay the Appellant's and the second Respondent's costs of the Appeal.

