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Partnership - Dissolution on Death - Right of Representatives of the Deceased Partner to Share in Good Will

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PARTNERSHIP—DISSOLUTION ON DEATH—RIGHT OF REPRESENTATIVES OF THE DECEASED PARTNER TO SHARE IN GOOD WILL—Plaintiff sought a judgment against the administrator of his deceased partner to compel the conveyance of the deceased's one-half interest in the partnership assets. Under the terms of the partnership agreement the surviving partner had the right to buy out the interest of the deceased partner at its "then book value." The administrator contended that good will was a valuable partnership asset, even though not

carried on the books, and should be taken into account in determining the price of the deceased's interest. On appeal from a judgment for plaintiff, *held*, affirmed. By setting the price of the deceased's interest at book value the partners had expressly excluded good will from the partnership assets. *Succession of Jurisich*, 224 La. 325, 69 S. (2d) 361 (1953).

Only in relatively recent years have intangible benefits, classified under the title of good will, been recognized as a valuable property of the going business concern.¹ In accordance with this development, the courts generally concede that in the dissolution of a partnership by reason of death of one of the members the surviving partner is held accountable to the representatives of the deceased for the good will, the same as for any other partnership asset.² Whether the business is sold to a third party or retained by the surviving member, the result is the same.³ Nor does it seem that good will has to be on the books⁴ or even mentioned in the agreement.⁵ Unless expressly excluded, it will be included as a partnership asset. This principle was applied by this same court in a 1949 decision,⁶ and the defendant urged that they follow it again. However, the partners may contract to exclude good will from the firm assets if they wish.⁷ This forms an exception to the general rule holding the surviving member accountable, and is the distinguishing feature of the principal case. In providing that the deceased's interest should be valued according to "book value," did the parties intend to exclude good will and thereby come within the exception? With more general terms such as partnership "property," "effects," or "assets" the court might easily have found that good will was

¹ Early text writers on partnership did not feel that good will was even important enough to deserve mention, or, if good will was mentioned these writers flatly denied its value as a partnership asset. WATSON, PARTNERSHIP (1794); 3 KENT, COMMENTARIES, 12th ed., 74 (1873).

² 44 A.L.R. 517 (1926). This annotation offers extensive citations from thirteen states, England, and Canada in support of this rule. For more recent decisions on this general problem see 1 A.L.R. Supp. Dec. 436 (1946); 2 A.L.R. Supp. Dec. 109 (1952); A.L.R. Supp. Dec. (1954 Supp.) 59.

³ This was not always true. In early cases the surviving partner could retain the use of the good will without accounting to the representatives of the deceased. *Hammond v. Douglas*, 5 Ves. Jr. 539, 31 Eng. Rep. 726 (1800); *Lewis v. Langdon*, 7 Sim. 421, 58 Eng. Rep. 899 (1835).

⁴ One author, who is both a lawyer and an accountant, suggests that, unless otherwise provided for in the articles, good will must be on the books and valued accordingly in order to be included as an asset on dissolution. MOORE, LAW AND ACCOUNTING 142 (1952). But were this true, then good will would always be valued at book value, which is not borne out by the cases. See *In re Brown*, 242 N.Y. 1, 150 N.E. 581 (1926); *Rutan v. Coolidge*, 241 Mass. 584, 136 N.E. 257 (1922); *Tennant v. Dunlop*, 97 Va. 234, 33 S.E. 620 (1899).

⁵ *Wilmer v. Thomas*, 74 Md. 485, 22 A. 403 (1891); *Lothrop Publishing Co. v. Lothrop, Lee & Shepard Co.*, 191 Mass. 353, 77 N.E. 841 (1906).

⁶ *Succession of Conway*, 215 La. 819, 41 S. (2d) 729 (1949).

⁷ 44 A.L.R. 517 (1926). The discussion on this point in the annotation is rather brief, yet it offers several leading cases where agreements to this effect, both express and implied, have been enforced. For later decisions in this area, see A.L.R. supplements cited in note 2 *supra*.

included,⁸ but not so with a concept so clearly defined as book value. By definition, book value encompasses only those assets which are on the books of the partnership.⁹ Under standard accounting practice good will would be listed on the books only when it represents actual cost incurred,¹⁰ and therefore only to that extent would it be included in book value. Furthermore, both partners had complete access to the partnership books and knew, or should have known, that good will was not carried thereon. Thus the court was on solid ground in finding that the parties did not intend to include good will as a partnership asset in setting their price on book value. If this holding did not fulfill the real intention of the parties, then the words were poorly chosen and the partners have no one to blame but their own counsel. The significance of this decision lies in pointing up once again that words for the lawyer are tools of art and must be used to express only what his client actually intends.

Richard M. Adams

⁸ Succession of Conway, note 6 *supra*.

⁹ Lane v. Barnard, 185 App. Div. 754, 173 N.Y.S. 714 (1919); Fleming v. Fleming, 211 Iowa 1251, 230 N.W. 359 (1930); Hagan v. Dundore, 187 Md. 430, 50 A. (2d) 570 (1946).

¹⁰ PATON, *ESSENTIALS OF ACCOUNTING* 585 (1949); LEAKE, *COMMERCIAL GOODWILL* 44 (1948).