

1889 EUGENE O'KEEFE AND WIDMER { APPELLANTS.  
 \*April 8, 9. HAWKE (DEFENDANTS)..... }  
 \*Dec. 14. AND

GEORGIANNE CURRAN AND } RESPONDENTS.  
 JOSEPH H. MEAD (PLAINTIFFS) }

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Partnership—Terms of—Breach of conditions—Expulsion of one partner—  
 Notice—Waiver—Goodwill.*

Partnership articles for a firm of three persons provided that if any partner should violate certain conditions of the terms of partnership the others could compel him to retire by giving three months' notice of their intention so to do, and a partner so retiring should forfeit his claim to a share of the goodwill of the business. One of the partners having broken such conditions of partnership the others verbally notified him that he must leave the firm and to avoid publicity he consented to an immediate dissolution which was advertised as "a dissolution by mutual consent." After the dissolution the retiring partner made an assignment of his goodwill and interest in the business and the assignee brought an action against the remaining partners for the value of the same.

*Held*, reversing the judgment of the court below, Fournier J. dissenting, that the action of the defendants in advertising that the dissolution was "by mutual consent" did not preclude them from showing that it took place in consequence of the misconduct of the retiring partner; that the forfeiture of the goodwill was caused by the improper conduct which led to the expulsion of the partner in fault and not by the mode in which such expulsion was effected; and, therefore, the want of notice required by the articles of intention to "expel" could not be relied on as taking the retirement out of that provision of the articles by which the goodwill was forfeited.

*Held* also, that if it was a dissolution by one partner voluntarily retiring no claim could be made by the retiring partner in respect to goodwill, as the account to be taken under the partnership articles in such cases does not provide therefor.

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\*PRESENT: Strong, Fournier, Taschereau and Gwynne JJ.

Semble, that the goodwill consisted wholly of the trade name of the firm.

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**APPEAL** from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favor of the plaintiffs.

The facts are stated quite fully in the judgment of Mr. Justice Gwynne as well as in the reports of the Ontario Courts. They may be briefly summed up as follows :

The defendant and the plaintiff Mead were partners in the brewing business, and among the articles of partnership were the following :

“Third—That if any of the said partners shall be guilty of any breach or non-observance of any of the stipulations contained in the fourteenth, fifteenth, sixteenth and seventeenth articles hereinafter mentioned, the other or others of the said partners shall be at liberty, if he or they shall think fit, within three calendar months after the same shall have become known to him or them, to dissolve the said partnership by giving to the partner who shall so offend, or leaving in the counting house of the place where the business shall then be carried on, notice in writing declaring the said partnership to be dissolved and determined ; and the said partnership shall from the time of giving or leaving such notice, or from any other time to be therein appointed for the purpose, absolutely cease and determine accordingly, without prejudice nevertheless to the remedies of the respective partners for the breach or non-observance of all or any of the covenants or agreements contained in these presents at any time or times before the determination of the said partnership. And the partner to whom the said notice shall be given shall be considered as

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quitting the business for the benefit of the other partners who shall give the said notice."

"Twenty-nine.—In the event of either of them, the said Widmer Hawke or Joseph Hooper Mead, retiring from the said firm hereby formed under article number two, or being compelled to leave the same firm under article number three, the partner so retiring or being compelled to leave the said firm shall not be entitled to receive, and shall not receive from the other of them, or from any new firm which may be formed to carry on the said business, any sum of money whatever for or in respect of his goodwill in the said business."

The plaintiff, Mead, having violated articles 14 and 17, was verbally notified by his partners that he must quit the firm, and to avoid publicity he consented to an immediate dissolution. Notice was given by advertisement that the firm was dissolved by mutual consent and the business was afterwards carried on by the defendants. At the same time Mead assigned to his mother all his right and title in the real and personal estate, stock-in-trade, plant, rights and credits of the firm, and the assignee brought an action against the defendants in which she claimed, among other things, Mead's share of the goodwill. This claim was dismissed at the hearing before the Chancellor, after which Mead executed another instrument in favor of his mother confirming the previous assignment and expressly conveying all his right and title to the goodwill and interest in the business, and another action was instituted against the defendants in which was claimed an account to be taken of Mead's share in the goodwill and payment of the same to the plaintiff.

The action was tried before Cameron C.J., who held that Mead was expelled from the firm under article 3, and he dismissed the action with costs. The Division-

al Court reversed this judgment and ordered judgment to be entered for the plaintiff for the value of the goodwill and costs. On appeal to the Court of Appeal the judges of that court were equally divided and the judgment for the plaintiff was affirmed. The defendants then appealed to the Supreme Court of Canada.

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Pending the present action the original plaintiff died and the action was revived in the name of the plaintiff Curran, devisee of her estate.

*Christopher Robinson* Q.C. and *Moss* Q.C. for the appellants. The partnership was in a position to be dissolved by the misconduct of Mead, and the three month's notice was only a mode of effecting the dissolution and could be waived. *Hall v. Hall* (1).

The partnership agreement amounts to a renunciation of the right to the goodwill in the events which actually happened. *Pearson v. Pearson* (2). And see *Lindley on Partnership* (3); *Tudor's Leading Cases on Mercantile Law* (4).

Mead was expelled under article three of the partnership agreement, and thereby forfeited his claim to goodwill. See *Atwood v. Maude* (5); *Mellerish v. Keen* (6).

*McCarthy* Q.C. and *Morrell* for the respondents. It cannot be held that the retirement of Mead was effected under article three unless the mode provided by that article was followed. *Smith v. Mules* (7); *Blisset v. Daniel* (8); *Clarke v. Harte* (9); *Wood v. Woad* (10).

The most satisfactory case on the right to goodwill is *Steuart v. Gladstone* (11).

(1) 20 Beav. 139.

(2) 27 Ch. D. 145.

(3) 5 ed. p. 444.

(4) 3 ed. pp. 553-4.

(5) 3 Ch. App. 369.

(6) 28 Beav. 453.

(7) 9 Hare 556.

(8) 10 Hare 493.

(9) 6 H.L. Cas. 633.

(10) L.R. 9 Ex. 190.

(11) 10 Ch. D. 626.

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As to what goodwill is see Pollock on Partnership (1); Lindley on Partnership (2); *Levy v. Walker* (3); *Pawsey v. Armstrong* (4).

As to the three months' notice being waived see *Selwyn v. Garfit* (5); *Mason v. Andes Insurance Co.* (6).

STRONG J.—I concur in the judgment of Mr. Justice Gwynne.

FOURNIER J.—I am of opinion that the appeal should be dismissed.

TASCHEREAU J.—I would allow this appeal and dismiss the action for the reasons given by Cameron C.J. at the trial and in the Divisional Court.

GWYNNE J.—That the plaintiff Mead was guilty of such breach of certain of the stipulations of the partnership articles that his co-partners, the defendants, were justified in determining the partnership under the provisions of the 3rd article cannot, in my opinion, admit of a doubt. His overdrawing the partnership account at the bank for the purpose of applying the monies so drawn to his own use was, in my opinion, a borrowing or taking of money from the bank, not on account of the partnership but for his own unauthorized use within the meaning of the article, and so a clear violation of it. So in like manner the constant cheques from time to time drawn by him on the partnership account at the bank, whether such account was overdrawn or not, and his applying the proceeds partly to his own use, partly to the use of his brother, partly to the use of Gillespie, Mead & Co., in which

(1) Art. 57.

(2) 5 ed. p. 439.

(3) 10 Ch. D. 436.

(4) 18 Ch. D. 698.

(5) 38 Ch. D. 283.

(6) 23 U.C.C.P. 44.

firm his brother was a partner, was also, in my opinion, a taking up of money from the bank as on account of the partnership, without the consent of his co-partners, within the meaning of that article. Then, again, his fraudulent conduct in respect of the \$900, drawn by him from the bank, which was the immediate cause of his expulsion, and his not having made or caused to be made any entry in the books of the partnership in relation to such sum by which his dealings therewith could be traced was, in my opinion, a clear breach of the 14th and 17th articles of the partnership articles.

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I am of opinion, further, that it was clearly established by the evidence that, in point of fact, Mead was removed from the partnership and that it was dissolved and determined solely because of Mead's misconduct and, as Mead well knew, in virtue of the authority deemed to be vested in his co-partners by the third article of the partnership articles, although the form pointed out in that article of giving to Mead notice in writing was not pursued. He was informed verbally, though not in writing, that the partnership was dissolved and determined for such his misconduct.

The substance of the article was complied with to which Mead, after vainly endeavoring to persuade his co-partners to alter their determination submitted; the form only of giving notice in writing to Mead was omitted. There can, I think, be no doubt that the form of the notice of dissolution, which was signed by all the parties for publication, was adopted for the purpose of sparing the feelings of Mead and his relatives. That notice cannot estop the defendants from proving that Mead's misconduct was the sole cause of the dissolution, nor can Mead or his assignees, in my opinion, be heard to invoke that notice in support of their claim to have an account taken in the present

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action of the value of the interest which he once had in the good will of the business, of which interest he was, by the express terms of the partnership, declared to be divested in the event of his voluntarily retiring from the partnership, or of its being dissolved by his co-partners, under the third article, for his misconduct; nor in whatever light the circumstances attending the dissolution may be viewed, is there, in my opinion, anything in the terms of the notice of dissolution which, in view of all the actual circumstances of the case, can be construed as giving to Mead any right to have any allowance made to him as for the value of the interest which he had under the articles of partnership in the good will of the business.

The circumstances of the case are as follows: The defendant O'Keefe had for many years carried on the business of brewer and maltster in the City of Toronto, for some time alone and afterwards in partnership with, and upon premises belonging to, the father of the defendant Hawke, under the name, style and firm of "O'Keefe & Co.," in which name the business had acquired a considerable reputation. In 1881 the defendant Hawke's father, on retiring from the business, was desirous that his son, the defendant Hawke, then a young man who knew nothing of the business, should be taken into the business by O'Keefe. The plaintiff Mead and his friends were at the same time very desirous that the plaintiff Mead, who was also a young man wholly ignorant of the business, should also be taken by O'Keefe into the business. The interest of O'Keefe in his partnership with the defendant Hawke's father had been, in round numbers, \$53,397.00 and that of the defendant Hawke's father \$14,071.00; an agreement was thereupon come to between O'Keefe, the defendant Hawke's father, the defendant Hawke and the plaintiff Mead respectively, that the defendant Hawke

should acquire the share his father had held to the amount of \$14,071.00, and that Mead should bring a like sum into the business ; and inasmuch as the defendant Hawke and the plaintiff Mead knew nothing of the business, and would require three years to acquire a thorough knowledge of it, it was agreed that they should form a partnership for three years, and that the defendant Hawke's father should execute a lease to the new firm of the premises wherein the business of " O'Keefe & Co." had been carried on for such period of three years, and that the defendant Hawke and the plaintiff Mead, in addition to the sums of \$14,071.00 brought by them respectively into the business, should each pay to O'Keefe the sum of \$12,500.00 in consideration of which payment O'Keefe agreed with each of them respectively to teach them the business during the said period of three years, and to sell and transfer absolutely to them jointly the whole interest in the good-will of the business as then already acquired, or as should thereafter be acquired, and to conduct the business as general manager during the three years partnership for the sum of \$2,000.00 per annum over and above his share in the net profits of the business, which was agreed to be one half of the whole and that of the defendant Hawke and the plaintiff Mead one-fourth each. Accordingly a partnership was entered into between O'Keefe, the defendant Hawke and Mead, for the term of three years from the 1st September, 1881, and the partnership articles were executed in the month of April following whereby, among other things, after reciting the payment of the sum of \$25,000.00 in equal shares by the defendant Hawke and the plaintiff Mead to O'Keefe, and his agreement to fully initiate and instruct them in the business of brewing, the said O'Keefe for himself, his heirs, executors and administrators, did grant, trans-

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fer and deliver to the said Hawke and Mead and the survivor of them, all the interest of him, the said O'Keefe, in the good-will of the business and partnership theretofore existing between him and the defendant Hawke's father, and also of the business to be carried on under the partnership then formed between O'Keefe, Hawke & Mead, and for the consideration aforesaid, that is in consideration of the payment of the said sum of \$25,000.00, the said O'Keefe did thereby covenant with the said Hawke and Mead and the survivor of them at the expiration of the new partnership to be formed, if formed as thereafter mentioned, to execute to the said Hawke and Mead, or to the survivor of them, a good and sufficient deed assigning and transferring to them all his right, title and interest in the said goodwill as aforesaid but that :

In the event of the said Widmer Hawke and the said Joseph Hooper Mead, or in the event of either of them, desiring it he, the said Eugene O'Keefe, will, if living at the expiration of the partnership hereby formed, enter into a fresh partnership with the said Hawke and Mead, if they both desire it, or in the event of only one of them desiring it, or being then alive, with the one so desiring, or with the survivor for the term of three years after the expiration of the partnership hereby formed, on the terms and conditions that the capital brought into such new partnership and business shall be not less than \$75,000 if the three partners be then alive and desirous to continue in business together or not less than \$50,000 if two only are alive and desirous to continue in business together, and shall be contributed by the partners therein in equal shares ; and he, the said Eugene O'Keefe, shall only be entitled to receive out of the profits of the said co-partnership during the said further period of three years, an equal share with each of the other partners, instead of the one-half share to be received by him during the aforesaid first period of three years ; and the salary, as chief brewer, agreed to be paid to the said Eugene O'Keefe during the said first period of three years shall cease and determine at the expiration of the said first period, and shall not be payable to him during the said second period of three years if the said partnership extend so long ; and he will accept one-half share in such net profits, if either of the said Hawke or Mead be then dead or unwilling to continue said partnership. In the event of no such new partnership being formed, or at the expiration of such

new partnership if the same shall be formed, he, the said Eugene O'Keefe, will retire from the present partnership, or such future partnership, as the case may be, and shall only call for and be entitled to receive whatever his share in the capital stock of the said firm may then be, and his share of the net profits up to the time of his retiring from the said firm, but shall receive nothing for the good will of the business at that date, and whether he, the said Eugene O'Keefe, shall retire from the partnership hereby formed at the expiration of the same, or shall enter upon such new partnership as hereby agreed, and shall retire therefrom at the expiration thereof as hereinbefore mentioned, he doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree with the said Hawke and Mead and the survivor of them, that he, the said Eugene O'Keefe, shall not, nor will at any time or times, during the period of twenty-five years from and after the time he shall have retired from the partnership hereby formed, or such new partnership as the case may be, either on his own account, or for or on account of any other person or persons whomsoever, corporation or corporations, either directly or indirectly, engage in or carry on within the provinces of Ontario, Quebec, Manitoba and the North-west Territories, or any province or provinces which hereafter may be formed out of any part thereof, the business of maltster or brewer of ale, porter or lager beer, and shall not nor will directly or indirectly, on his own account or on account of his wife for the time being, or on account of one or more or any of his children, invest any money in any such malting or brewing business within the limits above prescribed, nor shall either directly or indirectly participate in the earnings of any such malting or brewing business within the limits above described; or manufacture within any part of the United States of America malt, ale, beer, porter, or lager beer, to be sold afterwards within the limits above prescribed, unless duly authorized in writing so to do by the said Hawke and Mead, or the survivor of them. And the said O'Keefe, for himself, his executors and administrators, doth hereby promise and agree with the said Hawke and Mead and the survivor of them, that he, the said O'Keefe, shall and will, during the partnership hereby formed, and also during such new partnership if the same shall be formed, to the best of his knowledge and ability, teach and instruct the said Hawke and Mead and the survivor of them, the business of malting and brewing ale, beer, porter and lager beer, and shall and will to the best of his knowledge and ability, fully, particularly, and without reserve, initiate and instruct the said Hawke and Mead and the survivor of them in such malting and brewing business, imparting to them and the survivor of them, and instructing them in all the trade secrets in connection with

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the said malting or brewing business, with which the said O'Keefe may now or hereafter be acquainted.

Now this right to the use of the trade name of "O'Keefe & Co.," which is a right more in the nature of a trade mark than a "goodwill" is the only thing which came under the name of "goodwill" of the business thus transferred by O'Keefe to Hawke and Mead. It is apparent also from the above article extracted from the partnership articles, and also from the 23rd, that from the moment the articles of partnership were signed O'Keefe retained no right, title, interest or benefit whatever in the "goodwill" so transferred, other than such benefit as he might incidentally derive during the continuance of his partnership with Hawke and Mead or with one of them under the provisions of the articles in that behalf. He had nothing in the nature of "goodwill" to transfer to any one. The right and title to, and interest in, the use of the name of "O'Keefe & Co." as maltsters and brewers belonged under the articles wholly to Hawke and Mead as joint owners with benefit of survivorship.

In case after the expiration of the first partnership term of three years either Hawke or Mead should die the "goodwill" would be vested in the survivor, and in case they should both be living but one of them should be unwilling to continue carrying on the business and that the other should be willing, no provision being made in the articles for compensation to the one unwilling to continue the business, the one continuing the business, in the absence of a special provision to be made between him and the one ceasing to carry on the business, would retain the right to the use of the trade name, and nothing could be recovered from him by the other party in such a case. In effect the right to the use of the trade name of "O'Keefe & Co." belonged to Hawke and Mead so long as they should jointly carry on

the business, and upon either of them ceasing to carry on the business for any cause would belong to the other continuing to carry on the business without any compensation unless such was provided in the above articles of partnership or should be provided in an agreement to be entered into between them either on dissolution of the partnership or otherwise. Now by the partnership articles it is agreed that neither O'Keefe, Hawke or Mead should either by himself or with any other person or persons whomsoever, either directly or indirectly, engage in the business of brewers or maltsters, or in any business except the business of the said partnership and upon account thereof; provision is also made enabling either of the partners Hawke or Mead to retire from the business before the expiration of the partnership term formed by the articles without the consent of his partners by giving to them three months' notice in writing of his intent; and also for the removal from the partnership of such one of them as should be guilty of a breach or non-observance of certain specified articles by giving to or leaving for the one guilty of such breach or non-observance a notice dissolving the partnership for such cause. Then provision is made between the defendant Hawke and the plaintiff Mead as the sole owners of the "goodwill" for three events and only for three events, namely:—

1. The event of one or other of them voluntarily retiring from the business before the expiration of the three years for which the partnership was formed; 2, the event of one or other of them being compelled to leave the firm because of his being guilty of any breach or non-observance of any of the stipulations contained in the specified articles; and 3, the event of one or either of them dying before the expiration of the said partnership term of three years; and it was specially agreed that in the event of either the defend-

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ant Hawke or the plaintiff Mead retiring from the said firm, or being compelled to leave the said firm for a breach or non-observance of any of the stipulations of the specified articles, the one so retiring or being compelled to leave the said firm shall not be entitled to receive, and shall not receive from the other of them, or from any new firm which may be formed to carry on the business, any sum of money whatsoever for, or in respect of, his "goodwill" in the business; but that in the event of the death of one of them before the expiration of the partnership formed by the articles the survivor should and would pay to the personal representatives of the deceased one the sum of \$12,500; which should, among other things, be taken to be payment in full of the "goodwill" of the business which the partner so dying had bought from the said Eugene O'Keefe, and the same should therefore be considered to have been transferred to, and to have become the property of, the party making such payment.

Then the 18th article made provision for an account being taken every year of all the assets of the firm to participate in which the three partners were interested. It is obvious that the "goodwill" which belonged to Hawke and Mead jointly, and in which O'Keefe had no interest, formed no part of the account by this article prescribed to be taken.

Then the 19th article made provision for the account to be taken after the expiration of the partnership, or in the event of its sooner determination for any cause other than death, for the 21st article made provision for the case of death. That the "goodwill" formed no part of the account by the 19th article prescribed to be taken is apparent from this, that after the payment of all the debts of the partnership the balance arising from every particular in respect of which the account is directed to be taken is made divisible between the

three partners in the following proportions, namely, one-half share to O'Keefe and one-quarter share to Hawke and Mead respectively. Then the 21st article makes provision for the case of death, namely, that an account shall be taken of the stock in trade, monies, credits and things belonging to the said partnership as provided in the 18th article hereinbefore contained, so that the interest of such deceased partner in the capital stock in trade, monies, credits and things, and the net profits of the said firm up to the time of the decease of such deceased partner, may be ascertained, for payment of which by the surviving partners provision is made. Then inasmuch as this account had nothing to do with the "goodwill" of the business provision is made for it in the 26th article, namely, that :

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in the event of either the said Hawke or Mead departing this life before the expiration of the partnership hereby formed, in addition to the amount which the executors or administrators of the partner so dying would be entitled to receive, under article 21 hereinbefore contained, they shall be entitled to receive from the survivor of such of the two last mentioned partners, and such survivor hereby agrees to pay to the executors or administrators of the partner so dying, the sum of \$12,500 as aforesaid.

The articles, therefore, seem to provide for every possible contingency affecting the "goodwill." If Hawke or Mead voluntarily retires from the firm, or is compelled to leave for breach or non-observance of the specified articles, he is not to receive anything for interest in the "goodwill;" if either of them should die before the expiration of the term of the partnership the personal representative of the one so dying is to receive from the survivor a specified sum in full satisfaction of all interest of the deceased one in the goodwill; if both should live until the expiration of the partnership formed by the articles they are left to deal with the good will as they should think fit.

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The non-compliance by Hawke or Mead with the form pointed out in the 2nd article to enable a partner voluntarily to retire from the firm against the will of his co-partners would not, in my opinion, if his co-partners should waive compliance with the form, remove the case of the one retiring from the operation of the clause depriving him of his interest in the goodwill in the event of his retiring from the firm before the expiration of the partnership formed by the articles; nor would the expulsion of either the one or the other for breach or non-observance of the stipulations of the specified articles, to which expulsion the party guilty of such breach has submitted although he has not been served with a notice in writing terminating the partnership for such cause, remove the case from the operation of the clause divesting the expelled party of all his interest in the goodwill; it is to the substance of the acts that the forfeiture of interest in the goodwill is annexed, namely, in the one case to the fact of retirement and in the other to the fact of the expulsion for breach of the specified articles, and not to the form pursued for effecting such retirement or expulsion.

But we have in the notice of dissolution which was signed by Mead the terms of the dissolution, namely,

The partnership is dissolved by mutual consent, and that Messrs. O'Keefe and Hawke will continue the business, and are authorized to collect all debts due to the firm, and meet all the engagements thereof.

This agreement, as I have already said, does not, in my opinion, operate as having any effect to prevent the defendants showing the true state of the case to be that in point of fact Mead was expelled from the firm for breach of the specified articles, and that this form of notice was adopted to spare the feelings of Mead and his friends: but, however this may be, it is plain that under such terms of dissolution as above specified, Hawke must be entitled to continue using

the trade name of "O'Keefe & Co.," in which alone the "good will" consists. Of this right Hawke cannot be deprived, nor can he be compelled to pay anything to Mead for the enjoyment of such right in the absence of a special contract to that effect. As already shown, the only account which is provided by the articles of partnership to be taken in the events which have happened is that prescribed by the 19th article, which excludes any estimate of any interest of Mead in the "good will." The appeal must, therefore, in my opinion, be allowed with costs, and the action in the court below dismissed with costs.

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*Appeal allowed with costs and action dismissed.*

Solicitors for appellants: *Gordon & Sampson.*

Solicitors for respondents: *Crombie, Morrell & Gwynne.*