be placed on the list of contributories. The application is therefore granted, except with regard to Dr. Whitehead.

D. de Waal asked for costs.

DE VILLIERS, J.P.: Dr. Whitehead is entitled to his costs.

Attorneys for Master: *Neser & Hopley*; Attorneys for Dr. Whitehead: *Rooth & Wessels.*

[Reported by *Adolf Davis,* Esq., Advocate.]

VIGNE'S EXECUTOR v. MACKENZIE.

1913. *February* 18, 21. DE VILLIERS, J.P.

Partnership.—Death of partner.—Dissolution.—Surviving partners. —Appointment of liquidator.

Where a partnership is dissolved by the death of one of the partners, the surviving partners have the right, in the absence of any good cause to the contrary, to wind up the partnership. Where good cause exists the Court will appoint a liquidator or curator.

The applicant, who was the executor dative in the estate of the late P. J. Vigne, alleged in his petition that he had ascertained that the deceased held an interest in a syndicate known as the Windheuvel Syndicate, which carried on operations on certain gold mining claims at Ottoshoop, and owned certain machinery. The sole other interested party in the said syndicate was the respondent, whom the applicant called upon for certain information in regard to the syndicate. In view of certain misstatements or omissions of fact which applicant alleged had been made by the respondent, the applicant asked for the assets of the syndicate to be taken out of the control of the respondent. Applicant also contended that the syndicate had been dissolved by the death of Vigne. Application was also made for an order placing the affairs of the Windheuvel Syndicate in liquidation and calling on the respondent to nominate a liquidator to act with a liquidator to be nominated by the applicant, and for an order on the respondent to pay the

costs of the application. There was also a prayer that the order should operate as an interdict, restraining respondent from further dealings with the syndicate's assets.

The effect of the affidavits filed appears fully from the judgment.

W. S. Duxbury, for the applicant: The partnership was dissolved by the death of Vigne, and the Court will appoint a receiver or liquidator, as a matter of course. See *Harding* v. *Glover* (18 Ves. Jun. 281); *Caporn* v. *Marriott* (9 S.C. 12); *Lindley* on Partnership, 6th Ed., pp. 534 and 538; *Blakeney* v. *Dufaur* (15 Beav. 40); *Madgwick* v. *Wimble* (6 Beav. 495); *Clegg* v. *Fishwick* (1 Mac. & G. 294).

N. J. de Wet, K.C., for the respondent: This was a syndicate, not a partnership. They have principles in common, but a syndicate is not ended by the death of a member, see *Voet*, 17, 2, 23, where a public partnership for farming the revenue is of the same character as a syndicate. See also *Nathan's Common Law of S.A.*, Vol. II., § 934. In a syndicate the individuals bind themselves for a specific venture for a limited amount, which is not the case in an ordinary partnership. This syndicate had originally four members and no liquidation took place when two of them fell out. They merely abandoned their shares, see *Angehrn and Piel* v. *Freedman* (1903, T.H. 267, at p. 276), where a distinction is drawn between a partnership and a syndicate, or joint venture. See also *Fell* v. *Goodwill* (5 N.L.R. 265, at p. 269). As Vigne's estate is insolvent this question is merely academic, and applicant cannot ask for it to be settled, see *Colonial Government* v. *Stephan Bros.* (17 S.C. 59); *Wegner* v. *Surgeson* (1910, T.P. 571). *Policansky Bros.* v. *Herman & Canard* (1911, T.P.D. 319) thows that in order to carry costs applicant must derive some actual benefit from coming to Court. The Court will not appoint a receiver except in a partnership dispute before the Court, or where good reason is shown for interference, as a receiver is an officer of the Court; see *Lindley on Partnership*, 7th Ed., p. 578; *Collins* v. *Young* (1 McQ. H.L. Cas. 385). Applicant's remedy is to sue for an account: *re Quin & O'Hea* (1904, T.H. 77, at p. 79); *Moore* v. *Laughton* (18 C.T.R. 451), where a lessee was refused leave to sue *in forma pauperis* where it was shown that nothing would result from the action.

W. S. Duxbury, replied, and referred to *Lindley*, *ibid.*, 6th Ed., p. 334. We were compelled to come to Court to obtain a proper statement from the respondent. Where there is a dissolution of the

partnership by death the Court will appoint an officer to see that the assets of the partnership are saieguarded in the interest of the deceased's estate, see *Blakeney* v. *Dufaur* (*loc. cit.*).

Cur. adv. vult.

Postea (February 21st).

DE VILLIERS, J.P.: The proceedings in this matter arose in the following way: One P. J. Vigne died on the 15th February, 1912, and the applicant was appointed executor dative in the estate. Shortly afterwards he received information that the deceased, together with the respondent, had been interested in a syndicate known as the Windheuvel Syndicate, which carried on mining operations in the district of Marico. Thereupon he approached the respondent and asked him for information with regard to the share of the deceased in the syndicate. The respondent, through one Joyce, replied by letter, dated the 29th May, 1912, in which he set forth the position of the syndicate at some length. He gave the information that the syndicate originally consisted of four members, namely, himself, Morris, Vigne (the deceased), and Prout; that he, Mackenzie, contributed an amount of £795, Morris £205, and Vigne and Prout had each received a one-fifth share for services which they had rendered; that the syndicate had been formed for the purpose of acquiring from the brother of the deceased a lease to work the mine for a period of three years; that certain machinery had been bought, and that there was still a balance of £541 due in respect of it. The respondent admitted incidentally in the letter that the members of the syndicate were partners; but he stated that no written agreement had been entered into, and that the arrangement between the parties was a verbal one. He enclosed an account, from which it would appear that at the date of the death of the deceased the liabilities of the Windheuvel Syndicate stood at roughly £2,583, and that what he called the "actual realisable assets" amounted in all to only £100. In this amount of the liabilities is included an overdraft at the Standard Bank, for which he was personally liable, for a sum of £1,379. He also brings up the balance due on the machinery, namely, £541. The executor, as he was bound to do under the law—an executor being bound to find out and realise whatever assets belonged to the deceased—wrote, replying that he was not satisfied with the statement given, that the assets were remarkably small,

and that he wished to have a balance sheet. Thereupon a letter was written, on the 18th June, in which the respondent said that the balance which was due to him upon the liabilities was £827, that the bank was pressing, and that he wanted payment of the amount from the executor. On the 3rd September the executor wrote a letter in which he said it had come to his knowledge that the respondent had been carrying on mining operations on the property since the dissolution of the partnership; he asked him to cease doing so, and threatened him with legal proceedings in case he did not. It appears that the respondent then went to a different solicitor, Botes, in Zeerust, who wrote a letter, replying to this demand, in which the respondent took up a different position with reference to the relationship of the members of the syndicate. He denied that they were partners, and stated, further, that in case the applicant were to proceed to Court, to ask for an interdict, he would hold the applicant personally liable for any costs incurred. Thereupon application was made by the executor for the appointment of a receiver of the partnership, and for an interdict to restrain the respondent from carrying on mining operations. A replying affidavit was filed by the respondent, in which he set forth all the facts. Upon consideration of the documents as they stand I have no reason to believe that the respondent did not fully disclose the position in reference to the syndicate in this affidavit. In the affidavit he denies that the deceased had any interest in the syndicate at his death, and he bases that denial upon the fact that the deceased, who had received one-fifth share for services rendered, had since that time never contributed anything towards the partnership. He annexed the lease, under which the mining proposition was being worked, from which it appears, according to clauses 4 and 15, that unless the property was diligently worked to the satisfaction of the lessor, the latter would have the right to cancel the lease; therefore, it was the respondent's duty to continue carrying on mining operations in the interest of all parties concerned. He not only produced the lease under which he was working the mining proposition, but also his books and papers, from which the position of the syndicate could be ascertained. When the matter first came before the Court the parties agreed that it should be referred to Mr. Altman to report upon the position of the syndicate, and the question of costs and other incidental questions were directed to stand over. Altman has made a report and from the balance sheet attached to the report, it appears that at the date of

the deceased's death the liabilities of the syndicate stood at £2,555, and those of Mackenzie and Vigne would respectively amount to £400 and £553; so that, at that date, the syndicate was not in a flourishing condition. Mr. *Duxbury*, who appeared on behalf of the applicant, realising this, said that under these circumstances he would be satisfied if the estate were absolved from any liability in regard to the syndicate, provided the executor obtained the costs of the application.

The first question I have to consider is whether the Court will grant the application for the appointment of a receiver. A great many English authorities have been quoted, which I do not propose to review at any length. The latest English decision to which the Court was referred is the case of *Pini* v. *Roncoroni* (1892, 1 Ch. Div. 633). In that case STIRLING, J., said that he was prepared to accept the law as stated in *Lindley* on Partnerships (5th Ed., p. 547). He says (p. 637): "The plaintiff, however, insists that he is entitled as of right to the appointment of a receiver, and contends that the mere fact of the dissolution gives him that right. That is putting it rather higher than it is put in *Lindley* on Partnership, where it is said, and I adopt the statement, that where one partner seeks to have a receiver appointed as against his co-partners, 'if the partnership is already dissolved,' as it has been, 'the Court usually appoints a receiver, almost as a matter of course.' Now, what cause is shown here for the appointment of a receiver?" Then the learned judge proceeds to consider the cause which was there alleged for the appointment of a receiver. In our practice we have in the past sometimes used the word "receiver"; but, as pointed out by INNES, C.J., in *Gillingham* v. *Gillingham* (1904, T.S., p. 613), a more apt description of the person would be "liquidator," or "curator," under our law. I have not had the opportunity of going carefully into the Roman-Dutch law on the subject, but *Pothier* states that in France, at any rate, upon the dissolution of a partnership, where the partners could not agree, it was the invariable practice, and indeed the law prescribed, that there should be arbitration—that the matter should be referred to *boni viri*. Whatever was the law in France, our law is clear, that if sufficient cause be shown a liquidator or curator will be appointed to administer the estate. But I have never understood that this should be done as a matter of course upon the dissolution of a partnership. I have not so far dealt with Mr. *de Wet's* contention, that the syndicate is not a partnership in the strict sense of the term, because even

assuming that it is, I do not consider that in the present case sufficient cause has been made out for the appointment of a receiver. I take our law to be the same as was laid down in England in the case to which the Court has been referred, *Collins* v. *Young* (1 Mac-Queen's H.L. Rep. 385), in which it is said that, "when a partner dies, a right to wind up the partnership concerns is by law vested in the surviving partners. This is the principle on which all such estates are managed." That seems to me to be a principle which flows from the contract of partnership, which is founded upon the good faith and the character of the partners; and the death of one of the partners does not destroy that confidence which the deceased reposed in the surviving partners. The ordinary rule, therefore, I take to be that in the case of death of a partner, the surviving partners, in the absence of any cause to the contrary, have the right to wind up the partnership. In the present case the respondent certainly made a mistake, through his attorney, Botes, when he did not give the desired information to the executor. His first letters were perfectly clear. They were not full; as Mr. *de Wet* admits, they may have stated the legal position wrongly; but I have no reason to think that the respondent was guilty of any want of good faith. But he was wrong in the position which he took up in his reply to the executor's letter threatening proceedings. He knew that under the lease he was bound to work the property, or else the lease could be cancelled, and it was his duty, when he was threatened by the executor with legal proceedings, to have drawn the attention of the executor, who obviously knew nothing about the lease, to the fact that he was only acting in the best interests of the syndicate. As regards the way he has been carrying on operations, there is no reason for the appointment of a liquidator. But, seeing that when he was threatened with legal proceedings he did not disclose the reason why he was carrying on the business, there should be no order as to costs. If the executor demands a winding-up from the date of the death of the deceased he may do so. But in my opinion he is not entitled to do it by way of application; he must bring the ordinary *actio pro socio*. The order, therefore, is that the application is dismissed; no order as to costs.

Attorneys for Applicant: *Webb & Dyason*; Attorneys for Respondent: *Findlay, MacRobert & Niemeyer*.

[Reported by *Adolf Davis*, Esq., Advocate.]