ORIGINAL CIVIL.

1885. *July* 10, 17, 24

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Bayley.

BA'CHUBA'I AND L. A. WATKINS, PLAINTIFFS, *v.* SHA'MJI JA'DOWJI, DEFENDANT.*

Partnership—Continuing firm—Partnership for a fixed term—Death of partner—Power of partner to nominate a successor—General devise not an exercise of power—Effect of default in exercising power of nomination—Good-will—Valuable asset—Practice—Misjoinder.

Vunmálidáss Jivá, Jagjivan Hemji and Shámji Jádowji, being large shareholders in The Great Eastern Spinning and Weaving Mills, Limited, entered into an agreement in October, 1873, to cause the said company to be wound up and to form a new company to take over its assets and liabilities, and to cause themselves to be appointed agents of the new company under the firm of Vunmálidáss, Jagjivan, Shámji and Company, and under that name to act as agents of the new company—subject to the terms of the agreement. The agreement provided that the firm of Vunmálidáss, Jagjivan, Shámji and Company should take the agency of the new company for a period of thirty years; that of the profits to be derived by the said firm out of the agency Vunmálidáss should receive 39 cents, Jagjivan 31 cents, and Shámji 30 cents; that, in case of a vacancy in the firm of Vunmálidáss, Jagjivan, Shámji and Company caused by the death or retirement of any o the partners, the nominee of the dying or retiring partner should be admitted into partnership, and should receive the share of such partner, and should exercise al his authority. In pursuance of this agreement The Great Eastern Spinning and Weaving Mill, Limited, was wound up, and a new company, called "The New Great Eastern Spinning and Weaving Company, Limited," was formed and registered. Both the memorandum and articles of association of the said new company contained clauses providing that the firm of Vunmálidáss, Jigjivan, Shámji and Company, or whatever member or members that firm for the time consist of, should be agents of the company so long as the said firm should carry on business in Bombay, or until they should resign. The firm of Vunmálidáss, Jagjivan, Shámji and Company having been constituted under the said agreement, became the agents of the said company, and continued to act as such down to the date of the present suit. No other business was done by the firm, and the three partners divided the profits realized by the firm out of the agency business in the shares specified in the agreement as above mentioned. Vunmálidáss died in 1874, leaving a will whereby, in exercise of the right vested in him by the agreement, he nominated and appointed his wife Kessar as his successor in the firm, and she accordingly became and was recognized as a partner therein. In August, 1875, she assigned her interest in the firm to Hormasji Nowroji Sakalátwálla, and he thereupon became a partner, and received 39 cents of the profits. In November, 1876, Jágjivan assigned his interest in the firm (31 cents) to Hormasji Nowroji Sakalátwallá and Shámji Jádowji, of which 21 cents became the property of Hormasji Nowroji Sakalátwalla and 10 cents the property of

* Suit No. 256 of 1883.

Shámji Jádowji, the firm henceforth consisting only of these two partners, of whom the former received, in all, 60 cents of the profits and the latter 40 cents. In November, 1882, Hormasji Nowroji Sakalátwállá died, leaving a will whereby he appointed his wife, the plaintiff Báchubái, his executrix, and left all his property to her for life, and after her death to his son. The will did not refer to the firm, or nominate any successor in the partnership.

In the present suit Báchubái as executrix claimed to be entitled to 60 cents or shares in the firm of Vunmálidáss, Jagjvan, Shámji and Company up to the date of the testator's death, and to a like share in the profits earned subsequently to his death, or to be earned by the firm so long as it continued to carry on the said agency business of the company. The defendant admitted the right of the plaintiff to the share claimed in the profits earned prior to the testator's death, but resisted her claim to any portion of the subsequent profits.

Held, (1) on the authority of *Beamish* v. *Beamish* (1), that the testator's will did not operate as an exercise of the power of nominating a successor in the firm so as to make the plaintiff a partner.

(2) That, having regard to the nature of the duties of the firm as agents and to the language of the agreement constituting the firm, coupled with the fact that there was no capital employed in the business, it must have been intended that, in default of nomination of a successor by a retiring or deceased partner, the agency should be carried on by the continuing or surviving partners in the name of the firm, and that the interest of the testator in the firm upon his death therefore survived to the defendant.

Held, also, that, although the plaintiff was entitled to an account up to the date of the testator's death, she was not entitled to a share of the good-will as an asset of the firm. The good-will of a firm is attached to the name, and in the present case, by the partnership agreement itself, the name was to be used by the surviving partners or partner for their own benefit. That arrangement took away all value from the good-will, if, indeed, it was consistent with its being an asset at all.

Ambler v. *Bolton* (2) and *McClean* v. *Kennard* (3) distinguished.

The testator's estate had proved insolvent; and previously to the filing of this suit an administration suit had been filed by creditors. By a decree made in that suit on the 23rd January, 1883, a receiver (Watkins) had been appointed, who was made a co-plaintiff with the executrix in the present suit. It was contended on behalf of the defendant that there was a misjoinder, the receiver being only entitled to sue for what might be due to the testator's estate up to the date of his death.

Held, that there was no misjoinder. The receiver might have sued for every thing that was due to the estate, but for greater safety the executrix was added as a plaintiff.

THE plaintiff, Báchubái, was the widow of one Hormasji Nowroji Sakalátwállá, deceased, who had been a partner in the firm of

(1) Ir. Rep., 4 Eq., 120. (2) L. R., 14 Eq., 427. (3) L. R., 9 Ch. App., 336.

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Vunmálidáss, Jagjivan, Shámji and Company. The second plaintiff Watkins, was the receiver of the estate of the deceased, appointed by an order of Court dated 23rd January, 1883. The defendant, Shámji Jádowji, was the sole surviving partner in the above-mentioned firm.

Vunmálidáss Jivá, Jagjivan Hemji and the defendant Shámji Jádowji were, prior to the 29th October, 1873, large shareholders in a certain company in Bombay called The Great Eastern Spinning and Weaving Mills, Limited. On the said 29th October, 1873, they entered into an agreement to cause the said company to be wound up, and to form a new company to take over its assets and liabilities, and to cause themselves to be appointed agents of the new company under the name of Vunmálidáss, Jagjivan, Shámji and Company, and under that name to act as such agents of the new company, subject to the terms and conditions specified in the said agreement.

The following are the clauses of the agreement which are material to this report. This agreement provided that the name of the new company should be The Vunmálidáss Jivá Spinning and Weaving Company. It was, however, subsequently agreed that the name of the new company should be "The New Great Eastern Spinning and Weaving Company, Limited."

"We, the undersigned, Sháh Vunmálidáss Jivá and Sháh Jagjivandáss Hemji and Thákar Shámji Jádowji of our respective free will and pleasure and in sound mind and consciousness jointly make this writing. The same is duly agreed to and approved of by each of us and the heirs and representatives of each of us....."

"3. We are to remain (act) as the agents of the said Vunmálidáss Jivá Spinning and Weaving Company, Limited, and that business is duly to be taken in the name of Vunmálidáss, Shámji's Company."

"4. This agency business we are to take for thirty years, and a proper clause in respect thereof is to be got duly inserted in the deed of Vunmálidáss Spinning Company."

"5. Out of whatever may be got for the agency business, Sháh Vunmálidáss Jivá shall receive thirty-nine cents, and Tha (Thákar) Shámji Jádowji shall receive thirty cents, and thirty-one cents have been kept (allowed to) Sháh Jagjivandáss Hemji. In all cents one hundred are duly to be divided and received by us in accordance with the above shares."

"11. It is agreed to get the agency business of the Vunmálidáss Jivá Spinning Company in the name of Vunmálidáss, Jagjivan, Shámji Company. If within a

period of thirty years a vacancy should at any time take place therein by the death, which God forbid! or the retirement of any of us, then the said company shall duly take in (admit into) Vunmálidáss, Jagjivan, Shámji's Company that person whose name may be given (proposed) in his own place by the dying or retiring partner. And whatever share such deceased or retiring partner may have held, and whatever authority he may have exercised, that much share and authority shall be duly got (and exercised) by the partner coming in his stead."

"12. The partners of Sháh Vunmálidáss, Jagjivan Shámji's Company are duly not to carry on or do any business whatever under the name of this company, save and except this 'agency' business. And notwithstanding what is written herein, should any partner whatever do that, then the remaining partners shall duly recover from him rupees twenty-five thousand 'as liquidated damages', and the share of such partner as may act in contravention thereof is to be immediately treated as null..... (and) void, and he is to be duly removed from this company."

"The particulars thus stated are written in these eighteen clauses. In accordance therewith each of us has duly agreed and consented. And we have in our sound mind and conscious state made our signatures hereto. Each of us and the heirs and representatives of each of us are duly to observe and carry out the same *boná fide*, and with true religious faith."

"19. After we shall have become the 'agents' of the Sháh Vunmálidáss Jivá Spinning and Weaving Company, Limited, in accordance with the shares of each of us we are duly to keep in all four hundred shares of the company in the proportion of our shares. We are duly to keep the same as long as we may do the 'agency' business."

In pursuance of the above agreements the said Great Eastern Spinning and Weaving Mills, Limited, was wound up, and a new company, called "The New Great Eastern Spinning and Weaving Company, Limited", was formed and registered. The memorandum of association contained the following clause:—

Clause 6.—"That the firm of Vunmálidáss, Jagjivan, Shámji and Company, of Bombay, merchants, or whatever member or members that firm may for the time consist of, shall be the agents of the company, under the superintendence and control of the directors so long as the said firm shall carry on business in Bombay, or until they shall resign, and they shall receive a commission of ¼ anna per lb. on all the yarns and cloths manufactured and sold by the company, and a commission of 2½ *per* cent. on the proceeds of sale of materials manufactured from wool, jute, silk and other fibres and sold by the company. Should, however, the company during any one year be unable to declare a dividend of 4 *per* cent., owing to their profits being less than that amount, the agents shall only be paid two-thirds of the above commission."

The following are the material clauses of the articles of association:—

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"103. That the firm of Vunmálidáss, Jagjivan, Shámji and Company of Bombay, merchants, or whatever member or members that firm for the time consist of, shall be the agents of the company, under the superintendence and control of the directors, so long as the said firm shall carry on business in Bombay, or until they shall resign. And they shall receive a commission of ¼ anna *per* lb. on all the yarns and cloths manufactured and sold by the company, and a commission of 2½ *per* cent. on the proceeds of sale of materials manufactured from wool, jute, silk, and other fibres, and sold by the company. Should, however, the company during any one year be unable to declare a dividend of 4 *per* cent., owing to their profits being less than that amount, the agents shall only be paid two-thirds of the above commission.

"In the event of the company being wound up at any time during the existence or continuance of the said firm of Vunmáli, Jagjivan, Shámji and Company as its agents, the said firm shall be entitled to receive and shall receive from the said company, or the liquidators thereof, as compensation for the loss of their said appointment, the sum equivalent to five years' commission as liquidated damages, in full satisfaction and discharge of their claims in respect of such loss of their appointment.

"104. The duties of the agents shall be to purchase cotton, sell the yarn, cloth and materials of wool, jute, silk and other fibres manufactured in the mills, and waste of cotton and yarn in such manner and on such conditions as the directors for the time being of the company shall from time to time prescribe in that behalf."

In pursuance of the above-mentioned agreement the firm of Vunmálidáss, Jagjivan, Shámji and Company was duly constituted, and under the aforesaid memorandum and articles of association of The New Great Eastern Spinning and Weaving Company the said firm became its agents, and continued to be its agents up to the date of the present suit. Under the agreement, as above stated, the three partners divided the profits realized by the firm out of the said agency business, in the following shares, *viz.*, Vunmálidáss Jivá 39 cents, Jagjivan Hemji 31 cents, Shámji Jádowji 30 cents. No other business, except the agency business, was done by the said firm.

Vunmálidáss Jivá died on the 16th August, 1874, leaving a will dated the 15th August, 1874. By that will he exercised the right vested in him by clause 11 of the above agreement, and appointed his wife Kessar as his successor in the firm. The provision in his will was as follows:—

"At present I have become a partner in The New Great Eastern Spinning Agency. To carry on the business thereof my new wife Kessar is *mukhtyár*."

After the death of Vunmálidáss his widow Kessar became and was recognized as a partner in the said firm. On the 2nd August, 1875, by an agreement in writing of that date, she sold three hundred and sixteen shares in The New Great Eastern Spinning and Weaving Company, which belonged to the estate of her deceased husband Vunmálidáss, to Hormasji Nowroji Sakalátwállá, and assigned to him her interest in the agency business and her share in the firm. The following are the material clauses of the assignment:—

"As to the three hundred and sixteen shares of The New Great Eastern Spinning and Weaving Company, Limited, which have been mortgaged by me to the undermentioned persons, all those shares I have this day sold to you on the undermentioned terms through the brokers Rámji and Govindji. The particulars thereof, including my thirty-nine cents for commission and all rights."

"1. The price of these three hundred and sixteen shares is fixed at rupees nine hundred and ninety per share."

"3. Until now the agency business of The New Great Eastern Spinning and Weaving Company, Limited, has been taken (*i.e.* conducted) in partnership by the (Thákar) Shámji Jádowji and Jagjivan Hemji and myself, *i.e.*, my deceased husband Vunmáli Jivá under the name of Sháh Vunmálidáss, Jagjivan, Shámji and Company. Therein Set Vunmáli Jivá's share is thirty-nine cents, and Shámji Jadowji's (share is) thirty cents, and Jagjivan Hemji's (share is) thirty-one cents. As to Vunmáli Jivá's share of thirty-nine cents thereof; as to such commission of mine which has accumulated up to this day, and which may hereafter accrue on account of such share, you yourself are the owner of all such 'commission', because the price which in the above written first clause is fixed at Rs. 990 is fixed after calculating your benefit in such commission."

"4. As to the dividends on account of the said three hundred and sixteen shares which have accrued due up to this day, and which may accrue due hereafter, to be received from The New Great Eastern Spinning and Weaving Company, Limited, those also you yourself are to receive; because, the said price of Rs. 990 is fixed after calculating your right to the benefit of such dividends."

"6. In the firm of Sháh Vunmálidáss, Jagjivan and Shámji as mentioned in the above third clause, I will truly cause your name to be entered instead of my name."

Upon the execution of this agreement and assignment the said Hormasji Nowroji Sakalátwállá became and was recognized as a partner in the firm with Jagjivan Hemji and Shámji Jádowji, and entitled to 39 cents of the profits of the firm.

Jagjivan Hemji having become involved in pecuniary difficulties, a decree was passed against him, in execution of which all the shares held by him in The New Great Eastern Spinning and

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Weaving Company were attached and sold by the decree-holder. These shares were purchased by Hormasji Nowroji Sakalátwállá and the defendant Shámji. On the 14th November, 1876, Hormasji Nowroji Sakalátwállá obtained from the decree-holder an assignment of the said decree for the price of Rs. 13,100.

On the 19th November, 1876, Jagjivan Hemji executed a document, whereby, in consideration of Hormasji Nowroji Sakalátwállá releasing him from all claims under the said decree, and of Hormasji and of Shámji Jádowji for themselves, their heirs, representatives, and successors in the said firm, agreeing to pay him 10 per cent. of the commission thereafter to be received by the firm from the company, he made over and assigned all his interest as a partner in the firm to Hormasji Nowroji Sakalátwállá, Shámji Jadowji and their heirs and representatives.

The following are the material clauses of this agreement :—

"As regards whatever share, portion, right, and interest I have or may have in the said firm and in the commission and the agency business appertaining thereto and in the profits thereof, I have from this day released to you by virtue of this writing, as long as the moon lasts, all that share, portion, right and interest; and have given the same to you and your heirs and representatives, and have transferred the same. You and your heirs and representatives are duly to receive and enjoy the same for your own benefit. And in this manner I have duly given to you and have transferred to your name my said share, portion, and right. In consideration thereof, you and your heirs and representatives, and he who may carry on the business of the said Vunmálidáss, Jagjivan, Shámji and Company in your stead (*i.e.*) your [firm of] Vunmálidass, Jagjivan, Shámji and Company shall duly pay each year, in accordance with the below mentioned four instalments, namely, ten *per* cent. on the commission, whatever the same may come to, out of the amount of commission or allowance which they may get to me during my lifetime, and thereafter to my heirs and representatives, or to those whom I may direct the same to be paid, as long as you and your heirs and representatives and the partner or partners who in your place may carry on the business of agents of the abovementioned The New Great Eastern Spinning and Weaving Company, and receive commission in the name of the said Vunmálidáss, Jagjivan, Shámji and Company." * * * * *

"As regards whatever commission or allowance your said firm may receive from the 1st of October 1876 in accordance with these particulars, you, [and] your heirs, [and] representatives, and he, who in your stead may carry on the business of the said Vunmáli Jagjivan, Shámji and Company, shall duly pay to me and my heirs and representatives, or to him whom I may direct the same to be paid according to what is mentioned above, ten *per* cent. on the commission, whatever the same may come to every year. * * * *"

"I and you and your and my heirs and representatives do agree with each other to observe and fulfil this writing and all the conditions thereof."

Of the 31 cents in the profits of the firm thus assigned by Jagjivan to Hormasji and Shámji Jádowji, 21 cents became the property of Hormasji, which, added to the 39 cents which he had purchased from Kessar, made him proprietor of 60 cents in all. Shámji received 10 cents, which made him proprietor of 40 cents.

In 1876 Jagjivan became insolvent, and his estate, including his right to receive 10 per cent. of the firm's profits under the above assignment, vested in the Official Assignee, who in 1882 sued Hormasji and Shámji Jádowji to recover certain arrears of the said allowance, and by a consent decree dated the 13th January, 1883, passed in the suit (No. 196 of 1882) after the death of Hormasji, it was declared that the Official Assignee was entitled to receive the said allowance as long as the firm continued to receive it, and Shámji Jádowji was decreed to pay to the Official Assignee Rs. 21,500, being the arrears due, without prejudice to Shámji Jadowji's right to recover contribution from the estate of Hormasji.

On the 30th November, 1882, Hormasji Nowroji Saklátwállá died while still a partner in the firm, and entitled to 60 cents of the profits. By his will, dated 30th December 1874, he appointed the plaintiff, Báchubái, his executrix.

There was no allusion in the will to the firm or to the partnership, and no express appointment of a successor in the partnership. Hormasji left all his property to his wife, the plaintiff Báchubái, for life, and after her death to his son. The plaint submitted that, upon Hormasji's death, Báchubái as his executrix became entitled to his 60 parts or shares in the firm, and to receive 60 *per* cent. of the commission received by the firm from the company.

The estate of Hormasji proved insolvent, and in a suit filed by creditors for its administration, the second plaintiff, L. A. Watkins, was appointed receiver by a decree made on 23rd January, 1883; and by a further order, dated 31st July, 1883, the plaintiffs were empowered to bring this suit.

The plaintiffs contended that as representing the estate of Hormasji Nowroji Sakalátwállá they were entitled to a share of

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60 *per* cent. in the said firm up to the date of the testator's death, and to a like share in the commission earned subsequently to his death, and to be earned by the firm so long as it continued to carry on the said agency business of the company, and that the defendant should be ordered to pay the share of Hormasji in the commission already accrued.

The defendant admitted that the plaintiffs, or one of them, was entitled to a 60 *per* cent. share in the commission earned *prior to the death of* Hormasji Nowroji Sakalátwállá on 30th November, 1882, but alleged that he had duly accounted for the same, and that nothing was due to the plaintiffs in respect thereof. The following are the material clauses of his written statement:—

8. "On the death of the said Hormasji Nowroji Sakalátwállá, which took place on the 30th day of November, 1882, the interest of the said Hormasji Nowroji Sakalátwállá in the said firm of Vunmálidáss, Jagjivan, Shámji and Company ceased and determined, and the defendant denies that the plaintiffs, or either of them, are entitled to any share or interest in the commission earned by the said firm of Vunmálidáss, Jagjivan, Shámji and Company from and after the said 30th day of November 1882."

9. "The defendant says that the second plaintiff, Mr. L. A. Watkins, has sold all the shares of the said Hormasji Nowroji Sakalátwállá in The New Great Eastern Spinning and Weaving Company, Limited, and the defendant submits that, assuming that the plaintiffs, or either of them, ever had any share in the said firm of Vunmálidáss, Jagjivan, Shámji and Company subsequent to the death of the said Hormasji Nowroji Sakalátwállá, the fact of the said shares having been so sold as aforesaid, in violation of the provisions of the partnership agreement, determined such share."

The case was tried by Hart, J., of whose judgment the following is the material portion:—

"The difficulty in the present case is that the good-will consists of the support of a single customer, *viz.*, The New Great Eastern Company, who are in no way bound, but may, if they choose, continue to employ the defendant as agent notwithstanding the sale, or appoint another, without regard either to him or the purchaser. In such circumstances is it reasonably probable that any purchaser would bid any but a nominal price for the good-will?

"Shortly stated, the broad principles of law, generally applicable to such a case as the present, I conceive to be as follows. The death of one member of a firm operates as a dissolution of the partnership. His representatives have no right to become partners, nor to interfere in any way in the conduct of the business; but they represent the deceased for the purposes of the account. The surviving partners have no right to take the share of the deceased partner at their own valuation, or, in the absence of special agreement, or without the consent of his representatives, to ascertain it otherwise than by conversion of the assets of the partnership into money by actual sale. Such an asset is the good-will of the business if saleable. The value of the assets of the firm and of the deceased partner's share in them at the date of its dissolution by his death being thus determined, the account must proceed to ascertain what has been gained since such dissolution by the employment of the capital or property of the deceased partner; or, in other words, by continuing the employment of his share in the assets of the firm as found to exist at the date of his death; and he must be credited with his share in this, against which must be set a liberal allowance to the surviving partners for carrying on the business without his assistance. But the Court will not concern itself to determine the value of an unsaleable asset, by which I understand one that will certainly not command more than a merely nominal price when brought to sale; and, if subsequently acquired profits cannot be attributed to the employment of assets in which the deceased partner has a share, his *primâ-facie* right to share in them is rebutted.

"In the present case it is admitted that the firm has no capital. The nature of the business is such that its earnings largely depend on the personal exertions of the partners. The only asset of the firm is the good-will, which is limited to the custom of The New Great Eastern Copmany, who are not bound to employ any particular agents (for the provisions of the sixth article of the memorandum of association and the one hundred and third articles of association do not amount to a contract binding the company to the employment of the firm of Vunmálidáss, Jagjivan, Shámji and Company), and to the obtaining of this good-will the deceased Sakalátwálá did not contribute as a partner in the firm. The numerous shares which he held in the company, and his position as a director of it, doubtless contributed to influence the good-will of the company towards maintaining the firm as their agents both before and after he joined it. But this influence was contributed rather in his character of shareholder and director in the company, than of partner in the firm, and by his death and the sale of his shares it is now completely lost.

"In these circumstances the doubt I have felt throughout the case is, first, whether Sakalátwálá's share in such a good-will is of such worth that the Court ought to concern itself with its value at the date of his death, and put itself to the trouble and the parties to the expense of a sale which may realize nothing; and, secondly, whether the proportion of the earnings gained after his death to be attributed to the use of this share in the good-will is not so small that it will be swallowed up in the allowance which must be made to the defendant for his management. I cannot say that I have even now arrived, in my own mind, at any satisfactory determination of that doubt; but, on the whole, I am of opinion that the question had better be solved by the test of actual experi-

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ment. There is no doubt that at his death Sakalátwállá was entitled to 60 *per* cent. of the value of the good-will (whatever that might be worth) which formed the only asset of the firm. There is also no doubt that after his death this share (whatever its value) in the good-will continued to be used by the defendant towards gaining the subsequently acquired earnings. See *Smith* v. *Everett*(1). The plaintiffs insist that the value of such share should be determined by actual sale. Some director or large shareholder in the company may, like Vunmálidáss or Sakalátwállá himself, desire to be appointed agent, and to this end may be willing to purchase the good-will of the present firm; or the defendant, to further secure himself in his present position of agent, may be willing himself to become its purchaser. If nothing be realized by the sale, it is clear that Saklátwállá's 60 *per* cent. share in the good-will of the firm is worth nothing, and consequently that no part of the commission earned subsequently to his death can be attributed to the use of this share. If, on the other hand, the price realized by the sale of the good-will, after paying the expenses of advertisement and sale, amount to more than a merely nominal sum, I think the good-will may fairly be considered a valuable asset; and Saklátwállá's estate be credited with his share in it and in the earnings acquired by the use of that share in the business of the firm subsequently to his death—subject, however, to a liberal allowance to be made to the defendant for his management subsequent to the death of Sakalátwállá, when, instead of contributing one-half only of the labour, he had to contribute the whole.

"I do not think the plaintiffs are deprived of their right to such share as I have just mentioned in the earnings of the firm acquired subsequently to Sakalátwállá's death by reason of the sale of his shares in the company. The agreement to retain shares is binding only on partners in the firm. It was not as partners in the firm that plaintiffs sold these shares. Nor is it as partners in the firm that they are entitled to participate in the subsequently acquired earnings, but by reason of the retention and employment by defendant of Sakalátwállá's share after the dissolution of the firm after his death. But, further, breach of the agreement to retain a certain number of shares in the company would not itself operate, *ipso facto*, to dissolve the partnership.

"As regards the amount of allowance to be made to the defendant for managing the business, this in a measure depends on the amount realized by the sale of the good-will. If the good-will be worth very little, it is clear the labour must be worth much, for the earnings are gained by the good-will and the labour. What the latter, therefore, is worth in gaining the earnings cannot even be approximately stated until the value of the good-will is known, and this cannot be known until the price fetched by its sale is ascertained. Even when the value to be assigned to the labour must be, so far as I can see, a purely arbitrary computation, for I am unable to detect any such mathematical connection between the good-will and the labour as would enable one to express the proportion one bears to the other in a common money denomination. But it may be some guide to the fixing of an arbitrary value on the labour if the money value of the good-will be known. The nature and amount of the work to be done, the remuneration

(1) 27 Beav. 446.

generally paid for similar work in other cases, and the fact that in this case the remuneration must be calculated on a liberal scale, will be further guides towards determining what will be a reasonable allowance to the defendant for his management. As the taking of the account and the sale of the good-will must be entrusted to the Commissioner, I purpose, if the parties see no objection, to leave to him also the duty of determining the amount of the remuneration to be allowed to the defendant.

"The present order I think should be something to the following effect:—Declare that the partnership in the plaint mentioned was dissolved from the date of the death of Sakalátwállá on 30th November, 1882. Refer it to the Commissioner to take the accounts of such partnership down to that date; declare that the plaintiffs are entitled to what on the taking of such account may be found to be due to the estate of Sakalátwállá in respect of his 60 *per* cent. share in the said partnership. Order the Commissioner forthwith to sell the good-will of the said partnership by public auction, with liberty to the parties to bid, and let the said Commissioner apply the proceeds towards defraying the expenses of and incidental to such sale. Declare that the plaintiffs are entitled to 60 *per* cent. of the surplus proceeds after such application as aforesaid, and the defendant to 40 *per* cent. Should such surplus proceeds exceed a reasonable sum to be fixed by the said Commissioner as a nominal price for the said good-will, declare that the plaintiffs are entitled to 60 *per* cent. of the commission earned since 30th November, 1882. Refer it to the Commissioner to take the account of such earnings, debiting the defendant with 60 *per* cent. thereof, and crediting him with the amount, if any, found to be due from Sakalátwállá to the said partnership, on the taking of the account hereinbefore ordered, and with such sum as the Commissioner may consider to be reasonable as his remuneration for conducting the business of the said partnership from 30th November, 1882. Reserve further consideration and costs. Leave to apply."

The defendant appealed.

Inverarity and *Jardine* for the appellant.—In this case the facts are not disputed. The questions that arise are questions of law. First, we say there is a misjoinder of plaintiffs and of causes of action. Watkins was appointed receiver of Hormasji's estate to "get in the outstandings due to the deceased." Under that order he alone can sue for what accrued due up to the date of the death of Hormasji. The executrix, Báchubái, could not sue for that. On the other hand, for anything accruing due subsequently to the death of Hormasji, the executrix, Báchubái, alone can sue. These claims are improperly included in one suit

[SARGENT, C. J.—Two suits would be quite unnecessary. Here apparently the receiver might have sued alone to recover

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every thing that was due to the estate; but for greater safety the executrix, Báchubái, is added as a plaintiff. We do not think there is a misjoinder.]

Then, the question arises, what was the right of Hormasji's representatives on his death? We say his death dissolved the firm. His representatives were not entitled to be partners. The intention of clause 11 of the agreement was to give power to nominate a partner, and thus its effect was to exclude the representatives. As to the rights of the executors of a partner, see *Knox* v. *Gye*[1]. Hormasji's representatives had a right to his share and interest in the firm, *viz.*, 60 *per* cent. of the profits earned up to the date of his death. If the firm had been a trading partnership, and had a good-will attached to it, they would also have been entitled to a share in the good-will. But here there is nothing that can be considered a good-will. The business of the firm is an agency to do personal service. There is only one customer, *viz.*, the company. The company was quite free to cease to employ the firm at any time, and to employ other agents. The memorandum and articles of association did not constitute a contract by the company to employ the firm—*Melhado* v. *Porto Alegre Railway Company*[2]; *Eley* v. *Positive Assurance Company*[3]; *In re New Buxton Lime Company*[4].

If there was a contract, it might be a valuable asset of the firm; but, even if there was a contract in such a case, the company would not be compelled to keep it—*Nusserwánji Merwánji Pánday* v. *Gordon*[5]; *Mair* v. *Himálaya Tea Company*[6].

Then, what is the good-will which is to be sold? Good-will in the case of a trading concern is the chance of retaining the business.

But the 'chance' which the purchaser of this good-will would buy, he has already, without any purchase, if he can persuade the company to transfer its agency to him, which it is at liberty to do. As to good-will, see Lindley on Partnership, (4th ed.), p. 859. Suppose the good-will were sold, the defendant might immediately afterwards solicit the company to give him the

(1) 5 Eng. & Ir. Ap. at p. 675.
(2) L. R., 9 C. P., 503.
(3) L. R. 1 Ex. Div., 20 S. C. on appeal, *ibid.*, p. 88.
(4) L. R., 1 Ch. Div., 620.
(5) I. L. R., 6 Bom., 266.
(6) L. R., 1 Eq., 411.

agency—*Walker* v. *Mottram*[1]; *Pearson* v. *Pearson*[2], which overrules *Labouchere* v. *Dawson*[3]; *Johnson* v. *Hellely*[4]; *Ginesi* v *Cooper*[5]; *Leggott* v. *Barrett*[6]. There here no good-will of any value to be sold—Lindley on Partnership, (4th ed.), 1018.

Next, suppose there was here an asset of any value to be sold. The value to be ascertained is its value at Hormasji's death, and the plaintiffs would not be entitled to anything subsequently to that date. There is no capital in this firm, and since Hormasji's death the firm has not had the benefit of his skill, or of his influence, for his shares in the company were sold.

Latham (Advocate General) and *Kirkpatrick* for the respondents (plaintiffs).—The clause in Hormasji's will, giving his property to his widow, was an exercise of his power of appointment conferred on him by the 11th clause of the agreement—*Ponton* v. *Dunne*[7]; and Succession Act (X of 1865), sec. 78.

Next, we contend that, if his will was not an appointment, nevertheless Hormasji's representatives succeed to his interest in the firm as long as it lasts. The firm was a continuing firm, and was not dissolved by Hormasji's death. The intention of the parties to the partnership agreement clearly was that the firm should last for thirty years. See articles and memorandum of association. Their own conduct subsequently shows their interpretation of the agreement, *e.g.* see the consent decree of the 13th January 1883. It could not have been their intention that, on failure to nominate, the surviving partners should take the whole interest in the firm. Hormasji gave a large sum to Kessar for a part of his interest in the firm; see clause 3 of Kessar's assignment, *supra*, page 541; and he purchased the decree against Jagjivan for a considerable sum, and by that transaction acquired a further interest. He had, therefore, bought his interest in the firm, and cannot have intended that it should go to the surviving partners. The existence of the nomination clause is itself against such a construction. *Ponton* v. *Dunne*[7] shows that the effect of the nomination clause is to give

(1) L. R., 19 Ch. Div., 355.
(2) L.R., 27 Ch. Div., 145.
(3) L. R., 13 Eq., 322.
(4) 2 De G. J. & Sm., 446.
(5) L. R., 14 Ch. Div., 596.
(6) L. R., 15 Ch. Div., 306.
(7) 1 Russ. & My., 403.

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a right of property. If that property is not disposed of by nomination of a partner, it goes to the representatives under the ordinary law. Its existence does not depend on the fact of nomination. Our contention is, therefore, that the firm is a continuing firm, and that the plaintiffs are entitled, as Hormasji's representatives, to his interest in it as long as it continues—*Simmons* v. *Leonard*[1]; *Downs* v. *Collins*[2]; *McClean* v. *Kennard*[3]; *Ambler* v. *Bolton*[4].

The representatives are, at all events, partners as to the twenty-one shares taken by Hormasji under the assignment from Jagjivan of the 19th November, 1876. That assignment was to Hormasji, *his heirs and representatives.* If that assignment operated to make Hormasji a partner in respect of those shares, (as it admittedly did), it must make his representatives, (who are also mentioned), partners after his death.

If, however, the firm did not continue, but was dissolved by Hormasji's death, as in *Kershaw* v. *Matthews* [5], what are the plaintiffs' rights? They have a right to wind up the partnership—*Knox* v. *Gye* [6]. In such winding up their interests are twofold. First, they have a share in the good-will, which is an asset, and must be valued. Next, they are entitled to a share of the profits made since the death of Hormasji under any contract of employment made in his lifetime and in profits arising in consequence of any contract made in his life time—*McClean* v. *Kennard*[7]; *Ambler* v. *Bolton*[8]. The two rights are connected, and must be considered together.

As to the nature of a good-will, see Lindley on Partnership, (4th ed.), Vol. 2, p. 859 *et seq.*; Pollock's Digest of Partnership, p. 78 *et seq.*; *Churton* v. *Douglas* [9]. Its value must be ascertained in chambers—*Mellersh* v. *Keen* [10]. In *Smith* v. *Everett* [11] the nature of the good-will was as difficult to ascertain as here, and yet a substantial price was paid for it—*Levy* v.

(1) 3 Hare, 589.
(2) 6 Hare, 418.
L. R, 9 Ch. Ap,, 336.
L. R., 14 Eq., p. 427.
1 Russ., 62.
(6) 5 Eng. & Ir. Ap., 656.
(7) L. R., 9 Ch. Ap., 336.
(8) L. R., 14 Eq., p. 427.
(9) Johnson's Rep., 174 at p. 187.
(10) 27 Bea., 236.
(11) 27 Bea., 446.

Walker(1); *Ginesi* v. *Cooper*(2). A good-will may have an appreciable value as between the partners themselves—*Austen* v. *Boys*(3).

Next comes the question, what is the right of the plaintiffs, as representatives of Hormasji, to the profits of the firm made since Hormasji's death? The firm has been carried on in the same name, and the agency has continued under the original arrangement with the company. We contend that the representatives are entitled to Hormasji's full share, subject to an allowance to the defendant for personal service. Generally such profits have arisen from the use of capital, but there is no capital in this firm. Hormasji, however, purchased his interest in the firm. He had paid a large sum of money for the sixty shares of the profits which he possessed at his death. The surviving partner can have no right to this—*Willett* v. *Blandford*(4); *Sampson* v. *Chapman*(5); *Wedderburn* v. *Wedderburn*(6); *Ambler* v. *Bolton*(7); *McClean* v. *Kennard*(8). The defendant has carried on the whole business for his own exclusive benefit since Hormasji's death, and this business was merely the continuance of the business which existed in Hormasji's life: see Lindley on Partnership, (3rd ed.), p. 886-887. In the profits of such a business the representatives are entitled to share. The company is not free at any time to transfer its agency from the firm. If there is no contract with the firm, there is an existing contract with its own shareholders, and, unless and until the articles of association are altered, the business must be given to the firm. Even if the defendant had made a fresh arrangement with the company as to the agency since Hormasji's death, the plaintiffs would be entitled to a share —Lindley on Partnership, (4th ed.), p. 574; Pollock's Digest, pp. 60, 61, 41; *Clements* v. *Hall*(9); *McClean* v. *Kennard*(10); *Russell* v. *Austwick*(11).

Jardine in reply.—There is nothing in the agreement to show it was intended that the representatives should be partners.

(1) L. R., 10 Ch. Div., 436.
(2) L. R., 14 Ch. Div., 596.
(3) 2 De. G. & J. at p. 636.
(4) 1 Hare, 253 at p. 268, 270.
(5) 4 DeG. M. & G., 154.
(6 22 Bea. 84, p. 104.
(7) L. R., 14 Eq., p. 427.
(8) L. R., 9 Ch. Ap., 336.
(9) 2 DeG. & J., 173, p. 186.
(10) L. R., 9 Ch. Ap., 336.
(11) 1 Sim., 52.

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Clause 11 negatives that suggestion. Hormasji's will was not an exercise of the power of nomination—*Beamish* v. *Beamish*[1].

If there was a dissolution of the firm on Hormasji's death, his representatives are entitled to a share in the good-will if it was a valuable asset. We say there was no good-will of any value—Lindley on Partnership, (4th ed.), pp. 859-60. The purchaser, no doubt, would have the right to use the firm's name, and might ask the company to employ him. As to the use of the name of a firm as part of the good-will, see Lindley on Partnership (4th ed.), p. 862; *Johnson* v. *Helleley*[2]. If the firm is dissolved, and there is now no firm of the name, and the company is quite free to choose its own agent, no shareholder could take proceedings to compel the company to employ the firm. The purchaser would not be the "said firm" spoken of in the articles of association. He would be the successor of the said firm. The good-will is valueless[3].

The firm was dissolved as to Hormasji. It may continue as to the other partners. *McClean* v. *Kennard*[4] is distinguishable. In that case there was a contract, and in case of loss the estate of the deceased would have been liable. Here there is no contract and no liability.

We say it was intended that the survivors should carry on the business if the deceased partner did not exercise his right to nominate a successor. *Kershaw* v. *Matthews*[5] shows that, if such a right is not exercised, the ordinary rule of law as to dissolution comes into operation. So in this case, if there is no nomination, the obvious intention of the agreement will prevail.

SARGENT, C.J.—This is a suit brought by the widow of a deceased partner in the firm of Vunmálidáss, Jagjivan, Shámji and Company to recover a share in the profits made by that firm since the death of her husband, which took place on the 30th November, 1882.

The firm in question was formed in the year 1873 with the view of obtaining the agency of The New Great Eastern Spinning

(1) 4 Ir. Eq., 120.
(2) 2 DeG. J. & S., 446.
(3) 25 Bea., 177.
(4) L. R., 9 Ch. Ap., 336.
(5) 1 Russ., 62.

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and Weaving Company, Limited. The firm originally consisted of three partners, *viz.*, Vunmálidáss Jivá, Jagjivan Hemji and the defendant, Shámji Jádowji, who were to divide the profits between them according to the terms of the partnership agreement, which by one clause, (the 4th), provided that the agency to the company was to be obtained for thirty years, and by another clause, (the 11th), provided that, in the event of a vacancy occurring in the partnership within that period by the death or by the retirement of any partner, such partner should have a right of nominating a successor. By this clause each successive partner was to have the same right of nomination.

The firm, constituted under this agreement, obtained the agency to the company, and entered upon its duties as agents, and from that time until now the firm has been the agents of the company, the agency being the only business of the firm, and the single source of all the profits which it has made.

On the 16th August, 1874, Vunmálidáss, one of the partners, died, and by his will he appointed Kessar, his wife, to succeed him as partner in the firm, thus exercising the power given to him by the 11th clause of the partnership agreement. Kessar, by an agreement dated the 2nd August, 1875, sold the interest in the partnership, which she had thus acquired, to Hormasji Nowroji Sakalátwállá, who, therefore, became and was recognized as a partner of the firm.

Jagjivan Hemji, another of the original partners, became involved in pecuniary difficulties, and he, on the 19th November, 1876, transferred his interest in the firm to the other partners, Hormasji and Shámji Jádowji: so that, henceforward, they were the only partners in the firm—Hormasji being entitled to sixty shares of the profits, and Shámji Jádowji to forty shares.

Hormasji died in November, 1882. The firm has continued to act as the agents of the company; and this suit is brought by Hormasji's widow, Bachubái, claiming her husband's share of the profits earned since his death.

The first question to be determined in this case is, whether Hormasji's will operated as an exercise of the power of nominating a successor in the firm given by clause 11 of the part-

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nership agreement? If it did, then, of course, the plaintiff is entitled to what she claims in this suit.

In support of the plaintiff's contention on this point we were referred to the case of *Ponton* v. *Dunne*[1]. (His Lordship stated the facts of that case.) In that case, however, it is to be observed that the power was not to appoint a partner in the firm, but merely the person who was to take the deceased partner's share in the profits of the partnership, in respect of which the surviving partner was to be a trustee for such person, and the case merely decided that a general bequest would operate as an exercise of such an appointment. Here, however, the power is to appoint a partner in the firm; and it requires, we think, a specific direction in that behalf, either in express terms or, at any rate, by a specific disposal of the deceased partner's interest in the firm, neither of which is to be found in Hormasji's will, which was made before the partnership was thought of. The case of *Beamish* v. *Beamish*[2], where the circumstances were substantially the same as in the present case, supports this view. We must hold, therefore, that Hormasji's will did not operate as an exercise of the power of nominating his successor, and did not constitute the plaintiff a partner in the firm.

What, then, was the effect of Hormasji's death upon the partnership? Section 253, cl. 9, of the Indian Contract Act provides that the result, in the absence of any contract to the contrary, is to dissolve the partnership, whether entered into for a fixed time or not. It was contended for the plaintiff that such a contract, although not found in express terms, must be implied in this case. It was argued that the object of the partnership was to carry on the agency business of the company for thirty years, which, it was said, could only be effected by the continuance of the firm, as both the memorandum and articles of association of the company provided for the agency being given to the firm of Vunmálidáss, Jagjivan, Shámji and Company. But those documents do not provide only for the firm of Vunmálidáss, Jagjivan, Shámji and Company, as then constituted, being the agents of the company, but also for its being so whatever member or members that firm might, for the time being, consist of. Whether, therefore,

(1) 1 Russ. & My., 403. (2) Ir. Rep., 4 Eq., 120.

the business was continued by a firm of Vunmálidáss, Jagjivan, Shámji and Company, consisting of the surviving partners and the representatives of deceased partners, or of the surviving partners or partner alone, there would equally be a firm of Vunmálidáss, Jagjivan, Shámji and Company within the contemplation of the memorandum and articles of association; and, looking at the nature of the duties of the agents as defined by clause 104 of the articles of association, coupled with the peculiar language of clause 11, and the important circumstance that there was no capital employed in the business, we think it was intended that, in default of nomination of a successor by a retiring or deceased partner, the agency should be carried on by the continuing or surviving partners or partner in the name of Vunmálidáss, Jagjivan, Shámji and Company.

Under these circumstances the plaintiff is, of course, entitled to an account up to the date of Hormasji's death. But it has been contended that she also is entitled to share in the "good-will" of the business as an asset of the firm. Assuming (which may well be doubted) that the term "good-will" is applicable to a business of this nature, it is plain that it is attached to the name of the firm which, by the partnership agreement itself, is to be used by the surviving partners or partner for their own benefit. Such an arrangement between the partners must take away all value from the good-will; even if it be not,—as Mr. Justice Lindley in his treatise on Partnership, p. 887, (3rd ed.), considers it to be—inconsistent with its being an asset at all. The Master of the Rolls under similar circumstances refused to refer it to chambers to determine the value of the good-will—35 Beav.; and such is the proper course, we think, to adopt on the present occasion.

But it was argued that there was a contract on the part of the company to continue to employ this firm as its agents; and that such a contract was a valuable asset to a share in which the plaintiff is entitled. The cases of *Ambler* v. *Bolton*[1] and *McClean* v. *Kennard*[2] were relied upon as cases in point. In those cases there were contracts entered into during the partnership, which would have rendered the estate of the deceased partner liable in the event of loss, and in the profits of

(1) L. R., 14 Eq., p. 427. (2) L. R., 9 Ch. Ap., 336.

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which, therefore, the estate of the deceased partner was entitled to participate. Such contracts are in their nature assets of a partnership. But here there was simply a contract determinable at any time by the company, the profits of which would be derived entirely by the services of the surviving partners or partner, and in respect of which no liability could be incurred by the deceased partner. It cannot, therefore, in our opinion be regarded as an asset of the firm.

Under these circumstances we must reverse the decree of the Court below, and dismiss the suit with costs.

Appeal allowed.

Attorneys for the appellants.—Messrs. *Hore, Conroy and Brown.*

Attorneys for the respondents.—Messrs. *Little, Smith, Frere and Nicholson.*

REVISIONAL CRIMINAL.

1885 July 6.

Before Mr. Justice Nánábhái Haridás and Sir W. Wedderburn, Bart., Justice.

In re THE PETITION OF LIMDA KOYA.*

Ábkári (Bombay) Act V of 1878, Secs. 43, Cl. f, and 53—Mowra flowers, possession of—Liability of seller of the flowers where purchaser makes illicit use by distilling liquor therefrom—Burden of proof.

Mere possession of mowra flowers does not constitute an offence under section 43 of the Ábkári Act V of 1878, unless such possession is made out by the prosecution to have been for the purposes of distilling liquor therefrom. Nor is a seller of these flowers criminally responsible for any illicit use of them after they have passed from his control.

THIS was a petition to set aside the order of conviction and sentence passed by Ráo Bahádur Oomedrám, a Magistrate of the First Class at Surat.

The petitioner was a dealer in mowra flowers, and in course of his business sold some flowers to one Khushál Vajiria, who distilled liquor therefrom, and was tried and punished for the offence. On inquiry by the chief police constable, as to the

* Criminal Review Petition No. 77 of 1885.