

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Stephan and another v. The Board of Executors, Cape Town, and others, from the Supreme Court of the Cape of Good Hope; delivered the 31st March, 1909.*

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Present at the Hearing:

LORD MACNAGHTEN.

LORD ATKINSON.

LORD COLLINS.

SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

Their Lordships have to determine the meaning and effect of one clause in the will of Johan Carel Stephan, who died in February, 1900. The clause in question at first sight seems obscure, if not perplexing, but it appears to their Lordships that, if the testator's directions are followed attentively, all difficulty vanishes.

The testator, or "the appearer" as he is called in the will, which was declared before a notary, was entitled to one-half share in the business of Stephan Brothers carried on by him in partnership with his brother Hendrik; and he had separate property besides.

Hendrik survived the testator and continued to carry on the business during his life on his own sole account, as he was authorized to do by the will. In the events which happened he had a life interest in the entire residue of the testator's estate.

The question now at issue arose in the course of distributing the testator's estate on Hendrik's death, which occurred in 1906.

After providing for payment of debts and legacies the testator instituted as his heirs his brother Hendrik and certain other persons named in the will who are referred to afterwards as "the other heirs."

The institution was subject to three conditions numbered I., II., and III. For convenience of reference the copy of the will before the Court is divided into clauses numbered consecutively in Arabic figures. Condition No. I. becomes Clause 20, Condition No. II. is divided; it is comprised in Clauses 21 and 22. Condition No. III. corresponds with Clause 23.

By Clause 20 the testator directed that one fourth of the residue of his estate should go to his brother Hendrik, and the remaining three-fourths to the other heirs.

By Clause 21, the testator declared that Hendrik should be entitled to the usufruct of the whole residue during his life. He was desirous, he said, of giving his brother every opportunity to carry on the business of Stephan Brothers "for his own account and profit and loss during his lifetime." But he made it a condition that, if Hendrik should discontinue the business or take a partner into the firm, or float the same into a company, or otherwise change the personnel or status of the firm, then the other heirs should be entitled "to claim their three-fourths of the estate."

Clause 22 provided that, if Hendrik decided to carry on the business and, whilst so carrying it on, disposed of any immovable property or received payment of any mortgage bonds belonging to the partnership business or

to the separate estate, Hendrik should at once pay over to the other heirs one-fourth part of the proceeds if derived from the sale or realization of partnership property, or three-fourths if the property sold or realized was part of the testator's separate estate. A sale of all the landed property belonging to the firm was to be considered a discontinuance of the business, and "the heirs would in that event be entitled to their inheritances."

So far there is no difficulty. The scheme of distribution is clear. The residue of the estate was to be divided into fourths. Hendrik was to have one-fourth, the other heirs three-fourths between them. In the events which happened Hendrik became entitled to a life interest in the entire residue, and entitled also to retain in the business the testator's share of the partnership assets during his life. The interest of the other heirs was postponed until Hendrik's death. But there was to be a partial distribution in the lifetime of the tenant-for-life in case of a sale or realization of certain specified assets under the circumstances mentioned in Clause 22 ; and, moreover, if the assets so sold or realized formed part of the partnership property, the distributive shares of the tenant-for-life and the other heirs in the testator's moiety of the proceeds were to be half and half, instead of one-fourth and three-fourths respectively.

The present question is whether any further alteration is made in the scheme of distribution by the next clause, which is in the following terms :

23. III. In order to avoid all disputes and differences, the Appearer hereby declares it to be his will and desire that not longer than six months after his death a full and true inventory and account shall

be taken of Appearer's private estate and also that of Stephan Brothers, and that Appearer's other heirs shall be paid out their three-fourths' share in his private estate and one-fourth share of the firm of Stephan Brothers, on the valuations and accounts as set forth and contained in the said inventory, whenever such payment may be made to them, and they shall not be entitled to claim any profits or gains made by the said Henry Rudolph Stephan should he continue and carry on the business, nor on the other hand shall such heirs be responsible for any losses.

On the strength of this clause, it is contended by the Appellants that the provisions of Clause 22 are to be extended to the distribution of the estate on the death of the tenant-for-life, or that at least as regards the assets that would have been distributable in moieties between the tenant-for-life and the other heirs, had they been realized in the lifetime of Hendrik, the same rule of division must hold good when the distribution takes place on Hendrik's death.

Now, two observations arise on the clause. In the first place, it is plain that it must have been intended that the inventory and valuation should be the basis of distribution in all cases. The testator declares that his object was "to avoid all disputes and differences." In the next place, it is clear that, however the clause be construed, the intended basis of distribution is not in terms made applicable to every case. For instance, it is not applicable to a distribution of the estate in Hendrik's life-time on the happening of one of the contingencies that would entitle the other heirs to claim their three-fourths of the estate." The clause is perfectly accurate in reference to the shares of the other heirs in the separate estate, and also, as it seems to their Lordships, in reference to the payment-out of their one-fourth share in the firm "whenever *such* payment may be made to them," that is, to take the words literally—and

there is no reason why they should be taken otherwise—whenever the payment of the one-fourth is made. But then the one-fourth was only payable in the case of certain partnership assets being sold or realized during Hendrik's life. It is plain that some cases are not provided for in terms. There is some slip or omission. Perhaps it would be more accurate to say that there is an imperfect enumeration of particulars—a thing very likely to occur when no enumeration of particulars is required. But what is the consequence? Simply this, that the principle of division which is laid down clearly in Clause 20 must apply in all cases not specially mentioned in Clause 23. Nor will any difficulty or confusion arise in consequence of the omission. The last words of the clause, which are not superfluous, as the learned Counsel for the Appellants contended, but necessary and important, make it plain that the other heirs are not concerned with any increase or diminution in the value of the partnership assets while left in Hendrik's hands. So far as regards their interest, the value of the assets is fixed for good and all by the inventory and valuation.

The particular question for the decision of the Court arose in this way. Among the assets of the partnership estate at the death of Hendrik was a bond in favour of the partnership for the sum of £2,000. The bond is valued in the inventory at that sum. It was paid off in full after Hendrik's death.

Hendrik's representatives claimed to be entitled to three-fourths, or £1,500, that is, one half representing Hendrik's share as partner, and one-fourth under the will, leaving £500 for the other heirs. The other heirs or their representatives contended that they were entitled to £750 as representing three-fourths of the testator's interest

in that asset, and that Hendrik's representatives were entitled to £1,250 only, being Hendrik's half-share as partner, and one-fourth of the testator's half share under the will. A special case was settled, and it was agreed that it should be taken as a test case as similar questions had arisen, or were likely to arise.

The Supreme Court of the Colony decided in favour of the contention of the Respondents. Hendrik's representatives appealed from that decision by special leave.

For the reasons already given their Lordships are of opinion that the decision of the Supreme Court is correct. They will therefore humbly advise His Majesty that the Appeal should be dismissed.

The Appellants will bear the costs of the Appeal.