

# In the Supreme Court of British Columbia.

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ELLARD

v.

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Saturday, 18th August, 1888.

I have considered the arguments of counsel, and the report of Alfred Smithers, the Accountant, (of the 14th May, 1888) who was appointed to ascertain what sum one-fourth of the gross returns or profits of James Ellard and Company, between the date of James Wilton Harvey's appointment as Manager, and the 31st December, 1887 would amount to, to enable the order of the Court of the 4th August, 1887 to be carried out in favor of James W. Harvey the Manager. 20

Mr. Smithers seems not to have clearly apprehended the extent of the duty he was by the consent of both parties, called on to discharge, and to have experienced a difficulty in determining the meaning of the words "gross profits" and from this cause gave himself a quantity of very unnecessary trouble.

Had the order of Court of the fourth August, 1887 been shewn to him, he would there have read the words "Gross returns or profits" made since the death of the said testator adding "and of the amount received by the said J. W. Harvey and Esther Harvey." 30

The meaning of the phrase "gross returns or profits," so common in legal documents dealing with partnership or firm accounts is clearly laid down in "Lindley on partnership," 5th Ed. Vol. 1., p p. 8 and 9 who says:

"The actual or gross returns obtained by advances obviously include profits, if profits have been made. But those returns do not include losses, if losses are incurred; for losses are excess of advances over the returns and come out of the advances, not out of the returns. Hence persons who share gross returns necessarily share profits, but they do not, by sharing the returns, share losses; for these fall entirely on those making the advances." 40

Moreover although a division of gross returns is a division of profits, if there are any, it is so only incidentally and because such profits are included in what is divided. It is not a division of profits as such; and under an agreement for a division of gross returns whatever is returned must be divided whether there be profit or not.