C. L. HUFFMAN (PLAINTIFF).....APPELLANT;

AND

G. H. ROSS (DEFENDANT).....RESPONDENT.

1925

*Nov. 20.
*Dec. 10.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Partnership—Firm of stockbrokers—Retirement of one member of firm—Notice—Continuance of business with firm—Action against former partner—Evidence—Onus—Partnership Act, (Ont.) 10-11 Geo. V, c. 41, s. 37.

R., who was a member of the firm of B. & Co., stockbrokers, retired from the firm in May, 1920. The business was continued by B. alone, under the same firm name. The plaintiff became a customer of the firm in March, 1920, and continued to deal with the firm until it became bankrupt in 1924. The plaintiff filed a claim under the Bankruptcy Act against the insolvent estate of B. & Co.; but, so far as appeared, received no dividend upon his claim. In this action he sought to recover from R. the amount of his claim against the firm, alleging that at the time his claim arose R. was "a known partner of B. & Co. without notice of his retirement as a partner of the firm."

Held, that in the absence of notice to the plaintiff of his retirement, R. would be liable; that the onus did not rest on the plaintiff of establishing that he was unaware of R's retirement from the firm of B. & Co., but that it rested upon R. to prove either direct notice thereof or, at least, facts and circumstances from which knowledge of such retirement might fairly be inferred.

Judgment of the Appellate Division (57 Ont. L.R. 329) reversed and new trial ordered.

APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment of the County Court and dismissing the appellant's action.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

H. J. Scott K.C. for the appellant.

W. Nesbitt K.C. and *J. A. McEvoy* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—From the 31st of May, 1919, to the 31st of May, 1920, the defendant was a member of the brokerage firm of J. G. Beaty & Co. During that period the plaintiff became a customer of the firm. After the defendant had retired from the firm in 1920, a brokerage business

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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was carried on by J. G. Beaty alone under the name of J. G. Beaty & Co. until he became insolvent in 1924. As a result of transactions with J. G. Beaty & Co. entered upon subsequent to the defendant's retirement, the plaintiff became a creditor of J. G. Beaty for $2,818.90, and preferred a claim for that amount with Beaty's assignee in bankruptcy. In this action he sues the defendant for this sum

as a known partner of J. G. Beaty & Co., without notice of his retirement as a partner of the said firm.

In the County Court the action was dismissed on the ground that by making his claim against the insolvent estate of J. G. Beaty & Co. the plaintiff had elected to forego any rights he might have against the defendant. On appeal the judgment dismissing the action was upheld (1), but on the ground that, assuming the circumstances to be such that the plaintiff, if not apprised of the partnership dissolution, would be entitled to recover, he had

not succeeded in satisfying the learned trial judge or (the Appellate Divisional Court) that he did not in any way know of Ross's retirement before 1922, when the transactions in question were had.

For the reasons stated by Mr. Justice Riddell the Divisional Court (in our opinion rightly) rejected the ground on which the judgment of the County Court had been based; but, with deference, we are of the opinion that the onus did not rest on the plaintiff of establishing that he was unaware of the defendant's retirement from the firm of J. G. Beaty & Co., and that the judgment of the Appellate Division, therefore, cannot be supported on the ground on which it has been put. In the absence of notice to the plaintiff of his retirement, the defendant would be liable. It rested upon him to prove either direct notice thereof or, at least, facts and circumstances from which knowledge of such retirement might fairly be inferred. A finding that the plaintiff had such knowledge was essential to the defence.

We do not discern in the circumstances of this case anything which takes it out of the general rule embodied in s. 37 of the Partnership Act, 10-11 Geo. V, (Ont.), c. 41, and thus stated in Lindley on Partnership, 9th Ed., p. 291:

When an apparent partner retires, or when a partnership between several known partners is dissolved * * * those who dealt with the firm

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before the change took place are entitled to assume that no change has occurred until they have notice to the contrary.

On a mere perusal of the evidence in the record (which we advisedly refrain from discussing), we are not prepared to find that notice to the plaintiff of the defendant's retirement in 1920 has been established. But there is some evidence from which notice might be inferred: (*Leeson* v. *Holt* (1); *Barfoot* v. *Goodall* (2); *Hart* v. *Alexander* (3)), and we have not had the advantage of observing the plaintiff's demeanour when under examination in regard to the various matters relied upon as warranting the inference of knowledge which the defendant urges should be drawn. Upon the vital question whether knowledge by the plaintiff of the defendant's retirement at the time the transactions resulting in the present claim took place was established, there is no finding by the tribunal peculiarly competent, under circumstances such as this case presents, to make it—the trial court.

As already stated, when the plaintiff shewed that the defendant had been a member of the firm with which he dealt, the burden rested on the defendant to procure such a finding. He did not obtain it. He can have another opportunity to do so only as a matter of indulgence—and upon proper terms. On the other hand, there is no finding against him on this issue.

Under all the circumstances, we are of the opinion that, while the judgment dismissing the action must be set aside, a new trial should be directed upon payment by the defendant to the plaintiff of his costs of the appeals to the Appellate Division and to this court, and that the costs of the abortive trial should abide the event of the new trial. *Jones* v. *Hough* (4); *Dominion Trust Co.* v. *New York Life Ins. Co.* (5); *Cooper* v. *General Accident Fire and Life Ass. Corporation* (6).

Appeal allowed with costs.

Solicitors for the appellant: *Millar, Ferguson & Hunter.*
Solicitors for the respondent: *Young & McEvoy.*

(1) [1816] 1 Starkie, 186.
(2) [1811] 3 Camp. 147.
(3) [1837] 7 C. & P., 746.
(4) [1879] 5 Ex. D. 115, at p. 125.
(5) [1919] A.C. 254, at p. 257.
(6) [1922] 2 Ir. R. 214, at pp. 216, 219.