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In re YENIDJE TOBACCO COMPANY, LIMITED.

Company—Winding up—"Just and equitable"—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 129.

In 1914 W. and R., who traded separately as tobacconists and cigarette manufacturers, agreed to amalgamate their businesses, and in order to do so formed a private limited company in which they were the only shareholders and directors. The constitution of the company was such that under the articles of association W. and R. had equal voting powers, one director was to form a quorum, and if any dispute or difference should arise consequent whereon inability to pass a directors' resolution should result, the matter in dispute should be referred to arbitration, the award to be entered in the minute-book as a resolution duly passed by the board. The company's business was successfully carried on until June, 1915, when differences arose between the parties. One of such differences was referred to arbitration, which, after a protracted hearing involving costs exceeding 1000*l.*, resulted in an award to which R. declined to give effect. He brought an action for fraudulent misrepresentation against W., and the parties became so hostile that neither of them would speak to the other, communications having to be conveyed between them through the secretary of the company. In spite of this the company continued to transact business and large profits were made. Under these circumstances W. presented a petition alleging that a complete deadlock had arisen, that the substratum of the company was gone, and that it was "just and equitable" within s. 129 of the Companies (Consolidation) Act, 1908, that a winding up order should be made:—

Held, affirming the decision of Astbury J., that if this were a case of partnership there would clearly be grounds for a dissolution, and that the same principle ought to be applied where there was in substance a partnership in the guise of a private company. The position amounted to a complete deadlock, and it was "just and equitable" that the company should be wound up.

APPEAL from a decision of Astbury J.

In this case a petition was presented by Marcus Weinberg to wind up the above-named company on the ground that it was "just and equitable" that such an order should be made. The company was incorporated in March, 1914, with a nominal capital of 21,285*l.* divided into 20,285 preference shares of 1*l.* each, 500 "A" ordinary shares of 1*l.* each, and 500 "B" ordinary shares of 1*l.* each. The whole of the capital was paid up or credited as paid up. The

objects of the company were to acquire, amalgamate, and carry on two businesses formerly separately carried on by the petitioner and Louis Rothman respectively. The company was a private company, the only shareholders being the petitioner and Rothman. It was arranged between the parties that they should have equal rights of management and voting powers in the company. The articles of association were accordingly so drawn that neither party was in a position to outvote the other or to carry any resolution in opposition to the other. The only shares which carried a vote were the " A " shares, and these were allotted equally between the petitioner and Rothman, so that each had the same number of votes in the management of the company. Of the preference shares 16,995 were held by the petitioner and 3290 by Rothman, the whole of the " B " shares being allotted to the petitioner.

It was provided by the articles that the first directors should be the petitioner and Rothman, and each of them should hold office so long as he lived and was the registered holder of his qualification shares ; that the directors might meet and regulate their meetings as they thought fit, and that, unless otherwise determined, one should be a quorum ; that questions arising at any meeting should be decided by a majority of votes ; that in case of an equality the chairman should have a casting vote, provided that there should be no such casting vote during such time as the petitioner and Rothman should both be permanent directors of the company ; that if any dispute or difference should arise between the petitioner and Rothman consequent whereon inability to pass a directors' resolution should result, then the matter in dispute should be referred to two arbitrators (one to be appointed by each director) or their umpire, who should communicate their award to the secretary to be entered in the minute-book and deemed to have been duly passed by the board of directors.

The company's business was carried on successfully until June, 1915, when differences arose between the petitioner and Rothman, and in August of that year Rothman brought an action against the petitioner for a declaration that he had been induced to enter into the agreement for the sale of his business to the company by fraudulent misrepresentation and non-disclosure, and asking for rescission or rectification and damages. Since that time the parties had been

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in a state of continuous quarrel. One subject of disagreement related to the employment by the company as factory manager of a man named Litiger whom Rothman had purported to discharge. This matter was referred to arbitration under the articles. After a hearing which lasted eighteen days the umpire made an award confirming Litiger in his appointment at a weekly wage of 5*l.* The costs of the arbitrators and umpire alone amounted to 1050*l.*, of which Rothman was directed to pay two-thirds together with an additional sum of 50*l.* towards the petitioner's costs. Rothman did not pay this sum. Immediately after the publication of the award he arranged for a board meeting of the company after having tried to prevent Litiger from attending at the place of business of the company, notwithstanding the award. Rothman attended the meeting with a resolution written out purporting to dismiss Litiger, and, in the absence of the petitioner, tried to induce the secretary to enter his resolution upon the minutes. The secretary having refused to do so, the petitioner then appeared and further business became impossible. Another quarrel related to the engagement of a traveller and resulted in the company's losing his services. It was alleged that Rothman had threatened to ruin the company, and that he and the petitioner were not now on speaking terms, all communications between them having to be made through a third person at the directors' meetings. Notwithstanding these disagreements it appeared that the company continued to make considerable profits.

Under these circumstances it was contended by the petitioner that a complete deadlock had arisen and that the company ought to be wound up. Astbury J. held that it was not only "just and equitable," but essential in the interests of both parties, that the company should be wound up, and he made an order accordingly.

Rothman appealed.

Hon. F. Russell, K.C., and *A. H. Richardson*, for the appellant. This is not a case of deadlock. The company is able to carry on its business and is prosperous. The disputes that have arisen were trivial and are now at an end. The action brought by Rothman against the petitioner has never proceeded beyond service of the writ. The allegation that Rothman has threatened to ruin the

company is denied by him. Hitherto the jurisdiction to make a winding up order as being just and equitable on grounds not ejusdem generis with those mentioned in the first five sub-sections of s. 129 of the Companies (Consolidation) Act, 1908, has not been extended beyond cases of deadlock or where the substratum of the company has gone: *In re Sailing Ship Kentmere Co.* (1); *In re Fromm's Extract Co.* (2); *In re Furriers' Alliance, Ld.* (3); Stiebel on Company Law, p. 798. There can be no deadlock if, as here, the constitution of the company provides a method for the determination of disputes. Since the parties disagreed many directors' meetings have been held at which unanimous resolutions have been recorded. To wind up this company would be going far beyond the cases. It would not be just and equitable at the instance of the larger shareholder to wind up this company and so deprive the appellant of his interest in a profitable business. There is no deadlock and no insuperable difficulty in carrying on the real business of the company.

Gore-Browne, K.C., and *H. S. Henriques*, for the respondent, were not called upon.

LORD COZENS-HARDY M.R. This is an appeal from a decision of Astbury J., who ordered this private company to be compulsorily wound up. I think it right to consider what is the precise position of a private company such as this and in what respects it can be fairly called a partnership in the guise of a private company.

In the present case there were two tobacco manufacturers, one Rothman and the other Weinberg. They were minded to amalgamate their businesses. They formed a private limited company, one certainly of a most peculiar kind. Under the constitution of that company they are the sole shareholders in the company; the only voting power is given to the "A" shareholders, and although the holdings of the two members including "B" shares and preference shares are unequal, one having a larger holding than the other, yet with regard to the only shares which give the power of voting, that

(1) [1897] W. N. 58. (2) (1901) 17 Times L. R. 302.
(3) (1906) 51 Sol. J. 172.

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is the "A" shares, they each hold an equal number and consequently have equal voting rights. The articles of association provide that there shall be no casting vote, that one director shall form a quorum, and that in the event of any particular disagreement between the directors the matter in dispute shall be referred to arbitration; but there is no provision whatever in the articles, and I cannot imagine such a provision, that in the general management of the company all disputes between the directors shall go to arbitration, and certainly, having regard to the result of the one arbitration which has been held, it would be absurd to suggest that the working out of that provision is inexpensive. There was one dispute about a Mr. Litiger which was referred to two arbitrators who could not agree, and then an umpire was appointed, and the result was that the parties were some eighteen days before the arbitrators and umpire, the costs alone of the arbitrators and umpire amounting to upwards of 1000*l.*, to say nothing of the costs of the two parties, each of whom had to pay his own costs.

In those circumstances, supposing it had been a private partnership, an ordinary partnership between two people having equal shares, and there being no other provision to terminate it, what would have been the position? I think it is quite clear under the law of partnership, as has been asserted in this Court for many years and is now laid down by the Partnership Act, that that state of things might be a ground for dissolution of the partnership for the reasons which are stated by Lord Lindley in his book on Partnership at p. 657 in the passage which I will read, and which, I think, is quite justified by the authorities to which he refers: "Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation have been held sufficient to justify a dissolution. It is not necessary, in order to induce the Court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it."

Now here we have this fact. Mr. Rothman has commenced an

action charging Mr. Weinberg with fraud in obtaining the agreement under which he, Rothman, sold his business to the company. I ask myself the question: When one of the two partners has commenced, and has not discontinued, an action charging his co-partner with fraud in the inception of the partnership, is it likely, is it reasonable, is it common sense, to suppose those two partners can work together in the manner in which they ought to work in the conduct of the partnership business? Can they do so when things have reached such a pass, as they have here, that after an arbitration lasting eighteen days, an arbitration on the only point which was referred, which terminated in favour of Mr. Weinberg, and to which Mr. Rothman declines to give effect, in this sense, that although the award decided that Litiger had not been dismissed and ought to be continued as a servant of the firm until removed, Mr. Rothman will not allow him to come and do his business, so that he, Litiger, is in the happy position now of receiving his wages of 5*l*. a week without being allowed to do any work for the company in respect of which he is a servant?

The matter does not stop there. It is proved that these two directors are not on speaking terms, that the so-called meetings of the board of directors have been almost a farce or comedy, the directors will not speak to each other on the board, and some third person has to convey communications between them which ought to go directly from one to the other.

Is it possible to say that it is not just and equitable that that state of things should not be allowed to continue, and that the Court should not intervene and say this is not what the parties contemplated by the arrangement into which they entered? They assumed, and it is the foundation of the whole of the agreement that was made, that the two would act as reasonable men with reasonable courtesy and reasonable conduct in every way towards each other, and arbitration was only to be resorted to with regard to some particular dispute between the directors which could not be determined in any other way. Certainly, having regard to the fact that the only two directors will not speak to each other, and no business which deserves the name of business in the affairs of the company can be carried on, I think the company should not be allowed to continue. I have treated it as a partnership, and

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under the Partnership Act of course the application for a dissolution would take the form of an action; but this is not a partnership strictly, it is not a case in which it can be dissolved by action. But ought not precisely the same principles to apply to a case like this where in substance it is a partnership in the form or the guise of a private company? It is a private company, and there is no way to put an end to the state of things which now exists except by means of a compulsory order. It has been urged upon us that, although it is admitted that the "just and equitable" clause is not to be limited to cases ejusdem generis, it has nevertheless been held, according to the authorities, not to apply except where the substratum of the company has gone or where there is a complete deadlock. Those are the two instances which are given, but I should be very sorry, so far as my individual opinion goes, to hold that they are strictly the limits of the "just and equitable" clause as found in the Companies Act. I think that in a case like this we are bound to say that circumstances which would justify the winding up of a partnership between these two by action are circumstances which should induce the Court to exercise its jurisdiction under the just and equitable clause and to wind up the company.

Astbury J. dealt with this case, as it seems to me, in a most satisfactory way, and at the end of his judgment he says that he tried to suggest a solution: he suggested that the two should continue or try to continue for six months to see if they could get on better or that they should appoint one or more additional directors to assist them in the business; but this neither would do. If ever there was a case of deadlock I think it exists here; but, whether it exists or not, I think the circumstances are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed and which ought to be terminated as soon as possible. We are told that we ought not to do it because the company is prosperous, making large profits, rather larger profits than before the disputes became so acute. I think one's knowledge of what one sees in the streets is sufficient to account for that, having regard to the number of cigarettes that are sold, and we can take judicial notice of that in judging whether the business is much larger than it was before. Whether such profits

would be made in circumstances like this or not, it does not seem to me to remove the difficulty which exists. It is contrary to the good faith and essence of the agreement between the parties that the state of things which we find here should be allowed to continue.

In my opinion the appeal fails and ought to be dismissed with costs.

PICKFORD L.J. I agree and have nothing to add.

WARRINGTON L.J. Prior to March, 1914, two persons, one named Rothman and the other named Weinberg, were carrying on independent businesses as cigar and cigarette merchants and tobacconists. They determined that for the future they would carry on those two businesses together, and for the purpose of carrying into effect that determination they caused to be incorporated a private company which was registered in the month of March, 1914. Under the constitution of the company each of these two gentlemen had equal voting powers as members of the company. Each of them was appointed a director. They were the only directors. The articles contained a provision intended to meet the difficulty that might arise if these two gentlemen were unable to pass a resolution of directors. That article is in these terms: "If any dispute or difference shall arise between the said Marcus Weinberg and Louis Rothman whilst both holding the position of permanent directors consequent whereon inability to pass a directors' resolution will result, then and in any such case the matter in dispute shall be referred to the final arbitrament of two arbitrators or their umpire," and the arbitrators or their umpire were to communicate the award to the secretary, and it was to be entered in the minute-book and was to be equivalent to a resolution of the directors.

In the middle of the year 1915 there did arise a dispute or difference between these two gentlemen with reference to a certain specific matter connected with the business of the company, namely, whether Mr. Litiger, their factory manager, should continue in office or not. Rothman desired his dismissal, Weinberg desired his continuance in his present employment. That was referred to two arbitrators and their umpire. It cost the partners more than 1000*l.* in arbitrators' fees alone, without counting the expenses to

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which the two partners were themselves put in connection with the arbitration. It resulted in an award, the principal effect of which was that Litiger was still the factory manager notwithstanding his affected dismissal by Rothman. Rothman, it is not too much to say, refused to accept that award and attempted to act as if it had not been made. Another serious question has arisen which has not been the subject of arbitration. The dispute was as to the terms upon which a certain traveller should be engaged whose agreement had come to an end, and he solved the question by taking employment with somebody else. In addition to those two specific matters of dispute it appears that neither of these two directors will speak to the other. If any business has to be transacted by the company, some third person has to be present to whom each of these directors can express his views. They are not on speaking terms, to put it shortly.

Under those circumstances Weinberg applies to the Court for an order to wind up the company. Rothman opposes it. The company does not appear as such because there are no means by which instructions can be given to anybody to appear on its own behalf. In substance, therefore, it seems to me these two people are really partners. It is true they are carrying on the business by means of the machinery of a limited company, but in substance they are partners; the litigation in substance is an action for dissolution of the partnership, and I think we should be unduly bound by matters of form if we treated either the relations between them as other than that of partners or the litigation as other than an action brought by one for the dissolution of the partnership against the other; but one result which of course follows from the fact that there is this entity called a company is that, in order to obtain what is equivalent to a dissolution of the partnership, the machinery for winding up has to be resorted to. Now, if this had been an ordinary partnership and an action had been brought for dissolution, it seems to me quite clear that the plaintiff, who is the petitioner in this case, would have had sufficient ground for a dissolution of partnership according to the ordinary principle by which the Court is guided in such matters. Then s. 129 of the Companies (Consolidation) Act, 1908, which defines the grounds upon which the Court in the case of a company can make an order for winding up, includes the pro-

vision that such an order may be made if the Court is of opinion that it is just and equitable that the company should be wound up. At one time it was thought, and there was judicial opinion in support of it, that in order to bring the case within that provision of the Companies Act it must be shown to be ejusdem generis with a certain number of other cases which are specified in a previous part of the section; but that opinion has long been abandoned, and the Court has in more cases than one expressed the view that a company may be wound up if, for example, the state of things is such that what may be called a deadlock has been arrived at in the management of the business of the company. I am prepared to say that in a case like the present, where there are only two persons interested, where there are no shareholders other than those two, where there are no means of overruling by the action of a general meeting of shareholders the trouble which is occasioned by the quarrels of the two directors and shareholders, the company ought to be wound up if there exists such a ground as would be sufficient for the dissolution of a private partnership at the suit of one of the partners against the other. Such ground exists in the present case. I think, therefore, that it is just and equitable that the company should be wound up.

There is only one other point to which I ought to refer. It is said that according to the constitution of the company there is provided a means by which the quarrels of these directors can be overridden for the benefit and advantage of the company and the deadlock can be got rid of, and the means suggested is the provision in article 106 for reference to arbitration; but, in my judgment, that article does not contemplate a case such as the present, where, in the daily intercourse between the two directors, they are unwilling to speak to each other and discuss the affairs of the company. It relates, I think, to specific cases where a particular resolution important to the company cannot be passed because of a dispute or difference between the two directors, and it is therefore necessary to obtain the authority of some third person who will say what is to be done. It seems to me it has no reference to the ordinary everyday business of the company and its conduct, and that it really does not provide the means of getting rid of the difficulties which are encountered in the present case.

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For these reasons I think the order made by Astbury J. is quite right and the company must be wound up.

Solicitors for appellant: *G. & W. Webb.*

Solicitor for respondent: *Arthur S. Joseph.*

G. A. S.

SARGANT J 1916 *May* 24, 31.

GEORGE HOLLOWAY & WEBB, LIMITED *v.* CROMPTON.

[1914 H. 329.]

Practice — Costs — Apportionment — Chancery Division — Rules of the Supreme Court, 1883, Order LXV., *r.* 2.

The addition made in 1902 to Order LXV., r. 2, of the Rules of the Supreme Court, 1883, made an alteration in the practice of the Chancery Division, and is a rule of construction of orders in the form referred to in the first part of the added words. Where, therefore, an order is made giving a plaintiff part of the relief asked for and ordering taxation of his costs of the action, except so far as it relates to specified claims on which he has failed, and ordering taxation of the defendant's costs of those claims, with a direction as to set-off, the plaintiff is entitled to the general costs of the action and the defendant is not entitled to have them apportioned.

Todd v. *North Eastern Ry. Co.* (1903) 51 W. R. 333; 87 L. T. 710; 88 L. T. 112, distinguished.

THIS action was brought for (1.) a declaration that the defendant was liable to pay the amount of certain profits; (2.) an account of the same; (3.) an injunction to restrain the defendant from holding himself out as the successor of the plaintiffs in a certain department of their business; (4.) an injunction to restrain the defendant from intercepting certain letters and other communications; (5.) delivery up on oath of certain documents referred to in paragraph 8 of the statement of claim; (6.) an injunction to restrain the defendant from making use of those documents; (7.) damages for the detention of the same documents; (8.) payment of a sum said to be due for goods sold; (9.) an account of all moneys received by the defendant on account of the plaintiffs; (10.) payment of the amount found due on taking the account; (11.) payment of 12*l.* 14*s.* paid by the plaintiffs on the defendant's behalf.