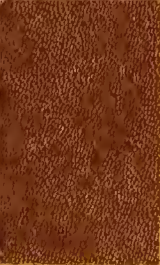

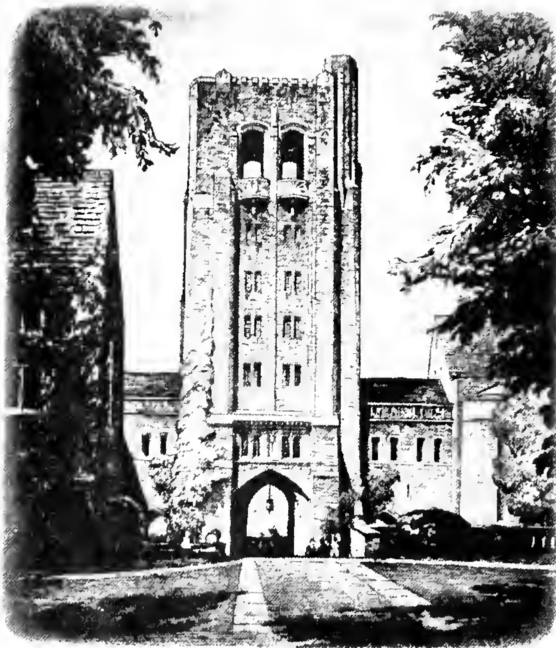

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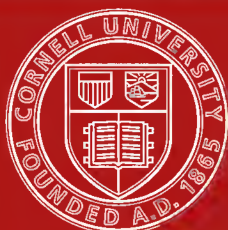

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THE LAW

OF

PARTNERSHIP.

BY

CLEMENT BATES,

OF THE CINCINNATI BAR,

AUTHOR OF "OHIO DIGEST," "PLEADINGS, PARTIES AND FORMS UNDER THE CODE," AND "LIMITED PARTNERSHIP."

VOL. I.

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PREFACE.

This book is the outcome of labors undertaken (at first without any idea of publication), and pursued for years in hours which should have been devoted to leisure and rest from practice. Its origin was in a desire to resurrect a quantity of law believed to exist, but not generally accessible, either because inclosed in cases not classified with partnership law, or disguised in the generalities of a harmless looking syllabus or index. To find this, involved examining each volume of reports, one by one, and making abstracts of the points, facts and dicta of every case. This was done for a long time as a pleasant study without definite design of exhausting the subject, but as the collection expanded from hundreds into thousands, and the germinative principles were seen to grow into a vast and intricate forest, the increasing fascinations of the pursuit converted the recreation into a task of great severity; and when the collection of raw material, nearly three times the size of this book, appeared to be too useful a weapon to be confined to the author's miscellaneous practice, the desire to complete, condense and organize it for the general use of the profession followed. Accordingly, no one of the nearly eleven thousand partnership cases in the common law, whether English, Irish or American, including Canadian and New Brunswick, has been consciously overlooked or omitted.

The construction of the book (also a long and not yet satisfactory effort) is based on an ideal, explained in the preface to the author's little work on Limited Partnership, placing the more fundamental, constant or ultimate principles in a comparatively prominent type, and offering illustrative, subordinate, qualificative or exceptional matter in a less conspicuous form in proportion to its value. This treatment, differing from codification in explaining principles instead of formulating rules, and to be carefully distinguished from the method of several excellent books made in a codified form, partakes of the same impossibility of perfection, and in so far as

it tends to keep a high ideal before the reader's eye may expose the author to criticism in proportion as his attempt falls short, as it must, of the mark. It also discloses the vast disproportion which the labor and thoughts of other lawyers in a law-book bear to the author's own small original contribution. But its compensations are in the service afforded by the mere attempt as the fore-runner of something better, and in facilitating a more rapid study of the law, a clearer separation or recognition of what is fundamental, and a readier search for applicable authorities which forms so large a part of modern practice, and to give which in larger numbers a condensed rather than elaborate style has been adopted in this book. The careful study of the cases has had the result also of developing a not inconsiderable want of harmony in our American law, the exhibition of which may assist in converging our jurisprudence into an increasing uniformity.

It would be invidious to mention the great writers whose works mark the history of the law of partnership, further than to express a keen appreciation of the great care and fidelity with which the English decisions have been studied by them. The American law, however, not only has several new topics, but in many respects has developed along lines diverging from the English, and, in a few respects, quite opposite; and the chief value, or at least greatest pains taken in this book, has been to emulate their industry in the far vaster, though less orderly, field of our own country.

I desire, in closing, to express most grateful acknowledgments to my friend, the learned and accomplished Librarian of the Cincinnati Law Library, Mr. M. W. Myers, for his constant and often much-needed encouragement in this laborious method of working out a legal topic, and to hope that his faith in its usefulness may be partially realized.

CLEMENT BATES.

CINCINNATI, JANUARY, 1888.

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THE LAW OF PARTNERSHIP.

PART I.

NATURE AND FORMATION.

CHAPTER I.

PARTNERS AND PARTNERSHIP DEFINED.

§ 1. **Definition.**— A partnership is the contract relation subsisting between persons who have combined their property, labor or skill in an enterprise or business as principals for the purpose of joint profit.

A great number of definitions have been collected by Sir N. Lindley in his admirable work.[1] He refuses to recommend any, but says that most of them are open to the criticism that defining a partnership as an agreement to combine property, work or labor is broad enough to include a corporation. This, however, is not quite correct, for an agreement never constitutes a corporation, but rather the action of the state operating upon the agreement and erecting it into a distinct body. All the definitions, including my own, would be open to criticism unless the word "persons" be interpreted to include conventional and artificial persons as well as natural, for a firm may be a member of another firm and a corporation also; for while a corporation does not generally have capacity, as we shall see, to become a partner, the reason is not in the nature of partnership, but in want of power in the corporation, and power being granted in the charter, it

[1] Partnership, vol. 1, p. 1.

may enter a partnership with an individual or another corporation. Jessel, M. R., in Pooley *v.* Driver,[1] has also criticised Chancellor Kent's definition as not including the case of an annuitant or an executor, who contributes neither property, labor or skill, and yet draws a share of the profits; but these persons are not partners, nor are they now liable as such unless they interfere in the management, in which case they do contribute skill or labor. He also criticises the definition of the New York code as not specifying that "carrying on business" means an honest business, since it might include a partnership between highwaymen, and he prefers Pothier's definition because containing the word honest. This, again, is erroneous. A partnership is no less one because illegal and therefore not enforcible by the courts.

The definition of the Indian contract act, adopted also by Pollock (Digest of the Law of Partnership) as "the relation which subsists between persons who have agreed to combine," etc., is defective as including an inchoate partnership as well as an actual one.

Should it be determined in the future that a partnership is an entity distinct from the persons composing it, my definition should not describe it as a relation but as a union or body formed by persons who, etc.

The Institutes and Pandects have nowhere given a definition of partnership, but the modern law upon the subject is undoubtedly based upon the Roman *societas*, which was either *societas universorum bonorum*, or communion of all property; *universorum quæ ex quæstu veniunt*, or trade partnership, the usual kind, and which was presumed to be intended in the absence of contrary proof; *negotiationis alicujus*, for a particular transaction; *vectigalis*, for the collection of taxes, or *rei unius*, the joint ownership of a single thing.

§ 2. **Is a contract relation.**— Partnership is a contract relation and not a *status;* for example, a decree finding its

[1] 5 Ch. D. 458.

existence or non-existence binds the parties to the case only, and not third persons.[1]

An agreement of partnership, like any other contract, must be founded on a consideration either of mutual promises or contributions. A mere promise by one person that another shall share in the profits of his enterprises, where the other furnishes no capital or labor, or otherwise promotes the common enterprise, is void.[2]

So where Reynolds & Lee purported to be a firm, but Lee was to pay all the losses and have all the profits, it was said that they were not partners *inter se*, but only such to those who trusted them as a firm.[3]

A sum is frequently paid for an admittance into a firm or for a share in a business by an incoming partner, called the premium. The questions arising upon this subject are involved in the right to a return of the premium in cases of premature dissolution, and belong to the subject of accounting. But any contribution, or promise to contribute, or act which may create a liability to third persons, is sufficient;[4] or mutual promises;[5] or subscriptions to capital.[6] But the inequality of the contributions goes only to the quantum of the consideration, and the courts cannot measure it.[7]

§ 3. **Not created by implication of law.**—Hence, also, a partnership is never created between parties by implication or operation of law, apart from an expressed or implied intention and agreement to constitute the relation. This doctrine must not be confused with holding persons liable as partners by estoppel, or, in a few states, by sharing profits, for these are not true partnerships, but mere cases of liability to certain persons.

Thus, two persons owning bonds and uniting in litigation to establish their validity, are not made partners by operation of law so

1 McDonald *v.* Matney, 82 Mo. 358, 364.

2 Mitchell *v.* O'Neale, 4 Nev. 504; Heyboe *v.* Burge, 9 C. B. 431.

3 Alabama Fertilizer Co. *v.* Reynolds & Lee, 79 Ala. 497.

4 The Herkimer, Stewart's Adm. 23.

5 Coleman *v.* Eyre, 45 N. Y. 38; Breslin *v.* Brown, 24 Ohio St. 565; Belcher *v.* Conner, 1 S. Ca. 88.

6 Kimmins *v.* Wilson, 8 W. Va. 584.

7 Dale *v.* Hamilton, 5 Hare, 393.

that a purchase of other bonds by one will inure to the benefit of both.[1]

So, if a man, having a wife living, marries a woman and they accumulate property, and he dies and the former wife claims the inheritance, the second wife cannot claim the property as surviving partner, for no partnership was ever contemplated between them.[2]

So where sons worked for a father without salary or wages, under a sort of patriarchal system, and their business grew to large proportions, but there was no agreement between them, nor anything but a mere expectancy of succession, the law cannot create a partnership by implication without the assent of all.[3]

So false declarations and acts to get another credit in order to share in the property so obtained does not create a partnership. As where a father, in order that his son might get goods on credit for their joint benefit, held out to the world that the son would receive his property, though he would be liable, it is not as partner.[4]

§ 4. Defective corporations.— The most important application of this principle occurs where persons have attempted to form a corporation, but by failure to comply with the statutes or otherwise have never perfected a corporate organization and thus entitled themselves to the immunities of one, but have nevertheless proceeded to transact business and incur debts, or have continued to act as a corporation after their charter has expired. The weight of authority sustains the doctrine that the corporators are not liable as partners when their acts were *bona fide* on the supposition that they were incorporated and were assuming only the limited liability of stockholders and did not intend to be liable as partners. The authority against this is, however, very formidable, and is based on general public policy rather than on any principle of partnership law.

The authorities holding that such persons are not liable as partners are: Fay *v.* Noble, 7 Cush. 188, where the organization was

[1] Wilson *v.* Cobb, 28 N. J. Eq. 177.

[2] Estate of Winters, 1 Myrick (Cal.) Prob. Rep. 131.

[3] Phillips *v.* Phillips, 49 Ill. 437.

[4] Farr *v.* Wheeler, 20 N. H. 569.

defective. Trowbridge *v.* Scudder, 11 Cush. 83, where the contract sued on was *ultra vires*. First Nat'l Bank *v.* Almy, 117 Mass. 476, where business was transacted before the whole stock was paid in, contrary to the statute; and s. P. Bank *v.* Hall, 35 Ohio St. 158. Ward *v.* Brigham, 127 Mass. 24, where officers were elected who transacted business before the organization was completed. Central City Sav. Bk. *v.* Walter, 66 N. Y. 424 (aff. 5 Hun, 34), where, after expiration of the charter, but in ignorance thereof, the business was continued. *Contra*, Nat'l Bk. of Watertown *v.* Landon, 45 N. Y. 410, where they continued business, knowing the charter had expired. So in New York Iron Mine *v.* Negaunee, 39 Mich. 644, where no meeting of stockholders or directors had been had for several years, and two persons who made the notes sued on owned all the stock; and Merchants' and Manuf. Bank *v.* Stone, 38 Mich. 779, where a bank which had discounted paper of the supposed corporation alleged that it was improperly organized, had conducted an unauthorized business, and that the corporate name was indeterminate. In State *v.* How, 1 Mich. 512, members of a bank organized under an unconstitutional law were held not liable for its bills because they are *nuda pacta* and unlawful. This, then, is not an authority on our doctrine. Rowland *v.* Meader Furniture Co. 38 Ohio St. 269, held that judgment of ouster does not make members liable as partners on the prior contracts; and in Bank *v.* Hall, 35 Ohio St. 158, 166, it was said that non-compliance with the statute in organizing, or exceeding the charter powers, does create the liability as partners; and Medill *v.* Collier, 16 Ohio St. 599, stockholders who did not participate in acts not merely *ultra vires* but positively forbidden by statute are not liable as partners. McClinch *v.* Sturgis, 72 Me. 288, on the ground that the omitted acts are directory, and if the state raises no objection no one else can. Stout *v.* Zulick (N. J.), 7 Atl. Rep. 362; and so, also, Tarbell *v.* Page, 24 Ill. 46, that the state alone can complain of a failure to file the certificate of incorporation with the secretary of state, and an employee cannot sue the stockholders for his salary. In Humphreys *v.* Mooney, 5 Colorado, 282, the defect was failure to file the certificate with the secretary of state; and so in Harrod *v.* Hamer, 32 Wis. 162, on the ground that this was not a condition precedent. Gartside Coal Co. *v.* Maxwell, 22 Fed. Rep. 197, where the defect is not stated, but it is held that if the acts are *bona fide* and without the knowledge of the defect in organization, the parties having

done business for several years supposing they were incorporated, are not liable as partners to one who dealt with them as a corporation. In Planters' and Miners' Bank *v.* Padgett, 69 Ga. 159, the corporation was created by a court having no authority to do so, but a creditor who had contracted with it as such, both parties believing the corporation to exist, cannot sue the members as partners. Stafford Bank *v.* Palmer, 47 Conn. 443, that stockholders who did not participate in a defective organization cannot be held as partners; and see *dictum* in Blanchard *v.* Kaull, 44 Cal. 440. A judgment against the corporation estops the creditor from claiming the stockholders to be partners. Pochelu *v.* Kemper, 14 La. An. 308; Cresswell *v.* Oberly, 17 Ill. App. 281.

§ 5. **Contrary cases.**— On the other hand, the following authorities distinctly hold that the associates are liable as partners: Jessup *v.* Carnegi, 12 J. & Sp. 260; 80 N. Y. 441, that neither the intention of the parties nor the belief of others that they are dealing with a corporation makes any difference; they are liable as partners if they undertake to act as a corporation without legal organization. *In re* Mendenhall, 9 Bankr. Reg. 497, and National Bank of Watertown *v.* Landon, 45 N. Y. 410 (66 Barb. 189), where stockholders continued business after the expiration of the charter, and each was held liable *in solido* for the acts of their managing agent. Bigelow *v.* Gregory, 73 Ill. 197, on the ground that publication and filing the certificate was a condition precedent under the Wisconsin statute. Coleman *v.* Coleman, 78 Ind. 344, a similar omission was held to make not only directors, but also subscribers, liable as partners. Kaiser *v.* Lawrence Sav. Bank, 56 Iowa, 104, where the defect was the same. Abbott *v.* Omaha Smelting Co. 4 Neb. 416, the same. Also the following cases: Garnett *v.* Richardson, 35 Ark. 144, where the certificate was not filed, and the court say the parties are liable as partners; yet from the statement of facts it would seem that the goods sued were bought in the partnership name. Martin *v.* Fewell, 79 Mo. 401, announces the doctrine broadly, and says it results from Richardson *v.* Pitts, 71 Mo. 128, but the defendants seem to have been aware that the business was being done before the organization was completed, the court saying that, if not liable as partners, they might run on indefinitely with the privileges of a corporation. But in Hurt *v.* Salisbury, 55 Mo. 310, the doctrine was squarely announced. In Field *v.* Cooks, 16 La. An. 153, the certificate of the district judge was omitted;

held liable as partners. So in Chaffe *v.* Ludeling, 27 La. An. 607, there was no pretense of any charter, the parties having bought out a railroad corporation and then contracted in its corporate name. In Vredenburg *v.* Behan, 33 La. An. 627, a rifle club was organized under a law for incorporating literary and scientific associations, and the officers were held liable in tort for injury done by a bear kept on the premises. See, also, the dissenting opinion of Morton, J., in Merchants' & Manufacturers' Bank *v.* Stone, 38 Mich. 779, as to corporation for unauthorized purpose. In Harris *v.* McGregor, 29 Cal. 124, the defendants were sued personally for injuries from their diversion of a water-course, their certificate of corporation being defective; but this is inconsistent with the *dictum* in the later case cited in § 5. In Shorb *v.* Beaudry, 56 Cal. 446; Fuller *v.* Rowe, 57 N. Y. 193 (rev. s. c. 59 Barb. 344); Cambridge Water Works *v.* Somerville Dyeing, etc. Co. 14 Gray, 193; Holbrook *v.* St. Paul F. & M. Ins. Co. 25 Minn. 229; and London Assur. Co. *v.* Drennen, 116 U. S. 461, the point was raised but not decided. In Flagg *v.* Stowe, 85 Ill. 164, persons agreeing to become incorporated and to furnish respectively a factory, machinery and money, not having, by failure to comply with the statute, become incorporated, are so far partners *inter se*, that an accounting and sharing of losses can be had, including a reasonable rent for the property. And see § 6.

§ 6. —— intentional violation of charter powers.— If the parties, even though organized as a corporation, knowingly conduct business wholly outside of the charter powers, or make use of the statutory organization to act in fraud of the laws of the state for the sake of profit, their relation is that of partners.

Thus, where a statute permits the incorporation of savings societies upon a mutual plan only, the depositors being members and sharing the earnings, and the corporators conduct the business as a trading and not mutual concern, doing a general banking business for their own profit, here, there being not even an attempted or imperfect execution of their powers, but a total diversion of it, they are liable as partners to depositors.[1]

Hill *v.* Beach, 12 N. J. Eq. 31, holds, where persons go to another state to be incorporated for the purpose of doing business in

[1] Ridenour *v.* Mayo, 40 Oh. St. 9.

the state where they live, presumably to escape liability, they commit a fraud on the laws of the latter state and will be treated as partners. *Contra*, that such act is not a fraud, Bank *v.* Hall, 35 Oh. St. 158.

The parties under an intended but fatally defective incorporation proceedings have the rights of partners in the property of the concern;[1] but not if not so intended.[2]

§ 7. **Participants in the illegal acts.**— But even where innocent stockholders of an imperfect corporate organization are not held personally liable, it may be that officers or participating stockholders who contract with knowledge of the want of the omission of statutory steps, or engage in an unauthorized business, would be liable.[3]

But there is no liability to a participant, for example, to the solicitor who helped to organize knowing there were more than the statutory number of members;[4] nor on contracts before the defendant became a member. Thus, where one Sweet, acting as president of a supposed corporation, employed Fuller as superintendent, at a salary, and afterwards Rowe, supposing the company was a legal corporation, joined it and was elected president, and notified Fuller to report to him, he is not liable with Sweet and others for the salary.[5]

§ 8. —— **firm becoming incorporated.**— Where a firm actually engaged in business becomes incorporated, but continues to do all its business in the partnership name, they are liable as partners on contracts so made.[6] So where an

[1] Conner *v.* Abbott, 35 Ark. 365; Whipple *v.* Parker, 29 Mich. 369; and see Holbrook *v.* St. Paul F. & M. Ins. Co. 25 Minn. 229, and Shorb *v.* Beaudry, 56 Cal. 446; Flagg *v.* Stowe, 85 Ill. 164.

[2] London Assur. Co. *v.* Drennen, 116 U. S. 461.

[3] Medill *v.* Collier, 16 Oh. St. 599; Bank *v.* Hall, 35 Oh. St. 158, 166; Stafford Bank *v.* Palmer, 47 Conn. 443, 448–9; National Bank of Watertown *v.* Landon, 45 N. Y. 410. See, also, Blanchard *v.* Kaull, 44 Cal. 440, and language of court in Gartside Coal Co. *v.* Maxwell, 22 Fed. Rep. 197. That the liability is in tort for acting as agents without authority, and cannot be in contract, since they did not promise as partners, Trowbridge *v.* Scudder, 11 Cush. 83. See, also, Sullivan *v.* Sullivan, 20 S. Ca. 79.

[4] *Re* South Wales Atl. Steamsh. Co. 2 Ch. D. 763.

[5] Fuller *v.* Rowe, 57 N. Y. 23 (rev. 59 Barb. 344).

[6] Bank *v.* Smith, 26 W. Va. 541, 553, the court saying the incorporation was a transparent fraud. See, also,

existing partnership attempts to become incorporated, but the proceedings are irregular, they are still a partnership. So on contracts made before they attempt to become a corporation.[1] So where stockholders represent themselves as personally liable for debts;[2] and no doubt notice of dissolution of the partnership is as necessary in the case of conversion of a firm into a corporation as in any other case, for the change of name might be notice only on written contracts; and it would be wise to have the corporate name distinctly different from the partnership name, lest the partners be held to a personal liability *in solido*, as partners by a holding out.

A corporation formed out of a firm without difference of membership is not liable for the debts of the partnership.[3]

KINDS OF PARTNERS AND PARTNERSHIPS.

Leaving out of view the classes of partners in limited partnerships, which are the general and special partners, members of ordinary partnerships may be divided generally into (1) Active and ostensible; (2) Secret or dormant; and (3) Nominal.

§ 9. Active and ostensible partners.— An ostensible partner is one who is known and declared to be such whether his name be in the firm style or not; for the firm name may be a purely fanciful one. He has also occasionally been called a public partner.

An active partner is generally the same as an ostensible one, but not necessarily so; for a member whose connection with the firm is intentionally concealed may be nevertheless an active partner, though not an ostensible one.

§ 10. Secret or dormant partner.— These terms are generally used as synonymous. A dormant partner must be a secret one or he ceases to be dormant, but many dormant

Garnett *v.* Richardson, 35 Ark. 144; Witmer *v.* Schlatter, 2 Rawle, 359.

[1] Whipple *v.* Parker, 29 Mich. 369; Haslett *v.* Wotherspoon, 2 Rich. (S. Ca.) Eq. 395.

[2] Reid *v.* Eatanton Mfg. Co. 40 Ga. 98.

[3] McLellan *v.* Detroit File Works, 56 Mich. 579.

partners are not only secret, but by the partnership articles are excluded from participating in the management of the business; while others do not participate, and yet are not by contract excluded from exercising the usual powers of a partner and from terminating their condition of dormancy at will; and yet other secret partners may be active participants in the conduct of the concern. Partnership nomenclature does not furnish any terms to distinguish between these classes of dormant or secret partners. Even the word silent, which is apt to be confined to those who are both secret and inactive, has no such generally recognized limitation of meaning.

§ **11. Nominal partner.** — A nominal partner literally would be one whose name is openly used as one of the partners whether he be an active partner or not; but the term is always understood to mean a person who is not a partner at all, but allows the use of his name in the firm, generally to give it additional credit or to attract custom, thus incurring all the liabilities while deriving none of the benefits of the association. He is also called a partner by holding out or by estoppel, for he is a partner only to those who trust the firm wholly or in part on the faith of his appearance as a member of it. This subject will be treated more fully under Holding Out.

§ **12. Kinds of partnerships.**—Partnerships may be divided into the ordinary partnership, the limited partnership and the joint stock company.

The limited partnership is one formed under statutes permitting a limited liability on the part of some of the members, which the common law utterly discountenances, and which have, therefore, been treated in this country with some unnecessary degree of strictness by the courts. Such members hazard only the amount of capital they have embarked and incur no further liability. They have formed the subject of a separate treatise by the author.[1]

[1] The Law of Limited Partnership, by Clement Bates, Boston, 1886, Little, Brown & Co.

The ordinary partnership includes the joint stock company as a peculiar class, owing to the nature of the partners' shares and the mode of government of the association.

Ordinary partnerships may be divided into particular, general and universal. These divisions are of no great importance and may be multiplied according to the fancy of the reader. Another is made between trading and non-trading partnerships, or those in which a primary element is buying and selling, and those in which it is not, the latter class including such partnerships as those for farming, mining and practicing in the professions. This division is of very great importance in determining the implied powers of individual partners, and will be treated of with that subject.

A PARTICULAR PARTNERSHIP is one where the parties have united to share the benefit of a single individual transaction or enterprise.

A GENERAL PARTNERSHIP is one where they have united for the general purposes of some kind of business. All partnerships may be said to be more or less limited,[1] and *vice versa*, those restricted to one venture may have as to it the incidents of a general partnership;[2] but this class represents the great majority of associations, whether for the prosecution of commercial, mechanical, manufacturing or professional avocations, and whether for a fixed period of time or at will.

§ **13. Universal partnership.**— A universal partnership is one in which all property owned by the parties is contributed, and all profits, however made, are for joint benefit. Some of the cases I have placed under this head can hardly be considered partnerships at all, but are rather communistic arrangements or tenancies in common.

The civil law recognized two kinds of universal partnership, the *societas universorum bonorum*, comprising a union of all property, real or personal, present or to be acquired, even by gift or inherit-

[1] Livingston *v.* Roosevelt, 4 Johns. 251, 277 (4 Am. Dec. 273); Walden *v.* Sherburne, 15 id. 409, 422.

[2] Horsey *v.* Heath, 5 Oh. 353, 356.

ance; and the *societas universorum quæ ex quæstu veniunt*, differing from the former in that real estate and subsequent acquisitions, by gift or descent, were not included, nor were past debts a charge. And in Louisiana the universal partnerships are recognized by the Code, §§ 2800-2805; but if part of the property of the partners is not included it is not a universal partnership.[1]

In the other American states partnerships have occasionally occurred approximating closely to a universal partnership. Such was Lyman *v.* Lyman, 2 Paine, C. C. 11, where two brothers for some thirty years included all their property and engaged in nearly every kind of enterprise, and it was held (p. 28) that even legacies to each partner, and to the wife of one, were included. Gaselys *v.* Separatists' Soc. 13 Oh. St. 144, if a partnership at all was a universal one, there was a renouncing of separate interests and a perpetual devotion of all property to a religious society, the members participating in the use of the fund so long only as they continued members.[2]

In Gray *v.* Palmer, 9 Cal. 616, one of two persons contributed to the joint fund all he possessed, and the other all he might become possessed of for two years for the purpose of accumulation, debts to be paid from the joint fund. The court said that there was nothing impracticable or against morality or public policy in a universal partnership.

Rice *v.* Barnard, 20 Vt. 479 (50 Am. Dec. 54), was a partnership so universal as to include everything except furniture and wearing apparel. The court said they would regard it rather as a tenancy in common than a partnership, and that partnership creditors could not have a priority over the separate creditors of each partner on distribution.

Quine *v.* Quine, 9 Sm. & Mar. 155, was a planting partnership between a person and his sister-in-law, which included all property, real or personal, bought by either, whether in their individual or joint names, holding, however, that a right of survivorship cannot be proved by mere conversations.[3]

[1] Murrell *v.* Murrell, 33 La. An. 1233.

[2] See further as to this society Goesele *v.* Bimeler, 14 How. 589, aff'g 5 McLean, 223. So of the Shakers. Waite *v.* Merrill, 4 Me. 102; Gass *v.* Wilhite, 2 Dana, 170. Of the Harmony Society. Baker *v.* Nachtrieb, 19 How. 126; Schriber *v.* Rapp, 5 Watts, 351.

[3] S. P. Houston *v.* Stanton, 11 Ala. 412.

But the court will not hold that a universal partnership is designed unless the intention is very clearly expressed.[1]

There are also certain general partnerships differing from the foregoing in that all property is not contributed, but separate ownership remains, except of the capital contributed, but the scope of the partnership is to trade in anything and everything in which the parties can make money.[2]

§ 14. **Mining partnerships** also, in many respects, form a class by themselves, being a cross between tenancies in common and partnerships proper. Their peculiarities, of which the chief one is the absence of the *delectus personarum*, and hence, that death or transfer of a share does not dissolve them, will be incidentally noticed as we progress.

[1] Gray *v.* Palmer, 9 Cal. 616; Mitchell *v.* O'Neale, 4 Nev. 504, 514.

[2] Such were Catlin *v.* Gilders, 3 Ala. 536; Princeton & Kingston Turnpike Co. *v.* Gulick, 16 N. J. L. 161; Goldsmith *v.* Sachs, 17 Fed. Rep. 726; 8 Sawy. 110.

CHAPTER II.

TESTS OF A PARTNERSHIP.

§ **15. Inter se and as to third persons.**— The very great importance of this, the most perplexed and difficult part of partnership law, the ascertainment of what constitutes a partnership, and in connection therewith the examination of the influence which the English case of Cox *v.* Hickman is having upon our jurisprudence, renders necessary a somewhat extended summary of the modern decisions.

As the law existed up to less than thirty years ago, it was necessary to make a difference between a true partnership and partnerships as to third persons. Persons having such interests in a partnership as to be entitled to a share in the profits were, with certain exceptions, as where a share of profits was the measure of a compensation, liable to creditors as if actual partners, on the assumption that they received part of the fund upon which creditors depended for payment, and this whether such person intended to be a partner or not or knew that he incurred a liability.

The injustice of this doctrine of partnership as to third persons has been more or less deplored by text-writers. Moreover the illogical and untruthful foundation upon which the doctrine rests is now pretty well understood. Persons held liable as partners to third persons did not take part of the fund upon which creditors relied any more than did a salaried agent, and in fact less so; for when a partnership was unable to pay its debts, it was because there were no profits, and in that case such person took nothing; whereas, had his compensation been definite, the fund would have been diminished.

But the doctrine of partnership as to third persons is now exploded in England, and by all the later American authorities, and nothing is left of it except in cases of partnership by estoppel, that is by holding out. It is still true that in many American states, where the only decisions are their earlier ones, the law is not yet

announced to have reached the modern point; for in all the American states the early decisions, while not going to the length of the older English law, were, of course, deep in its shadow, merely increasing the exceptions and somewhat profiting by the light of growing modern criticism. This subject will appear more definitely as we proceed. It is true that the later decisions, English and American, do not generally profess to overrule the former ones; nevertheless the starting point or basis of reasoning is quite different, and is no longer participation in profits, independent of intention, but is now to ascertain the intention of the parties, to determine which a sharing of profits is but a factor in the evidence and not conclusive.

It is to be remembered that persons who are partners *inter se* are always liable as partners to third persons, and that persons who are found not to be partners as to third persons cannot be partners *inter se;* hence, in determining what is a true partnership, authorities as to what does not constitute persons partners *inter se* are applicable.

§ 16. Earlier English law.— The rule so long in vogue, that a sharing of profits made the sharer liable as a partner to third persons, was first announced in Grace *v.* Smith, 2 W. Bl. 998 (1775). There Smith & Robinson dissolved partnership, duly advertising the fact, on terms by which Robinson was to take the business and assume the debts and pay Smith back his original capital and £1,000 for profits, and Smith was to let £4,000 remain in the business for seven years at five per cent. In an action by a creditor, charging Smith as a secret partner, De Grey, J., said: "Every man who has a share of the profits of a trade ought also to bear his share of the loss. If any one takes part of the profit, he takes a part of the fund which the creditor relies on for payment." . . . "I think the true criterion is to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund for payment." The jury found the loan was on general personal security only, found for Smith, and a new trial was refused. Hence the case was rightly decided, but these statements of law have had a wide influence.

In an earlier similar case, Bloxham *v.* Pell, cited in 2 W. Bl. 999, Lord Mansfield had, on facts similar to those in Grace *v.* Smith, ruled that the arrangement was a device to obtain more than legal

interest, and hence was either a crime or a partnership, and sustained it as being the latter.[1]

Waugh *v.* Carver, 2 H. Bl. 235 (1793); 1 Smith's Lead. Cas. 968. Carver & Son, ship agents at one place, and Giesler, a ship agent at another place, agreed to throw business into each other's hands and divide commissions and profits, neither to be affected by the other's losses or liable for his acts. Eyre, L. C. J., said that it was plain the parties were not and never meant to be partners, but as they took part of the fund on which creditors rely, they were liable as parties under Grace *v.* Smith.

This case was followed in 1821 by Cheap *v.* Cramond, 4 B. & Ald. 663, where merchants divided profits on business recommended or influenced by one to the other, and were in consequence held to be partners as to third persons.[2]

But a share of gross returns in lieu of compensation was early held not to constitute a liability as partners.[3] It had previously been decided that sharing gross receipts did not create a partnership *inter se*.[4]

Then a distinction was made between an agreement to receive as compensation a part of the profits and an agreement to receive a sum equal to or in proportion to a part of the profits, the latter not constituting a partnership.[5]

[1] This same kind of reasoning was subsequently adopted in Gilpin *v.* Enderbey, 5 B. & Ald. 954, in which the question was of a partnership *inter se;* Fereday *v.* Hordern, Jac. 144; and see Jestons *v.* Brooke, Cowp. 793.

[2] And by Heyhoe *v.* Burge, 9 C. B. 431. See, also, Hesketh *v.* Blanchard, 4 East, 144; Smith *v.* Watson, 2 B. & C. 401, of a broker paid by a share of profits in lieu of commission; Barry *v.* Nesham, 3 C. B. 641, a seller of a business guarantying certain profits to the buyer, but to have all above that himself; *Ex parte* Gellar, 1 Rose, 297. For the modern law, see § 60.

[3] Dry *v.* Boswell, 1 Camp. 329, of a boatman receiving half the boat's gross earnings in lieu of wages.

[4] Wilkinson *v.* Frasier, 4 Esp. 182, of seamen sharing the oil of a whaling voyage as wages.

[5] *Ex parte* Hamper, 17 Ves. 403, 412; *Ex parte* Langdale, 18 id. 300; *Ex parte* Watson, 19 id. 459, 461; *Ex parte* Rowlandson, 1 Rose, 89; Brockway *v.* Burnap, 16 Barb. 309; Pierson *v.* Steinmyer, 4 Rich. L. 309; Loomis *v.* Marshall, 12 Conn. 69; Turner *v.* Bissell, 14 Pick. 192; Miller *v.* Bartlet, 15 S. & R. 137; Lord *v.* Proctor, 7 Phila. 630; Irwin *v.* Bidwell, 72 Pa. St. 344. The fullest examination of the old cases will be found in Eastman *v.* Clark, 53 N. H. 276. A very neat *resumé* of their effect is given by Sir N. Lindley, Partnership, vol. 1, p. 34 *et seq.*

§ 17. **Intention.**— To determine whether the relation between persons constitutes a partnership their intention in forming it governs. When the facts are given, this question is one of law. The fact that the contract may be denominated by the parties a partnership, or that they declare in it that they do not design becoming partners, is controlled by the nature of the contract. If it constitutes a partnership it is one; and if not, not, independent of the language of the parties.

The declarations of the parties themselves upon the subject, if not inconsistent with the other terms of the contract, will control. If they have agreed not to be partners they are not, whatever may be their responsibilities otherwise.[1]

The word partnership is not necessary to be used to constitute a partnership, nor are the words manager, servant, agent, superintendent, and the like, necessary to show that an employment was intended.[2]

The intention of the parties will be determined from the effect of the whole contract, regardless of special expressions. And if the actual relation which the parties have assumed towards each other, and the rights and obligations which have been created by them, are those of partners, the actual intention of the parties or their declared purpose cannot suspend the consequences.[3] And so if the parties have

[1] Pollard *v.* Stanton, 7 Ala. 761; Marks *v.* Stein, 11 La. Ann. 509; Kerr *v.* Potter, 6 Gill, 404; Reddington *v.* Lanahan, 59 Md. 429; Gill *v.* Kuhn, 6 S. & R. 333.

[2] See, for example, Van Kuren *v.* Trenton Locomotive & Mach. Mfg. Co. 13 N. J. Eq. 302; Bloomfield *v.* Buchanan, 13 Oregon, 108; Ryder *v.* Wilcox, 103 Mass. 24, 27; Greenham *v.* Gray, 4 Irish Com. L. 501. The contract where third persons' claims are not in question will be liberally construed in reference to the actual understanding of the parties and the purposes they had in view. Hitchings *v.* Ellis, 12 Gray, 449, 452; and see Couch *v.* Woodruff, 63 Ala. 466; Tayloe *v.* Bush, 75 id. 432.

[3] Pooley *v.* Driver, 5 Ch. D. 458; *Ex parte* Delhasse, 7 id. 511; Moore *v.* Davis, 11 id. 261; Cooley *v.* Broad, 29 La. Ann. 345; Mulhall *v.* Cheatham, 1 Mo. App. 476; Beecher *v.* Bush, 45 Mich. 188, 194 (40 Am. Rep. 465); Manhattan Brass & Mfg. Co. *v.* Sears, 45 N. Y., 797 (6 Am. Rep. 177); rev. s. c. 1 Sweeny, 426; Cothran *v.* Marmaduke, 60 Tex. 370, 372; Stevens *v.* Gainesville Nat'l Bank, 62 Tex. 499, 503; Duryea *v.* Whitcomb, 31 Vt. 395; Rosenfield *v.* Haight, 53 Wis. 260.

used the word partnership in their contract and called themselves partners, this will not make them such if the contract is not consistent with such relation.[1]

§ 18. **Mutual agency as a test of intention.**— It is impossible to lay down any absolute rule to ascertain the presence of an intention to create a partnership. The earliest of the modern English cases, Cox *v.* Hickman, suggests agency as a test; that is, if a person is connected with a firm as a principal, as one trading on his own behalf as well as in behalf of the others, he is a partner. And the same idea may be otherwise expressed; thus, if the party is a constituent part of the conventional being created by the parties in forming a partnership, he is a partner.[2]

In later cases this use of the word agency has been criticised; thus, JESSEL, M. R., in Pooley *v.* Driver,[3] regrets it as not helping in the slightest degree, because only stating in other words that he must be a partner; and Baron CLEASBY, in Holme *v.* Hammond,[4] says: "My view is that agency is in such cases deduced from partnership rather than partnership from agency." But the critics offer nothing as satisfactory in its place.

As consequences rather than as tests, if he is a partner, he has a lien to compel the application of the assets to the payment of the debts, and the debts must be paid before a court will permit him to share; and he obtains his share of the profits, not as a personal creditor of his associate, but out of the assets prior to the separate creditors of the copartners, and independent of the latter's con-

[1] Oliver *v.* Gray, 4 Ark. 425; Dwinel *v.* Stone, 30 Me. 384; Sailors *v.* Nixon-Jones Printing Co. 20 Ill. App. 509; McDonald *v.* Matney, 82 Mo., 358, 366; Livingston *v.* Lynch, 4 Johns. Ch. 573, 592.

[2] Agency was also adopted as the test in Kilshaw *v.* Jukes, 3 Best & Sm. 847; Bullen *v.* Sharp, L. R. 1 C. P. 86; *In re* English and Irish Church, etc. Assur. Soc. 1 Hen. & M. 85. Agency is not a perfect test, for parties may be partners *inter se* because they so intend, although one is deprived of all authority, as in the case suggested by CLEASBY, B., Holme *v.* Hammond, L. R. 7 Ex. 218, 233:—if A. puts in the capital, and B. and C. are to carry on the business in their own names, A. not to appear at all, or interfere, or buy or sell, or sign negotiable paper, here there is no agency, although a person becoming aware of the dormant partner, but not of the limitation upon his authority, could bind the firm by dealing with him.

[3] 5 Ch. Div. 458.

[4] L. R. 7 Ex. 218.

sent, bankruptcy, insolvency, death or assignment; and conversely, if he can share with the creditors, yet the existence of such a lien would show an intention to be partners, and the existence of a power of disposition arising from the relation of the parties would show the same intention.

§ 19. Modern law; English.— It now becomes necessary to examine *seriatim* the principal modern English decisions repudiating the distinction between partnerships *inter se*, and those which are such only as to third persons in consequence of a sharing of profits, and then to see the influence these decisions have had upon the American law.

In Cox *v.* Hickman,[1] a firm of B. Smith & Son, carrying on business at the Stanton Iron Works, becoming embarrassed surrendered the control of their property to trustees appointed by their creditors, who numbered over one hundred, under a deed by which trustees for creditors were to carry on the business under the name of The Stanton Iron Co., with power to do whatever was necessary for that purpose, and to divide the net income, which was always to be deemed the property of the Smiths, among the creditors, and when the debts were all paid then to hold for the Smiths. In fact, of the trustees, one refused to act and the other shortly resigned, and the business was conducted by three others of the creditors; but this forms no part of the opinions rendered, though it might have done so. Hickman supplied goods to the Stanton Iron Co. and drew bills on them, which were accepted in the name of the company by one of the three managers, and action was brought upon one of the bills against the defendants, who were among the creditors, as partners. The question then was, were the creditors liable as partners? The judges in the exchequer chamber were equally divided. Of the lords, composed of the Chancellor (Campbell), Cranworth and Wensleydale, who rendered opinions, Brougham and Chelmsford concurring, all agreed that the defendants were not liable, for they were not partners *inter se*, and never intended to be liable as partners. Lord CRANWORTH, who delivered the principal opinion, says: "The liability of one partner for the acts of his copartner is, in truth, the liability of a principal for the acts of his agent." . . . "A right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have

[1] 8 H. of L. Cas. 268 (1860).

been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of liability is that the trade has been carried on by persons acting on his behalf; . . . that he stood in the relation of principal towards the persons acting ostensibly as the traders." "The debtor is still the person solely interested in the profits, save only that he has mortgaged them to the creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors, though their consent is necessary in such a case, for without it all the property might be seized by them in execution; . . . the debtor or the trustees are the persons by or on behalf of whom it is carried on." He further said that the provision that the creditors might order a discontinuance of the business is only to qualify their consent to it; that the reservation of such a power in a third person would not make the creditors partners if they were not so already, and it makes no difference that the power was reserved to themselves. Lord WENSLEYDALE also said: "The law as to partnership is undoubtedly a branch of the law as to principal and agent." "Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from the contract by virtue of the agreement made at the time of the employment." "I think it is impossible to say that the agreement to receive this debt so secured, partly out of the existing assets, partly out of the trade, is such a participation in profits as to constitute the relation of principal and agent between the creditors and trustees." It is to be noticed that the lords expressed their intention of not overruling the previous cases.[1]

§ 20. —— independent contractors dividing profits of a job.— In Kilshaw *v.* Jukes, 3 Best & Smith, 847 (Q. B. 1863), Kilshaw had sold timber to the defendants, Till & Wynn, and now claims that Jukes was their dormant partner and liable for the debt. The three defendants had jointly agreed to purchase a piece of land and to complete buildings upon it, the vendors agreeing to advance money for the buildings, and the conveyance to be to the three on

[1] S. C. as Wheatcroft *v.* Hickman, 9 C. B. N. S. 47; reversing Hickman *v.* Cox, 3 C. B. N. S. 523, in the Cam. Scac., which affirmed the Common Pleas in 18 C. B. 617.

completion of the buildings, and all were liable to the vendors for the purchase money. The timber bought of plaintiff was for the erection of the buildings. *Inter se* the agreement was that Till & Wynn should erect the buildings themselves and Jukes should have an interest only to the extent of an old debt owed him by them and for such iron as he should supply for the buildings; any surplus was to be Till & Wynn's, and if the proceeds should be insufficient to repay Jukes he was to be a loser, and he gave no authority to Till & Wynn to order timber on his account. BLACKBURN, J., analyzed the question thus: All three are of course liable to the vendor to pay for the land and to procure the erection of buildings, but this is quite consistent with Jukes being no party to the contracts for material or labor for the buildings, as all three might have had a contractor erect the buildings for their benefit without being liable for the material or labor obtained by the contractor; and if Jukes *bona fide* and not as a clerk made a similar arrangement with Till & Wynn, by which he put them in the position of a contractor, there is nothing to prevent him; and the only question is whether the interest he reserved to himself made him liable as a partner; and held that under Cox *v.* Hickman the interest on the profits did not make Jukes a partner. Wightman, J., dissenting on the ground that Cox *v.* Hickman was upon circumstances so peculiar as not to be of general application.

§ 21. —— loan on profits as interest; annuity creditor.— In Bullen *v.* Sharp, L. R. 1 C. P. 86 (Cam. Scac. 1865), the defendant's son became an underwriter, and in consideration of Sharp, the elder, guarantying the son to the extent of £5,000 in such business, the son promised to pay the father an annuity of £500 per annum, to be increased in case one-fourth of the son's average annual net profits during the first three years exceeded £500. The average annual profits exceeded £2,000. By a subsequent deed of settlement, the son, when about to marry, made his father and another trustees; the trustees to receive the proceeds of the business from its manager and hold them in trust to pay the annuity and an allowance to the son, and accumulate the surplus for the benefit of the business and the son's family. The son became bankrupt, and a policy-holder sued the father as partner. The father had expressly stipulated with the son that he was not a partner, but this was not known to the plaintiff and therefore did not affect the question. BLACKBURN, J., says that the trustees taking the profits

as a reserve fund to meet the emergencies of the business, and not causing the business to be carried on for them, does not constitute the trustees principals, which according to Cox *v.* Hickman is the true question. And that the first arrangement with the father constituted him an annuity creditor, and went no further than did that in Cox *v.* Hickman, and the trade is not carried on by or on account of the annuitant creditor. BRAMWELL, B., said: "Partnership means a certain relation between two parties. How then can it be correct to say that A. and B. are not in partnership as between themselves; they have not held themselves out as being so, and yet a third person has a right to say they are so as relates to him?" "If A. agrees with B. to share profits and losses, but not to interfere with the business, nor buy nor sell, and C., knowing this, deals with B., he would have no claim on A. Why should he if he does not know of it? Why, upon finding out something between A. and B. which has in no way affected or influenced him, should he who has dealt with B. have a claim on A.?" The whole of Baron Bramwell's opinion is a powerful *expose* of the illogical and untrue basis of the old law. Shee, J., and Pigott, B., dissented.[1]

§ 22. Same, with large powers of control.—In Mollwo, March & Co. *v.* The Court of Wards, L. R. 4 P. C. 419 (1872), two partners as W. N. Watson & Co. were deeply indebted to the rajah for large advances in their business, and the rajah, to have security for his debt and for future advances, and wishing also to obtain some control over the business, by which he might check what he considered the excessive trading of the Watsons, entered into a contract with them by which they agreed to carry on their business subject to his control, in that he could take possession of consignments, and the Watsons could not sell or make shipments without his consent or draw money without his sanction, and he might direct a reduction or enlargement of the establishment, and agreed that their stock in trade should be answerable to him, and that he should receive twenty per cent. of the net profits until the debt due him should be paid off, and should also pay him twelve per cent. interest on the debt. In fact the rajah never received any property, proceeds or interest and exercised but little control; but the question was on the effect of the agreement to make him liable as a partner to the plaintiffs for a debt contracted by the Watsons.

[1] This case was followed in *Ex parte* Tennant, 6 Ch. D. 303.

Sir Montague Smith, rendering the decision of the court, after criticising the test of liability as partner laid down in Grace *v.* Smith and Waugh *v.* Carver as based on unsound reasons, says "the judgment in Cox *v.* Hickman had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. . . . Whether that relation does or does not exist must depend on the real intention and contract of the parties." To the argument that the large powers of control constituted the rajah, in fact, the managing partner, he says that the rajah had no initiative power; he could not direct what shipments should be made or require the Watsons to continue to trade; his powers, however large, were powers of control only. It was held that the parties did not intend to create a partnership; that their true relation was that of creditor and debtors; that the trade was not carried on for the common benefit of the Watsons and the rajah so as to create a partnership, nor carried on for the rajah as principal in any other character; that he was not in any sense the owner of the business.

In Dean *v.* Harris, 33 L. T. N. S. 639, A., by written agreement, lent B. £2,000 as capital to develop mines, A. having a lien on the mines to secure repayment, and to receive 3*d.* per ton on the product as commission; B. to receive a salary, which was not to commence until A. had been repaid, and A. was to have three-fourths and B. one-fourth of the net profits. A. advanced in all £11,000 and died. He was held not to be liable as a partner for the debts.

In Kelly *v.* Scotto, 49 L. J. Ch. 383; 42 L. T. N. S. 827, S. having a building contract to erect eight houses and needing funds, H. made advances to him, taking his contract as security for repayment, S. agreeing to finish two of the houses, keeping accounts of the cost open to H.'s inspection, to procure leases of the houses to nominees of H. and sell the leases at prices fixed by H. and apply the proceeds to repay H.'s advances; H. also to have half the difference between the cost and the proceeds, and, in case of deficiency to pay his advances and share of the proceeds, were not to have a lien upon the other houses. H. was held not liable as a partner for the timber used in building.[1]

[1] For cases where a pretended loan is a mere device, see *infra*, § 50.

§ 23. Influence of Cox v. Hickman in America.— The most prominent feature of the modern English law may be summed up as follows: A person is not liable as a partner to third persons unless he is an actual partner *inter se*, the case of holding out of course apart.

This doctrine is announced as the law in the following cases, which will be examined *seriatim*, with a simplified statement of the facts of each; for in some of them the court has seized the opportunity to express an emphatic approval and adoption of the doctrine where the facts of the case did not strictly involve it.[1]

In Meehan *v.* Valentine, 29 Fed. Rep. 276, A. lent $10,000 to partners, who were at the end of a year to pay him one-tenth of the profits over $10,000, and if the profits did not exceed $10,000, then merely interest on the sum loaned. In an action on notes made by the firm it was held that A. was not a partner; that participation in profits did not constitute a partnership, though sufficient proof of it in the absence of other evidence. The court approves Cox *v.* Hickman, and says that Berthold *v.* Goldsmith, 24 How. 536, is not contrary to the modern law.

In re Francis, 2 Sawy. 286; s. c. 7 Bankr. Reg. 359, while holding the loan in that case to be a device, and therefore a contract of partnership, approves the doctrines of Cox *v.* Hickman. Deady, J., rules that if the evidence is consistent with a partnership or a mere employment, the burden of proof is upon the participants in the profits to show that he is not a partner when sued by third persons.

Re Ward, 8 Reporter, 136 (U. S. D. C. Tenn. 1879), holds that a loan with interest in a proportion of profits or share of profits does not *per se* import a partnership, though strong evidence of it, and approves Cox *v.* Hickman.[2]

In Culley *v.* Edwards, 44 Ark. 423, an agreement as follows: Received $9,491.77 which I invested in merchandise in 1866, which moneys I promise to keep invested in merchandise or other business which may be agreed upon until May 1, 1886, at which time I prom-

[1] Many earlier American cases had recognized that to constitute one a partner even as to third persons he must be a principal. Berthold *v.* Goldsmith, 24 How. 536; Loomis *v.* Marshall, 12 Conn. 69; 30 Am. Dec. 596; Polk *v.* Buchanan, 5 Sneed (Tenn.), 721.

[2] See, also, Moore *v.* Walton, 9 Bankr. Reg. 402.

ise to pay it back with one-half the net earnings, was held not to show a partnership because the party was bound to refund the principal in any event. The court say further that participation in profits as a test of partnership is abandoned in England and in this country, and that the test is whether the business is carried on on behalf of the person claimed to be charged; that is, was he a principal towards the ostensible traders? And they approve and adopt the doctrines of Cox *v.* Hickman and the other later English cases, though the question in the case was *inter se* and not as to third persons.

In Le Levre *v.* Castagnio, 5 Colorado, 564, M. owned a mine, and having no money to work it, L. furnished him with $2,000, in consideration of which M. agreed to give him one-fifth of the profits, and, in order to secure him in the advances, to deliver to him all the ore until repayments. This was held not to be a partnership *inter se* or as to third persons.

In Vinson *v.* Beveridge, 3 MacArthur (D. C.), 597, it was held that a person receiving a share of the profits, but without being a partner, is not liable as one in the absence of a holding out.

In Smith *v.* Knight, 71 Ill. 148; 22 Am. Rep. 94, a firm agreed to advance money to H. to enable him to do a commission business, for which he was to pay legal interest and divide commissions, less office expenses, the firm not to be liable for losses. This was held not to render the firm liable as his partners to third persons for losses, because the intention of the parties is to be considered, and that was that losses were not to be shared.[1]

In Macy *v.* Combs, 15 Ind. 469 (1860), it was held that the intention of the parties is often necessary in case of doubt, even to ascertain if a partnership exists as to third persons.

In Williams *v.* Soutter, 7 Iowa, 435 (1858), in an action against S. and D. for the price of goods sold, an agreement was admitted in evidence whereby D. agreed to lend S. $2,000, to be employed in business, for twelve months, to be repaid with thirty per cent. interest or one-third the profits, less business expenses, if desired, but D. not to be expected to take an active part in the business.

[1] In Niehoff *v.* Dudley, 40 Ill. 406, a loan on a share of profits in lieu of interest, though evidence of a partnership, held not absolute; the intention governs; and here there being an intention expressed not to be partners, they are not such even as to third persons. For the facts of this case see § 48.

This, with other evidence, was deemed to show a partnership; but as the judgment was reversed because some of the other evidence of a partnership was hearsay, it follows that the court did not consider the above agreement to amount to a partnership, for otherwise the incompetent evidence would have been immaterial.

In Chaffraix *v.* Lafitte, 30 La. An. Part I, 631 (1878), a bank made an agreement with two firms, one firm in the sugar business to buy molasses and ship in the name of the other, a cotton firm, deliver to the latter the bills of lading, the latter to pay for it with the money of the bank; the two firms to receive part of the profits for services and share the losses. This was held not a partnership between the three, even as to third persons, they not having intended to form a partnership, nor held themselves out as such.

In Beecher *v.* Bush, 45 Mich. 188 (40 Am. Rep. 465), it was held that where a person hires a hotel from another and runs it, paying the owner from day to day a sum equal to one-third of the gross receipts, this is not a partnership; and there is no such thing as a partnership as to third persons when there is none *inter se*, in the absence of concealment or deception. The court (COOLEY, J., pp. 200–202) approve the late English decisions to the full extent, and say that the elements of partnership are community of interest in the business, for the conduct of which the parties are mutually principals and agents for each other, with general powers within the scope of the business, though these powers may *inter se* be restricted, even to making one partner the sole agent; yet if there is no agency there is no partnership, and the agency must be intended by the parties.[1]

In Kellogg Newspaper Co. *v.* Farrell, 88 Mo. 594 (1886), by an agreement between F. and L., F. turns over his newspaper to L. for one year, L. agreeing to run it in every respect as if he were the owner, in his own name, pay all expenses and give F. one-half the net profits quarterly. F. reserves the right to indicate the general and political policy of the paper and to sell the one-half interest at any time, and will then lease to L. the other half at $1,500 per annum. The plaintiff sold materials to L. and now sues F. for the price. It was held that F. was not liable as a partner; that sharing of profit and loss does not necessarily constitute a partnership, but it is a question of intent, and L. was to conduct the paper as

[1] Followed in Colwell *v.* Britton (Mich.), 26 N. W. Rep. 538.

owner and not as partner and pay all expenses. F.'s reservation of a control of the policy of the paper was not a control over its business affairs, and the one-half the proceeds to be paid him was merely compensation.[1]

In Parchen *v.* Anderson, 5 Montana, 438 (1885), N. let two partners, A. & S., have $500 on the following agreement: "In consideration of $500 we sell one-fourth of the net profits of the Centennial mill to N." It was held not sufficient to constitute N. a partner, he not intending to be one. The court approve the modern English and American cases, and while saying that the agreement is strong evidence that N. was a partner, but that sharing profits alone is not an arbitrary test, add (pp. 447 and 457) that if there is no partnership *inter se* there can be none as to third persons, except by holding out. They notice, however, that net profits may mean the results of business already transacted and concluded.

In the court of appeals of New York, in Leggett *v.* Hyde, 58 N. Y. 272, 281 (17 Am. Rep. 244), (aff'g 1 N. Y. Supreme Ct. 418), it was said that the doctrines of Cox *v.* Hickman had not been adopted in that state,[2] and accordingly a loan on a share of profits in lieu of interest, the principal to be repaid regardless of the success of the business, was held to constitute the parties partners as to third persons, contrary to the lender's intention. It was justly observed in the supreme court of Michigan in Beecher *v.* Bush, 45 Mich. 188, 195–6, that in New York the doctrine that participation in profits created the liability of partners had been closely adhered to, and that the courts were hampered by their own early decisions and had not followed Cox *v.* Hickman to the full extent.

But the later New York cases do not sustain these rulings and statements. In Central City Sav. Bk. *v.* Walker, 66 N. Y. 424,

[1] See, also, Kelly *v.* Gaines, 24 Mo. App. 506. In Campbell *v.* Dent, 54 Mo. 325, 332, it was said that communion of profits would not constitute a partnership unless each party had an interest in the profits as principal trader, and the old case of Waugh *v.* Carver (§ 16) was said to be bad law, both in England and this country.

[2] The same statement was again made in Burnett *v.* Snyder, 81 N. Y. 550 (37 Am. Rep. 527), with the further statement that the sharing profit and loss must be as a proprietor with a right to an account and a lien, and that therefore a sub-partner is not liable as partner to third persons. Thus the opinion denies Cox *v.* Hickman and adopts it in full immediately afterwards.

430, ALLEN, J., said that to constitute a partnership as to third persons there must be an assent of the individuals to the creation of that relation, or an estoppel or ratification, and cites the New Hampshire case of Eastman *v.* Clark, which approves the modern decisions to the full extent. And a sharing of profits in lieu of interest on a loan has since been held not to create a partnership.[1]

In Eastman *v.* Clark, 53 N. H. 276 (16 Am. Rep. 192), two persons, each owning a coach and horses, agreed to run a line of coaches between two points and divide the gross receipts, and this was held not to constitute a partnership *inter se* or as to third persons. The opinion in this case is several hundred pages long and very minute in its examination of authorities. It attacks the rule that participating in the net profits creates the liability of partner as to third persons with great severity. It strongly approves and adopts the law as laid down in Cox *v.* Hickman and cognate cases, and holds that agency is the true test, and that the interest in the profits must be as a principal trader.

This case necessarily overrules doctrines such as those laid down in the earlier case of Bromley *v.* Elliot, 38 N. H. 287, 306.

In Wild *v.* Davenport, 48 N. J. L. 129, where an executor was receiving part of the profits under the will of a deceased partner, the court said that participation in profits was not an invariable test of partnership, and that if a party is not actually in business as a principal trader he is not liable as a dormant partner except by virtue of a contract making him actually a partner.

In Brundred *v.* Muzzy, 25 N. J. L. 268, a contract recited that Brundred & Son owed Bell & Son, and to secure the debt, and for further advances, authorized Bell & Son to have the entire management and control of their business until the debt was reduced to $10,000, giving them until then sole power to collect all moneys due and pay all present and future indebtedness, and assigning them all the property of Brundred & Son, who would draw a stated sum for support. This was held not to make Bell & Son partners, and, therefore, not liable on a subsequent note made by Brundred

[1] In Richardson *v.* Hughitt, 76 N. Y. 55 (32 Am. Rep. 267), where the product was to be put into the lender's hands as security, and an account of sales made to him. Eager *v.* Crawford, 76 id. 97; Curry *v.* Fowler, 87 id. 33 (41 Am. Rep. 343), (aff'g 14 J. & Sp. 195), where the lender was to receive interest and half the profits. See, also, Cassidy *v.* Hall, 97 N. Y. 159; Magovern *v.* Robertson, 40 Hun, 166.

& Son. For even if Bell & Son are to take all the profits, they take as creditors and not as participators, and such profits inure to the benefit of Brundred & Son.

In Harvey *v.* Childs, 28 Oh. St. 319 (22 Am. Rep. 387), P. had contracted for two car loads of hogs and agreed that if C. would lend him money enough to pay for them and others, enough to make up two car loads, C. could take possession as security, sell them and keep one-third of the net profits, but the money was to be repaid in full in case the proceeds were insufficient, so that C. should have no loss. There was a loss, but P. repaid C. in full, but had not paid for the hogs, and the vendor sued C. for the price, and the arrangement was held not to be a partnership but a loan and a pledge; the hogs were P.'s and not C.'s. Cox *v.* Hickman and similar cases are approved and announced to be the law, and the relation of each as principal and agent to be the true test of partnership, and liability to rest on the ground that it was incurred on the express or implied authority of the party sought to be charged, and profits must be shared as principals in a joint business where each has express or implied authority to bind the others.

In Hart *v.* Kelley, 83 Pa. St. 286, A. agreed to loan B. sufficient to enable him to carry on a saloon business in a specified house, the lender to receive three-fourths of the net profits as compensation for the use of the money. In an action against him for work and labor on the property he was held not a partner, and Cox *v.* Hickman was approved. It is statutory in Pennsylvania, however, that a lender of money on a share of profits in lieu of interest is not a partner.[1]

In Boston, etc. Smelting Co. *v.* Smith, 13 R. I. 27 (43 Am. Rep. 3), a contract by which M. is to loan S. $5,000 for one year and indorse for him, for which S. is to pay him ten per cent. of his net business profits and two per cent. of his net profits for every $1,000 indorsed for him over said $5,000, S. agreeing to conduct his business to the best advantage, keep accurate accounts open at all times to M.'s inspection, was held not to constitute a partnership but to be a mere contract of loan; there being no reason to suspect a latent design to form a partnership, under the disguise of a loan; and the

[1] S. P. also Irwin *v.* Bidwell, 72 Pa. St. 244, and Lord *v.* Proctor, 7 Phila. 630; but in Pennsylvania the old difference between an agreement to receive a share of profits and a sum equal to a share of profits seems to be recognized. Lord *v.* Proctor, 7 Phila. 630; Irwin *v.* Bidwell, 72 Pa. St. 244.

agreement as to the conduct of the business being merely a requirement to observe good faith. The court say that the later English cases are the truest exposition of the common law.

In Polk *v.* Buchanau, 5 Sneed (Tenn.), 721, one who has loaned money to a mining concern, and as a security has taken a conveyance of one-half of their mines, and was to receive one-fourth of the profits in consideration of the loan, but without intention of being a partner, does not become one as to third persons, and was therefore held not liable for the hire of slaves.

In Buzard *v.* First Nat. Bank (Tex. 1886), 2 S. W. Rep. 54, Buzard, who had employed Pennington as his agent on a salary to buy and sell cattle, by a new agreement advanced to him $16,500 to be used in buying cattle; Pennington to buy, keep and sell them, use the proceeds to repay the advance, and divide the net proceeds equally. If the proceeds were not sufficient, Buzard was to get back his money and Pennington to receive nothing, but was to have no loss except of his labor, his share of profits being in lieu of his former salary. The cattle were to bear Buzard's brand, but Pennington was to use his discretion in the business, excepting that Buzard fixed certain limitations of prices in buying and selling. In an action on a note given by Pennington in his own name for money advanced by plaintiff and put into cattle, it was held that Buzard was not liable, as he did not intend or believe himself to be a partner. The court approve the rule of Cox *v.* Hickman and attempt to distinguish Cothran *v.* Marmaduke, 60 Tex. 370.

In Chapline *v.* Conant, 3 W. Va. 507, C. and W., the latter as trustee of Mrs. E., bought and equipped a hotel; then C. and E., the husband of Mrs. E., went into partnership as C. & E. to run it, under an agreement by which C. and the trustee, W., were to pay the losses and divide the profits equally. E. was not to be liable for losses, or be entitled to any profits. C. was to pay half the profits to W. as trustee, C. and W. paying the losses and dividing the profits equally. It was held that the profits payable to W. were in the nature of rent; that as the evidence showed he did not intend to be a partner with C. and E., nor did they intend he should, nor did he act as such, he was not liable as one to a third person upon a negotiable draft made by C. and E.; that a right secured to W. to inspect the books and require an account does not make him one. Cox *v.* Hickman is approved as being the law. The test was said to be whether the supposed partners acquire any property in or con-

trol over or specific lien to the profits while they remain undivided in preference to other creditors.

In *In re* Randolph, 1 Ontario App. 315, R., by an agreement with P. and H., was to consign lumber to them, they to guaranty sales and receive one-half the net profits instead of the commissions which they had been in the habit of receiving under a former arrangement between the parties. This was held not to constitute a partnership, none being intended, although P. and H. on one occasion shared a loss, and therefore P. and H. could claim as creditors against R.'s estate with other creditors. Cox *v.* Hickman is approved and followed in this case.

In Darling *v.* Bellhouse, 19 Up. Can. Q. B. 268, an agreement by which a creditor of a firm was to be paid his debt in instalments and meantime to have access to the books and act as purchasing agent on a salary, and as soon as the shares of the partners should equal his debt he was to have the right to become a partner or draw out his debt with a bonus as compensation for the right to be a partner, was held not to constitute a partnership.[1]

§ 24. Proximate tests of intention.— The intention of the parties being the sole criterion of partnership, certain principles may be laid down as approximate guides to ascertain it. No really absolute tests can be given; for even if the vast mass of cases were harmonious, it rarely happens that a single one of the following principles controls; on the contrary, each case generally involves several, some of which point towards partnership and others to a contrary intention; hence each case stands somewhat upon its own circumstances, much as in the cases of the construction of wills, and must be taken by the four corners.

The cases will be considered in the following principal classes:

I. Where the agreement is to share both profit and loss.

[1] To the same effect, see Hill *v.* Bellhouse, 10 Up. Can. C. P. 122. These cases were decided while Cox *v.* Hickman was pending in the house of lords.

In Maulson *v.* Peck, 18 Up. Can. Q. B. 113, trustees under an assignment for the benefit of creditors, having power to replenish the stock from time to time to facilitate sales of old stock, this was held not to make assenting creditors partners therein, the power to purchase being only as absolutely necessary and not to make money.

II. Where the agreement is to share profits and saying nothing as to losses.

III. Where the agreement is to share profits but not losses.

IV. Where the agreement is to share gross returns.

I. SHARING BOTH PROFIT AND LOSS.

§ 25. An agreement to share in the profit and loss of a business or adventure shows an intention to create a partnership unless such evidence of intention is controlled by stipulations or interpreted by conduct inconsistent with it.

§ 26. **With a common stock.**— Where the goods or material, or the money wherewith to buy them, are contributed by all, and are joined in a common stock, and are to be used or disposed of for joint benefit, with an agreement for a division of profit and loss, this constitutes a partnership.[1]

Thus, where four persons agreed that one of their number should buy potatoes in New Hampshire and Vermont, send them to market, each to be accountable for his own sales, the cost of purchasing and the profit and loss to be in specified proportions, it was held a partnership, for the purchases were for sale again for joint benefits, negativing the idea of separate interests, and the division of profit and loss shows that it is not a mere joint ownership of property, but with right of separate disposition, *i. e.*, without joint profits. Nor is it a division of profits as compensation for services, for each put in part of the capital and neither was the servant of the others. Nor was it a division of profits as compensation for the use of capital, for they owned the property jointly, without agreement for

[1] See Moore *v.* Davis, 11 Ch. D. 261; *In re* Warren, 2 Ware, C. C. 322; Felichy *v.* Hamilton, 1 Wash. C. C. 491; Scott *v.* Campbell, 30 Ala. 728; Meaher *v.* Cox, 37 Ala. 201; Autrey *v.* Frieze, 59 id. 587; Laffan *v.* Naglee, 9 Cal. 602; Solomon *v.* Solomon, 2 Ga. 18; Morse *v.* Richmond, 97 Ill. 303 (aff. 6 Ill. App. 166); Aultman *v.* Fuller, 53 Iowa, 60 (in effect reversing Iliff *v.* Brazill, 27 id. 131); Starbuck *v.* Shaw, 10 Gray, 492; Somerby *v.* Buntin, 118 Mass. 279; Bohrer *v.* Drake, 33 Minn. 408; Priest *v.* Chouteau, 12 Mo. App. 252 (aff. 85 Mo. 398); Cumpston *v.* McNair, 1 Wend. 457; Smith *v.* Small, 54 Barb. 223; Arguimbo *v.* Hillier, 17 Jones & Sp. 253; Jones *v.* Call, 93 N. Ca. 170; Choteau *v.* Raitt, 20 Oh. 132; Burnley *v.* Rice, 18 Tex. 481, 496; Duryea *v.* Whitcomb, 31 Vt. 395; Chapman *v.* Wilson, 1 Rob. (Va.) 267.

severance until final accounting, and they relied on the proceeds and property for reimbursement and not on individual credit.[1]

That a certain class of losses is not to be divided makes no difference; thus, where two steamboat owners agreed each to furnish a certain number of boats in which the respective owners should retain the property and assume the risk, and be liable for losses by accident and negligence, but the compensation of joint agents, and damages or losses on cotton should be a joint charge, and the profits, less running expenses, should be divided, this is a partnership *inter se.*[2]

So if, on dissolution of a partnership, one partner agrees to take all the assets, pay all the debts, give the other one-third of the profits arising from sales of goods, and the other agrees to share one-third the losses and act as clerk, this constitutes a partnership *inter se.*[3]

Persons who purchase land on speculation, contributing equally to the cost and the expenses of platting and improving it, the proceeds after paying expenses to be equally divided, are partners and all liable on a note made by one of their number in whose name the title was taken, he being authorized to make loans, although the lender was not aware of the source of his power.[4]

Where it was agreed that T. should make a note and four others should indorse it; that the note should be discounted and the proceeds used by T. to buy and sell brooms in his own name, and the proceeds of sale, after paying the note, should be divided and profits and losses shared, and T. sold brooms and received in payment for some of them a note which he indorsed in his own name to the plaintiff, the other four persons are liable on the note as partners doing business under the name of T.[5]

§ 27. **Same; services.**— Similar to this class of cases is the class where the dealing is not in goods or manufactures, but is in rendering services requiring the use of a capital and the possibility of a loss; here a joint contribution of capital and agreement to share profit and loss creates a partnership.

[1] Duryea *v.* Whitcomb, 31 Vt. 395.

[2] Meaher *v.* Cox, 37 Ala. 201.

[3] Scott *v.* Campbell, 30 Ala. 728. The case seems also to hold that sharing profit and loss is not merely strong presumptive evidence of a partnership, but conclusive of it.

[4] Morse *v.* Richmond, 97 Ill. 303 (affirming 6 Ill. App. 166).

[5] Mohawk Nat. Bank *v.* Van Slyck, 29 Hun. 188.

Thus, where M., owning a contract to carry the mails, sold half of it to C. and they agreed to carry together, sharing profit and loss, it is a partnership and not an employment.[1] So of two contractors to build a railroad, sharing profit and loss, they are partners; hence one alone can swear to a chattel mortgage for both.[2] So of a contract between two parties to share profits and losses on their contracts with towns to furnish recruits.[3] So of a contract to prosecute a voyage, each giving his time and services, sharing the freights earned and dividing profits and losses; therefore the freight earned cannot be garnished in an action against one alone.[4] Where two firms agree to pack pork on joint account for one season, sharing profit and loss, it was held to be a partnership *inter se*, though one firm alone had control of and could sell the product; hence each firm can require the assets to be applied to the debts.[5] Where one party agreed to furnish a horse and mail-cart and the other pay him a stipulated annual sum for them, but expenses for repairing and losses of packages and receipts are to be divided, it is a partnership.[6]

§ 28. **When one contributes whole capital.**— If one person is to furnish the property, or the money with which to procure it, and the other is to give his services in disposing of it under an agreement by which they are to divide profit and loss, it is a partnership *inter se*, for a sharing of loss is generally inconsistent with a mere employment.[7]

Thus a contract by which K. was to furnish a stock of goods and keep it up, it to remain his property, and N. was to sell them, paying over all cash each day, and drawing $50 per month, and at the

[1] Cole *v.* Moxley, 12 W. Va. 730.

[2] Belknap *v.* Wendell, 1 Foster (21 N. H.), 175.

[3] Marsh *v.* Russell, 66 N. Y. 288.

[4] Bulfinch *v.* Winchenbach, 3 Allen, 161.

[5] Meador *v.* Hughes, 14 Bush, 652, and Brett *v.* Beckwith, 3 Jur. N. S. 31, of two underwriters agreeing to share profit and loss of their businesses; S. P. Shubrick *v.* Fisher, 2 Desaus. 148.

[6] Green *v.* Beesley, 2 Bing. N. Cas. 108.

[7] Pawsey *v.* Armstrong, 18 Ch. D. 698 (doubted in Walker *v.* Hirsch, 27 id. 460); Emanuel *v.* Draughn, 14 Ala. 303; Couch *v.* Woodruff, 63 Ala. 466; Clark *v.* Gridley, 49 Cal. 105; Pierce *v.* Shippee, 90 Ill. 371; Kuhn *v.* Newman, 49 Iowa, 424; Getchell *v.* Foster, 106 Mass. 42; Brownlee *v.* Allen, 21 Mo. 123; Mulhall *v.* Cheatham, 1 Mo. App. 476; Tyler *v.* Scott, 45 Vt.. 261; Sprout *v.* Crowley, 30 Wis. 187.

end of the term N. is stand half the losses and take half the profits in merchandise on hand, was held a partnership as being the usual case of one furnishing the goods, the other his time, and dividing profit and loss, except that the goods remain K.'s property, which means only that they shall belong to him until N. acquires an interest. Hence, K. cannot replevy from N., nor can he show exclusive title by proving that there were no profits, for such evidence would require an accounting in a law case.[1]

So if P. furnishes S. money to buy corn, S. to pay all expenses of shipment and sale, reimburse to P. the cost, gain and loss to be equally divided, S. buying in his own name, this is a partnership;[2] or where A. furnishes B. money to buy tobacco on joint account, B. to buy, prize and sell the tobacco, profit and loss to be divided. This is a partnership.[3]

§ 29. Sharing profit and loss when not a partnership.— But an agreement to share profit and loss does not absolutely constitute a partnership as a conclusion of law. If other circumstances show that no partnership was intended or created they will control.[4] A conspicuous example of this is where a partner agrees to divide the profit and loss or profit of his share with a third person, thus forming a subordinate partnership. The sub-partner, although he gains or loses as the principal firm does, is neither their partner nor liable to their creditors as such. This will be treated hereafter under Sub-partnerships.

An arrangement by which one person buys and ships goods for a firm in another city, with their funds, profit and loss to be divided, and each shipment to be a distinct venture, was held not a partnership *inter se*, and therefore the firm could sue on a policy without prejudice from the acts or order of the other, who had attempted

[1] Kuhn *v.* Newman, 49 Iowa, 424; s. p. Getchell *v.* Foster, 106 Mass. 42.

[2] Pierce *v.* Shippee, 90 Ill. 371.

[3] Clarke *v.* Ware, 8 Ky. Law Rep. 438.

[4] Bullen v. Sharp, L. R. 1 C. P. 86 (*supra*, § 21); Kilshaw *v.* Jukes, 3 Best & Smith, 847 (*supra*, § 20); *Ex parte* Delhasse, 7 Ch. D. 511, 521; Walker *v.* Hirsch, 27 Ch. D. 460; Noakes *v.* Barlow, 26 L. T. N. S. 36; Chaffraix *v.* Lafitte, 30 La. An. Part I, 631, *supra;* Dwinel *v.* Stone, 30 Me. 384; Smith *v.* Wright, 5 Sandf. 113, but this point was shaken on the affirmance of the case in 4 Abb. App. Dec. 274.

to cancel the policy.[1] So where A. furnished hides to B., to be made into leather and returned to A., B. to receive a certain sum per pound, and profit and loss to be divided, this is not a partnership, and hence B.'s sale of the leather to a third person gave him no title as against A.[2] So where two firms, A. & B. and C. & D., agree with each other to furnish S. with a certain amount of wool in certain proportions, agreeing among themselves to divide profit and loss, they were held not to be partners, and therefore could not join in action against S. for the proceeds.[3] Where W. agreed with M., B. & Co. to buy timber land, cut the timber and put it on the cars, M., B. & Co. to sell the lumber, and after paying W. the cost and $4.50 per thousand feet, the net proceeds, deducting further expenses, were to be divided and losses were to be divided, it was held that the parties are not taxable as a firm on the lumber. M., B. & Co. had no control of it before shipment and W. none after.[4]

Where plaintiff was to cultivate defendant's farm, each to pay half the expenses and divide the profits equally, a charge to the jury that they were partners was held erroneous. They are not necessarily partners, but were probably mere tenants in common in the crop.[5]

A. and B., buyers of cattle each on his own account, for shipment, to avoid conflict and rivalry agree to buy each for himself as before, but that each should have half the profits and pay half the losses on every shipment of the other. This is not a partnership.[6]

Where plaintiff by contract was to share in profits and losses of defendant's business for three years in the proportion of seventeen

[1] Marsh *v.* Northwestern Natl. Ins. Co. 3 Biss. 351.

[2] Fawcett *v.* Osborn, 32 Ill. 411. It is not certain whether the court ruled there was no partnership, the question being as to the title of the goods. See the earlier case of the same partnership. Stevens *v.* Faucet, 24 Ill. 483.

[3] Snell *v.* De Land, 43 Ill. 323.

[4] Monroe *v.* Greenhoe, 54 Mich. 9.

[5] Donnell *v.* Harshe, 67 Mo. 170; s. p. Musser *v.* Brink, 68 Mo. 242; 80 id. 350; Ashby *v.* Shaw, 82 Mo. 76. In one case B., the owner of a bank, agreed to give H. one-third of his net profits for a year, A. to bear one-third the losses, and to attend to the business, but B. to have entire control. The object of this contract does not appear. The court say that mere participation in profit and loss does not necessarily constitute a partnership *inter se*, but that it is a question of intention, each case to be determined on its own facts, and that the above contract is not conclusive, McDonald *v.* Matney, 82 Mo. 358.

[6] Clifton *v.* Howard, 89 Mo. 192.

and one-half per cent., and to act as salesman, but not to have the right of partnership in the firm, and the capital then standing to his credit on the books was to remain in at seven per cent., but he could draw an annual amount for support, it was held that the parties were not partners *inter se*, and therefore that plaintiff was not chargeable with interest on losses of the first year, but that his percentage related to the result of the entire term and not of each year.[1]

Where E. sold goods to T. B. & Co. and sues them, and also V. and X., claiming the latter to be partners of T. B. & Co., the relation between the defendants being created by a writing, whereby V. and X., who lived elsewhere, were to pay half the rent of a store to be hired by T. B. & Co., the latter to sell goods sent them by V. and X., paying all expenses and to sell no other goods, and to receive a commission equal to one-half the net profits on sales, and pay one-half of any loss that might occur, V. and X. are not partners of T. B. & Co. A commission measured by a share of the profits does not create a partnership, and sharing losses does not mean a loss by fall of prices, which would probably make them partners, but a loss which might arise in the sale and disposition of the goods; as a factor might agree to be liable for losses by robbery, fire or bad debts.[2]

A contract to buy certain land, erect a mill on it, put in machinery and hold the property jointly, sharing the expense equally and also the profits, whether arising from sale or lease, and if either paid more than his share he was to have a lien for repayment, constitutes not a partnership but a tenancy in common, for there

[1] Osbrey *v.* Reimer, 51 N. Y. 630 (affirming S. C. 49 Barb. 265.)

[2] Edwards *v.* Tracy, 62 Pa. St. 374. It is further said on p. 380, that conceding T. B. & Co. would be liable as partners for purchases by V. and X., the correlative proposition would hold good, that V. and X. would be liable for purchases by T. B. & Co. In Morgan *v.* Stearns, 41 Vt. 398, the facts are not given; the referee had reported that a "sort of partnership" existed between the plaintiff and defendant, that they were to share equally in profits and losses, but whether they were partners *inter se* does not appear. The court said "sharing the profits and loss of the business is not decisive as between the parties, as there may have been merely an arrangement with a view to compensation for services," and the referee's rejection of a claim for a share of certain expenses was affirmed.

was no agreement for partnership, or name, or capital, or business contemplated, or right to sell.[1]

In one case A. furnished cigars to B. to sell, and a horse and wagon, each to bear half the expenses and each half the losses on sales, the profits to be divided equally. The court held that an action at law between the parties lay because there was no partnership, but an arrangement analogous to a case of merchant and factor. The decision was put on the ground that had A. died there was no community of interest in the horse and wagon and cigars which would have survived to B., nor power in B. to incur liability, make contracts, manage the business or dispose of the whole stock at once.[2]

II. SHARING PROFITS, NOTHING BEING SAID AS TO LOSSES.

§ **30.** It will be remembered that our definition of partnership, unlike that of the Roman law, is silent as to losses. A contract to share profits, nothing being said about losses, furnishes by far the largest and most perplexing class of cases, and may or may not constitute a partnership. Many authorities have ruled that as net profits *ex vi termini* import deduction for losses, this class of cases belongs to the class just considered, and therefore constitutes a partnership. But in this connection, at least, there is no difference between profits and net profits, and the confusion of the two classes is productive of error.

If there is a community of profits, a partnership follows. Community of profits means a proprietorship in them as distinguished from a personal claim upon the other associate; in other words, a property right in them from the start in one associate as much as in the other. But the saying that one who takes part of the profits *as* profits is a partner has now gone out of vogue, having been found to be unserviceable as a test, and amounting merely to a change of expres-

[1] Farrand *v.* Gleason, 56 Vt. 633. In Chapline *v.* Conant, 3 W. Va. 507, abstracted above (§ 23), there was a sharing of profit and loss but no partnership.

[2] Newberger *v.* Fields, 23 Mo. App. 631.

sion.[1] So a former difference between taking a share of the profits and an amount measured by a share of profits is no longer regarded. The latter expression may show an intention not to be a partner, but the former does not show the contrary, as will be seen in numerous instances hereafter cited. So an old verbal difference between gross and net profits must now be considered as unsubstantial, as there are numerous cases where sharing net profits does not constitute partnership.

The cases on this subject are like cases on the construction of wills, as various as the facts of each vary; and in determining the intention or the nature of the relation, consideration is to be had, among other things, to the objects and purposes of the parties; the powers granted to or withheld from each; the extent of their interests; their former relations or occupations; the extent and nature of their interest in the capital stock. And though the cases are not all reconcilable, they may be classified so as to assist in the determination of future questions.

§ **31. With joint capital.**—In this class of cases, if there is a joint ownership in the capital stock, the conclusion is irresistible that there is a communion of interest in the profits, and not a portion of them, as compensation, for each has as much right as the other, and hence that a partnership results; but even here care must be taken not to confuse a contribution to capital with a contribution of the use of property on a share of profits or income as rent, which may take place although the parties both own the property as tenants in common; as, for example, where two persons bought a circus and one contracted with the other to run it and divide the income. In the case from which this example is taken there was held to be no partnership, on the ground that dividing an income does not make a partnership, but the same would have been true had half the profits been payable as rent.[2]

[1] Bromley *v.* Elliot, 38 N. H. 287, 304; and see Parker *v.* Canfield, 37 Conn. 250, 267 (9 Am. Rep. 317); Beecher *v.* Bush, 45 Mich. 188, 195 (40 Am. Rep. 465).

[2] Quackenbush *v.* Sawyer, 54 Cal.

§ 32. Illustrations of true partnerships.— W. contributed a steamboat to T., to be put into line, and T. contributed the good will of an established line and his care, skill and expenses, T. to have the management and the selection of the officers and crew; but W. was to appoint the clerk and disbursing officer, and the receipts were to be applied in the following order: Expenses, insurance $6,000, to W.; $300 to T.; balance to be equally divided. This was held to be a true partnership and not a charter-party, for each contributed to the enterprise and there is a communion of profits.[1]

Persons who by agreement jointly buy a tract of land in order to jointly sell it and share the profits were held to be purchasers *inter se* for the transaction and to owe to each other the duties of that relation.[2]

There is considerable difficulty in reconciling some of the cases under this section and those which the court decided under § 63. Where parties buy land jointly to farm it and sell again, plaintiff to farm it, defendant to ship and sell the produce, expenses to be shared equally and net profits divided, it is a partnership *inter se*, and one cannot sue the other at law for his share.[3] Where two persons put in $3,000 each and one his personal services, and they are to divide the net profits, it was said to be a partnership, at least as to third persons.[4] So if each contribute a stock of merchandise and are to share equally the expenses and profits, though one is to pass for proprietor and the other for salesman.[5]

Where one is to furnish a mill and the other the hands to work it, the latter to be superintendent, the profits to be divided, it was held to be a partnership on the ground that the latter in furnishing the hands furnished part of the capital stock, for that consists of the mill and the hands.[6] One who receives money from another to in-

439; and see Chapman *v.* Eames, 67 Me. 452.

[1] Ward *v.* Thompson, 22 How. 330, aff'g Newb. 95.

[2] Yeoman *v.* Lasley, 40 Oh. St. 190; Hulett *v.* Fairbanks, 40 id. 233; Canada *v.* Barksdale, 76 Va. 899; Brinkley *v.* Harkins, 48 Tex. 225; Russell *v.* Green, 10 Conn. 269, of lumber so bought.

[3] Fisher *v.* Sweet, 67 Cal. 228.

[4] Perry *v.* Butt, 14 Ga. 699.

[5] Marks *v.* Stein, 11 La. Ann. 509; and see Everitt *v.* Chapman, 6 Conn. 347.

[6] Sankey *v.* Columbus Iron Works, 44 Ga. 228. So if one furnishes the mill and the other the timber; for there is a community of interest in the sawed lumber. Jones *v.* McMichael, 12 Rich. L. 176.

vest on real estate in joint account was called a partner, since the land is held for both.[1] And so where G. represented that he knew where a railroad was to run, but had no money, and R. furnished the money, G. to buy land to be held by a third person in trust for both, and both to have an equal interest in them, this is a partnership in the lands, so that a loss by depreciation, the railroad not having been made there, must be equally borne.[2]

Where proprietors of a factory associate themselves to manufacture a commodity, assigning to each specific departments of duty and providing that each shall receive a stated salary, but saying nothing about either profit or loss, it is a partnership *inter se.*[3]

An agreement between A. and B. that B. should furnish a vessel and cargo, and A. should take charge and prosecute a voyage at monthly wages of $50 and one-fifth interest in the voyage and should furnish $1,000, A. acting on letters of instruction from B., which stated "for your services you are to receive $50 per month and one-fifth interest in the cargo," was held to be a partnership and not an employment, for there was a joint interest in the capital invested in a common enterprise. There was also additional evidence that B. kept the accounts of all the voyages in a continuous partnership account, which A. knew, which tended to show that the interest in the profits was a common interest. Hence, it was held that A. could not sue B. at law.[4]

So an agreement to cut and store ice for sale and divide the profits, deducting expenses, constitutes a partnership *inter se*, so that a sale by some of the partners is valid.[5] And agents of a company paid by a percentage on its sales, who agree to divide the percentage between them and make purchases in their joint names, and who paid bills rendered them in the joint name, are partners *inter se*, so that a suit for an accounting by one against the other will lie.[6]

By an agreement between W. and R., W. was to carry on a business in the name of the X. company, furnish a certain capital and let the company have the use of his coal land, paying him a certain rate per ton for coal mined and interest on the capital of

[1] Mill *v.* Sheibly, 68 Ga. 556.

[2] Richards *v.* Grinnell, 63 Iowa, 44; 50 Am. Rep. 727.

[3] Doak *v.* Swann, 8 Me. 170; affirmed in Barrett *v.* Swann, 17 id. 180 (22 Am. Dec. 223).

[4] Julio *v.* Ingalls, 1 Allen, 41.

[5] Staples *v.* Sprague, 75 Me. 458.

[6] Heise *v.* Barth, 40 Md. 259.

the company, and R. was to manage the business and "in payment for his services" receive a certain annual sum and half the net profits and let to the company his apparatus, trade-marks and patents. Annual settlements were to be made and all sums due R. paid or credited to him on interest. This was held to be a partnership *inter se* and not an agency, and therefore R. could not sue W. at law for excluding him from the management and refusal to make settlements on business continued by W. with R.'s tools, apparatus, etc.[1]

An oral agreement between A. and B. that A. should contribute his inchoate interest in an unpatented machine, and B. money to obtain a patent, and both their services to make it remunerative, is an agreement of partnership and not for the sale of goods under the statute of frauds, and the patent when obtained is partnership property, being the result of joint contribution, in whosesoever name it is taken out.[2]

Where B. was to furnish marble and A. to pay him half the cost of it, B. to board A., and both to contribute skill and labor in manufacturing it, and the proceeds and avails to be equally divided, they are partners *inter se* and as to third persons, and both liable for a purchase by one of them from a seller not aware of the existence of the firm.[3]

M. and H. were to purchase pork on joint account and in their joint names, and M. is to furnish all money necessary in excess of advances obtainable on the pork and is to receive back his advances with interest, the balance to be divided; this is a partnership *inter se* and not a loan; hence M. has a priority in the assets over H.'s individual creditors.[4]

Under a contract between W. and B., by which W. leased to B. his factory with tools and machinery, and B. agreed to use it so as to afford the greatest profit to the parties, manufacture, give all his time to it, furnish all necessary capital and labor and keep books open to W.'s inspection, take an account at stated periods and divide profits after payment of expenses, B. to have also a salary and interest on any capital over $20,000, the court held a suit for an accounting and dissolution was maintainable, the parties being

[1] Ryder v. Wilcox, 103 Mass. 24.

[2] Somerby v. Buntin, 118 Mass. 279.

[3] Griffith v. Buffum, 22 Vt. 181; 54 Am. Dec. 64.

[4] Miller v. Price, 20 Wis. 117.

partners because there was a common interest in the capital and profits.[1]

An agreement to buy an interest in a business with a view to carry it on together, sharing profits, is an agreement of partnership.[2]

§ 33. ——illustrations of partnership as to third persons.[3] A. & B. having a contract to build a railroad sold an interest in it to C. & D., the latter to be equally interested in the profits, benefits and advantages of the contract, it being the intention to make them in all respects equal with A. & B., the business to be in the name of A. & B. This is a partnership *inter se* and as to third persons, because it conveys an interest in the business itself and not in the profits, as compensation or as interest on a loan, and C. & D. are liable on a note for supplies signed A. & B.[4]

Tyler, owning a tin shop, agreed with D., a plumber, to work together, Tyler to have ten per cent. of the profits on his stock and the balance of profits to be equally divided, the concern being continued in Tyler's name; annual balances being struck and D.'s share being carried to his credit; both giving their entire time. This was held to be a partnership, as being an agreement to share profit and loss. It was certainly a joint business, and, hence, inferentially an agreement to share profit and loss.[5]

Where D. & Co. were to furnish a stock of goods and shop fixtures valued at $4,000, and B. was to manage the business, pay interest on half the valuation and pay rent for the store, and divide the profits equally, this was held to constitute a partnership as to third persons, although there was a prior understanding that B.'s share of profits was in lieu of a salary.[6]

Where L. was owner and publisher of the "Commercial Catalogue," and being about to begin the canvass for its third number, A., a tailor, agreed to pay and paid to the business $400, L. to give A. the orders he received, and the profits, deducting all expenses, to be shared equally. They are partners as to third persons.[7]

1 Wood *v.* Beath, 23 Wis. 254.

2 Goddard *v.* Pratt, 16 Pick. 412, 426; Pinkerton *v.* Ross, 33 Up. Can. Q. B. 508; Botham *v.* Keefer, 2 Ont. App. 595; Plumer *v.* Lord, 7 Allen, 481; Tyler *v.* Scott, 45 Vt. 261; Voorhees *v.* Jones, 29 N. J. L. 270.

3 Many of these are undoubtedly true partnerships, but I classify them according to the facts.

4 Voorhees *v.* Jones, 29 N. J. L. 270.

5 Tyler *v.* Scott, 45 Vt. 261.

6 Brigham *v.* Clark, 100 Mass. 430.

7 Pettee *v.* Appleton, 114 Mass. 114.

H. & L., a manufacturing firm, agreed with A. & B. to form a joint stock company of the establishment and divide the capital among the four; and, as A. & B. advanced money for immediate use, it was agreed, in consideration thereof, that they should share in the profits from that date. The joint stock company was not organized for nine months, the business in the meantime being in the name of H. & L.; A. & B., who were non-residents, not interfering. A. & B. were held to be partners, and liable for debts incurred thereafter, for they shared the profits as profits. Here A. & B. each put in $1,000.[1]

A. and B. each agreed to contribute distinct stocks of goods, B. to carry on business with them in his store and the net income to be divided. This is a partnership as to third persons and not an employment, because B. furnishes the store and adds to the stock; hence A. is liable as partner for the price of goods purchased by B., although the secret agreement avoided common ownership in the stock and personal liability for engagements.[2]

A. contributed a foundry at a rental and furnished the capital; B. contributed his services and the use of his patents, agreeing that at the close an account should be taken of the "joint stock and joint liabilities," and an equal division of profits should be made. This shows an intention to create a partnership *inter se*, although the word partnership was nowhere used; but no word denoting an employment, as superintendent, foreman, etc., was used.[3]

Three partners agreed with four others to convey a half interest in the business to the latter and one-half the net profits, the profits to be applied to paying for the latter's shares of capital, and at the end of five years the sellers were to convey to the buyers an eighth each, that is, one-half of the property of the firm, the property to remain in the former in the meantime. This creates a present partnership, being a right to share profits and to use the capital with an inchoate title in it.[4]

Where one hands money to another to buy corn, not as a loan but for half the corn, the other to sell it all in his own name and return the money and half the profits, it was held to be a partnership.[5]

[1] Citizens' Bank *v.* Hine, 49 Conn. 236.

[2] Bromley *v.* Elliot, 38 N. H. 287.

[3] Van Kuren *v.* Trenton Locomotive & Mach. Mfg. Co. 13 N. J. Eq. 302.

[4] Vassar *v.* Camp, 14 Barb. 341; affirmed on other grounds in 11 N. Y. 441.

[5] Wilkes *v.* Clark, 1 Dev. L. 178.

A contract was held to constitute a partnership *inter se* and as to third persons, and not a hiring, where A., B. and C. agree to take charge of X. and Y.'s logging camps, to be started when the latter should direct, hire men to run them and cut and run all the logs they could get out during the season, X. and Y. to pay all stumpage and pay for all hired help, teams, supplies and expenses in getting the logs to market; X. and Y. to sell the logs, and, after deducting money paid out, the balance and the teams and supplies left over to be divided, the share of A., B. and C. to be full compensation for their work and labor. The title to the property was in all jointly and there was communion of profits, for the teams and supplies were to be divided. The power reserved in X. and Y. to sell the logs does not destroy the legal effect of the contract, and X. and Y. are liable with A., B. and C. on the latter's contracts for supplies.[1]

P. and L. agreed to join in raising a sunken steamer, L. to furnish the machinery and P. the labor, money and other appliances, L. to sell the material saved and divide proceeds after repaying P. his advances. This was held a partnership *inter se* and as to third persons.[2]

S. was appointed sutler of a regiment, and D. agreed with him to furnish the capital and procure a stock of goods for the business, S. to carry on the business, and the profits, after repaying D.'s advances, to be divided. S. carried on the business in his own name, and not as agent of D., and was held liable to third persons as partner for subsequent purchases, because his interest in the profits is a right to receive and retain one-half of the profits; but here S., in contributing the appointment of the office, certainly contributed part of the capital.[3]

But where L. had a contract to furnish timber for a United States navy yard, and, having no money, it was agreed that plaintiff should furnish him with funds and he should go to Florida, purchase, load and ship timber, consigning it to the plaintiff for delivery, and plaintiff should receive the money from the United States authorities, and the profits should be divided, this was said not to be a partnership, but to be like mariners on a whaling voyage paid from a share of the cargo, or freighters dividing the profits of a voyage.[4]

[1] Upham *v.* Hewitt, 42 Wis. 85.

[2] Lynch *v.* Thompson, 61 Miss. 354.

[3] Appleton *v.* Smith, 24 Wis. 331.

[4] Rice *v.* Austin, 17 Mass. 197, 206. In Cumpston *v.* McNair, 1 Wend. 457, two persons jointly owning salt

§ 34. **Where one furnishes all the capital.**— Where there is no joint interest in the capital, the intention of the parties is more difficult to arrive at, and there is a proportionately greater tendency in the courts to disagree and to decide so as to avoid a hardship rather than to ascertain and apply a logical test.

Thus, if A. furnishes B. money to enable him to conduct an enterprise or prosecute a business, and B. has creditors whose claims have arisen independently of the business, if A. is not a partner, the goods bought by B. with A.'s money, being B.'s, are liable for his individual debts; but if A. is a partner, B.'s interest in the goods being only his share of surplus after payment of partnership debts, including any balance due A., A. is protected against B.'s individual creditors. Hence a person may sometimes prefer to be a partner rather than a lender, and the courts may, owing to the hardship of such cases, find he was partner on insufficient evidence.

And so, if A. furnishes all the money, goods or other property, and B. all the services, on a division of profits, on a question of the degree of fidelity each owes the other, the courts would be inclined to hold them to be partners, and in an action or suit by one against the other to obtain his share of the results, if relief could be granted nearly equally well in a court of law or in chancery, a court might readily sustain the jurisdiction by finding there was or was not a partnership. These and other readily occurring considerations account for and render probable some want of harmony in the authorities.

§ 35. **—— if the investment is on joint account it is a partnership.** Although one partner has furnished all the capital, if the business or enterprise appears to be owned by both jointly, a communion of profits as partners rather than a sharing of them as compensation will naturally be

agreed that one should take it to market, sell, and apply the proceeds to a joint debt. This was held a partnership, and a note by one in the name of both to defray transportation charges was held to bind both. This would surely not be called a partnership now.

considered to result, or, in other words, both are principals. This rule is, however, imperfect, since the difficulty sometimes arises to determine whether the business is owned by both, and since joint ownership may be inferred as a consequence quite as well as a cause of sharing profits as partners. The general rule in such cases of doubt is that the parties are to be treated as partners, unless the contrary is shown; that is, they will be supposed to have desired to obtain the benefit of a partnership and to share the chances together where they have omitted to show a contrary intention.[1]

Thus, Gray, owning a factory, contributed it at a rent and agreed to supply all necessary funds. Greenham was to work it, to have "full and absolute control," to employ and dismiss hands, and was not to enter any other trade. He was to have for his "management" £150 per annum and one-fifth of the profits. Nothing was said as to losses, nor was the word "partner" used in the contract. Gray discharged Greenham for alleged misconduct, claiming he was an employee only. They were held to be partners. The word management was construed not to show a relation of master and servant, but to relate to a managing partner. The great powers of control and the use of a firm name were decisive. The cases of hiring were called exceptional in the sense that a contract to share profits is presumably one of partnership.[2] And where E. was to furnish a stock of merchandise and put it in H.'s salesroom, H. to sell at retail, pay E. all proceeds and be responsible for the safety of the goods, all the expenses to be paid out of the profits and the net income equally divided, this was held to be a true partnership because there was a communion of profits.[3]

Where A., B. and C. made an agreement for an adventure in Texas, A. and B. to furnish the capital, B. and C. to go to Texas with the goods, C. to travel about there and sell, B. to receive a

[1] Per JESSEL, M. R. in Pooley *v.* Driver, 5 Ch. D. 458; Greenham *v.* Gray, 4 Irish Com. L. 501; Lockwood *v.* Doane, 107 Ill. 235; Ryder *v.* Wilcox, 103 Mass. 24, 27; *Re* Francis, 2 Sawy. 286; 7 Bankr. Reg. 359; Cothran *v.* Marmaduke, 60 Tex. 370.

[2] Greenham *v.* Gray, 4 Irish Com. L. 501.

[3] Bigelow *v.* Eliot, 1 Cliff. 28.

monthly sum for services, and C. one-fifth of the profits for services and four-fifths to be divided between A. and B., this was held to be a partnership *inter se*, although nothing is said about sharing losses. All are principals, although C. is paid for services; yet so is B., who is confessedly a partner.[1]

Where R. furnishes L. with $254, which L. agrees to invest in cattle, feed them, and in a year sell them, the cattle to belong to R. until the money is repaid, profits to be equally divided; L. guarantying that R.'s profits shall not be less than twenty per cent., this was held to be a true partnership in the profits and not a cover for a usurious transaction, and a suit for an accounting lies between them.[2]

If one furnishes funds and the other services and skill for a trade or operation, profits to be shared, both are liable for the price of goods sold to be used in the business.[3] Where, by an agreement between L. and R., R. was to furnish the capital and W. to go to Virginia to plant and buy oysters to be sent in R.'s vessels to R. in New York, each to have half the net profits, they are partners *inter se*, and R. can maintain a suit for an accounting against W.[4] Where A. contributes services in collecting and buying hogs and cattle, and B. furnishes the capital, profits to be divided, nothing being said about losses, there is a community of profits and therefore a partnership, and A. cannot sue B. at law for his share.[5]

B. advanced $20,000 to H. to invest in the purchase and sale of cotton goods, H. to attend to business, and, after repaying the money, divide the profits equally. Real estate was bought with part of the proceeds and the title taken in H.'s name. There was held to be a partnership *inter se*, and a loss must fall upon both.[6] So where S. gave N. $300 to buy sheep, S. to have half the profits, and if there were losses he was to have no interest, this is a partnership *inter se*, not merely in the profits, but in the $300.[7]

Where L. agreed to lease his saw-mill for eleven months to W. and T., and to advance $1,000 to make improvements, and to bear one-third of the expenses of running it above that, W. and T. to

[1] Bucknam *v.* Barnum, 15 Conn. 67.

[2] Robbins *v.* Laswell, 27 Ill. 365.

[3] Bearce *v.* Washburn, 43 Me. 564; Wright *v.* Davidson, 13 Minn. 449.

[4] Ruckman *v.* Decker, 23 N. J. Eq. 283. The case was reversed in 28 N. J. Eq. 614, but this point is not affected thereby.

[5] Lengle *v.* Smith, 48 Mo. 276.

[6] Brinkley *v.* Harkins, 48 Tex. 225.

[7] Newbrau *v.* Snider, 1 W. Va. 153.

make certain repairs and to run the mill, the lumber to be shipped to a person in Chicago designated by L., and the proceeds to be applied seventy-five cents per thousand feet to L. for rent, $1.75 per thousand feet to W. and T. for expense of manufacturing, then to L. for advances for logs to stock the mill W. and T. were to pay L. one-fourth of the net proceeds out of the balance. L., W. and T. were held partners and jointly liable for the repairs to the mill because jointly interested in the lumber and in the profits.[1]

An agreement between two that each should furnish a horse to break land, one to pay all expenses, the other to do all the work, money earned to be equally divided, was held a partnership *inter se;* as was also an agreement that one should furnish a horse and boy for a corn-shelling machine, the other to go around with the machine and do the work, earnings and expenses to be shared alike. And under both agreements a suit for accounting lies.[2]

Two merchants agreed to open a store, one to put in all the stock, the other to superintend, and receive one-third of the profits "realized;" this is a partnership *inter se;* realized means profits deducting losses, and a loss by fire is not different from any other loss and must be deducted before estimating profits.[3]

Two persons agree to carry on a business, one to give his labor, the other all materials and also provisions for the former's family, profits, less cost of materials and provisions, to be divided; this is a partnership; therefore the former must be a co-plaintiff in an action for work and labor. The reason assigned is that he looked to the profits as such. Probably the better reason is that both owned the business.[4]

§ 36. —— **no co-ownership of the business.**— On the other hand, if it clearly appears that the parties are not joint owners of the business, or that one alone is principal and the other receives his share as compensation, it is not a partnership. Numerous examples of this will be found below in treating of profits as compensation, and the case of a subpartnership hereafter examined is a further instance.

Where H. & J. agreed to buy of D. all the whisky made by him, and to allow him half the profits over the price paid, D. is not a

[1] Whitney *v.* Ludington, 17 Wis. 140.

[2] Gilbank *v.* Stephenson, 31 Wis. 592.

[3] Simpson *v.* Feltz, 1 McCord, Ch. 213; 16 Am. Dec. 602.

[4] Holt *v.* Kernodle, 4 Ired. L. 199.

partner of H. & L., and hence not liable for barrels ordered by D., for the whisky. The half profits is only an additional price for the whisky.[1]

Plaintiffs placed money in the hands of defendants, who were partners in the purchase of prize claims, to be invested in them and collected, and the net profits to be divided. This is not a partnership, for the plaintiff was to be owner of the claims, but is an employment.[2] Where B. agreed that on all claims against the United States, which L. should procure to be put in B.'s hands, B. will pay him twenty per cent. as fast as the claims were paid, there is no partnership, for there is no joint and mutual interest in the business, and an action at law for L.'s share lies.[3]

Ole Bull and S., a music dealer, agreed to go America on a musical tour, Ole Bull to play the violin at concerts to be arranged for by S.; each to pay his own traveling expenses, and S. to receive one-third the net proceeds. Ole Bull discharged S. and employed another agent. S. can sue him in *assumpsit*.[4]

A. agreed with two executors to cut logs from the decedent's lands, run them to market, sell and divide profits after repayment of money advanced for the purpose by one of the executors. This is a contract of hire and A. has no leviable interest in the logs.[5] So a laborer paid under a written contract a share of the net profits of a business, after deducting a sum as interest on the capital, and having no other interest, is not a partner *inter se*.[6]

The owner of several farms agreed that three of his sons and a son-in-law could work them for five years, he and they furnishing what teams and tools they had, each to have his living out of the products, and at the end of five years they to have one-half his personal property and half the product of the farms, and if they were faithful he was to deed to them one-half the farms. This is not a partnership *inter se*. Hence the representative of the son-in-law, who died shortly after, never having been able to work, is not entitled to an accounting. The owner evidently intended to keep the title of the real and personal property during the term, and the services were a condition precedent to the conveyances.[7]

Where three individuals, H., N. and G., contracted with the U. S.

[1] Donley v. Hall, 5 Bush, 549.
[2] Prouty v. Swift, 51 N. Y. 594.
[3] Logie v. Black, 24 W. Va. 1.
[4] Bull v. Schuberth, 2 Md. 38.
[5] Ford v. Smith, 27 Wis. 261. See Dwinel v. Stone, 30 Me. 384 (§ 37).
[6] Atherton v. Tilton, 44 N. H. 452.
[7] Chase v. Barrett, 4 Paige, 148.

R. Co., reciting that they contemplated assuming control of the company if satisfied that its business was profitable, and to determine this, agreeing to advance it money to enable it to fill such of its orders for goods as these parties approved of, the company agreeing to assign the orders to said parties, who were to collect, reimburse themselves and retain a proportion of the profits, not less than ten per cent. of the face of the order, this was ruled not to be a partnership.[1]

A contract providing that F. shall send to S. hides for the purpose of being tanned, S. not to work for any other party, and to receive for his services a part of the profits, is not a partnership *inter se*. The expressions shall send leather, shall not work for any other party, shall be paid for services, all show that a partnership was not intended.[2]

§ 37. Control or power of disposition as a test.— Where from the relation of the parties it appears that there is no right of control over the property or profits, or no power of disposition in one of them, although he is to share the profits, this is not consistent with a partnership, and hence the intention not to become partners will be inferred.[3]

In Dwinel *v.* Stone,[4] A. owned logs and B. was to cut them on a share of profits; this is not a partnership. The reason given by the court, however, is open to very great dispute, namely, that there can be no profit or loss separate from a joint interest in the capital; here the logs which are the capital belonged wholly to A.

In Braley *v.* Goddard,[5] G., having the sole right to cut timber from certain lands, made an agreement with B., whereby G. was to furnish teams, money and supplies, and B. was to cut the timber and take it to market, giving his whole time to the work, and the profits were to be divided. If B. desired to sell his share of the lumber he could do so, G. approving the price and the buyer, but

[1] Cassidy *v.* Hall, 97 N. Y., 159.

[2] Stevens *v.* Faucet, 24 Ill. 483. See the same partnership, Fawcett *v.* Osborn, 32 id. 411.

[3] Dwinel *v.* Stone, 30 Me. 384; Braley *v.* Goddard, 49 id. 115; Tharp *v.* Marsh, 40 Miss. 158; Donnell *v.* Harshe, 67 Mo. 170; Musser *v.* Brink, 68 Mo. 242; 80 id. 350; Ashby *v.* Shaw, 82 Mo. 76; Newberger *v.* Fields, 23 Mo. App. 631; Conklin *v.* Barton, 43 Barb. 435; Voorhees *v.* Jones, 29 N. J. L. 270; Kellogg *v.* Griswold, 12 Vt. 291; Clark *v.* Smith, 52 id. 529; Woodward *v.* Cowing, 41 Me. 9 (*dictum*).

[4] 30 Me. 384.

[5] 49 Me. 115.

G. was entitled to take it at the price. This was held not to constitute a partnership *inter se*, because B. did not have a partner's right to dispose of the whole; hence B. can sue G. at law for his services.

In Clark *v.* Smith,[1] C. owned a mill, farm and wood lot; F. agreed with him to cut the timber, haul it to the mill and manufacture it into chair backs or such other goods as C. directed, and carry on the farm in connection with the mill; C. to furnish lumber, market the goods and make collections. Taxes on the mill and farm, expenses of hauling, freight and proceeds to be equally divided. It was held that F. was not a partner, because he had no control of the products, voice in the sale nor share or specific interest in the profits, but merely a share in the proceeds without considering the raw material as anything; and this was as compensation and not as profits, and hence had no attachable interest in the product.

§ 38. And on the other hand, the existence of a power of disposition in each has been held sufficient to constitute a partnership, even though the gross receipts were, in the absence of such disposition, to be divided.[2]

In Moore *v.* Davis,[3] Davis, in order to realize an estate as a building speculation, agreed with Moore, a practical land agent and surveyor, to pay him one-half the profits, deducting purchase money, interest on it, legal charges, auctioneer's charges, etc., Moore to allow him one-third of any fees he received from builders and to bear half of any losses; Moore not to require vouchers from or question payments or expenses made by Davis. The agreement not to be "construed as a partnership between us, and only and solely to relate to the above estate," and Moore not to charge Davis' credit in respect thereof without his written consent. Davis having discharged Moore for alleged neglect, Moore brought suit for an account of profits, and it was held to be a partnership and not a hiring. That Moore was to bring in one-third of his fees as a circumstance. The agreement to share profit and loss is "a strong feature in favor of a partnership." The words negativing a partship negative a general partnership, and, unless they admit a partnership in the estate, would be unmeaning; and the clause

[1] 52 Vt. 529.

[2] Autrey *v.* Frieze, 59 Ala. 587; Farmers' Ins. Co. *v.* Ross, 29 Oh. St. 429; and see Whitney *v.* Ludington, 17 Wis. 140.

[3] 11 Ch. D. 261.

forbidding Moore to charge Davis' credit suppose the existence of a partnership, for he could not charge Davis' credit as an employee, and are equivalent to stating that Davis, as managing partner, was to have control. The fact that payments were contemplated out of Moore's pocket would be most unusual, unless he were a partner.

The owner of a vessel and the captain agreed to pay part of the expenses and divide the freight earned, with power in the captain to invest the proceeds on joint account. It was held that the owner's consent having been deemed necessary to investing the freight earned in merchandise, showed that he owned part of the profits, and that it was, therefore, not the measure of an amount to be paid for the hire of the schooner, but was profits proper and the arrangement a partnership.[1]

An agreement was made by which H. is to look up and bid in desirable lands at tax sales, and E. is to furnish the money. Both were to control the subsequent disposition of them, and the profits were to be divided equally after repaying E. out of the first proceeds of sales whatever was due him on preceding purchases. Here is a course of dealing as distinguished from particular purchases, a right in H. to use his discretion in selecting and buying and equal power in selling, and this is a partnership; both are agents of the firm. That the land is bought in E.'s name is immaterial.[2]

If there is otherwise a true partnership, however, as in a joint adventure with participation of profit and loss, the fact that by the contract one party is to have control of the product for sale will not prevent it being such.[3]

§ 39. Contracts to manufacture in which each is principal.—There is no reason why a person owning or purchasing raw material may not procure the services of another as an independent contractor to manufacture it into goods, and deliver the products to the original owner for disposition, and receive his compensation in a share of the avails, without the parties being partners; although each incurs certain expenses, and hence incidentally the terms profit and loss are applicable, yet these are cases of compensation or of division of gross receipts.[4]

[1] Cox *v.* Delano, 3 Dev. L. 89.

[2] Hunt *v.* Erikson, 57 Mich. 330.

[3] Meador *v.* Hughes, 14 Bush, 652.

[4] Kilshaw *v.* Jukes, 3 Best & Smith, 847 (§ 20), is somewhat of this kind.

Thus, in Loomis *v.* Marshall,[1] M. agreed to furnish a supply of wool to F.'s factory for two years; F. to make it into cloth, devoting the entire use of the factory thereto, and the net avails, less cost of sale, was to be divided, and the cost of the warp in making satinets, and the cost of insurance, was to be shared. M. was held not to be a partner of F. and therefore not liable for work and labor done in the factory. The court distinguished between sharing profits and avails; thus, if M. had purchased the wool at a very low price he would have made more than F., and he might make and F. lose.

So where A. owned a marble quarry, and B. agreed to erect a mill to manufacture it, A. to quarry and ship the marble to B.'s mill, paying half the cost of transportation, B. to manufacture the marble, sell it, collect the price and divide avails equally, this was held not to be a partnership *inter se;* because there was no community of profit and loss, for one might gain and the other lose at the same time.[2]

Plaintiffs agreed to purchase a certain quantity of hides, and deliver them at H.'s tannery, and he was to tan them at his own expense; after which plaintiffs were to sell them at their expense and give H. one-half the proceeds over the original cost. This was held not to constitute a partnership *inter se*, but is a mere compensation to H., and H. has no ownership in the hides and is liable if he convert them. And a subsequent agreement that each could use such leather as he desired does not change the relation.[3]

In a similar case, A. was to furnish stock, B. to manufacture it into cloth and deliver the cloth to A., and A. was to pay him a certain price per yard and one-third of the net profits. They were held not to be partners *inter se*, nor as to third persons; and, therefore, A. is not liable to one who sold dye-stuffs to B. for the purpose of the manufacture, though he had given credit to both. The court say that there is no difference between sharing gross and net profits, and that B. had no specific lien or preference in payment over other creditors of A.[4]

A. was to furnish wool, B. to make it into hat bodies without charge for time or expenses, and A. to peddle or sell the same with-

[1] 12 Conn. 69; 30 Am. Dec. 596. See, also, Kellogg *v.* Griswold, 12 Vt. 291; also, Fawcett *v.* Osborn, 32 Ill. 411, and Stevens *v.* Faucet, 24 id. 483 (§ 29), where the agreement was to share profit and loss.

[2] Flint *v.* Marble Co. 53 Vt. 669.

[3] Clement *v.* Hadlock, 13 N. H. 185.

[4] Denny *v.* Cabot, 6 Met. 82.

out charge for time or expenses; each to pay half the expense of extra work, wool and wear of machinery, and the proceeds, less cost of work, to be divided. This was held not to be a partnership; the court saying that a joint interest in gross earnings, but not in loss or net profits, is not a partnership.[1]

E. & K. were to furnish B. with money up to $10,000 to enable him to make horse rakes, B. to sell them and pay all proceeds to E. & K. until the advances were refunded. They are not partners, and E. & K. are therefore not liable to one who furnished B. with material, though he had charged them all.[2]

J. & Co. agreed to furnish materials, F. to manufacture them, T. & Co. to sell and pay him the profits, less cost of material and ten per cent. on the sales; held, they are not partners, and the articles manufactured in A.'s shop are not liable to attachment by his creditors, but are the property of J. & Co.[3]

B. was to furnish wool to R. for one year, R. to work it into satinets, finding and paying for the warp himself; B. to have the sole direction of selling, and each paying half the charges; B. to pay R. forty per cent. of the sales of the satinets. B. is not a partner of R. and therefore not liable for the warps furnished to B. B.'s object was to get his wool worked into cloth, and R. had no interest in the profits except as regulating his compensation. This case is like Loomis *v.* Marshall, 12 Conn. 69, *supra*, except that there the warps were at joint expense.[4]

A. agreed to furnish lumber for three years, B. to manufacture it into doors and blinds, sell them, and divide profits after paying freight and expenses; this is not a partnership *inter se*, but a mere contract for manufacture, in which each party is a principal.[5]

§ **40. —— unless the profit is a joint fund.**—But even here an intention to regard the profits as a fund for all with a lien upon its disposition will be evidence of a partnership. Whether the contract is to be construed as providing such a fund depends often upon the length of the chancellor's foot, for the cases are not reconcilable.

Thus, where W., the owner of a zinc mine, agreed with M. S. & Co. to furnish them two thousand tons of ore per year for three

[1] Mason *v.* Potter, 26 Vt. 722.

[2] Eshleman *v.* Harnish, 76 Pa. St. 97.

[3] Judson *v.* Adams, 8 Cush. 556.

[4] Turner *v.* Bissell, 14 Pick. 192.

[5] Hitchings *v.* Ellis, 12 Gray, 449.

years at $10 per ton, they to provide suitable building and machinery, to be paid for out of the profits, and to convert the ore into paints, the profits to be divided, this was held to be a partnership *inter se.*[1]

And so, per *contra*, where G. furnished a mill and M. the corn to be ground, M. to have a certain amount of meal on each car load ground, in addition to the price of the corn he furnished, out of the profits, G. was held not to be a partner with M. as to third persons who sold the corn to M., because he had no interest in the profits while they were accruing, and the contract is one for compensation only.[2]

F. Bros., wholesale dry goods dealers, agreed to furnish to M. all the goods and raw material necessary to make clothing to enable him to carry on a retail business in ready-made clothing, M. to supply all other goods necessary for the business and give all his time to it, F. Bros. to be allowed in settlement the regular wholesale prices for what they furnished, and M. to receive the net profits beyond that, he paying all expenses. F. Bros. purchased the building whereon the business was, and that was charged in the account and paid by M. in the settlements; afterwards F. Bros. stopped the business by taking entire and exclusive possession of the whole concern. In a suit by M. against F. Bros. they were held to be partners because there was a community of interest in the profits and losses, although the arrangement seemed designed to escape being partners.[3]

Where L. hired a shop wherein the same business had formerly been carried on, and bought a stock of goods in his own name and permitted W. to carry on business with them, W. to pay all expenses and return to L. the value of all he put in and half of all he made over his own expenses, L. to have the right to take possession at any time to secure himself, L. is liable as a partner to a third person who sold goods to W. to carry on the business in reliance on a belief that L. was a partner. The court bases the decision on the doctrine that L. has an interest in the profits as profits, and a lien on the whole as profits for his share. This doctrine would make them true partners, that is, *inter se.*[4]

St. G. advanced money to pay land, D. to make all sales, and

[1] Wadsworth *v.* Manning, 4 Md. 59.

[2] Kelly *v.* Gaines, 24 Mo. App. 506.

[3] Meyers *v.* Field, 37 Mo. 434.

[4] Pratt *v.* Langdon, 97 Mass. 97; 12 Allen, 546.

after return of the purchase money and paying expenses and costs, the net profits were to be divided. This contract is consistent with either a partnership or an employment. The referee having found it to be the latter, the court affirmed the finding.[1]

§ 41. Services in procuring sales.— It frequently happens that the owner of land or goods, desiring to get them into market and sold, will contract to pay one who agrees to do this a certain per cent. of the net proceeds. These contracts are construed as employments and not as partnerships.

Thus, where the owner of hay procured defendant to take it to market, sell it at not less than a certain price, he to receive a certain compensation and half the excess, this is not a partnership *inter se.*[2]

Two persons, having a contract to build a road, agreed with M. that if he would advance a certain sum and help build the road they would let him have a share in the profits proportionate to the help he afforded, one-half to be taken from each contractor's share. This is a mode of compensation and not a partnership, and M. can sue in *assumpsit* for the amount due him.[3]

So if the owner of land warrants agrees with a person that the latter shall enter, locate and survey them for a share of the land or profit, this is not a partnership.[4]

D. had N. buy cattle in his name, N. to slaughter them and sell the meat, and pay D. out of the proceeds the cost and one-fourth of a cent per pound, and N. to have the balance. Held not a partnership; and whether the cattle are subject to the claims of D.'s creditors depends on whether the money was loaned by D. to N., or N. was employed as D.'s agent, which is a question for the jury.[5]

A contractor to carry the mails agreed with a subcontractor that the latter should perform half the service and be entitled to half the profits. This was held to be a partnership.[6]

§ 42. Arrangement to collect a debt.— Where the object of an agreement is to collect a debt due from one party to another, this fact will necessarily go far to show that no inten-

[1] Darrow *v.* St. George, 8 Colorado, 592.

[2] Morrison *v.* Cole, 30 Mich. 102.

[3] Muzzy *v.* Whitney, 10 Johns. 226.

[4] McArthur *v.* Ladd, 5 Oh. 514; and Ellsworth *v.* Pomeroy, 26 Ind. 158.

[5] Dale *v.* Pierce, 85 Pa. 474.

[6] Wilkinson *v.* Jett, 7 Leigh (Va.), 115; 30 Am. Dec. 493.

tion to become partners existed. Their relation becomes analogous to that of employer and employee, or lender and borrower, or landlord and tenant, by which one is to bear all the loss, and it is not that of joint principals and agents.[1]

Thus, mill-owners indebted to J., in order to pay the debt made an agreement with him whereby J. was to furnish wheat. The mill-owners were to make it into flour, and all flour, except a part sold at the mill in order to carry it on, was to be sold to pay J. the cost of the wheat and two and one-half per cent., and the balance to liquidate the debt, and the surplus to the mill-owners. This is not a partnership, but a compensation for the use of the mill, and a levy of execution upon the wheat by creditors of the mill-owners is null as against J.[2]

D. owned a mill and was indebted to B. B. agreed to assist in running the mill, furnish the stock and support D.'s family; D. and his sons to operate the mill, B. to sell the lumber, and after deducting the means furnished by him and his compensation, to apply the surplus to the debt. This was held not to be a partnership *inter se.*[3]

Parties to whom B. was indebted were to furnish him with funds to buy lumber, ship it to them and pay him a compensation for his services, and apply the rest of the profits to the debt. This is not a partnership, for there is no community of profit and loss, and B.'s creditors cannot levy upon the lumber.[4]

So where by the articles of partnership the share of profits of one partner was to be paid to his creditor, who had sold him the goods constituting his contribution to the business, this does not make the creditor a partner and he can sue the firm at law.[5]

If, however, the creditors agree to advance money to continue the debtor's business for their own profit and to bear losses equally, they are partners as to each other.[6] And where one creditor, with the concurrence of another, obtains from their common debtor all

[1] Cox *v.* Hickman, 8 H. L. 268 (*supra*, § 19).

[2] Johnson *v.* Miller, 16 Oh. 431.

[3] Dils *v.* Bridge, 23 W. Va. 20.

[4] Clark *v.* McKellar, 12 Up. Can. C. P. 562.

[5] Drake *v.* Ramey, 3 Rich. L. (S. Ca.) 37; and see Delaney *v.* Timberlake, 23 Minn. 383, where one partner agreed to pay out of profits the debt owed by a third person to the firm. Such person is not made a partner as sharing profits.

[6] Wills *v.* Simmonds, 51 How. Pr. 48; s. c. 8 Hun, 189.

his stock of goods by making a payment thereon, for the purpose of selling again to reimburse themselves their debt, a loss by decline of prices must be shared by both. This, however, should not be called a partnership between the creditors.[1]

§ 43. Profits as compensation for services.— A person who is to receive a share of the profits as compensation for services as servant, clerk, manager, broker, or any other agent, is not a partner. The only difference between him and any other employee is that his salary or wages is contingent. His connection with the firm is inconsistent with a partnership, for it precludes the rights, duties, powers and liabilities of that relation. In most of the cases cited in the notes, the contract of the parties expressly stated that the share of profits was for services; in others that conclusion was inferred. But whether expressed or inferred, it is clear that the parties are not partners.[2]

[1] Stettauer *v.* Carney. 20 Kan. 474.

[2] Regina *v.* McDonald, 7 Jur. N. S. 1127; 31 L. J. M. C. 67; Geddes *v.* Wallace, 2 Bligh, 270; Pott *v.* Eyton, 3 C. B. 32; Rawlinson *v.* Clark, 15 M. & W. 292; Stocker *v.* Brockelbank, 3 Mac. & G. 250; Ross *v.* Parkyns, L. R. 20 Eq. 331; Berthold *v.* Goldsmith, 24 How. 536; Seymour *v.* Freer, 8 Wall. 202, 215; *Re* Blumenthal, 18 Bankr. Reg. 555; Hazard *v.* Hazard, 1 Story, 371; Einstein *v.* Gourdin, 4 Wood's C. C. 415; Brown *v.* Hicks, 24 Fed. Rep. 811; Shropshire *v.* Shepperd, 3 Ala. 733; Hodges *v.* Dawes, 6 Ala. 215; Moore *v.* Smith, 19 Ala. 774; Dillard *v.* Scruggs, 36 Ala. 670; Randle *v.* State, 49 id. 14; Tayloe *v.* Bush, 75 id. 432; Olmstead *v.* Hill, 2 Ark. 346; Christian *v.* Crocker, 25 Ark. 327; Hanna *v.* Flint, 14 Cal. 73; Darrow *v.* St. George, 8 Colorado, 592; Pond *v.* Cummins, 50 Conn. 372; Sankey *v.* Columbus Iron Works, 44 Ga. 228; Stevens *v.* Faucet, 24 Ill. 483; Porter *v.* Ewing, 24 id. 617; Fawcett *v.* Osborn, 32 id. 411; Burton *v.* Goodspeed, 69 id. 237; Macy *v.* Combs, 15 Ind. 469; Ellsworth *v.* Pomeroy, 26 id. 158; Emmons *v.* Newman, 38 id. 372; Keiser *v.* State, 58 id. 379; Heshion *v.* Julian, 82 Ind. 576; Price *v.* Alexander, 2 G. Greene (Iowa), 427; 52 Am. Dec. 526; Reed *v.* Murphy, 2 G. Greene (Iowa), 574; Ruddick *v.* Otis, 33 Iowa, 402; Holbrook *v.* Oberne, 56 Iowa, 324; Shepard *v.* Pratt, 16 Kan. 209; Heran *v.* Hall, 1 B. Mon. 159; Bulloc *v.* Pailhos, 20 Mart. 172; Cline *v.* Caldwell, 4 La. 137; Taylor *v.* Sotolinger, 6 La. Ann. 154; Hallet *v.* Desban, 14 id. 529; St. Victor *v.* Daubert, 9 La. 314; Miller *v.* Chandler, 29 La. Ann. 88; Chaffraix *v.* Price, id. 176; Maunsell *v.* Willett, 36 id. 322; Halliday *v.* Bridewell, 36 id. 238; Dwinel *v.* Stone, 30 Me. 384; Weems *v.* Stallings, 2 Har. & J. 365; Kerr *v.* Potter, 6 Gill, 404; Bull *v.* Schuberth, 2 Md. 38; Benson *v.* Ketchum, 14 id. 331; Crawford *v.*

Nor are such persons liable as partners to third parties by reason of sharing the profits of the business.[1]

Austin, 34 id. 49; Sangston *v.* Hack, 52 id. 173, 192-3; Reddington *v.* Lanahan, 59 id. 429; Whiting *v.* Leakin, 66 id. 255; Blanchard *v.* Coolidge, 22 Pick. 151; Judson *v.* Adams, 8 Cush. 556; Baxter *v.* Rodman, 3 Pick. 435; Bradley *v.* White, 10 Met. 303; 43 Am. Dec. 435; Denny *v.* Cabot, 6 Met. 82; Buck *v.* Dowley, 16 Gray, 555; Holmes *v.* Old Colony R. R. 5 Gray, 58, 60; Emmons *v.* Westfield Bank, 97 Mass. 230; Haskins *v.* Warren, 115 id. 514; Commonwealth *v.* Bennett, 118 id. 443; Partridge *v.* Kingman, 130 id. 476; Morrison *v.* Cole, 30 Mich. 102; Wiggins *v.* Graham, 51 Mo. 17; State *v.* Donnelly, 9 Mo. App. 519; Gill *v.* Ferris, 82 Mo. 156, 167; Mason *v.* Hackett, 4 Nev. 420; Clement *v.* Hadlock, 13 N. H. 185; Newman *v.* Bean, 21 id. 93; Atherton *v.* Tilton, 44 id. 452; Nutting *v.* Colt, 7 N. J. Eq. 539; Hargrave *v.* Conroy, 19 id. 281; McMahon *v.* O'Donnell, 20 id. 306; Smith *v.* Perry, 29 N. J. L. 74; Voorhees *v.* Jones, 29 id. 270; Muzzy *v.* Whitney, 10 Johns. 226; Vanderburgh *v.* Hull, 20 Wend. 70; Chase *v.* Barrett, 4 Paige, 148; Burckle *v.* Eckart, 1 Den. 337 (aff'd 3 Den. 279; 3 N. Y. 132); Ross *v.* Drinker, 2 Hall, 415; Mohawk R. R. *v.* Niles, 3 Hill, 162; Hodgman *v.* Smith, 13 Barb. 302; Brockway *v.* Burnap, 16 id. 309 (12 id. 347); Clark *v.* Gilbert, 32 id. 576; Conklin *v.* Barton, 43 id. 435; Lamb *v.* Grover, 47 id. 317; Merwin *v.* Playford, 3 Robt. 702; Strong *v.* Place, 4 id. 385 (51 N. Y. 627); Leonard *v.* New York Tel. Co. 41 N. Y. 544; Lewis *v.* Greider, 51 id. 231 (aff. 49 Barb. 605); Osbrey *v.* Reimer, 51 N. Y. 630 (aff. 49 Barb. 265); Prouty *v.* Swift, 51 N. Y. 594; Smith *v.* Bodine, 74 id. 30; Moore *v.* Huntington, 7 Hun, 425; Butler *v.* Finck, 21 id. 210; Beudel *v.* Hettrick, 45 How. Pr. 198; 3 Jones & Sp. 405; McArthur *v.* Ladd, 5 Oh. 514: Johnson *v.* Miller, 16 id. 431; Ditsche *v.* Becker, 6 Phila. 176; Blight *v.* Ewing, 1 Pittsb. 275; Miller *v.* Bartlet, 15 S. & R. 137; Raiguel's Appeal, 80 Pa. St. 234; Dale *v.* Pierce, 85 id. 474; Potter *v.* Moses, 1 R. I. 430; Bentley *v.* Harris, 10 id. 434; Simpson *v.* Feltz, 1 McCord, Ch. 213; Lowry *v.* Brooks, 2 McCord, L. 421; Bartlett *v.* Jones, 2 Strob. L. 471 (47 Am. Dec. 606); Norment *v.* Hull, 1 Humph. 320; Bell *v.* Hare, 12 Heisk. 615; Whitworth *v.* Patterson, 6 Lea, 119, 124; Goode *v.* McCartney, 10 Tex. 193; Bradshaw *v.* Apperson, 36 id. 133; Cothran *v.* Marmaduke, 60 id. 370; Grabenheimer *v.* Rindskoff, 64 id. 49; Boardman *v.* Keeler, 2 Vt. 65; Ambler *v.* Bradley, 6 id. 119; Kellogg *v.* Griswold, 12 id. 291; Stearns *v.* Haven, 16 id. 87; Mason *v.* Potter, 26 id. 722; Bruce *v.* Hastings, 41 id. 380, 384; Clark *v.* Smith, 52 id. 529; Hawkins *v.* McIntire, 45 id. 496; Wilkinson *v.* Jett, 7 Leigh (Va.), 115; 30 Am. Dec. 493; Dils *v.* Bridge, 23 W. Va. 20; Sodiker *v.* Applegate, 24 id. 411; 49 Am. Rep. 252; Ford *v.* Smith, 27 Wis. 261; Nicholaus *v.* Thielges, 50 id. 491; Northern R'y Co. *v.* Patton, 15 Up. Can. C. P. 332.

[1] Hazard *v.* Hazard, 1 Story, 371; Shaw *v.* Galt, 16 Irish Com. L. 357; Berthold *v.* Goldsmith, 24 How. 536; *Re* Francis, 2 Sawy. 286; 7 Bank. Reg. 359; Marsh *v.* Dawes, 3 Biss. 351; Oppenheimer *v.* Clemmons, 18 Fed. Rep. 886; Hodges *v.* Dawes, 6

§ 44. Contrary cases.— There are, however, a few decisions holding that one who participates in the profits, though as compensation merely, is liable as a partner to third persons.[1]

§ 45. Profits as rent.— On the same principles as the foregoing, an indefinite compensation out of profits for the use of property, real or personal, and dependent on the success of the business, is in lieu of rent and does not constitute the owner a partner *inter se*.[2] Nor liable as partner to third

Ala. 215; Loomis *v.* Marshall, 12 Conn. 69; Parker *v.* Fergus, 43 Ill. 437; Burton *v.* Goodspeed, 69 id. 237; Macy *v.* Combs, 15 Ind. 469; Shepard *v.* Pratt, 16 Kan. 209; Hallet *v.* Desban, 14 La. An. 529; Chaffraix *v.* Lafitte, 30 La. An. 631; Turner *v.* Bissell, 14 Pick. 192; Blanchard *v.* Coolidge, 22 id. 151; Denny *v.* Cabot, 6 Met. 82; Bradley *v.* White, 10 id. 303; 43 Am. Dec. 435; Meserve *v.* Andrews, 104 Mass. 360; Partridge *v.* Kingman, 130 id. 476; Hall *v.* Edson, 40 Mich. 651; Wiggins *v.* Graham, 51 Mo. 17, 20; Voorhees *v.* Jones, 29 N. J. Eq. 270; Burckle *v.* Eckhart, 1 Den. 337 (aff'd, 3 N. Y. 132); Fitch *v.* Hall, 25 Barb. 13; Hotchkiss *v.* English, 4 Hun, 369; Butler *v.* Finch, 21 id. 210; Wright *v.* Delaware & Hudson Canal Co. 40 id. 343; Miller *v.* Bartlet, 15 S. & R., 137; Dunham *v.* Rogers, 1 Barr, 255; Edwards *v.* Tracy, 62 Pa. St. 374; Polk *v.* Buchanan, 5 Sneed, 721; Goode *v.* McCartney, 10 Tex. 193; Buzard *v.* First Nat'l B'k (Tex. 1886), 2 S. W. Rep. 54; Bowman *v.* Bailey, 10 Vt. 170.

[1] *Ex parte* Rowlandson, 1 Rose, 92; *Ex parte* Digby, 1 Deac. 341; Withington *v.* Herring, 3 Moo. & P. 30; Miller *v.* Hughes, 1 A. K. Mar. (Ky.) 181; Taylor *v.* Terme, 3 Har. & J. 505; Rowland *v.* Long, 45 Md. 439; Strader *v.* White, 2 Neb. 348, where the arrangement was a device; Motley *v.* Jones, 3 Ired. Eq. 144; Purviance *v.* McClintee, 6 S. & R. 259; Ditsche *v.* Becker, 6 Phila. 176. I omit overruled American cases in states where the principles of Cox *v.* Heckman have since been adopted.

[2] Wish *v.* Small, 1 Camp. 331; Lyon *v.* Knowles, 3 Best & Sm. 556; McDonnell *v.* Battle House Co. 67 Ala. 90; 42 Am. Rep. 99; Quackenbush *v.* Sawyer, 54 Cal. 439; Beckwith *v.* Talbot, 2 Colorado, 639; Parker *v.* Fergus, 43 Ill. 437; Smith *v.* Vanderburg, 46 Ill. 34; Keiser *v.* State, 58 Ind. 379; Reed *v.* Murphy, 2 G. Greene (Iowa), 574; Price *v.* Alexander, 2 id. 427; 52 Am. Dec., 526; Thompson *v.* Snow, 4 Me. 264; 16 Am. Dec. 263; Bridges *v.* Sprague, 57 id. 543; Reynolds *v.* Tappan, 15 Mass. 370; Cutler *v.* Winsor, 6 Pick. 335; 17 Am. Dec. 385; Holmes *v.* Old Colony R. R. 5 Gray, 58; Beecher *v.* Bush, 45 Mich. 188; 40 Am. Rep. 465; Thayer *v.* Augustine, 55 id. 187; Ward *v.* Bodeman, 1 Mo. App. 272, 281; Campbell *v.* Dent, 54 Mo. 325; Kellogg Newspaper Co. *v.* Farrell, 88 id. 594; Perrine *v.* Hankisson, 11 N. J. L. 181; Heimstreet *v.* Howland, 5 Den. 68; Pinckney *v.* Keyler, 4 E. D. Smith, 469; Johnson *v.* Miller, 16 Oh. 431; Dunham *v.* Rogers, 1 Barr, 255; Irwin *v.* Bidwell, 72 Pa. St. 244, 251; Brown *v.* Jaquette, 94

persons, because of sharing the profits, for exactly the same reasons that protect an employee so paid.[1]

§ **46. —— illustrations.**— F. sued P. and X. as partners in an opera house for work done in printing bills. P. denied he was partner. P. owned the building, and by a contract with X. leased part of it to X. for an opera house, P. to act as treasurer at a salary, and for the use of the building was to receive daily one-half of the proceeds, deducting expenses and salary. P. is not liable; he has no control in the management, furnishes none of the means, and shares none of the losses.[2]

The defendant leased his building to one who had a license to sell liquors, the lessee to furnish the stock and employ the defendant as his clerk; defendant to conduct the business in the licensee's name, and receive all the profits for services and rent, except a certain sum *per diem* to the licensee. It was held that the defendant was not a partner but an agent, and therefore protected by the license. This case involves their relations *inter se* rather than as to third persons, since the third persons referred to in this connection are only creditors of the business.[3]

A railroad company leased to an individual a house for a certain sum and "half the net profits arising from keeping said house as a hotel," keeping an account open for their inspection, the lessee having a free pass over the railroad for supplies. Held, the railroad com-

id. 113; 39 Am. Rep. 770; England *v.* England, 1 Baxter, 108; Tobias *v.* Blin, 21 Vt. 544; Felton *v.* Deall, 22 id. 170; Bowyer *v.* Anderson, 2 Leigh (Va.), 550; Chapline *v.* Conant, 3 W. Va. 507; Haydon *v.* Crawford, 3 Up. Can. Q. B. (old ser.) 583; Hawley *v.* Dixon, 7 Up. Can. Q. B. 218; Great Western R'y *v.* Preston & Berlin R'y, 17 id. 477.

[1] McDonnell *v.* Battle House Co., 67 Ala. 90; 42 Am. Rep. 99; Parker *v.* Fergus, 43 Ill. 437; Smith *v.* Vanderburg, 46 Ill. 34; Bridges *v.* Sprague, 57 Me. 543; Reynolds *v.* Toppan, 15 Mass. 370; Cutler *v.* Winsor, 6 Pick. 335; 17 Am. Dec. 385; Holmes *v.* Old Colony R. R. 5 Gray, 58; Beecher *v.* Bush, 45 Mich. 188; 40 Am. Rep. 465 (§ 23); Ward *v.* Bodeman, 1 Mo. App. 272, 281; Campbell *v.* Dent, 54 Mo. 325; Kellogg Newspaper Co. *v.* Farrell, 88 Mo. 594 (§ 23); Heimstreet *v.* Howland, 5 Den. 68; Dunham *v.* Rogers, 1 Barr, 255; England *v.* England, 1 Baxter, 108; Felton *v.* Deall, 22 Vt. 170; Bowyer *v.* Anderson, 2 Leigh (Va.), 550; Chapline *v.* Conant, 3 W. Va. 507 (§ 23). *Contra*, that a liability as partners to third persons is thereby created. Buckner *v.* Lee, 8 Ga. 285; Dalton City Co. *v.* Dalton Mfg. Co. 33 id. 243; Dalton City Co. *v.* Hawes, 37 id. 115.

[2] Parker *v.* Fergus, 43 Ill. 437.

[3] Keiser *v.* State, 58 Ind. 379.

pany does not become a partner thereby even as to third persons, for the lessee pays all the bills, owns the supplies bought and the money taken in.[1]

The owner of a ferry leased it to F. for two years for $1,000 cash paid, and if the net profits do not produce to F. $2,000 in the two years, he to have the right to hold over until he gets $2,000, and if over $2,000 is produced in two years the surplus to be divided. This was held not a partnership, and the lessor therefore not liable for a loss by F.'s negligence in operating the ferry.[2]

§ 47. **Profits as interest on loans.**— The English courts prior to Cox *v.* Hickman, while recognizing that the payment of salary or wages or compensation for the use of property in an amount measured by a proportion of profits did not create a partnership, did not extend the principle to compensation for the loan of money.[3] It would seem that there is no difference between paying for the use of money at a rate determinable by results and the use of services or property, yet the fact that such compensation produced in the first cases an interest in excess of the usury laws, seems to to have been the cause of the disallowance of it. This is altered now in England, not only by the later decisions,[4]

[1] Holmes *v.* Old Colony R. R. 5 Gray, 58.

[2] Bowyer *v.* Anderson, 2 Leigh (Va.), 550.

[3] Grace *v.* Smith, 2 Wm. Bl. 998; Gilpin *v.* Enderbey, 5 B. & Ald. 954; Fereday *v.* Hordern, Jac. 144; Bloxham *v.* Pell, 2 Wm. Blacks. 999.

[4] Pennsylvania also has such a statute. Moore *v.* Walton, 9 Bankr. Reg. 402; *Re* Francis, 2 Sawy. 286; 7 Bankr. Reg. 359; *Re* Ward (U. S. D. C. Tenn. 1879), 8 Reporter, 136; Swann *v.* Sanborn, 4 Woods, C. C. 625; Meehan *v.* Valentine, 29 Fed. Rep. 276; Smith *v.* Garth, 32 Ala. 368; Culley *v.* Edwards, 44 id. 423; Le Levre *v.* Castagnio, 5 Colorado, 564; Parker *v.* Canfield, 37 Conn. 250; 9 Am. Rep. 317; Plunkett *v.* Dillon, 4 Del. Ch. 198; Slade *v.* Paschal, 67 Ga. 541; Niehoff *v.* Dudley, 40 Ill. 406; Smith *v.* Vanderburg, 46 id. 34; Lintner *v.* Millikin, 47 id. 178; Adams *v.* Funk, 53 id. 219; Hefner *v.* Palmer, 67 id. 161; Smith *v.* Knight, 71 id. 148; 22 Am. Rep. 94; Williams *v.* Soutter, 7 Iowa, 435; Bailey *v.* Clark, 6 Pick. 372; Gallop *v.* Newman, 7 id. 282; Wall *v.* Balcom, 9 Gray. 92; Buck *v.* Dowley, 16 id. 555; Rice *v.* Austin, 17 Mass. 197; Emmons *v.* Westfield Bank, 97 id. 230; Parchen *v.* Anderson, 5 Montana, 438; Muzzy *v.* Whitney, 10 Johns. 226; Osbrey *v.* Reimer, 49 Barb. 265; Manhattan Brass Mfg. Co. *v.* Sears, 1 Sweeny, 426; Salter *v.* Ham, 31 N. Y. 321; Arnold *v.* Angell, 62 id. 508; Richardson *v.* Hughitt, 76 id. 55; Eager *v.*

but by a statute called Bovill's act. Nor are they partners as to third persons.[1]

§ 48. —— **illustrations.**—M. furnished P. with money to carry on business, and as compensation P. was to let M. have goods at cost prices, nothing being said as to interest or profits and losses. This was held not to constitute them partners as to third persons, but to be a mere loan.[2]

N. & Co. rented part of their business to C. & Co., and paid part of the expense of keeping their office and agreed to loan them not to exceed $5,000, and to receive one-third of their profits weekly as interest, with a clause in the contract that they were not part-

Crawford, id. 97; Curry *v.* Fowler, 87 id. 33; 41 Am. Rep. 343 (aff'g, 14 J. & Sp. 195); Cassidy *v.* Hall, 97 N. Y. 159; Harvey *v.* Childs, 28 Ohio St. 319; 22 Am. Rep. 387; Lord *v.* Proctor, 7 Phila. 630; Irwin *v.* Bidwell, 72 Pa. St. 244; Hart *v.* Kelley, 83 id. 286; Eshleman *v.* Harnish, 76 id. 97; Boston, etc. Smelting Co. *v.* Smith, 13 R. I. 27; 43 Am. Rep. 3; Polk *v.* Buchanan, 5 Sneed (Tenn.), 721; Cooper *v.* Tappan, 9 Wis. 361; Munson *v.* Hall, 10 Grant's Ch. (Up. Can.) 61.

[1] Bullen *v.* Sharp, L. R. 1 C. P. 86; *Ex parte* Tennant, 6 Ch. D. 303; Mollwo, March & Co. *v.* Court of Wards, L. R. 4 P. C. 419; Dean *v.* Harris, 33 L. T. N. S. 639; Kelly *v.* Scotto, 49 L. J. Ch. 383; 42 L. T. N. S. 827; Cully *v.* Edwards, 44 Ark. 423, this was *inter se*, but the principles laid down make it applicable to third persons by abolishing the distinction between partnerships *inter se* and as to third persons. Le Levre *v.* Castagnio, 5 Colorado, 564. In Smith *v.* Knight, 71 Ill. 148 (22 Am. Rep. 94), it was held that a loan on interest and share of profits does not constitute a partnership as to third persons, and a *dictum* to the same effect occurs in Hefner *v.* Palmer, 67 Ill. 161. Williams *v.* Soutter, 7 Iowa, 435; Parchen *v.* Anderson, 5 Montana, 438; Richardson *v.* Hughitt, 76 N. Y. 55 (32 Am. Rep. 267); Eager *v.* Crawford, 76 id. 97; Curry *v.* Fowler, 87 id. 33 (41 Am. Rep. 343), affirming 14 Jones & Sp. 195; Cassidy *v.* Hall, 97 id. 159; Magovern *v.* Robertson, 40 Hun, 166; Harvey *v.* Childs, 28 Oh. St. 319; 22 Am. Rep. 387; Boston, etc. Smelting Co. *v.* Smith, 13 R. I. 27; 43 Am. Rep. 3; Polk *v.* Buchanan, 5 Sneed, 721.—(The earlier New York cases to the contrary are the following, holding such lender to be a partner as to third persons: Cushman *v.* Bailey, 1 Hill, 526; Everett *v.* Coe, 5 Den. 180; Manhattan Co. *v.* Sears, 45 N. Y. 797; Haas *v.* Roat, 16 Hun, 526, aff'd 26 id. 632; Leggett *v.* Hyde, 58 N. Y. 272; 17 Am. Rep. 244, aff'g 1 N. Y. Supreme Ct. 418. These New York cases must be deemed overruled by the later ones given above in so far as inconsistent.)—Bailey *v.* Clark, 6 Pick. 372 (*dictum*); Pettee *v.* Appleton, 114 Mass. 114; Sheridan *v.* Medara, 10 N. J. Eq. 469; Pierson *v.* Steinmeyer, 4 Rich. L. 309; Cothran *v.* Marmaduke, 60 Tex. 370, 373; but query, repudiated in Buzard *v.* First Nat'l Bank, 2 S. W. Rep. 54, in full above.

[2] Slade *v.* Paschal, 67 Ga. 541.

ners; and the execution of this agreement was held not to make them partners, and therefore not liable on a note of C. & Co.[1]

A. B. of one part, and C., D., E. and F. of the other, made a contract whereby A. B. sold to C. the exclusive right to manufacture a patented article, and also the stock and fixtures then on hand used for the purpose, in consideration that thirty-seven and one-half per cent. of the net profits be paid them. D., E. and F. agreed, in order that profits might be made, to put in $15,000 as capital; to employ C. as superintendent, he to be paid a certain compensation out of the business for superintendence; D., E. and F. also covenant that A. and B. shall have thirty-seven and one-half per cent. of the profits after deducting expenses and twenty per cent. to them on their capital. In an action against them all on a note made by C., D. claiming that he was not a partner, it was held that A. and B. are mere creditors, as being vendors and having no community of interest; that D., E. and F. were lenders; they had not furnished the capital on joint account and had no share of the profits.[2]

E. and K. agreed to furnish B. with money not exceeding $10,000, to enable him to make horse-rakes, B. to sell them and all proceeds to be paid to E. and K. until the advances were refunded. This does not make them partners as to third persons, for B. was to hand over the proceeds only in payment. That the plaintiff, who had been furnishing the material to B., on seeing the agreement thereafter charged material to B. & Co., supposing E. and K. had become partners, makes no difference.[3]

B. and P., on September 2, 1867, loaned T. $10,000, T. agreeing to pay it back on January 1, 1870, and to pay them thirty cents per barrel on oil refined by him, and to keep accurate accounts, and to open new books, and not to sell or incumber his refinery, nor pursue a speculative business, nor to agree to sell refined oil without having first secured the crude material from which to make it, and to keep his refinery insured. B. and P. were held not to be liable as partners to T.'s creditors, for B. and P. had no lien and must come in *pro rata* with other creditors, and the fact that they had a mortgage from T. so as to get a priority, and that the loan was usurious, does not change their relation from creditors to partners. And so, although had the plaintiff known of the agreement

[1] Niehoff *v.* Dudley, 40 Ill. 406.

[2] Smith *v.* Vanderburg, 46 Ill. 34.

[3] Eshleman *v.* Harnish, 76 Pa. St. 97. See, also, Hart *v.* Kelley, 83 Pa. St. 286.

and trusted them as partners on the faith of it, it might have constituted them such by holding out.[1]

§ 49. What is a loan.— The fact, however, that the interest expected or received is disproportionate and the contract usurious will not affect its construction.[2]

To constitute a loan, the money advanced must be returnable in any event independently of the success or nonsuccess of the business or the making of profits. If the repayment is contingent upon profits it is not a loan, for it is then made, not upon the personal responsibility of the borrower, but upon the security of the business, and the above principles do not apply.[3]

§ 50. —— when a device.— And if it appears that the transaction is a device to obtain the benefits of a partnership without its responsibilities, as where the powers are inconsistent with the lending of money, the contract is one of partnership, whatever the parties may call it.[4]

[1] Irwin *v.* Bidwell, 72 Pa. St. 244.

[2] Plunkett *v.* Dillon, 4 Del. Ch. 198; Richardson *v.* Hughitt, 76 N. Y. 55; 32 Am. Rep. 267; Curry *v.* Fowler, 87 id. 33; 41 Am. Rep. 343 (aff. 14 J. & Sp. 195); Irwin *v.* Bidwell, 72 Pa. St. 244. *Contra,* Hargrave *v.* Conroy, 19 N. J. Eq. 281, 283; Oppenheimer *v.* Clemmons, 18 Fed. Rep. 886. See Brigham *v.* Dana, 29 Vt. 1, 8; *Re* Francis, 2 Sawy. 286; 7 Bankr. Reg. 359 (§ 23); Parker *v.* Canfield, 37 Conn. 250 (9 Am. Rep. 317); in this case C. and H. each agreed to put $5,000 into Andrews' business and receive each one-sixth of the net profits, the business to be in the name and under the sole management of Andrews. After the money had been advanced and the business conducted for a time, C. and H. learned that they were partners. Thereupon a writing was drawn up declaring the money to be a loan to Andrews and was to be paid back in three years, and six per cent. interest was to be paid annually, and in consideration of the trouble and expense of getting the money, C. and H. were each to have a sum equal to one-sixth of the profits, but only as compensation. It was held that the one-sixth of the profits to each was for services already performed, and was wholly disproportionate to the insignificant trouble of getting the loan; that the arrangement was a mere sham, and C. and H. were liable as partners.

This decision was doubted in Richardson *v.* Hughitt, 76 N. Y. 55; 32 Am. Rep. 267.

[3] *Ex parte* Delhasse, 7 Ch. D. 511; Pooley *v.* Driver, 5 Ch. D. 458; Harris *v.* Hillegass, 54 Cal. 463; Wood *v.* Vallette, 7 Oh. St. 172; Brigham *v.* Dana, 29 Vt. 1, 7; Rosenfeld *v.* Haight, 53 Wis. 260; 40 Am. Rep. 770.

[4] *Ex parte* Mills, 8 Ch. D. 569,

The firm of Charles Barrett & Co. was formed for a term of fourteen years between B. and H., who were to contribute certain shares of capital and carry on the business; the rest of the capital was to be contributed by other persons by way of loan in shares of £500 each, which was to be paid back preferentially on dissolution, but any excess of profits received during the term by the contributors over the total profits realized was to be refunded, not exceeding, however, the original contributions. The contributors were parties to the deed of partnership, a clause of which was that the capital should be employed in the business and should not be drawn out during the continuance of the partnership, thus entitling the contributors to control its employment by preventing a diversion of it from the business, which is not consistent with the ordinary position of lenders or with a personal demand. To this partnership the defendants loaned £2,500, reciting that the loan was made under an act of parliament providing that lenders of money payable in profits in lieu of interest should not be considered partners.[1] The loan was to last for the term of the partnership. The defendants were to receive a proportion of profits in lieu of interest, with an obligation to refund if profits annually received exceeded their share of the total profits, thus compelling a person assuming to be a lender to pay back a part of his interest because the borrowers subsequently incur losses. The arrangement was held to be an elaborate device, an ingenious contrivance, for giving the contributors the whole advantages of a partnership without subjecting them to any of the liabilities, and they were held to be partners and liable for the debts.[2]

H. agreed to loan to N. Bros. $5,000 not less than one nor more than five years, at his option, in consideration whereof N. Bros. agreed to give their whole time to the business, keep accurate and detailed accounts, open at all times to H.'s inspection, and pay H. three-fifths of the profits every six months, guarantying that this should amount to at least $3,000 per annum. As security for the loan, H. was to have a lien upon all the property of the firm. N.

574–6; Badeley *v.* Consolidated Bank, 34 Ch. D. 536.

[1] This act really seems to add nothing to the law of partnership except to provide that on distribution the creditors must be paid before the lender. Such lenders would not be partners independent of the act, where the loan is not a device, as it was in the above case.

[2] Pooley *v.* Driver, 5 Ch. D. 458.

Bros. agreed to contract no debts outside of the business and to use no funds except for their support. Any violation was to end the loan, and thereupon H. could take possession and sell to repay all sums due him. H. was held to be a partner and liable upon a note made by N. Bros., on the ground that he had an interest in the profits as profits, for he could claim three-fifths specifically and could insist on an accounting and division of profits, and N. Bros. could not use the funds except for support, showing they were not sole proprietors, and there was no provision for repaying the advance except on violating the agreement. The court cite Leggett *v.* Hyde, 58 N. Y. 272, as being analogous.[1]

§ 51. Executors or trustees as partners.— Under the older English law an executor or trustee who received part of the profits in his representative capacity, and without personal interest, but in pursuance to instructions of the will, and without active participation in the business, was liable as a partner to third persons.[2]

This rule was so great a hardship upon the executor that he could not be compelled to come into the partnership in the testator's place, although the decedent and his copartners had covenanted that death should not dissolve the firm, and although the estate might be liable for breach of covenant by reason of the executor's withdrawal, and the executor is entitled to a decree for dissolution.[3]

§ 52. —— without active participation.— If the executor merely leaves the assets in the business, but does not personally engage in it, he is not a partner, dormant or otherwise, nor responsible to creditors, for he is not a principal, and the surviving partners are not his agents, and the principles of Cox *v.* Hickman apply,[4] even though he intentionally leaves

[1] Rosenfeld *v.* Haight, 53 Wis. 260 (40 Am. Rep. 770).

[2] Barker *v.* Parker, 1 T. R. 287; Wightman *v.* Townroe, 1 M. & S. 412; Labouchere *v.* Tupper, 11 Moo. P. C. 198; *Ex parte* Garland, 10 Ves. 110; *In re* Leeds Banking Co. L. R. 1 Ch. App. 231; Wild *v.* Davenport, 48 N. J. L. 129.

[3] Pigott *v.* Bayley, McCl. & Y. 569; Madgwick *v.* Wimble, 6 Beav. 495; Downs *v.* Collins, 6 Hare, 418; Page *v.* Cox, 10 id. 163; Edgar *v.* Cook, 4 Ala. 588; Phillips *v.* Blatchford, 137 Mass. 510; Berry *v.* Folkes, 60 Miss. 576, 612; Jacquin *v.* Buisson, 11 How. Pr. 385.

[4] Holme *v.* Hammond, L. R. 7 Ex.

them in as a more or less permanent investment under instructions in the will.[1]

This doctrine was applied, although an executor entered into written articles of partnership with the surviving partners and a third person who was taken in as partner, but the executor was not by the agreement to take any part or exercise any control in the business, and never did so, and was held not liable as a partner. In construing the articles of partnership the court look to the will to ascertain if he is acting under its powers and not of his own motion.[2]

Some authorities use language implying that involuntarily leaving the assets in the business, not permissively as by mere failure to compel a winding-up, but by contract with the surviving partners, in compliance with the will, differs from voluntarily leaving them in as an investment, and that in the latter case the executor is personally liable to subsequent business creditors, the estate not being liable.[3] But in fact so much of the estate as is embarked in the business would be liable, whether rightly or wrongly there, and no other part of it would be; hence this distinction does not exist. The executor's liability for such unauthorized use of the assets is to the distributees of the individual estate who have suffered the loss, but his authority or want of authority cannot, on principle, affect his relation to business creditors. The subject of continuance of partnership after death by will or contract is considered further on (§§ 598–605).

§ 53. —— **participation in the business.**— But if the executor engages personally in the business, though acting in conformity to the will or to the partnership articles, which provide for his admittance into the firm in the decedent's place, he is then a principal and personally liable for debts thereafter incurred.[4]

218; Wild *v.* Davenport, 48 N. J. L. 129; Avery *v.* Myers, 60 Miss. 367; and see Brower *v.* Creditors, 11 La. Ann. 117.

[1] Holme *v.* Hammond, L. R. 7 Ex. 218; Price *v.* Groom, 2 Ex. 542; Wild *v.* Davenport, 48 N. J. L. 129; Owens *v.* Mackall, 33 Md. 382; Brasfield *v.* French, 59 Miss. 632; Richter *v.* Poppenhausen, 42 N. Y. 373; 9 Abb. Pr. (N. S.) 263; 39 How. Pr. 82; Phillips *v.* Blatchford, 137 Mass. 510, 514.

[2] Owens *v.* Mackall, 33 Md. 382.

[3] Citizens' Mut. Ins. Co. *v.* Ligon, 59 Miss. 305, 314; Richter *v.* Poppenhausen, 42 N. Y. 373; Avery *v.* Myers, 60 Miss. 367; Owens *v.* Mackall, 33 Md. 382.

[4] Alsop *v.* Mather, 8 Conn. 584; 21

A mere request to a dealer with the firm to continue the fulfillment of a contract for which the estate is already chargeable is not taking part in the business.

Thus, where a contract for goods has been but partially filled at the time a partner died, the request by his executor to the seller to continue delivery under the contract to the surviving partner, and a promise to pay as soon as the estate is settled, and stating that the business is going on, does not make the executor jointly liable or show that he is a partner, but is a mere promise to pay the amount chargeable to the estate.[1]

If the widow and next of kin advance further capital and make a new agreement with the surviving partner as to the proportion of profits for each, this is not a continuance of the old concern, but a new partnership, and all are liable to third persons.[2]

A direction in a will that one of the executors carry on the testator's business in his own name, and when the heir comes of age deliver him the business and half the profits, does not make the executor a partner. He is trustee, and if he continues business after the majority of the heir under a power of attorney from him, he is agent or trustee still and not partner.[3]

§ 54. **Other representatives.**— A parent may *bona fide* put money into a concern as his infant son's share of capital, under an agreement that the son's share of the profits during minority shall be accounted for to the father; and if it was not the intention of the parties that the father shall be a partner, he will not be liable as such.[4]

On the other hand, if the father in fact puts in his own money and reserves the same control of the business that the son would have had if present and of age, and appropriates the profits to his own use, he may be held as the actual partner, although he signs the articles for his son as his guardian, but without authority.[5]

Am. Dec. 703; Wild *v.* Davenport, 48 N. J. L. 129; Citizens' Mut. Ins. Co. *v.* Ligon, 59 Miss. 305; Gibson *v.* Stevens, 7 N. H. 352, 356. See Kreis *v.* Gorton, 23 Oh. St. 468.

[1] Richter *v.* Poppenhausen, 42 N. Y. 373; 9 Abb. Pr. (N. S.) 263.

[2] Delaney *v.* Dutcher, 23 Minn. 373.

[3] Gibson *v.* Stevens, 7 N. H. 352.

[4] Barklie *v.* Scott, 1 Huds. & Br. 83. This case was approved in Owens *v.* Mackall, 53 Md. 382.

[5] Miles *v.* Wann, 27 Minn. 56. Or if he appears as the partner to the world, Williams *v.* Rogers, 14 Bush, 776.

And if a person buys an interest in a firm for the benefit of another, but the contract between them is such that the second person is to buy from the other instead of taking the original purchase, the other must be deemed the partner.

Thus, where the property of the Phœnix Metre Co., a partnership, was represented by four shares, of which Slaney held two and T. the other two, and T. agreed to sell his two shares to Slaney, who, not having the money, procured Starr to buy them in his, Slaney's, name, agreeing to repurchase from him at an agreed advance within a certain time, to secure which agreement he executed a mortgage to Starr, here it was held that the beneficial interest and ownership of the shares bought in Slaney's name passed to Starr, for the mortgage was not to pay a debt but to secure a contract of purchase, and partnership creditors must be paid on distribution before Starr.[1]

§ 55. **Annuitants.**— Under the old law a person receiving an annuity out of profit of a business was liable as a partner merely because sharing part of the profits, although not one *inter se.*[2]

All this is of course contrary to the modern doctrine in Cox *v.* Hickman, besides being the subject of act of parliament. (See § 21.)

And now where a testator desires his assets to continue in business, and that dividends of profits be paid to beneficiaries of his will, the beneficiaries of the dividends are not partners, but receive them in lieu of interest on their money.[3]

And upon the subsequent bankruptcy of the firm such *bona fide* dividends cannot be recovered back.[4]

[1] Starr *v.* Dugan, 22 Md. 58.

[2] Bloxham *v.* Pell, cited in 2 W. Bl. 999; *Ex parte* Chuck, 8 Bing. 469; *In re* Colbeck, Buck, 48; *Ex parte* Hamper, 17 Ves. 403, 412; Bond *v.* Pittard, 3 M. & W. 357. And where an executor was held to be a partner it was said that his *cestuis que trustent* could have been held as such instead. Goddard *v.* Hughes, 1 Cr. & M. 33.

[3] Jones *v.* Walker, 103 U. S. 444; Pitkin *v.* Pitkin, 7 Conn. 307; 18 Am. Dec. 111; Heighe *v.* Littig, 63 Md. 301; Philips *v.* Samuel, 76 Mo. 657. *Contra,* Nave *v.* Sturges, 5 Mo. App. 557.

[4] Jones *v.* Walker, *supra;* Pitkin *v.* Pitkin, *supra.*

III. SHARING PROFITS WITH STIPULATION AGAINST LOSSES.

§ 56. The fact that in a contract for sharing profits a stipulation is added that losses shall not be divided does not change the presumptive character of the contract as one of partnership. Such a stipulation is, of course, perfectly legal.[1]

Inasmuch as partners may agree that some of their number shall be indemnified or guarantied against loss, such a stipulation between parties does not prevent their contract being one of partnership if it would otherwise be such.[2]

A writing, "Received of G. & Co. $2,000 to invest in wool. Said G. & Co. to receive two-thirds of the net profits on the sale, and O. S. one-third," signed O. S., was held, in an action to compel O. S. to share a loss, not to establish a partnership *inter se*, because there was no sharing of loss intended.[3]

A person receiving a fixed salary without share of profits was held to be a partner, such being the intention. In that case A. desired a partner, so that there would be some one to close up in case

[1] Gilpin *v.* Enderbey, 5 B. & A. 954; Bond *v.* Pittard, 3 M. & W. 357; Fereday *v.* Hordern, Jac. 144; Hazard *v.* Hazard, 1 Story, C. C. 371, 374.

[2] Bond *v.* Pittard, 3 M. & W. 357; Geddes *v.* Wallace, 2 Bligh, 270; Brown *v.* Tapscott, 6 M. & W. 119; Pollard *v.* Stanton, 7 Ala. 761; Camp *v.* Montgomery, 74 Ga. (1886); Consolidated Bank *v.* State, 5 La. Ann. 44; Robbins *v.* Laswell, 27 Ill. 365 (§ 35); Rowland *v.* Long, 45 Md. 439; Bank of Rochester *v.* Monteath, 1 Den. 402; 43 Am. Dec. 681; Walden *v.* Sherburne, 15 Johns. 409. *Contra*, that if one guaranties the other against loss, there cannot be a partnership, and that sharing of losses is necessary to constitute a partnership, Whitehill *v.* Shickle, 43 Mo. 537. In this case W. agreed with S. to give his whole time to making and selling filters invented by S., W. to furnish all the money, conduct the business in his own name, keep books open to S.'s inspection, and to have one-third of the net profits, S. agreeing to indemnify W. against loss for four months, and at the end of a year S. was to assign to W. one-third of the patent. At the end of the four months W. gave up business and sued S. for losses. S. contended that there was a partnership, and therefore an accounting must be had. It was held as above; but there being clauses consistent only with the theory of a partnership, that contract was said to be at most one which would ripen into a partnership at the end of the four months if S. did not then cease business.

[3] Ruddick *v.* Otis, 33 Iowa, 402; Marston *v.* Gould, 69 N. Y. 220.

of his death, and agreed to take in B. as a partner on a salary for the first year, and a share of profits thereafter. Their written agreement recited a partnership formed that day, and they acted and contracted as partners. On A.'s death, within the year, B. was held to have the rights of surviving partner.[1]

A person who has notice that no personal responsibility is to be incurred by one of the parties cannot hold him liable as a partner.[2]

§ 57. Sharing losses only.— Arrangements between parties are sometimes made for sharing of losses only. These are not partnerships *inter se*, and are only such to third persons if there is a holding out. If the arrangement is merely to share an expense of keeping property, as where two joint owners of a horse agree in writing that one shall keep him for a certain time, the expense to be divided, they are not partners *inter se*, though they call themselves such, and an action at law lies for contribution of outlays.[3]

If the arrangement is in relation to an enterprise for profit, the agreed exclusion of some of the parties from sharing the benefit, though they share losses, makes it a *societas leonina*, and it is not a proper partnership.[4]

An agreement between two railroad corporations that any loss to persons or goods, not traceable to either road, each should pay in proportion to its share of the freight, does not constitute them partners nor give third persons new rights, but merely furnishes a rule for settlements between themselves.[5]

On the other hand, however, where G. in writing allowed L. to use their joint names as a firm name and to purchase and sell goods, G. not claiming any of the profits, but seven per cent. was to be

[1] Adams Bank *v.* Rice, 2 Allen, 480.

[2] Burritt *v.* Dickson, 8 Cal. 113; Bailey *v.* Clark, 6 Pick. 372; Edgerly *v.* Gardner, 9 Neb. 130; Beudel *v.* Hettrick, 35 N. Y. Superior Ct. 405; Jordan *v.* Wilkins, 3 Wash. C. C. 110.

[3] Oliver *v.* Gray, 4 Ark. 425; Ala. Fertilizer Co. *v.* Reynolds & Lee, 79 Ala. 497.

[4] Lowry *v.* Brooks, 2 McCord, 421; Bailey *v.* Clark, 6 Pick. 372; Moss *v.* Jerome, 10 Bosw. 220; Ala. Fertilizer Co. *v.* Reynolds & Lee, 79 Ala. 497. Hence nominal partners are not partners *inter se*, Jones *v.* Howard, 53 Miss. 707.

[5] Algen *v.* Boston & Maine R. R. 132 Mass. 423; and see Irvin *v.* Nashville, Chat. & St. L. R'y Co. 92 Ill. 103 (34 Am. Rep. 116).

paid on his advances to the firm, it was held on the death of L. that G. could sue as surviving partner for debts due to the firm.[1]

IV. SHARING GROSS RECEIPTS.

§ 58. An agreement to share the gross receipts does not constitute a partnership where there is no common stock or joint capital. If all the partners have united their separate stocks of goods for the convenience or benefit of a joint sale, and the proceeds of sale leave a deficiency over the original outlay, there may be a loss to each, or, if a surplus, there is a gain to each; but there is a mere tenancy in common and not a partnership. On the other hand, if there is a joint business, or a capital or common stock, the division of the product in kind is as much a sharing of profits as if they had sold and divided the proceeds.[2] But where there is no common stock or joint capital a division of the gross receipts, either arising from joint labor or labor upon property of another, does not constitute a partnership, for it does not involve the division of profit or loss, and the benefit is not dependent on the success of the enterprise. The rule has been stated now for about one hundred and fifty years, that sharing gross profits does not constitute a partnership; yet in truth the proper explanation of this class of cases seems not that, but they rather should be grounded upon the fact that no idea or possibility of joint profit is implicated.

§ 59. **Working or letting on shares.**— Laborers or cultivators who farm land for the owner, or rent it on shares, for a share of the crops, are not partners.[3] So of persons agreeing to divide the fish in a joint haul;[4] or parties agreeing to divide a reward when obtained;[5] or coach owners

[1] Hendrick *v.* Gunn, 35 Ga. 234.

[2] Everitt *v.* Chapman, 6 Conn. 347; Brady *v.* Colhoun, 1 Pa. 140; Jones *v.* McMichael, 12 Rich. (S. Ca.) L. 176.

[3] Courts *v.* Happle, 49 Ala. 254; Tayloe *v.* Bush, 75 Ala. 432; Christian *v.* Crocker, 25 Ark. 327; Gardenhire *v.* Smith, 39 id. 280; Holloway *v.* Brinkley, 42 Ga. 226; Smith *v.* Summerlin, 48 id. 425; Gurr *v.* Martin, 73 id. 528; Blue *v.* Leathers, 15 Ill. 31; Frout *v.* Hardin, 56 Ind. 165; McLaurin *v.* McColl, 3 Strob. L. 21; Mann *v.* Taylor, 5 Heisk. 267; Albee *v.* Fairbanks, 10 Vt. 314; Haydon *v.* Crawford, 3 Up. Can. Q. B. (old ser.) 583.

[4] Hirley *v.* Walton, 63 Ill. 260.

[5] Dawson *v.* Gurley, 22 Ark. 381.

dividing the gross receipts of a line of coaches;[1] or seamen to be paid in proportion to the fish caught;[2] or a collector of wharfage paid by a share of gross receipts;[3] or a person agreeing to make tunnels for a mine in consideration of a part interest in the mine, and he can sue at law for non-payment;[4] or two workmen agreeing to divide their wages.[5]

So of one who lets property for a proportion of gross receipts as a hotel;[6] or the machinery in a steamboat;[7] or a ferry;[8] or a vessel;[9] or the right to make and sell a patented device.[10] So of the owners of a ditch dividing profits on sales of water;[11] or the proprietor and manager of a theater dividing gross receipts, the manager alone finding the actors and the proprietor providing the general service and expenses;[12] or the owner of a lighter giving one who worked her half the gross proceeds.[13]

So of sailors paid a proportion of the oil secured on a whaling voyage;[14] or a person taking out a cargo belonging

[1] Eastman *v.* Clark, 53 N. H. 276; 16 Am. Rep. 192.

[2] Holden *v.* French, 68 Me. 241.

[3] Maunsell *v.* Willett, 36 La. Ann. 322.

[4] Barber *v.* Cazalis, 30 Cal. 92.

[5] Finckle *v.* Stacey, Sel. Cas. in Ch. 9; Hawkins *v.* McIntyre, 45 Vt. 496, where they were to finish a church together, dividing receipts, less expense of help and material; and see Smith *v.* Moynihan, 44 Cal. 53, where a boiler-maker and a builder of steam-engines jointly agreed with the owner of a boat to put in an engine, not specifying what part each was to do or defining their relations. The employee of one sued both; presumably they are not partners.

[6] O'Donnell *v.* Battle House Co. 67 Ala. 90; 42 Am. Rep. 99; Beecher *v.* Bush, 45 Mich. 188; 40 Am. Rep. 465; Farrand *v.* Gleason, 56 Vt. 633.

[7] Knowlton *v.* Reed, 38 Me. 246.

[8] Heimstreet *v.* Howland, 5 Den. 68.

[9] Bowman *v.* Bailey, 10 Vt. 170; Tobias *v.* Blin, 21 id. 544; Cutler *v.* Winsor, 6 Pick. 335; 17 Am. Dec. 385.

[10] Wheeler *v.* Farmer, 38 Cal. 203; Gillies *v.* Colton, 22 Grant's Ch. (Up. Can.) 123.

[11] Bradley *v.* Harkness, 26 Cal. 69; but see Abel *v.* Love, 17 Cal. 233.

[12] Lyon *v.* Knowles, 3 B. & S. 556.

[13] Dry *v.* Boswell, 1 Camp. 329.

[14] Mair *v.* Glennie, 4 M. & S. 240; Wilkinson *v.* Frasier, 4 Esp. 182. See Perrott *v.* Bryant, 2 Young & C. Ex. 61; The Frederick, 5 Rob. Adm. 8; Reed *v.* Hussey, Blatchf. & H. Adm. 525; Duryee *v.* Elkins, 1 Abb. Adm. 529; Coffin *v.* Jenkins, 3 Story, C. C. 108; Baxter *v.* Rodman, 3 Pick. 435; Grozier *v.* Atwood, 4 id. 234; Turner *v.* Bissell, 14 id. 192; Rice *v.* Austin, 17 Mass. 197, 205. See Bridges *v.* Sprague, 57 Me. 543; Holden *v.* French, 68 id. 241; Moore *v.* Curry, 106 Mass. 409; Joy *v.* Allen, 2 Woodb. & M. 303.

to another to sell and bring back a return load and receive half the proceeds.[1]

§ 60. —— **brokers.**— A broker who sells on a commission proportioned to the proceeds of sales is not a partner, but an employee.[2] And though his reward is a share of net profits, as where a broker buys commodities with the funds of another, he to sell again and divide profits, he is not a partner, for the nature of his occupation shows that he has no ownership in the commodities and the power to sell may be revoked, subject only to a claim for breach of contract.[3] And where brokers or commission merchants agree to divide commissions with each other they are not made partners thereby.

Thus, where A., a real estate agent, was employed to sell defendant's land and took in B. to help him, agreeing to give B. half the commission, and B. sold the land and received payment from the defendant and attempted to release A.'s claim upon the defendant, it was held that he could not do so, being a mere agent of A., without interest in specie in the commission, and not his partner.[4]

So an arrangement between commission merchants in one city and their correspondents in another, that, on all sales of produce shipped by the former to the latter, part of the latter's commissions should be paid to the former, is not a partnership.[5]

Where the broker has an interest in the capital, as where he agrees to share in the speculation, which is thereafter spoken of by parties as a joint purchase, joint concern, etc., he will be deemed a partner *inter se*.[6]

[1] Lowry *v.* Brooks, 2 McCord (S. Ca.), L. 421.

[2] For example, see Dillard *v.* Scruggs, 36 Ala. 670; and see the cases cited under § 43. So of an ex-partner receiving a percentage on gross sales for his influence, Gibson *v.* Stone, 43 Barb. 285; 28 How. Pr. 468.

[3] Hanna *v.* Flint, 14 Cal. 73.

[4] Wass *v.* Atwater, 33 Minn. 83.

[5] Pomeroy *v.* Sigerson, 22 Mo. 177. For the English cases prior to Cox *v.* Hickman, holding such arrangements to be partnerships as to third persons, see § 16. In Thwing *v.* Clifford, 136 Mass. 482, an agreement by a broker employed to sell a horse, to share commissions with another broker if he will procure a buyer, was said to constitute them partners in the transaction. So that a fraud by the latter upon the owner, whereby the owner was induced to name a price on a false basis and a sale was effected, bars the innocent broker's action for commissions.

[6] Reid *v.* Hollinshead, 4 B. & C. 867.

§ 61. —— though both furnish expenses or outlay.—The fact that the recipient of part of the gross receipts is to furnish part of the expenses or tools or material, as well as labor, does not alter the result. Thus in cultivating land, where an overseer or cultivator is to furnish part of the teams or pay part of the labor, and the crop is to be divided, it is not a partnership, but is a leasing, or an employment, or a tenancy in common of the crop, according to the nature of the enterprise.[1]

But the joint cultivation of land, with an agreement to divide profits, is a partnership.[2].

If the owner of land agrees with a person that he shall cut the timber, each paying certain of the expenses and divide the profits;[3] or, if B. is to build houses on A.'s land, the proceeds, deducting the cost of the houses and the agreed value of the land, to be divided, they are not partners.[4]

So if the owner of a mill furnishes the mill, and another contracts to keep a supply of logs and the lumber is to be divided.[5]

So if the owner is to furnish a brick-yard and another the labor and materials, and they are to divide the brick they make, it is not a partnership.[6] Yet in Farmers' Ins. Co. *v.* Ross,[7] although the bricks were to be divided, there was a power in each by the contract to sell them. The question arose on an action against both

[1] Moore *v.* Smith, 19 Ala. 774; Blue *v.* Leathers, 15 Ill. 31; Donnell *v.* Harshe, 67 Mo. 170; Musser *v.* Brink, 68 Mo. 242; 80 id. 350; Putnam *v.* Wise, 1 Hill, 234; Day *v.* Stevens, 88 N. Ca. 83; 43 Am. Rep. 732 (limiting Curtis *v.* Cash, 84 id. 41); Brown *v.* Jaquette, 94 Pa. St. 113; 39 Am. Rep. 770; Murray *v.* Stevens, Rich. Eq. Cas. (S. Ca.) 205. See, also, Clark *v.* Smith, 52 Vt., 529; and Hermanos *v.* Duvigneaud, 10 La. Ann. 114. *Contra*, Allen *v.* Davis, 13 Ark. 28; Holifield *v.* White, 52 Ga. 567; Adams *v.* Carter, 53 Ga. 160.

[2] Urquhart *v.* Powell, 54 Ga. 29; Plummer *v.* Trost, 81 Mo. 425; Reynolds *v.* Pool, 84 N. Ca. 37; 37 Am. Rep. 607; Brown *v.* Higginbotham, 5 Leigh (Va.), 583; 27 Am. Dec. 618. *Contra*, Donnell *v.* Harsche, 67 Mo. 170.

[3] St. Denis *v.* Saunders, 36 Mich. 369.

[4] Bisbee *v.* Taft, 11 R. I. 307. See Kilshaw *v.* Jukes, § 20.

[5] Robinson *v.* Bullock, 58 Ala. 618; Stoallings *v.* Baker, 15 Mo. 481; Kelly *v.* Gaines, 24 Mo. App. 506; Ambler *v.* Bradley, 6 Vt. 119. But see Jones *v.* McMichael, 12 Rich. L. 176.

[6] Lamont *v.* Fullam, 133 Mass. 583; Chapman *v.* Lipscomb, 18 S. Ca. 222.

[7] 29 Oh. St. 429. The case is criticised in Beecher *v.* Bush, 45 Mich. 188, 197-8.

for breach of contract of sale made by one of them. The court held there was a partnership, because a joint sale, and not a separate sale of his share by each, was contemplated, and that a division of articles made is a division of profit and loss.[1] And where two agreed to burn lime on shares, one to fill the kiln with stones and the other to furnish the wood and burn the kiln, the lime to be equally divided, they were held to be partners.[2]

§ 62. —— **herding.**— A contract by which a person or persons are to herd the cattle of another for a certain number of years, and then return the original number and divide the increase, or pay the valuation originally placed upon the herd and divide the excess, is held not to be a partnership between the owner and herders.[3]

Thus, three persons made a contract with B., the owner of cattle, to herd them for a certain time. A valuation of the cattle was agreed upon, and at the end of the period B. was to sell the cattle, retain the amount of the valuation, and divide the excess in specified proportions between the three persons. Each of the three supported himself and hired his own assistants. It was held that the three herders were not partners, and the contract was one of employment, under which each could bring a separate action for services, though the language was joint.[4]

But if they are jointly engaged in the business they are partners. Thus, two persons who agreed to keep the sheep of another, keeping up the flock and paying the owner part of the wool and dividing the profits, were held to be partners *inter se*, so far that the settlement by one in the name of both, of a claim due them for breach of warranty of soundness, bound both.[5]

§ 63. —— **tenants in common dividing returns.**— The same principle applies where tenants in common of property, real

[1] In Aubrey *v.* Frieze, 59 Ala. 587, crops jointly produced at joint expense were to be divided, but the fact of an unqualified power of disposition in each was held to show a partnership.

[2] Musier *v.* Trumpbour, 5 Wend. 274.

[3] Robinson *v.* Haas, 40 Cal. 474; Ashby *v.* Shaw, 82 Mo. 76.

[4] Beckwith *v.* Talbot, 95 U. S. 289 (s. c. 2 Colorado, 639).

[5] Stapleton *v.* King, 33 Iowa, 28; 11 Am. Rep. 109. And see Brown *v.* Robbins, 3 N. H. 64, where they were held jointly liable to the owner for the price obtained for the cattle which they were jointly taking to a market.

or personal, agree to divide the returns from it, or where property, labor or materials are united to produce certain goods which are to be divided in specie; this does not constitute a partnership.

In the leading case on this principle two persons having a race horse in common agreed that one should keep, train and manage him on a specified weekly allowance for expenses, the other to pay for his transportation to races and entrance money, and the winnings to be divided, and this was held, in an action between the two for his keep, though perhaps it was not necessary to pass on the question, not to be a partnership *inter se.*[1]

Two persons bought a circus, and one contracted with the other to run it and divide the income. They are not partners, for only one was in the business. A mere joint ownership does not make a partnership, nor does dividing an income.[2]

So an agreement that A. should buy the undivided half of B.'s land at half the cost of the land, and of improvements made and to be made, and divide and sell it, sharing profits, and dividing unsold lots, is not a partnership *inter se.*[3]

In Bruce *v.* Hastings, 41 Vt. 380, Hastings had agreed to buy a farm from one N.; he then agreed with Bruce that they together would carry out the contract and would sell the property and divide profits equally. Hastings took no deed from N., but had N. make deeds direct to the persons to whom they sold lots. Bruce sued Hastings in *assumpsit* for half the profits; and the defense that they were partners, and hence the action must be for an accounting, was overruled, and the contract was held not to be one of partnership, but of compensation for assistance in carrying out a single specific purpose or enterprise, or a tenancy in common, except that they did not have the legal title.[4]

The leasing of ground by two, under an agreement with the lessor to erect a building upon it, and the construction of a hotel which is

[1] French *v.* Styring, 2 C. B. N. S. 357.

[2] Quackenbush *v.* Sawyer, 54 Cal. 439. See, also, Chapman *v.* Eames, 67 Me. 452.

[3] Munson *v.* Sears, 12 Iowa, 162; Sears *v.* Munson, 23 id. 380.

[4] It will be hereafter seen that an action at law is frequently allowed to settle partnerships in a single enterprise; hence this case was rightly decided, either on the principles of this section or of § 32.

afterwards rented and the rents divided, does not make them partners in the property.[1] So a contract to buy certain land, erect a mill upon it, sharing the expenses, and to divide the profits arising from selling or leasing it, does not create a partnership, but is a mere tenancy in common, for there is name, capital, business contemplated, or right to sell, or agreement for a partnership.[2] So if two persons buy a horse to resell at a profit, they are tenants in common and not partners, and one has no lien on the other's share and can sue him at law.[3] And if tenants in common of land agree to cut the timber and share equally in the expenses and proceeds, it is not a partnership *inter se;*[4] or if the owner sells the standing timber, paying in part of the gross proceeds.[5]

If the article alleged to be owned in common was procured as subsidiary to the carrying on of a business with it, there is a partnership; as where A. and B. agree to buy C.'s ice machine and to make and sell ice for ten years. This is not a tenancy in common, for the machine was bought for the business, and if it were destroyed another could be substituted.[6]

§ 64. **Joint enterprise not for profit.**—If a joint or common enterprise is not entered into for the purpose of earning profits while together there is no partnership.

Thus an arrangement between B. and C. for keeping house together, to lessen expenses, C. to pay rent and butcher bills, and B. all other bills, is no partnership, and C. cannot bind B. for the rent.[7] An agreement to buy or hold land in common does not create a partnership;[8] nor

1 Treiber *v.* Lanahan, 23 Md. 116.

2 Farrand *v.* Gleason, 56 Vt. 633.

3 Goell *v.* Morse, 126 Mass. 480; Oliver *v.* Gray, 4 Ark. 425.

4 Millett *v.* Holt, 60 Me. 169.

5 Fail *v.* McRee, 36 Ala. 61.

6 Leiden *v.* Lawrence, 2 N. R. 283 (Exch.).

7 Austin *v.* Thomson, 45 N. H. 113.

8 Huckabee *v.* Nelson, 54 Ala. 12; Gilmore *v.* Black, 11 Me. 485; Treiber *v.* Lanahan, 23 Md. 116; Sikes *v.* Work, 6 Gray, 433; Ballou *v.* Spencer, 4 Cow. 163, where one attempted to sign for both on the purchase notes; Brady *v.* Colhoun, 1 Pa. 140; White *v.* Fitzgerald, 19 Wis. 480, holding that a writing by F., in whose name the title stood, stating the following is the property owned jointly by G. F. and J. W.: one hundred acres bought of O. and since sold for $7,500 to S., $2,100 paid, out of which W. received $1,000; two acres each had half in full, sold to F. for $2,600, no part of which has

a purchase of stock.[1] An agreement to buy and freight a vessel in common is not a partnership *inter se.*[2] So where persons are jointly concerned in building a mill, they are not thereby made partners, but each is alone liable on his own contracts for material.[3]

A joint interest in a patent does not make the parties partners.[4]

After a partnership had ceased active operations two persons purchased the interest of one partner in the profits; these two, though recognized as members of the firm, are not partners, and, therefore, can sue each other at law, for there is no participation in profit and loss.[5]

§ 65. A joint purchase, with the intention of dividing the property or making separate sales, each on his own account, does not constitute a partnership, for no joint profits are designed to be made.[6]

Thus, where A. and B. talked of buying lands, and A. told B. to go and buy and he "would go halves with him," and A. bought in his own name and employed the plaintiff to make certain needed improvements, and gave him a note signed in the name of both A. and B., there was held to be no partnership, and B. is not liable on the note.[7] So where

been given W., etc., etc., is not sufficient to show a partnership in buying and selling land, but is rather a declaration of trust; Stannard *v.* Smith, 40 Vt. 513, that the mere fact that others were co-owners with defendant in land does not make them partners in his scheme to develop a mine upon it, and his employee can sue him alone for services.

[1] Humphries *v.* McCraw, 5 Ark. 61, where each contributed money to buy a drove of hogs, and afterwards one took out his share by consent. The rest can sue without joining him.

[2] De Wolf *v.* Howland, 2 Paine, C. C. 356.

[3] Porter *v.* McClure, 15 Wend. 187; Noyes *v.* Cushman, 25 Vt. 390; Morris *v.* Litchfield, 14 Ill. App. 83, where a person agreed to pay half the cost of fitting up a space in the steam vessel for carrying his goods; he is not liable on the contracts of the owners of the vessel for work.

[4] Section 69.

[5] Cowles *v.* Garrett, 30 Ala. 341; Goddard *v.* Pratt, 16 Pick. 412, 425; Vere *v.* Ashby, 10 B. & C. 288; Parchen *v.* Anderson, 5 Montana, 438, 457. *Contra inter se*, if already partners in the succeeding business. McGill *v.* Dowdle, 33 Ark. 311.

[6] Hoare *v.* Dawes, 1 Doug. 371; Gibson *v.* Lupton, 9 Bing. 287; Coope *v.* Eyre, 1 H. Bl. 37; Reid *v.* Hollinshead, 4 B. & C. 867.

[7] Huckabee *v.* Nelson, 54 Ala. 12.

five parties raised $90,000 in fixed proportions, and employed one of their number to purchase a large quantity of cotton for them and to prepare it for market, they to own it in such proportions, but the subject of selling was left for future arrangement, they are tenants in common and not partners. The fact of an original intention to sell and divide profits is not sufficient without an agreement to that effect, since either could change his mind and one could not bind another. Hence if the party who had prepared the cotton for market shipped it for sale and received advances on it from the consignee, which he divided among his associates, this is a conversion by him, waived by them, and they are not liable to the consignee, the cotton not having realized the advances.[1]

§ 66. —— **pooling arrangements.**— An arrangement is frequently made by which the owners of separate businesses, which each conducts at his own expense and under his own control, divide the net earnings or the gross proceeds of certain parts of the business to which each has contributed.

Thus the owners of connecting lines of railroads or other carriers associating on terms of each giving through bills or tickets, and dividing proceeds in proportion to the freight earned by each, but without agreement to share the proceeds of business on all the lines, are not partners. These are mere running arrangements.[2]

[1] Baldwin *v.* Burrows, 47 N. Y. 199.

[2] Croft *v.* B. & O. R. R. 1 MacArthur (D. C.), 492; Ellsworth *v.* Tartt, 26 Ala. 733 (62 Am. Dec. 749); Hot Springs R. R. *v.* Trippe, 42 Ark. 465 (48 Am. Rep. 65); Irvin *v.* Nashville, C. & St. L. Co. 92 Ill. 103 (34 Am. Rep. 116); Atchison, Topeka & Santa Fe R. R. *v.* Roach, 35 Kan. 740; Darling *v.* Boston & C. R. R. 11 Allen, 295; Gass *v.* N. Y. Providence & Boston R. R. 99 Mass. 220; Pratt *v.* Ogdensburg & Lake Champlain R. R. 102 id. 557, 567; Hartan *v.* Eastern R. R. 114 Mass. 44; Algen *v.* Boston & Maine R. R. 132 id. 423 (6 Am. & Eng. R. R. Cas. 562); Watkins *v.* Terre Haute, etc. R. R. 8 Mo. App. 569; Wetmore *v.* Baker, 9 Johns. 307; Pattison *v.* Blanchard, 5 N. Y. 186; Merrick *v.* Gordon, 20 id. 93; Briggs *v.* Vanderbilt, 19 Barb. 222; Mohawk & Hudson R. R. *v.* Niles, 3 Hill (N. Y.), 162; Railroad *v.* Sprayberry, 8 Bax. 341; Nashville & Chat. R. R. *v.* Sprayberry, 9 Heisk. 853. And see St. Louis Ins. Co. *v.* St. Louis, Vandalia, etc. R. R. 104 U. S. 146 (3 Am. & Eng. R. R. Cas. 562). But

If two firms agree to divide equally profits, on compressing and shipping cotton, of the business after excluding a certain amount, viz., the first fifty thousand bales, to cover expenses, each business, however, to be conducted separately, and neither contributing to the expenses or losses of the other, they are not partners *inter se.*[1]

Where two firms agreed each to make contracts with third persons in their separate names for the sale and delivery of flour and other produce with a view to realize an anticipated rise in the prices, the contracts to be for joint benefit, and profits to be equally divided and losses shared equally, the partners of both firms were sued for non-performance of a contract made by one of the firms in its own name, the arrangement was held not to be a partnership in Smith *v.* Wright, 5 Sandf. 113, but in 4 Abb. App. Dec. 274, affirming the judgment for want of allegation of offer to perform, the arrangement was said to be a partnership as to third persons.[2]

So where R. owned one boat and D. another, and they agreed that at the end of the season, if the earnings of one boat, deducting expenses, exceeded that of the other, the excess should be divided, but neither had control or voice in the management of the other's boat, the claim of each is not on the earnings in specie, but a personal claim against the owner; hence they are not partners; and a passenger injured on one boat by boiler explosion cannot hold the owner of the other liable as a partner.[3]

But if in such case the ownership in the earnings is a vested interest in them as such and before division, and not a personal debt of the owner, it is held that the owners are partners, and the passenger injured by the boiler explosion could recover from both.[4]

§ 67. —— **common fund.**—Where the earnings are put into a common fund it has been held that the associates are partners.

contracting in a joint name representing them all makes them jointly and severally liable for a loss, Block *v.* Fitchburg R. R. 139 Mass. 308.

1 Mayrant *v.* Marston, 67 Ala. 453; Jordan *v.* Wilkins, 3 Wash. C. C. 110.

2 Where M., having a contract to finish a church, agreed with H. to work it together, dividing receipts, less expense of material and help, this was held not to be a partnership *inter se.* An agreement that they should work against each other day by day means merely that if one worked when the other did not he should be allowed for it. Hawkins *v.* McIntyre, 45 Vt. 496.

3 Fay *v.* Davidson, 13 Minn. 523.

4 Connolly *v.* Davidson, 15 Minn. 519.

A stage route consisted of sections. The occupants of each section provided his own coaches and horses, employed his own drivers and paid the expenses of his own section, except tolls. The fares, less tolls, were to be divided in proportion to the length of each section. A person was injured by being run into by a coach on one section and sued all the owners as partners. The fact that each pays the expenses of his own section tends to show that there was no partnership; but as the passage money was to constitute a common fund, this was held to distinguish the case from one where each retained the passage money of his own line and was merely agent of the others in collecting their money as in the cases above cited, and there was held to be a partnership here and a liability for the injury.[1]

If such stage managers unite in having a joint capital and divide profits, they are of course partners as to third persons.[2] So, if they hold themselves out as a joint concern, third persons may hold them as such.[3] And if their drivers or agents are jointly employed, and hence are the servants of all, all are jointly liable for their defaults.[4]

[1] Champion *v.* Bostwick, 18 Wend. 175 (31 Am. Dec. 376). See Wayland *v.* Elkins, 1 Stark. 272; Holt, N. P. 227; Fromont *v.* Coupland, 2 Bing. 170, and Connolly *v.* Davidson, *supra;* The Stbt. Swallow, Olcott, 334; Meaher *v.* Cox, 37 Ala. 201; Bowas *v.* Pioneer Tow Line, 2 Sawy. 21. And this is the explanation of such cases as Musier *v.* Trumpbour, 5 Wend. 274, cited *supra*, § 61. See, also, Green *v.* Beesley, 2 Bing. N. C. 108, where, however, losses were also to be divided.

[2] Cooley *v.* Broad, 29 La. Ann. 345 (29 Am. Rep. 332); Dow *v.* Sayward, 12 N. H. 271 (aff'd, 14 id. 9).

[3] Paris, etc. Road Co. *v.* Weeks, 11 Up. Can. Q. B. 56; Wyman *v.* Chicago & Alton R. R. 4 Mo. App. 35.

[4] Cobb *v.* Abbot, 14 Pick. 289; Dwight *v.* Brewster, 1 id. 50; Barrett *v.* I. & St. L. R. R. 9 Mo. App. 226; Fairchild *v.* Slocum, 19 Wend. 320 (aff'd, 7 Hill, 292). One railway company working the lines of another company in connection with its own, on a division of net receipts, was held not to form a partnership though under a joint committee selected from the directors of each. McCallum *v.* Buffalo & Lake Huron R'y Co. 19 Up. Can. C. P. 117. On this principle of mixing in a joint fund, Sims *v.* Willing, 8 S. & R. 103, was decided, where A. chartered a vessel by B.'s direction to carry a cargo of flour belonging in part to A., part to B., and part to C., the whole to be sold to the consignee. The vessel was captured by British cruisers and A., B. and C. were held partners and individually liable for the amount of a general average.

§ 68. **Cheese factory.**— The patrons of a cheese factory, that is, persons who send milk to the establishment founded by them, and receive in return, at their option, cheese or the proceeds of its sale, in proportion to the delivery of milk, are not partners, but either part owners or creditors, that is, they are either bailors or vendors.[1]

§ 69. **Patents.**— A contract by which an inventor agrees that a person shall have the exclusive right to make and sell his device, paying part of the proceeds or profits, is not a partnership.[2] Nor where the owner of a device agrees with another to get a patent in their joint names and sell the right to use it, payable in royalties, and divide profits.[3]

Co-ownership in a copyright is not a partnership; therefore, if one uses the plates and prints and sells copies, the remedies as between partners are not applicable;[4] nor a joint interest in a patent.[5]

§ 70. **Ship-owners.**— On the same principle that co-ownership or joint ownership does not constitute the owners partners, part owners of ships, steamboats or other craft are, in absence of some other element in this relation, uniformly treated as not partners, ever since Doddington *v.* Hallet, 1 Ves. Sr. 497, was overruled by Lord Eldon in *Ex parte* Young, 2 Ves. & Bea. 342, and *Ex parte* Harrison, 2 Rose, 76.[6]

[1] Butterfield *v.* Lathrop, 71 Pa. St. 225; Sargent *v.* Downey, 45 Wis. 498; Gill *v.* Morrison, 26 Up. Can. C. P. 124; Hawley *v.* Keeler, 62 Barb. 231 (aff'd, 53 N. Y. 114).

[2] Wheeler *v.* Farmer, 38 Cal. 203; Vose *v.* Singer, 4 Allen, 226; Mathers *v.* Green, L. R. 1 Ch. App. 29; Gillies *v.* Colton, 22 Grant's Ch. Up. Can. 123.

[3] Hermanos *v.* Duvigneaud, 10 La. Ann. 114.

[4] Carter *v.* Bailey, 64 Me. 458. As to trade-mark, Dent *v.* Turpin, 2 J. & H. 139.

[5] Parkhurst *v.* Kinsman, 1 Blatchf. 488; Pitts *v.* Hall, 3 id. 201; Penniman *v.* Munson, 26 Vt. 164; Carter *v.* Bailey, 64 Me. 458.

[6] *Ex parte* Young, 2 V. & B. 242; *Ex parte* Harrison, 2 Rose, 76; Helme *v.* Smith, 7 Bing. 709; Green *v.* Briggs, 6 Hare, 395; Berthold *v.* Goldsmith, 24 How. 536; The William Bagaley, 5 Wall. 377; Macy *v.* DeWolf, 3 Woodb. & M. 193; Jackson *v.* Robinson, 3 Mason, 138; Donald *v.* Hewitt, 33 Ala. 534; Bacon *v.* Cannon, 2 Houst. 47; Loubat *v.* Nourse, 5 Fla. 350; Allen *v.* Hawley, 6 id. 142 (63 Am. Dec. 198); Patterson *v.* Chalmers, 7 B. Mon. 595; Owens

A ship or steamboat may, however, be the subject of partnership as well as any other property.[1] And if she is owned by a partnership as part of their assets, she is held the same as other property and hence may be sold by one partner.[2] And in other respects the rules governing ordinary partnerships apply.[3] And part owners of a ship may be partners in the earnings or freight.[4]

§ 71. **Joint cargo.**— Persons not connected in trade who contribute specified portions of a cargo, or ship-owners who unite in taking an interest in the proceeds of a cargo sent out by them to be sold, without agreement as to profit and loss, are not partners, the only joint act being that of selling.[5]

v. Davis, 15 La. Ann. 22; Theriot *v.* Michel, 28 La. Ann. 107; Harding *v.* Foxcroft, 6 Me. 76; Knowlton *v.* Reed, 38 id. 246; Little *v.* Merrill, 62 id. 328; Merrill *v.* Bartlett, 6 Pick. 46. And see Thorndike *v.* DeWolf, 6 id. 120; Moore *v.* Curry, 106 Mass. 409; Cinnamond *v.* Greenlee, 10 Mo. 578; Ward *v.* Bodeman, 1 Mo. App. 272; Mumford *v.* Nicoll, 20 Johns. 611 (reversing 4 Johns. Ch. 522); Stedman *v.* Feidler, 20 N. Y. 437; Williams *v.* Lawrence, 47 N. Y. 462; Scottin *v.* Stanley, 1 Dall. 129; Coe *v.* Cook, 3 Whart. 569; Hopkins *v.* Forsyth, 14 Pa. St. 34; Coursin's Appeal, 79 Pa. St. 220; Baker *v.* Casey, 19 Grant's Ch. (Up. Can.) 537. *Contra,* Story on Partnership, § 344; Hinton *v.* Law, 10 Mo. 701. See Seabrook *v.* Rose, 2 Hill (S. Ca.), Ch. 553.

[1] Campbell *v.* Mullett, 2 Swanst. 551; Nugent *v.* Locke, 4 Cal. 318; Loubat *v.* Nourse, 5 Fla. 350; Allen *v.* Hawley, 6 id. 142 (63 Am. Dec. 198); Hewitt *v.* Sturdevant, 4 B. Mon. 453, 459; Phillips *v.* Purington, 15 Me. 425; Lamb *v.* Durant, 12 Mass. 54 (7 Am. Dec. 31); Mumford *v.* Nicoll, 20 Johns. 611, 628 (rev. s. c. 4 Johns. Ch. 52); Williams *v.* Lawrence, 47 N. Y. 462; Lape *v.* Parvin, 2 Disney, 560; and cases in the next notes.

[2] The William Bagaley, 5 Wall. 377, 406; Lamb *v.* Durant, 12 Mass. 54 (7 Am. Dec. 31). And see Hewitt *v.* Sturdevant, 4 B. Mon. 453; *Ex parte* Howden, 2 M. D. & D. 574.

[3] Loubat *v.* Nourse, 5 Fla. 350; Allen *v.* Hawley, 6 id. 142 (63 Am. Dec. 198); Williams *v.* Lawrence, 47 N. Y. 462; Wright *v.* Hunter, 1 East, 20.

[4] Phillips *v.* Pennywit, 1 Ark. 59; Starbuck *v.* Shaw, 10 Gray, 492; Russell *v.* Minnesota Outfit, 1 Minn. 162; Young *v.* Brick, 3 N. J. L., 241, 490, 664; Reeves *v.* Goff, 3 id. 194, 454, 609; Mumford *v.* Nicoll, 20 Johns. 611 (reversing 4 Johns. Ch. 522); Merritt *v.* Walsh, 32 N. Y. 685, 689; Williams *v.* Lawrence, 47 id. 462; Coe *v.* Cook, 3 Whart. 569; Baker *v.* Casey, 19 Grant's Ch. (Up. Can.) 537.

[5] Saville *v.* Robertson, 4 T. R. 720; Hoare *v.* Dawes, 1 Dougl. 371; Coope *v.* Eyre, 1 H. Bl. 37; Harding *v.* Foxcroft, 6 Me. 76; Holmes *v.* United F. Ins. Co. 2 Johns. Cas. 329; Post *v.* Kimberly, 9 Johns. 470; French *v.* Price, 24 Pick. 13, 19; Jackson *v.*

This principle was held to apply where A. sold to B. two thousand boxes of candles on joint account, B. to receive a commission on sales, and for one-half the sales B. is to pass over the purchase notes to A. The sale by A. to B. make them tenants in common of the candles, and the agreement to consign them to B. for sale on joint account, though simultaneous with the sale, and perhaps constituting one motive for it, is distinct from it.[1]

Robinson, 3 Mason, 138; De Wolf *v.* Howland, 2 Paine, C. C. 356; Coe *v.* Cook, 3 Whart. 569.

[1] Hawes *v.* Tillinghast, 1 Gray, 289.

CHAPTER III.

JOINT STOCK COMPANIES, CLUBS AND GRANGES.

§ 72. **Joint stock company.**— There is nothing illegal in a partnership with transferable shares, and that is all that a joint stock company is. There is no intermediate association or form of organization between a corporation and a partnership known to the common law, and, unless otherwise provided by statute, as is the case in England and New York, a joint stock company is treated and has the attributes of a common partnership.[1] Yet the fact of transferable shares makes such an association different, not merely in magnitude but in kind, from ordinary partnerships, because not based upon mutual trust and confidence in the

[1] That it is a partnership, Perring *v.* Hone, 4 Bing. 28; Fox *v.* Clifton, 6 id. 776; Clagett *v.* Kilbourne, 1 Black, 346; Montgomery *v.* Elliott, 6 Ala. 701; Grady *v.* Robinson, 28 Ala. 289; Smith *v.* Fagan, 17 Cal. 178; McConnell *v.* Denver, 35 id. 365; Pettis *v.* Atkins, 60 Ill. 454; Pipe *v.* Bateman, 1 Iowa, 369; Greenup *v.* Barbee, 1 Bibb, 320; Frost *v.* Walker, 60 Me. 468; Alvord *v.* Smith, 5 Pick. 232; Haskell *v.* Adams, 7 id. 59; Kingman *v.* Spurr, id. 235; Tyrrell *v.* Washburn, 6 Allen, 466; Taft *v.* Ward, 106 Mass. 518; Bodwell *v.* Eastman, id. 525; Whitman *v.* Porter, 107 id. 522; Gott *v.* Dinsmore, 111 id. 45; Taft *v.* Warde, 111 id. 518; Machinists' Nat'l Bank *v.* Dean, 124 id. 81; Boston & Albany R. R. *v.* Pearson, 128 id. 445; Phillips *v.* Blatchford, 137 id. 510; Ricker *v.* American Loan & Trust Co. 140 id. 346; Burgan *v.* Lyell, 2 Mich. 102; 55 Am. Dec. 53; Butterfield *v.* Beardsley, 28 Mich. 412; Whipple *v.* Parker, 29 id. 369; Willson *v.* Owen, 30 id. 474; Boisgerard *v.* Wall, 1 Sm. & Mar. Ch. 404; Atkins *v.* Hunt, 14 N. H. 205; Niven *v.* Spickerman, 12 Johns. 401; Skinner *v.* Dayton, 19 id. 513 (10 Am. Dec. 286): rev. 5 Johns. Ch. 351; Moore *v.* Brink, 4 Hun, 402; 6 N. Y. Supreme Ct. 22; Rianhard *v.* Hovey, 13 Oh. 300; Cochran *v.* Perry, 8 W. & S. 262; Hedge & Horn's Appeal, 63 Pa. St. 273; Thomson's Estate, 12 Phila. 36; Shamburg *v.* Abbott, 112 Pa. St. 6; Cutler *v.* Thomas, 25 Vt. 73; Chapman *v.* Devereux, 32 Vt. 616 (9 Am. Law Reg. O. S. 419); Walker *v.* Wait, 50 Vt. 668; McNeish *v.* Hulless Oat Co. 57 Vt. 316; Hardy *v.* Norfolk Mfg. Co. 80 Va. 404; Kimmins *v.* Wilson, 8 W. Va. 584; First Nat'l Bank *v.* Goff, 31 Wis. 77; Werner *v.* Leisen, 31 Wis. 169.

skill, knowledge and integrity of every other partner.[1] Hence, a sale of his shares by a member, the shares being transferable, is not a dissolution.[2] Death of a member is not a dissolution, if such was the intent; and the character of the association, in that the shares are transferable and it is governed by officers, and is in the form of a corporation, is evidence of such intent.[3] It is obvious that much less evidence is required to show such intent than in the case of the purchase of an interest in an ordinary partnership.[4] And the fact of such purpose is a question of fact for the jury.[5]

If the concern is composed of numerous members and is governed by managers, there is no implied power in the other members to act.[6] And if the managers are to act as a board, the individual assent of each is, as in the case of directors of a corporation, not equivalent to an act of the board.[7]

§ 73. **——liability, and how enforced.**— Although by the law of the state in which the association was organized, actions against it must be in the name of the president or treasurer, and that no action shall be brought against the members until execution against the company is returned unsatisfied, it is nevertheless a mere partnership.[8] These provisions relate to the remedy and are local, and outside such state the personal liability of the members may be enforced in the first instance.[9]

[1] Per JAMES, L. J., Baird's Case, L. R. 5 Ch. App. 725, 733.

[2] Cothran *v.* Perry, 8 W. & S. 262.

[3] Baird's Case, L. R. 5 Ch. App. 725; Machinists' Nat'l B'k *v.* Dean, 124 Mass. 81; Tenney *v.* New Engl. Protec. Un. 37 Vt. 64; Walker *v.* Wait, 50 id. 668; McNeish *v.* Hulless Oat Co. 57 id. 316.

[4] Machinists' Nat'l B'k *v.* Dean, 124 Mass. 81, 84.

[5] McNeish *v.* Hulless Oat Co. 57 Vt. 316.

[6] Greenwood's Case, 3 DeG. M. & G. 459, 477.

[7] Skinner *v.* Dayton, 5 Johns. Ch. 351.

[8] Taft *v.* Warde, 106 Mass. 518; Boston & Albany R. R. *v.* Pearson, 128 Mass. 445; and cases cited, all of them being upon the New England Express Co., organized under the laws of New York. *Contra*, Fargo *v.* Louisv. New Alb. & C. R'y, 10 Biss. 273.

[9] Taft *v.* Warde, 106 Mass. 518; Gott *v.* Dinsmore, 111 id. 45; Boston & Albany R. R. *v.* Pearson, 128 id. 445. See Cutler *v.* Thomas, 25 Vt. 73.

The members are individually liable *in solido* for the debts as in an ordinary partnership;[1] although the articles have not been complied with as between the partners, in that but a small part of the contemplated capital had been subscribed.[2]

Purchasers of shares become partners and are liable as such;[3] and liable for notes issued after they become members for prior debts.[4] In contributing *inter se*, those who are insolvent or removed from the jurisdiction are not counted.[5]

§ 74. —— **what constitutes membership.**— A subscriber to whom shares have been delivered is a partner, though he never signed the deed or articles.[6] And even though certificates of stock have not been delivered to him, and he has signed only the subscription paper and paid the executive committee.[6] And though a share was assigned to one not present at the meeting, but who agreed to take it, although he has not paid or performed other conditions subsequent.[8] But a mere signing the subscription paper and paying is not sufficient until the company is organized, for otherwise the first signer would be at once a member.[9] Signature of the name to the subscription and payment of assessments is sufficient proof of membership, without showing by whom the names were signed.[10] And proof that the party was a

[1] Carlew *v.* Drury, 1 Ves. & B. 157; Keasley *v.* Codd, 2 C. & P. 408, n.; R. *v.* Dodd, 9 East, 516; Robinson's Case, 6 DeG. M. & G. 572; Hodgson *v.* Baldwin, 65 Ill. 532; Greenup *v.* Barbee, 1 Bibb, 320; Frost *v.* Walker, 60 Me. 468; Whitman *v.* Porter, 107 Mass. 522, 524; Gott *v.* Dinsmore, 111 Mass. 45; Skinner *v.* Dayton, 19 Johns. 537; Hess *v.* Werts, 4 S. & R. 361; Cutler *v.* Thomas, 25 Vt. 73; First Nat'l Bank *v.* Goff, 31 Wis. 77.

[2] Bodwell *v.* Eastman, 106 Mass. 525.

[3] Machinists' Nat'l B'k *v.* Dean, 124 Mass. 81.

[4] McConnell *v.* Denver, 35 Cal. 365.

[5] Whitman *v.* Porter, 107 Mass. 522. As to the personal liability of purchasers of shares for antecedent liabilities for which their assignors were chargeable, see § 187.

[6] Perring *v.* Hone, 4 Bing. 28; Butterfield *v.* Beardsley, 28 Mich. 412.

[7] Boston & Albany R. R. *v.* Pearson, 128 Mass. 445; Frost *v.* Walker, 60 Me. 468.

[8] Grady *v.* Robinson, 28 Ala. 289.

[9] Hedge & Horn's Appeal, 63 Pa. St. 273; Fox *v.* Clifton, 6 Bing. 776.

[10] Frost *v.* Walker, 60 Me. 468.

member of the executive committee is sufficient without proving ownership of shares.[1]

If the shares are not transferable without the consent of the directors, the assignee is not a partner until such consent is had, and cannot maintain suit for an account.[2] But a mere affirmative provision that shares are assignable by certificate, which when filed enable the assignee to be a partner, is for the convenience of the company, and does not prevent a sale without that ceremony.[3]

§ 75. **Clubs.**— A club or unincorporated association not formed for purposes of gain or pecuniary profit is not a partnership.[4] The fact that they have common property or a joint fund does not make them partners. As where a club for moral and social objects sublets surplus room and thus accumulates a fund.[5] Or a musical club owns the instruments, and requires resigning members to leave them as common property.[6] This category includes unincorporated associations for various purposes, as social or pleasure clubs, political clubs, associations for mutual benefit, church associations, library associations, secret societies, lodges, and the like.

As these associations are not formed for profit and loss, if a contract is made in their society name, the associates are not bound by it, unless it was authorized by them; but all the officers or members who joined in making or authorizing the contract are represented by the joint name, and they are liable upon it, on the ground of principal and agent and not of partnership.

[1] Bodwell *v.* Eastman, 106 Mass. 525, 526. And see Taft *v.* Warde, 111 Mass. 518; Pettis *v.* Atkins, 60 Ill. 454; Doubleday *v.* Muskett, 7 Bing. 110.

[2] Kingman *v.* Spurr, 7 Pick. 235; Perring *v.* Hone, 4 Bing. 28.

[3] Alvord *v.* Smith, 5 Pick. 232.

[4] St. James Club, 2 DeG. M. & G. 383; Andrews *v.* Alexander, L. R. 8 Eq. 176; Austin *v.* Thomson, 45 N. H. 113, and the cases cited through this section. The contrary expression in Babb *v.* Reed, 5 Rawle, 151 (28 Am. Dec. 650), has been limited in Ash *v.* Guie, 97 Pa. St. 493. For promoters of corporations, see § 89.

[5] Lafond *v.* Deems, 81 N. Y. 507.

[6] Danbury Cornet Band *v.* Bean, 54 N. H. 524.

Thus, in Richmond *v.* Judy, 6 Mo. App. 465, it was held that where a committee to conduct a political campaign is sued for advertising bills, the members are liable only for the acts which they have authorized. In Ash *v.* Guie, 97 Pa. St. 493 (39 Am. Rep. 818; 10 Am. Law Rec. 278), a committee of a masonic lodge, appointed to erect a building and borrow for the purpose, who issue certificates of indebtedness, bind only the members who authorized or ratified the act.

So in Burt *v.* Lathrop, 52 Mich. 106, the members of an association to resist the claims of a patentee, the conditions of membership being an initiation fee and *pro rata* assessments, are not liable personally for a contract of their officers in employing an attorney.

So in Flemyng *v.* Hector, 2 M. & W. 172, where a member of the Westminster Reform Club was sued for the value of labor and material supplied to the club, and the same ruling made.[1]

But those who made or authorized the contract are liable.[2]

Not being a partnership, a member who has paid more than his share towards the authorized common object cannot have a bill in equity for an accounting.[3] And the committee can sue the members at law for their subscriptions, which could not be done if there was a partnership.[4] And a member who abstracts the funds may be prosecuted for embezzlement, which could not be done if he were a partner.[5]

[1] Devoss *v.* Gray, 22 Oh. St. 189.

[2] Ferris *v.* Thaw, 5 Mo. App. 279; Eichbaum *v.* Irons, 6 W. & S. 67; Blakely *v.* Bennecke, 59 Mo. 193; Lewis *v.* Tilton, 64 Iowa, 220; 52 Am. Rep. 436; Heath *v.* Goslin, 80 Mo. 310; 50 Am. Rep. 505; Ray *v.* Powers, 134 Mass. 22; Cross *v.* Williams, 7 H. & N. 675; Cockerell *v.* Aucompte, 2 C. B. N. S. 440; Burls *v.* Smith, 7 Bing. 705; Luckombe *v.* Ashton, 2 F. & F. 705; Delauney *v.* Stickland, 2 Stark. 416; Braithwaite *v.* Skofield, 9 B. & C. 401.

[3] Woodward *v.* Cowing, 41 Me. 9, an association to build a meeting house. *Contra*, Cheeny *v.* Clark, 3 Vt. 431.

[4] Hall *v.* Thayer, 12 Met. 130. See Caldicott *v.* Griffiths, 8 Exch. 898.

[5] Queen *v.* Robson, 16 Q. B. D. 137. The elder of a church cannot sue in his own name to secure a title to the lot, but the members must join, or part may sue on behalf of all if very numerous. McConnell *v.* Gardner, Morris (Iowa), 272; Lloyd *v.* Loaring, 6 Ves. 773, a masonic lodge. And a suit against them must be against the members and not against the society on its agent's contracts, Wilkins *v.* Wardens, etc. of St. Mark's Church, 52 Ga. 351.

But the rights of members in the property and contracts belonging to the club are similar to those of a partnership. Thus, part of the members cannot sue the rest at law on their contract with the association;[1] and it has been held that a court of equity, when applied to wind up a club, would deal with it as a partnership, and entertain the bill.[2]

§ 76. **Granges and co-operative stores.**— There is a form of association intermediate between a club, which is not formed for profit, and a joint stock company which is, namely, a co-operative store or grange, where the members own the store and buy from it at cost prices with a percentage for estimated expenses added, there being no design to make profit, since the sales are to themselves alone. But where the objects contemplate selling to the outside world these bodies are deemed partnerships;[3] the advantage being to obtain for members alone the benefit of wholesale purchases of miscellaneous commodities — the business being generally managed by an agent controlled by a board of directors ignorant of trade, under constitutions which have frequently been found full and minute as to all the rules fit for a debating society and wholly silent on the points most vital to pecuniary welfare.[4]

[1] McMahon *v.* Rauhr, 47 N. Y. 67.

[2] Beaumont *v.* Meredith, 3 Ves. & B. 180; Gorman *v.* Russell, 14 Cal. 531; 18 id. 688. *Contra*, Burke *v.* Roper, 79 Ala. 138.

[3] Hodgson *v.* Baldwin, 65 Ill. 532; Manning *v.* Gasharie, 27 Ind. 399; Beaman *v.* Whitney, 20 Me. 413; Atkins *v.* Hunt, 14 N. H. 205; Farnum *v.* Patch, 60 id. 294; Edgerly *v.* Gardner, 9 Neb. 130; Smith *v.* Hollister, 32 Vt. 695; Stimson *v.* Lewis, 36 Vt. 91; Tenney *v.* New Engl. Protec. Union, 37 Vt. 64; Henry *v.* Jackson, 37 Vt. 431.

[4] Henry *v.* Jackson, 37 Vt. 431, 435.

CHAPTER IV.

INCHOATE PARTNERSHIPS.

§ 78. **Executory contract not a partnership.**—An executory contract to form a partnership is not a partnership, though it may ripen into one, by being what is commonly called launched, that is, by carrying the agreement into effect, and engaging in the joint undertaking; but the effect and the agreement itself are two different things. Hence, an agreement to become partners at a certain time does not alone show partnership, even when that time has arrived, so as to enable one party to compel the other to account to him for profits earned, after a refusal to admit the complainant; nor does it enable the one party to render the other liable on contracts entered into by him before the consummation of the partnership.

Hence, an agreement by A. with C., that on the death of A.'s partner, B., C. should become a partner, is not sufficient evidence of partnership after such death.[1] An agreement that whichever party procured a contract to build a railroad, all would be partners in it, and one got it and refused to take in the rest, is not a partnership, but a mere executory agreement.[2] Under an agreement to form a partnership at a future date, where one of the parties proceeded to conduct the proposed enterprise for his own special benefit, to the exclusion of the other, repudiation of the agreement gives the other no claim for an accounting of profits, but only an action at law for breach of contract.[3] Even an oral acceptance of an offer

[1] Brink *v.* New Amsterdam F. Ins. Co. 5 Robt. (N. Y.) 104.

[2] Wilson *v.* Campbell, 10 Ill. 383; Vance *v.* Blair, 18 Oh. 532; 51 Am. Dec. 467.

[3] Powell *v.* Maguire, 43 Cal. 11. See, also, Metzner *v.* Baldwin, 11 Minn. 150; Doyle *v.* Bailey, 75 Ill. 418. And in Reboul *v.* Chalker, 27 Conn. 114, where A. and B. bought a stock of goods, and made a contract which recited an equal ownership in the goods, and their intention to form a partnership to continue for three years from May 1, and provided for the business, but A. re-

of partnership, without change in the business or money paid or property turned over, is not conclusive of the formation of a firm.[1]

Where a person contracts for a lease of land and a growing crop, for which he pays a certain sum, getting part of it from a third person, under an agreement that the latter shall become his partner, if the lessee acquires possession, this is no partnership, possession never having been obtained, and the lessee can sue alone for breach of contract by the lessor.[2]

So, where C. and W., in 1868, agreed to form a partnership, to farm the property of W. for the ensuing year, and W. died before the beginning of the year, C. is not entitled to the possession of the farm as surviving partner.[3] This, doubtless, would have been the ruling, even had the contract stipulated for a partnership *in presenti*, if nothing had been done under it, for a surviving partner takes the partnership assets to wind up the business and not to carry it on.

So, an agreement made in August, 1873, between D. and H., that

fused to perform the contract and proceeded to purchase more goods in his own name and for his individual benefit, in an action to hold B. liable as a partner for the price of the latter goods, it was held that there had not been a partnership and a dissolution; but the partnership term was not to begin until May 1, and the remedy *inter se* for refusal to perform would be an action for breach of contract, and that B. could not be held. The fact that they had purchased goods does not advance the beginning of the term, for they could buy books, rent a store, etc., without beginning the partnership. And in Metcalf *v.* Redmon, 43 Ill. 264, R. wrote to M., offering to go into partnership in the purchase of twenty horses, to be shipped to and sold by R., and M. accepted the offer, bought twenty-seven horses and opened books in the name of M. and R.; but sold the horses elsewhere, without R.'s knowledge, and there being a loss sued R. for an accounting. As the field of profit was R.'s state, M. had not complied with the terms, the partnership was not launched, and the bill, therefore, was not maintainable.

[1] Hutchins *v.* Buckner, 3 Mo. App. 594. And see Gray *v.* Gibson, 6 Mich. 300.

[2] Snodgrass *v.* Reynolds, 79 Ala. 452. Where M. paid to the firm of Schacher Bros. £2,000, to be invested in a steamer, to be used in trade; M. to have five per cent. on his money, and a one-eighth share in earnings of the steamer, and M. also agreed within a year to pay £4,000 more, and thereupon was to have a three-sixteenths interest in all Schacher Bros. business, including the steamer, this agreement does not constitute M. their partner in the steamer, the £4,000 never having been fully paid. Meyer *v.* Schacher, 38 L. T. N. S. 37.

[3] Cline *v.* Wilson, 26 Ark. 154.

D. would cut timber from H.'s land in partnership with him, was said not to make them partners before the job was begun, so as to render H. liable for goods sold to D. in October, 1873.[1] But purchases before the partnership is formed may be ratified by the others by disposing of the goods for their own purposes after learning that they were purchased on the credit of the supposed firm.[2]

§ 79. —— **intention to form a partnership.**— A mere intention to form a partnership does not constitute one until an actual agreement is made.[3] As where several persons contributed a fund and employed one of their number to buy a quantity of cotton, leaving the subject of sale for future arrangement, they are merely tenants in common, and the fact that they originally intended to sell and divide profits does not make them partners.[4] So, the fact that several persons associated themselves to run a line of stage-coaches and had a general meeting, and debts were contracted on account of the company, does not prove a partnership *inter se;* hence one who paid the debts can sue the rest at law for contribution.[5]

§ 80. **Purchases in contemplation of a partnership.**— So, contracts made and liabilities incurred by individuals upon their separate credit and on their own account, under an

[1] Hall *v.* Edson, 40 Mich. 651. An agreement by a firm of spice dealers with a person to admit him to a share in an investment, if his secret information of changes in the tariff obtained from a congressional committee prove true, is not a partnership. Strong *v.* Place, 51 N. Y. 627; 4 Robt. 385. For other examples of agreements between parties to form partnerships to begin at a future date, before which time one of them makes purchases in the name of all without the knowledge of the others, for which they were held not liable because the purchasing party had not yet authority to bind them, see Davis *v.* Evans, 39 Vt. 182; Gaus *v.* Hobbs, 18 Kan. 500; Mousseau *v.* Thebens, 19 La. Ann. 516. See Lowe *v.* Dixon, 16 Q. B. D. 455, where all were held liable.

[2] Pike *v.* Douglass, 28 Ark. 59; Fleshman *v.* Collier, 47 Ga. 253; Westcott *v.* Price, Wright (O.), 220. An assumption of specified portions of the debt by the members is not an assumption by the partnership. Mousseau *v.* Thebens, 19 La. Ann. 516.

[3] Lycoming Ins. Co. *v.* Barringer, 73 Ill. 230; Bourne *v.* Freeth, 9 B. & C. 632; Reynell *v.* Lewis, 15 M. & W. 517.

[4] Baldwin *v.* Burrows, 47 N. Y. 199, 207.

[5] Chandler *v.* Brainard, 14 Pick. 285.

agreement by which money or property so obtained shall, when procured, be contributed to a partnership to be formed between them, followed by the formation of the partnership and putting the money or goods into it, does not make the firm liable on these contracts, for the power of each to bind the others does not begin until the firm is created; the agreement being that each shall do certain things at his own expense and then become partners.[1]

In Saville *v.* Robertson, 4 T. R. 720, several persons agreed to share the profit and loss of an adventure, but no one was to be responsible for anything ordered except by himself. The rest are not responsible for the goods ordered by one, for the partnership does not begin until the stocks are united.

In McGar *v.* Drake (Tenn. 1877), 5 Reporter, 347, an agreement between Parker and Drake that Parker should buy McGar's hogs and Drake should buy those of another person, and put them together in partnership when purchased, does not make Drake liable on the purchase to McGar. So, also, Webb *v.* Liggett, 6 Mo. App. 345, where L. and D. were to furnish animals, tools and money to cultivate hemp, and G. was to furnish the land, superintend the crop as agent of L. and D., ship it to L. and D.'s commission merchant, who was to pay him one-third the profits. L. and D. are not liable for the rent of land leased by G. in his own name for the purpose.

And in Valentine *v.* Hickle, 39 Ohio St. 19, each of three persons was to buy cattle on his own account, and upon each lot of cattle reaching the place of shipment the others could take an interest in it or not, as they saw fit; if they did, the cattle were to become partnership property and to be shipped and sold on joint account; here neither became liable on the other's purchases, although the cattle were accepted.

In Coope *v.* Eyre, 1 H. Bl. 37, A., B., C. and D. agree that A. shall buy and they shall have aliquot parts of the purchase. This is

[1] Heap *v.* Dobson, 15 C. B. N. S. 460; Smith *v.* Craven, 1 Cr. & J. 500; Coope *v.* Eyre, 1 H. Bl. 37; Saville *v.* Robertson, 4 T. R. 720; Young *v.* Hunter, 4 Taunt. 582; Hutton *v.* Bullock, L. R. 8 Q. B. 331; 9 id. 572; Baxter *v.* Plunkett, 4 Houst. 450; Brooke *v.* Evans, 5 Watts, 196; Webb *v.* Liggett, 6 Mo. App. 345; Valentine *v.* Hickle, 39 Ohio St. 19; Heckert *v.* Fegely, 6 W. & S. 139; McGar *v.* Drake (Tenn. 1877), 5 Reporter, 347.

not a partnership, for there is no agreement to join in a sale; it is a sub-sale only.

In Hutton *v.* Bullock, L. R. 8 Q. B. 331, affirmed in 9 id. 572, H., F. & Co., a London firm, were to "purchase" goods and send them out on "joint account" of themselves and H., B. & Co., a firm at Rangoon, each firm to charge a commission, one for buying and the other for selling. Plaintiff, who sold the goods to H., F. & Co., had no knowledge of the interest of H., B. & Co., and it was held could not charge them as undisclosed principals, the agreement not being to purchase on joint account, but to ship on joint account.

In Gouthwaite *v.* Duckworth, 2 East, 421, B. & P., partners, being indebted to D., all three agreed to join in buying and selling goods, B. & P. to buy, pay for and sell them and remit the proceeds to D., who should deduct the amount of his debt and share profit with B. & P. All three were held liable to pay for goods bought by B., on the ground that the purchase was for the adventure and the adventure began with the purchase.[1] And in Saufley *v.* Howard, 7 Dana, 367, H. and A. agreed to share profits of sales of goods to be bought by A. on his own credit, and A. bought, paying by a note in the firm name, and H. received the goods in boxes marked in the firm name, and both were held liable; and the provision that A. was to buy on his own credit was regarded as a secret restriction on liability.

§ 81. **What are not in futuro.**—If, however, the contract of partnership either expresses an existing association, as distinguished from an executory agreement, or contemplates continuous proceedings to be begun immediately for the joint benefit, the intention is to create a partnership *in presenti* and not one *in futuro.*

Thus, a recital that the parties "have entered" into a partnership, and fixing no time for its commencement, has been regarded as intending an existing partnership. The facts in the case, however, showed that the parties actually acted as partners.[2]

In Aspinwall *v.* Williams, 1 Oh. 84, by the articles of partnership to operate a distillery, each partner was assigned the performance of certain duties, at joint cost, in order to put the partnership

[1] This case is very close. See, also, Everitt *v.* Chapman, 6 Conn. 317.

[2] Ingraham *v.* Foster, 31 Ala. 123.

into operation. Thus, one was to build the distillery at joint cost, and the rest to furnish stills, worms and goods; there was no agreement as to the cost of any part, but that each was to be owner of the whole equally. They were held to be partners at once and not from the commencement of business, and all liable on a note made by one in the firm name.[1]

In Lucas *v.* Cole, 57 Mo. 143, where both parties who had agreed to become partners were held liable for the purchase of goods by one on behalf of both for the purpose of conducting the partnership, the court, without saying as in the above case that the partnership had already begun, placed their ruling on the ground that business preparatory to the business of the partnership binds both the partners.

So in Atkins *v.* Hunt, 14 N. H. 205, subscribing at a meeting articles of association for trading called The Farmers' and Mechanics' Store, which articles prescribed that the business should be done by a majority of those present, constituted a present partnership or actual existing reality, and not a proposition to form one. The statute, however, provided that each subscriber should be a partner.

In Adams Bank *v.* Rice, 2 Allen, 480, A. said to B. that he needed a partner so that in case of his death there should be some one to close up the business, and proposed to take B. in, paying him $1,500 the first year and a share of profits thereafter, and an agreement was executed accordingly, stating that the parties had this day formed a partnership as A. & Co., and sales were made and drafts drawn in the firm name, and each acted as a full partner; A. having died within the year, B. was held to be his surviving partner, although receiving a fixed sum.

In Beauregard *v.* Case, 91 U. S. 134, B. was to lease a railroad, and he and M. & G. were to put in not to exceed $150,000 each, and run it until the profits repaid M. & G. their contributions, after which the profits would be divided. It was held that the postponement of division of profits did not prevent its being a present partnership, and liable for B.'s overdrafts on a bank to raise money to operate the railroad.

In Drennen *v.* London Assur. Co. 113 U. S. 51, A. was to be ad-

[1] See, also, Noyes *v.* Cushman, 25 Vt. 390, which is very similar to this; and Kerrick *v.* Stevens, 55 Mich. 167, analyzed under the next section.

mitted into a business on the terms that the company would be incorporated and he should pay into the firm $5,000 for its use, which was to be put into the corporation, but no change in the name or *character* of the firm should be made until the corporation was formed. This was held to mean that A. was not to act for or have an interest in the property until the corporation was formed.

In Haskins *v.* Burr, 106 Mass. 48, defendant, desiring to secure plaintiff's services in his factory business, and plaintiff, desiring to secure an interest therein, made an agreement reciting these facts, and agreeing that plaintiff should be employed at a certain salary and should give his notes for a certain sum; that if certain mortgages on the property were paid out of the profits, and if the notes were paid, the defendant would convey one-half of the business to the plaintiff. Before the notes or mortgages were paid, the defendant sold the property and thus incapacitated himself from fulfilling the contract; plaintiff thereupon claimed an accounting as partner from the beginning. It was held that his remedy was at law, for breach of contract, for the agreement was wholly executory and he had no joint property in the capital or lien on the profits.

§ 82. —— **same.**—And the fact that the present tense or future tense is used in the articles will not be allowed to control a manifest purpose.

Thus, in Kerrick *v.* Stevens, 55 Mich. 167, the defendant was by the articles to furnish money and the others to do work in putting up a factory in which to manufacture a patented device, contributed by one as his capital, and when the factory was completed all were to be equal partners; and in an action before its completion, for the price of machinery furnished for the factory, where some of the defendants denied the partnership, it was held that to determine when the partnership began "the purpose must be derived from the nature of the agreement and not from the technical meaning of words as present or future, standing alone." It is quite proper to use future words as to the interest to be held in future property. It would be an "anomaly to have capital paid in and expended without any partnership existing."

And in Goddard *v.* Pratt, 16 Pick. 412, a member of P. & Co. having died, several persons agreed to buy out his interest in P. & Co. and to be interested in the profits, the surviving members of P.

& Co. to get the concern incorporated and then a copartnership to be formed; but it was held that the parties became partners, at least from the time of payment, and that the agreement was not executory.

In Vassar *v.* Camp, 14 Barb. 341,[1] three partners agreed to convey to four other persons a half interest in the firm, and give them half the net profits, such profits to be applied to paying for the latter's shares of the business, and at the end of five years to convey the half interest, one-eighth to each, profit and loss to be shared. Here was a right to share profits and to use the capital, and an inchoate interest in the capital, and it was held to be a present partnership.

§ 83. **Conditions precedent.**— If the performance of certain things are conditions precedent to the existence of the partnership, the parties are not partners until these are performed.[2]

In James *v.* Stratton, 32 Ill. 202, W. and S. were to buy cattle on joint account, and W. failed to furnish his share of funds, and S. borrowed the money, paid for all the cattle and shipped them in his own name, and a creditor of W. levied on his supposed interest in them; but it was held there never had been a partnership, and W. had no interest.[3]

In Napoleon *v.* State, 3 Tex. App. 522, N. and R. agreed to become partners, with equal capital, in selling confectionery at a picnic, N. to buy the stock and manage the business; R. paid his share of the capital to N., who abandoned the enterprise and kept the money, and it was held that no partnership was consummated, and, therefore, N. was liable for embezzlement.

In Hobart *v.* Ballard, 31 Iowa, 521, plaintiff agreed to buy an interest in a business for $1,500, of which he paid $1,295; but the terms were that he was not to share profits or be an acting partner until full payment; and defendant having refused to let him become a partner, he applied for a receiver, and it was held that these facts were not sufficient to show a present partnership.

In Johnston *v.* Eichelberger, 13 Fla. 230, where A. sold to B. one-half his stock of goods, B. agreeing to pay half the cost and

[1] Affirmed on other points in 11 N. Y. 441.

[2] Dickinson *v.* Valpy, 10 B. & C. 128, 142; Metcalf *v.* Redmon, 43 Ill. 264, noticed fully (§ 78, note).

[3] See, also, Stevenson *v.* Mathers, 67 Ill. 123.

charges to be incurred, not yet ascertained, in getting the goods, and they were then to sell the goods as partners, it was held that the property must pass before there is a partnership, and that the vendor could insist on payment first, and that slight circumstances, attributable to courtesy and confidence, would not be deemed a waiver of this condition.

In Fox *v.* Clifton, 6 Bing. 776, an advertisement inviting subscriptions to shares in a company with a capital of £600,000, or twelve thousand shares, on terms to be settled in a deed, was regarded only as an offer to form a partnership, and defendants subscribing and paying the first instalment as an assent to the terms. But as only seven thousand five hundred shares in all were taken, and of those only two thousand three hundred paid the first instalment, the defendants, who had never attended any of the meetings or in any way interfered as partners, were held not bound by the act of the directors in purchasing goods and employing labor, for they had assented to be partners in a concern raising £600,000 capital and governed by a deed never executed. The directors, therefore, acted before they had any authority to bind the defendants. See, also, Hedge & Horn's Appeal, 63 Pa. St. 273.

§ 84. **Same.**—But it seems that terms will not be treated as conditions precedent unless so expressed, or in their nature such as to raise a presumption that they are so.

Thus, in Durant *v.* Rhener, 26 Minn. 362, a contract between the firm of D. W. & Co., the plaintiffs, and R., the defendant, that R. should put up ice for the southern market and plaintiffs should furnish the money, and plaintiffs were, on getting south, to look over the market and determine whether it was safe to put up ice, and they wrote to defendant to put up ice but never furnished any money, though ready and willing to do so had they been called upon; and defendant sold the ice at a profit of $2,500, in an action for an accounting of profits it was called a partnership *in presenti*, and not one to begin when plaintiffs sent notice to the defendant to put up the ice, but, being contracted on Sunday, was held void.

So where B. and H. wrote to B. and S. proposing that the latter should consider a shipment of three hundred bales of cotton as on joint account, and B. and S. wrote, consenting, and requested B. and H. to designate and mark the cotton on joint account and advise them when it was shipped, this constitutes a contract, and the

request to designate and mark is not a condition imposed in the acceptance, but a direction.[1]

In Guice *v.* Thornton, 76 Ala. 466, on an agreement to form a partnership, each to contribute $2,000, a charge to the jury that no partnership arises until the shares are brought together into a common venture, and until then one party cannot bind the rest by a note in the firm name, was held erroneous on the ground that a partnership is deemed to be *in presenti* from the time of signing the agreement, unless the terms of the instrument rebut this presumption.

The conditions may be subsequent ones by the terms of the agreement, as in Grady *v.* Robinson, 28 Ala. 289, where a partnership to speculate in Indian lands was agreed on at a meeting of the company, the number of shares were fixed, the interest of each member was allotted, and a specified sum required to be paid on each share, and each member was to relinquish to the company all interest then held by him in the lands, and, on failure to comply, his interest was to be forfeited. A person who had agreed to take the shares assigned to him was held to be a partner as to third persons who had purchased tracts from the company and now seek to divest the title, although he had not paid his instalment or relinquished the interest held by him in the land.

§ 85. Oral conditions.—Whether oral evidence is admissible to show that a contract of present partnership was not to go into operation except upon a contingency depends upon the rules of evidence. That an oral condition cannot be engrafted upon them has been held,[2] and such is doubtless the law. On the other hand, parol evidence has been admitted to show that the articles were to be held by one of the signers until certain debts were paid.[3] The cases are not inconsistent, for delivery being part of the execution of an instrument, the latter evidence went to show incomplete execution and not to contradict.

§ 86. Waiving conditions by launching.—Inasmuch as acting together as partners may constitute a partnership, though no written articles by agreement be entered into, so actually beginning the joint business or launching it to-

[1] Brisban *v.* Boyd, 4 Paige, 17, 20. See Saufley *v.* Howard, 7 Dana, 367.

[2] Dix *v.* Otis, 5 Pick. 38; Williams *v.* Jones, 5 B. & C. 108.

[3] Beall *v.* Poole, 27 Md. 645.

gether, although something remains to be done or conditions to be performed by one or all, will constitute an immediate partnership *inter se* and as to third persons. This is, as it were, converting a condition precedent into a condition subsequent. Thus, if partners agree to act together as such without waiting for the signature of an absent one to the articles, although they would not form a partnership without him, they become partners *inter se* thereby.[1] So if a partner has not done all that he agreed to do, as where he fails to contribute all he had agreed to put in, but they go on, it becomes a partnership *in presenti*.[2]

In Cook *v.* Carpenter, 34 Vt. 121, B., of A. & B., partners in cattle dealing, proposed to take C. into the firm, to which A. agreed, provided B. and C. would furnish all the money necessary, and A. agreeing to do the selling and guaranty sales. C. accepted this proposition, but B. did not tell him that he and B. were to furnish all the funds. Stock was bought and all three signed the note, and A. having had to pay it sued B. and C., claiming that there was no partnership for want of a meeting of minds, and that he was surety only. But it was held that as both A. and C. agreed to be partners, and both understood that they were acting as such, and actually proceeded in the business, neither ought to claim the contract as he and not the other understood it, and in this dilemma the rule must be applied that persons who agree to become partners and actually act, are so, although they did not understand the conditions of partnership alike.

In Gullich *v.* Alford, 61 Miss. 224, where G., who owned a mill and owed A., agreed with A. to convey half the mill to A., the debt being part payment, A. to repair the mill and G. and A. to form a partnership, and pursuant to this they ran the mill together for a time, dividing profits each day until A., being unable to pro-

[1] Ontario Salt Co. *v.* Merchants' Salt Co. 18 Grant's Ch. (Up. Can.) 551; McStea *v.* Matthews, 50 N. Y. 166, and on the same instrument, Hubbard *v.* Matthews, 54 N. Y. 43; 13 Am. Rep. 562. And see Wood *v.* Cullen, 13 Minn. 394, where one partner had not signed the articles but was held liable on a partnership note.

[2] Stein *v.* Robertson, 30 Ala. 286, 293; Hartman *v.* Woehr, 18 N. J. Eq. 383; Palmer *v.* Tyler, 15 Minn. 106; Coggswell *v.* Wilson, 11 Oregon, 371; Boyd *v.* Mynatt, 4 Ala. 79; Campbell *v.* Whitley, 39 id. 172; Jackson *v.* Sedgwick, 1 Swanst. 460. See Perkins *v.* Perkins, 3 Gratt. 364.

cure a conveyance from G., abandoned the partnership and sued G. as for services, it was held that, having acted as partners and enjoyed the fruits of the enterprise in part as such, a conveyance could not now be claimed to be a condition precedent to full execution, and A.'s remedy was in equity for an accounting.

In Phillips *v.* Nash, 47 Ga. 218, a person purchased an interest in an existing firm, the agreement reciting a present and not a future conveyance of the interest, although it was also agreed that an account of stock should be taken, and he should pay more if it exceeded an estimated amount. They were held to be partners from the time of conveyance, the law of sales governing the transaction.

In Thurston *v.* Perkins, 7 Mo. 29, partnership articles were executed and the partners began to act as such, but gave it up after six weeks, finding that they could not buy goods on credit. The attempt to purchase was held an act of partnership, for the world cannot look to see if they actually traded, and notice of dissolution was held necessary to relieve one from liability on subsequent contracts.

§ 87. —— **payment for future partnership.**— But mere payment of money in anticipation of a future partnership does not make the parties partners.[1]

So negotiations to admit E. as a partner were had, he to pay £2,000 to the partners as premium and "& Co." to be added to the old firm's name, and he paid the £2,000 and "& Co." was added to the name, but E. did nothing else and refused to be a partner. This is not sufficient to make him one, and he can prove in bankruptcy as creditor for his advance.[2]

If all the acts proved are equally consistent with an intention to become a partner in a business to be afterwards carried on as with that of an existing partnership, it is difficult to say that there is evidence of authority in the rest to bind him.[3]

§ 88. **Options to become partner.**— Articles of partnership or agreements are frequently made stipulating that employee or others of the firm may, after a certain tin become a partner, or may have an option to be a partı

[1] Hubbell *v.* Woolf, 15 Ind. 204; Hoile *v.* York, 27 Wis. 209.

[2] *Ex parte* Turquand, 2 M. D. & D. 339.

[3] Per PARKE, J., in Dickinson *v.* Valpy, 10 B. & C. 128, 141; and this was quoted and held to be the law in Atkins *v.* Hunt, 14 N. H. 205.

from a prior period; or that one who loans money for the business may on or before a certain date elect to be considered a partner from the beginning, letting the loan stand as capital. In all such cases there is no partnership either *inter se* or as to third persons until the election has been made.[1] But the agreement must be *bona fide*, and not for purposes of concealment.[2]

In Sailors *v.* Nixon-Jones Printing Co. 20 Ill. App. 509, three persons, each owning a third interest in a business, made a contract called "partnership," by which two of them were to carry on the business at their own profit and loss and the other was bound to become a partner in two years. This was held not to be a partnership, because there was no community of profit and loss, and the third owner is not liable for debts incurred during the two years.[3]

Where A. advances money to B. to be used in his business and takes notes for it, both agreeing that he might become an equal partner and the money become his capital if he desired, and B. carried on the business, taking more than half the profits and crediting A. with interest, and A. expostulated, saying he was a partner and should have profits and not interest, but B. continued to credit interest, upon A.'s bringing suit upon the notes, the court can hold that there is no partnership and the action lies.[4]

If, however, among actual partners there is a stipulation that one might at the end of a year or other period elect to be an employee from the beginning, at a salary in lieu of profits, the exercise of such election is not a dissolution and a new partnership, but *inter se* the other partners are regarded as a firm from the beginning.[5]

[1] *Ex parte* Davis, 4 DeG. J. & Sm. 523; Gabriell *v.* Evill, 9 M. & W. 297, and Car. & Marsh. 358; Price *v.* Groom, 2 Ex. 542; Howell *v.* Brodie, 6 Bing. N. C. 44; Adams *v.* Pugh, 7 Cal. 150; Williams *v.* Soutter, 7 Iowa, 435; Moore *v.* Waltou, 9 Bankr. Reg. 402; Irwin *v.* Bidwell, 72 Pa. St. 244; Darling *v.* Bellhouse, 19 Up. Can. Q. B. 268; Hill *v.* Bellhouse, 10 Up. Can. C. P. 122.

[2] See Courtenay *v.* Wagstaff, 16 C. B. N. S. 110.

[3] A partnership may be contracted to take effect in the future or on conditions. Avery *v.* Lauve, 1 La. Ann. 457. And this is an enforcible right. Handlin *v.* Davis, 81 Ky 34.

[4] Morrill *v.* Spurr, 143 Mass. 257.

[5] Bidwell *v.* Madison, 10 Minn. 13

§ 89. **Promoters of corporations.**— Associates joining to form a future company, or the promoters of a corporation, are not partners while engaged in taking the necessary preliminary steps; provided, of course, they do not begin the business, or contract or otherwise act as partners. They never have agreed to be partners at all;[1] and if one lends money or performs services on a contract with the rest, he can recover from them at law.[2] And if the board of which he is a member orders work done, he may be liable on the principle stated in § 75;[3] but unless the contract was by himself or an authorized agent, he is not liable merely from the fact of membership in the committee.[4]

[1] See, for example, Reynell *v.* Lewis, 15 M. & W. 517; 1 Sim. N. S. 178; Hamilton *v.* Smith, 5 Jur. N. S. 32; West Point Foundry Ass'n *v.* Brown, 3 Edw. Ch. 284; Sylvester *v.* McCuaig, 28 Up. Can. C. P. 443.

[2] Hamilton *v.* Smith, 5 Jur. N. S. 32; Sylvester *v.* McCuaig, 28 Up. Can. C. P. 443. The contrary had been ruled in Holmes *v.* Higgins, 1 B. & C. 74, but this is clearly not so.

[3] Doubleday *v.* Muskett, 7 Bing. 110.

[4] Bailey *v.* Macaulay, 19 L. J. Q. B. 73; Wood *v.* Duke of Argyll, 6 Man. & Gr. 926. As to the liability of stockholders in an abortive corporation, see §§ 4–6.

CHAPTER V.

BY HOLDING OUT OR ESTOPPEL.

§ 90. In general.— A person not actually a partner may render himself liable as one by inducing people to act upon the faith of representations by him that he is a partner. Not being a partner, he is not liable generally, but only to those whom he has misled, the principle applicable being that of ordinary estoppel. These representations may be to a particular person, whose conduct alone is influenced by them; or they may be assertions intended to be repeated and acted upon by third persons, as where defendant informs A. that he is a partner, and A. informs plaintiff, who supplies goods in reliance on the statement,[1] as where he gives the information to a mercantile agency; or the representation may be still more general, as where he lends his name generally by permitting it to appear in the firm style, in which case he represents to the whole world that he is a partner.[2]

The representations need not be by himself, nor be absolute assertions. If he knowingly permits others to hold him out as a partner, or to convey the impression that he is one,[3] or where appearances are held out justifying the belief, or there is a failure to contradict an impression or undeceive a party, under circumstances calling upon the defendant not to remain silent.

But while it is very difficult to distinguish between evidence that goes to show a person to be in fact a partner and that which proves a holding out, yet liability on the latter ground proceeds solely on the ground of estoppel, and the

[1] Per WILLIAMS, J., in Martyn *v.* Gray, 14 C. B. N. S. 824, 841.

[2] EYRE, C. J., Waugh *v.* Carver, 2 H. Bl. 235.

[3] Qui facit per alium, must face it himself. Punch.

plaintiff, therefore, must have relied upon the appearances, and therefore have known them at the time of contracting, which is not true of evidence tending to prove actual partnership. Furthermore, to constitute an estoppel, the defendant must have been in fault by being a participant in the misrepresentation; the rights of dormancy of a secret partner may be destroyed by an unauthorized or accidental divulging of his membership by others, but a person not an actual partner cannot be made such by representations of others of which he was not aware.

§ 91. Plaintiff's knowledge necessary.— A person being liable as a partner by holding out on the ground of estoppel solely, is therefore not liable to one who did not know of such holding out at the time of contracting. The holding out must antedate the contract, and the plaintiff's knowledge of and reliance on his alleged connection must be proved as of that time, for otherwise the plaintiff was not misled.[1]

Thus, where T.'s name was signed to partnership articles, without his knowledge, by another, and he immediately withdrew it, but all the cards, letter-heads and circulars with his name on them were used until used up, and then his name was dropped, and it was in controversy whether he knew and consented or not; but as the plaintiff did not know of these representations, T. was held not liable as a partner.[2]

[1] De Berkom *v.* Smith, 1 Esp. 29; Vice *v.* Lady Anson, 7 B. & C. 409, more fully reported in 3 C. & P. 19; Dickinson *v.* Valpy, 10 B. & C. 128, 140, per PARKE, J.; Baird *v.* Planque, 1 F. & F. 344; Pott *v.* Eyton, 3 C. B. 32; Martyn *v.* Gray, 14 C. B. N. S. 824; Edmundson *v.* Thompson, 2 F. & F. 564; Benedict *v.* Davis, 2 McLean, 347; Thompson *v.* First Nat'l Bank, 111 U. S. 530; Wright *v.* Powell, 8 Ala. 560; Vinson *v.* Beveridge, 3 MacArthur (D. C.), 597, 601; Bowie *v.* Maddox, 29 Ga. 285; Hefner *v.* Palmer, 67 Ill. 161; Markham *v.* Jones, 7 B. Mon. 456; Walrath *v.* Viley, 2 Bush, 478; Grieff *v.* Boudousquie, 18 La. Ann. 631; Allen *v.* Dunn, 15 Me. 292 (33 Am. Dec. 614); Palmer *v.* Pinkham, 37 id. 252; Wood *v.* Pennell, 51 id. 52; Fitch *v.* Harrington, 13 Gray, 468; 8 Am. Law Reg. (N. S.) 688; Rimel *v.* Hayes, 83 Mo. 200; Irvin *v.* Conklin, 36 Barb. 64; Cassidy *v.* Hall, 97 N. Y. 159; Cook *v.* Slate Co. 36 Oh. St. 135, 139; Kirk *v.* Hartman, 63 Pa. St. 97.

[2] Thompson *v.* First Nat'l Bank, 111 U. S. 530.

J. conducted a shop for E., paying him a percentage on sales. J.'s bank account was in his own name, and he overdrew and the bank sued E. as a partner of J. The licenses to sell were in E.'s name and his name was over the door; but the bank did not know this and had never treated J. as being a partner of E. A verdict for E. was held justified.[1]

The plaintiff may have known of the holding out from third persons who have repeated to him the defendant's declarations to them or related his acts.[2]

And even if there was a holding out, but plaintiff knew the terms on which the defendant was employed, there is no estoppel, for he was not misled.[3]

§ 92. —— **doctrine of a holding out to the world is erroneous.**— There is a statement attributed to Lord Mansfield, that if the holding consists in permitting the use of one's name in the firm, this being a holding out to the whole world, there is a liability to the whole world, even to those who may not have known the fact.[4] This is entirely inconsistent with the doctrine of the foregoing section, and rests ou no principle, and must be considered as exploded. Nevertheless it had, for a time at least, some influence upon the law, and there are some decisions (see the next section) which may seem to incline that way.

It was these decisions that led Mr. Parsons, in his admirable work upon partnership,[5] to frame a most ingenious rule that a person held out by his own negligence merely is liable only to those who knew and trusted the appearance, but that a person held out by his own consent and connivance is conclusively presumed to be a partner to all customers; and this rule was approved and adopted from Mr. Parsons' work by the court of appeals of New York.[6]

[1] Pott *v.* Eyton, 3 C. B. 32.

[2] Martyn *v.* Gray, 14 C. B. N. S. 824, 841; Shott *v.* Streatfield, Moo. & Rob. 9.

[3] Alderson *v.* Pope, 1 Camp. 404; Pratt *v.* Langdon, 97 Mass. 97, 100; but see Stearns *v.* Haven, 14 Vt. 540, 546; and proof of subsequent acts and declarations to third persons were admitted in Poole *v.* Fisher, 62 Ill. 181.

[4] In Young *v.* Axtell 2 H. Bl. 242. Lord Mansfield seems to have ruled that Mrs. Axtell was liable because she permitted her name to be used as a member of the firm on bills sent to customers and in the business, although the plaintiff did not know of it. See the criticism of Mr. Smith, in Waugh *v.* Carver, 1 Smith's Lead. Cas. 507, and Wood *v.* Pennell, 51 Me. 52.

[5] Pars. Part. p. 119.

[6] Poillon *v.* Secor, 61 N. Y. 456. In

§ 93. Criticism and suggestion.— If there is anything left of Lord Mansfield's rule, it cannot be as broad as that adopted by the New York court. The rule there attempted to be laid down might have been more plausibly stated, thus: The permitted use of a person's name in the firm style is proof of an actual and not nominal partnership. This renders such person liable independent of knowledge of the dealer, and yet does away with the groundless and harsh conclusive presumption attending every kind of intentional holding out, and with the mischievous vagueness of a distinction between holding out by consent and by negligence. Even this suggested proposition is probably not the law, but it is not easy to settle it conclusively, because, where a person's name is in the firm, the plaintiff is sure of being aware of the holding out at the time of the contracting, and hence the point would not be presented to the court for decision, and the *dicta* are against it.[1]

The rule, however, in Poillon *v.* Secor is objectionable. Acts and declarations of the alleged partner before third persons and unknown to plaintiff may be proved by him if they are evidence of an actual partnership, but if insufficient to prove an actual partnership he must show a knowledge of and a justifiable reliance upon them on his part, at the time of giving credit to the firm, in order to charge the person as partner.[2] Moreover, the rule as stated in that case seems to confuse evidence of an actual partnership, and evidence of a holding out. The holding out may be intentional as to the one or two persons without extending to others, which the rule does not recognize; and if negligence can constitute the estoppel, a holding out by negligence may be to the whole world as well as to a few.

this case Secor allowed his name to be used in a smelting business with Swan, a well known worker of ores, as Secor, Swan & Co., and it appeared on bill-heads, advertisements, etc. The plaintiff gave credit to the firm without knowing of the holding out or trusting it upon Secor's account, and Secor was held liable for the above reasons, adopting Mr. Parsons' rule. The same ruling was made in Pringle *v.* Leverich, 16 Jones & Sp. 90, 94. The supreme court of the United States in Thompson *v.* First Natl. Bank, 111 U. S. 529, criticises Poillon *v.* Secor as the only American case sustaining the doctrine, and says the notion arose from a statement attributed to Lord Mansfield, doubtless referring to the one in the text.

[1] See § 102 and § 1147.

[2] Fitch *v.* Harrington, 13 Gray, 468; 8 Am. Law Reg. (N. S.) 688.

§ 94. Probable explanation of the cases.— The proper explanation of the cases given below lies rather in the regarding representations to the world generally of the fact of partnership, such as using the name in the firm style or permitting it to be over the door, and statements to or authorizing commercial agencies to announce it, as evidence for the jury of the fact of partnership; and if it falls short of proving that fact, the degree of publicity is evidence corroborating plaintiff's probable knowledge of it at the time he gave credit,[1] and with knowledge the usual principle applies, that in trusting the firm he is presumed to trust every member of it.[2]

In Wheeler *v.* McEldowney, 60 Ill. 358, plaintiff sued A. and B. on a note for work done by him signed by A. in the name of A. & Co., and on proof that a title-bond for the purchase of the mill had been given, made to A. and B., "composing the firm of A. & Co.," with the knowledge of B., who made most of the payments and frequently visited the mill, the plaintiff was allowed to hold B., although it was testified that he never had been a partner, on the ground that he had held himself out as such to the public and for reasons of public policy.

In Poole *v.* Fisher, 62 Ill. 181, M. had told a mercantile agency that he was a partner, and F. at the time of purchasing the goods had said the same, as had also M., and he was held liable on the debt; the court say that he is liable to third persons generally.

In Thompson *v.* First Nat'l Bank, 111 U. S. 530, 537, it was said that there might be cases where the holding out was so public and so long continued that the jury could infer that the plaintiff knew of it; and in Bowen *v.* Rutherford, 60 Ill. 41 (14 Am. Rep. 25), it was said that there must be such publicity to the holding out as to afford a presumption that the creditor knew of it, otherwise he must prove credit given on the faith of it.[3]

[1] Dickinson *v.* Valpy, 10 B. & C. 128, 140, where Parke, J., says, "if it could be proved that the defendant held himself out — not to the world, for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity that the plaintiff knew it and believed him to be a partner, he would be liable." Wood *v.* Pennell, 51 Me. 52. And see hereafter under Evidence.

[2] Booe *v.* Caldwell, 12 Ind. 12; Rizer *v.* James, 26 Kan. 221. And see Contract with one partner.

[3] And see Hefner *v.* Palmer, 67 Ill. 161; Benedict *v.* Davis, 2 McLean, 347, 350.

A person representing himself to a few third persons as a partner is not such a holding out to the world as to render him liable to one who did not know of the representations.[1]

In Casco Bank *v.* Hills, 16 Me. 155, a notice by surviving partners that the business of the late firm would for the present be carried on in the same name by a designated one of their number, who is duly authorized to settle all matters, was held to make them all partners by holding out to the would, and liable on a note in the firm name made by such designated partner.

§ **95. Defendant's knowledge.**— To estop a person to deny that he is a partner, the act of holding out must be voluntary on his part. Merely being held out as partner by another, without knowledge of it, creates no liability; for no estoppel arises where he is not in fault. The unauthorized use of one's name by another, who does not know of it, or not under such circumstances as to be called upon to contradict the false appearances, is not a holding out by himself and creates no estoppel to deny partnership. A holding out must be by his own admissions, assent or acts. Thus, that directors placed the defendants' names on the list of partners, without their knowledge, and the plaintiffs trusted to those named on the list, does not make the defendants in any way liable.[2]

§ **96. Acquiescence.**— But no particular mode of holding out is necessary. If he knowingly consents to being represented as a partner, no matter how, he is liable; and his knowledge and consent may be inferred from circumstances.[3] And if he is held out with his consent, or in his presence, or after his culpable silence, he is liable to those misled thereby.[4] What constitutes culpability in remaining silent,

[1] Markham *v.* Jones, 7 B. Mon. 456; Vice *v.* Lady Anson, 7 B. & C. 409; 5 C. & P. 19; Benedict *v.* Davis, 2 McLean, 347.

[2] Fox *v.* Clifton, 6 Bing. 776; 4 M. & P. 713; Hastings *v.* Hopkinson, 28 Vt. 108, 114; Swann *v.* Sanborn, 4 Woods, C. C. 625; *Re* Jewett, 7 Biss. 328; 15 Bankr. Reg. 126; Cole *v.* Butler, 24 Mo. App. 76; Bishop *v.* Georgeson, 60 Ill. 484; Campbell *v.* Hastings, 29 Ark. 512; Cassidy *v.* Hall, 97 N. Y. 159; Denithorne *v.* Hook, 112 Pa. St. 240; Benjamin *v.* Covert, 47 Wis. 375, 384. And see Gay *v.* Fretwell, 9 Wis. 186; Pott *v.* Eyton, 3 C. B. 32.

[3] Holland *v.* Long, 57 Ga. 36.

[4] Nicholson *v.* Moog, 65 Ala. 471;

so as to justify an inference of acquiescence, must depend on the facts of each case.

§ 97. —— **illustrations.**—In Potter *v.* Greene, 9 Gray, 309, a paragraph appeared in a newspaper, to which Greene was a subscriber, stating that a company of gentlemen had bought the Sagamore Thread Co.'s property, and that Greene was one of them, and was to be in charge. The paragraph did not purport to be inserted by the partnership, and it was held not admissible as evidence of a holding out, though Greene never requested a retraction. It was doubtful whether he ever knew it; but the court said that if he did see it, they were of opinion that he was under no obligation, legal or moral, to give it a contradiction.

In Newsome *v.* Coles, 2 Camp. 617, three brothers had been partners, after their father's death, as Thomas Coles & Sons, and dissolved; two of them going into a new business, and one continuing the old business in the old name; due notice of dissolution was published. A person who had never dealt with them gave credit to the single brother, and on seeking to hold the other two as partners, it was held that the latter were not bound to take any steps to prevent the use of the old name. (See § 100, *infra.*)

In Polk *v.* Oliver, 56 Miss. 566, 570, it is suggested that a person knowing he is held out as a partner by another is not bound to interfere; but that if he was once a partner, and his notice of withdrawal was not very extensive, he cannot allow the world at large to be ignorant of the unauthorized use of his name.[1]

In Wright *v.* Boynton, 37 N. H. 9, a person appointed as agent to transact all business for the defendant, added a person as partner of the principal without authority, and it being sought to hold the principal for the acts of such person, it was held that the principal was not exonerated by mere silence; that he must dissent or give notice in a reasonable time, or assent will be presumed; and that a person knowing he is held out as a partner must publicly disclaim it.

Craig *v.* Alverson, 6 J. J. Mar. 609; Wood *v.* Pennell, 51 Me. 52; Kritzer *v.* Sweet, 57 Mich. 617.

[1] And see Wood *v.* Pennell, 51 Me. 52. And so if a retired partner knowingly allows a reputation to exist that he is still in the firm, and this comes to the plaintiff's knowledge, before selling, although the plaintiff had not previously heard that he was a partner, but there had been no notice of dissolution. Benjamin *v.* Covert, 47 Wis. 375, 384.

In Ihmsen *v.* Lathrop, 104 Pa. St. 365, the city directory gave Domenec Ihmsen as a partner, whereas he was only manager, and his son Domenec O. Ihmsen was the partner; and the court said this could not be received without evidence that he had seen it and made no effort to have it changed; but that if he did object and refused to pay for the directory until corrected, and a promise was given to correct it the next year, the jury could give no weight to the evidence.

In Rittenhouse *v.* Leigh, 57 Miss. 697, the defendant, on hearing she was held out as a partner, remonstrated, and the firm promised to withdraw her name; they broke the promise; but she was not shown to have been aware of this, and the court said she was not compelled to do more than make the request.

In Bowie *v.* Maddox, 29 Ga. 285, it was held that the fact that defendant manifested surprise when told that he was regarded as a partner is not competent evidence, for it is a mere declaration, by acting, in his own favor.

§ 98. Prior unknown acts of holding out.— Estoppel being the sole ground upon which a person can be charged as a partner by holding out, and not the doctrine of a general liability by a holding out to the world, independent of the plaintiff's knowledge, it would follow that acts of holding out, of which the plaintiff was unaware, cannot be admitted even to corroborate the acts known and relied upon. The plaintiff cannot show all the acts of the defendant and prove afterwards what came to his knowledge.[1]

[1] Rimel *v.* Hayes, 83 Mo. 200, 209. Nevertheless several of the few cases in which this apparently obvious principle was brought directly to the attention of the court seem to have disregarded it. In Smith *v.* Hill, 45 Vt. 90 (12 Am. Rep. 189), Harrington gave a note signed Hill & Co. without Hill's authority, Hill not being his partner, and the payee took the note on the credit of Hill's name, and it was held that he could prove prior acts of holding out by Hill of which he was not aware at the time he took the note; as that on a prior occasion Harrington made a similar note, and Hill remonstrated and made Harrington promise not to use his name so as to hurt him; and this was construed to mean not to use his name beyond an ability to indemnify him, a risk that Hill ran and not those who received the paper. See, also, Slade *v.* Paschal, 67 Ga. 541. In Conklin *v.* Barton, 43 Barb. 435, plaintiff sued the defendants as partners for liquor sold by him to one of them. He failed to prove a partnership between the defendants, but proved acts of holding out prior to

§ **99. What constitutes a holding out.**— Owing to the fact that the question of holding out is for the jury, there must be conflicting findings upon very similar facts; and Mr. Justice Lindley[1] has given an excellent example of this in Wood *v.* Duke of Argyll, 6 M. & G. 928, and Lake *v.* Duke of Argyll, 6 Q. B. 477. Nevertheless, the courts have frequently passed upon the sufficiency and even relevancy of evidence, and from these may be gathered some principles as well as illustrations.

If a person is authorized by a firm to hold himself out as their partner, and does so, this is a holding out by the partners of themselves as his partner.[2]

The acts or language must reasonably import membership in the firm and not merely an interest, for a person may have an interest in the firm without being a partner and have a right to announce that fact; the question is, what does the language used import, and not what interpretation the creditor placed upon it.

Thus, the name of a firm over a store, and used by a person managing the store, may be evidence that he is their agent, but is not the slightest that they are his partners.[3] So where partners are trying to bolster up the credit of a corporation and invite persons to trust it by saying "we are the company," and that the firm backed the company, and by other assurances of an interest in it, whatever be the liability of the partners as guarantors or promisors, this is no holding out of a partnership with the corporation.[4] So in an action against two persons as partners in an opera house to collect the amount of printing bills, neither the statements of one of the defendants that he was going into the business, nor the fact that he did an auction business in the same building and sold tickets for the opera and was its treasurer, and announced as treasurer on the bills, are calculated in any degree to give the impression that he was a partner.[5] So advertising thus, "from the first

the sale. Evidence that both the defendants gave the bond to obtain a tavern-keeper's license was admitted as corroborative of the acts of holding out, although unknown to the plaintiff at the time of making the sales.

[1] Partnership, vol. 1, p. 53.

[2] Hinman *v.* Littell, 23 Mich. 484.

[3] Gilbraith *v.* Lineberger, 69 N. Ca. 145.

[4] McLewer *v.* Hall, 103 N. Y. 639.

[5] Parker *v.* Fergus, 43 Ill. 437.

instant B. has an interest in our establishment; we trust with his additional aid we shall be able to offer further inducements," etc., signed F. & Co., was held not to be a declaration of partnership, because not implying that B. was a member of the firm; in fact, the use of "we" and "our" and "his" seems to repel the implication.[1]

But the person need not be designated by name; a pertinent description, sufficiently identifying him, given by his authority, is sufficient.[2]

The expression of an intention or willingness to become a partner is not a representation that he is one.[3]

§ 100. —— **retaining the old name.**— Where, after a duly published dissolution, the continuing partner retains the old name with the acquiescence of the retired partner, with or without the fact that the latter remains in the store, this is sufficient evidence of a holding out to any person misled.[4]

It is to be remembered here, however, that when a firm is dissolved by the death of a partner, this act of nature must be taken notice of by the whole world, and no notice of dissolution is necessary to release his estate from liability on subsequent contracts, nor does the continued use of the old name by the surviving partners charge it or the executor with liability. The doctrine of holding out has no application; it is like the case of a person held out without his knowledge. Nor if the executor continue business under

[1] Vinson *v.* Beveridge, 3 MacArthur (D. C.), 597.

[2] Martyn *v.* Gray, 14 C. B. N. S. 824, 841.

[3] Bourne *v.* Freeth, 9 B. & C. 632; Reynell *v.* Lewis, 15 M. & W. 517. And see § 79, *supra*.

[4] And see Notice of Dissolution. *Re* Krueger, 2 Low. 66; 5 Bankr. Reg. 439; State *v.* Wiggin, 20 Me. 449; Tregerthen *v.* Lohrum, 6 Mo. App. 576; Jordan *v.* Smith, 17 Up. Can. Q. B. 590, with a change of name from S. & P. to S. & Co.; Wait *v.* Brewster, 31 Vt. 516; Fleming *v.* Dorn, 34 Ga. 213. Especially where it is the principal part of the firm name and is retained by consent, Speer *v.* Bishop, 24 Oh. St. 598. That merely keeping the old name over the door is not sufficient of itself to render the retired partner liable, Boyd *v.* McCann, 10 Md. 118. See Newsome *v.* Coles, § 97, *supra*. And the fact that persons dealing with business houses pay very little attention to their letter-heads was remarked upon by Campbell, J., in Hastings Natl. Bank *v.* Hibbard, 48 Mich. 452, 456.

the old name, for he cannot pledge the general estate unless explicitly authorized so to do.

§ 101. —— **language amounting to holding out.**— So the employment by the owner of a business of a person on a share of the profits, and using "& Co." after the owner's name, was held a holding out as to the landlord, who believed the clerk to be a partner;[1] but the clerk's use of "& Co." after his employer's name may not be a holding out of himself as partner.[2]

Taking part in the transaction of business in such a way or by the use of such language as to lead one trusting the firm to believe the defendant was a principal;[3] or silence when introduced or referred to as a partner,[4] or as one who would be a partner after a certain date, and goods were then sold to the new firm to be paid for after that date;[5] or using the word we, or speaking of the business as his;[6] but such expressions alone are manifestly very weak evidence, for they may naturally refer to the party's actual interest as clerk or employee.[7]

In Ihmsen *v.* Lathrop, 104 Pa. St. 365, Domeneck O. Ihmsen was a partner and his father, Domeneck Ihmsen, was employed in the firm as its manager, with power to sign the firm name to checks, notes, etc., and this fact of his using the firm name with the nearly identical name was held to render him liable by holding out on a note signed by him in the firm name, without other evidence, although the exercise of a power to sign the firm name does not ordinarily require the statement that the signer is not a partner.

In Cassidy *v.* Hall, 97 N. Y. 159, the facts that employees receive a share of the profits as compensation, have large powers, and are exceptionally active in their efforts to place the concern on a

[1] Brown *v.* Pickard (Utah), 9 Pac. Rep. 573; French *v.* Barrow, 49 Vt. 471.

[2] Edmundson *v.* Thompson, 2 F. & F. 564.

[3] Sun Ins. Co. *v.* Kountz Line, 122 U. S. 583; Brugman *v.* McGuire, 32 Ark. 733; Sherrod *v.* Langdon, 21 Iowa, 518; Parshall *v.* Fisher, 43 Mich. 529; Smith *v.* Smith, 7 Foster (N. H.), 244; Shafer *v.* Randolph, 99 Pa. St. 250.

[4] Barcroft *v.* Haworth, 29 Iowa, 462; Manson, Town of, *v.* Ware, 63 Iowa, 345; Burgan *v.* Cahoon, 1 Pennypacker (Pa.), 320; Lewis *v.* Alexander, 51 Tex. 578.

[5] Bliss *v.* Swartz, 7 Lans. 187; 64 Barb. 215.

[6] Woodward *v.* Clark, 30 Kan. 78; Thomas *v.* Green, 30 Md. 1; Rippey *v.* Evans, 22 Mo. 157; Gates *v.* Watson, 54 Mo. 585.

[7] See Cassidy *v.* Hall, 97 N. Y. 159.

good basis with a view of ultimately buying it out, were held not to be so inconsistent with their relation as employees as to constitute them partners, though accompanied by declarations as to its financial responsibility, sufficient to constitute a guaranty.

In Town *v.* Hendee, 27 Vt. 258, employing one as agent to sell only and not to buy, and writing to plaintiff that "whatever goods were sold to such agent to be sold in the store with our goods he can pay for out of the avails of the goods," does not hold out the agent as authorized to buy in the employers' names, but merely agrees that the proceeds of their own goods may go to pay for the agent's purchases for himself.

In Saufley *v.* Howard, 7 Dana, 367, the fact of receiving the goods, for the price of which the note in suit was given, in boxes marked with a firm name composed of defendants' names, was held sufficient evidence of a holding out.

In Humes *v.* O'Bryan, 74 Ala. 64, 83, it was said that the fact that two persons were actually partners in a planting or farming business was a link in the evidence to prove that one of them was held out as the other's partner in a store.

§ 102. In tort.— Liability arising from holding out is not confined to actions on contract, but may arise in torts, as for deceit and false warranty in a sale of sheep, in which sale defendant participated,[1] or for damages to a horse and buggy let to the supposed firm.[2]

In Stables *v.* Eley, 1 C. & P. 614, a retired partner's name was used by the continuing partners, and remained upon a wagon used by them, and one of their drivers negligently ran over the plaintiff. The retired partner was held liable. Where is the estoppel in such a case? Can the plaintiff show that he would not have been run over but for the name? That he was induced to sue a wrong party does not seem sufficient, for it would apply to a holding out after the accident.[3]

§ 103. Confers no rights inter se.— Nor does a holding out confer any rights between the partners as against each

[1] Sherrod *v.* Langdon, 21 Iowa, 518.

[2] Maxwell *v.* Gibbs, 32 Iowa, 32.

[3] The case might be sustained on the doctrine that a name in the firm style is proof of actual and not nominal partnership, if such were the law. See § 93.

other in relation to the property in the absence of liability *inter se* for misconduct.

The nominal partner, who has paid some of the debts, is a mere simple contract creditor of the person or firm whose debts he discharged and has no lien upon the assets, but must pursue his remedy at law like any other creditor.[1] Hence, an employee who knows he is not a partner, but is being extensively held out and trusted as such, is not entitled to an injunction and receiver to prevent misapplication of the funds, and for an adjustment of the affairs of the firm, though he is liable for debts, for he has no lien.[2] Hence a partner, by holding out, has no lien, and therefore the joint creditors obtain through him no priority in the distribution of the supposed joint assets over individual creditors, for there are no joint assets.[3]

§ 104. **Strangers, how affected.**— From the fact that the liability is only to those who gave credit, it follows that persons who give no credit cannot take advantage of the acts, nor are bound by them.

Thus, a creditor of one held out as a partner, but not really such, cannot sustain an attachment on the goods of the supposed firm against the debtor who has no interest in them.[4]

In Barrett *v.* Smith, 17 Ill. 565, S., a banker, under the name of S. & Co., employed a teller, who gave bond for fidelity in his office with defendants as his sureties. S. afterwards held out one W. as his partner, and it was held that the defendants had a right to suppose that a new firm had been formed and that they were no longer answerable on the bond, and may therefore have relaxed their vigilance over the teller's conduct, and were not liable. The force

[1] Stone *v.* Manning, 3 Ill. 530; Glenn *v.* Gill, 2 Md. 1.

[2] Kerr *v.* Potter, 6 Gill, 404; Nutting *v.* Colt, 7 N. J. Eq. 539. In the latter case, however, p. 543, it was said that if there were evidence that the other partner had betrayed the complainant's confidence and showed a disposition to withdraw the assets from the reach of creditors, an injunction and receiver would be granted.

[3] Glenn *v.* Gill, 2 Md. 1; Kerr *v.* Potter, 6 Gill, 404, on the same partnership.

[4] Allen *v.* Dunn, 15 Me. 292; 33 Am. Dec. 614; Partridge *v.* Kingman, 130 Mass. 476.

of the case as an authority is, however, diminished by the fact that W. was an actual partner.[1]

§ 105. Creditors, how affected — Reputed ownership.— A doctrine called that of reputed ownership arose under a provision of the English bankrupt law requiring property in the possession, order or disposition of a person as the reputed owner, with the consent of the real owner, to be treated as the property of such possessor. Under this doctrine, if an owner of property holds out others as his partners, the creditors of the supposed firm can demand a distribution of the property as if there were an actual partnership, and thus retain the priority on distribution which they may have relied upon. We have seen that the ostensible partner may be regarded as the sole owner of the joint property, but not on distribution in bankruptcy under this clause, for the possession of one partner is not inconsistent with ownership in his firm, each partner being himself an owner; but a sole owner who holds the goods out as belonging to his firm makes a reputed ownership inconsistent with the actual, and is held to the appearance he has created.

In *Re* Rowland, L. R. 1 Ch. App. 421, C. contracted to employ R. on a salary and share of profits, they to become partners in the future, and the business to be in the name of C. & Co. Both became bankrupts. The property which belonged to C. was applied to the joint creditors. The court say that reputed ownership has nothing to do with the case; but in *Ex parte* Hayman, 8 Ch. D. 11, it is said that reputed ownership is the real reason for that decision.

[1] In Somerset Potter Works *v.* Minot, 19 Cush. 592, 595-6, where creditors of a firm desiriug to share *pari passu* with the individual creditors of one partner in his separate property, which would yield more than the firm assets, offered to prove that the firm was nominal merely; but the court said that as the parties had assumed to be partners and dealt as such, persons dealing with the firm have rights and are therefore subject to the correlative right of priority of separate creditors in the separate estate. The contrary, however, was ruled in a case equally strong on the facts as to the creditors, though the person held out knew he was no partner. Kerr *v.* Potter, 6 Gill, 404, and Glenn *v.* Gill, 2 Md. 1.

Where partners, by secret arrangement or by their articles, each own a specific part of the stock, and there is no joint ownership, the doctrine of reputed ownership applies, and, as to creditors without notice, the assets will be regarded as joint. Hence a mortgage by one of his interest, to secure an individual debt to his partner, will be postponed to claims of joint creditors on distribution;[1] and so if the partners divide up the assets but continue to hold and deal with them as joint property, subsequent joint debts will be held superior on distribution to rights derived from the individuals.[2]

But apart from this provision of the bankrupt law, the doctrine of estoppel which applies to the partnership does not apply to change the title to its property, and if the partners are estopped, the individual creditors of the actual owner are not estopped to obtain a lien upon the assets as against the creditors of the business establishment or supposed firm. Again, the creditors' priority arises out of and

[1] Elliot *v.* Stevens, 38 N. H. 311.

[2] Moline Wagon Co. *v.* Rummell, 2 McCrary, 307; 12 Fed. Rep. 658; 14 id. 155. And see Birks *v.* French, 21 Kan. 238; Hamill *v.* Willett, 6 Bosw. 533; Grasswitt *v.* Connally, 27 Gratt. 19; *Re* Tomes, 19 Bankr. Reg. 36. This doctrine has also been placed upon the ground of estoppel; creditors having relied not merely upon the personal responsibility of the nominal partners, but upon an expected priority in the partnership property, and on this ground the actual partner and those claiming under him, as his assignee for the benefit of creditors, have been held estopped as against such creditors to deny the partnership and the consequent preference in the distribution of its assets of those who trusted the supposed firm. Kelly *v.* Scott, 49 N. Y. 595. And see Hillman *v.* Moore, 3 Tenn. Ch. 454.

In Williams *v.* Butler, 35 Ill. 544, Mrs. A., living in Massachusetts, gave her son general power of attorney to manage and invest for her in Chicago. He made a partnership between her and W. as W. & Co., which was carried on for two years without her knowledge, she merely taking such sums or profits as were sent to her. X., an individual creditor of W., having levied upon the effects, W. and Mrs. A. confessed judgments in favor of one R. and others, and R. filed a bill asking to have the proceeds of X.'s execution applied to their judgments, Mrs. A. filing an answer admitting the partnership and concurring in the prayer. The prayer was granted, on the ground that ratification of the agent's act established a partnership, and, though generally ratification will not relate back to cut off intervening rights, yet for the protection of a clearly superior equity it would do so.

through the equity of each partner to have the debts paid with the assets, and as a nominal partner has no such equity, it follows that the business creditors have no preference over the avowedly individual creditors of the actual owner of the business independent of the provisions of the bankrupt law.[1]

In Hillman *v.* Moore, 3 Tenn. Ch. 454, a separate creditor had obtained a legal right by levy on and sale of the property under a judgment against the actual owner, and his title was held superior to that of the reputed partnership's creditors. Kelly *v.* Scott, cited in the previous section, is distinguished on the ground that the estoppel upon the partners reached those who claimed through them, to wit, the assignee for creditors.

§ **106. Individual using a firm name.**— Where a person carries on business in a firm name without having a partner, the same reason applies as in case of a nominal partner, and creditors of the supposed firm have no priority over his other creditors on distribution.[2] And a partner may make himself severally liable by holding himself out as the only member of a firm.[3]

§ **107. Two firms using same name.**— There is another species of holding out which occasionally occurs, as where there are two firms of the same name and in the same kind or a similar kind of business in the same locality. If the two houses are composed of the same individuals, they are in law

[1] Swan *v.* Sanborn, 4 Woods, C. C. 625; Glenn *v.* Gill, 2 Md. 1; Hillman *v.* Moore, 3 Tenn. Ch. 454; Grabenheimer *v.* Rindskoff, 64 Tex. 49. And see Kerr *v.* Potter, 6 Gill, 404. And for this reason an assignment for the benefit of creditors, preferring separate to business creditors, has been upheld by the actual owner in case of a nominal partnership. Whitworth *v.* Patterson, 6 Lea, 119. And a mortgagee of a person is not prevented by the fact that the mortgagor holds himself out to others as a partner, and the mortgaged property as partnership property, from showing, as against subsequent attaching partnership creditors, that the mortgagor was not really a partner, and that the mortgage is therefore the prior lien. Taylor *v.* Wilson, 58 N. H. 465.

[2] Scull's Appeal (Pa. 1886), 7 Atl. Rep. 588; Miller *v.* Creditors, 37 La. Ann. 604; 2 Bell's Com. on Law of Scotland, 625.

[3] Bonfield *v.* Smith, 12 M. & W. 405.

but one firm; but if there is a partner in one who is not in the other, they are distinct firms. In the latter case it may be difficult to tell which is liable.[1]

The intent when the difference is known will govern, if ascertainable; or if the controversy grows out of a transaction in the scope of the business of one firm and not of the other, or a purchase suitable to one and not to the other, or if the avowed purpose of the contract points to one firm, these facts will be final;[2] or if one of the firms has gone out of business, that identifies the other as the debtor.[3]

If two persons have two kinds of business with a dormant partner in one of them, a note in the firm name has been held presumably to be by the firm not containing the dormant partner.[4]

But it sometimes happens that a person is deceived by the name and circumstances into believing he is dealing with the firm he is not dealing with, and in such cases he can hold the other firm.[5]

Where a father sold out his business to his son, of the same name, and advertised the fact, and a person who had never dealt with the concern before, came to the store and sold, he cannot hold the father; the old signs and letter-heads were used, but as he did not know their significance, he was not misled by them, nor even if he knew the father had once owned the store.[6] But to a former dealer without notice of the dissolution, the father is liable.[7]

[1] Lord Kenyon in the last century, in Baker *v.* Charlton, Peake, 80, decided that if several firms had the same name, a partner in one could not show that a bill in the firm name was drawn on account of the partnership in which he was not a member. In McNair *v.* Fleming, cited in Davison *v.* Robertson, 3 Dow. 218, 229, half a dozen firms did business in the same name, and it was held that unless the holder of a bill can be shown to have knowledge of which firm drew it, he can sue them all.

[2] Elkin *v.* Green, 13 Bush, 612; Cushing *v.* Smith, 43 Tex. 261; Hastings Nat. Bk. *v.* Hibbard, 48 Mich. 452; Mechanics' & Farmers' Bk. *v.* Dakin, 24 Wend. 411; *Re* Munn, 3 Biss. 442.

[3] Jones *v.* Parker, 20 N. H. 31.

[4] Fosdick *v.* Van Horn, 40 Oh. St. 459.

[5] Spencer *v.* Billing, 16 Oh. St. 75; Cushing *v.* Smith, 43 Tex. 261; Beall *v.* Lowndes, 4 S. Ca. 258; Hastings Nat. Bk. *v.* Hibbard, 48 Mich. 452, 458 (*dictum*); Spencer *v.* Billing, 3 Camp. 310; Swan *v.* Steele, 7 East, 210; 3 Smith, 199. And see Tams *v.* Hitner, 9 Pa. St. 441.

[6] Preston *v.* Foellinger, 24 Fed. Rep. 680.

[7] Elverson *v.* Leeds, 97 Ind. 336; 49 Am. Rep. 458.

§ 108. **Deceptive similarity of names.**— So, also, if the firms have designedly adopted names closely similar for the purpose of misleading the public, the act of a common agent of one may bind the other in favor of a person thus deceived.

Thus where the individuals composing Adams & Co., widely and favorably known as an express company, formed an additional partnership, composed mainly of the same individuals, in the name of Adams & Co.'s Western Express, the similarity of names being with the design of obtaining patronage, both firms employing a common agent, who contracted in the name of the latter to transport gold for the plaintiff, she supposing herself to be dealing with the former, it was held she could recover for the loss of her gold from the former.[1]

§ 109. **Actions by and against nominal partners.**— As the nominal partner has no real interest in a claim belonging to the firm, it follows that the actual owners recover in their own names and should not join the nominal partner. In other words, the theory of a partnership by holding out is one of liabilities and not of rights. In bringing an action against the apparent partners, they are sued as if actual members of the firm. The plaintiff generally does not know whether they are really such or not. The issue is, are they such towards him? Hence it is not necessary to plead specially that there is an estoppel or holding out, but the plaintiff can sue the defendants as partners and prove they are such by estoppel, and it is not a variance.[2]

Hence, of course, such defendant cannot put in evidence the written contract by which he acted to show he was not

[1] Adams & Co. *v.* Brown, 16 Oh. St. 75. See, also, S. P. Cushing *v.* Smith, 43 Tex. 261; Beall *v.* Lowndes, 4 S. Ca. 258.

[2] Nichols *v.* James, 130 Mass. 589; Rice *v.* Barrett, 116 Mass. 312; Fisher *v.* Bowles, 20 Ill. 396; Brugman *v.* McGuire, 32 Ark. 733; Maxwell *v.* Gibbs, 32 Iowa, 32; Hancock *v.* Hintrager, 60 Iowa, 374; Campbell *v.* Hood, 6 Mo. 211; Rippey *v.* Evans, 22 id. 157; Young *v.* Smith, 25 id. 341; Rimel *v.* Hayes, 83 id. 200; Reber *v.* Columbus Mach. Mfg. Co. 12 Oh. St. 175; Reed *v.* Kremer, 111 Pa. St. 482; Hicks *v.* Cram, 17 Vt. 449; Sherman *v.* Kreul, 42 Wis. 33, 40.

a partner;[1] certainly unless he also show plaintiff knew of it.[2]

A creditor cannot hold both a retired partner, who is liable by holding out, and an incoming partner on a contract with the new firm. If the new firm retained the old name and he had no notice of dissolution, he can hold the old partners or the new, but not both; he must elect.[3]

[1] Rimel *v.* Hayes, 83 Mo. 200.

[2] Plaintiff can testify on whose credit he did the work, but not that he would not have done it on the credit of the actual partners. Rimel *v.* Hayes, 83 Mo. 200.

[3] Scarfe *v.* Jardine, L. R. 7 App. Cas. 345.

CHAPTER VI.

ILLEGAL PARTNERSHIPS.

§ 110. As to persons.— A partnership may be illegal by reason of disqualification of certain persons to engage in a traffic permitted to the public generally. Thus, antagonists in time of war cannot become partners; that is, an alien enemy cannot form a partnership with a citizen,[1] unless domiciled here;[2] nor a subject of this country, residing in a country at war with this, even bring an action, for the fruits of the action might be remitted and so furnish resources against this country;[3] nor a neutral in such country, for the same reason.[4] So, if a sheriff is forbidden to buy county scrip, he cannot do it indirectly by forming a partnership, and the partnership is illegal.[5]

Where a statute forbids a lawyer or doctor, not licensed, to practice, the partnership between him and a licensed practitioner is not illegal, if the former's share of the profits is not in consideration of his practicing.[6]

And a partnership between a lawyer and clerk, or physician and apothecary, is presumably legal and can recover for services; for *non constat* that the disqualified member will try cases or prescribe.[7]

1 Evans *v.* Richardson, 3 Mer. 469. And see Brandon *v.* Nesbitt, 6 T. R. 23; McAdams *v.* Hawes, 9 Bush, 15.

2 Per ROOKE, J., in McConnell *v.* Hector, 3 B. & P. 113.

3 McConnell *v.* Hector, *supra.*

4 O'Mealey *v.* Wilson, 1 Camp. 482; Albretcht *v.* Sussmann, 2 Ves. & B. 323. See § 582.

5 Read *v.* Smith, 60 Tex. 379.

6 Scott *v.* Miller, H. V. Johns. 220.

7 Turner *v.* Reynell, 14 C. B. N. S. 328; Harland *v.* Lilienthal, 53 N. Y. 438; Swan *v.* Scott, 23 Up. Can. Q. B. 434. But see Dunne *v.* O'Reilly, 11 Up. Can. C. P. 404, of Attorney and Clerk. But see Candler *v.* Candler, Jac. 225; 6 Madd. 141, of an ordinary partnership, not excluding the disqualified person from practicing. Even receiving part of the profits as salary was called illegal, as an evasion of the statutes, in Tench *v.* Roberts, 6 Madd. 145; *Re* Jackson, 1 B. & C. 270; *Re* Clark, 3 D. & R. 260; Hopkinson *v.* Smith, 1 Bing. 13; 7 Moo. 242. In the last three cases the clerk practiced; but

§ **111. —— in public office.**— An occupation may be legal when carried on by an individual, but illegal for a partnership on grounds of public policy; as where the duty is a personal one.

Thus, there can be no partnership in a public office. As in the office of sheriff,[1] or of a district attorney;[2] nor in the office of administrator or executor, for he must retain exclusive control over the assets, and such a contract invites misappropriation and abuse.[3] If two executors traffic in the estate for joint benefit, no accounting will be granted between them;[4] nor in the profits of a licensed Indian trader.[5] Attorneys at law are not officers, and a partnership between them is legal.[6] The law that one sutler shall be appointed for each regiment, who shall be the sole sutler and shall not farm out or underlet his privileges, was held not to prevent his taking a partner, the object being to provide a sole responsibility.[7] Nor does a statute forbidding a contractor with the government assigning his claim, prevent a partnership, for there is no claim then to assign; nor the forbidding of a transfer of a contract, for the object of this is to protect the government from being harassed by multiplying those with whom it deals, and a memorandum of division between the partners on dissolution does not violate this provision.[8]

§ **112. As to occupation.**— A partnership may be illegal by reason of being formed to carry on an unlawful occupation. As for sharing in the proceeds of acts which are punishable as crimes or misdemeanors, as a partnership of smugglers or highway robbers; or one forbidden by good morals, whether there is or is not a statute making it penal,

had he not done so the rule of Cox *v.* Hickman would have required the decision to be the other way, because not a partnership. That a lawyer may be partner with his client, and that the firm is formed to furnish iron to a railway company, of which the lawyer is director, will not excuse an accounting of profits between the partners, see Cameron *v.* Bickford, 11 Ont. App. 52.

[1] Jones *v.* Perchard, 2 Esp. 507; Canfield *v.* Hard, 6 Conn. 180.

[2] See Gaston *v.* Drake, 1 Nev. 175.

[3] Forsyth *v.* Woods, 11 Wall. 484; Seely *v.* Beck, 42 Mo. 143.

[4] Bowen *v.* Richardson, 133 Mass. 293.

[5] Gould *v.* Kendall, 15 Nebr. 549.

[6] Warner *v.* Griswold, 8 Wend. 665.

[7] Wolcott *v.* Gibson, 51 Ill. 69.

[8] Hobbs *v.* McLean, 117 U. S. 567.

as a partnership in a gambling establishment.[1] So of a partnership to speculate on margins or in futures;[2] or a partnership to derive a profit from acts which are against public policy; thus a combination among manufacturers or dealers to regulate prices and stifle competition;[3] or an agreement to corner a stock.[4] But if the effect of the combination is not to prevent a healthy competition, the objection to it does not exist.[5]

§ 113. Bidders on public contracts.— For a similar reason a partnership between bidders on a public contract, if for the purpose of preventing competition, is illegal.[6] But not if the purpose of the partnership is to do the work, where its object and necessary tendency is not to raise the price.[7]

A partnership to buy land at a tax sale has been held contrary to public policy; not that a partnership cannot buy, but where the formation of the partnership is speculation at such sales.[8] A partnership to buy lands at a public sale by the United States, unlike a combination to bid at execution sales, is not illegal when not amounting to an agreement not to bid against each other.[9] A partnership to furnish recruits to the government was held legal, though the articles provided that the partners should not come into competition or furnish recruits below a fixed price, unless there is proof that it is part of a conspiracy to control prices or create a monopoly.[10]

In Powell *v.* Maguire, 43 Cal. 11, it was held that a partnership formed to manage a ferry franchise, to be obtained from the legis-

[1] Boggess *v.* Lilly, 18 Tex. 200; Watson *v.* Fletcher, 7 Gratt. 1. Or lottery. Watson *v.* Murray, 23 N. J. Eq. 257; Sykes *v.* Beadon, L. R. 11 Ch. D. 170.

[2] Faikney *v.* Reynous, 4 Burr. 2069; Petrie *v.* Hanway, 3 T. R. 418; Patterson's Appeal (Supreme Ct. Pa. 1883), 13 Weekly Notes of Cas. 154; Wann *v.* Kelly, 5 Fed. Rep. 584; Tenney *v.* Foote, 95 Ill. 99; Williams *v.* Connor, 14 S. Ca. 621.

[3] Salt Co. *v.* Guthrie, 35 Oh. St. 666; Morris Run Coal Co. *v.* Barclay Coal Co. 68 Pa. St. 173; Craft *v.* McConoughy, 79 Ill. 346.

[4] Sampson *v.* Shaw, 101 Mass. 145.

[5] Fairbank *v.* Newton, 50 Wis. 628; Fairbank *v.* Leary, 40 id. 637.

[6] King *v.* Winants, 71 N. Ca. 469; Hunt *v.* Pfeiffer, 108 Ind. 197.

[7] Breslin *v.* Brown, 24 Oh. St. 565. But see Woodworth *v.* Bennett, 43 N. Y. 273.

[8] Dudley *v.* Little, 2 Oh. St. 504.

[9] Piatt *v.* Oliver, 2 McLean, 267.

[10] Marsh *v.* Russell, 66 N. Y. 288 (rev. 2 Lans. 340).

lature by one partner, was void on the ground that the names of actual grantees should be known to legislature, since a contrary rule might lead powerful combinations to procure vicious legislation in the name of the least obnoxious of the parties.

§ 114. Contracts void by law; war.— So, where a class of contracts is made void by law, a partnership for such traffic is void. Such are in many states partnerships to traffic in intoxicating liquors;[1] or between a bidder for a city contract and another person, where the city ordinance required all persons interested to be named and forbade secret interests.[2] The most numerous class of illegal partnerships are those between citizens of belligerent powers or for trading in times of war within the lines of military occupation, or with the enemy or in the enemy's commodities;[3] as trafficking in Confederate money.[4] In such cases the property established in the enemy's country, or used for such illegal traffic, is subject to seizure and condemnation.[5] So of a partnership in a voyage between ports interdicted by the government;[6] or a partnership to trade with Indians;[7] or in violation of the navigation laws.[8]

In Decker *v.* Ruckman, 28 N. J. Eq. 614, a partnership was formed in New Jersey to plant oysters in Virginia, where it was illegal for non-residents so to do; but the question of whether the illegality would be recognized in New Jersey was not passed upon.

In Harvey *v.* Varney, 98 Mass. 118, the firm of H. & V. was formed in part for the purpose of transferring to it the property of a former firm of A. & B., in order to hinder the creditors of the

[1] Warren *v.* Chapman, 105 Mass. 87; McGunn *v.* Hanlin, 29 Mich. 476; Tucker *v.* Adams, 63 N. H. 361.

[2] Kelly *v.* Devlin, 58 How. Pr. 487.

[3] Snell *v.* Dwight, 120 Mass. 9; Dunham *v.* Presby, 120 id. 285; Lewis *v.* Alexander, 51 Tex. 578.

[4] Anderson *v.* Whitlock, 2 Bush, 398; Pfeuffer *v.* Maltby, 54 Tex. 454.

[5] The Cheshire, 3 Wall. 231; Prize Cases, 2 Black, 635; U. S. *v.* Hallock, U. S. Supreme Ct. Book 17, Lawy. Coop. Ass'n, p. 568, not elsewhere reported.

[6] Stewart *v.* McIntosh, 4 Har. & J. 233.

[7] Gould *v.* Kendall, 15 Neb. 549.

[8] Sharp *v.* Taylor, 2 Phil. Ch. 801. In Durant *v.* Rhener, 26 Minn. 362, it was even held that partnership formed on Sunday was void; and *contra* if formed subsequently in pursuance of an agreement made on Sunday.

latter, and this agreement was held valid between the partners, though it would be voidable as to creditors.

That a partner is to receive interest on his capital in excess of the per cent. allowed by the usury laws is not illegal or usurious. It is not a case of the loan of money.[1]

§ 115. Illegal ventures of a legal partnership.— A partnership may be legal and yet some of its adventures, or part of the receipts derived by it, or by some of the partners, be illegal. As where the business of the firm is to act as agent for others, and the partnership receives a bribe or commission from the parties with whom it or he transacts the principal's business;[2] or from some other illegal source, as where an association for holding horse fairs derives part of its profits from selling pools,[3] or a firm doing a legal business in war times engages in forbidden adventures in the enemy's country.[4]

In Whitcher *v.* Morey, 39 Vt. 459, a deposition was objected to because the law partner of the master in chancery who took it acted as attorney for one of the parties in taking the deposition; but the court overruled the objection on the ground that it would not presume that the partnership extended to sharing each other's fees in the matter.

If a statute makes illegal a business which had theretofore been legal, but the business is continued nevertheless, this will not prevent an accounting between the partners for the time during which it was legal.[5]

§ 116. Title to partnership assets.— The title and property rights of the partnership in its chattels is not in resisting third persons affected by the fact that the partnership business is illegal; hence, if the sheriff levy upon the interest of one partner in a stock of liquors, and left it in the hands of one partner as receiptor, and afterwards brings re-

[1] Case *v.* Fish, 58 Wis. 56, 105-7; Cunningham *v.* Green, 23 Ohio St. 296.

[2] Todd *v.* Rafferty, 30 N. J. Eq. 254; Northrup *v.* Phillips, 99 Ill. 449.

[3] Willson *v.* Owen, 30 Mich. 474.

[4] See § 121.

[5] Bennet *v.* Woolfolk, 15 Ga. 213. As to partnerships carried on under an illegal name, as where a statute forbids the use of the collective expression, "& Co.," see § 198.

plevin, the partners can set up the title of the partnership as a defense.[1]

So, where a gambling firm bought and used a house for gaming purposes, the surviving partner cannot impeach the title of his partner's grantor on that ground;[2] but in McPherson *v.* Pemberton, 1 Jones' L. 378, it was held that persons who formed a partnership in order to hinder the creditors of one of them cannot jointly maintain trespass *q. c. f.* against one who seized their goods.[3]

Third persons' rights against the illegal firm will be protected where they are not *particeps criminis.* Thus, where a clergyman is a secret partner, though prohibited by statute from trading, he is liable to become a bankrupt in respect to the partnership concerns.[4]

§ **117. Presumption against illegality.**— Illegality will not be presumed; thus, a partnership to buy one hundred bales of cotton futures will not be presumed to be a gaming contract.[5] And where a master in chancery takes a deposition, his law partner acting as attorney for one of the parties in taking it, the deposition will not be excluded unless it appears that the partnership extended to sharing each other's fees in the matter, which will not be presumed.[6]

§ **118. Judicial accounting of illegal partnership.**— Owing to the difference between the authorities as to interfering between law-breakers to compel payment when no accounting is necessary, and in order to define the boundaries of the disputed territory, this subject will be treated in the following order:

I. Accounting of the affairs of an illegal partnership. This is not granted by the courts.

II. Accounting of legal investments of the proceeds of a

[1] Tucker *v.* Adams, 63 N. H. 361.

[2] Watson *v.* Fletcher, 7 Gratt. 1.

[3] In case of the illegality of a patent in which a firm is formed to deal, the patentee not being the original and first inventor, an accounting between the partners may be had; in such a case the term illegality is out of place, because used in the sense of invalidity or failure of title. Kinsman *v.* Parkhurst, 18 How. 289.

[4] Meymot's Case, 1 Atk. 198, 199.

[5] Williams *v.* Connor, 14 S. Ca. 621.

[6] Whitcher *v.* Morey, 39 Vt. 459. And see Fairbank *v.* Leary, 40 Wis. 637; and Cameron *v.* Bickford, 11 Ont. App. 52.

past and settled illegal partnership, the origin of the fund being foreign to the controversy. This is granted.

III. Compelling settlement of balances when the parties themselves have stated their own accounts, and nothing remains but to pay over. This is disputed.

I.

§ 119. **Refused between wrong-doers.**—A bill for an accounting and settlement of the partnership transactions of an illegal partnership, or of the legal gains of a legal partnership, will not be sustained either for the purpose of obtaining a division of profits or contribution for losses and expenses, for the taking of the account involves a dealing with, and hence a recognition of, the illegal acts, but the court will dismiss the bill and leave the parties where it finds them.

The traditional case of the bill for an accounting between two highwaymen, whether legendary or not, is far from uninstructive, since it shows by a *reductio ad absurdum* that an accounting of illegal gains cannot be had. I copy in the notes the report from Pothier, omitting a few concluding biographical lines on the counsel. The case is also given in Lindley on Partnership and Pollock on Contracts by G. W. Wald.[1]

[1] Everet *v.* Williams, 2 Pothier on Obl. 3, note, taken from Europ. Mag. 1787, vol. 2, p. 360. The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate rings, watches, etc.; that the defendant applied to him to become a partner; that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads and at inns, taverns, ale-houses, or at markets or fairs. "And your orator and the said Joseph Williams proceeded jointly in the said business with good success, on Hounslow Heath, where they dealt with a gentleman for a gold watch, and afterwards the said Joseph Williams told your orator that Finchley, in the county of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley aforesaid, and it would be almost all clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles and other things; that about a month afterwards the said

This was held of a partnership in a lottery or a gambling business;[1] although legal in the state where the contracts were made, but a misdemeanor by the *lex fori.*[2] So of a partnership to corner a stock; it is a conspiracy rather than a contract;[3] or to stifle competition, as a combination among dealers in a commodity,[4] or among bidders for a public contract;[5] or to trade in the insurrectionary states after intercourse has been forbidden; or in places interdicted by congress.[6]

The partner who has provided the funds can, however, recover back any unexpended balance where the recovery is equivalent to a revocation, but not if he advanced the whole fund on terms of returning the balance.[7]

So if a tax collector, prohibited by statute from investing in county scrip, forms a secret partnership in order to obtain profits thereby, indirectly, an accounting will not be enforced.[8] So where the state engineer formed a partnership with W. and B. to bid on a state contract in the name of W., which was illegal, and they

Joseph Williams informed your orator that there was a gentlemen at Blackheath who had a good horse, saddle, bridle, watch, sword, cane and other things to dispose of, which he believed might be had for little or no money; and they accordingly went and met with the said gentleman, and after some small discourse they dealt for the said horse, etc.; that your orator and the said Joseph Williams continued their joint dealing together until Michaelmas, and dealt together in several places, viz., at Bagshot in Surry, Salisbury in Wiltshire, Hampstead in Middlesex, and elsewhere, to the amount of £2,000 and upwards." The rest of the bill is in the ordinary form for a partnership account. 3d October, 1725, on the motion of Sargeant Girdler, the bill referred for scandal and impertinence. 29th November. Report of the bill as scandalous and impertinent confirmed; and order to attach White and Wreathcock, the solicitors. 6th December, the solicitors brought into court and fined £50 each; and ordered that Jonathan Collins, Esq., the counsel who signed the bill, should pay the costs. The plaintiff was executed at Tyburn in 1730, the defendant at Maidstone in 1735. Pothier regards the case as a tradition, as does also the vice-chancellor in Ashhurst *v.* Mason, L. R. 20 Eq. 225, 230.

[1] Watson *v.* Murray, 23 N. J. Eq. 257; Watson *v.* Fletcher, 7 Gratt. 1. And per JESSEL, M. R., in Sykes *v.* Beadon, 11 Ch. D. 170, 196.

[2] Watson *v.* Murray, *supra.*

[3] Sampson *v.* Shaw, 101 Mass. 145.

[4] Craft *v.* McConoughy, 79 Ill. 346; Fairbank *v.* Leary, 40 Wis. 637.

[5] King *v.* Winants, 71 N. Ca. 469.

[6] Snell *v.* Dwight, 120 Mass. 9; Dunham *v.* Presby, 120 Mass. 285; Stewart *v.* McIntosh, 4 Har. & J. 233; Lane *v.* Thomas, 37 Tex. 157.

[7] Sampson *v.* Shaw, *supra.*

[8] Read *v.* Smith, 60 Tex. 379.

obtained the contract, and sold out their bid at a profit before the contract was awarded, and the money came into W.'s hands, B. cannot compel W. to pay him his share; the firm itself being illegal, none of the parties can obtain any rights under it.[1] So a suit for dissolution and accounting of a partnership made on Sunday was not allowed, because the partnership was void.[2] So of a partnership to trade with Indians, which is a violation of the statutes of the United States; a partner cannot claim damages or compensation for a breach of the articles.[3] Where a Scotchman and an American made a contract to export goods from England to America in war time, provided peace was not declared, though the goods did not sail till after peace was made, the court refused to interfere between the partners on the ground of illegality.[4]

§ **120.** —— **same.**— Where, on grounds of public policy, there can be no partnership, as in the duties of certain public offices, or in the trusts of an executorship or an administration contemplating a misuse of funds or breach of trust, no accounting of the joint transaction would be decreed.

In Bowen *v.* Richardson, 133 Mass. 293, two executors united in misusing the trust funds by speculating in real estate for their own benefit in the name of one of them; the beneficiaries not being debarred by acquiescence or otherwise from claiming the advantage thereof, the other's bill for an account and share of profits was not sustained.[5]

But where a possible ineligibility of a partner arises from his contract relations with third persons, but no abuse of trust or fraud appears, it seems that an accounting will not be refused.

Thus, in Cameron *v.* Bickford, 11 Ont. App. 52, C. and B. agreed together jointly to furnish iron for a railway and carry out a contract to construct a road. The fact that C. had been the legal adviser for the company and was one of the directors of the road will not excuse B. from accounting.

[1] Woodworth *v.* Bennett, 43 N. Y. 273.

[2] Durant *v.* Rhener, 26 Minn. 362.

[3] Gould *v.* Kendall, 15 Neb. 549.

[4] Evans *v.* Richardson, 3 Mer. 469.

[5] Woodworth *v.* Bennett, 43 N. Y. 273, of a partnership in a state contract between an engineer of the state and a contractor.

§ 121. —— part of the business legal and part not.— Where part of the business is legal and part not, the court, in an action to wind up, may take charge and settle that part of the business which is legal, but not of the illegal part.

In Dunham *v.* Presby, 120 Mass. 285, P., of the firm of A., B. & P., made an agreement with X., Y. & Z. to buy cotton in localities beyond the lines of military occupation, which agreement his partners ratified. After the purchase was made, and while the cotton was at sea, X., Y. & Z. became alarmed for its safety on account of news of the presence of a rebel cruiser, and P. thereupon bought out their interests for $3,500. P. supposed that he had no authority to buy for his partners, and that he was buying for himself. The cotton arrived safely and realized over $17,000. P. accounted with his partners for his original share, without disclosing his purchase of the other interests. A bill by the other partners to compel P. to account for such gains was held not to be sustainable because they arose from an illegal trading.

So, where one of the partners of a firm which acted as purchasing agents bought at one price and turned in the property to the customers at a higher price, equity will not aid the copartner in procuring a division of these illegal gains; and the fact that the innocent partner may be liable to the cheated parties is no reason for allowing the accounting in anticipation of his loss and before it is actually sustained.[1]

Where part of a business consisted in keeping a gambling house and selling liquors illegally, a large stock of which is on hand, an accounting of the legal part was granted.[2] And if the business of a partnership was made illegal by statute, but was conducted thereafter, an accounting for the time it was legal may be obtained, and a precise allegation as to that time is not necessary, for the defendants are presumed to know.[3]

But if the two classes cannot be separated, the accounting will be refused.[4]

[1] Todd *v.* Rafferty, 30 N. J. Eq. 254; Northrup *v.* Phillips, 99 Ill. 449. A *dictum* in Woodworth *v.* Bennett, 43 N. Y. 273, seems to imply that an accounting has been carried to the limit of including illegal gains of a legal partnership.

[2] Anderson *v.* Powell, 44 Iowa, 20.

[3] Bennet *v.* Woolfolk, 15 Ga. 213.

[4] Lane *v.* Thomas, 37 Tex. 157, where part of the profits were based upon traffic in Confederate money.

§ 122. **Motives.**— Where the business is legal, but the motives for forming the partnership are in fraud of the rights of others, and hence voidable as to them, the partners can be compelled to account to each other. As where two persons form a firm for the purpose of hindering the creditors of one of them, this fact is no defense to a bill for settlement of the concern.[1]

II.

§ 123. **Where the illegality is wholly a thing of the past.**— We may assume another proposition as being law, namely, where the proceeds of the illegal transactions have all been gathered in and divided; or if the proportionate ownership is settled without division, but they have passed from the possession of one partner into the joint fund and are again invested in legal enterprises, so that the possession of any one partner in whose hands they come relates back to a new and legal starting point, the original illegal origin of the fund will not relieve him from liability to account, being entirely outside of the field of litigation.

III.

§ 124. **When not wholly past.**— But a much disputed territory lies intermediate between these classes of cases; that is, between those, on the one hand, where the court is asked to take an accounting of illegal transactions, not merely to enforce the final claims, but to ascertain what they are, and, on the other hand, those where there has been a complete settlement of rights and extinguishment of all claims arising from the illegal enterprise and a new departure.

Where the partners have themselves come to an accounting of all the illegal transactions, and have ascertained

[1] Harvey *v.* Varney, 98 Mass. 118; Brigham *v.* Smith, 3 E. & A. (Up. Can.) 46. *Contra,* McPherson *v.* Pemberton, 1 Jones, L. 378, holding that such partners cannot jointly maintain trespass *q. c. f.* against one who seized their goods.

[2] See Anderson *v.* Whitlock, 2 Bush, 398, 404-5; and see the rest of this chapter.

the balances and settled the concerns up to the point of paying differences or dividing property, and the court is applied to to compel this final step, the authorities disagree, some holding that the assistance of a court is recognizing and enforcing a violation of law, and refusing to interfere in any way; while others hold that as the illegality only incidentally appears in the cause, public safety does not require the court, after the illegal transaction is settled and closed and the title to proceeds arising from it is alone asserted, to permit one party to perpetrate the further wrong of appropriating all. It may be noticed here, that, while the latter class of cases do not seem to divide upon the once valid distinction between what is *malum in se* and what is merely *malum prohibitum*, no case calling for decision has arisen where the fund arose from acts constituting a felony, or graver crime than gambling transactions or dealing with a public enemy.

§ 125. **Brooks v. Martin.**— The leading and much-criticised case granting relief in this class of cases is Brooks *v.* Martin, 2 Wall. 70. In that case a partnership was formed to buy up soldiers' claims for land warrants, which was contrary to an act of congress. The plaintiff contributed all the funds, and the defendant bought up land warrants, located the lands and converted the warrants into lands, and converted part of the lands into money and mortgages, and had, by fraudulently concealing the value of the assets, bought out the plaintiff's interest for a trifle, and this suit was to compel an accounting and division.

The court said that, although in such a partnership a suit by one partner to compel the other to contribute an agreed share of the purchase money could not have been sustained, "a large proportion of the lands so located had also been sold, and the money paid for some of it and notes and mortgages given for the remainder. There were then in the hands of the defendant, lands, money, notes and mortgages, the result of the partnership business, the original capital of which the plaintiff had advanced. It is to have an account of these funds and a division of these proceeds that the bill

is filed. Does it lie in the mouth of the partner who has by fraudulent means obtained possession and control of these funds to refuse to do equity to his other partners because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute enacted for the benefit of the soldier is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice between himself and his partner, or what rule of public morals will be weakened by compelling him to do so. The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions, which were illegal, have become accomplished facts and cannot be affected by any action of the court in this case."

The case of Brooks *v.* Martin relied upon the earlier English case of Sharp *v.* Taylor, 2 Phil. 801, where, on bill filed for a share of freight money in the hands of one partner, earned in a trade which violated the navigation laws, Lord COTTENHAM said: "Can one of two partners possess himself of the property of the firm and be permitted to retain it if he can show that in realizing it some provision in some act of parliament has been violated? The answer is that the transaction alleged to have been illegal is completed and closed and will not be in any manner affected by what the court is asked to do between the parties."

This case, however, has been much criticised in England. Thus, in Sykes *v.* Beadon, 11 Ch. D. 170, there was an illegal association in the nature of a partnership in a lottery. An action was brought against its trustees for breach of trust, which had caused a loss of part of the fund. JESSEL, M. R., says: Lord Cottenham's reasoning in Sharp *v.* Taylor is inconclusive and unsatisfactory. "The notion that because a transaction which is illegal is closed that therefore a court of equity is to interfere in dividing the proceeds of the illegal transaction, is not only opposed to principle, but to authority, in the well-known case of highwaymen." He adds, however, p. 197: "It does not follow that you cannot in some cases recover money paid over to third persons in pursuance of the contract."

§ 126. Explanation of Brooks v. Martin.—It is to be noticed of Brooks *v.* Martin that the statute did not make the

title to the lands subsequently acquired void. Also, that the suit did not dispute the amount of money received for the illegally obtained warrants, but required an accounting of the proceeds of the lands without disputing the correctness of the consideration paid for them, much as if the lands had been purchased by new advances by the plaintiff after full settlement of the prior illegal transactions in warrants. The fact that the controversy was over reinvestments of profits into other forms was emphasized by the court, and this fact is regarded as an important element in the comments upon it.[1] And the cases in the next section which follow it do so on the ground that the controversy could be settled without reference to the illegal transaction, the court not being compelled to inquire how the parties got the money in dispute.

But the case has been deemed of further application in so far as it sustains Sharp *v.* Taylor, 2 Phil. 801, *supra,* in holding that after the close of an illegal transaction the partner who is in possession of the ascertained profits can be compelled to divide them.[2]

§ **127. Cases enforcing payment of balances.** — Here, again, no general rule can be devised which will reconcile the cases, though in the majority of these cases an express promise was made. Thus, where partners were concerned in illegal stock jobbing which resulted in a loss, and one paid all the debt and took security from the other for his share,

[1] Gould *v.* Kendall, 15 Neb. 549, and Pfeuffer *v.* Maltby, 54 Tex. 454.

[2] This view of that case would seem to be sustained by Pfeiffer *v.* Maltby, 38 Tex. 523, a case of trafficking with the enemy (but Pfeuffer *v.* Maltby, 54 id. 454, puts the case on the basis of reinvestment of profits, under Brooks *v.* Martin). Lewis *v.* Alexander, 51 Tex. 578, also a case of prohibited traffic during the war; Attaway *v.* Third Nat'l B'k, 15 Mo. App. 577; Wann *v.* Kelly, 5 Fed. Rep. 584, profits of a joint dealing on margin; Willson *v.* Owen, 30 Mich. 474, where, however, the association was for holding horse fairs, involving selling pools, and the illegality was said to appear incidentally only. The difficulty with this class of cases is that they approach the conclusion that if the highwaymen in Everet *v.* Williams invested their profits in other forms, an accounting would have been granted, unless we distinguish between *malum in se* and *malum prohibitum.*

the security was held enforceable as a new contract not infected by the original transaction.[1]

So where partners in dealing faro became indebted on partnership account and one paid the debt, in consideration of which the other gave him a note for his share of the losses, the payee was held entitled to recover on the note.[2]

So of a partnership to ship merchandise from Mexico to Texas, with a view to obtain cotton during the war, and after settlement one partner gave the others notes for their shares of the proceeds, it was held that the illegality does not attach to the notes and is no defense to them. The court in this case, perhaps, had in mind the old distinction between a contract which is *malum in se* and one which is merely *malum prohibitum*, for they say that a contract may be illegal without it being immoral or illegal to adjust profit and loss.[3]

In McGunn *v.* Hanlin, 29 Mich. 476, articles of partnership contemplated the sale of liquors as part of the business, and on dissolution liquors were among the stock; the retiring partner authorized his copartner to pay debts incurred in their purchase and charge him the price of them in the settlement. It was held that when sued for contribution he could not set up the liquor law in defense, for that only goes to buyer and seller, and does not prevent dealings being included within grounds of estoppel or agency, and he cannot repudiate the payment.

So in Belcher *v.* Conner, 1 S. Ca. 88, a partnership to buy and sell slaves. The constitution, article 4, section 34, made contracts the consideration of which is the purchase of slaves, null. A demand

[1] Faikney *v.* Reynous, 4 Burr. 2069; Petrie *v.* Hanway, 3 T. R. 418. Woodworth *v.* Bennett, 43 N. Y. 273, admits the irreconcilability of the cases.

[2] Boggess *v.* Lilly, 18 Tex. 200. And see Crescent Ins. Co. *v.* Baer (Fla. 1887), 1 So. R. 318.

[3] De Leon *v.* Trevino, 49 Tex. 88. See, also, the query in King *v.* Winants, 71 N. Ca. 469, 470; and in Pfeuffer *v.* Maltby, 54 Tex. 454, of a partnership to traffic in Confederate money and cotton, where the distinction between contracts made with specific reference to direct aid in the actual prosecution of hostilities, and such as might be made in the ordinary transaction of social and business life, though tending to supply the wants of people in the hostile territory; also between enforcing an illegal partnership and adjusting the profit and loss after it has been closed and the money passed into other forms. See, also, Watson *v.* Fletcher, 7 Gratt. 1; Leftwich *v.* Clinton, 4 Lans. 176.

for an accounting between the parties was sustained on the theory that the liability to account was not founded on a contract the consideration of which was the purchase of slaves, but that its consideration was the mutual covenants and promises of the partners.

§ 128. **Cases refusing payment.**— Nevertheless in this view of Brooks *v.* Martin, that is in so far as it follows the case of Sharp *v.* Taylor, it is in many states not law, and the mere fact that a fraud or illegal enterprise is completed will not entitle the parties to compel a division.[1]

§ 129. **Neglect to register.**—Some states have a statute requiring partnerships to record in some designated public

[1] Todd *v.* Rafferty, 30 N. J. Eq. 254; Woodworth *v.* Bennett, 43 N. Y. 273, where the fund was all in the hands of one partner. Stewart *v.* McIntosh, 4 Har. & J. 233, where the proceeds of an illegal voyage were in the hands of a third person, who refused to pay it over. Patterson's Appeal (Supr. Ct. Pa. 1883), 13 W. N. Cas. 154, where the proceeds of a joint deal on a margin were in the hands of one of parties, and an account had been stated, the balance due acknowledged, and a promise to pay made, but the court would not enforce it. Hunt *v.* Pfeiffer, 108 Ind. 197, where a partnership is formed to stifle competition in bidding on a public contract, and obtains the contract, and some of the partners exclude another from its benefits, no action by him for a share of profits will lie. Gould *v.* Kendall, 15 Neb. 549, where it was said that in so far as Brooks *v.* Martin follows Sharp *v.* Taylor, it can scarcely be considered authority. See, also, Dunham *v.* Presby, 120 Mass. 285; Northrup *v.* Phillips, 99 Ill. 449. There are other cases upon this controversy which do not involve partnerships, but these I have not space to comment upon. In Warren *v.* Chapman, 105 Mass. 87, where a firm made illegal sales of intoxicating liquors; and the buyer executed a note to one of the partners in consideration that he would pay the debt, the note was held void, for the payee was an original offender, and part of the consideration of the note was his own share of the debt, and this taints the whole. This last expression would seem to imply that had the note not included the payee's share of the debt it would not have been illegal. In Tenney *v.* Foote, 95 Ill. 99, a note made to a firm, part of the consideration of which arose on contracts of one partner without the other's knowledge, for a commission in dealing in options, was held void. In Forsyth *v.* Woods, 11 Wall. 484, a partnership in conducting the administration of an estate was formed between the administrator and another, which is illegal; a person who went on the administrator's bond at the request of the firm had to pay, and sued the firm for reimbursement, claiming that he had paid a partnership debt, since they were partners in the administration, and it was held that he could not recover.

office the individual names of the partners, not making the partnership illegal for non-compliance, but imposing, generally, a disability to maintain an action on contracts in case of omission; or where the firm is defendant, relieving the plaintiff of the consequences of nonjoinder of a partner as defendant. Such statutes have existed in California, Nevada,[1] New Hampshire and Upper Canada, and for one year in Ohio.

Any form of acknowledgment will satisfy the statute, none being prescribed.[2] Where the statute in terms applies only to trading partnerships, any firm which buys and sells comes in this category; as a partnership to print and publish a newspaper.[3]

The statute was held not to apply to an action by the partners as individuals, not upon a partnership contract,[4] nor to actions for torts committed against the property of the firm;[5] nor to actions not growing out of the partnership affairs, as where the sheriff, having levied upon property as belonging to a partner, leaves it in the hands of a receiptor, and then replevies from him on his refusal to deliver.[6]

The publication must be before the action is begun and not merely before trial, for beginning an action is part of the "maintaining" of it.[7] The statute is only matter in abatement, and if an action is defeated for non-compliance, a new action lies after the statement has been filed.[8] The statute does not prevent one to whom the partnership assigned a claim suing upon it; the assignee's title may be good although the assignment was made to evade the statute.[9]

[1] Where the penalty is $1,000. St. 1881, ch. 65, §§ 27–29.

[2] Fabian *v.* Callahan, 56 Cal. 159.

[3] Pinkerton *v.* Ross, 33 Up. Can. Q. B. 508, the court saying, p. 514, that a firm making bricks on its own land would not be within the statute, whereas if it purchase the clay, though of little value as compared with the product, it would be.

[4] McCord *v.* Seale, 56 Cal. 262.

[5] Ralph *v.* Lockwood, 61 Cal. 155.

[6] Tucker *v.* Adams, 63 N. H. 361.

[7] Byers *v.* Bourret, 64 Cal. 73.

[8] Sweeney *v.* Stanford, 67 Cal. 635.

[9] Cheney *v.* Newberry, 67 Cal. 126.

CHAPTER VII.

PERSONS COMPOSING THE FIRM.

§ **130.** Any person who has capacity to enter into contracts can be a partner; hence this branch of the law of partnership involves the general question of capacity belonging to the law of contracts, except as somewhat modified in the case of infants and married women when seeking to disaffirm.

ALIENS.

§ **131.** The capacity of an alien to be a partner is the same as his capacity to form any other contract. Any immunity from liability to be sued enjoyed by the accredited and recognized minister of a foreign government applies to him as a partner, if he engages in trade.[1] But war is a disqualification of an alien's right to contract if he is a citizen of one of the antagonists.[2]

LUNATICS.

§ **132.** As the contract of a lunatic with a person who is not aware of his infirmity, if executed, binds him, and if disaffirmed, while executory, is binding to the extent of restoring to the other party an equivalent for what he has parted with, it follows that a partnership contract with a lunatic is valid to the same extent. And if a partner becomes a lunatic while the firm is in operation, it is merely a cause for dissolution in a proper case and not a dissolution *per se;* and, until dissolved, he has the rights and liabilities of a partner.[3]

CORPORATION AS A PARTNER.

§ **133. Generally cannot be a partner.**— A corporation cannot form a partnership with an individual or with an-

[1] Magdalena Steam Nav. Co. *v.* Martin, 2 E. & E. 94.

[2] See § 110.

[3] See § 581.

other corporation. This results not from any principle of partnership law, but from the nature of a corporation, and, therefore, if the corporation is invested with power to form such a relation the objection is removed. A corporation can, in general, be bound only by the acts of its duly elected officers or agents; hence, as a partnership implies two principals, or an agent who is not appointed, and is not, at least in a partnership of fixed duration, removable at will, such relation violates this rule of corporations. So, if the statute requires a corporation to make periodical statements of its condition and debts, this cannot be done if another principal has the power of creating them. So, if the statute limits the amount of the indebtedness which a corporation may incur.[1]

In Van Keuren *v.* Trenton Locomotive & Mach. Mfg. Co. 13 N. J. Eq. 302, where a corporation and the plaintiff formed a partnership, and after two years the corporation excluded the plaintiff from the business and took the property, it was held that the want of corporate power was no defense to a suit for an accounting and injunction, and that the services and property of plaintiff could not be thus taken away from him. In French *v.* Donohue, 29 Minn. 111, it was held that such a partnership could recover on obligations made to the firm, and the debtor could not repudiate them; the want of capacity does not concern him. In Bissell *v.* M. S. & N. I. R. R. Cos. 22 N. Y. 258, it was held that *ultra vires* was no defense in an action by an injured passenger against two railroad corporations which had formed a partnership. In Gunn *v.* Central R. R. Co. 74 Ga. 509, a railroad company attempted to form a partnership with a person to run a line of boats, but this was held to be *ultra vires*, and hence an action of tort would not lie against the corporation for acts of the firm.[2]

[1] Whittenton Mills *v.* Upton, 10 Gray, 582; Hackett *v.* Multnomah R'y Co. 12 Oregon, 124; Marine Bank *v.* Ogden, 29 Ill. 248; New York & Sharon Canal Co. *v.* Fulton Bank, 7 Wend. 412, 414; Pearce *v.* Madison & Indianapolis R. R. 21 How. 441; State *ex rel.* Pearson *v.* Concord R. R. Co. (N. H.) 13 Am. and Eng. R. R. Cas. 94; Gunn *v.* Central R. R. Co. 74 Ga. 509.

[2] Yet three railroad corporations were said to have formed a partnership in Railroad Co. *v.* Bixby, 55 Vt. 235; and a corporation and an individual were said to be partners in Catskill Bank *v.* Hooper, 5 Gray, 574;

§ 134. May receive capacity.— It results from the reasons above given against a corporation being a member of a partnership, that if it has been granted capacity it may become a partner.

In Butler *v.* American Toy Co. 46 Conn. 136, the preamble in the company's charter recited the death of a member of a firm which, with another firm, constituted the partnership called the American Toy Co., and that the corporation was formed to enable the surviving partners and the representatives of the deceased to continue the business for which the corporation was formed. This was held by necessary intendment to authorize the corporation to take the place of the firm as a member of the American Toy Co.

In Allen *v.* Woonsocket Co. 11 R. I. 288, it was held that a partnership at will between a firm and an individual, where the individual was to have no control as partner, and no stockholder's rights were imperiled because one person owned all the stock, was not *ultra vires*. But the suit was for an accounting between the partners, which would probably have been granted even if the contract were *ultra vires*.

In Catskill Bank *v.* Gray, 14 Barb. 471, a corporation formed for the manufacture of iron leased its mills for five years to Gray by a contract by which it was to receive a share of the profits, and such control as to render the contract one of partnership; and in an action on mercantile paper made by an agent of the mills, it was held that the corporation having been formed to manufacture iron could carry out this purpose by making such a partnership, and was liable as a partner on the paper. But this case is hardly consistent with the general rule.

In Ontario Salt Co. *v.* Merchants' Salt Co. 18 Grant's Ch. (Up. Can.) 540, an association of salt manufacturers, some of them corporations, to develop the business and sell the product, the association not being a monopoly, was legal. But it can scarcely be considered a partnership.[1]

Associations of connecting railroads or other common carriers on a continuous line of travel are frequently formed for through transportation, with a division of receipts in specified proportions. These are held legal, as are many other pooling arrangements, on

s. c. at an earlier stage, Catskill B'k *v.* Gray, 14 Barb. 471, 582.

[1] A corporation was also a partner in Jones *v.* Parker, 20 N. H. 31.

the ground that they do not constitute a partnership; for although each can issue through tickets, there is no community of loss nor interest in the earnings of each other, but a mere running arrangement.[1]

MARRIED WOMEN.

§ 135. In general.— The complications that arise where a married woman is or has acted as a member of a firm depend for solution on the various statutes of the several states, and to give the necessary space to analyze them is out of the question in this book; but as all the decisions have never been collected together, I shall give them with an approximate classification. The cases where the husband is not a member of the firm will be treated first. In some states she can invest her separate means in a firm; in others, only with the husband's consent, and in others not at all. The common law incapacity of a married woman to contract made her contract of partnership wholly void where she had no separate estate. But where she had a separate estate she could embark it in a partnership. Her capacity to contract a partnership, in case of the absence, abandonment, separation or alienage of the husband, is the same as in other contracts in such cases.[2]

§ 136. Statutes — Where the husband is not in the firm. Where statutes give a married woman power to sell and contract as to her separate property and to carry on business, she may invest it in a partnership, since this is a usual way of carrying on business; and it is no objection that she thereby becomes liable for the acts of others, for the same happens if she owns stock in a company or employs an agent. Her separate property is still hers, and does not become liable for her husband's debts.[3]

[1] See Hot Springs R. R. *v.* Trippe, 42 Ark. 465; 48 Am. Rep. 65; Ellsworth *v.* Tartt, 26 Ala. 733; 62 Am. Dec. 749; Irvin *v.* Nashville, C. & St. L. R'y, 92 Ill. 103; 34 Am. Rep. 116; Pratt *v.* Ogdensburg & Lake Champlain R. R. 102 Mass. 557, 567; Briggs *v.* Vanderbilt, 19 Barb. 222. And see *supra*, § 65.

[2] Thus, where the husband has been absent and unheard from for seven years, see Brown *v.* Jones, 18 N. H. 230.

[3] Plumer *v.* Lord, 5 Allen, 460; Ab-

Where the statute allows her to carry on a trade separately from her husband, the employment of their husbands by a firm of wives is carrying on business separately from the husbands, since they are agents and not owners.[1]

But where the statutes give her no power or only a limited power to become a partner, the rule of the common law prevails and she cannot enter a firm.[2]

§ **137. Property in such cases.**— That though she has no capacity to become a partner, and yet does so, her property still remains hers, and her husband cannot assign it, has been held.[3] Nor can his creditors reach it;[4] a trespasser on the property — one who levied on the partnership property under execution against the husband — cannot when sued by the firm question her capacity.[5] She may claim as creditor in case of insolvency of the firm for a loan to it — she did not in this case seek to recover her capital;[6] and her

bott *v.* Jackson, 43 Ark. 212; Dupuy *v.* Sheak, 57 Iowa, 361; Silveus *v.* Porter, 74 Pa. St. 448; Newman *v.* Morris, 52 Miss. 402. And see Edwards *v.* Thomas, 66 Mo. 468, 481.

1 Kutcher *v.* Williams, 40 N. J. Eq. 436. In the following cases, also, a married woman was a member of a partnership, but the consent of the husband incidentally appears: Craig *v.* Chandler, 6 Colorado, 543, where she bought her husband's interest in a firm and claimed her share on dissolution; Merchants' Nat'l Bank *v.* Raymond, 27 Wis. 569; Atwood *v.* Meredith, 37 Miss. 635; Bitter *v.* Rathman, 61 N. Y. 512; Penn *v.* Whitehead, 17 Gratt. 503. A married executrix of the estate of a deceased partner, the firm being continued by wife, is not a partner, for she receives profits as executrix and not from her own estate. Brasfield *v.* French, 59 Miss. 632. Of the above cases the husband was the wife's manager in the conduct of the business in Kutcher *v.* Williams, 40 N. J. Eq. 436; Penn *v.* Whitehead, 17 Gratt. 503; Atwood *v.* Meredith, 37 Miss. 635; Newman *v.* Morris, 52 Miss. 402; Dupuy *v.* Sheak, 57 Iowa, 361.

2 Bradstreet *v.* Baer, 41 Md. 19; Frank *v.* Anderson, 13 Lea (Tenn.), 695; Carey *v.* Burruss, 20 W. Va. 571; 43 Am. Rep. 790; Brown *v.* Jewett, 18 N. H. 230; Todd *v.* Clapp, 118 Mass. 495; and *dicta* in Howard *v.* Shaw, 91 Ind. 384; 46 Am. Rep. 607; Brown *v.* Chancellor, 61 Tex. 437, 445; Miller *v.* Marx, 65 id. 131; Howard *v.* Stephens, 52 Miss. 239. Nevertheless the question was raised whether a married woman could become liable as a partner by holding out in Rittenhouse *v.* Leigh, 57 Miss. 697.

3 Howard *v.* Stephens, 52 Miss. 239.

4 Maghee *v.* Baker, 15 Ind. 254; Horneffer *v.* Duress, 13 Wis. [603]; Duress *v.* Horneffer, 15 id. [195]. *Contra*, that the property invested would be liable for debts, and the profits would belong to the husband. Miller *v.* Marx, 65 Tex. 131.

5 Horneffer *v.* Duress, *supra*.

6 Frank *v.* Anderson, 13 Lea, 695.

copartners cannot deny her capacity to sue alone for an accounting and dissolution.[1] As her partnership is a nullity, the other partner can be sued alone.[2] The firm's property is liable for its debts.[3] The earnings or profits become the husband's property is also held.[4]

§ 138. —— **husband deemed the debtor, when.**— Other jurisdictions hold that if a married woman assumes to enter a general mercantile partnership not connected with her separate property, the husband, if he assented to her so doing, is deemed the partner and she merely his agent, and the property or its proceeds is liable for his debts.[5]

One who marries a woman who is a member of a firm becomes liable for the existing partnership debts, since she was liable *in solido*, and this not because he receives property from her, but because her legal existence is suspended or merged in his;[6] but her partnership debts incurred after coverture in a firm with her separate estate, he having no interest and no control, stand on a different basis.[7]

So if his labor and skill are mixed up with hers in a business carried on by both, the business is deemed his and is subject to his debts.[8]

[1] Bitter *v.* Rathman, 61 N. Y. 512.

[2] Carey *v.* Burruss, 20 W. Va. 571; 43 Am. Rep. 790.

[3] Newman *v.* Morris, 52 Miss. 402; Miller *v.* Marx, 65 Tex. 131. And see Clay *v.* Van Winkle, 75 Ind. 239; Edwards *v.* Thomas, 66 Mo. 468. But see Bradstreet *v.* Baer, 41 Md. 19. Yarbrough *v.* Bush, 69 Ala. 170, was where an action was brought against the partnership in the firm name under the statute, and therefore no personal liability would be adjudged; that her plea of coverture was no defense, although she could not incur a contractual liability, because the partnership property was bound for the debts.

[4] Miller *v.* Marx, 65 Tex. 131; Cranor *v.* Winters, 75 Ind. 301, 303.

[5] Swasey *v.* Antram, 24 Oh. St. 87; 13 Am. Law Reg. (N. S.) 577.

[6] Alexander *v.* Morgan, 31 Oh. St. 546.

[7] Id. 551.

[8] National Bank *v.* Sprague, 20 N. J. Eq. 13. The reversal of this case in 21 N. J. Eq. 530, did not involve this point, but in so far as it prevents her employment of the husband in a firm in which her capital is her separate property it would not be consisted with Kutcher *v.* Williams, 40 N. J. Eq. 436, cited above. That the personal property of the wife is presumptively his, and therefore her interest in a firm will be presumed to be his, and a creditor of the firm may therefore join him as defendant, and she may be stricken out of the judgment, his consent to the rendition of the judgment being deemed a ratification of her purchase of goods the price of which was

And where the husband is allowed to act and appear as the sole owner, he will be deemed such as to creditors, and the wife cannot then, after judgment against him, claim the property to be partnership assets.[1]

§ 139. As a partner of her husband.—It has been held by the preponderance of authorities, even under the broadest statutes, that a married woman has not capacity to contract a partnership with her husband, or, in other words, to become a member of a firm in which her husband is a partner, even in those states where she may embark in another partnership.[2] In states where she cannot be a partner in any firm, *a fortiori* she cannot become her husband's partner; and though she holds herself out as such partner, and her means give credit to the firm, she is not liable for its debts; she cannot, by acts or declarations, remove her own disabilities.

bere sued for, Wells *v.* Simmons, 66 Mo. 617, 620. That a married woman cannot put her separate property into a partnership and retain it as separate property, and therefore cannot, without her husband's joining, recover a judgment in connection with the other partners; he was here an agent in the management of the business, Bradford *v.* Johnson, 44 Tex. 381. That if a *feme covert* partner employing her husband as her agent in the business buys out her copartner, this dissolves the agency, and if the husband thereafter conducts the business in his own name, he, and not she, is liable for the debts thereafter contracted, Hamilton *v.* Douglas, 46 N. Y. 218.

[1] Parshall *v.* Fisher, 43 Mich. 529; Norris *v.* McCanna, 29 Fed. Rep. 757.

[2] Lord *v.* Parker, 3 Allen, 127; Plumer *v.* Lord, 5 id. 460; s. c. 7 id. 481; Bowker *v.* Bradford, 140 Mass. 521; Haas *v.* Shaw, 91 Ind. 384; 46 Am. Rep. 607; Montgomery *v.* Sprankle, 31 Ind. 113; Payne *v.* Thompson, 44 Oh. St. 192; Fairlee *v.* Bloomingdale, 14 Abb. New Cas. 341; 67 How. Pr. 292; Kaufman *v.* Schoeffel, 37 Hun, 140 (*contra*, Graff *v.* Kinney, id. 405; 15 Abb. N. Cas. 397); Wallace *v.* Finberg, 46 Tex. 35; Cox *v.* Miller, 54 Tex. 16; Boyle's Estate, Tucker (N. Y.), 4; Brown *v.* Chancellor, 61 Tex. 437, 445; Miller *v.* Marx, 65 id. 131; Cosio *v.* De Bernales, Ryan & Moody, 102; Mayo *v.* Soyster, 30 Md. 402, where it was held improper to join the wife as co-defendant to collect by attachment a debt incurred by them while trading as "The New Hope Mine;" and the same ruling was made, incidentally or in *dicta*, in the following cases: Knott *v.* Knott, 6 Oregon, 142, 150; Wilson *v.* Loomis, 55 Ill. 352; Huffman *v.* Copeland, 86 Ind. 224, 227; Sherman *v.* Elder, 1 Hilton (N. Y.), 178; Chambovet *v.* Cagney, 35 N. Y. Superior Ct. 474; and the point was raised but not decided in

The partnership assets are liable for the partnership debts; as where a husband was in a firm with the wife's money and she afterwards bought out the other partner, if a creditor of the firm make a levy she cannot replevy on a claim that the assets are her individual property.[1]

§ 140. Effect on property.—If, however, she nevertheless does join in a partnership with her husband, or in which he is a member, the result to herself and to her property is variously ruled under the various statutes, as shown in the foot-note.[2]

Francis *v.* Dickel, 68 Ga. 255. For the Mexican law, see Fuller *v.* Ferguson, 26 Cal. 546.

[1] Clay *v.* Van Winkle, 75 Ind. 239. The only cases in which a contrary rule is hinted are the following: Zimmerman *v.* Erhard, 8 Daly, 311; 58 How. Pr. 11 (aff'd on other grounds, 83 N. Y. 74); but the only one of the opinions which bases the case on this doctrine is denied to be law in Fairlee *v.* Bloomington, *supra;* Ploss *v.* Thomas, 6 Mo. App. 157, in which case it was admitted that contracts were not enforceable against her; Edwards *v.* McEnhill, 51 Mich. 160, the court refused to decide the point, saying that if she had such capacity the facts showing it must be stated; and *In re* Kinkead, 3 Biss. 405; 7 Bankr. Reg. 439 (U. S. D. C. Ill.), wherein Blodgett, J., says: "I can see nothing in the relation of husband and wife which would prevent the wife from being her husband's partner in business if she could be a partner with any other person." In Graff *v.* Kinney, 37 Hun, 405; s. c. 15 Abb. New Cas. 397, it was held that a married woman could form a partnership with her husband with reference to her separate property, on the ground that she could employ him as agent, and a partnership is merely a mutual agency; and in Scott *v.* Conway, 58 N. Y. 619, a married woman defendant was not allowed to interpose the defense that she had a dormant partner, viz., her husband, but is held to the truth of the appearance she has held out.

[2] It was held that she became a creditor of the husband or of the firm in Boyle's Estate, 1 Tucker (N. Y.), 4; and see Lord *v.* Davis, 3 Allen, 131; Huffman *v.* Copeland, 86 Ind. 224; see, also, Glidden *v.* Taylor, 16 Oh. St. 509. That the other partners cannot deny her a share in the profits (the husband does not appear to claim it as his in this case), Knott *v.* Knott, 6 Oregon, 142, 150. That the property still remains hers as against the husband's creditors, Ploss *v.* Thomas, 6 Mo. App. 157. That the earnings are his, there being no capital in this case, Plummer *v.* Trost, 81 Mo. 425. That the property is perhaps hers *inter se*, as if it were a loan to her husband, but is liable for his debts, Wilson *v.* Loomis, 55 Ill. 352. That it ceases to be her separate property and becomes his, Lord *v.* Parker, 3 Allen, 127, 129; and *dictum* in Sherman *v.* Elder, 1 Hilt. (N. Y.) 178. Where both are in the "business" of carrying on a farm,

§ 141. Wife's claim against her husband's firm.— Where the wife of one of the partners lent money to or performed service for the firm, or where a woman who is creditor of a firm marries one of the partners, equity will enforce the debt where the statute preserves her choses in action as separate property in a suit by her to recover it back;[1] but if the statute does not preserve it as separate property, the marriage extinguishes the debt, and this terminates it as to the other partners also.[2]

But where a statute allows a *feme covert* to contract as if sole, except with her husband, she cannot contract with a firm of which he is a partner, for this is contracting with him jointly with others.[3] Yet, though the firm's note payable to her is void, she can hold the indorser, for he is estopped to deny the maker's capacity.[4] And she is bound if she indorses for the accommodation of the firm;[5] and if she invests in her husband's firm and afterwards assigns the fund, and the firm promise the assignee to pay him, he can maintain an action on the promise.[6]

INFANTS.

§ 142. Voidable, not void.— The ordinary rules as to infants' contracts apply to partnerships, viz.: That such contracts — leaving out those for necessaries, and the capacity to

which was the wife's separate property, both were held liable on a joint note, on the principle that she can incur debts on the credit of her separate property. Krouskop *v.* Shontz, 51 Wis. 204, 217.

[1] Bennett *v.* Winfield, 4 Heisk. (Tenn.) 440; Devin *v.* Devin, 17 How. Pr. 514; Adams *v.* Curtis, 4 Lansing, 164; Gould *v.* Gould, 35 N. J. Eq. 37; id. 562; 36 id. 380; Benson *v.* Morgan, 50 Mich. 78, holding also that the husband has no power to settle with his partners for her claim. And see cases in the preceding note.

[2] Fox *v.* Johnson, 4 Del. Ch. 580.

[3] Kenworthy *v.* Sawyer, 125 Mass. 28; Edwards *v.* Stevens, 3 Allen, 315.

[4] Kenworthy *v.* Sawyer, 125 Mass. 28, 29.

[5] Id.

[6] Lord *v.* Davis, 3 Allen, 131. A wife was creditor of the firm of A., B. & C. C. sold out to D. and the firm became A., B. & D., and her husband was a member of it. Payments by him to her upon the debt were held to be evidence of the assent of all parties to a substitution of the new firm for the old as debtors, for they are presumed to be known to all the partners, where there are

give a power of attorney, and the somewhat controverted question of contracts clearly not for the infant's benefit, such as going security — are not void, but voidable, and that he alone can avail himself of the privilege of avoiding them. Also that if he fraudulently represents himself to be of age, he may be bound to others who act on the faith of such representations, and may be liable to restore any advantage thereby gained. This, however, is not a contractual obligation, but an estoppel to take advantage of his own fraud.

These ordinary rules applied to partnership law produce complications which will not be noticed.

An infant's contract of partnership is therefore, of course, not void, but voidable. He can be a partner.[1]

It was hinted in one case that an infant, by the mere act of forming a partnership, holds himself out as an adult and practices a fraud.[2] But this is not the law. A contract by an infant is not made binding thus, and there is no estoppel without actual misrepresentation.[3]

The consent of the parent, though he be insolvent, to an infant's becoming a partner, is a release of his services, and the creditors of the parent have no recourse on the minor's earnings.[4]

§ 143. Rights and powers inter se.— While the infant is a partner, he has all the rights and powers of one to hold

no circumstances of concealment. Osborn *v.* Osborn, 36 Mich. 48.

[1] Goode *v.* Harrison, 5 B. & Ald. 147; Whitney *v.* Dutch, 14 Mass. 457; 7 Am. Dec. 229; Dunton *v.* Brown, 31 Mich. 182, and the numerous cases hereinafter cited, assume the same doctrine. Where plaintiff on one part agreed toform a partnership with defendant and his infant brother, representing together the other interest, but the partnership articles were signed only by the adult brother, it was held that the infant had not become a partner; that he was therefore not a necessary party to a suit for an accounting, McGunn *v.* Hanlin, 29 Mich. 476.

[2] Kemp *v.* Cook, 18 Md. 130, 138.

[3] Thus, where an infant was a secret partner and falsely represented his ostensible partner as worthy of credit in order to obtain profit for both, his infancy is a defense to an action for the price of the goods obtained, though the seller could have rescinded for fraud and reclaimed them. Vinsen *v.* Lockwood, 7 Bush, 458.

[4] Penn *v.* Whitehead, 17 Gratt. 503.

possession of the assets, collect and pay debts, and bind the firm by contracting obligations in its name.[1]

The adult partner who has contracted a partnership relation with an infant, on the faith of the latter's fraudulent representations that he is of age, can rescind or dissolve for this reason, for otherwise he might be ruined by the contracts of a partner who could bind him and repudiate his own liability.[2] But in the absence of such fraud he is bound, for the infant alone can avail himself of this incapacity. Hence, if a parent without authority invests his children's money in a partnership, the adult partner cannot resist their right to insist on the partnership.[3]

Where an infant partner of a firm, which had a claim on an insurance company, was induced by the debtor's fraud to settle the claim, and the firm received and divided the money, but afterwards sought to enforce a rescission of the settlement, it was ruled that they must pay back the whole amount, although the infant was unable to restore his share.[4]

§ 144. **Accounting and payment of losses.**— The infant can call on his partner for an accounting and a share of the profits.[5] And his partner can require the infant to account. The court has the same power to decree a dissolution and compel an accounting for the misconduct of the infant as in other cases.[6]

The adult partner has a right to insist upon the assets of the firm being applied to the debts. The infant's right to rescind is subordinate to this equity of the adult partner.

1 Bush *v.* Linthicum, 59 Md. 344, 349.

2 Id. 355.

3 Stein *v.* Robertson, 30 Ala. 286.

4 Brown *v.* Hartford F. Ins. Co. 117 Mass. 479.

5 Gay *v.* Johnson, 32 N. H. 167.

6 Bush *v.* Linthicum, 59 Md. 344 (holding that he cannot be made personally answerable for the costs); Kitchen *v.* Lee, 11 Paige, 107; Breed *v.* Judd, 1 Gray, 455. In Breed *v.* Judd, 1 Gray, 455, an infant, in consideration of an outfit to enable him to go to California on a mining adventure, agreed to give one-third of the profits to the person who furnished the outfit, and having sent back the agreed one-third of the profits, sought to rescind and recover them again, deducting the amount of the outfit; but the court refused to allow this, saying that otherwise the defendant would have no compensation for his risk.

It is not like the case of performing services or delivering money to another; but the possession is deemed joint and not in the adult only. The infant's disaffirmance is executory only, and he cannot draw out his original capital and throw the entire loss upon the adult partner, nor compel the latter to bear the burden of the debts except in excess of the entire assets of the firm.[1]

§ **145. Ratification.**—If the infant, after coming of age, ratify the prior contracts of the partnership, he becomes bound for its debts.[2] Whether there is or is not a ratification seems to be a question of intention on his part, to be determined by his conduct or declarations. It is doubtful whether remaining in the partnership and continuing business is a ratification of it by the infant as to prior contracts made during the minority.

Mere continuance was deemed not to show such intent in two cases, in one of which the note in suit was not ratified by continuing in business after majority without knowledge of the note.[3]

And in the other, a promise after coming of age to pay his share of notes, was held to be, not a ratification, but a refusal to ratify, but that dealing with such part of goods unpaid for as remained on hand was a ratification as to them, for he could have returned them.[4]

[1] Page *v.* Morse, 128 Mass. 99; Moley *v.* Brine, 120 Mass. 324; Dunton *v.* Brown, 31 Mich. 182. In Dunton *v.* Brown, 31 Mich. 182, where the infant partner sought to rescind the contract of partnership, and recover his capital and value of his services, it was said that neither he while under age, nor his guardian, could determine whether a voidable contract should be annulled. In Sparman *v.* Keim, 83 N. Y. 245, however, he was allowed to avoid the partnership contract and recover his capital. In *Ex parte* Taylor, 8 De G. M. & G. 254; 25 L. J. Bkr. 35; 2 Jur. (N. S.) 220, it was decided that if an infant pay a premium for admittance into a partnership, he cannot recover it back, and consequently could not prove it against his partner's estate in bankruptcy.

[2] Whitney *v.* Dutch, 14 Mass. 457; 7 Am. Dec. 229.

[3] Crabtree *v.* May, 1 B. Mon. 289. The exact contrary was ruled in Miller *v.* Sims, 2 Hill (S. Ca.), L. 479, and the cases cannot be reconciled, unless in the latter there was dealing with the goods for which the note was given; but the ruling was said in Dana *v.* Stearns, 3 Cush. 372, 376, to go beyond any case within the knowledge of the court.

[4] Minock *v.* Shortridge, 21 Mich. 304.

So, where two partners, both minors, gave a mortgage to secure future advances of goods, if part of the goods was furnished after one came of age, this ratified the mortgage as to him.[1]

Where the infant partner sold his interest in the firm to the adult, taking a chattel mortgage to secure the purchase money, and after coming of age proved the mortgage as a claim on his partner's estate in insolvency, this was held not to ratify the partnership so as to make him liable for the debts, but, if anything, to ratify the dissolution only.[2]

If the infant deals with the goods under a new title after coming of age, as where on sale of partnership effects they were bought in by his grandfather, and afterwards by him sold to the infant this is, of course, no ratification.[3] Where judgment was rendered against both partners, the infant's omission to attack it for six years after majority was deemed a ratification.[4]

§ 146. —— contracts after majority.— But on contracts made by the firm after the infant comes of age, he is bound by continuing in the business. And where he had, while an infant, purchased goods together with his partners, but did no partnership act after coming of age, he was held bound for subsequent purchases by the partners from the same dealer, if no knowledge of dissolution was had by such dealer; the court holding that the partnership must be deemed to continue until notice to the contrary.[5]

§ 147. Creditors' rights in the assets.— The creditors have the right to subject the entire assets of the firm, although one of the partners be a minor. His plea of infancy avoids any personal responsibility for the debt, but will not exempt his interest in the joint property, for he has no separate interest in the joint property until all the debts are paid and a division made.[6] Nor can separate creditors of an

[1] Keegan *v.* Cox, 116 Mass. 289.

[2] Dana *v.* Stearns, 3 Cush. 372, 376.

[3] Todd *v.* Clapp, 118 Mass. 495.

[4] Kemp *v.* Cook, 18 Md. 130.

[5] Goode *v.* Harrison, 5 B. & Ald. 147. But see King *v.* Barbour, 70 Ind. 35.

[6] Yates *v.* Lyon, 61 N. Y. 344, 346; Bush *v.* Linthicum, 59 Md. 344, 349; Whittemore *v.* Elliott, 7 Hun, 518. See Furlong *v.* Bartlett, 21 Pick. 401. A minor, whose contribution to the capital of the firm was $1,000, but who had sold out his interest to his copartner for that sum, and thus dissolved the partnership and re-

adult partner claim an equality of distribution in insolvency with partnership creditors on the ground of the infancy of the copartner, since he alone can avoid the partnership.[1]

§ **148. Actions by and against.**— In actions to collect demands due the firm the infant partner must be co-plaintiff with the others.[2] In actions against the firm the infant must be made a co-defendant; this follows from the principles that his contract is not void, and that no one but himself can avoid it; the plaintiff cannot treat it as void, but must join him; moreover, he has a right to be heard.[3]

On plea of infancy by the minor defendant, plaintiff may reply confirmation of the contract by him after coming of age.[4]

§ **149. Judgment is a partnership debt.**— A judgment on a demand due from the firm is a partnership debt, whether the infant was dismissed or retained as a party; and even if there was but one adult partner, and the judgment is against him alone, after plea of infancy. Hence, if several actions

ceived back his capital, is entitled to an injunction to prevent a levy of execution on his property under a judgment got against the firm without his knowledge, Vansyckle *v.* Rorback, 6 N. J. Eq. 234.

[1] David *v.* Birchard, 53 Wis. 492, 497. And see Yates *v.* Lyon, 61 N. Y. 344.

[2] Teed *v.* Elworthy, 14 East, 210; Osburn *v.* Farr, 42 Mich. 134. A *dictum* to the contrary occurs in Phillips *v.* Pennywit, 1 Ark. 59.

[3] Wamsley *v.* Lindenberger, 2 Rand. (Va.) 478; Slocum *v.* Hooker, 13 Barb. 536 (reversing s. c. 12 id. 563); Mason *v.* Denison, 15 Wend. 64. In former times, when the infant's contract was void, it was held proper not to join him as defendant; and when his non-joinder was pleaded, to reply that the partner not joined was an infant. Burgess *v.* Merrill, 4 Taunt. 468; Gibbs *v.* Merrill, 3 id. 307; Jaffray *v.* Frebain, 5 Esp. 47; Chandler *v.* Parkes, 3 id. 76. But these cases cannot be considered law unless it be in a case where the contract is void as to the omitted partner, as in some states in the cases of married women.

[4] Kirby *v.* Cannon, 9 Ind. 371. It has been held that on plea of infancy the plaintiff might dismiss as to the infant and recover against the others without being compelled to resort to a new action, for a release of the infant who has not confirmed his contract does not release the others. Kirby *v.* Cannon, 9 Ind. 371; Woodward *v.* Newhall, 1 Pick. 500; Hartness *v.* Thompson, 5 Johns. 160. And on plea of infancy, judgment can go against the adults. Tuttle *v.* Cooper, 10 Pick. 281; Hartness *v.* Thompson, 5 Johns. 160.

are brought against the firm, and the minor pleads infancy to some and not to others, and some of the judgments are therefore against the adults alone and some against all the partners, yet the judgments stand on an equality in the distribution of the firm's assets; for pleading infancy is not a disaffirmance of the partnership, but a mere denial of individual liability.[1]

In view of the right of the adult partner to have the assets of the firm applied to the partnership debts, and the right of its creditors to secure priority in the distribution over the separate creditors of the individual partner, there would doubtless be no impropriety in retaining the infant as a party, with a proper restriction on the judgment against execution on his individual property.[2]

§ 150. A firm as partner in another firm.— A partnership may *inter se* be regarded as a member of a firm. The liability *in solido* of each partner to creditors renders this unimportant as to third persons, but *inter se*, as bearing on distribution and on liability to each other, it may be very important. The intention of the parties must be ascertained and is the sole test.

In *In re* Hamilton, 1 Fed. Rep. 800, where two firms formed a conjoint firm, each firm and not each individual was intended to be a partner, this intention being inferred from the facts: 1. That there was no firm name, but paper of the conjoint firm was made in the name of the separate firms. 2. The agreement of partnership was signed in the firm names. 3. Profits and losses were allotted to firms and not to individuals. 4. The separate firms presented claims upon the joint fund in their firm names.[2]

DORMANT PARTNER.

§ 151. What is a dormant partner.— A dormant partner is one who takes no active part in the business and whose

[1] Whittemore v. Elliott, 7 Hun, 518; Gay v. Johnson, 32 N. H. 167.

[2] A statute authorizing a judgment against all joint debtors, though some are not served with process, applies, though one be an infant. Mason v. Denison, 11 Wend. 612 (aff'd, 15 id. 64).

[3] See, also, Raymond v. Putnam, 44 N. H. 160; Gulick v. Gulick, 14 N. J. L. 578, 582; *Re* Warner, 7 Bankr. Reg. 47; Rich v. Davis, 6 Cal. 163; Bullock v. Hubbard, 23 id. 495.

name does not appear in the title of the partnership, and who is unknown to those who lend credit to the firm. Absolute and universal or even a studied secrecy is not essential, for the connection of the dormant partner may be known to a few or even to many. He is then no longer dormant as to them, but continues so as to the rest of the public.[1] If, however, the connection becomes generally known in any way, the dormancy ceases, that is, secrecy is essential, independent of the manner of exposure; and unlike holding out, to render a third person liable as partner, if the other partners or third persons divulge the connection without the consent or knowledge of the dormant partner, or it is revealed by casual means, he is no longer dormant, though the firm style be the name of another partner only.[2] The question of dormancy is one of fact for the jury.[3]

It seems to have been thought that the law of dormant partners applies only to commercial partnerships, and that in real estate matters a partnership cannot be in the name of one person, doubtless by reason of the statute of frauds;[4] but this has been justly denied *in toto*.[5]

Many modern decisions have extended the doctrine of dormant partnership to cover cases where a partner contracts with the plaintiff, who does not know and has no reason to suppose there is a dormant partner or a partnership, and who is therefore permitted

[1] Metcalf *v.* Officer, 1 McCrary, 325; 2 Fed. Rep. 640; *In re* Ess, 3 Biss. 301; Cregler *v.* Durham, 9 Ind. 375; Kelley *v.* Hurlburt, 5 Cow. 534; Davis *v.* Allen, 3 N. Y. 168; North *v.* Bloss, 30 N. Y. 374, 380; Fosdick *v.* Van Horn, 40 Oh. St. 459.

[2] Evans *v.* Drummond, 4 Esp. 89; U. S. Bank *v.* Binney, 5 Mason, 176 (aff'd as Winship *v.* Bank of U. S. 5 Pet. 529); Boyd *v.* Ricketts, 60 Miss. 62; Deering *v.* Flanders, 49 N. H. 225; Clark *v.* Fletcher, 96 Pa. St. 416; Benjamin *v.* Covert, 47 Wis. 375, 382. This was denied by Baldwin, J., in his dissenting opinion in Winship *v.* Bank of U. S. 5 Pet. 529, 574.

[3] Goddard *v.* Pratt, 16 Pick. 412, 429; Metcalf *v.* Officer, 1 McCrary, 325; 2 Fed. Rep. 640; North *v.* Bloss, 30 N. Y. 374, 379; Cregler *v.* Durham, 9 Ind. 375; Hunter *v.* Hubbard, 26 Tex. 537.

[4] Smith *v.* Burnham, 3 Sumner, 435; Pitts *v.* Waugh, 4 Mass. 424; Patterson *v.* Brewster, 4 Edw. Ch. 352; Speake *v.* Prewitt, 6 Tex. 252 (a *dictum*).

[5] Chester *v.* Dickerson, 54 N. Y. 1, 10; Benners *v.* Harrison, 19 Barb. 53, 58; Gray *v.* Palmer, 9 Cal. 616; Brooke *v.* Washington, 8 Gratt. 248 (56 Am. Dec. 142). And see more fully in the chapter on Real Estate.

to sue such partner alone without joining his associates, they being regarded as to the plaintiff in the light of dormant partners.[1]

§ 152. —— **the firm name not decisive.**— It has been said that every person whose name is not included in the firm style, or under a general designation as & Co., is to be deemed a dormant partner;[2] but this obviously is quite too sweeping; it must be intended that he shall be unknown, and he must also, of course, be not generally known.[3] Otherwise, if the firm name were a purely artificial and fictitious one, as The Citizens' Bank, or The Warren Factory, all the partners would be dormant, which is preposterous; for credit must be given to somebody, and not to a mere name, and somebody must be plaintiff, whereas a dormant partner need not be plaintiff.[4]

The fact that the firm name contains a collective word or a general designation, as & Co., & Son, & Bro., does not prevent a partner in it being dormant, if there are more than two;[5] but if the firm consists of but two and its name has a collective expression, the legal presumption is that both partners are ostensible.[6]

[1] De Mautort *v.* Saunders, 1 B. & Ad. 398; Chase *v.* Deming, 42 N. H. 274, where he denied there were others; Clark *v.* Holmes, 3 Johns. 148; Hurlbut *v.* Post, 1 Bosw. 28; Brown *v.* Burdsal, 29 Barb. 549; Cookingham *v.* Lasher, 38 id. 656; 2 Keyes, 454; 1 Abb. Dec. 436; Farwell *v.* Davis, 66 Barb. 73; Worth *v.* Bloss, 30 N. Y. 374, 380; Leslie *v.* Wiley, 47 id. 648. See § 1052.

[2] Leveck *v.* Shaftoe, 2 Esp. 468; Bank of St. Marys *v.* St. John, 25 Ala. 566; Mitchell *v.* Dall, 2 Har. & Gill, 159, 172; Cammack *v.* Johnson, 2 N. J. Eq. 163; Mason *v.* Connell, 1 Whart. 381, 385; Jones *v.* Fegely, 4 Phila. 1; Shamburg *v.* Ruggles, 83 Pa. St. 148, 150; Speake *v.* Prewitt, 6 Tex. 252.

[3] Phillips *v.* Nash, 47 Ga. 218; Howell *v.* Adams, 68 N. Y. 314.

[4] Shamburg *v.* Ruggles, 83 Pa. St. 148; Clark *v.* Fletcher, 96 id. 416, 419. Yet see Bernard *v.* Torrance, 5 Gill & J. 383.

[5] See the facts in the following cases: Metcalf *v.* Officer, 1 McCrary, 325; 2 Fed. Rep. 640; Warren *v.* Ball, 37 Ill. 76; Kennedy *v.* Bohannon, 11 B. Mon. 118; Goddard *v.* Pratt, 16 Pick. 412, 428; Grosvenor *v.* Lloyd, 1 Met. 19; Benton *v.* Chamberlain, 23 Vt. 711; Waite *v.* Dodge, 34 id. 181. See Hagar *v.* Stone, 20 Vt. 106, 111.

[6] Metcalf *v.* Officer, 1 McCrary, 325; 2 Fed. Rep. 640; Shamburg *v.* Ruggles, 83 Pa. St. 148, 151. But see facts in Grosvenor *v.* Lloyd, 1 Met. 19, where I. Stone and D. Stone were partners as I. Stone & Co., but the contract sued upon was for rent of premises rented to I. Stone.

§ 153. —— **need not abstain from participation.**—It is not essential to dormancy that the dormant partner should wholly abstain from participation in the business. He may participate, provided he is not known in it as a partner,[1] or even appear to the public as a clerk or agent.[2] But the active manager and business-man of the firm, if a partner and not an agent, it was said, could not be a dormant partner.[3]

§ 154. **Powers of dormant partner.**—The powers of the dormant partner *inter se* must be governed by the contract between the parties.[4] In the absence of express restriction in the articles upon his participation in the business, the mere fact that he is a dormant partner does not of itself place any limit upon his general power as a partner;[5] hence his admissions are evidence against the firm.[6] On the death of the active partner, he may take charge of the winding-up as surviving partner and bring necessary suits.[7]

§ 155. **Property may be deemed to belong to ostensible partner.**— A partner cannot keep his membership secret and afterwards be allowed to appear and embarrass creditors or persons who have acquired claims on the faith of the sole ownership of the ostensible partner. Thus, an execution or attachment on a judgment against the ostensible partner, levied upon the property of a dormant partnership, will

[1] Bank of St. Marys *v.* St. John, 25 Ala. 566; Mitchell *v.* Dall, 2 Har. & Gill, 159; North *v.* Bloss, 30 N. Y. 374, 380; Fosdick *v.* Van Horn, 40 Oh. St. 459, 466.

[2] Waite *v.* Dodge, 34 Vt. 181; How *v.* Kane, 2 Pin. (Wis.), 531; 2 Chand. 222 (54 Am. Dec. 152).

[3] Choteau *v.* Raitt, 20 Oh. 132, 144–5. *Contra*, Bank of St. Marys *v.* St. John, *supra*.

[4] If in fact he has no actual power and is not known to be a partner, his attempt to contract on behalf of the firm, it was said by Mr. Justice Lindley, Partnership, 238 (*d*), would probably not bind it; citing Nicholson *v.* Ricketts, 2 E. & E. 524; CLEASBY, B., in Holme *v.* Hammond, L. R. 7 Ex. 218, 233. But see Rich *v.* Davis, 6 Cal. 163.

[5] Cammack *v.* Johnson, 2 N. J. Eq. 163. See Holme *v.* Hammond, *supra*.

[6] Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15.

[7] Beach *v.* Hayward, 10 Oh. 455. This had been said to be uncertain in Johnson *v.* Ames, 6 Pick. 330, 334; but in the analogous case of a limited partnership, a surviving special partner can wind up, see Bates' Limited Partnership, p. 197.

not be postponed to a subsequent levy by a partnership creditor. The dormant partner cannot assert a lien in violation of the appearances he has held out, and, therefore, the partnership creditors cannot do so through him.[1] So, if a person have an account in bank, and take in a secret partner, subsequent deposits may be applied by the bank to prior overdrafts.[2]

§ 156. Liability of dormant partner.— A dormant partner's liability for the debts of the firm depends on the general principles of commercial law applicable to any other

[1] *Ex parte* Norfolk, 19 Ves. 455; *Ex parte* Law, 3 Deac. 541; *Ex parte* Chuck, 8 Bing. 469; French *v.* Chase, 6 Me. 166; Lord *v.* Baldwin, 6 Pick. 348; Cammack *v.* Johnson, 2 N. J. Eq. 163; Van Valen *v.* Russell, 13 Barb. 590; Brown's Appeal, 17 Pa. St. 480; Hillman *v.* Moore, 3 Tenn. Ch. 454; Whitworth *v.* Patterson, 6 Lea, 119, 123; How *v*. Kane, 2 Pin. (Wis.) 531; 2 Chand. 222 (54 Am. Dec. 152); Callender *v.* Robinson, 96 Pa. St. 454. And see Talcott *v.* Dudley, 5 Ill. 427. *Contra* on the ground that a creditor's priority is not because he trusted the partnership, but because the credit he gave tended to increase their funds, and, therefore, they have priority over separate creditors, although the partnership was in the name of the ostensible partner alone and the other was unknown, Witter *v.* Richards, 10 Conn. 37. *Contra*, also, Taylor *v.* Jarvis, 14 Up. Can. Q. B. 128, holding that judgment on a note signed B. & Co., got against B. alone, supposing there was no partner, will be postponed to a levy under a subsequent judgment against both partners. And see Boro *v.* Harris, 13 Lea, 36. And by statute in Mississippi, if a person trade in his own name, without & Co., or other partnership designation or sign, all the property is treated as his, Gumbel *v.* Koon, 59 Miss. 264.

[2] Allen *v.* Brown, 39 Iowa, 230. On this principle, if the ostensible partner goes into bankruptcy, it was held that the creditors of the business could regard him as their sole debtor, and elect to prove against his estate *pari passu* with his separate creditors, who would then be subrogated to the claims against the joint estate, or can claim against the joint estate. *Ex parte* Hodgkinson, 19 Ves. 294; *Ex parte* Norfolk, 19 Ves. 455; *Ex parte* Chuck, 8 Bing. 469; *Ex parte* Reid, 2 Rose. 84; *Ex parte* Norfolk, 19 Ves. 455; *Ex parte* Watson, 19 Ves. 459. If the ostensible partner becomes bankrupt, the fact that he was allowed to carry on the business as sole owner, if *bona fide*, will not entitle his assignees in bankruptcy to take possession of the partnership stock as if he were sole owner, regardless of the rights of the dormant partner, Reynolds *v.* Bowley, L. R. 2 Q. B. 474; *Ex parte* Hayman, 8 Ch. D. 11. If the dormant partner goes into bankruptcy the assignee cannot take rights in the property against the creditors which the assignor could not, Talcott *v.* Dudley, 5 Ill. 427.

undiscovered principal, and he is chargeable when discovered just as the other partners are. The authority of the ostensible partners within the scope of the business to bind the dormant partner is the same as it is to bind each other, or, rather, it binds the whole firm alike.[1]

If a loan has been made by a person who has a secret partner, but is made not only on his individual credit, but for his individual benefit, and not in his business, so that it is his personal matter alone, the secret partner is not affected by it.[2] If the borrowing partner declares the loan to be for his business, this declaration is conclusive of the fact on the principles stated in section 450.[3]

If A. agree to deliver goods to B. at a future time, and before delivery B. takes in a secret partner, credit, if given at the time of the delivery, will be presumed given to the firm though unknown to A.[4]

Cuttle & Bordley bought goods of plaintiff and many others, and shipped them to Gilmore, at Baltimore, under fictitious names. Gilmore sold them under the same names, but being a member of the firm of Cuttle & Bordley, he was held liable to the plaintiff *ex contractu*, though the plaintiff was ignorant of his existence.[5]

K. was a secret partner of E. in many of his purchases of hogs but not in all of them, and it was impossible to ascertain to what extent. In an action for the price of a certain purchase made by E., in which K. took an active part, it was held that such purchase would be deemed one of them.[6]

Where fraud in the formation of the partnership was perpetrated

[1] Winship *v.* Bank of U. S. 5 Pet. 529; U. S. Bank *v.* Binney, 5 Mason, 176; Snead *v.* Barringer, 1 Stew. 134; Parker *v.* Canfield, 37 Conn. 250; 9 Am. Rep. 317; Phillips *v.* Nash, 47 Ga. 218; Holland *v.* Long, 57 id. 36, 40; Lindsey *v.* Edmiston, 25 Ill. 359; Bisel *v.* Hobbs, 6 Blackf. 479; Gilmore *v.* Merritt, 62 Ind. 525; Scott *v.* Colmesnil, 7 J. J. Mar. 416; Kennedy *v.* Bohannon, 11 B. Mon. 118; St. Armand *v.* Long, 25 La. Ann. 167; Bernard *v.* Torrance, 5 Gill & J. 383; Moale *v.* Hollins, 11 id. 11; Richardson *v.* Farmer, 36 Mo. 35; Tucker *v.* Peaslee, 36 N. H. 167; Bromley *v.* Elliot, 38 id. 287, 302; Johnston *v.* Warden, 3 Watts, 101; Lea *v.* Guice, 13 Sm. & Mar. 656; Gavin *v.* Walker, 14 Lea, 643; Bradshaw *v.* Apperson, 36 Tex. 133; Griffith *v.* Buffum, 22 Vt. 181; 54 Am. Dec. 64.

[2] See *In re* Munn, 3 Biss. 442.

[3] Winship *v.* Bank of U. S. 5 Pet. 529; Gavin *v.* Walker, 14 Lea, 643.

[4] Johnston *v.* Warden, 3 Watts, 101.

[5] Gilmore *v.* Merritt, 62 Ind. 325.

[6] Lindsey *v.* Edmiston, 25 Ill. 359.

upon the dormant partner, and on its discovery he rescinded the contract of partnership without having received any part of the funds, he was not liable to creditors.[1]

§ 157. **Rationale of his liability.**— The liability of a dormant partner was at an early period explained as founded on his taking part of the fund upon which creditors rely, or, in other words, because he receives part of the profits or gets the benefit of the contracts of the ostensible partner. This reason has been repeated again and again ever since then.[2] But where money is borrowed or credit given for the business without knowledge on the part of the lender that there is a dormant partner, the latter is liable, though the borrowing partner misapply the funds or credit and no benefit is received, the fund never having come to the use of the firm.[3] Hence it evidently appears that the true ground of liability is that the dormant partner is an undisclosed principal.[4] In case of a note given in a business transaction in the name of the ostensible partner alone, where not only the dormant partner was unknown, but also the fact that there was a firm of any kind, the dormant partner is, nevertheless, liable if the loan was for the business. Had the firm been known and had a name, taking such a note would have been an election to take the signer alone, but here there is no opportunity to elect. The name of the signing partner will be regarded as the firm name.[5]

DELECTUS PERSONARUM.

§ 158. Partnership being a relationship created by agreement and founded upon and requiring a degree of mutual

[1] Mason *v.* Connell, 1 Whart. 381, and Wood *v.* Connell, 2 id. 542.

[2] Waugh *v.* Carver, 2 H. Bl. 235; for example, Phillips *v.* Nash, 47 Ga. 218; Lea *v.* Guice, 13 Sm. & Mar. 656; Fosdick *v.* Van Horn, 40 Oh. St. 459, 466.

[3] Winship *v.* Bank of U. S. 5 Pet. 229; Gavin *v.* Walker, 14 Lea, 643. *Contra*, see Bank of Alexandria *v.* Mandeville, 1 Cranch, C. C. 575.

[4] Winship *v.* Bank of U. S. 5 Pet. 529; Parker *v.* Canfield, 37 Conn. 250, 270 (9 Am. Rep. 317); Grosvenor *v.* Lloyd, 1 Met. 19; Tucker *v.* Peaslee, 36 N. H. 167.

[5] Snead *v.* Barringer, 1 Stew. 134; Parker *v.* Canfield, 37 Conn. 250; 9 Am. Rep. 317; Scott *v.* Colmesnil, 7 J. J. Mar. 416; Moale *v.* Hollins, 11 Gill & J. 11; Richardson *v.* Turner, 36 Mo. 35; Griffith *v.* Buffum, 22 Vt. 181; 54 Am. Dec. 64.

confidence not found in any other contract relationship, and, in fact, resembling marriage in this respect, it follows that no person can become a member of a firm without the consent of the others. Hence, no one of the partners can introduce a person into the firm, or engage the firm in another partnership, unless his copartners are willing. Hence, for example, the executors of a deceased partner cannot become members of the firm without the consent of the surviving partner, however imperative the directions of the will for the continuance of the business may be.[1] If a partner sells his interest in the firm, the purchaser cannot be made a partner by any contract with his vendor alone, nor acquire any right to interfere in the partnership affairs.[2]

§ 159. Cannot make the firm partner in other concerns.— On the same principle, a partner cannot engage his firm in enterprises in which a third person is a partner with him.[3] Thus, a partner intrusted with money of the firm for the purpose of going into another state and purchasing commodities there, and who there takes in a third person as partner in the speculation, and intrusts the money to him, and the new member is robbed of it, is guilty of a conversion and must account to the original firm for the money.[4] Or if, in such case, the speculation is disastrous, the new associate cannot require the firm to share the loss with him.[5] So an agent, having a general power of attorney to transact his absent principal's business, cannot embark the principal or his property in a partnership.[6]

[1] Pearce *v.* Chamberlain, 2 Ves. Sr. 33; Crawford *v.* Hamilton, 3 Madd. 254: Bray *v.* Fromont, 6 id. 5; Crawshay *v.* Maule, 1 Swanst. 495; Tatam *v.* Williams, 3 Hare, 347.

[2] Jefferys *v.* Smith, 3 Russ. 158; Bank *v.* Railroad Co. 11 Wall. 624; Jones *v.* Scott, 2 Ala. 58; Meaher *v.* Cox, 37 id. 201; Miller *v.* Brigham, 50 Cal. 615; Love *v.* Payne, 73 Ind. 80; 38 Am. Rep. 111; Taylor *v.* Penny, 5 La. Ann. 7; Merrick *v.* Brainard, 38 Barb. 574; Mason *v.* Connell, 1 Whart. 381; McGlensey *v.* Cox, 1 Phila. 387; Setzer *v.* Beale, 19 W. Va. 274.

[3] Numerous authorities on the general proposition will be found under Sub-partnership.

[4] Reis *v.* Hellman, 25 Oh. St. 180.

[5] Freeman *v.* Bloomfield, 43 Mo. 391.

[6] Campbell *v.* Hastings, 29 Ark. 512, 539–40.

§ **160. Consent in advance.**— The consent to the admission of a new member may be given in advance; the time or place of it is immaterial. Thus, if the shares of partners are by the articles agreed to be transferable, the buyer of a share is by the agreement made a partner in the seller's place.[1] And so if partners have agreed in advance that any one of them may nominate his successor, the agreement is valid.[2]

But a mere right reserved in the articles to a partner, to assign his share, is not equivalent to an agreement to admit the assignee to membership in the firm, independent of the acknowledgment of the firm.[3]

An article in the partnership contract providing negatively that one partner cannot sell his interest without giving his copartners the first chance to purchase does not imply a right to introduce a stranger into the firm upon their refusal to buy.[4]

§ **161. Ratification and acquiescence.**— If the other partners recognize the third person, whether he be the buyer of the entire interest of a retiring partner, or a person whom a partner has assumed to introduce into the firm, or another firm with whom he has assumed to associate his partner, as partner, and treat him or them as such, this ratifies the act on the terms of the old articles;[5] but not on terms differing from the articles and unknown to them.[6]

Mere silence or failure to dissent, after knowledge that a partner has engaged the firm as member of another firm, is evidence from which acquiescence or ratification may be inferred;[7] or that other similar contracts had previously been recognized.[8]

In Jones *v.* O'Farrel, 1 Nev. 354, Hill & James being partners in a particular kind of business, James formed a partnership with

[1] Fox *v.* Clifton, 9 Bing. 119; Mayhew's Case, 5 De G. M. & G. 837.

[2] Lovegrove *v.* Nelson, 3 M. & K. 1, 20.

[3] Jefferys *v.* Smith, 3 Russ. 158.

[4] McGlensey *v.* Cox, 1 Phila. 387; 5 Pa. L. J. 203; 1 Am. Law Reg. (O. S.) 34.

[5] Meaher *v.* Cox, 37 Ala. 201; Rosenstiel *v.* Gray, 112 Ill. 282.

[6] Love *v.* Payne, 73 Ind. 80; 38 Am. Rep. 111.

[7] Tabb *v.* Gist, 1 Brock. 33; Mason *v.* Connell, 1 Whart. 381; Wood *v.* Connell, 2 id. 542.

[8] Buckingham *v.* Hanna, 20 Ind. 110.

others, as O'Farrell, James & Co. in a different business, being an enterprise to improve Hill's property. Hill was held not bound to notify the world that he is not a member of the new concern.

§ 162. **Effect inter se of sale of a share.**—The sale of a share without consent of the partners is not, however, void, but is a dissolution; certainly if the partnership be at will (See §§ 570, 571); and the purchaser's remedy is to demand an accounting.[1]

In Jones *v.* Scott, 2 Ala. 58, two firms, J. & H. and S. & S., owned a boat and ran her in partnership as common carriers. S. & S., without the knowledge of J. & H., sold out all their interest to the former captain and clerk, H. and D., after which a loss of freight occurred; here, although the owner of the freight could have recovered from J. & H. unless he had timely notice of the dissolution, yet S. & S. cannot recover contribution from J. & H., whom they have made associates of irresponsible persons without their consent.

§ 163. **Partnerships without delectus personarum.**— There are two exceptions to the right of *delectus personarum* — one in the case of joint stock companies with transferable shares (§ 72); this is not really an exception because transfer without dissolution is designed and agreed upon in advance from the nature of the association. The other exception is in case of mining partnerships. In this peculiar kind of partnership there is no *delectus personarum*, but any partner may assign his share without dissolving the firm; nor is death a dissolution, and the assignee has his rights and remedies against the other associates.[2] Partnerships in mines may, however, as in the somewhat analogous case of ships (§ 70), be ordinary partners if such is the agreement.[3]

1 See § 927.

2 Bentley *v.* Bates, 4 Y. & C. 182; Redmayne *v.* Forster, L. R. 2 Eq. 467; Kahn *v.* Central Smelting Co. 102 U. S. 641; Skillman *v.* Lachman, 23 Cal. 199; Duryea *v.* Burt, 28 id. 569; Dougherty *v.* Creary, 30 id. 290; Taylor *v.* Castle, 42 id. 367; Nisbet *v.* Nash, 52 id. 540; Campbell *v.* Colorado Coal & Iron Co. 9 Col. 60; Southmayd *v.* Southmayd, 4 Montana, 100, 113; Lamar *v.* Hale, 79 Va. 147.

3 Jefferys *v.* Smith, 3 Russ. 158; Crawshay *v.* Maule, 1 Swanst. 518.

SUB-PARTNERSHIPS.

§ **164.** A partner has a right to contract with a stranger on his own account, whereby the latter shall participate in his share of the profits and bear part of his losses. This wheel within a wheel is called for convenience a sub-partnership, and constitutes the parties to it partners, and the third person is called a sub-partner.

But as between the original partners the sub-partner is not a member of the firm,[1] but is only a partner of the one with whom he contracted.[2] The right of *delectus personarum* prevents any person being made a partner of others without their consent, and forcing upon the rest an associate whom they had not selected.

Thus, where D. and L. were partners carrying on several businesses in different cities, and the partnership was to apply to any and all real estate subsequently purchased by L., and L. took in P. as a partner in the business in one of the cities as L. & P., and they became possessed of considerable real estate, most of which was held in P.'s name; and D. recognized that L. had taken in such partner, and L. died and his administratrix claimed that P. should sell the real estate as surviving partner of L. & P. and account to her for L.'s share, but D. claimed that P. must account to him as surviving partner of D. & L. for L.'s share, the latter view was held to be the true one, for P. holds the assets composing L.'s share for the legal representative of the original firm.[3]

Where one partner has taken in sub-partners, another partner

[1] Nam socii mei socius, meus socius non est. Dig. lib. 17, tit. 2, § 20.

[2] *Ex parte* Barrow, 2 Rose, 252; Brown *v.* De Tastet, Jac. 284; Bray *v.* Fromont, 6 Madd. 5; *Ex parte* Dodgson, Mont. & McAr. 445; Frost *v.* Moulton, 21 Beav. 596; Fairholm *v.* Marjoribanks, 3 Ross, L. C. 697 (a Scotch case); Mathewson *v.* Clarke, 6 How. 122; Bybee *v.* Hawkett, 12 Fed. Rep. 649; 8 Sawy. 176; Fry *v.* Hawley, 4 Fla. 258; Meyer *v.* Krohn, 114 Ill. 574, 581; Reynolds *v.* Hicks, 19 Ind. 113; Fitch *v.* Harrington, 13 Gray, 468; 8 Am. Law Reg. (N. S.) 688; Shearer *v.* Paine, 12 Allen, 289; McHale *v.* Oertel, 15 Mo. App. 582; Murray *v.* Bogart, 14 Johns. 318; 7 Am. Dec. 466; Burnett *v.* Snyder, 76 N. Y. 344 (aff'g, 11 Jones & Sp. 238); s. c. 81 N. Y. 550; 37 Am. Rep. 527; (rev. 13 J. & Sp. 577); Newland *v.* Tate, 3 Ired. Eq. 226; Channel *v.* Fassitt, 16 Oh. 166; Setzer *v.* Beale, 19 W. Va. 274; Mair *v.* Bacon, 5 Grant's Ch. (Up. Can.) 338.

[3] Shearer *v.* Paine, 12 Allen, 289.

who is afterwards compelled to pay a judgment against the firm cannot sue the sub-partners for contribution.[1] Nor can the sub-partner compel an original partner with whom he has not contracted to share a loss.[2]

§ 166. Nor does the mere knowledge, recognition and approval of the other partners of the arrangement between one of their number and a sub-partner constitute the latter a member of the firm.[3]

Thus, where X. refused to become a partner in S., P. & Co., but concurrently with the formation of that partnership entered into an arrangement with two of the partners, S. and P., reciting that it was deemed expedient that he should have an interest in the firm and contracting that he should receive one-third of the profits and bear one-third of the loss of S. and P.'s share, in an action by a creditor against him as a partner in the original firm, it was held that he was not such.[4]

The fact that the sub-partner was appointed agent and manager of the firm is not recognition of him as a partner, and he is therefore entitled to compensation as an employee of the firm.[5] But if all agreed that a person should be admitted as a partner, he is not changed from a partner to a sub-partner merely by a contract with one of the partners that he should be a partner in the latter's share, unless the rest understood that he had ceased to be a partner.[6]

§ 167. Nor has he a right to accounting.— A sub-partner being a stranger to the principal firm has no right to compel an accounting from it or from any member of it, except his partner;[7] hence, in a suit for an accounting between the sub-partner and his partner, the other partners in the principal firm are not necessary parties.[8]

[1] Murray *v.* Bogart, 14 Johns. 318; 7 Am. Dec. 466; Setzer *v.* Beale, 19 W. Va. 274; Mair *v.* Bacon, 5 Grant's Ch. (Up. Can.) 338.

[2] Freeman *v.* Bloomfield, 43 Mo. 391.

[3] Shearer *v.* Paine, 12 Allen, 289, *supra;* Channel *v.* Fassitt, 16 Oh. 166; Setzer *v.* Beale, 19 W. Va. 274, 291–2.

[4] Burnett *v.* Snyder, 81 N. Y. 550; 37 Am. Rep. 527 (rev. 13 Jones & Sp. 577); s. c. 76 N. Y. 344.

[5] Newland *v.* Tate, 3 Ired. Eq. 226.

[6] Setzer *v.* Beale, 19 W. Va. 274, 297.

[7] Sir Charles Raymond's Case, cited in *Ex parte* Barrow, 2 Rose, 252, 255; Brown *v.* De Tastet, Jacob, 284; Bray *v.* Fromont, 6 Madd. 5; Mathewson *v.* Clarke, 6 How. 122; Reilly *v.* Reilly, 14 Mo. App. 62.

[8] Brown *v.* De Tastet, Jacob, 284; Settembre *v.* Putnam, 30 Cal. 490.

Yet it has been held that the other principal partners could be made parties so that the right to know the state of the accounts and of discovery to which the sub-partner is entitled against his partner may be enforced through the latter.[1] And in winding up the principal firm it is not error to decree to a sub-partner, whose connection had been consented to, the amount due him as against the other principal partner who is a debtor to the firm.[2] And after the dissolution of the principal firm, a sub-partner of one of the members can maintain suit in chancery for his proportionate share of the adventure, for he is then enforcing no right of the partnership, though he could neither have compelled a dissolution nor have maintained this suit prior to dissolution.[3]

§ 168. Nor is he a partner as to creditors.— Nor is such sub-partner liable as partner to creditors of the firm, for he does not participate in the profits as principal, and has no community in them or lien before division to compel an accounting and distribution, nor a control over the operations of the firm, but his claim is merely a demand against the partner with whom he contracted. The principles of Cox *v.* Hickman, etc., §§ 19–23, are conclusive upon this.[4]

§ 169. Rights of the sub-partners inter se.— Subject to the foregoing principles the rules that govern the existence, formation, conduct and duration of a sub-partnership are doubtless the same as those which apply to any other partnership having a managing and a sleeping partner. Thus, if the contract be to share the profits and loss of the interest of a partner, it is a sub-partnership and not a contract of sale.[5] And the duration of the sub-partnership depends upon

[1] Chandler *v.* Chandler, 4 Pick. 78.

[2] Rosenstiel *v.* Gray, 112 Ill. 282.

[3] Mathewson *v.* Clarke, 6 How. 122. And see Shearer *v.* Paine, 12 Allen, 289, cited fully *supra.*

[4] Fairholm *v.* Marjoribanks, 3 Ross, Lead. Cas. 697; Bybee *v.* Hawkett, 12 Fed. Rep. 649; 8 Sawy. 176; Meyer *v.* Krohn, 114 Ill. 574, 581–2; Reynolds *v.* Hicks, 19 Ind. 113; Burnett *v.* Snyder, 76 N. Y. 344 (aff. 11 Jones & Sp. 238); s. c. 81 N. Y. 550; 37 Am. Rep. 527 (rev. 13 Jones & Sp. 577), and given fully above. See Drake *v.* Ramey, 3 Rich. L. 37. *Contra*, Baring *v.* Crafts, 9 Met. 380; Fitch *v.* Harrington, 13 Gray, 468 (8 Am. Law Reg. (N. S.) 688): and *dictum* in Newland *v.* Tate, 3 Ired. Eq. 226. But these cases are not founded on principle.

[5] Coleman *v.* Eyre, 45 N. Y. 38, where the statute of frauds was urged against an oral contract to

the contract between the parties to it, and the conclusion does not follow that it is to last as long as the principal partnership.[1] A sub-partner can enforce his contract with his copartner without awaiting the settlement of the original firm, the amount of profits of the latter being a mere fact to be proved.[2]

In Richardson *v.* Dickinson, 6 Foster (26 N. H.), 217, D. having joined eight others in a partnership for a trading and mining expedition, each to contribute $1,000, R. advanced to him $500 towards his contribution, he agreeing that on *final* distribution of the company's affairs, he and R. would divide profits accruing from the enterprise. Before any profits were realized D. sold out his share to the other members for $2,000. It was held that R. was entitled to a share in the purchase money as profits, for this increase in profits as to D. is a final distribution as to him, but he will not be held for any more in the absence of fraud, though a month later he could have realized more, as did the others.

In Scott *v.* Clark, 1 Oh. St. 382, a similar mining expedition to California, of which C. became a member by S. paying in C.'s contribution on an agreement that he should have half of all that C. should obtain by being a member. The company was dissolvable at any time by vote of two-thirds of the members, and was subsequently so dissolved, and C. made money on his own account. It was held that S. was entitled only to half the share assigned to C. on dissolution, and not half of the whole proceeds of C.'s trip to California, the latter being his individual property.

share the profit and loss of the interest of one person in the shipment, but it was held to be a sale.

[1] Frost *v.* Moulton, 21 Beav. 596, 598; both parties here testified that there was no limit.

[2] Reilly *v.* Reilly, 14 Mo. App. 62.

CHAPTER VIII.

THE FIRM AS AN ENTITY.

§ **170. Opposing conceptions of a firm.**—There is one striking and very important difference between the mercantile conception of a partnership and its attitude in the eye of the law. In the commercial view a firm is regarded as if it were a corporation; it is regarded as an entity or personified being, distinct or apart from its constituent members. The accountant makes each of the partners a debtor or creditor to the firm and not to each other. Changes of membership are not regarded as the ending of one and the beginning of another partnership, but as mere incidents in an unbroken continuity. Business houses in different places under different names, but composed of the same persons, as where A. and B. have an establishment in one city as A. & Co. and in another as B. & Co., are regarded as distinct partnerships with distinct debtors and creditors, and as debtors or creditors of each other, unlike the legal treatment of the partners.[1]

§ **171.** Originally a partnership was, and to a very large extent still is, in its legal aspect, something very different from this. The common law recognized but two kinds of persons, the natural and the artificial; one created by nature, the other by the sovereign; but a conventional being, or the attempt to create an entity by private agreement, was unauthorized, and even its possibility not recognized. It was not a thing distinct from the members composing it, nor was it an entity at all, but a mere expression of the relation

[1] In Bank of Toronto *v.* Nixon, 4 Ont. App. 346, the court construed a statute referring to an alteration or change of partnership to apply to the retirement of a partner, which legally makes a dissolution and new firm and not an alteration, regarding the legislature as more probably familiar with the mercantile than the legal view.

of certain persons to each other, or description of a peculiar species of mutual agency of each for all, in which each agent is also a joint principal, with certain equitable rights over the application of the joint property, and the firm name a mere symbol or convenient abbreviation of all the names adopted for mutual purposes. Real estate could not be held or conveyed in the firm name. The same idea runs through other parts of the law, as in demands by and against the firm being prosecuted by and against the partners; judgments against the partners being liens on the real estate of each; executions upon a debt of the firm being levied upon and satisfied out of the separate property of any partner without resorting to the partnership assets in the first instance; bonds and guaranties to a firm for good conduct of another, or to a person for the good conduct of a firm, expiring on a change of membership.

So a partner stealthily or forcibly breaking into the store, taking the money, or appropriating the goods, commits no crime, neither embezzlement, larceny or burglary, nor even a trespass, for the firm not being a distinct proprietor, these acts relate to his own property.

So, also, we find that if one of a firm has disqualified himself to sue, as by having released the debtor, or having conveyed to him, though wrongfully, the property sought to be recovered, the firm is disabled to sue, because one of the plaintiffs is seeking to repudiate his own act, whereas if the firm were a distinct individuality it would not be thus affected.[1]

§ **172.** On the other hand, of the justice, convenience and desirability of treating a firm as a person there is but little doubt, and there are certain parts of the law difficult to explain except upon the theory that a partnership is an entity.

[1] And this has been carried to such an extent as to hold that where a note is made to the firm of A. & B., and is by them indorsed to the firm of B. & C., B. being a partner common to both, and the maker pays the note to A., so that A. & B. could not sue upon it, B.'s disqualification disables B. & C. to sue. Jacaud *v.* French, 12 East, 317.

This appears on the distribution of assets by a court in cases of death or bankruptcy, awarding a priority to the partnership creditors; true this is explained as based upon an extension and enforcement of the right of each partner to have the assets applied so as to relieve him from the debts; but where did he get this right? It is not a lien, for a lien is based upon possession, and ceases when that is lost, whereas here is no possessory right, but an equity, easier understood and more consistent by regarding the firm as an individual with its environment of rights and liabilities, than to imagine an equitable lien in a partner that has no counterpart elsewhere in the law. When we come to the subject of shares, in the next chapter, we shall find a great deal to suggest the personification of the firm.

The law of Scotland,[1] and the systems of continental Europe and the Roman law, regarded the firm as a separate person capable of suing and being sued by its own members, and having distinct rights and interests, and such is the law of Louisiana.[2]

Equity also in some respects treated a partnership as if it were distinct from its members, in permitting a firm to sue another firm with which it had a member in common for a balance, although the suit was required to be in the individual names; and even at law on a note or other promise made by a firm jointly with an individual, the persons composing the firm were regarded as but one promisor or one surety, and *inter se* bound for half the debt only.[3]

[1] Bell's Law of Scotland, § 357.

[2] Succession of Pilcher, 1 South. Rep. 929 (1887), where it is called a moral being distinct from the individuals; a civil person which has peculiar rights and attributes, and its partners do not own the property; it is the ideal being that owns it. See, also, Liverpool, etc. Nav. Co. *v.* Agar, 14 Fed. Rep. 615; 4 Woods, 201, of a Louisiana commercial partnership.

[3] Chaffee *v.* Jones, 19 Pick. 260; Hosmer *v.* Burke, 26 Iowa, 353; Warner *v.* Smith, 1 De G. J. & S. 337, of division of profits on a joint enterprise between a partnership and an individual. So in West & Co. *v.* Valley Bank 6 Oh. St. 168, where by statute damages were allowed on protested bills drawn on persons "without the jurisdiction of this state," and the firm of Taylor & Cassilly had a business house in Cincinnati, where C. resided, and another in New Orleans, where T. resided, each house keeping independent accounts, and a bill was drawn on "Taylor & Cassilly, New Orleans," and accepted by C. in Connecticut for the New Orleans house,

§ 173. And judicial declarations that a firm is a distinct entity are now frequently to be met with.

Jessel, M. R., in Pooley *v.* Driver, L. R. 5 Ch. D. 458, says, speaking of agency as a test of partnership, "you cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners, a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity before it was part of the *whole law of the land, as it now is.*"

In Walker *v.* Wait, 50 Vt. 668, it was said that a partnership or joint stock company is just as distinct and palpable an entity in the eye of the law as distinguished from the individuals composing it, as is a corporation, and can contract as an individualized and unified party with one of its members as effectually as a corporation with one stockholder. The only difference is a technical one, that plaintiff as a partner would be on both sides of the record; but when the note of a partnership to one member is transferred to a stranger, he can sue on it at law.

Other similar declarations, that a partnership is a distinct thing, artificial being or legal entity apart from the partners, are not unfrequent.[1]

Other examples of an unconscious instinct in courts towards

this was held not to be drawn on the natural persons, but upon the ideal mercantile person as domiciled at New Orleans, which is a person "without the jurisdiction of the state." The rulings in this case and two preceding ones may, however, be explained as merely carrying out the contract of the parties. See, also, City Bank of New Orleans *v.* Stagg, 1 Handy, 382, illustrating the doctrine that the domicile of the drawee determines the right to damages on protest and holding a bill on a foreign house payable there, and accepted by a partner residing here. So Chenowith *v.* Chamberlin, 6 B. Mon. 60 (43 Am. Dec. 145), of a resident drawing on his firm domiciled out of the state.

[1] Forsyth *v.* Woods, 11 Wall. 484, holding that a promise by the partners collectively respecting a matter not within the scope of the firm's business is not a promise of the firm and should not be declared upon as such. Bracken *v.* Ellsworth, 64 Ga. 243, 251; Henry *v.* Anderson, 77 Ind. 361, 363; Fitzgerald *v.* Grimmell, 64 Iowa, 261; Cross *v.* National Bank, 17 Kan. 336, 340; Robertson *v.* Corsett, 39 Mich. 777; Roop *v.* Herron, 15 Neb. 73; Curtis *v.* Hollingshead, 14 N. J. L. 402, 410; Faulkner *v.* Whitaker, 15 id. 438; Meily *v.* Wood, 71 Pa. St. 488, 492; 10 Am. Rep. 719; and a firm is spoken of as having a domicile in Cameron *v.* Canico, 9 Bankr. Reg. 527; Pecks *v.* Barnum, 24 Vt. 75, 79.

treating a firm as an entity, as far as possible, may perhaps be seen in the effort to preserve insurance policies issued to a firm from forfeiture by alteration of membership under clauses against alienation of the property or changes of title.

The statutes in England and in many of the code states permitting actions to be brought by and against firms in the firm name have made the partnership into a person for many purposes of procedure, even to allowing one firm to sue another having a member in common with it, and have gone far towards fostering a further recognition of the entity conception of a partnership.[1]

§ **174.** How far the original legal conception of a firm has shifted or is shifting, and however desirable that some of its corners be rubbed off, yet it nowhere is coterminous with the accountant's idea of the firm as expressed above, nor do the judicial expressions of its personification go to that length. This is conspicuously so in the law of conveyancing and procedure. A deed to or by a firm in a conventional name either wholly fails to convey the legal title, or is highly defective. Actions must be brought, statutes apart, by and against the individual partners, and judgment against the individuals will reach their private property equally with the partnership property, subject, of course, to any priorities separate creditors may have; and every addition or retirement of a member, though the business be continued under the same name, ends the old and forms a new and distinct firm, so that in an action, under a statute, in the firm name, causes of action in favor of the old and new firms cannot be joined. Identity of style, name and continuity of interest fuse the two bodies into one as little as where a father and son bear the same name.

Thus, where a person is indebted to A., B. and C., partners as A. & Co., and after C. has retired and D. taken his place the debtor becomes indebted to the new firm of A. & Co., composed of A., B. and D., and makes two notes to A. & Co., one for the former debt

[1] And it has been so called under such statutes in Newlon *v.* Heaton, 42 Iowa, 593, 597; Leach *v.* Milburn Wagon Co. 14 Neb. 106, 108; Whitman *v.* Keith, 18 Oh. St. 134, 144. See Actions in firm name, § 1059.

and one for the latter, the two notes cannot be sued upon in the same action, for the two payees are distinct concerns.[1]

A mortgage to a firm to secure advances to be made by the mortgagor will not inure to the holder of notes made by the mortgagor to a firm composed of the original partners and a new member;[2] hence, also, a power granted to trustees to loan money to a firm is not a power to lend to continuing partners after death or retirement of one;[3] and so a power to a firm is terminated by a partner retiring.[4] And under a statute that a signature is admitted, unless its genuineness is specially denied, if an action is brought against D. and M. on a note signed by them as D. & Co., a general denial by D. admits the genuineness of the signature and that he is a member, for the firm not being distinct from its members, the averment is equivalent to alleging that each signed.[5]

§ 175. Taxation of a firm.— The treatment of a firm as an entity or otherwise, and as having a domicile, frequently obtains in levying taxes and in filing its chattel mortgages, and here will be a convenient place for treating these subjects.

The doctrine of *mobilia sequuntur personam* makes personal property taxable at the residence of its owner and not at the place where it happens to be. Under the doctrine that the persons composing a firm, and not the firm itself as an ideal person, is owner, the property is listed and taxed where the partners live, if they reside in the same taxing district.[6] So a tax on all persons exercising a profession can be levied upon each partner separately, although he practices only in a firm.[7] This rule of personal property applies to water-craft belonging to the firm, for they are migratory in character.[8]

[1] Dyas *v.* Dinkgrave, 15 La. Ann. 502.

[2] Abat *v.* Penny, 19 La. Ann. 289.

[3] Fowler *v.* Reynal, 2 DeG. & Sm. 749; 3 M. & G. 500.

[4] Jones *v.* Shears, 4 Ad. & El. 832.

[5] Haskins *v.* D'Este, 133 Mass. 356.

[6] Griffith *v.* Carter, 8 Kan. 565 (now changed by statute, see Swallow *v.* Thomas, 15 id. 66); Taylor *v.* Love, 43 N. J. L. 142.

[7] Lanier *v.* Macon, 59 Ga. 187; Wilder *v.* Savannah, 70 id. 760; 48 Am. Rep. 598.

[6] Cook *v.* Port Fulton, 106 Ind. 170; Peabody *v.* County Comm'rs, 10 Gray, 97; *In re* Hatt, 7 Up. Can. L. J. 103. In Taylor *v.* Love, 43 N. J. L. 142, it was said that a firm has no domicile apart from the joint domicile of the partners, although it may not be inaccurate to speak of its domicile, where all the partners live where the business is carried on. But if they live in different districts the place of business does not fix the place of taxation for all the prop-

If all the partners live in the same town the assessment may be either against the partners individually or against the firm.[1]

An assessment is only made upon those who are partners at that time; the fact that a partner has retired without notice of dissolution does not make him liable to the state, because levying a tax is not giving a credit but is an arbitrary imposition;[2] though *inter se* a partner who has sold his interest to his copartners has been required to reimburse them if they have been compelled to pay taxes upon the entire stock as an incumbrance upon the property sold.[3] Yet it was held that an incoming partner must pay the share of taxes of a retiring partner, whom he has bought out, though not mentioned in the schedule of liabilities.[4]

§ 176. Many statutes, however, treat the firm as an independent owner and tax it and not the partners, and independently of their residences.[5] And an assessment even of land to the partnership, and not to the separate partners, is proper.[6] Thus, under a statute requiring property of a firm or corporation to be listed by the principal accounting officer, the managing partner, who lives where the business is carried on, may properly list the entire assets there, and the other partner, who lived in another county, need not list his interest at all.[7] So an English joint stock company was held to be so far converted into an artificial body as to be taxable as a com-

erty, wherever situated; and where the firm's business and property was in Jersey City, and one partner lived in Elizabeth and the other three partners out of the state, it was held proper to tax the three non-residents where the property was and the other partner at Elizabeth. A provision that a firm shall pay but one tax was said to be right in principle, and that it would be unjust and unequal to tax each partner separately in addition, Savannah *v.* Hines, 53 Ga. 616 (of a firm of lawyers).

[1] Taylor *v.* Love, 43 N. J. L. 142; State *v.* Parker, 34 id. 71. And see Swallow *v.* Thomas, 15 Kan. 66. In either case the whole property must be assessed at full value, and a partner asking a reduction must show the amount of debts owing and his proportion of them, State *v.* Parker, 34 N. J. L. 71.

[2] Washburn *v.* Walworth, 133 Mass. 499.

[3] Evans *v.* Bradford, 35 Ind. 527.

[4] Wheat *v.* Hamilton, 53 Ind. 256.

[5] Thibodaux *v.* Keller, 29 La. Ann. 508, 509; Stockwell *v.* Brewer, 59 Me. 286; Hubbard *v.* Winsor, 15 Mich. 146; Putman *v.* Fife Lake Township, 45 id. 125; McCoy *v.* Anderson, 47 id. 502; Williams *v.* Saginaw, 51 id. 120; Robinson *v.* Ward, 13 Oh. St. 293; *In re* Hatt, 7 Up. Can. L. J. 103.

[6] Hubbard *v.* Winsor, 15 Mich. 146.

[7] Swallow *v.* Thomas, 15 Kan. 66; Little *v.* Cambridge, 9 Cush. 298.

pany.[1] An unincorporated joint stock company, with transferable shares, is a partnership, and taxable as such where the business is carried on, and the shareholder is not taxed on its property. The partner's interest is not the market value of his shares, but an individual interest in the assets as a tenant in common.[2] That a firm is taxed by a wrong name is immaterial.[3]

After dissolution and while the partnership is being wound up, no division of property is worked, so that the share of each partner is to be separately taxed, but it is proper and legal to continue to tax the firm as before; it still continues for the purpose of closing up;[4] and so in case of dissolution by death, it is proper to assess the firm in the firm name, and the taxes are paid out of the partnership funds.[5]

§ 177. —— **branch business.**—An act requiring the property to be taxed where the business is carried on means that subsidiary activities and operations lacking the fixed character of an establishment having an identity will be drawn to the home establishment. Hence, a firm of lumber dealers is to be taxed at the home office, where it makes its sales upon lumber which is sawed and shipped elsewhere, and is not sent to the home establishment at all;[6] and even though a few sales were made at the place where the lumber was sawed;[7] and though the partners themselves have temporarily gone to the place where the logs are, in order to work upon them.[8]

An excellent justification of this policy is in the fact that the

[1] Oliver *v.* Liverpool & London L. & F. Ins. Co. 100 Mass. 531.

[2] Hoadley *v.* County Comm'rs, 105 Mass. 519. In Gleason *v.* McKay, 134 Mass. 419, a tax on partnerships, to be paid on the aggregate value of the capital stock, which was held in assignable shares, was ruled to be unconstitutional. For as a tax on property it is not proportional; but it is not a tax on property, the property not being inquired into; but is a tax on the shares, which are the property of the individual members, and if valid the legislature can select any business and tax it.

[3] Lyle *v.* Jacques, 101 Ill. 644.

[4] Oliver *v.* Lynn, 130 Mass. 143. *Contra,* Von Phul *v.* New Orleans, 24 La. Ann. 261.

[5] Blodgett *v.* Muskegon (Mich. 1886), 27 N. W. Rep. 686.

[6] Putman *v.* Fife Lake Twp. 45 Mich. 125.

[7] McCoy *v.* Anderson, 47 Mich. 502.

[8] Torrent *v.* Yager, 52 Mich. 506. In Barker *v.* Watertown, 137 Mass. 227, a firm had three factories in the three different cities of B., N. and W. Neither of the partners lived at W., nor were the books kept there. The goods made at the factory at W. were kept in an adjacent storehouse until sold, the sales being chiefly on orders received at B., one of the partners going each day to the three fac-

books and papers, from which the amount and value of the property are ascertainable, are generally kept at the place of business, and the partner's right of review and correction of the assessments may not be available elsewhere.[1]

Stock in trade in a factory, hired by the firm in a town other than where the principal place of business is, may be taxed at its locality, as one other than where the owners reside, even if one partner lives there, for he is not the owner.[2]

If the owners reside elsewhere the tax can be assessed to the person in charge.[3]

§ 178. Licenses.— A license issued to or special tax levied upon a firm, which is required before it can engage in a particular business, will inure to a continuing partner after he has bought out his copartner, and he need not pay again.[4] But where the license is issued to one partner it was held to be a matter of personal confidence, and sales by his copartner were held to be illegal.[5]

§ 179. Filing of chattel mortgages.— The filing of a chattel mortgage of partners is like the filing of a chattel mortgage by any joint tenants, and if the latter must file it at the place of residence of each mortgagor, a partnership mortgage must be filed in the county or township of each partner,[6] though the chattels are in the possession of one partner.[7]

tories and shipping goods from them to customers. It was held that the firm had a "place of business" at W., where goods were "employed" in its business ,and such goods were taxable there. But merely keeping property in another place in order that a distinct firm may do work upon it is not a having a branch business, Little *v.* Cambridge, 9 Cush. 298. So if sent there for sale, Fairbanks *v.* Kittridge, 24 Vt. 9. If the principal place of business is out of the state, the interest of a resident partner is taxable here, Bemis *v.* Boston, 14 Allen, 366.

[1] McCoy *v.* Anderson, 47 Mich. 502.

[2] Lee *v.* Templeton, 6 Gray, 579.

[3] Danville Co. *v.* Parks, 88 Ill. 170; Hittinger *v.* Westford, 135 Mass. 258; Putman *v.* Fife Lake Twp. 45 Mich. 125; McCoy *v.* Anderson, 47 id. 502.

[4] United States *v.* Glab, 99 U. S. 225; State *v.* Gerhardt, 3 Jones, L. 178. *Contra*, Harding *v.* Hagar, 63 Me. 515.

[5] Webber *v.* Williams, 36 Me. 512. And in U. S. *v.* Glab, 99 U. S. 225, the query was made whether a license to a firm would have continued had the change been by the addition instead of the loss of a partner. That a firm can take out a license to sell liquors was said in Lemons *v.* State, 50 Ala. 130.

[6] Briggs *v.* Leitelt, 41 Mich. 79; Stewart *v.* Platt, 101 U. S. 731; Rich *v.* Roberts, 48 Me. 548; 50 id. 395.

[7] Morrill *v.* Sanford, 49 Me. 566.

But in Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254, where the statute required chattel mortgages to be filed where the owner resides, and if he is a non-resident, then where the property is, it is said that, for many purposes, a firm is a distinct concern, and possesses a sort of individuality. It has for some purposes an ideal existence. Its creditors and debtors differ from those of individuals. A member may be creditor or debtor of it. A member is agent of it but not of individual interests. It may be taxed and sometimes sued in firm name. It may have a local abiding place. Hence a firm chattel mortgage filed where the firm has its residence is sufficient if executed by all the partners, all of whom live in the state, but not where the business seat is; it is well filed where they live. But if executed for the firm by a resident partner, and the other partner is a non-resident, and the resident partner lives where the firm is, it is properly filed there, though some of the property is in another part of the country.[1]

The execution of a chattel mortgage by one partner belongs to the subject of Powers.[2]

[1] Where chattels of one partner are used by the firm and the partner mortgages them, and it is agreed between the mortgagor and mortgagee that the other partner shall retain possession for the mortgagee, the property being used as before, this is no change of possession to protect the unfiled mortgage against other creditors. Mere words are no change. Porter *v.* Parmley, 52 N. Y. 185.

[2] § 407.

CHAPTER IX.

INTEREST OR SHARE OF EACH.

§ **180. Nature of.**— A partner has no specific interest in any particular chattel or asset, or part of the property of the firm; his only interest is in a proper proportion of the surplus of the whole after payment of debts, including the amounts due the other partners.[1]

From this nature of a share and in view of the *delectus personarum*, it follows that upon the death of a partner the surviving partner alone can wind up the business, and the administrator's right is to require him to do so; and so in case of bankruptcy of a partner, whereby he is disqualified to act, the solvent partner has the right to wind up, and the assignee gets the bankrupt's surplus, though in case of bankruptcy the assignee may have to be a co-plaintiff in actions. So in execution sales of the interest of a partner, only a share in the surplus passes. And so if a partner sells his interest to his copartners, claims standing against him on the books are extinguished, for they are not debts, but items of the general account.[2]

§ **181. Presumed equality of.**—In the absence of agreement or evidence as to the proportions of profit and loss to be divided between the partners, the presumption is in favor

[1] Farquhar *v.* Hadden, L. R. 7 Ch. App. 1; Filley *v.* Phelps, 18 Conn. 294; Trowbridge *v.* Cross, 117 Ill. 109; Bopp *v.* Fox, 63 id. 540; Perry *v.* Holloway, 6 La. Ann. 265; Douglas *v.* Winslow, 20 Me. 89; Fern *v.* Cushing, 4 Cushing, 357; Tobey *v.* McFarlin, 115 Mass. 98; Schalck *v.* Harmon, 6 Minn. 265, 269; Bowman *v.* O'Reilly, 31 Miss. 261; Gaines *v.* Coney, 51 id. 323; Buffum *v.* Seaver, 16 N. H. 160; Mabbett *v.* White, 12 N. Y. 442, 455; Staats *v.* Bristow, 73 id. 264. Many other cases to this effect will be found under the subjects of Exemptions, Executions against one Partner and Retiring Partners, and Incoming Partner.

[2] Hence it was even queried, if all the partners lived in another state and the place of business was there, whether the interest of one partner could be said to exist in this state so as to form the subject of an attachment here. Dow *v.* Sayward, 14 N. H. 9, 13.

of the equality of the shares. It makes no difference that one partner has contributed all the capital and the other only services or skill, for the court cannot set a proportionate value upon these respective contributions. The value of each partner depends on many things besides his capital, such as skill, industry, reputation, connection, and the like; and the silence of the parties naturally signifies an agreed and conceded equality. It follows from the same reasons that if the contribution to capital is in unequal proportions, the profits and losses are not presumably to be shared in the ratio of the shares of capital, but equally.[1]

While losses are presumed to be borne in the same ratio as profits,[2] there is no positive rule to that effect.[3] If the

[1] Farrar *v.* Beswick, 1 Moo. & R. 527; Robinson *v.* Anderson, 20 Beav. 98; 7 DeG. M. & G. 239, of attorneys employed together in one case; Collins *v.* Jackson, 31 Beav. 645; Webster *v.* Bray, 7 Hare, 159; Stuart *v.* Forbes, 1 Macn. & G. 137; 1 Hall & Tw. 461; Copland *v.* Toulmin, 7 Cl. & Fin. 349; Stewart *v.* Forbes, 1 Hall & Tw. 461; 1 Macn. & G. 137; Brown *v.* Dale, 9 Ch. D. 78; Turnipseed *v.* Goodwin, 9 Ala. 372; Donelson *v.* Posey, 13 id. 752; Stein *v.* Robertson, 30 id. 286; Brewer *v.* Browne, 68 id. 210; Griggs *v.* Clark, 23 Cal. 427; Roach *v.* Perry, 16 Ill. 37; Farr *v.* Johnson, 25 id. 522; Remick *v.* Emig, 42 id. 342, 348; Taft *v.* Schwamb, 80 id. 289; Flagg *v.* Stowe, 85 id. 164; Ligare *v.* Peacock, 109 id. 94; Moore *v.* Bare, 11 Iowa, 198; Honore *v.* Colmesnil, 1 J. J. Mar. 506; Pirtle *v.* Penn, 3 Dana, 247 (28 Am. Dec. 70); Conwell *v.* Sandidge, 5 id. 210; Lee *v.* Lashbrooke, 8 id. 214; Wolfe *v.* Gilmer, 7 La. Ann. 583; Northrup *v.* McGill, 27 Mich. 234; Randle *v.* Richardson, 53 Miss. 176; Henry *v.* Bassett, 75 Mo. 89; Ratzer *v.* Ratzer, 28 N. J. Eq. 136; Buckingham *v.* Ludlum, 29 id. 345; Gould *v.* Gould, 6 Wend. 263; Ryder *v.* Gilbert, 16 Hun, 163; Taylor *v.* Taylor, 2 Murph. (N. Ca.) 70; Jones *v.* Jones, 1 Ired. Eq. 332; Worthy *v.* Brower, 93 N. Ca. 344; Knott *v.* Knott, 6 Oregon, 142, 150; Christman *v.* Baurichter, 10 Phila. 115; Whitis *v.* Polk, 36 Tex. 602.

According to the Scotch law it is not necessarily presumed that partners share equally, but is a question for the jury, considering all the circumstances, including good will, skill, capital, labor, etc., what should be the share of profit and loss. Thompson *v.* Williamson, 7 Bligh. N. R. 432. And so, also, by two earlier English cases, Peacock *v.* Peacock, 2 Camp. 45; Sharpe *v.* Cummings, 2 Dow & L. 504. And was doubted in Towner *v.* Lane, 9 Leigh (Va.), 262.

[2] See, for example, Flagg *v.* Stowe, 85 Ill. 164; Whitcomb *v.* Converse, 119 Mass. 38, 42; Moley *v.* Brine, 120 id. 324.

[3] *Re* Albion L. Ass. Soc. 16 Ch. D. 83.

articles or agreement are silent, the books and accounts are as conclusive as a regular contract, and even more so, for the contract may be changed by parol.[1]

This doctrine must be kept distinct from divisions of capital and repayment of capital on winding up. It relates only to dividing profit and loss, but does not alter the treatment of capital, as if a debt, to be first paid before profits are divided, and in case of impairment to be repaid, less the equalization of losses.

§ 182. —— **examples.**— And if the partnership is composed of an individual and a firm of two persons, the presumption of equality will give the firm half the profits as constituting one partner, and to each member of it, one-half of its half.[2]

Where one furnished the manuscript of a book and the other the materials and labor to print and bind it, they were held to be presumptively equal partners in the gross and not the net profits.[3]

Where capital was contributed in unequal proportions, and profits and loss were to be divided in the same proportion, and at the expiration of the partnership it was renewed, with the exception that each partner's interest should be equal, this means equality in the ownership of the capital as well as shares of profit and loss, and parol evidence of a different intention is not admissible.[4]

Under articles by which each of two partners should use due diligence in procuring logs for their mill, and bear equal expense in procuring them, each does not contract to furnish half the logs, but to pay half the expenses.[5]

Where partners engage the partnership funds in an outside speculation the profit or loss is to be shared in the same proportion as they share in their other business.[6]

Where the articles of partnership between two partners require money to be advanced in equal proportions, and profits to be di-

[1] See § 211.

[2] Warner *v.* Smith, 1 De G. J. & S. 337; Honore *v.* Colmesnil, 1 J. J. Mar. 506; Conwell *v.* Sandidge, 5 Dana, 210; Turnipseed *v.* Goodwin, 9 Ala. 372.

[3] Pirtle *v.* Penn, 3 Dana, 247 (28 Am. Dec. 70).

[4] Taft *v.* Schwamb, 80 Ill. 289.

[5] Pence *v.* McPherson, 30 Ind. 66.

[6] Storm *v.* Cumberland, 18 Grant Ch. (Up. Can.) 245.

vided in the proportion that the interests of each bear to the total amount paid in, and on accounting the defendant claimed more than half profits because he had put in more, the complainant can show that he had desired and offered to put in an equal amount, but defendant had excluded him from so doing and from information as to the amount so necessary to equalize the contributions, for the provision in the articles was intended to reach a wilful default, which did not exist here, and if one increased his amount the other would not be in default until notice thereof and demand for contribution; and a partner has no right to pay expenses out of his own pocket when the firm is able to pay, and thus increase his interest, for each has the right to have the product sold to pay expenses.[1]

Where a partner, in partnership five years with his two sons, put in $1,000 for himself, and each son was to put in $500, their payments to be made by deduction of that amount from their inheritance in his estate, and in case of dissolution before five years each son is to be entitled to but $100 for each year, in such case, if the firm is not dissolved before the end of the term, the $500 of each son is to be considered an advancement by the father and as if paid in by the sons, and the profits or increase was held divisible in the proportion of $500 to $2,000, but in case of dissolution before, each son was to share in the increase in the proportion of $100 for each year.[2]

Where defendants formed a business connection with parties in Porto Rico, agreeing to give them one-fourth of the business, and afterwards formed a partnership with plaintiffs, agreeing that plaintiffs should be one-third interested in shipments to Porto Rico, and the defendants are to represent the other two-thirds, it was held that the plaintiffs are entitled to one-third of the whole amount, and not one-third of three-quarters only.[3]

§ 183. Mortgage or sale of a share.— As the share of a partner is merely a right to a proper proportion of the sur-

[1] Fulmer's Appeal, 90 Pa. St. 143.

[2] Frederick *v.* Cooper, 3 Iowa, 171.

[3] Pond *v.* Clark, 24 Conn. 370. Where A. has $1,000 of the funds of the firm of A., B. & C., and furnishes it to buy cattle for himself and B., C. disclaiming any interest in the purchase, and the cattle are sold for $1,120, B. is entitled to one-third and not one-half of the proceeds, since the funds belonged to A., B. & C. The other two-thirds may be treated as A.'s as between him and B. Bullock *v.* Ashley, 90 Ill. 102.

plus, after payment of partnership debts and adjustment of balances, it follows that the assignee or mortgagee of the interest of one partner takes subject to all debts and liabilities, for he can get no greater right than his assignee could convey. The sale by a partner of his interest in the firm to a third person has no effect, as we have seen, to entitle the assignee to admission into the firm, by reason of the *delectus personarum.*[1] And such sale, at least in a partnership at will, dissolves the firm.

Such sale is, however, not entirely inoperative, for it is effectual to carry the right, after winding up, to such share of surplus as would otherwise have been due to the partner in preference to other and unsecured individual creditors.[2] Indeed it has been said that the buyer becomes a tenant in common with the other partners. Yet any analogy to a tenancy in common is fanciful or rather erroneous. There is no tenancy in common thereby created in the property or right to any aliquot part of it; except of course in a mining partnership. The other partners have the sole right of possession and of winding up, and a complete power of disposition. The buyer or mortgagee of the share of one partner has a mere right to receive the share of a surplus which would otherwise have been allotted to his assignor, and his right, therefore, is a *jus in personam* and not a *jus in rem.*[3]

[1] § 158.

[2] Thompson *v.* Spittle, 102 Mass. 207, and cases cited in this chapter generally.

[3] The assignee was distinctly held not to be a tenant in common in Bank *v.* Railroad Co. 11 Wall. 624; Donaldson *v.* Bank of Cape Fear, 1 Dev. Eq., 103 (18 Am. Dec. 577). In Thompson *v.* Spittle, 102 Mass. 207, 210, it was said that a mortgage by one partner of his interest in a firm and its property could not take effect upon subsequently acquired property, and that the purchase of other goods, and mingling them, could neither divest the mortgagee's rights nor transfer to him the newly acquired property. In Mosely *v.* Garrett, 1 J. J. Mar. (Ky.) 212, it was held that if one partner mortgages his interest to secure indorsers, and procure funds for the firm, the other partner could not divert the fund mortgaged from the contemplated purposes and apply it to other partnership debts. In Jones *v.* Neale, 2 Patt. & H. (Va.) 339, it was held that a conveyance by one partner to secure a partnership creditor would pass a good title, both in law and equity, to his individual moiety, superior to the claims of other partnership creditors; but not so of a

§ **184.** Hence a partner cannot give to his individual creditor a specific lien upon partnership property or upon his interest in it to overreach the general lien of his copartners or the priority of the partnership creditors. Thus, if a partner mortgage or sell his interest in the assets, the mortgagee or assignee is entitled only to the share of the partner in the surplus after satisfaction of all partnership claims.[1] And though the mortgage be upon partnership real estate.[2] So if he conveys it absolutely.[3] So a chattel mortgage by a partner in his own name passes no title in the property.[4] So

conveyance to secure a separate creditor; but see § 548.

[1] Smith *v.* Parkes, 16 Beav. 115; Fox *v.* Hanbury, Cowper, 445; West *v.* Skip, 1 Ves. Sr. 239; Young *v.* Keighly, 15 Ves. 557; Bentley *v.* Bates, 4 Younge & C. 182, 190; Warren *v.* Taylor, 60 Ala. 218; Chase *v.* Steel, 9 Cal. 64; Burpee *v.* Bunn, 22 Cal. 194; Jones *v.* Parsons, 25 id. 100; Sheehy *v.* Graves, 58 id. 449; Filley *v.* Phelps, 18 Conn. 294; Beecher *v.* Stevens, 43 Conn. 587; Sutlive *v.* Jones, 61 Ga. 676; Shaw *v.* McDonald, 21 Ga. 395; Smith *v.* Andrews, 49 Ill. 28; Kistner *v.* Sindlinger, 33 Ind. 114; Smith *v.* Evans, 37 Ind. 526; Conant *v.* Frary, 49 id. 530; Henry *v.* Anderson, 77 id. 361; Deeter *v.* Sellers, 102 id. 458; Fargo *v.* Wells, 45 Iowa, 491 (*dictum*); Hodges *v.* Holman, 1 Dana, 50; Whitmore *v.* Shiverick, 3 Nev. 288; Lovejoy *v.* Bowers, 11 N. H. 404; Receivers of Mechanics' Bank *v.* Godwin, 5 N. J. Eq. 334; Matlack *v.* James, 13 id. 126; Hiscock *v.* Phelps, 49 N. Y. 97, 103–4; Tarbell *v.* West, 86 id. 280; Tarbel *v.* Bradley, 7 Abb. N. Cas. 273; Williams *v.* Lawrence, 53 Barb. 320, 324; Bank of N. Ca. *v.* Fowle, 4 Jones' Eq. 8; Ross *v.* Henderson, 77 N. Ca. 470; Burbank *v.* Wiley, 79 id. 501; Bank *v.* Sawyer, 38 Oh. St. 339; Hunt *v.* Smith, 3 Rich. Eq. 465; White *v.* Dougherty, Mart. & Yer. (Tenn.) 309; Williams *v.* Love, 2 Head, 80; Stebbins *v.* Willard, 53 Vt. 665; Jones *v.* Neale, 2 Patt. & H. (Va.) 339.

[2] Jones *v.* Parsons, 25 Cal. 100; Beecher *v.* Stevens, 43 Conn. 587; Whitmore *v.* Shiverick, 3 Nev. 288; Tarbell *v.* West, 86 N. Y. 280; Tarbel *v.* Bradley, 7 Abb. N. Cas. 273; Miller *v.* Proctor, 20 Oh. St. 442; Bank *v.* Sawyer, 38 Oh. St. 339.

[3] Bank *v.* Railroad Co. 11 Wall. 624; Burpee *v.* Bunn, 22 Cal. 194; Marks *v.* Sayward, 50 id. 57 (*dictum*); Yale *v.* Yale, 13 Conn. 185; 33 Am. Dec. 393; Matlack *v.* James, 13 N. J. Eq. 126; Rosenstiel *v.* Gray, 112 Ill. 282; Holland *v.* Fuller, 13 Ind. 195; Donaldson *v.* Bank of Cape Fear, 1 Dev. (N. Ca.) Eq. 103; Rodriguez *v.* Heffernan, 5 Johns. Ch. 417; Ross *v.* Henderson, 77 N. Ca. 170; Boyce *v.* Coster, 4 Strob. (S. Ca.) Eq. 25; Williams *v.* Love, 2 Head, 80.

[4] Clark *v.* Houghton, 12 Gray, 38; Deeter *v.* Sellers, 102 Ind. 458; Smith *v.* Andrews, 49 Ill. 28; Yale *v.* Yale, 13 Conn. 185; 33 Am. Dec. 393.

of the lien upon partnership real estate of a judgment against one partner.[1]

If the conveyance by a partner of his interest be a sale of real estate, of which the legal title is in the partners as tenants in common, the vendee necessarily gets the legal title of a specific undivided share, and in an action by him to recover this, the partners must plead that it is the property of an unsettled partnership or that the seller was indebted to the firm, making equitable defense in an action at law.[2]

In Beecher *v.* Stevens, 43 Conn. 587, by an agreement of both partners, one sold out his interest in the firm to a third person in order that the latter might form a partnership with the other, and deeded to him an undivided half of real estate constituting part of the assets, the buyer mortgaging it back to the retiring partner to secure the purchase price and payment of his share of debts, and the new firm afterwards made mortgages to subsequent creditors. The former mortgage was held to be the prior lien and not to be a mortgage of individual interest on mere surplus; nor is it a mortgage on the interest of the new member in the new firm, for then the equity of later creditors could have been asserted against it by the other partner, but is a mortgage on the interest of the old member in the old firm.

In Maxwell *v.* Wheeling, 9 W. Va. 206, M., of M. & McK., partners, conveyed all his interest in the firm to S. to secure an individual debt due to a third person. S. sold the property under the trust at auction, and McK. bought it, paying S. in cash. Firm creditors, after this, garnished the cash in S.'s hands as partnership property. It was held to be M.'s individual money, and the creditors must look to the property in McK.'s hands, for M. could sell to S. only his own interest, that is, his share after the creditors were paid, and, therefore, did not sell partnership property.

§ 185. Subject to subsequent firm debts.— But his interest, mortgaged or sold, is subject not only to existing lia-

[1] Johnson *v.* Rogers, 15 Bankr. Reg. 1; 5 Am. Law Rec. 536. See § 186.

[2] McCauley *v.* Fulton, 44 Cal. 355. See Marks *v.* Sayward, 50 id. 57, an application of the same doctrine to an assignment by one partner of his interest in a note which the other subsequently collected and was then sued for the half by such assignee, the defendant must plead his lien.

bilities, but also to subsequent equities, and the claims of subsequent creditors and the fluctuations of business. Hence, though the partnership debts are later in date than the mortgage or assignment of the share, yet the mortgagor gets only the interest in the surplus as of the date of its ascertainment or of the foreclosure, and not as of the date of its execution or of default.[1]

And where the partnership, being for a fixed and unexpired term, is not dissolved, and the other partners do not choose to apply for dissolution, their right to continue the business at the risk of diminishing the assigned share is not affected, although they have notice of the sale or incumbrance.[2]

In Lovejoy *v.* Bowers, 11 N. H. 404, the mortgagee of one partner in a specific part of the partnership property, to wit, forty-six horses and four stages of a stage partnership, whether he could have insisted on a dissolution or not, which was not decided, did not do so and the business continued. It was held that a partner cannot mortgage or sell his undivided interest in a specific part of the partnership property, and that even if the mortgaged property comprised the entire assets so that the mortgage was of the share of the surplus, it would not avail against creditors, whether prior or subsequent, and the mortgagee's right was only in the surplus as it stood when the dissolution took place; and the suggestion was made that all the property taken may have been supplied by subsequent creditors, or drawn from profits on contracts with them.

§ **186. —— and subsequent conveyances.**— Hence, if the title of the property is subsequently conveyed as a partnership act, whether by all the partners uniting in selling it, or by

[1] Cavander *v.* Bulteel, L. R. 9 Ch. App. 79; Kelly *v.* Hutton, 3 id. 690; Whetham *v.* Davey, 30 Ch. D. 574; Lindsay *v.* Gibbs, 3 DeG. & J. 690; Guion *v.* Trask, 1 id. 379; Beecher *v.* Stevens, 43 Conn. 587 (*dictum*); Conant *v.* Frary, 49 Ind. 530; Churchill *v.* Proctor, 31 Minn. 129; Lovejoy *v.* Bowers, 11 N. H. 404; Receivers of Mechanics' Bank *v.* Godwin, 5 N. J. Eq. 334, 338; Hiscock *v.* Phelps, 49 N. Y. 97, 103–4; Bank of N. Ca. *v.* Fowle, 4 Jones (N. Ca.), Eq. 8; Burbank *v.* Wiley, 79 N. Ca. 501; Bank *v.* Sawyer, 38 Oh. St. 339; Page *v.* Thomas, 43 id. 38, 44–5.

[2] Whetham *v.* Davey, 30 Ch. D. 574; Cavander *v.* Bulteel, L. R. 9 Ch. App. 78; Kelly *v.* Hutton, 3 id. 703; Redmayne *v.* Forster, L. R. 2 Eq. 467.

a single partner conveying it in the due exercise of his power as a partner in the scope of the business, the second sale conveys a title discharged of all lien or right under the previous individual act of mortgaging or assigning a separate share.[1]

Thus, where Y. & H. were deeply involved, and Y., to pay his private debt, gave a bill of sale of a horse belonging to the partnership to the plaintiff, his creditor, and afterwards he gave a bill of sale of the same horse to a partnership creditor, the latter is entitled to hold the horse against the claim of the former.[2] And where one partner mortgaged his interest, described as one-half, in certain property of the firm, to secure his individual debt, and the other partner subsequently sold and delivered the property in order to get money to pay a partnership debt, the buyer's title is good as against the mortgagee. The opinion somewhat limits this by making the insolvency of the firm an element, regarding the mortgage as a lien upon the partner's surplus, the proof being that there was no surplus.[3]

A judgment for his separate debt against one partner in whose name is the title of real estate of the firm will be postponed to subsequent mortgages or sales by the firm and to partnership debts and equities,[4] and if a cloud on the title will be removed.[5]

And so, if the property is attached or sold on execution against the firm, the buyer's title is unincumbered by such mortgage.[6]

[1] Cavander *v.* Bulteel, L. R. 9 Ch. App. 79; Jones *v.* Parsons, 25 Cal. 100; Yale *v.* Yale, 13 Conn. 185; 33 Am. Dec. 393; Shaw *v.* McDonald, 21 Ga. 395; Tarbell *v.* West, 86 N. Y. 280; Tarbel *v.* Bradley, 7 Abb. N. Cas. 273; Bank *v.* Sawyer, 38 Oh. St. 338; Bentley *v.* Bates, 4 Young. & C. 182, 190. But see Treadwell *v.* Williams, 9 Bosw. 649.

[2] Yale *v.* Yale, *supra.*

[3] Shaw *v.* McDonald, 21 Ga. 395.

[4] Lake *v.* Craddock, 3 P. Wms. 158; 1 Eq. Cas. Abr. 290; Coster *v.* Bank of Georgia, 24 Ala. 37; Evans *v.* Hawley, 35 Iowa, 83; Kramers *v.* Arthur, 7 Barr, 165; Lancaster Bank *v.* Myley, 13 Pa. St. 544; Meily *v.* Wood, 71 Pa. St. 488 (rev. 8 Phila. 517); Willis *v.* Freeman, 35 Vt. 44; Johnson *v.* Rogers, 15 Bankr. Reg. 1; 5 Am. Law Rec. 536. *Contra,* Blake *v.* Nutter, 19 Me. 16.

[5] Evans *v.* Hawley, *supra.*

[6] Smith *v.* Andrews, 49 Ill. 28; Robinson *v.* Tevis, 38 Cal. 611; Commercial Bank *v.* Wilkins, 9 Me. 28; Hill *v.* Wiggin, 31 N. H. 292; Staats

Thus, where W. & R., being partners as bakers, W. gave a mortgage on a horse and wagon of the firm for a private debt without R.'s knowledge; a partnership creditor subsequently attached the horses and wagons against the protest of the mortgagee, who then sued the sheriff in trespass, but it was held that his mortgage gave him no interest in the property which cut off the other partner or creditors from subjecting it.[1]

In Tarbell *v.* West, 86 N. Y. 280, a partner made a mortgage upon his interest in the firm, which included real estate held in the name of another partner and also chattels, and the mortgage was recorded both as a real estate and as a chattel mortgage; the firm was then organized into a corporation, which bought out all the firm's property and business; it was held that the corporation received the property free of the mortgage although such partner was a director in it; that a mortgage by a partner conveys nothing, and a buyer from the firm, either during the partnership or in winding up, gets title discharged of it, whether he had notice or not.

§ 187. Assignee's rights.— But the assignee of a share, of course, incurs no personal liability for a deficit in case the share will not pay debts and balances, and no personal judgment can be awarded against him, unless he has agreed to assume that burden;[2] and so even if he is taken into the firm, he is not deemed to assume existing debts.[3] If the concern has transferable shares, it gives a partner a right to convey his interest with its antecedent liability, and such is the meaning of a transfer in such cases, as in a corporation;[4] and in case of a banking partnership with transferable shares, where a partner may become indebted to the firm in his capacity as customer of the bank, there is no lien upon his shares unless the articles specially reserve it, the right to sell shares being a main inducement to take them.[5]

v. Bristow, 73 N. Y. 264; Kistner *v.* Sindlinger, 33 Ind. 114; Whitmore *v.* Shiverick, 3 Nev. 288.

[1] Smith *v.* Andrews, 49 Ill. 28.

[2] Hunt *v.* Smith, 3 Rich. Eq. 465.

[3] See § 507.

[4] Mayhew's Case, 5 DeG. M. & G. 837; Savage *v.* Putnam, 32 N. Y. 501; Phillips *v.* Blatchford, 137 Mass. 510; Baird's Case, L. R. 5 Ch. App. 725. But see Lake *v.* Munford, 4 Sm. & Mar. 312.

[5] Pinkett *v.* Wright, 2 Hare, 120; s. c. as Murray *v.* Pinkett, 12 Cl. & Fin. 764. See Spence *v.* Whitaker, 3 Porter (Ala.), 297.

Incident to the right of the assignee or mortgagee to share in the surplus is the right to enforce a settlement of the partnership accounts in order to ascertain if there is any surplus; and he may also foreclose and in the same suit demand an accounting.[1]

Where real estate is in the name of one partner, a *bona fide* mortgagee or buyer from him for value without knowledge of the firm's interest would be protected.[2]

§ 188. Mortgage of share to a partner.— The same rules apply when the partner receives instead of giving a mortgage upon an interest. Thus, a mortgage to one partner on partnership property to secure a return to him of his capital puts him in no better position than before, for, as against copartners, he already has a lien, and as to creditors the mortgage is not available.[3]

Thus, if one of three partners buys out another, the interest purchased by him is subject to the claims of the third partner on such share; and if the third partner pay a debt, he may be entitled to charge two-thirds of it to the buying partner.[4] So, if a partner sells out his interest to a third person, who is thereupon taken into

[1] See §§ 927, 928. For as the lien of the other partners is not affected by the mortgage of an interest, they cannot prevent a foreclosure of the mortgage. Smith *v.* Evans, 37 Ind. 526. As to the right to wind up a partnership for a fixed term not yet expired, see § 585.

[2] Dupuy *v.* Leavenworth, 17 Cal. 262; Reeves *v.* Ayers, 38 Ill. 418; Hiscock *v.* Phelps, 49 N. Y. 97 (s. c. below. 2 Lans. 106); Lewis *v.* Anderson, 20 Oh. St. 281, 285; Miller *v.* Proctor, id. 442, 448; Mason *v.* Parker, 16 Grant's Ch. (Up. Can.) 230. As to what constitutes notice of the partnership, see § 295. Where the title to a mine is in two partners, a purchaser of the interest of one holds subject to the trust in favor of other partners, of whose existence he had no knowledge; but here he at least had notice that there was a partnership. Settembre *v.* Putnam, 30 Cal. 490. A mortgagee of the share of a partner in real estate without notice of the partnership, if to secure a pre-existing debt of such partner, is not a holder for value, but takes subject to partnership liabilities. Hiscock *v.* Phelps, 49 N. Y. 97, 103-4; Lewis *v.* Anderson, 20 Oh. St. 281, 285. But see Reeves *v.* Ayers, 38 Ill. 418.

[3] Irwin *v.* Bidwell, 72 Pa. St. 244, 250. The mortgage itself is not partnership assets, Niagara Co. Nat. Bank *v.* Lord, 33 Hun, 557; but has been held good in the hands of a *bona fide* buyer as against creditors. Scudder *v.* Delashmut, 7 Iowa, 39. See Reid *v.* Godwin, 43 Ga. 527.

[4] Kendrick *v.* Tarbell, 27 Vt. 512.

the firm, and the retiring partner takes a mortgage from the vendee of the share sold to secure the purchase money, or reserves a lien upon it, this lien is subordinate to the claims of the other partners for debts and balances.[1]

So, where L., of L. & A., sold out all his interest to A., who gave him a mortgage on the partnership property to secure the purchase money and his liability for debts, the property being sold by consent and the money being in L.'s hands, he can appropriate it to pay partnership debts before paying A.[2]

Where M., of H. & M., partners owning real and personal property, sold out to his partner H. all his interest in the firm in consideration of H.'s promise to pay the debts and pay him $1,500, and H. mortgaged the real estate, which still stood in the names of both, to a partnership creditor, the mortgagee having foreclosed, is entitled to a decree for the title against both, for H.'s mortgage was of half the legal title and the entire equitable title, and the claim for a firm debt is prior to his claim, which is for an individual debt.[3]

§ 189. Whether sales of shares separately is a sale of the whole.— A most interesting question, on which courts have differed, arises: whether or not a transfer of his share by each of the partners separately will convey the entire interest of the firm, leaving nothing for the partnership creditors except the individual responsibility of the former partners; or whether such transfer, like the transfer of a single share, is of the surplus only after settlement of liabilities, which is all that an individual partner has.

On the one hand it is urged that to convert the assets of the firm into separate property of each partner, or of those claiming under each, requires the concurrence of each partner. On a transfer by each partner individually of his respective interest, each still retains his personal right to have the assets applied to indemnify him against the partnership debts, and the sale is subject to those debts. The title of the firm as between it and its creditors is not divested

[1] Conwell *v.* Sandidge, 8 Dana, 273; Savage *v.* Carter, 9 id. 408, where the lien was reserved on specific property.

[2] Low *v.* Allen, 41 Me. 248.

[3] Seaman *v.* Huffaker, 21 Kan. 254.

as to the *corpus* of the property, or at least as to so much as is necessary to pay debts, by separate transfers to strangers. If a retiring partner selling out to his copartners loses his lien it is because the concurrence of all in the conversion of the property has been had. And even if the firm altogether sell, if the sale is not *bona fide* creditors can attack it.

A sale of the interest of one partner, whether voluntary or on execution, which confessedly carries an interest incumbered by debts, or, in other words, a share in a surplus left after settlement of liabilities, if after this a sale of the other partner's interest is to deprive the latter of his right to require the assets to be applied to debts, and hence destroy the foundation of the preference of joint creditors in the assets, involves the absurdity that the latter sale converts the interest purchased at the former sale from an interest on the surplus to an interest in the *corpus* of the property.

In Menagh *v.* Whitwell, 52 N. Y. 146 (11 Am. Rep. 683), a firm consisting of three partners was insolvent. One partner gave a chattel mortgage to A. on his interest, described as being three-fifths of the factory, property, accounts, etc., to secure his individual debt. Another partner gave a like mortgage for a like purpose to B., and the third partner sold out his so-called one-fifth interest to C. The mortgagees took possession, under the mortgages which gave that power, of their undivided interests, and on foreclosure the interests were purchased by different persons. Judgments against the firm were obtained by partnership creditors, and executions thereunder were levied upon the property after these transfers on foreclosure. It was held, on the grounds stated above, that the buyers from the individual partners obtained only their interest in the surplus and that the property was still subject to levy by joint creditors. RAPALLO, J., in criticising the Pennsylvania cases hereafter noticed, and in order to show the injustice of the contrary view, puts a case where a firm is solvent, while its members individually are insolvent, to show the injustice of a doctrine that would exclude the joint creditors. Thus, suppose a firm of three equal members, having assets worth $300,000 and owing debts of $150,000. Here the interest of each partner is $50,000. Now if

the members are individually indebted, and one sells his interest for $50,000 and the share of another is sold on execution at $50,000, its full value, the equity of the joint creditors can be worked out through the equity of the remaining partner and those who have sold can be protected, the purchasers of the interests receiving the surplus only, and joint creditors can still levy. But under the Pennsylvania doctrine a sale by the third partner converts the interests of the former buyers from an interest in the surplus to shares in the *corpus* of the property, thus doubling their value, and appropriating the fund which should have gone to pay the joint debt to the individual transferrers without any consideration.

In Osborn *v.* McBride, 3 Sawy. 590; 16 Bankr. Reg. 22, judgments were rendered against each partner separately in favor of an individual creditor of each, and under them the property of the partnership was sold on separate executions and separate sales to the plaintiff in the actions. He was held to have acquired only a right to an account subordinate to the claims of joint creditors, and could not hold the property against the subsequent assignee in bankruptcy of the firm.[1]

In Commercial Bank *v.* Mitchell, 58 Cal. 42, a joint and several note was signed by each partner for a partnership debt. The holder sued the partners upon it as individuals and not as a firm, and got out an attachment which was levied on the separate interests of the defendants in the joint property. A subsequent attachment in an action against the firm was held to be the superior lien, on the ground that the interest of the partners was the balance after the debts are paid.

In Caldwell *v.* Bloomington Mfg. Co. 17 Neb. 489, A. & B., a firm, being insolvent, A. made a bill of sale of his interest to S. to pay or secure his individual debt, and B. made a similar bill of sale of his interest to C. for his individual debt due C. S. and C. claimed to have divided the assets between themselves under their mortgages, but the fund realized by foreclosure of a mortgage prior to theirs was held to be subject first to the claims of partnership creditors.

[1] The earliest case upon the subject had been that of Brinkerhoff *v.* Marvin, 5 Johns. Ch. 320, in which each partner had successively confessed a judgment against himself in favor of the same creditor on partnership debts, and the partnership property was held to be bound, as there was one consolidated judgment for the whole against both partners.

In Maxwell *v.* Wheeling, 9 W. Va. 206, M., of M. & McK., a firm, conveyed all his interest to S. to secure his individual debt to a third person. S. sold the property under the trust at auction, and McK. bought it, paying S. in cash. This cash was held not subject to judgment creditors of the partnership, in S.'s hands, as being joint property, and that the creditors must look to the property in McK.'s hands, for M. did not sell partnership property to S., but could sell his own share only.

In New Hampshire, levies by separate creditors of each of the partners were held subordinate on distribution of proceeds to a subsequent levy by a partnership creditor.[1]

§ **190. Contrary rulings.**— On the other hand it is urged that although the joint effects belong to the firm and not to the partners, each of whom is entitled only to a share of what may remain after payment of the partnership debts, and consequently no greater interest can be derived by a purchase of such share, either by voluntary assignment or sale on execution, for the sale is not of chattels, but an interest incumbered with the joint debts, yet as the partnership creditors' priority on distribution arises because the partner whose share has not been sold has the right to insist upon the application of all the assets to the debts for his own protection in order to receive his share unincumbered, or to diminish his personal responsibility, and the courts will use this right for the benefit of the creditors whenever the fund is in its hands, as is sometimes said by a species of equitable subrogation, and the joint creditors have no lien arising out of any preference inherent in their relation as creditors, hence where the copartners have lost their right to insist upon such application, the foundation for asserting a preference to joint creditors is gone.

[1] Tappan *v.* Blaisdell, 5 N. H. 190; Jarvis *v.* Brooks, 7 Foster, 37; 59 Am. Dec. 359. It will be seen, however, hereafter, that in this state the creditor has more than a mere derivative equity, but has an inherent priority, not dependent upon the equity of the partners; and in California it was ruled that an assignment for benefit of creditors by each of the partners of his separate property conveys no partnership property, and hence, on discharge in insolvency, the partnership creditors can still sue and attach. Glenn *v.* Arnold, 56 Cal. 631; Freeman *v.* Campbell, id. 639.

This view of the law was adopted in Doner *v.* Stauffer, 1 Pa. (Penrose & Watts) 198, where Howry *v.* Eshelman were in partnership and separate creditors of each obtained judgments against each, and were successively levied upon the interest of each in the firm, and the partnership property was simultaneously sold under them and the proceeds paid into court. But the firm was largely insolvent, and the unpaid claims of partnership creditors exceeded the proceeds, and one of the partners was greatly interested in having them paid in order to lessen his individual liability. Gibson, C. J., says that, had the sales of the interest of each been successive, the first sale would have passed the interest of one partner, subject to the equity of the copartner, the execution creditor receiving the price, and the second sale would have passed the interest of the copartner, including this equity, to the same purchaser. That a simultaneous sale of the whole was in legal contemplation a separate sale of the interest of each, and therefore made no difference in the result. That had there been separate purchasers of the share of each, the question might arise whether they stood in the relation of partners so as to enable the joint creditors to follow the goods, but it seems to him they would not. That it is conceded that the goods in the hands of the buyers are not subject to creditors' claims, and the proceeds cannot be substituted for the goods because the partners' lien is gone.

This decision is followed by two others in that state,[1] one of which held if each partner sells his interest in the property and it is sold on executions against each, the partners' lien is waived and the creditor's priority is gone. And the other,[2] where each partner assigned his private property and his interest in the firm on successive days to the same assignee, held, that there was nothing left in the partners through which partnership creditors could take, and therefore the sheriff could not levy for a partnership debt.[3]

In Couchman *v.* Maupin, 78 Ky. 33, a creditor of the partners as individuals, and not as a firm, got judgment and placed one execution in the hands of the officer, and by the law of that state it

[1] Coover's Appeal, 29 Pa. St. 9 (aff'g 3 Phila. 287).

[2] McNutt *v.* Strayhorn, 39 Pa. St. 269.

[3] And yet in Pennsylvania the usual doctrine is recognized that if the interest of one partner is sold the proceeds are not partnership assets, because it is his property and not the joint property which is sold. Jones' Appeal, 70 Pa. St. 169.

became a lien from such time; before actual levy the partners conveyed all the assets to a trustee for the benefit of partnership creditors. The execution creditor was held to have the preferable lien. The reasoning of the court is that creditors have no lien except what is derived from or through the partners by equitable subrogation, the partners' lien being to secure to each his rights, and not for the protection of creditors, and if no partner can assert his lien the creditors are equally unable to do so; and it makes no difference whether the partners' lien is lost by voluntary waiver or by operation of law; and as the debt here was the debt of each, the lien cannot be used to protect a partner against his own debt; hence, partnership creditors can get no lien prior to that held on a joint debt of the individual partners.[1]

In Kimball *v.* Thompson, 13 Met. 283, if a partner, with the consent of the other partner, sells his half of the effects of the firm to a third person without fraud, and the other partner then sells his half to the same person, the latter gets a good title against all the world and creditors cannot object. But here there was a concurrent intention of both partners to determine the joint ownership.[2]

[1] S. P. Saunders *v.* Reilly, 105 N. Y. 12.

[2] In Norris *v.* Vernon, 8 Rich. L. 13, each partner seems to have made separate assignments of his share.

CHAPTER X.

THE FIRM NAME.

§ 191. **Rationale of.**— It is usual for partners to adopt a firm or partnership name or style;[1] for convenience of designation and in trading partnerships, this convenience is so great as to almost be a necessity.

But as a partnership is not a person distinct from its members, the only office for a firm name is identification and convenient abbreviation except in limited partnerships,[2] as the agreed sign or adopted symbol to represent and include the individual names the same as if each was separately given, but with the additional signification that a partnership act is denoted by using the joint name;[3] for the presence of the separate individual names does not necessarily show this unless an intention to do a partnership act is also present, either expressly or by implication derived from the nature of the act.[4] In other words, though the fact of a firm name implies the fact of a firm,[5] yet the converse is not true — a partnership does not involve a name.

This name may contain the name of one or more or all the partners, or the names of one or more with a collective designation, or may be purely fanciful, and in this country may be a corporate name. The use of the collective designation "& Co." creates a presumption that there is a partner

[1] The word firm means the name, from the Italian *firmare* — to sign or subscribe, and only derivatively denotes the body. See Churton *v.* Douglas, H. V. Johns. 174, 189. As referring to the body, it is synonymous with partnership; thus, where a record finds a mortgage was to secure the "firm" it does not mean as tenants in common; hence the surviving partner can foreclose. Bolckow *v.* Foster, 25 Grant's Ch. (Up. Can.) 476.

[2] See Bates on Limited Partnerships, p. 73.

[3] Haskins *v.* D'Este, 133 Mass. 356; Ferris *v.* Thaw, 5 Mo. App. 279, 288; Baring *v.* Crafts, 9 Met. 380, 392.

[4] See § 453.

[5] Fulton *v.* Maccracken, 18 Md. 528, 544.

in addition to the one or to those whose names appear;[1] but this is rebuttable.[2] Hence a name is not an organic or indispensable part of the existence of a partnership.[3] Hence, also, in an action against partners, it is not necessary to prove that they had a name, or if a name be averred it is not necessary to prove it if it be charged and proved that the partners made a promise in the name used in the promise.[4] And in an action by partners the allegation that they did business under a stated name is not material and need not be proved.[5]

§ **192. Name of one as a firm name.**—The name of a single partner may be and often is adopted as the firm name.[6] In such case a note, bill or contract in the individual name of such partner may be his individual promise or a partnership transaction, which is open to proof. *Prima facie* the contract is what it purports to be, the individual matter of the signer; but it may be shown to have been made by the authority or for the purposes of the firm, or that credit was given to the firm by reason of declarations of the partner that it was for the partnership.[7]

1 The Francis, 1 Gall. 618; The San Jose Indiano, 2 id. 268; Ferguson *v.* King, 5 La. Ann. 642; Whitlock *v.* McKechnie, 1 Bosw. 427; Armstrong *v.* Robinson, 5 Gill & J. 412. *Contra,* Robinson *v.* Magarity, 28 Ill. 423 (a *dictum*).

2 Whitlock *v.* McKechnie, *supra;* Ferguson *v.* King, *supra;* Charman *v.* Henshaw, 15 Gray, 293. And where a note is payable to the firm, but no such firm exists, the person to whom the note is given may assume such firm name in order to indorse the note over. Blodgett *v.* Jackson, 40 N. H. 21. For the effect upon a priority of business creditors over separate creditors where a person carries on business by himself, but in a firm name, see § 106.

3 LeRoy *v.* Johnson, 2 Pet. 186, 198; Pursley *v.* Ramsey, 31 Ga. 403; Kitner *v.* Whitlock, 88 Ill. 513; Getchell *v.* Foster, 106 Mass. 42, 47; Haskins *v.* D'Este, 133 id. 356; Ontario Bank *v.* Hennessey, 48 N. Y. 545.

4 Lea *v.* Guice, 13 Sm. & Mar. 656; Lessing *v.* Sulzbacher, 35 Mo. 445. Drake *v.* Elwyn, 1 Caines, 184 (not overruled on this point in s. c. 1 N. Y. 242.)

5 Stickney *v.* Smith, 5 Minn. 486.

6 As in Kirk *v.* Blurton, 9 M. & W. 284; Manuf. & Mech. Bank *v.* Winship, 5 Pick. 11; Winship *v.* Bank of U. S. 5 Peters, 529.

7 See § 443; Yorkshire Banking Co. *v.* Beatson, L. R. 4 C. P. Div. 204; Winship *v.* Bank of U. S. 5 Pet. 529; Strauss *v.* Waldo, 25 Ga. 641; Theilen *v.* Hann, 27 Kan. 778. In Bank of Rochester *v.* Monteath, 1 Den.

§ 193. Changing or adding another name.— Partners may change their name if they desire, and this is not a dissolution and formation of a new firm, and does not release or terminate contracts made with or by, or obligations to and from, the partners under the former name.[1]

Hence the partners may by a usage recognize a certain name as representing the firm, as effectually as if expressly agreed upon in the articles of partnership; as by signing notes made in a certain way, or paying bills drawn on it in that name,[2] or making out the books, bills and accounts, or advertising in a firm name,[3] so, also, printed cards are evidence of the name of the firm,[4] and may bring an action in their individual names on obligations made to them in a name not formally adopted by them or varying from the correct name.[5]

§ 194. Substituting firm for individual names, and vice versa.— A note payable to partners individually may be indorsed over by using the firm name,[6] and a note payable to a firm may be indorsed over by using all individual names in the indorsement. Thus, where a note was payable to J. J. & J. P. Kirk, and was indorsed thus: John J. Kirk, Geo.

402; 43 Am. Dec. 681, one of the names was that of a person not a partner. In Mississippi there is a statute that if a person transact business as a trader in partnership without the words & Co., or by a like designation fail to disclose, partnership property shall be treated as his; and under this statute it was held that cotton bought by a person in his own name was liable to execution on a judgment rendered before the statute took effect, although owned by an undisclosed partner who claims it. Gumbel *v.* Koon, 59 Miss. 264.

[1] Gill *v.* Ferris, 82 Mo. 156; Shine *v.* Central Sav. Bk. 70 id. 524; Mellinger *v.* Parsons, 51 Iowa, 58; Billingsley *v.* Dawson, 27 id. 210.

[2] Pursley *v.* Ramsey, 31 Ga. 403; Jemison *v.* Minor, 34 Ala. 33; Palmer *v.* Stephens, 1 Den. 471; Folk *v.* Wilson, 21 Md. 538.

[3] Le Roy *v.* Johnson, 2 Pet. 186, 198.

[4] Michael *v.* Workman, 5 W. Va. 391, 393.

[5] Crawford *v.* Collins, 45 Barb. 269; 30 How. Pr. 398; Messner *v.* Lewis, 20 Tex. 221, where the partners sued in their individual names, joining causes of action payable to them under different names as constituting different houses.

[6] § 453; Mick *v.* Howard, 1 Ind. 250; Dudley *v.* Littlefield, 21 Me. 418. And see Cooper *v.* Bailey, 52 id. 230.

McConeghy, the indorsee sued McConeghy, who in defense claimed to have indorsed for the maker's accommodation, and claimed that the plaintiff had no title because the payees had not indorsed. It was held that the payees are presumed *prima facie* to constitute a partnership, and, from identity of name, that John J. Kirk was one of the partners; and it was further held that the indorsement of negotiable paper by one partner on partnership account would bind the firm.[1] A note payable to a firm and indorsed over in the name of one partner has been held to convey the equitable title, the other partner not being the objector.[2] A note made payable to one partner, in the course of business, cannot be indorsed over by the other partner in the payee's name;[3] but a note payable to A. may be indorsed over in the name of A. & Co.; just as if A. and B. convey A.'s property, it is a good conveyance by A.[4]

§ 195. **One firm with several names.**— As any symbol that the partners may use to designate themselves collectively will represent them, a firm may have several names if its members choose.[5] Hence, judgment may be had in one action on a note signed A. Hunt & Bro. and on another signed Hunt & Bro., where both names represent the same individuals;[6] or defendants may be described as partners under a certain name, and their promise by another name may be shown and recovered upon, just as a person assuming an *alias* may be made liable.[7]

[1] McConeghy *v.* Kirk, 68 Pa. St. 200. But *contra* as to the proposition that the indorsement of one individual name will convey title to a note payable to the firm, McIntire *v.* McLaurin, 2 Humph. 71; 36 Am. Dec. 300; Moore *v.* Ayres, 5 Sm. & Mar. 310; Estabrook *v.* Smith, 6 Gray, 570, where one of the payee firm in his individual name indorsed the note to the other.

[2] Planters', etc. Bank *v.* Willis, 5 Ala. 770; Ala. Coal Mining Co. *v.* Brainard, 35 id. 476; Wartelle *v.* Hudson, 8 La. Ann. 486.

[3] McCauley *v.* Gordon, 64 Ga. 221; 37 Am. Rep. 68.

[4] Finch *v.* De Forest, 16 Conn. 445.

[5] Michael *v.* Workman, 5 W. Va. 391; Moffat *v.* McKissick, 8 Baxter, 517.

[6] Hunt *v.* Semonin, 79 Ky. 270.

[7] Miner *v.* Downer, 20 Vt. 461; Brown *v.* Jewett, 18 N. H. 230, where they were known as "Farmers & Mechanics," and as "Farmers

Especially is this common where there are two places of business in different cities.[1] Thus, where partners carried on a business as J. & B. in Dakota, and as J., B. & Co. in Colorado, the fact of two names is of no importance where the same individuals, neither more nor less, own each business, and the assets of both nominal firms in the hands of an assignee in insolvency are equally applicable to creditors of each house.[2] If the number of partners vary in each, that is, if either have a partner not common to the other, they are of course separate firms.[3]

§ **196. Two firms with same name.**— Two independent firms, composed in part of the same partners, may adopt the same name, and in such case the question, which is bound by a contract made in the firm name by a partner common to both, is one of identity, or to determine to which credit was intended to be given, and is the same question that arises where a firm is in the name of an individual and a note is made by him. If the controversy grows out of a purchase of goods in the firm name, apparently suitable to one firm and not to the other, or for a loan of money to pay the debts of one firm, the limitation on the partner's authority arising from the scope of the business, which every one must take notice of, determines.[4]

& Mechanics' Co.," and as "Farmers & Mechanics' Store." Where Taylor & Cassily had a business house in New Orleans, where Taylor resided, and one in Cincinnati, where Cassily lived, dealing with each other as independent firms, a bill drawn in Cincinnati on "Taylor & Cassily, New Orleans," is subject to damages on protest as being drawn on persons without the state. West & Co. *v.* Valley Bank, 6 Oh. St. 168.

[1] In Matter of Vetterlein, 5 Ben. C. C. 311; Sparhawk *v.* Drexel, 12 Bankr. Reg. 450; Lathrop *v.* Snell, 6 Fla. 750; Ballin *v.* Ferst, 55 Ga. 546; Wright *v.* Hooker, 10 N. Y. 51; Bank of Rochester *v.* Monteath, 1 Den. 402; 43 Am. Dec. 681; *In re* Williams, 3 Woods, C. C. 493; Campbell *v.* Colorado Coal & Iron Co. 9 Colorado, 60; Buckner *v.* Calcote, 28 Miss. 432, 585-9; Anderson *v.* Norton, 15 Lea, 14; Messner *v.* Lewis, 20 Tex. 221; Sneed *v.* Kelly, 3 Dana. 538.

[2] Campbell *v.* Colorado Coal & Iron Co. *supra;* S. P. In Matter of Vetterlein, 5 Ben. C. C. 311; *In re* Williams, 3 Woods, C. C. 493. See Buckner *v.* Calcote, 28 Miss. 432, 585-9.

[3] Harrison *v.* McCormick, 69 Cal. 616.

[4] Elkin *v.* Green, 13 Bush, 612.

Where a note is made by the Avery Factory Co. by C., its agent, and there was a corporation and also a partnership of that name, of both of which C. was agent, evidence that the corporation had ceased business and the partnership had not is competent to identify the latter as the maker of the note.[1]

In Hastings Nat'l Bank *v.* Hibbard, 48 Mich. 452, three partners operated a mill under the firm style of H. & G.; they had another mill, and as to it took in another partner; but both firms had the same name of H. & G., and used the same letter-heads with the names of all four partners printed thereon. One of the original partners made a note in the firm name, and procured the plaintiff a banking corporation, to discount it. The jury having found that the loan was upon the credit of the original firm, the plaintiff cannot elect which firm to sue, and cannot hold the new partner liable. It was said (p. 458) that had the bank officers supposed there was but one firm, all the partners would have been bound.[2]

So in Fosdick *v.* Van Horn, 40 Oh. St., 459, there were two firms of the same name in the same community, one of which contained a dormant partner, who was not a member of the other. A note was given in the common firm name, and it was held that this must be presumed to be the note of the firm not containing the dormant partner; and to charge the other firm, proof was necessary

[1] Jones *v.* Parker, 20 N. H. 31. Lord Kenyon had decided in the last century in Baker *v.* Charlton, Peake, 80, that where several partnerships had the same name, a partner in one could not show that a bill in the firm name was drawn on account of one of the other firms in which he was not a partner. This is of course not now the law. In Swan *v.* Steele, 7 East, 210; 3 Smith, 199, Wood & Payne had two kinds of business, cotton and groceries, Steele being a dormant partner in the former only. A bill payable to the cotton firm was indorsed over by Wood & Payne, without Steele's knowledge, to pay a debt of the grocer firm, yet, because the indorsement represented the former firm, Steele was held upon it. It is difficult to agree with this case, however, for the indorsement of the debt of the grocer house was notice to the plaintiff that only the partners in that house were liable, and Steele was not liable by holding out because his membership in either house was unknown. Had plaintiff known that the bill belonged to the cotton house and known it was not the same firm as the grocer house, the known misappropriation should have prevented his recovery upon it.

[2] See, also, Mechanics' & Farmers' Bank *v.* Dakin, 24 Wend. 411; and *Re* Munn, 3 Biss. 442.

either that credit was given to it, which may be shown by contemporaneous declarations of the ostensible partners or by circumstances, or that the proceeds of the note inured to it, or the avowed purpose for which the money is needed will determine.[1]

If the firms have different names, a note in the name of one cannot generally bind the other, for though the partner who made the note could have acted in the capacity of partner of either, yet the note shows in which capacity he acted.[2]

§ 197. Form of signing.— As to the form of the signature of the firm's name, a note I promise, signed A., for A., B., C. & Co., will bind the firm.[3] So of a contract by W., Superintendent of Keets Mining Co., *parties* of the first part, signed W., Supt. Keets Min. Co.[4] So I promise, signed with the firm's name, A., B. & Co.[5] So a promise by the company, signed A. B., treasurer, is the company's note.[6]

§ 198. Illegal names.— In Massachusetts there is a statute forbidding the use of the name of a former partner, without his written consent, or that of his representatives if deceased.[7]

In New York and Louisiana there is a statute forbidding the use in the firm style of the name of a person as partner who is not one, or the use of "& Co." unless an actual partner is represented by it.[8] This does not interfere, prohibit or prevent the use of fanciful names, such as Eureka Co. or Alderney Manufacturing Co.[9] And being highly penal will not be extended to cover a case where "& Co." represented an actual person, though under disability, as where it represents the wife of the named partner;[10] and for the same reason will not be extended to forfeit property rights, as where

[1] Elkin *v.* Green, 13 Bush, 612.

[2] Miner *v.* Downer, 19 Vt. 14, See § 107. The consequences of an intentional and deceptive similarity of names have been considered. § 108.

[3] Gallway *v.* Mathew, 10 East, 264; s. c. as Galway *v.* Matthew, 1 Camp. 403; Staats *v.* Howlett, 4 Den. 559; Caldwell *v.* Sithens, 5 Blackf. 99.

[4] Pearson *v.* Post, 2 Dakota, 220.

[5] Doty *v.* Bates, 11 Johns. 544.

[6] Walker *v.* Wait, 50 Vt. 668.

[7] This statute will be found construed in Rogers *v.* Taintor, 97 Mass. 291; Morse *v.* Hall, 109 id. 409; Sohier *v.* Johnson, 111 id. 238.

[8] In France, Code de Commerce, 21, the name must contain no other names than those of actual partners; and so in Germany, except that a name may be retained after changes in the firm.

[9] Gay *v.* Seibold, 97 N. Y. 472, 476; 49 Am. Rep. 533; Lauferty *v.* Wheeler, 11 Daly, 194.

[10] Zimmerman *v.* Erhard, 83 N. Y. 74.

property is shipped by a person in the name of a dissolved firm, he can recover against the carrier for negligence;[1] nor to transactions isolated from the general business of the firm, as a note to the firm not in the ordinary course of business;[2] or a leasing of part of the firm's premises;[3] and one who continues business in the old name is not liable for fraud, if no fraud was intended.[4]

The act was held to apply to protect those giving credit to the firm, and not those obtaining credit from it, and therefore to be no defense to a bond to the firm reciting the names of the partners and giving the firm name with "& Co."[5] But it had also been held, where surviving partners continued business in the old name, although the deceased had directed its continuance, they could not recover for goods sold.[6]

A person who does business in another state, in a name composed of his own with "& Co.," and employs an agent to canvass for him in New York, cannot be defeated in an action against his agent on this ground, where the contract was made in the other state.[7]

An act authorizing the continued use of partnership names, on filing a certificate and advertising the change, does not enlarge or create rights of property; and therefore, where two of three former partners put the old name on a trade-mark, this is a materially false statement and they have no standing in equity.[8]

POWER OF A PARTNER IN RELATION TO THE NAME.

What has hitherto been said has related solely to the adoption and use of the name by all the partners. In order to treat the whole subject together, the powers of an individual partner in relation to the name will be now considered, although it is somewhat anticipating the subject of implied powers.

[1] Wood *v.* Erie R. R. Co. 72 N. Y. 196; 28 Am. Rep. 125 (aff'g, 9 Hun, 648).

[2] Pollard *v.* Brady, 48 N. Y. Superior Ct. 476.

[3] Sparrow *v.* Kohn, 109 Pa. St. 359.

[4] Thompson *v.* Gray, 11 Daly, 183.

[5] Gay *v.* Seibold, 97 N. Y. 472; 49 Am. Rep. 533; Kent *v.* Mojonier, 36 La. Ann. 259.

[6] Lane *v.* Arnold, 13 Abb. New Cas. 73.

[7] Stoddart *v.* Key, 62 How. Pr. 137; Succession of Bofenschen, 29 La. Ann. 711.

[8] Hazard *v.* Caswell, 93 N. Y. 259 (rev. 14 J. & Sp. 559). For the right to use the name after death or other dissolution, see Good Will.

§ 199. Cannot bind the firm by wrong name.— The general principle is that a partner cannot bind the firm in a name other than its adopted style.[1] The firm is not to be charged by having contracts in all sorts of names unloaded upon it. The risk is sufficiently great when a partner is enabled to charge the firm in the adopted name without increasing the hazard; and an act even within the scope of the business is not necessarily binding on the firm, unless its name is used; and if any other name is used without specific authority to do the act in question, there must be proof that a partnership act was understood by the party crediting the firm, and with such proof there must be decisive evidence that the firm got the benefit of the contract, in order to hold it for the consideration.

The doctrine that a bill on the firm can be accepted by one partner in his own name stands on the ground that the word "accepted" was at common law sufficient without signature, the addition of the partner's name merely authenticating the acceptance; and even this doctrine is not universal.[2]

[1] Coote *v.* Bank of U. S. 3 Cranch, C. C. 95; Kirby *v.* Hewitt, 26 Barb. 607; Ostrom *v.* Jacobs, 9 Met. 454; Norton *v.* Thatcher, 8 Neb. 186; Crouch *v.* Bowman, 3 Humph. 209; Markham *v.* Hazen, 48 Ga. 570; Kirk *v.* Blurton, 9 M. & W. 284; 12 L. J. Ex. 117; Gordon *v.* Bankstead, 37 Ill. 147; Tilford *v.* Ramsey, 37 Mo. 563, 567; Palmer *v.* Stephens, 1 Den. 471; Moffat *v.* McKissick, 8 Baxter, 517; Royal Canadian Bank *v.* Wilson, 24 Up. Can. C. P. 362. And see McLinden *v.* Wenthworth, 51 Wis. 170, where, however, the payee knew of the want of authority; Heenan *v.* Nash, 8 Minn. 407.

[2] See § 441. In Marshall *v.* Colman, 2 Jac. & W. 266, 267–8, Lord Eldon said that if the agreed firm name was A., B., C. & D., it was a breach of covenant for a partner to sign A. & Co., or A. for self and partners, because it cannot be known who are the & Co. from such signatures, and the other partners can have no injunction or dissolution for such cause. In Kirk *v.* Blurton, 9 M. & W. 284; 12 L. J. Ex. 117, where the firm name was John Blurton, a bill signed John Blurton & Co. was held not to bind the firm. In Royal Canadian Bank *v.* Wilson, 24 Up. Can. C. P. 362, a draft drawn on Wilson, Moul & Co. and accepted in that name by one partner, when the firm name was J. S. Wilson & Co., and the above name was not adopted until two months later, was held not to bind the firm; the partner had signed for his private purposes.

It may be stated, as a general principle, that a firm is not liable upon mercantile paper, unless it purports to bind the firm, either by the use of the individual names or the firm name.[1] But a bill on the firm in the wrong name and accepted in the right name is binding;[2] and a bill drawn by a firm and issued by its successor in business, under a changed name, after the death of one partner, binds the new firm.[3]

A receipt by a partner in his own name in relation to the joint business binds the firm.[4]

§ 200. **Individual names instead of firm name.**— We have elsewhere seen that a note signed by each partner, if made for a partnership purpose, binds the firm.[5] So a single partner who, instead of signing the name of the firm which represents all the members, signs the individual names represented, binds the firm the same as if he had used the representative name. This is true in case of conveyances, and is true in case of executory contracts creating a liability, provided the firm received the benefit of the consideration or if the firm has no name. Further than this the cases do not yet seem to go; and it must be remembered that he binds them jointly and not severally, for no partner is the several agent of each member.[6]

[1] See §§ 436–454.

[2] Lloyd *v.* Ashby, 2 B. & Ad. 23; Carney *v.* Hotchkiss, 48 Mich. 276.

[3] Usher *v.* Dauncey, 4 Camp. 97.

[4] Willet *v.* Chambers, Cowp. 814; Brown *v.* Lawrence, 5 Conn. 397, where one partner receipted in his own name for notes to be collected and the proceeds credited on the bailor's debt to the firm; Tomlin *v.* Lawrence, 3 Moo. & P. 555, a draft by a partner in his own name on a debtor of the firm, accepted by the debtor, firm cannot sue until after the draft has been dishonored by the debtor; Bisel *v.* Hobbs, 6 Blackf. 479, a receipt for a quantity of corn is evidence of delivery; Byington *v.* Gaff, 44 Ill. 510, a delivery and bill of sale to one partner of a steamboat contracted to be bought by the firm.

[5] § 453.

[6] Galway *v.* Matthew, 1 Camp. 403; Norton *v.* Seymour, 3 C. B. 792; Richardson *v.* Huggins, 23 N. H. 106; Patch *v.* Wheatland, 8 Allen, 102, a mortgage of a ship; Holden *v.* Bloxum, 35 Miss. 381, a note for a purchase of goods for the firm; Crouch *v.* Bowman, 3 Humph. 209, a note for a purchase, holding that the goods must be proved to have gone to the firm's use. McGregor *v.* Cleveland, 5 Wend. 475, here notes signed by one partner in the name of F. & R. Cleveland had been ratified

In Norton *v.* Seymour, 3 C. B. 792,[1] Thomas Seymour and Sarah Ayres were in partnership as Seymour & Ayres, and Seymour signed a note in the individual names of the partners, and it was held good, WILDE, C. J., saying: "The note was signed in the names of Seymour & Ayres with the addition of their respective Christian names;" and Maule, J., saying: "I should hesitate to say that one of two partners could not bind the other by signing the true names of both instead of the fictitious name. That, however, is not the question here." In this case, also, the firm seem to have received the consideration of the note.

§ 201. **If no name has been adopted.**—If no name has been adopted by agreement or usage it is not necessary that a partner, in order to perform a partnership act, should use the individual names of all the partners, but any name may be used by him by which an intention to bind the firm appears. Hence, if there is no adopted firm, the partner contracting or purchasing, giving a note signed in the name of himself & Co., sufficiently expresses that it is given for the firm;[2] or may use his own name alone.[3] As where a partner signed a written contract for a purchase of goods for the firm in his own name, the firm having no name, the seller may, by oral evidence, show that he intended to give credit to the firm;[4] or adopt a fictitious name, as where the acting partner gave a note signed Atlantic Furniture Co., the co-

by the other, and the note in question was signed "Frederick Cleveland and Rufus Cleveland," and while it does not appear that the firm received the consideration, it also does not appear that they had adopted any firm name. Kitner *v.* Whitlock, 88 Ill. 513, on notes; Maiden *v.* Webster, 30 Ind. 317; Nelson *v.* Neely, 63 Ind. 194; Iddings *v.* Pierson, 100 Ind. 418; Crozier *v.* Kirker, 4 Tex. 252; 51 Am. Dec. 724; Getchell *v.* Foster, 106 Mass. 42; Austin *v.* Williams, 2 Oh. 61 (*dictum*); *Ex parte* Buckley, 14 M. & W. 469; 1 Ph. 562; s. c. as *Ex parte* Clarke, De Gex, 153; *Ex parte* Stone, L. R. 8 Ch. App. 914; *Re* Warren, 2 Ware, 322; *Re* Thomas, 17 Bankr. Reg. 54; 8 Biss. 139.

[1] s. c. 16 L. J. C. P. 100; 11 Jur. 312 (1847).

[2] Austin *v.* Williams, 2 Oh. 61; Aspinwall *v.* Williams, 1 id. 84; Kinsman *v.* Castleman, 1 Mon. (Ky.) 210; Drake *v.* Elwyn, 1 Caines, 184; Brown *v.* Pickard (Utah), 9 Pac. R. 573.

[3] Sage *v.* Sherman, 2 N. Y. 417.

[4] Getchell *v.* Foster, 106 Mass. 42. It must not be forgotten that if there is a firm name a partner cannot cast his own loans made in his own name upon the firm by declaring they are for the firm. Uhler *v.*

partnership, though not having concurred in the name, are bound by the note.[1] Or if goods for the firm are sold and charged and invoiced to one partner & Co., it is a partnership debt, though no note was given.[2]

But if the partners have a name, no such liberty can be taken without an assent or habit; hence, if a firm has adopted the name of John Blurton, one of the partners, a bill or indorsement by the other partner in the name of John Blurton & Co. is not binding on the firm in the hands of an indorsee.[3] Hence, a note or obligation in the name of one partner is his individual debt.[4]

Browning, 28 N. J. L. 79; Dryer *v.* Sander, 48 Mo. 400; nor bind the firm on negotiable paper in his own name, nor upon a chattel mortgage, Clark *v.* Houghton, 12 Gray, 38; Seekel *v.* Fletcher, 53 Iowa, 330, a sale to two as partners and purchase money note signed by one, but intended and accepted as binding both. In Drake *v.* Elwyn, 1 Caines, 184, the persons Elwyn and P. Whittaker and S. Whittaker were sued upon a note signed Elwyn & Co.; their business was sometimes called Whittaker's Store, sometimes Elwyn's Store and sometimes Elwyn's & Whittaker's Store. It was held that, as the signature imported a partnership, and it being proved that the defendants were partners, the doubt being as to the name, it is to be presumed that Elwyn & Co. was the name of the firm, so as to cast on the defendants the burden of proving what it was if a different name existed. In Barcroft *v.* Haworth, 29 Iowa, 462, it was said that if it was intended to bind the firm, any signature would suffice, and the firm name need not be used; and therefore, where two partners signed and a third assented, a fourth partner may be shown to be bound by proof of intention to bind the firm and credit given on the faith of this intention. But in this case it was clear that there was no firm name, and I submit that the case can only be sustained for that reason or in case the firm got the benefit of the note.

[1] Holland *v.* Long, 57 Ga. 36, 40.

[2] Crary *v.* Williams, 2 Oh. 65. And see Baring *v.* Crafts, 9 Met. 380.

[3] Kirk *v.* Blurton, 9 M. & W. 284; 12 L. J. Ex. 117. In this case, Drake *v.* Elwyn, 1 Caines, 184, *supra*, was cited in argument, and Baron Alderson said that doubt was not intended to be thrown upon that decision.

[4] In Haskell *v.* Champion, 30 Mo. 136, where B. F. C. Champion, a member of Champion & Co., signed a note in his own name, B. F. C. Champion, and after procuring indorsers on it added "& Co." to his signature, the indorsers were held to be released. It was said on page 139 that had the note been for a debt due by Champion & Co. it does not follow that they would not have been liable, for a partner can no more, by misnaming his firm, obtain an advantage than individuals. The only proper explanation of this *dic-*

§ 202. ——**immaterial deviation from true name by assent.**— The doctrine is further limited in that if a name is used varying from the true designation in so slight a way that the deviation appears casual rather than intentional, it may be left to the jury to say whether there was any substantial difference.

The leading case upon this is Faith *v.* Richmond, 11 A. & E. 339; 3 P. & D. 187 (1840), where three partners, Richmond, Barbour and Hannay, carried on business under the name of "The Newcastle & Sunderland Wall's End Coal Co.," and Richmond signed a note "For the Newcastle Coal Co., William Richmond, Manager." Lord Denman left it to the jury to say whether or not the style used was one which, though slightly varying from that of the firm, was essentially the same, and a verdict for the defendant was upheld, there being no authority to make this specific note or to use such name. It is possible that a verdict for the plaintiff would have been set aside, for in Kirk *v.* Blurton, 9 M. & W. 284; 12 L. J. Ex. 117, where Blurton and Habershon were partners under the name of John Blurton, and Habershon drew a bill in the name of John Blurton & Co., payable to their own order, and indorsed it John Blurton & Co.— probably for his own use — the bill and indorsement were held not binding, Rolfe, B., saying the implied authority of a partner is to bind in the name of the partnership only, and it is better to adhere to this rule and not to measure deviations. And Alderson, B., said: "In those cases where the question has been left to the jury, it has been whether there was substantially any difference between the signature and the name of the partnership. For instance, if the signature were Coal & Co. and the true designation of the partnership were Cole & Co., it would no doubt be for the jury to say whether it was in substance the same." Yet Martin, B., in 5 H. & N., 517, thinks that it should have been left to the jury to say whether John Blurton and John Blurton & Co. are not substantially the same. So where a firm's name is Charles G. Ramsey & Co. and a partner signed a note Chas. G. Ramsey & Co., it will be left to the jury to say whether there is any substantial difference between the name and signature.[1] Where the name of a firm is John Winship, firm

tum is that the firm would be liable upon the original consideration and not upon the paper. See § 440.

[1] Tilford *v.* Ramsey, 37 Mo. 563, 567; Kinsman *v.* Dallam, 5 Mon. (Ky.) 382. And see Mifflin *v.* Smith,

paper for a loan signed in the name of John Winship, Jr., was held binding;[1] and where a firm's name was Elias Malone, and the managing partner signed a note for a loan, "Elias Malone & Co., Still House," to distinguish it from his individual paper, the deviation was regarded as immaterial, but the firm got the benefit.[2]

§ 203. **Other name by assent.**— If there is a habit or assent of the firm or of the managing partner shown to use another than the agreed name, either generally or for particular purposes, such use of the name by one partner binds the firm.[3]

§ 204. **Particular authority executed in wrong name.**— If a partner is authorized by his firm to make a particular note or bill, and does so in a wrong name or in his own name, a person taking the paper on the credit of the firm is entitled to treat the transaction as by the firm in such name.

In Reimsdyk *v.* Kane, 1 Gall. 630, a partner was authorized to draw on a particular house to take up money, and did so, but signed his own name, directing the bill to be charged to account of the firm, and it was held that equity would enforce it against all in favor of a payee who had trusted the joint credit, and the bill would be deemed guarantied as to acceptance and payment by the firm.

17 S. & R. 165, where the agreed name was Nathan Smith, and the contract was signed N. Smith, but the business was done in the latter name.

1 Winship *v.* Bank of U. S. 5 Pet. 529. No notice was taken of this point in the case.

2 Moffat *v.* McKissick, 8 Baxter, 517.

3 Williamson *v.* Johnson, 1 B. & C. 146; 2 D. & R., 281 (explained as resting upon this ground in Faith *v.* Richmond, 11 A. & E. 339; 3 P. & D. 187), where the managing partner of Habgood & Co. was in the habit of indorsing in the name of Habgood & Fowler, a former firm. Mellendy *v.* New Engl. Prot. Union, 36 Vt. 31, where the name of the New England Protective Union, Division 172, a name always used before the world, was in giving notes always signed merely "Div. 172." Mifflin *v.* Smith, 17 S. & R. 165, where the agreed name of a firm, consisting of an ostensible and a dormant partner, was Nathan Smith, but the business was carried on in the name of N. Smith. Palmer *v.* Stephens, 1 Den. 471, where a clerk signed a note G. Stephens, where the firm name was G. Stephens & Sons; this was said to be valid if all the members had assented to the use of such name, or it may be if the managing partner assented, otherwise not. Folk *v.* Wilson, 21 Md. 538, where firm's notes in the name of one partner had been recognized.

So in Farmers' Bank *v.* Bayless, 41 Mo. 274, 287, it was said by Holmes, J., that if the firm authorized a note it might be its note by one name as well as by another, and was a loan to the firm, but the burden of proof of this was on the plaintiff.

So in Morse *v.* Richmond, 97 Ill. 303 (aff. 6 Ill. App. 166), where a partner holding the title to real estate was authorized to borrow, and signed his own name as "trustee."

§ 205. Credit to firm under a wrong name.— If a wrong name was used in the exercise of a proper power, and the firm received the benefit of the act, and the other party gave credit to the firm, believing himself to be dealing with it, the partners are liable on the original consideration.

In Bacon *v.* Hutchings, 5 Bush, 595, D. & D. dissolved and shortly afterwards formed with H. and W. a new firm of H., D. & Co., and in order to raise money a bill was drawn without D.'s knowledge in the name of D. & D., indorsed by H., and the new firm got the proceeds and the transaction was entered on its books. The new firm was held liable on the draft, on the ground that in the exercise of the power to make bills to carry on the business, whether the firm style or some other style is used, does not change the rights of creditors or responsibility of the partners.[1]

But this principle will not apply where the promise is that of the individual and does not purport to be a partnership act, no firm name of any kind being used;[2] else he might cast upon the firm a loan made on his own note by declaring it to be for the firm.[3] Nor if the note is under seal.[4] And if

[1] This case should have been decided on the ground that the firm was liable on the original consideration and not on the paper, a distinction which the court recognized in Macklin *v.* Crutcher, 6 Bush, 401. Barcroft *v.* Haworth, 29 Iowa, 462; Farmers' Bk. *v.* Bayliss, 41 Mo. 274, 287, given more fully elsewhere in this chapter, may also be regarded as illustrations of this rule, as may also the cases under § 451. Gage *v.* Rollins, 10 Met. 348, 354; Weaver *v.* Tapscott, 9 Leigh (Va.), 424. And see Miner *v.* Downer, 19 Vt. 14; 20 id. 461.

[2] §§ 436-447; Goldie *v.* Maxwell, 1 Up. Can. Q. B. 424, a note in individual name for partnership purposes; s. p. *Re* Herrick, 13 Bankr. Reg. 312; Strauss *v.* Waldo, 25 Ga. 641. See Butterfield *v.* Hemsley, 12 Gray, 226.

[3] Uhler *v.* Browning, 28 N. J. L. 79.

[4] § 438; Harris *v.* Miller, Meigs (Tenn.), 158; 33 Am. Dec. 138; Williams *v.* Gillies, 75 N. Y. 197 (rev. 13 Hun, 422); Patterson *v.* Brewster, 4 Edw. Ch. 352, 355; U. S. *v.* Astley, 3 Wash. C. C. 508.

the articles provided that A., of A. & Co., shall furnish all the funds and shall provide them by his individual note, on which he alone shall be liable, he alone is liable on the note signed by him, though he declare that it binds the firm.[1]

So where a partner orders goods for the firm in the name of S. & Co., instead of the firm name, H. & S., this is only evidence tending to show that no contract was made with H. & S.[2]

If there had been two different firms a note in the name of one cannot be sued on as that of the other.[3]

§ 206. Where the partners are plaintiffs.— A promise may be made to one partner with the intent that the firm shall be beneficiary of the contract. In these cases all the partners may sue upon it; and so if one partner misappropriates the joint property, or makes a contract in regard to it, all the partners may sue.[4]

[1] Dryer *v.* Sander, 48 Mo. 400.

[2] Hancock *v.* Hintrager, 60 Iowa, 374.

[3] Miner *v.* Downer, 19 Vt. 14; 20 id. 461, and § 196.

[4] See under Remedies.

PART II.

CONDUCT OF THE BUSINESS.

CHAPTER I.

ARTICLES OF PARTNERSHIP.

§ **207.** The contract between the partners is the guide to their powers, rights, duties, and, except as modified by the apparent scope of the business, of their liabilities. Hence the importance of carefully anticipating and providing against possibilities of dispute. This contract is never deemed to contain all the rules for guiding conduct on the principle of *expressio unius est exclusio alterius*, but to be an enumeration of those as to which the law is silent or as to which it is desired to alter usual legal rules.

§ **208. Statute of frauds.**— A contract of present partnership, or for the transfer of a share in one, need not be in writing under the statute of frauds.[1] Yet where it appeared that the contract could not be performed within a year it was held void.[2] And if the contract in terms is for a partnership for more than a year, the statute of frauds was held to apply.[3] And so if the contract be to procure the admission of a person into a firm, and is not to be performed

[1] *Re* Great Western Tel. Co. 5 Biss. 363; Smith *v.* Tarlton, 2 Barb. Ch. 336; Coleman *v.* Eyre, 45 N. Y. 38. Certainly so where the enterprise may be completed within a year. Jordan *v.* Miller, 75 Va. 442. And if formed in a state where it must be written, but is to be executed in a state where this is not required, an action for an account cannot be defeated in the latter state for such reason. Young *v.* Pearson, 1 Cal. 448.

[2] Jones *v.* McMichael, 12 Rich. L. 176.

[3] Morris *v.* Peckham, 51 Conn. 128; Williams *v.* Jones, 5 B. & C. 108. But see McKay *v.* Rutherford, 13 Jur. 21.

within a year, it must be proved by writing;[1] or for a partnership not to begin within a year.[2]

On an oral contract to sell half of a patent right, and to go into partnership for more than a year with the buyer, a mere written assignment of the half of the patent is not a memorandum of the partnership, nor is it performance.[3]

§ **209.** A verbal contract of partnership for more than a year, if acted upon, and business conducted under it, is valid. As where a person leased his hotel to another in writing, and then really formed a ten-year partnership with him, the rent to be payable out of the profits, the fact of a partnership between the parties can be shown as a defense to an action at law for the rent.[4]

Where a partnership to work a mine was formed orally, and two of the partners entered upon and worked it, a purchase of the property by a third partner was held to inure to their benefit, the statute of frauds not applying because of performance.[5]

So where C., on buying a third interest in a stage company, agreed that S. should have half his interest, part of the consideration being the extinguishment of a debt due by C. to S., and thereupon all the partners entered into written articles in which S. & C. were described as owners of a third interest, and to share in the profits, thus recognizing S. as an owner, it was held that all the delivery possible had been made by C. to S.[6]

[1] Whipple *v.* Parker, 29 Mich. 369.

[2] Williams *v.* Jones, 5 B. & C. 108, 110. For the subject of the statute of frauds as applied to real estate, see § 301. In Huntley *v.* Huntley, 114 U. S. 394, the query was raised whether the sale of a share in a partnership was a contract for the sale of goods, wares or merchandise of the value of £10 or upwards. But in Coleman *v.* Eyre, 45 N. Y. 38, an oral contract to take a share in the interest of one who was jointly interested with others in a shipment, and to share profits and losses, was held not to be a contract of sale within the statute of frauds, but an agreement to share profits and losses founded on mutual promises.

[3] Morris *v.* Peckham, 51 Conn. 128.

[4] Pico *v.* Cuyas, 47 Cal. 174. See, also, Baxter *v.* West, 1 Dr. & Sm. 173; Williams *v.* Williams, L. R. 2 Ch. App. 294; Burdon *v.* Barkus, 4 DeG. F. & J. 42; Gates *v.* Fraser, 6 Ill. App. 229; Southmayd *v.* Southmayd, 4 Montana, 100; Burn *v.* Strong, 14 Grant's Ch. (Up. Can.) 651.

[5] Burn *v.* Strong, 14 Grant's Ch. (Up. Can.) 651.

[6] Huntley *v.* Huntley, 114 U. S. 394.

§ 210. Oral evidence.— We will first consider some general rules of construction of the articles and then proceed to consider the most important of what are termed the usual clauses. The application of oral evidence to the articles is like that in case of any other written contract; all prior negotiations are merged in the writing, and it cannot be contradicted or varied by oral agreements except to the extent that it imports a receipt.

Thus, articles by which a sale by an existing firm to an incoming partner of half of their business and half of a contract of articles for future delivery, merges a parol guaranty that the articles would sell at a stated price.[1] An agreement in the articles that one partner shall pay in his agreed capital when needed cannot be shown by parol not to be payable until the other partner's contribution was all in.[2] But a recital in the articles that each has paid in so much of his share of capital is no estoppel and may be explained or even contradicted, like any other receipt.[3]

§ 211. Altered by conduct and construed by practice.— As any written contract, no matter how stringent, may be superseded or qualified by subsequent oral contract, so any part of the partnership articles may be varied or rescinded by the consent of all the partners, and such consent may be shown by a course of conduct or established and uniform usage.[4]

But property rights are not to be deemed as affected by mere intendment, as where the share of a partner dying may be bought at the last semi-annual valuation and the partners afterwards take their accounts yearly by agreement, yet on death the share must be reckoned up to what would have been the last semi-annual settlement.[5]

[1] Evans *v.* Hanson, 42 Ill. 234.

[2] Reiter *v.* Morton, 96 Pa. St. 229, 241.

[3] Lowe *v.* Thompson, 86 Ind. 503.

[4] Const *v.* Harris, Turn. & R. 496, 517; Coventry *v.* Barclay, 3 D. J. S. 320, on app. fr. 33 Beav. 1; England *v.* Curling, 8 Beav. 129; Pilling *v.* Pilling, 3 DeG. J. & Sm. 162; Hall *v.* Sannoner, 44 Ark. 34; Boisgerard *v.* Wall, Sm. & Mar. Ch. 404; McGraw *v.* Pulling, 1 Freem. (Miss.) Ch. 357; Thomas *v.* Lines, 83 N. Ca. 191; Henry *v.* Jackson, 37 Vt. 431.

[5] Lawes *v.* Lawes, 9 Ch. D. 98.

Thus, if the parties agree that no one of them shall draw or accept a bill of exchange in his own name without the concurrence of all the others, yet if they afterwards slide into a habit of permitting one of them to draw or accept bills without the concurrence of the others, the court will hold that they have varied the terms of the original agreement in that respect.[1] So if the articles forbid sales on credit, but were violated constantly by one partner with the concurrence and acquiescence of the others,[2] or where the salary of the active partner was fixed at $1,000, and after a great increase in the business and changes in the firm the salary was charged on the books at the rate of $5,000, a settlement on this basis will not be disturbed.[3] And where the partners were to contribute to profits and losses in certain proportions, but the manager had received shares of profits but never had been required to contribute to losses, the articles are qualified and no longer bind him in this respect.[4] Where the articles of partnership between attorneys excluded the pending business of the partner who took the other into partnership, but the former allowed the latter to prepare and argue the old cases and make charges as to them on the books of the firm, this acquiescence will prevent his claiming that the fees are not a partnership demand.[5]

§ 212. —— **provisions not acted on.**— So a provision in the articles that has never been acted upon will be regarded as expunged. Thus, in Jackson *v.* Sedgwick, 1 Swanst. 460, it was agreed that annual settlements should be had, and in case of death an allowance to the representatives in lieu of profits, since the last annual account, should be made; but no accounts were taken for several years and other business was engaged in, to which the agreement could not be applied with justice, it was regarded as waived.[6] So

[1] Per Lord ELDON, Const *v.* Harris, Turn. & R. 496, 523; Gammon *v.* Huse, 100 Ill. 234.

[2] Hall *v.* Sannoner, 44 Ark. 34; Dow *v.* Moore, 47 N. H. 419.

[3] Gage *v.* Parmalee, 87 Ill. 329.

[4] Geddes *v.* Wallace, 2 Bligh, 270.

[5] Thrall *v.* Seward, 37 Vt. 573. Other examples occur where the articles provide that the capital or property shall beloug to one or some of the partners exclusively, but the subsequent purchases of permanent property are credited to such partners on the books, thus making it the property of the firm. See §§ 56, 59.

[6] And see Simmons *v.* Leonard, 3 Hare, 581.

in Boyd *v.* Mynatt, 4 Ala. 79, where the partnership was unsuccessful because the complainant had failed to furnish the capital he had agreed to contribute, this principle was applied, but without prejudice to an action at law for the breach.[1]

§ 213. —— **unanimous assent necessary.**—In order to change the articles, whether by express agreement or usage, the unanimous concurrence or consent of all is necessary.[2]

Thus, in Thomas *v.* Lines, 83 N. Ca. 191, where the will of one partner left to legatees his interest in his partnership, and it was claimed that money of the firm in the testator's drawer was not partnership property, and a tacit understanding was sought to be introduced that each partner might use funds collected by him for his personal benefit, to modify the articles, the proof was excluded as showing a mere disregard of the articles by one or more of the partners while still in force.

And if a change is proposed, even if a majority have the power to make it, notice of it and a chance to be heard should be given to all the partners, otherwise it will not bind the minority.[3]

Where the articles have once been changed, whether expressly or tacitly, the assignee of a partner, or the representatives of a deceased partner, are bound by his assent, and cannot require the firm to revert to the original provisions.[4]

§ 214. —— **suggested restriction of above principle.**— As seen by the outside world, the powers of each partner are determined by the apparent scope of the business as hereafter explained,[5] an element of which is the usage of the partners. This makes a distinction possible; a unanimous assent to a change in the articles is necessary *inter se*,

[1] *Contra*, see Smith *v.* Duke of Chandos, Barnardiston, 419; 2 Atk. 458. Livingston *v.* Lynch, 4 Johns. Ch. 573. And see § 434.

[2] Const *v.* Harris, Turn. & R. 496, 517; England *v.* Curling, 8 Beav. 129; Abbot *v.* Johnson, 32 N. H. 9; 524.

[3] Const *v.* Harris, Turn. & R. 496, 524–5.

[4] Const *v.* Harris, Turn. & R. 496, 524.

[5] § 316.

whether shown by express agreement or tacit acquiescence with knowledge; but as to the outside world, who can judge only by appearances and deal on the faith of them, the gross negligence of a partner in permitting a usage to grow up which he should have known and stopped may render him liable for contracts outside of the agreed scope of the business, though he was ignorant of them; the agreement of the articles then becomes in the nature of a secret restriction upon apparent powers.[1]

For example, where R. and L. formed a partnership to sell "fertilizers on consignment alone," which, of course, excluded the power to purchase, and R. for two years had negligently permitted L., the managing partner, to purchase fertilizers on the firm's account for resale, R. was held liable to the seller, the court saying that holding otherwise would be to reward gross negligence.[2]

§ 215. Ambiguities construed by firm's practice.— In case of ambiguity in the articles, or want of explicitness, the interpretation of the parties as shown by their subsequent conduct will be accepted as the true construction and in aid of the intent.[3]

As where an annual valuation is required to settle the accounts, and for many years it is made in a particular way and acted upon by all, the mode thus adopted cannot be disputed if the articles are silent or even if inconsistent with them.[4]

In *Ex parte* Barber, L. R. 5 Ch. App. 687, the habit of the partners was to debit bad debts to the profit and loss account of the current year when they were discovered, regardless of the year in which they were reckoned as assets; one partner died and his account was made up on the basis of the accounts of the year, and afterwards some of the accounts of that year were discovered to be uncollectible, but the executors were held entitled to the amount as first made up without deduction for the subsequently discovered loss.

In Moore *v.* Trieber, 31 Ark. 113, partners had a grocery and dry goods business. T. was a partner in the dry goods branch

[1] See § 323.

[2] Ala. Fertilizer Co. *v.* Reynolds & Lee, 79 Ala. 497.

[3] Geddes *v.* Wallace, 2 Bli. 270, 297; Beacham *v.* Eckford, 2 Sandf. Ch. 116, 120.

[4] Coventry *v.* Barclay, 3 D. J. S. 320.

only, separate books being kept, and was by the articles to receive half the cash receipts in her profits and the balance only in outstanding accounts. A custom of the firm to credit payments, first to accounts for groceries and the balance only to dry goods, never having been objected to by T., is presumed acquiesced in by her.[1]

§ 216. Continue in force if firm continues after term.— If a partnership is continued after the expiration of the time originally contemplated, or is dissolved by the retirement or addition of a partner, the business being continued, the continued partnership is deemed to be on the same terms, as far as applicable, as before, except that it becomes a partnership at will, and all the provisions of the original articles which are consistent with a continuance of the partnership at will or for a new term, if so agreed, are binding on the members.[2] Thus of provisions for compensating an active partner, not to be applicable unless profits are realized, the restriction applies to the continued firm.[3] So the arbitration clause continues in force after the expiration of the original term if the business continues;[4] and a provision that on the death of a partner before the expiration of the term the survivor could take his interest, paying £1,500 to his executor,[5] or at a valuation,[6] applies to the continued partnership; but this cannot be exercised several years after

[1] It is to be remembered that the shares of partners and the right to or liability for interest, shown upon the books to be the understanding of the firm, are as conclusively established as if in a regular contract. Stewart *v.* Forbes, 1 Hall & Tw. 461; 1 Macn. & G. 137.

[2] Cox *v.* Willoughby, 13 Ch. D. 863; Clark *v.* Leach, 32 Beav. 14 (aff'd in 1 DeG. J. & Sm. 409); Austen *v.* Boys, 24 Beav. 598 (aff'd in 2 DeG. & J. 626); Booth *v.* Parks, 1 Moll. (Irish) 465; Crawshay *v.* Collins, 15 Ves. 218; U. S. Bank *v.* Binney, 5 Mason, 176, 185; Stephens *v.* Orman, 10 Fla. 9; Frederick *v.* Cooper, 3 Iowa, 171, 183; Sangston *v.* Hack, 52 Md. 173; Blasdell *v.* Souther, 6 Gray, 149; Mifflin *v.* Smith, 17 S. & R. 165; Bradley *v.* Chamberlin, 16 Vt. 613. See Gould *v.* Horner, 12 Barb. 601.

[3] Bradley *v.* Chamberlin, 16 Vt. 613; Boardman *v.* Close, 44 Iowa, 428.

[4] Gillett *v.* Thornton, L. R. 19 Eq. 599, a statute having made this clause enforcible.

[5] Cox *v.* Willoughby, 13 Ch. D. 863, not following Cookson *v.* Cookson, 8 Sim. 529.

[6] Essex *v.* Essex, 20 Beav. 442.

the death;[1] and if partially new articles are drawn up the original bind *pro tanto.*[2]

So, where R. contributed a sum of money which L. agreed to invest in cattle, and sell them at the end of a year, on a division of profits, L. guarantying twenty per cent. to R., and R. continued to advance money for three years, all subsequent dealings will be referred to the original terms.[3]

A partnership was formed to dig for gold on one property, one partner paying all expenses; this was abandoned, and by mutual consent digging was resumed on another lot. The same terms will be presumed to govern.[4]

So if, in a partnership composed of an active and a silent partner, the active partner continues business after the expiration of the term with the assets, and without accounting, it is not a dissolution, and the silent partner will share as under the original agreement.[5]

§ **217. So of a new firm.**— The original articles may thus run through two or three changes of partnership caused by changes of members.

Thus, a right upon the death of either of three partners to take the whole business, paying his share as it appeared at the last settlement, is, after one has died and his share has been thus paid off, applicable as between the two survivors who had continued the business, upon the death of one of them;[6] and where F. & S. entered into written articles, then F. sold his interest to B., and the firm of B. & S. was formed; then S. sold out to C., and B. and C. became the partners in the concern, the original articles are deemed to be still in force.[7] And where the active partners were to receive an annual compensation, and afterwards an inactive partner sold out to a third person, who allowed the business to continue with-

[1] See Yates *v.* Finn, 13 Ch. D. 839.

[2] Austen *v.* Boys, 24 Beav. 598 (aff'd in 2 DeG. & J. 626).

[3] Robbins *v.* Laswell, 27 Ill. 365.

[4] Burn *v.* Strong, 14 Grant's Ch. (Up. Can.) 651.

[5] Parsons *v.* Hayward, 31 Beav. 199; aff'd in 4 DeG. F. & J. 474. *Contra*, as to surviving partners continuing without settlement, Foster *v.* Hall, 4 Humph. (Tenn.) 346.

[6] King *v.* Chuck, 17 Beav. 325; Robertson *v.* Miller, 1 Brock. 466.

[7] Boardman *v.* Close, 44 Iowa, 428; Sangston *v.* Hack, 52 Md. 173.

out interruption, the compensation must be allowed as under the old articles.[1]

§ 218. Clauses which do not continue.— On the other hand, a clause requiring a partner who wishes to retire, to notify the rest a certain time beforehand, is not applicable after the term has expired, for the partnership is then at will.[2]

And a penal clause that if either partner did certain things the other could dissolve and retain the business as if the former had abandoned it or was expelled was held not to continue after the original term, because the partner might justly say that he had agreed to be a partner on those terms for the agreed time, with the right to take his interest out thereafter.[3]

§ 219. Rights of third persons in.— Provisions in articles giving annuities or other rights to the decedent's widow, in case of his death, or to other persons not parties, can be enforced by them, being a trust and not a contract.[4]

But strangers, for whose benefit the articles were not made, cannot enforce provisions only incidentally advantageous to them. Thus, where the firm agree to pay one partner, when the profits reach a certain point, $2,000 per annum, of which $1,000 is to be paid to a third person, until he has received $5,000, here, though such person may, perhaps, collect his amounts as they fall due, he cannot have an action against the partners for refusing to go on with the business or for other misconduct by which the amount out of which he was to be paid was prevented from accruing;[5] yet

[1] Wilson *v.* Lineberger, 83 N. Ca. 524. A firm of two machinists agreed to pay plaintiff a commission of two and one-half per cent. on locomotives made and sold by them, for five years, in consideration of his soliciting for them, provided, that if a new partner was admitted who objected to the agreement being continued, it should become null. After dissolution a verbal continuance of the agreement was made with one partner, and the subsequent admission of another partner, who objected to it, was held to annul it, Blasdell *v.* Souther, 6 Gray, 149.

[2] Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 307; Neilson *v.* Mossend Iron Co. L. R. 11 App. Cas. 298. See Wilson *v.* Simpson, 89 N. Y. 619; Duffield *v.* Brainerd, 45 Conn. 424.

[3] Clark *v.* Leach, 32 Beav. 14; aff'd in 1 DeG. J. & Sm. 409.

[4] Page *v.* Cox, 10 Hare, 163.

[5] Greenwood *v.* Sheldon, 31 Minn. 254.

a partner who has agreed to pay an annuity out of the profits is liable in damages if he wilfully refuses to continue the business.[1]

§ 220. **Firm name.**—The general rule of law is that when a firm name has been adopted, a partner cannot bind the firm by any other name, except by using the individual names of each partner. But that if no name has been adopted, he can use his own name with "& Co." or some other representative expression. In order that it may appear beyond controversy when a partnership act is intended, it is advisable to adopt a name. It is also advisable to provide in the articles that no other than the agreed name shall be used, partly to remind the partners of this rule, and partly because an express covenant to that effect can be enforced by injunction.[2]

§ 221. **Time partnership begins.**—The date of the beginning of a partnership is a matter of importance, because the agency of each to act for all, and the right to share profits, begin then; and upon this matter may depend the question of whether preliminary purchases or other acts were authorized to be made on joint credit or were individual transactions.[3] If the time is not specified the date of the execution of the instrument will govern; and it has been held that parol evidence of a different intention is not admissible, where the language imports an absolute partnership *in presenti*.

Thus in Williams *v.* Jones, 5 B. & C. 108, W., an attorney, agreed to take J.'s son into partnership for ten years, in consideration, in writing, of £250 cash and £100 payable in two years from date. The date for the beginning of the partnership was stated. The action was by W. against J. for the £100, and the plea was *non-assumpsit*, with proof that J.'s son was not admitted to practice until six months after the date of the contract, and hence the partnership was illegal, as being between an attorney and a person not admitted. The plaintiff offered evidence that the contract was not

[1] McIntyre *v.* Belcher, 14 C. B. N. S. 654.

[2] See §§ 199, 660.

[3] This is fully considered under Inchoate Partnerships, § 80.

put in force until J.'s son was admitted; but the exclusion of this evidence was held correct, because it varied the writing, which was for a present partnership, and sought to make it conditional upon J.'s son's admission to practice, and the plaintiff was nonsuited.[1]

Where the articles provide that the partnership shall be deemed to have commenced at a preceding date, this is a bargain between the parties, but not a pledging of credit to third persons, or at most is a ratification of acts done for the benefit of as well as in the name of the firm, and does not bind an incoming partner to make good antecedent abuses of powers by a partner, of which the firm got no benefit, and by which the other partners *inter se* are not bound.[2]

So an agreement that the partnership shall be in existence from a future day, where the partners begin to act as such immediately, is, like all other secret stipulations, inoperative as to creditors.[3]

§ 222. **Duration.**— The importance of fixing the duration of the partnership results from the fact that otherwise it is a partnership at will, dissolvable at the pleasure of any member, without liability to his copartners, however ruinous the consequences to them. But the agreement for a fixed term need not be express; it may appear by implication.

Even if a definite term is agreed on, the death or bankruptcy of a partner before its completion will terminate the partnership, unless there is a specific and express provision covering these contingencies. In deciding upon the advisability of such provision, it must be remembered that, in many kinds of business, an immediate dissolution and winding up may be disastrous both to the living partners

[1] The day of delivery and not the written date is the day of execution. Holmes *v.* Porter, 39 Me. 157, of an agreement of dissolution.

[2] Vere *v.* Ashby, 10 B. & C. 288. In this case, on June 24, C. agreed to become a member of the firm of A. & B., the partnership to be considered as beginning from May 18. On May 21, B. used the firm name to raise money, which he intended to apply and did apply for his private purposes, although the lender did not know this. The lender cannot hold C. upon the paper.

[3] See Battley *v.* Lewis, 1 M. & G. 155.

and to the estate of the deceased, and that the representatives of the estate cannot safely remedy this if they would, for want of authority to hazard its assets by consenting to or permitting a continuance. Moreover the surviving partners cannot be compelled to admit the executors to a share of the management of the business, even though they have agreed upon its being continued after death, unless they have also agreed that such representative shall have such right.[1]

§ 223. **Business to be stated.**— The business or objects of the partnership ought of course to be described in the articles, because its nature and requirements are the measure of the power of each partner to bind the firm.[2]

§ 224. **Fidelity to the firm; compensation; competing.**— It is common to insert a clause requiring the observation of good faith to each other and fidelity to the common interests. This clause is of no value except as a reminder to the partners, for, as we have seen, the highest degree of good faith will be exacted without any stipulation whatever.

As fidelity to the firm requires a partner to give his time to the business, except when incapacitated, and to perform all necessary services without compensation,[3] the articles should specify to what extent any of the partners are not expected to devote themselves to the transaction of business, and what extra compensation as salary or commissions he may have in addition to his share of the profits; and so if he is to have any personal advantage in the way of commissions or profits on sales or purchases to or from the firm by, to or through him.

A reservation of a right in one partner of a professional partnership to carry on any other business, and to absent himself as he should see fit, was held to give him the right to cease business altogether and move away, and this was not abandoning the partnership.[4] Even a positive agreement to give time to the business is not broken by absence from sickness.[5]

[1] § 158.
[2] § 316.
[3] See § 770.
[4] McFerran *v.* Filbert, 102 Pa. St. 73.
[5] Boast *v.* Firth, L. R. 4 C. P. 1; Robinson *v.* Davison, 6 Exch. 269.

And for the same reason, if a partner is to be permitted to have dealings on his own account in any kind of business which is within the scope of the partnership objects, or to be a member of a competing firm, this right must be reserved, for a partner will not be allowed to compete with the partnership.[1] But such privileges, in case of doubt, will doubtless be construed in favor of the firm.

Thus, in Starr *v.* Case, 59 Iowa, 491, the articles required from each partner his entire time except time for fulfilling the duties of any office or agency held individually, and neither partner should accept or continue in office without the consent of all; this exception was construed to refer to future as well as existing offices, and the word "held" was not confined to existing positions.

If a partner holds an office, the emoluments of it belong presumably to him and not to the firm.[2] Hence it is desirable, that doubt may be avoided, to specify whether the salary is to belong to the firm or not.

§ 225. **Books and accounts.**— The duty of each partner to keep accurate accounts of his own transactions always ready for inspection has been elsewhere noticed.[3] And the great importance of keepiug books will be hereafter treated. The duty of keeping the books at the place of business, accessible to each party, is implied as matter of law. Nevertheless, it is advisable to provide against their removal, since it is certain that a breach of an express covenant to that effect will be prevented by injunction.[4]

In order to show the condition of the firm and the account of each partner with the firm, it is usual to agree that periodical settlements of the accounts be made, showing the assets and liabilities of the firm and the balances in favor of or against each partner, and an ascertainment and division of profits. Such accountings, after the acquiescence of all the partners, are presumptively correct, and can only be attacked on affirmative proof of error. But it may conduce to the welfare of the partners to close this source of objection, unless availed of within a reasonable time, and for that

[1] § 306.
[2] See § 269.
[3] § 313.
[4] § 314.

purpose a clause is often inserted that the periodical statements shall be conclusive upon the partners, unless errors are found and objected to within a given time. No accounts are binding upon a partner if his acquiescence, or signature when signing is required, was obtained by fraud, deception or concealment.[1]

§ 226. Capital.— It is of importance to specify what is to be regarded as capital, and if it be contributed in goods their value ought to be agreed upon, so that upon dissolution the amount due each as capital shall not be in dispute, and that in case profits are to be divided in proportion to capital the ratio may be obvious. If the capital is to bear interest this must be stated, for otherwise it will not.[2] If the use alone of property as distinguished from the property is contributed, this should be made clear. And where the use consists of a leasehold for a term longer than the partnership term, or consists of a good will or of a patent right or trade secret, the benefit of which, after the expiration of the partnership, is to belong exclusively to the partner who contributed it, it is particularly important to show this. If one partner is to have a right to increase his capital, this must be stated; and if accumulated profits are to be left in as capital, this must be stated, otherwise they are mere deposits.[3] If payments of contributions to capital or other acts are conditions precedent to the existence of the partnership, this should be stated.[4]

§ 227. —— real estate.— It should appear whether real estate in the name of one partner becomes joint property or

[1] §§ 959, 961.

[2] § 781.

[3] § 255.

[4] An agreement in the articles of a planting partnership that one partner would "advance" to the firm mules, implements and supplies, was construed to mean free of cost, but the mules and implements remained his property, and the supplies consumed in the use were to be reimbursed to him out of the crop. Nichol *v.* Stewart, 36 Ark. 612. If a partner contributes the use of a mill, machinery, etc., the firm is not bound to leave it in good repair at dissolution. If the articles provide that additions are to be paid for by him and repairs by the firm, as to what are additions and repairs, see Dunnell *v.* Henderson, 23 N. J. Eq. 174.

whether its use only is contributed; and if the former, whether the partners hold as tenants in common or whether it is assets; the general American rule being that the surplus of partnership real estate, after all debts and copartners' claims are satisfied, is no longer personalty but descends as real estate. If an out and out conversion into personalty is intended, so that the surplus shall go to the personal representatives and not to widow and heirs, this should be stated.[1]

§ 228. **Division of profits.**— The articles ought to state the proportion in which profit and loss should be divided; the amount of earnings to be held back, if any; the periods of computation and division, and, as far as possible, the method of ascertainment. We have elsewhere seen that there is a presumed equality in shares if the articles are silent; but this presumption is not irresistible and may be overthrown by construction; hence is a further necessity for explicit statement.

If the articles are silent as to the period of division, it does not follow that the profits are, by agreement, to accumulate until the end of the term, but may be divided from time to time as the partners may decide.[2] But this is a matter within the control of the majority, and, to prevent dispute, especially if the number of partners is even, should be declared in advance by stipulation.

Where partners in a mill were in the habit of dividing the grain received as toll as it was received, this usage is evidence of an agreement to that effect, and one partner cannot require the other to let the grain accumulate in order to pay a debt of the firm, or prevent the other taking possession of his share.[3] And where some of the partners claimed that a settlement was to be had but once a year, it was held that another provision by which such parties could pay out plaintiff's share at a certain amount within six months showed that a more frequent settlement was intended.[4]

1 § 297.

2 Kennedy *v.* Kennedy, 3 Dana, 239.

3 In Carrithers *v.* Jarrell, 20 Ga. 842. But it will be observed of this case that the question was of the right to take possession of an article rather than to insist upon a division.

4 Wood *v.* Beath, 23 Wis. 254, 260.

In Parnell *v.* Robinson, 58 Ga. 26, a firm for the storage and sale of cotton had, for ten or twelve years, a quantity of cotton for which no owner had appeared. After the death of one partner the surviving partner sold it. The court required him to account for a share of the proceeds with the administrator, because the possession had been joint, and the estate would be liable to the true owner; but, to protect the survivor, the court ordered the administrator to hold the fund for a reasonable time, viz., twelve months, and advertise for the owners.

§ 229. —— **meaning of profits.**— Profits, pure and simple, is the advance obtained in sales beyond the cost of purchase, orthe excess of the value of returns over the value of advances.[1]

The meaning of profits as distinguished from capital is illustrated in Fletcher *v.* Hawkins, 2 R. I. 330. There H., a member of a mining association, whose shares were $300, procured his $300 from F., to whom he agreed to pay one-fourth of the profits. H. sent out a man in his place on the expedition, the substitute agreeing to pay over to H. half his profits. The association was to divide profits over and above capital once a year, but dissolved before beginning, each man agreeing to work by himself for the member who sent him. H.'s substitute sent back $300 worth of gold, which H. receipted for as half the proceeds of their engagement. It was held that H. was not liable to pay F. part of this, because it is not profits, not being in excess of capital. The substitute is bound to account for H.'s capital as well as for profits, and this is an accounting, and H.'s receipt does not estop him. The word profits in the ordinary sense, legal and mercantile, being the excess over capital, and was used in that sense in the articles, and though a hard bargain for the plaintiff, the burden is on him to show that his contract required a different meaning to be given to the word.

So in Leach *v.* Leach, 18 Pick. 68, the articles required T. to furnish $20,000 as capital, and J. to manage the business and keep the stock at its original value out of the proceeds of sales, the profits to be equally divided, and on dissolution T. was to receive back $20,000 in the stock remaining, losses by bad debts, decay of goods and inevitable accidents excepted. The proper construction is not that bad debts are to be deducted out of the

[1] See Doane *v.* Adams, 15 La. Ann. 350; Shea *v.* Donahue, 15 Lea, 160.

capital but out of the profits; there would be no profits unless there is a surplus after keeping the capital unimpaired, otherwise the profits would not be equally divided; and the phrase "losses by bad debts, etc., excepted" means that if there are no profits and the capital is reduced, then this provision is to be applied.

Expenses in permanent improvements are really additions to capital, or, if it be not intended to increase the capital, should be paid for out of the capital and not out of the profits.

Thus, in Braun's Appeal, 105 Pa. St. 414, one partner was to receive a percentage of the "gross income." The partners, in order to put their establishment, a mill, in running order, made improvements beyond ordinary repairs, which increased the capacity of the mill and added to its permanent value. It was held that these expenses were not to be deducted in reckoning profits, but must be regarded as capital.

So in Squires *v.* Anderson, 54 Mo. 193, where one partner furnished land to be cultivated, and the necessary money, and the other the labor, the land remaining the property of the former, he is to be charged with all permanent improvements paid for with partnership funds, but not with the increased value of vines due to their growth during the term which were upon the firm at the formation of the partnership. This incidental growth was not intended to be considered.[1]

In a partnership in a land speculation, where one partner furnishes all the funds and the other does the work, and profits, deducting expenditures, are to be divided, the profits are the value of the land, whether ascertained by resale or by valuation, deducting cost and incidental expenses.[2]

§ 230. —— net profits.—The term net profits means, in effect, the same thing as profits, and the term gross profits

1 We shall elsewhere see that capital or unsettled balances do not bear interest, and hence profits are not to be reduced on that account. §§ 781, 786. In Dunlap *v.* Odena, 1 Rich. (S. Ca.) Eq. 272, A., owning a business in which he worked and employed two hands, agreed to pay plaintiff one-third of the net profits in consideration of plaintiff's going security for him for the original purchase of the business. Here it was held he could credit himself with his own labor and that of his two hands before reckoning profits.

2 Proudfoot *v.* Bush, 7 Grant's Ch. (Up. Can.) 518.

is a solecism, although it has been used by political economists as representing the total difference between the values of advances and returns, in contradistinction to net profits, as meaning only that part of such amount as can be attributed solely to capital. Gross returns are returns without deduction for losses or capital.

The term net profits is illustrated in Welsh *v.* Canfield, 60 Md. 469. The articles of partnership provided that each partner should be entitled to a stated proportion of profits, W.'s share being one-eighth, and should bear losses in the same proportion. Another article provided that if the net profits in any one year should be so small that W.'s portion should not amount to $2,500, his account should be credited with enough to make up that sum. Heavy losses having occurred, W. claimed that he was chargeable with them only to the extent of diminishing his yearly profits down to $2,500. But the other partners claimed that their obligation to make up to W. a deficiency in profits was limited to $2,500, and if after this there still remained a loss, he was responsible for one-eighth of it. It was held that the latter of the above articles applied in case the net profits did not divide to W. $2,500 to indemnify him for the loss he otherwise would bear under the former article, and that he was entitled to any sum necessary to give him a net profit of $2,500. Because to credit him with a sum as *net* profits, and then charge him with a loss that not only eats it up but inflicts an absolute loss beyond, is not giving him a net gain, but only giving the benefit of a certain sum which it would be a misnomer to call *net*. That he is to be "credited" instead of paid makes no difference. The term is appropriate in relation to a current business where a credit may be absorbed by a debt.[1]

[1] Salaries of partners are part of the expenses, to be deducted before an employee's share of net profits is to be computed. Fuller *v.* Miller, 105 Mass. 103. So are losses by fire. Gill *v.* Geyer, 15 Oh. St. 399; Meserve *v.* Andrews, 106 Mass. 419; and see next section. So if one partner guaranties to the other $10,000 profits the first year, notwithstanding losses to any extent, and no profits were made, this means that the former's share shall be $10,000, and not that the whole profits shall be $10,000, which would give him but $5,000. Grant *v.* Bryant, 101 Mass. 567; Dumont *v.* Ruepprecht, 38 Ala. 175. But if a partner is to get half the crop after all supplies which he had furnished were paid, the payment is not to be out of the other's share, but before division. Nichol *v.* Stewart, 36 Ark. 612.

§ 231. —— **losses.**— There is another very important observation to be made in this connection. Where one partner furnishes all the capital, and the other his skill and labor only, as the capital belongs to the firm, a loss of it falls upon all the partners and not upon the one furnishing it alone. If the partner who furnishes labor only is to risk the loss of that alone, and is not in addition to become indebted for impairment of capital, it must be so expressed in the articles.

If, however, the partners are such in profits alone, and the stock, plant or other property out of which earnings are made remains the property of one partner alone, a loss of it is not a loss by the firm.[1] Even in the latter case, if the course of dealing has shown that the net profits alone are to be divided, a loss of stock by fire must be deducted before estimating profits, whether the other associate be a partner or an employee.[2] But if one partner furnishes the capital, and not the mere use of property, loss by fire is like a loss by bad debts, to be borne by all;[3] and insurance of it is part of the expenses of the business.[4]

§ 232. **Restrictions on ordinary powers.**— If the ordinary powers of a partner are to be restricted, as the right to draw checks or bills and make notes or accept drafts, this must be specified in the articles; and even then it does not bind third persons who have no notice of the restriction.[5] And the same is to be said of the not uncommon agreement

[1] Whitcomb *v.* Converse, 119 Mass. 38, 43; 20 Am. Rep. 311.

[2] Gill *v.* Geyer, 15 Oh. St. 399. And see Meserve *v.* Andrews, 106 Mass. 419.

[3] Carlisle *v.* Tenbrook, 57 Ind. 529; Taft *v.* Schwamb, 80 Ill. 289; Savery *v.* Thurston, 4 Ill. App. 55; Gill *v.* Geyer, 15 Oh. St. 399; Meserve *v.* Andrews, 106 Mass. 419.

[4] Livingston *v.* Blanchard, 130 Mass. 341. This subject is treated more fully under Winding-up, §§ 813–819.

[5] Where one partner was to furnish all the capital, payable in such sums as may be drawn for by the operating agent, to be used in buying logs, but neither of the partners nor the agent were to sign the firm name to any note, this clause does not limit the first, and orders drawn on the partners to pay for logs, signed P. & B., by W., agent, are rightly executed. Gaslin *v.* Pinney, 23 Minn. 26.

that no partner shall become security for third persons. So the right to receive payment of debts cannot be limited by mere notice to the debtor not to pay a particular partner, unless it be so agreed between the partners, even if he be insolvent.[1] Hence, in order to restrict to one partner the right to collect debts or to wind up, a special agreement is necessary, and such agreement is enforcible by receiver and injunction.[2]

And it may be wise, in order to avoid future dispute, to settle upon the powers of the majority, or, if the number of partners is even, to agree as to the exercise of the power of engaging and discharging employees.

§ **233. Arbitration clause.**— An agreement to submit disputes to arbitration is a common provision in articles of partnership; nevertheless the ordinary rule, that such an agreement will not be specifically enforced when its effect is to oust the courts of jurisdiction, applies to partnerships.[3] Nor will an action lie for damages for breach of an agreement to arbitrate, for *non constat* that the plaintiff would have succeeded in the arbitration.[4]

Hence, to a bill in equity for discovery or an accounting, the pendency of arbitration proceedings is no defense, for the award may never be made, as the court cannot compel the arbitrators to act or to decide.[5] True, the court and the arbitrators may arrive at different conclusions, but so may two courts.[6]

Nevertheless where there is an agreement to submit disputes to arbitration, the court may refuse the ruinous course

[1] See § 326.

[2] See Davis v. Amer, 3 Drew, 64.

[3] Street v. Rigby, 6 Ves. 615, 618; Tattersall v. Groote, 2 B. & P. 131, 135; Lee v. Page, 7 Jur. N. S. 768; 30 L. J. N. S. Ch. 857; Pearl v. Harris, 121 Mass. 390; Page v. Vankirk, 6 Phila. 264; 1 Brewst. 282. The case of Halfhide v. Fenning, 2 Bro. C. C. 336, has been overruled upon this point in numerous cases not involving partnerships.

[4] Tattersall v. Groote, 2 B. & P. 131; but in Livingston v. Ralli, 5 E. & B. 132, the action was held to lie.

[5] Cooke v. Cooke, L. R. 4 Eq. 77, 88; Street v. Rigby, 6 Ves. 615, 618; Meaher v. Cox, 37 Ala. 201; s. c. Ala. Sel. Cas. 156; Page v. Vankirk, 6 Phila. 264; s. c. 1 Brewst. 282. See De Pusey v. Dupont, 1 Del. Ch. 82. But see Russell v. Russell, 14 Ch. D. 471.

[6] Cooke v. Cooke, L. R. 4 Eq. 77, 88.

of appointing a receiver until the parties have tried to settle their disputes in the way agreed;[1] but its jurisdiction to grant injunction and receiver is not ousted by such agreement and will be exercised in a proper case.[2]

And if a contract of dissolution provides, among other things, for arbitration, and its other provisions have been carried out and the arbitration is in progress, if one partner can revoke the submission at all he cannot do so without rescinding the entire contract.[3]

§ 234. —— power of the arbitrators.—If partnership disputes are submitted to arbitration for general settlement and accounting, the arbitrators do not exceed their jurisdiction by awarding a dissolution.[4] On the other hand, although the question of dissolution may be specifically submitted, among other things, they need not award upon it, unless the submission requires a finding upon all points.[5]

The arbitrators may award that one shall have certain of the property, or may divide the property between them,[6] and order

[1] Waters *v.* Taylor, 15 Ves. 10.

[2] Page *v.* Vankirk, 6 Phila. 264; 1 Brewst. 282.

[3] Haley *v.* Bellamy, 137 Mass. 357. In England the statute, 17 and 18 Vic. ch. 125, § 11, now controls, and provides that if parties have agreed in writing to submit disputes to arbitration, and shall nevertheless commence suit, the court may, if there is no good reason to the contrary, stay the suit on the defendant's application in order that arbitration may take place. This provision was acted upon in Plews *v.* Baker, L. R. 16 Eq. 564; Randegger *v.* Holmes, L. R. 1 C. P. 679; Hirsch *v.* Im Thurn, 4 C. B. N. S. 569; Gillett *v.* Thornton, L. R. 19 Eq. 599; Witt *v.* Corcoran, cited in notes to Wellesford *v.* Watson, L. R. 8 Ch. App. on p. 476, and further explained in Plews *v.* Baker, L. R. 16 Eq. 564, 571; Russell *v.* Russell, L. R. 14 Ch. D. 471.

[4] Green *v.* Waring, 1 W. Bl. 475; Hutchinson *v.* Whitfield, Hayes (Irish), 78. The dissolution was awarded as of a day then past in Routh *v.* Peach, 3 Anstr. 637. And if the articles provide that dissolution must be by deed, an award under seal satisfies them. Hutchinson *v.* Whitfield, *supra*.

[5] Simmonds *v.* Swaine, 1 Taunt. 549. See Page *v.* Vankirk, 6 Phila. 264; s. c. 1 Brewst. 282.

[6] Wood *v.* Wilson, 2 Cr. M. & R. 241; Leavitt *v.* Comer, 5 Cush. 129; Lamphire *v.* Cowan, 39 Vt. 420. R. & B., partners, had two establishments, one for tailoring and one for merchandise; they dissolved, and, submitting their matters to arbitration, the tailoring establishment was awarded to R., he to pay its debts, and the merchandising establishment to B., he to pay its debts and R. $468. A creditor of the mer-

conveyances;[1] or may award that the debts, when collected, shall be divided between the parties, because the arbitrators cannot control the debtors of the firm to prevent their paying all to one partner if they choose;[2] or that one shall have all the debts due, with a right to sue in the name of the other if necessary,[3] or that one shall pay or secure to the others a specified amount, and assume the debt;[4] or that one shall take all the property, as trustee, to wind up; in which case the trustee can maintain trover against a third person to whom another partner, after such dissolution and with notice of its terms, has transferred property to secure a debt of the firm.[5]

In these cases the arbitrators do right in requiring such partner to give a bond of indemnity to protect the other partner, regardless of whether he has acted well or badly;[6] and if the arbitrators have not required it, the court will impose and enforce it by injunction.[7]

The arbitrator has no right to collect debts,[8] nor to order a partner to pay him money to be used in paying debts,[9] because the court has no control over the arbitrator; or may forbid one of the partners from carrying on a competing business within specified bounds.[10] An award directing accounts to be taken without order-

chandising establishment got judgment and levied on individual estate of R. and B. respectively. R. asked an injunction against selling his lands before B.'s property was exhausted, claiming to be in effect a surety for B.; but it was decreed that he must pay the $468 on the judgment within thirty days, else the injunction would be dissolved; for each part of the award depends on the other parts. Runyon *v.* Brokaw, 5 N. J. Eq. 340.

[1] Wood *v.* Wilson, 2 Cr. M. & R. 241.

[2] Lingood *v.* Eade, 2 Atk. 501, 505.

[3] Burton *v.* Wigley, 1 Bing. N. C. 665.

[4] Simmonds *v.* Swaine, 1 Taunt. 549; Byers *v.* Van Deusen, 5 Wend. 268.

[5] Hutchinson *v.* Whitfield, Hayes (Irish), 78; Cook *v.* Jenkins, 35 Ga. 113.

[6] Cook *v.* Jenkins, 35 Ga. 113; Burton *v.* Wigley, 1 Bing. N. C. 665.

[7] Cook *v.* Jenkins, *supra.* If the partners have assigned their property to a trustee with certain instructions as to its disposition, and afterwards submit to arbitration, recognizing these instructions, the arbitrators have no right to deviate from them and make other disposition of the property. McCormick *v.* Gray, 13 How. 26.

[8] Lingood *v.* Eade, 2 Atk. 501, 505. Nevertheless he did so by appointing a person for the purpose, the court saying nothing as to the authority in Routh *v.* Peach, 2 Anstr. 519.

[9] *Re* Mackey, 2 A. & E. 356.

[10] Burton *v.* Wigley, 1 Bing. N. C. 665; Morley *v.* Newman, 5 D. & R. 317; Green *v.* Waring, 1 W. Bl. 475.

ing payment of any balance is not invalid, for the court may enforce the payment of balances.[1]

A submission may be of both partnership and individual matters, and if the award is of partnership matters only, it must be shown that individual controversies in fact existed in order to attack it.[2] The submission of partnership matters to ascertain the share of a deceased partner does not include real estate not alleged to be partnership property.[3] An award between partners, relating to disposition of debts and assets, is not uncertain because their amounts are not stated if sufficiently identified. The award need not provide a method of enforcement. This is often impossible between partners. It may be valid, though it does not and cannot affect creditors or debtors of the firm. If the award divides the assets and liabilities, and establishes the rights and duties of the partners between each other, it is final. If the submission embraces all matters of difference, the award will be presumed, if there is no evidence to the contrary, to include all matters of difference, and that all matters of difference were included. It is not uncertain if it states results and not processes.[4]

§ 235. Allowances for subsistence.— The best way for arranging for private expenses is to stipulate that each partner may withdraw a certain weekly, monthly or other

[1] Wilkinson *v.* Page, 1 Hare, 226. In Tattersall *v.* Groote, 2 B. & P. 131, where a partner had paid a sum of money or premium for admittance into the firm, it was held that the arbitrator could not award its return unless the question was specifically submitted, because its payment and the formation of the partnership was the consideration for sustaining the covenant to submit to arbitration, and if the articles of partnership were a nullity the covenant also was null. Is this piece of ingenuity called for? The award is good if within the submission. The submission is just as good upon the consideration of mutual promises, as if there had been no covenant. The only question is what was submitted.

[2] Leavitt *v.* Comer, 5 Cush. 129.

[3] Ebert *v.* Ebert, 5 Md. 353. Two persons formerly partners submit all matters between them to arbitration. After the hearing had begun they and another person, who had transacted part of their business, submit to the same arbitrators all unsettled matters between them, and an award was made in the second arbitration that a certain sum was due such third person. *Held*, the arbitrators can take such award into consideration in determining between the original parties which of the two shall pay it. This is not an including of matters other than between said first two parties, Wallis *v.* Carpenter, 13 Allen, 19.

[4] Lamphire *v.* Cowan, 39 Vt. 420.

periodical sum for support. It ought to be provided, also, that interest should be charged upon sums in excess of these amounts, since overdrafts do not generally bear interest, or perhaps to provide for interest upon all sums, so that a partner may receive benefit by drawing less than his amount.

§ **236. Interest.**— Capital does not generally bear interest; while upon loans or advances to the firm, certainly when made with the knowledge of the other partners, interest is chargeable; hence, if it be desired that capital draw interest and advances not, the articles should so state.[1]

§ **237. Expenses.**— Provision is frequently made for the payment of personal expenses, *eo nomine.* The word expenses, in such case, will at least be confined to the ordinary habit of persons in the same condition of life. Thus, if it be agreed that each may draw out only so much as is necessary for private expenses, usual expenses of family and education of children may be included, but not the purchase of plate, furniture, carriages, and the like.[2]

Where a person formed a partnership with his son-in-law, agreeing to furnish a shop, tools, etc., and a house for his son-in-law to live in, and that he was to be at "no expense," this means that outlays for the business would not be required, and does not refer to the support of the family.[3]

A provision that each partner shall pay his own individual expenses, and that one member shall be liable for all debts made in New York on account of the firm for which it may not have received full benefit, means that the individual expenses of a member while at home, being his private and family bills, shall be at his own cost, and does not include traveling expenses away from home on the business of the firm; nor are board bills in New York debts on account of the firm under the exception, but are to be credited to the partner.[4]

It is a general rule that each partner may claim reimbursement for the expenses necessarily incurred by him in the prosecution of

[1] § 781.

[2] Stoughton *v.* Lynch, 1 Johns. Ch. 467.

[3] Brown *v.* Haynes, 6 Jones' Eq. (N. Ca.) 49.

[4] Withers *v.* Withers, 8 Pet. 355.

the business. This subject will be considered under the head Accounting,[1] and applies even when the partner furnishes no capital and is to contribute his services; as where one furnishes money with which the other is to buy land and sell it in parcels, the expenses of surveying are to be credited to him.[2]

Yet there having been expenses of a peculiar kind which have been disallowed, or as to which courts have disagreed, such as treating customers, the intention in regard to these should therefore be specified.[3]

§ 238. **Dissolution.**— A right to dissolve upon giving notice to copartners is not unusual; the meaning of such a clause is elsewhere considered.[4] A provision that, upon one partner becoming insolvent, the others may dissolve, it seems, does not mean a declared or adjudicated insolvency under insolvent acts.[5] Nor is insufficiency of assets necessary to constitute insolvency,[6] if there is inability to pay debts.

§ 239. —— **covenant to indemnify outgoing partner.**— It is usual, when a retiring partner assigns his interest in the firm to his copartners, to receive a covenant from them to pay debts or to save him harmless. The difference between these two is that, on a covenant to save harmless or indemnify, action lies only after the retiring partner has paid debts; but a covenant to pay a debt is broken by non-payment, and the covenantee need not pay before suing.[7] Al-

[1] § 766.

[2] Burleigh *v.* White, 70 Me. 130.

[3] § 766. Where each partner was to contribute towards the expenses in proportion to his interest in the lots in which the mining operations were carried on, and their interests were in different proportions in the different lots, each partner is to be charged his proportion of the expenses of raising the mineral on each lot, but during the time in which the accounts were not kept so as to show what expense was incurred on each lot separately, the entire expense will be apportioned to each lot in the proportion of its yield of mineral, and each partner charged with a share of such expense in the ratio of his interest in each lot. Levi *v.* Karrick, 13 Iowa, 344.

[4] § 574.

[5] Parker *v.* Gossage, 2 Cr. M. & R. 617; Biddlecombe *v.* Bond, 4 Ad. & E. 332.

[6] See Bayley *v.* Schofield, 1 M. & S. 338. And see Benjamin on Sales, § 837, under Stoppage in Transitu.

[7] §§ 636–640.

though the liability of the copartners to pay out a retiring partner may be joint and several,[1] yet on the bond or covenant of indemnity their liability will be governed by the language of the covenant;[2] especially where one of the covenantors is an incoming partner, and therefore not liable at all, except upon the covenant.[3] The mere recital in a contract of sale or transfer of a business, or an interest in it, that the consideration is the vendee's assumption of debts or other expression of intention that they shall pay the debts, may amount to a covenant to assume them.[4]

But the retiring partner will not preserve the equitable lien which he had while partner upon the assets to compel their application to the debts, unless the lien be specially reserved;[5] hence the contract should preserve the lien expressly, if that be the intention. But even if it does so, the nature of this so-called lien must be remembered; it is not a strict lien, but a mere equitable right to have remaining assets applied.[6]

§ 240. **Outgoing partner not to compete.**— As a sale of the good-will does not prevent the seller from engaging in a similar and competing business,[7] so long as he does not solicit the old customers or represent himself as continuing the old concern, it follows that, if a retiring partner is to be restrained from going into competition, a special covenant to this effect is necessary.

§ 241. **Expulsion of a partner.**— A remedy between partners is sometimes provided by inserting a power of expulsion in the articles. Like all provisions for forfeitures, this is

1 Beresford *v.* Browning, L. R. 20 Eq. 564; aff'd, 1 Ch. D. 30.

2 Wilmer *v.* Currey, 2 DeG. & Sm. 347.

3 Sumner *v.* Powell, 2 Mer. 30; aff'd, T. & R. 423.

4 Saltoun *v.* Houstoun, 1 Bing. 433.

5 See § 550.

6 Where plaintiff and defendants were in business together and defendants retired, plaintiff continuing the business alone, and plaintiff and defendants again became partners, defendants covenanting to indemnify against liabilities connected with the business the parties were formerly in, this covenant refers to the time they were all together and not to the time when the plaintiff was alone. Haskell *v.* Moore, 29 Cal. 437.

7 § 664.

strictly construed,[1] and does not exist unless expressly conferred.[2] Hence a partner's rights are not forfeited by failure to pay his share of the agreed capital,[3] or his share of debts or expenses;[4] or refusal to do acts not required when he became a member and foreign to the objects of the concern.[5] Nor does such a provision in a partnership for a certain term exist after the term, the partnership being continued without further agreement,[6] and cannot be exercised except by the concurrence of all who have the power to expel;[7] and an opportunity to explain and be heard must be afforded;[8] and he must be allowed to assist in making the accounts to determine his share;[9] and if annual valuations of shares are to be taken, and in case of bankruptcy, death or expulsion, the valuation was to determine the amount due to the outgoing partner, if no valuations were ever made, the power to expel cannot be exercised, for he will not be bound by an account afterwards taken by the other partners.[10]

§ 242. —— **to be exercised bona fide.**— The power must be exercised *bona fide*, and for the benefit of the firm, and not for the benefit of individual partners or on personal grounds. The obligation to exercise good faith towards each other imposes these limitations, even though the power

[1] Clarke *v.* Hart, 6 H. L. C. 633 (aff'g Hart *v.* Clarke, 6 DeG. M. & G. 232, and reversing 19 Beav. 349).

[2] Hubbard *v.* Guild, 1 Duer, 662. But the solvent partner can obtain a receiver if necessary. Id., and Freeland *v.* Stansfeld, 2 Sm. & G. 479.

[3] Piatt *v.* Oliver, 3 McLean, 27; Patterson *v.* Silliman, 28 Pa. St. 304.

[4] Kimball *v.* Gearhart, 12 Cal. 27.

[5] Gorman *v.* Russell, 14 Cal. 531. The onus to prove the right to forfeit existed is upon the person who exercised it, although he be a defendant in the cause where it is in issue. Patterson *v.* Silliman, 28 Pa. St. 304.

[6] Clark *v.* Leach, 32 Beav. 14; aff'd, 1 DeG. J. & Sm. 409.

[7] Smith *v.* Mules, 9 Hare, 556.

[8] Steuart *v.* Gladstone, 10 Ch. D. 626; Wood *v.* Woad, L. R. 9 Ex. 190. And see Blisset *v.* Daniel, 10 Hare, 493; 1 Eq. 484; Russell *v.* Russell, 14 Ch. D. 471.

[9] Steuart *v.* Gladstone, 10 Ch. D. 626.

[10] Blisset *v.* Daniel, 10 Hare, 493; 1 Eq. 484. Where the accounts were to be taken each year of all assets "susceptible of valuation," and an expelled partner was to be paid out according to the last account, adding for the time since a proportion averaged on the profits of the three preceding years, the good-will cannot be allowed for, because not susceptible of valuation. Steuart *v.* Gladstone, 10 Ch. D. 626.

is granted in general terms to the majority, without requiring the existence of any specific grounds.

Thus, in Blisset *v.* Daniel, 10 Hare, 493; s. c. 1 Eq. 484, articles between seven partners provided that it should be lawful for the holders of two-thirds or more of the shares, from time to time, to expel any partner on a written notice, thus, "we do hereby give you notice that you are expelled from the partnership," etc. The managing partner desired to get rid of the complainant as partner, because he objected to the appointment of the manager's son as assistant, and, by threatening to the other partners to resign, unless the complainant was expelled, induced them to sign the notice, first having induced him to sign a balance sheet, in ignorance of the intended expulsion. It was held that no previous meeting of the partners was necessary to render the notice valid, and that no grounds for it need be stated; but that the literal construction of the articles would not be enforced, and that the power could not be used for private benefit, and on such grounds; and its exercise in this case was fraudulent and void, and the complainant was decreed to be reinstated.[1]

§ 243. **Right to retire or to sell a share.**— If the partnership is for a fixed term, a refusal to continue, or any voluntary act causing a dissolution, is a breach of contract; hence if a right to retire is reserved, this should be stated.[2]

The sale may be made to a person not responsible.[3]

The right to retire on certain terms, if reserved in the articles, is deemed applicable only to an existing firm, and not after dissolution; hence, if the articles permit any partner to withdraw during the first year on certain conditions, but one partner died in six months after the firm was formed, thus dissolving the firm, the

[1] In case of illegal expulsion, as the party has not ceased to be a partner, he has not suffered damage and cannot sue at law. Wood *v.* Woad, L. R. 9 Ex. 190. But if reinstatement be not an adequate relief, dissolution and accounting may be decreed, Patterson *v.* Silliman, 28 Pa. St. 304. The expelled partner going into business again, although the other partners have the good will, can solicit the old customers, because his alienation of it was involuntary, Dawson *v.* Beeson, 22 Ch. D. 504, and § 667.

[2] As to when this provision involves the right to make the buyer or assignee of a share a partner, see § 162.

[3] Jefferys *v.* Smith, 3 Russ. 158, 168.

right ceased, and the only remedy remaining was the ordinary suit for an accounting.[1]

Where notice in writing of an intention to sell is required by the articles to be given at a monthly meeting, a notice written in a book kept to be used at such meetings was held sufficient.[2]

If a right to sell must be exercised by first offering the share to the copartners, and, upon their refusal to buy, individual partners were to have the right of pre-emption, an offer by a partner to sell, made to all the rest collectively, is equivalent also to giving each an individual opportunity to buy without additional offers;[3] and the acceptance of such offer makes a contract, and the offer cannot be withdrawn, or a dissolution be had under other provisions.[4]

A restriction in the articles that neither party should sell or assign his share without the other's consent will not be construed to apply after dissolution, because it is in restraint of the right of a person to dispose of his own property; hence it is not operative after the concern is in the receiver's hands for final settlement.[5]

Provisions in the articles, that in case of the death of a partner the survivor should buy his share, and if he refused it should be sold, will, where the survivor refuses to buy or admit any buyer into the partnership, make him accountable for the value of the share.[6]

§ 244. Valuation of share of outgoing partner.—We shall see, in treating of the subject of winding up, that in the absence of agreement between partners the general rule applied by a court of equity is to ascertain the value of assets by ordering them sold. When a partner retires, dies, or becomes bankrupt, neither he nor his executor or assignees in bankruptcy can be compelled by the continuing partners to accept the calculated value of his interest, but a winding up can be insisted upon in the absence of contract

[1] Frank *v.* Beswick, 44 Up. Can. Q. B. 1.

[2] Glassington *v.* Thwaites, Coop. 115. But such notice had been adopted under previous sales by the partners.

[3] Homfray *v.* Fothergill, L. R. 1 Eq. 567.

[4] Id. And see Warder *v.* Stilwell, 3 Jur. N. S. 9.

[5] Noonan *v.* McNab, 30 Wis. 277. See, also, *dictum* in Noonan *v.* Orton, 31 id. 265. In the case cited the partnership was at will, and not for a fixed term; hence the restriction amounted merely to forbidding a dissolution in that manner.

[6] Featherstonhaugh *v.* Turner, 25 Beav. 382.

or statutory regulation.[1] Even a stipulation for a division of assets at the termination of the partnership gives no right to buy at a valuation nor dispense with a sale.[2]

To avoid the inconvenient and often ruinous consequences of such enforced settlement, it is frequently stipulated in the articles that on the retirement, death or bankruptcy of a partner his share shall or may be paid out at a valuation. On account of the constantly fluctuating value of the share a fixed sum can very rarely be settled upon in advance.[3] The most common and convenient way is by agreement that the share shall be valued as it appeared at the last annual or periodical account, with an addition for the time since, or interest on such valuation in lieu of profits, or of profits averaged on those of the past year or years.

This method of valuing the share is generally a very fair and just one, provided two precautions are observed: 1st. That the fixed property of the firm, such as its real estate, be included in the account, and that its nominal value as therein specified be proportionate to its actual worth. 2d. That the good will, which, although it may often be of great importance, is rarely estimated in the periodical account as an asset, and hence, if it is to be considered in the valuation of a share, should be specifically provided for.

To constitute a continuing partner it is not necessary that the business shall be continued precisely the same as before if it be substantially the same business.

This is illustrated in Read *v.* Nevitt, 41 Wis. 348, where N. & R. were partners in the insurance business as agents for seven companies and did a small real estate business also. The articles provided that on dissolution the continuing partner should pay the retiring partner $700. A few days before dissolution, N., without R.'s knowledge, wrote to the companies of the expected dissolution and procured the agency of five of them for himself, the other two ceasing to employ either. N., after dissolution, carried on the business as before, and did a little land business for one old customer,

[1] This is provided for by statute in some jurisdictions in case of the death of a partner. See Rammelsberg *v.* Mitchell, 29 Oh. St. 22.

[2] Cook *v.* Collingridge, Jac. 607; Rigden *v.* Pierce, 6 Madd. 353.

[3] Nevertheless, this was done and carried into effect in Cox *v.* Willoughby, 13 Ch. D. 863.

R. transacting no business whatever. It was held that R. was substantially a retiring and N. a continuing partner, although there was no agreement or understanding that such was their respective attitudes. This is not an acquiescence barring R.'s right of recovery, and N.'s letters of solicitation to the companies are competent evidence to show that he was a continuing partner.

§ 245. —— **if last valuation is imperfect.**— In construing and applying the right to purchase at the last valuation, the courts will regard the practice of the partners, the course of dealing among them and the nature of the account actually taken. If the account did not include all the assets of the firm, it will not from that be supposed that the share to be purchased was to lose the benefit of the non-enumerated property.

Thus, where the articles provided that the share of a partner who should die could be taken at the value according to the last stock-taking, and the partners had been in the habit of laying aside part of the earnings as a reserve for unexpected losses, and this fund was kept out of the account, the executors of a deceased partner are entitled to a share in such fund.[1] And if the articles provided for half-yearly settlement of accounts on specified dates, and the share of a deceased partner is to be taken at the last half-yearly statement, a subsequent parol agreement to take the accounts yearly will not be deemed to affect pecuniary interests, and the value must be reckoned up to the nearest half-yearly date originally specified.[2]

In Pettyt *v.* Janeson, 6 Madd. 146, the articles directed an annual settlement on March 25, and that if a partner died his executors should receive what the last annual settlement showed to be due, with five per cent. interest in lieu of subsequent profits. The settlements were not regularly made and the last one was on November 5, 1811, and a partner died in February, 1813. His executors claimed profits to the date of death on the ground that there had been no annual settlements as agreed upon, while the surviving partner desired to pay the amount, as it appeared, in November, 1811, with interest. The court held that an annual settlement was contemplated, and the date of November 5 was to be considered as

[1] Coventry *v.* Barclay, 33 Beav. 1; and on app. 3 DeG., J. & Sm. 320.

[2] Laws *v.* Laws, 9 Ch. D. 98.

substituted for March 25, and required an accounting as of November 5, 1812, and gave interest from that time on the amount thus ascertained.

In Simmons *v.* Leonard, 3 Hare, 581, the articles provided for an annual account, and if a partuer died his executor should receive the amount due him at the last annual account, with interest, in lieu of subsequent profits; and that his executors should have no right to examine books. No account was taken for several years prior to the death of a partner, and the court held that the intention of the parties was to avoid a winding up and sale, and that this could be carried out by taking the account from the books. They therefore refused to require a sale, but allowed the executors to have an account from the books and to participate in profits to the day of the death.

In Browning *v.* Browning, 31 Beav. 316, the articles provided that five per cent. interest is to be paid on the capital of each partner, and that upon death a share is to be valued as of the last stock-taking, with five per cent. interest in lieu of profits; and the executors were held entitled to interest on the capital since the last annual stock taking, and also interest in lieu of profits; and as the articles provided that capital contributed by a partner since the last stock-taking, was to be added into his share, the court held it to follow that capital withdrawn in the interim was to be deducted.[1]

[1] If the surviving partners are to pay a decedent's share as at the last balance, in equal instalments every six months up to five years, "with interest thereon from the date of the balance," this means interest on the instalments remaining unpaid, and not on those paid, Ewing *v.* Ewing, L. R. 8 App. Cas. 822. If the articles provide that at dissolution one partner shall have £150 over and above one-half of all they might then possess, and that all profits and losses shall be borne equally, except that such partner should receive £150 more than the other, these clauses construed together mean that the £150 shall be deducted not from the other's share, but from the gross amount, O'Lone *v.* O'Lone, 2 Grant's Ch. (Up. Can.) 125. If two partners in the construction of a railroad are to receive twenty per cent. of the contract price in railroad stock, and one of them, with the other's consent, sells out his interest, the buyer becoming a partner in his place, both the original partners agreeing that the buyer shall receive his share in cash, the other partner must keep the railroad stock towards his share of the earnings, Knapp *v.* Levanway, 27 Vt. 298.

§ 246. —— **representatives and assignees bound.**— The agreement for the valuation of a share as by taking the last annual statements is binding not only upon the parties, but upon the representatives or assignees of any of them.

But where the share of a retiring partner is to be ascertained by valuers appointed by each, here, if the dissolution is caused by the bankruptcy of one partner, such clause cannot be enforced, because a partner after bankruptcy cannot retain a capacity to act, and no valuation can be had.[1] And an agreement for the valuation of a share made subsequent to the formation of the partnership, and in contemplation of the bankruptcy of the partner, may be void on that account;[2] and a provision that on bankruptcy of a partner his share shall go to his copartners is a fraud on the bankrupt laws and void.[3]

If the articles give the right to surviving partners to buy the share of the deceased partner at a valuation, without specifying the mode of determining its value, a settlement in good faith with the administrator binds the distributees of the estate.[4]

§ 247. —— **specific performance.**— Agreements for the purchase or sale of a share at a valuation can be specifically enforced, in spite of the uncertainty.[5] Thus, where a price was fixed, except upon certain subordinate and subsidiary assets, which were to be taken at a valuation, specific performance can be had.[6]

Where an interest in business was to be sold, and an agreement as to paying for the good will, "etc.," as a separate item, the *et cetera* was held to refer to matters connected with the good will, but specific performance was refused for other uncertainties.[7] But if specific performance requires the court to act not in making a valuation, but in appointing valuers, it will not be granted.[8]

[1] Wilson *v.* Greenwood, 1 Swanst. 471.

[2] Id.

[3] Whitmore *v.* Mason, 2 Johns. & Hem. 204.

[4] See § 743. An agreement that on the death of either party the assets shall vest in the survivor, and he shall be debtor to the decedent's executor, if *bona fide*, and for valuable consideration, is valid. Gaut *v.* Reed, 24 Tex. 46, 54.

[5] Dinham *v.* Bradford, L. R. 5 Ch. App. 519; Maddock *v.* Astbury, 32 N. J. Eq. 181.

[6] Jackson *v.* Jackson, 1 Sm. & G. 184.

[7] Cooper *v.* Hood, 26 Beav. 293.

[8] See Vickers *v.* Vickers, L. R. 4 Eq. 529; Collins *v.* Collins, 26 Beav. 306.

An agreement between S. and L. that in case of S.'s going out S. should have no right to sell to any one except L., and L. should have the right to recover S.'s interest, and against that should pay $1,000, was held to give L. an option to buy the interest at that price, and not to be an obligation to do so.[1]

§ 248. **Good will.**—The subject of the good will belongs with the dissolution clauses. Its nature and disposition is considered in a subsequent chapter,[2] by consulting which its vague and even uncertain character as an asset will appear, and the consequent importance of providing for it.

The nature of the good will, and whether it has any existence at all, depends on the nature of the business. In a retail trading partnership, it may have no existence apart from the locality of the establishment, except in so far as it is involved in the trade-marks of the firm, and in the right to use the trade name.. In a professional partnership it may have no existence at all recognizable by law, unless an existence is created for it by contract of the parties; hence, if a retiring partner in such a partnership is to have an allowance in regard thereto, the value of the good will should be agreed upon.

In some partnerships the good will is involved chiefly in the name, as in case of a newspaper, and sometimes is so important an element of value that the cessation of business for a day, involving a destruction of the good will, would render the other assets of comparatively little value, as in the case of a newspaper. The courts will, however, preserve the good will in winding up as far as possible, if no provision has been made.

The good will, in so far as it has a value, is a partnership asset, and on the death of a partner does not belong to the survivors; but the sale of the good will by an outgoing partner will not prevent him from going into the same kind of business, the utmost effect of such sale being to prevent his soliciting old customers, or to represent himself as suc

[1] Scharringhausen *v.* Luebsen, 52 Mo. 337.

[2] § 657 *et seq.*

cessor to the old firm; hence, without repeating here matter that will appear elsewhere, it is only necessary to suggest:

1st. That the articles recognize, and if possible provide for valuing the good will, if it be designed to recognize it in those partnerships where it has no legal existence apart from contract, as in partnerships dependent on confidence in personal skill and integrity.

2d. If the surviving or continuing members, on death or the retirement of a partner, or expiration of the partnership, are to become owners of the good will, this should be provided for.

3d. If on dissolution the use of the old name or trade-marks is to belong to certain partners, this should be stated, guarding the agreement so as to protect retiring members from the hazards of being held out as partners still.

4th. If the partnership is for a term the court will generally value the good will, in case of premature dissolution, at so many years' purchase of the profits; but if the partnership is one at will, this rule will not apply; and if the good will is to belong to the continuing partners, the amount to be paid to a retiring partner, if any, should be provided for.

5th. If the outgoing partner is not to go into a competing business, this must be specified, with reasonable limitations as to territorial restriction, as explained in the chapter on Good Will.

§ 249. Continuance after death — Representatives and annuitants.— As death causes a dissolution of the partnership, and as executors or representatives of the deceased cannot take his place in the firm without consent of the surviving partners, and as, on the one hand, the sudden dissolution and winding up of the firm, or taking the decedent's share out by sale, may cripple the surviving partners or destroy the prosperity of the concern, and on the other the executor cannot leave the share in at the hazard of business without personal responsibility therefor, unless the will or the articles provide for it, it is frequently provided that the partnership

shall not be dissolved by death. The difference between such provision in a will and in articles is this: if provided for only in the will, the other partners are not bound to let in the representative, for they have not agreed to do so.[1] And if in the articles, the surviving partners are compelled by their agreement to admit him.[2] But the representative is not bound to come in to the extent of active participation in management by which he will become liable as a partner to third persons, and if he refuses the whole partnership must be wound up unless some other arrangement has been made;[3] as by valuation of shares or gradual payments.

The representative is entitled to reasonable time and opportunity for investigation before electing whether he will come in, but is not entitled to require a judicial accounting.[4] But doing any partnership act is an exercise of the option.[5] But the terms on which a representative can come in must be strictly complied with. Thus, if an administrator can do so by giving notice within three months after the death, a notice by the widow within three months, but without having become administrator until after the three months, is not sufficient.[6] And if he can come in on condition he acts to the satisfaction of the survivors, their discretion in excluding him is final.[7]

If the will provides for the continuance of the partnership by the surviving partner for the benefit of the estate, or by him and the executor, only such of the assets of the deceased partner's estate as are already embarked will be subject to the hazards of the business, unless, in the most clear and explicit terms, the intention to risk more, or to authorize the executor to do so, appears.[8]

We have already seen that a mere annuitant, who does not participate in the management of the business, is not liable as a partner, at least in most jurisdictions.[9] If the annuity is payable out of profits, either absolutely or at the election of the surviving

[1] § 158.

[2] Page *v.* Cox, 10 Hare, 163; Wainwright *v.* Waterman, 1 Ves. Sr. 311.

[3] Kershaw *v.* Matthews, 2 Russ. 62; Downs *v.* Collins, 6 Hare, 418; Madgwick *v.* Wimble, 6 Beav. 495.

[4] Pigott *v.* Bagley, McCl. & Y. 569.

[5] Edwards *v.* Thomas, 66 Mo. 468.

[6] Holland *v.* King, 6 C. B. 727. And see Brooke *v.* Garrod, 2 De G. & J. 62; 3 K. & J. 608.

[7] Milliken *v.* Milliken, 8 Irish Eq. 16.

[8] § 600.

[9] §§ 51–55.

partner, and there are no profits, he need not pay it; hence, if the annuity is intended to be in the nature of interest on purchase money, or to be payable absolutely, it should not depend upon the state of the earnings.[1]

§ 250. **Penalty.**—It is often attempted to reinforce a partner's motives to keep faith and observe his covenants by affixing an agreement to pay a penalty or sum as liquidated damages upon breach. Upon these clauses the general rules must be remembered:

1st. That if the amount to be paid is by way of penalty, it will not be enforced unless actual damages to the amount be shown.

2d. Calling the amount liquidated damages will not make it such, but it may still be a penalty, though the parties agree that it shall not be; and so calling the sum a penalty will not deprive the parties of the right to have it treated as liquidated damages, if such is its nature and the term penalty was not used technically.

Thus, in Maxwell *v.* Allen, 78 Me. 32, one partner agreed to sell out his interest to the other, an appraisement to be had to determine the amount,—the value of the property was about $25,000,—and a stipulation that whichever party should break the contract was to forfeit $500, was held to make this sum liquidated damages.

The amount may be treated as liquidated damages if, independent of the stipulation, the damages would be uncertain, conjectural and incapable of any accurate ascertainment, provided the agreed amount is not obviously excessive.

A single amount as liquidated or ascertained damages cannot, however, be agreed upon to extend to breaches of any of the several covenants which are of various degrees of importance, thus putting them all upon the same basis; hence, a covenant that for breach of any of the foregoing stipulations a party shall pay a named sum as liquidated damages, and not as penalty, is worthless, and the court will treat the amount as penalty.[2] Nor will the covenant be separated or garbled,[3] so as to apply to those breaches

[1] *Ex parte* Harper, 1 De G. & J. 180.

[2] Kemble *v.* Farren, 6 Bing. 141; Charleston Fruit Co. *v.* Bond, 26 Fed. Rep. 18.

[3] To use the expression of Chambre, J., in Astley *v.* Weldon, 2 B. & P. 346.

which are in their nature uncertain.[1] And where a large sum is agreed on as damages for the non-payment of a small sum, it will always be regarded as penalty and not enforced. Again, care must be taken to provide against payment of the agreed damages being the limit of compensation;[2] and to prevent the covenant being in the alternative, whereby, upon payment of the agreed damages, a continued breach will be authorized and relief by injunction no longer attainable.

[1] Id.

[2] See Clarke *v.* Lord Abingdon, 17 Ves. 106; Perzell *v.* Shook, 53 N. Y. Superior Ct. 501.

CHAPTER II.

CAPITAL AND PROPERTY.

§ 251. **What is capital.**—The capital of the firm is the sum of the amounts agreed to be contributed by each partner as the basis for beginning or continuing the business. It must be distinguished from advances by partners, which are in effect loans to the firm and not obligatory upon them to make. The importance of distinguishing between the two arises particularly with regard to charging interest, to withdrawal of funds by any partner which the articles may prohibit to the extent of impairing his contribution to the capital, and to the proportion of profits to which each is entitled, which is often fixed as in the ratio of the capital of each.

Thus, where four persons agree to buy oil lands for resale, each contributing in specified proportions to be repaid from sales, and the lands have greatly depreciated, and one filed a bill calling upon the others to make up the difference between the amounts contributed by him and them, these contributions are capital and not advances, otherwise there would be no capital, and hence there was no right to compel contribution.[1]

Where a former book-keeper was taken into the firm, and an amount due him from the old firm was placed to his credit on the books of the new, the fact that no amount of capital which he should contribute had been agreed on shows that this credit was not a contribution to capital, but rather a loan to be repaid him with his share of profits.[2]

Where W. contributed a plant, valued in the articles at $40,000, which was to continue his property until the firm had repaid him $24,000, which he had expended upon the plant, it was held that his capital was only $16,000, being the difference between these sums.[3]

[1] Foster *v.* Chaplin, 19 Grant's Ch. (Up. Can.) 251. See, also, Wood *v.* Scoles, L. R. 1 Ch. App. 369.

[2] Topping *v.* Paddock, 92 Ill. 92.

[3] Worthington *v.* Macdonell, 9 Duval (Canada), 327.

Where the owner of a business sells a half interest or other share to another who goes into partnership with him, the consideration paid by the buyer is not a contribution by him to capital, but is the seller's individual property.[1]

§ 252. The articles of partnership, or the will of a partner, may use the term capital in a sense different from its ordinary and recognized signification, and which then becomes a question of construction of the document. Thus, where one partner died, leaving a will, in which, after speaking of his interest in the firm, he required his "present capital" to be left in for two years,— his interest in the firm was then $43,000,— the question was how much was to be left in. It appeared that each partner had contributed $20,000 as capital, and the articles provided that neither the capital nor the accrued but undivided profits were to be used by either partner, and at dissolution each was to draw out his original capital, and division of the rest of the assets was provided for. These provisions of the articles clearly distinguished the interest into capital and undrawn profits, and prevented the $23,000 from being treated as capitalized, and the $20,000 only is to remain in. The fact that the withdrawal of the $23,000 would injure the prosperity of the business cannot affect the construction, since but for the will the entire $43,000 must have been drawn out.[2]

On the other hand a testator may make no distinction between the primary fund and its accretions, and may use capital in a general sense, including all the accumulated earnings of the firm which remained invested.[3]

Where no fixed amount of capital is agreed on, but the partners are to advance money as needed to put up the works and start the business, and profits are to be divided in proportion to the contributions, the reasonable construction is that contributions should cease when the business becomes self-supporting, and after that time a partner cannot, without the other's assent, increase his interest in the profits by additional contributions.[4]

[1] Ball *v.* Farley (Ala.), 1 South. Rep. 253; Evans *v.* Hanson, 42 Ill. 234. See Jones' Appeal, 70 Pa. St. 169.

[2] Dean *v.* Dean, 54 Wis. 23.

[3] As was the case in Thomas *v.* Lines, 83 N. Ca. 191.

[4] PAXSON, J., in Fulmer's Appeal, 90 Pa. St. 143, 146. In Stidger *v.* Reynolds, 10 Oh. 351, money got on joint credit was called floating capital in distinction to fixed capital, but this is incorrect; borrowing on joint credit is not creating capital, for an equivalent joint debt is thereby created.

§ 253. **Other than money.**— Capital need not be contributed in money, but may be in stock, real estate or other property. The use of a patent or trade secret or good will, in fact anything to which the copartners may acquire a joint title or which creditors can reach, may be contributed as capital. But where one partner contributes only his time, skill and experience, it is improper to call this his capital, for it has none of the attributes of capital, and in case of loss counts for nothing against the amount due the other partner for contributions of capital proper.

§ 254. **Contribution should be free of liens and charges.**— If a person agrees to contribute his business, stock on hand, etc., against a specified sum to be paid in by the copartner, this business and stock goes in as his share of capital, whether its value exceeds or falls short of the contribution of the other, and must be put in free of liens and without charge for transportation. If, for example, some of the goods are in the hands of factors and subject to their liens, the amount of these claims, and the cost of delivering the goods at the firm's place of business, will on an accounting be charged to the partner who contributed them.[1]

§ 255. **Right to increase it.**— When profits are to be divided in proportion to capital, the amount of each partner's capital ought to be definitely fixed. And in such case no partner can increase his capital without the consent of the others, either by additions, advances or the use of undrawn profits.[2]

[1] Dunnell *v.* Henderson, 23 N. J. Eq. 174. And if a person agrees to "advance" teams and tools to a farming partnership, it means free of cost, but they continue his property. Nichol *v.* Stewart, 36 Ark. 612. Where S. takes L. into partnership in a stock of ice, the articles reciting that, in consideration of $150, S. "puts in the concern six hundred and sixty tons of ice now at R.'s ice house," if S.'s stock of ice is more than that amount, L. is not a partner in the excess, and if less, L. is entitled to an allowance as damages, because the articles in effect represented that such an amount was there. Sexton *v.* Lamb, 27 Kan. 426.

[2] Crawshay *v.* Collins, 2 Russ. 325; 15 Ves. 218; 1 Jac. & W. 267; Farmer *v.* Samuel, 4 Litt. (Ky.) 187 (14 Am. Dec. 106); Cock *v.* Evans, 9 Yer. (Tenn.) 287, 295-7.

Thus, in Fulmer's Appeal, 90 Pa. St. 143, 146, a partnership of two were engaged in a very profitable business, and profits were to be divided in proportion to capital. The products of the factory, if sold, would have realized all necessary money to pay expenses, but one of the partners, with a view of increasing his own interest in the business, held back the products from sale and paid the expenses out of his own pocket. It was held that this did not increase his interest, and that the other partner had a right to have the sales made.[1]

Even where it is provided that the capital may be increased, a contribution of money which can at any time be withdrawn will not be deemed an addition to capital; nor should such increase be at discretion, apart from the necessities of the business, or without notice to the other partners, unless the articles permit this.

In Tutt *v.* Land, 50 Ga. 339, one partner furnished the entire capital, $29,000, and it was stipulated that if the necessities of the business required more, and he supplied it, interest at a certain rate should be allowed thereon. At the end of a year this partner's share of the profits amounted to $19,000, which he allowed to remain in the business, but without any agreement that an increase was necessary or notice to his copartner that the rights of the firm had attached to the undrawn money. Hence, as he had never parted with his individual right to it, the interest to be received upon increase of capital was not allowed.[2]

§ 256. Is not individual property.— The capital,[3] in whatever shape contributed, becomes at once the property of the firm and is no longer individual property. The phrase capital, or capital stock, conclusively excludes the idea of continued individual proprietorship.

Thus, if a partner was to contribute money, but, instead of so doing, puts in horses and wagons already owned by by him, they are no longer his individual effects, and the partnership creditors have a priority over his private credit-

[1] For a further point in this case see § 252.

[2] S. P. Dumont *v.* Rueppreeht, 38 Ala. 175. But see Raymond *v.* Putnam, 44 N. H. 160, 168, where undrawn profits were added to the original capital.

[3] Where the use only of a thing is contributed, the thing itself is not capital because it is not contributed.

ors in them on dissolution, although no credit upon the books was given him for them.[1]

So if one partner contributes a building and machinery and the others cash, the building and machinery cease to be individual property, although the title may have been left in the original owner's name, and if destroyed by fire, the firm, and not he, must bear the loss.[2]

The fact that one partner is to, and does, contribute all the capital, and the other services only, does not affect the rule, nor should it. Even if in such case the partners dissolve the day after the contribution to capital was made, the capital is joint property, but the interests in it may be in the proportion of all to nothing,[3] whether the partnership be regarded as a joint ownership in different proportions, or the firm be considered a conventional entity distinct from its constituent members, and the members' interests a mere claim upon a share of surplus. The rules of distribution on winding up, which require repayment of capital to the respective partners after equalizing losses before distribution between them, prevents any inequality arising from the cessation of individual ownership in the contribution of capital.

§ 257. Partnership in profits alone.— The partnership may exist in the profits alone without any joint interest in the property, not only in professional and mechanical, but in manufacturing partnerships.[4] There is a difficulty in ap-

[1] Robinson *v.* Ashton, L. R. 20 Eq. 25; *Ex parte* Morley, L. R. 8 Ch. App. 1026; Clements *v.* Jessup, 36 N. J. Eq. 569.

[2] Taft *v.* Schwamb, 80 Ill. 289.

[3] See, for example, Malley *v.* Atlantic Ins. Co. 51 Conn. 222; Bradbury *v.* Smith, 21 Me. 117; Nutting *v.* Ashcraft, 101 Mass. 300.

[4] French *v.* Styring, 2 C. B. N. S. 357, 363, in the earnings of a race-horse; Fromont *v.* Coupland, 2 Bing. 170, and Barton *v.* Hanson, 2 Taunt. 49, in a stage route, each providing his own horses; Crawshay *v.* Maule, 1 Swanst. 523; Peacock *v.* Peacock, 1 Camp. 45; *Ex parte* Hamper, 17 Ves. 403; Steward *v.* Blakeney, L. R. 4 Ch. 603; London Assur. Co. *v.* Drennen, 116 U. S. 461, perhaps not a partnership; Berthold *v.* Goldsmith, 24 How. 536; Stevens *v.* Faucet, 24 Ill. 483, and Fawcett *v.* Osborn, 32 id. 411, one owned the hides, the other to work on them — probably not a partnership, though called so; Robbins *v.* Laswell, 27 Ill. 365, one owned the cattle; Flagg *v.*

plying this doctrine to mercantile partnerships, on account of the principle that what is purchased with profits is joint property, whatever the original contributions may have been.[1] So, also, property used to prosecute the partnership business may be owned by the partners as tenants in common and the partnership may be confined to the profits.[2]

§ 258. **When not.**—If one party advances all the money to buy goods on joint account, the partners are deemed to be joint owners in the goods as well as in the profit and loss.[3] And if one party advances money to be invested in goods, this may not create a partnership at all;[4] but if is a partnership *inter se* the presumption seems to be in favor of joint ownership in the goods as well as a partnership in profit and loss, in the absence of a contract to the contrary.[5]

Stowe, 85 Ill. 164, in the use of machinery, a patent, and lands separately owned; Graves *v.* Kellenberger, 51 Ind. 66; Stumph *v.* Bauer, 76 Ind. 157; Dupuy *v.* Sheak, 57 Iowa, 361; Root *v.* Gay, 64 id. 399; City Fire Ins. Co. *v.* Doll, 35 Md. 89, only the use of a mill and teams contributed; Blanchard *v.* Coolidge, 22 Pick. 151; Howe *v.* Howe, 99 Mass. 71, 73; Moody *v.* Rathburn, 7 Minn. 89; Hankey *v.* Becht, 25 id. 212; McCauley *v.* Cleveland, 21 Mo. 438; Gillham *v.* Kerone, 45 Mo. 487; State *ex rel. v.* Finn, 11 Mo. App. 546; Bowker *v.* Gleason (N. J.), 7 Atl. Rep. 885; Champion *v.* Bostwick, 18 Wend. 175; Conklin *v.* Barton, 43 Barb. 435, one owned the hotel, they were partners in running it; Moore *v.* Huntington, 7 Hun, 425; Bisbee *v.* Taft, 11 R. I. 307; Bartlett *v.* Jones, 2 Strob. L. 471 (47 Am. Dec. 606). The above authorities abundantly dispose of the statements apparently made that a partnership in the profits and in the property must go together, in Dwinel *v.* Stone, 30 Me. 384; Newberger *v.* Fields, 23 Mo. App. 631; Syers *v.* Syers, L. R. 1 App. Cas. 174; Chase *v.* Barrett, 4 Paige, 148.

[1] See §§ 261, 265.

[2] Examples of this will be found in the subjects of Real Estate, Ships and Mines. See, also, French *v.* Styring, 2 C. B. N. S. 357, 363, a race-horse owned in common, but perhaps not a partnership. See, also, Rushing *v.* Peoples, 42 Ark. 390, of goods held in common.

[3] Reid *v.* Hollinshead, 4 B. & C. 867; 7 D. & R. 444; Raba *v.* Ryland, Gow. N. P. 133; Tupper *v.* Haythorne, id. 135; *Re* Gellar, 1 Rose, 297; Miller *v.* Sullivan, 1 Cint. Superior Ct. Rep. 271; Soule *v.* Hayward, 1 Cal. 345. See Julio *v.* Ingalls, 1 Allen, 41.

[4] This is the explanation of such cases as Meyer *v.* Sharpe, 5 Taunt. 74; Smith *v.* Watson, 2 B. & C. 401; 3 D. & R. 751; Rice *v.* Austin, 17 Mass. 107; Bartlett *v.* Jones, 2 Strob. L. 471, and those in §§ 34–40.

[5] Bradbury *v.* Smith, 21 Me. 117; Knight *v.* Ogden, 2 Tenn. Ch. 473; Newbrau *v.* Snider, 1 W. Va. 153. And

§ 259. Examples.— Where A. agreed to build houses for B. at actual cost, the houses and lots to be sold, and the proceeds, deducting cost of houses, and an agreed value for the land, to be divided, if a partnership at all, it is in the disposition of the property and not in the buildings; hence, A. is not liable to subcontractors.[1]

Where F. advanced money to build a mill on R.'s real estate, they to be partners until the mill is finished, and then R.'s money and his share of the profits are to be refunded, as it appeared that F. was not expected to have any interest in the mill, he is to be regarded as a partner in the profits alone, that is, on division, R. is to receive the mill, and F. his money back with profits.[2]

A provision in the articles of a carriage manufacturing partnership, that one partner should put in the entire capital, and the other, who was to give his whole time, should have no interest or ownership therein, will not be construed to extend to the stock made by the latter, or under his supervision, or to the materials or stock bought by the firm to carry on the business; but means that on dissolution the balance only above the amount put in by the other partner should be divided.[3]

So if partners owning separate parts of the stock allow a mingling of them, so that the separate interests cannot be identified, the whole will be treated as joint.[4]

If partners in the profits alone of cattle invest the proceeds in more cattle, the partner who had an interest in the original herd assenting that his profits upon them shall go into the new purchase, he has an interest in the latter and not merely in the profits, which is subject to execution.[5]

Where S. gave N. $300 to buy sheep, S. to have half the profits,

if the firm is formed to manufacture under a secret process, the invention will be deemed to belong to all the partners, and each can use it after dissolution unless the right of property has been confined to one partner. Morison *v.* Moat, 9 Hare, 241; Kenny's Patent Button-Holeing Co. *v.* Somervell, 38 L. T. N. S. 878; 26 W. R. 786.

[1] Bisbee *v.* Taft, 11 R. I. 307.

[2] Pearce *v.* Pearce, 77 Ill. 284.

[3] Snyder *v.* Lunsford, 9 W. Va. 223.

[4] Sims *v.* Willing, 8 S. & R. 103; Chappell *v.* Cox, 18 Md. 513; White Mountain Bank *v.* West, 46 Me. 15; Laswell *v.* Robbins, 39 Ill. 209; King *v.* Hamilton, 16 Ill. 190.

[5] Hankey *v.* Becht, 25 Minn. 212.

and if there were losses he was to have no interest, the partnership extends to the sheep and is not confined to the $300.[1]

Where G. buys the stock, good will and fixtures of a business, and admits B. to a partnership, reciting the purchase, and agrees to give B. half the net profits, the consideration from B. being his knowledge of the business, the stock, good will and fixtures remain A.'s property.[2]

§ 260. Where one party furnished all the capital, and the other had no interest in it, but was a partner in the profits only, the separate creditors of the former can levy upon the capital stock;[3] but the separate creditors of the latter cannot levy upon it, because the debtor has no interest, and such levy is a trespass. Nor has he any interest in the profits, unless profits are made, and the other partner can show that there were no profits.[4]

§ 261. —— **purchases with profits.**— In all cases, however, even where it is stipulated that the capital shall belong to one party, all property, whether real or personal, which is purchased with partnership funds or profits, belongs to the partnership and not to one partner.

A very important and interesting application of this principle was made in Clark's Appeal, 72 Pa. St. 142. There M. had contributed to the partnership of M. & C. a foundry and other real estate, retaining the legal title, but carried in the stock account to his credit; but there was a reservation in him of a right upon dissolution to withdraw the property from the firm at its original valuation. The buildings burned down and were rebuilt at a greater cost with partnership funds. On dissolution, the property having risen in value, M. claimed it, and it was allowed to him by the master, on payment of the additional cost of building; but this was reversed, the court not allowing it to be withdrawn at all; holding that M. lost the

[1] Newbrau *v.* Snider, 1 W. Va. 153.

[2] Bowker *v.* Gleason (N. J.), 7 Atl. Rep. 885.

[3] Stumph *v.* Bauer, 76 Ind. 157. And see Rushing *v.* Peoples, 42 Ark. 390.

[4] Smith *v.* Watson, 2 B. & C. 401; 3 D. & R. 751; Blanchard *v.* Coolidge, 22 Pick. 151; Dupuy *v.* Sheak, 57 Iowa, 361; Gillham *v.* Kerone, 45 Mo. 487; State *ex rel.* *v.* Finn, 11 Mo. App. 546; Bartlett *v.* Jones, 2 Strob. L. 471 (47 Am. Dec. 606).

right on allowing rebuilding out of joint funds. The renewed property not being of equivalent value with the original, and the undestroyed part bearing no relative value, and the destroyed part being incapable of valuation and not represented by the cost, the property must be regarded as a new thing.

Where the articles of partnership between R., M. and G. provided that the capital should belong to R. and M. exclusively, but they buy machinery for the concern, but credit themselves upon the books with the cost of it, they thereby make it the property of the firm and cannot maintain trover against G. for it;[1] and articles bought with partnership earnings belong to the firm, and are not governed by such provision in the articles.[2] So shares in a corporation bought with partnership funds in the name of one partner are deemed to be held for the firm.[3] So of real estate so bought.[4]

Insurance issued to partners on partnership property, though it specifies the amount of interest of each partner, is joint property, and if one partner after a loss receives his proportion of insurance money, he must account to the firm for it;[5] and so of insurance on the entire stock, taken out by one partner, he must account to the firm for payment of loss.[6]

So the lease of property for the firm is partnership property.[7] And if one partner, in contemplation of approaching dissolution, procures a renewal in his own name, or does so after dissolution, where the firm had a privilege of renewal, he holds the new term in trust for all the partners; and so of any property acquired in violation of the duty to observe good faith.[8]

[1] Robinson *v.* Gilfillan, 15 Hun, 267.

[2] Snyder *v.* Lunsford, 9 W. Va. 223. But the mere fact that advertising, of which the firm had had the benefit, had been paid out of partnership funds, does not give each partner on the expiration of the firm a share in the advantages of the publicity. Morison *v.* Moat, 9 Hare, 241, 266.

[3] *Ex parte* Connell, 3 Deac. 201; *Ex parte* Hinds, 3 De G. & S. 613; Wilde *v.* Jenkins, 4 Paige, 481; Kenton Furnace Mfg. Co. *v.* McAlpin, 5 Fed. Rep. 737. A partnership to build a railroad does not carry the stock already held by each, and one partner cannot deal with the others' stock then acquired. Alspaugh *v.* Mathews, 4 Sneed, 216.

[4] See § 281.

[5] Northrup *v.* Phillips, 99 Ill. 449.

[6] Manhattan Ins. Co. *v.* Wheeler, 59 Pa. St. 227.

[7] Priest *v.* Chouteau, 12 Mo. App. 252; 85 Mo., 398; Morton *v.* Ostrom, 33 Barb. 256.

[8] § 305.

§ 262. Purchases by one may be advances.— The mere fact that personal property used by the firm is bought with the money of one partner does not necessarily give rise to the inference that it is his,[1] though it may be his and the use only contributed.[2] But the contribution of the use of the thing, and not of the thing itself, occurs much more frequently in cases of real estate than of personal property.

Lumber which a partner buys with his own means and sends to the copartners to be used in erecting the firm's mill, and part is so used, and the rest is prepared and fitted for such use, will all of it be regarded as partnership property.[3]

So a partner who mingles his own cattle with that of the firm upon its farm, the business being that of raising and dealing in stock, will be regarded as converted into joint property, and its increase is the firm's and any loss a joint loss.[4]

§ 263. Incoming partners.— Where the owner of a business takes in partners, it becomes a question of intention whether the stock becomes partnership property or not, and an intention that it shall may be inferred, in the absence of express agreement, from the nature of the property, conduct and circumstances.[5]

If in such case the incoming partners agree to pay their proportion for the property, or contribute a certain amount in the future, the partnership not being conditioned upon

[1] *Ex parte* Hare, 1 Deac. 16; 2 Mont. & A. 478.

[2] Cutler *v.* Hake, 47 Mich. 80, of teams; *Ex parte* Owen, 4 DeG. & Sm. 351, of office furniture; *Ex parte* Smith, 3 Madd. 63, of utensils. As to the right of third persons to rely upon the apparent or reputed ownership of the stock in possession of a firm, see § 104.

[3] Person *v.* Wilson, 25 Minn. 189.

[4] Laswell *v.* Robbins, 39 Ill. 209; King *v.* Hamilton, 16 Ill. 190; White Mountain Bank *v.* West, 46 Me. 15. There is one decision holding that property bought by one with his own funds, to be used for partnership purposes, is presumed as between partners to remain his own property, and if consumed or destroyed in the use and replaced by the other partners, the new property belongs to the same partner individually. Kelly *v.* Clancey, 16 Mo. App. 549.

[5] *Ex parte* Owen, 4 DeG. & Sm. 351; Parker *v.* Hills, 5 Jur. N. S. 809; 7 id. 833. And see Pilling *v.* Pilling, 3 DeG. J. & S. 162.

the payment, the property becomes joint from that time;[1] and if a leasehold be assigned by the lessee to the new firm, the unexpired term of the lease, after dissolution, belongs to the partners and not to him alone;[2] but not if the lease remained individual property and its use only was contributed as long as the firm should exist.[3]

A person having an established business took in his two sons as partners, he putting in his business and stock as capital, in estimating the value of which the debts due were put at twenty per cent. below their face, but in fact yielded more; and the excess was held to be part of the capital of the parent and not profits.[4]

§ 264. But where the transfer is distinctly *in futuro*, and conditioned upon unfulfilled terms, the title does not pass.

Where three partners agreed to manufacture the ore of a fourth partner, and for that purpose to erect suitable buildings, to be paid for out of profits, and, having leased a lot and put up buildings with their own funds, abandoned the partnership and went into another business on the property, the buildings do not belong to the firm.[5]

Where C., having an established business, took B. into partnership and contributed the business, but certain chronometers belonging to C. were put in under a stipulation that they should be taken at a valuation, but the valuation was never fixed, and at dissolution they were left with C. and treated as his own, with the knowledge of B., they were held never to have been partnership property.[6]

L. & F. were partners in the livery business, and L. bought a stable for the business, agreeing to convey one-half to F. whenever the latter should pay half the purchase money. L. died, and final settlement by F., as surviving partner, showed a balance due F.,

[1] Malley *v.* Atlantic Ins. Co. 51 Conn. 222; Sims *v.* Willing, 8 S. & R. 103; Rogers *v.* Nichols, 20 Tex. 719. Here A. contracted to buy a storehouse and merchandise, and then took B. and C. into equal interests with him, they agreeing to pay their proportion,— the property becomes that of the firm.

[2] Morton *v.* Ostrom, 33 Barb. 256.

[3] Burdon *v.* Barkus, 4 Giff. 412; aff'd in 4 DeG. F. & J. 42.

[4] Cook *v.* Benbow, 3 DeG. J. & Sm. 1.

[5] Wadsworth *v.* Manning, 4 Md. 59.

[6] Penny *v.* Black, 9 Bosw. 310.

whereupon he asked specific performance of the contract to convey, but the court regarded the agreement to convey as an individual and not a partnership transaction, and therefore presumably not included in the settlement and balance.[1]

§ 265. —— acquired with joint funds.— If property is bought by a partner in his own name for use by the firm, and is paid for with partnership funds, it is partnership property,[2] and the firm may sue on warranty in the sale.[3]

Thus, if an application for a patent by partners is rejected, but a subsequent application by one partner is accepted, the patent belongs to the firm, and the patentee cannot appropriate the whole.[4]

And articles manufactured by the firm under a patent belonging to one partner may be sold after dissolution as the property of the firm, as if the license still continued.[5]

Hence, if an application for insurance states that the firm owns the land, the mere fact that the title was in the name of one partner does not amount to a misrepresentation.[6]

And if a partner uses the funds of the firm without authority to purchase property for himself, either in his own name or that of his wife, or others, the other partners can require it to be held in trust for the firm.[7]

A judgment confessed in favor of one partner to secure a debt due the firm is held by him in trust for the firm.[8] And so a judgment in favor of the firm, and sold by its assignee for creditors and bought in by a third person for the firm, is held as partnership

[1] Fish *v.* Lightner, 44 Mo. 268.

[2] Wilde *v.* Jenkins, 4 Paige, 481; Smith *v.* Smith, 5 Ves. 189, 193; Robley *v.* Brooke, 7 Bligh, 90; Morris *v.* Barrett, 3 Y. & J. 384; Hersom *v.* Henderson, 23 N. H. 498; Scott *v.* McKinney, 98 Mass. 344. This subject is considered further under Real Estate, § 279 *et seq.*

[3] Hersom *v.* Henderson, *supra.*

[4] Vetter *v.* Lentzinger, 31 Iowa, 182.

[5] Montross *v.* Mabie, 30 Fed. Rep. 234.

[6] Collins *v.* Charlestown Mut. F. Ins. Co. 10 Gray, 155.

[7] See §§ 545-6. A firm of mechanics engaged to do certain work, and before its completion successive changes in the firm by the retirement of some members and addition of others took place, the old firm, as it continued liable to the employers, may file the lien, but holds it for the benefit of the last firm, which owns the debt, though as to the employer, the subsequent firms may be regarded as agents of the original to do the work. German Bank *v.* Schloth, 59 Iowa, 516.

[8] Chapin *v.* Clemitson, 1 Barb. 311.

property and not as tenants in common, and one partner can sell it to close up business.[1]

§ 266. —— individual property acquired at firm's expense.— Property bought with money of the firm may, however, have been purchased for one partner alone, and hence is not partnership assets, but so much of the fund has been converted into separate property; and the fact that he is charged in the books with the cost is evidence of this fact.[2] And so the firm may have lent money to a partner to make a purchase, in which case he is debtor for the amount, and not trustee of the purchase.[3]

Where a partner invented a machine and procured a patent for it in his own name, but at the firm's expense; and the firm also paid the cost of some litigation, but was more than repaid by the benefit of the free use of the machines, the patent is not partnership property, and after dissolution the other partners cannot use or vend it;[4] and inventions relating to improvements in machinery to facilitate the partnership business are the inventor's individual property, although he is bound to give his whole time to the firm's business.[5] But if he affixes his invention to the firm's machines, each member can after dissolution continue the use of those machines with the invention embodied in them.[6]

§ 267. Claims outside of scope.— As partners may enlarge the scope of the business at will, it follows that claims arising in transactions outside of the original purpose of the firm may be joint assets and not individual property. Thus where a firm in the dairy business rendered services in herding cattle, and brought suit for their compensation in the firm name, it is no defense that they were not in the busi-

[1] Thursby *v.* Lidgerwood, 69 N. Y. 198.

[2] Reno *v.* Crane, 2 Blackf. 217; Smith *v.* Smith, 5 Ves. 189; Walton *v.* Butler, 29 Beav. 428; *Ex parte* Emly, 1 Rose, 64. And see similar cases under Real Estate, § 284.

[3] See Smith *v.* Smith, 5 Ves. 189.

[4] Keller *v.* Stolzenbach, 20 Fed. Rep. 47; McWilliams Mfg. Co. *v.* Blundell, 11 Fed. Rep. 419; 22 Pat. Off. Gaz. 177.

[5] Belcher *v.* Whittemore, 134 Mass. 330; Burr *v.* De La Vergne, 102 N. Y. 415.

[6] Wade *v.* Metcalf, 16 Fed. Rep. 130.

ness of herding, and therefore could not sue as a firm, for the compensation would go to the firm.[1]

§ 268. **Claims for damages.**— A judgment in favor of partners for trespass to goods of the firm is assets of the partnership so as to preclude the defendant from set-off of a claim against one partner.[2] So if one partner rents property to the firm, and an increased expense in transacting business occurs by the city emptying a sewer near it, damages for this are due to the firm and not to him, although his rent is in proportion to the amount of business.[3] Where a stage-coach partnership was obliged to pay damages for injury to a passenger of the coach caused by its being upset while on a ferry boat, its claim against the owner of the boat passes by a sale of all its property to two of the partners on dissolution.[4] On the other hand a claim in favor of partners in a coal mine against a railroad company for appropriating part of their land was held not to pass by a sale by one of the partners to the other of all his interest in the property, for the claim is not part of the property.[5] A claim for a penalty for charging illegal fees to a firm, if given by the statute, not by way of redress, but as a punishment, to such individual as shall first begin suit for it, cannot be recovered by the firm.[6]

§ 269. **Personal benefit.**— A benefit may be conferred upon a partner for his exclusive use, for which he will not be accountable to the firm. As where a ship belonging to a Frenchman and an American was captured by a British cruiser, and compensation made to the American for his interest alone, to the exclusion of the Frenchman, this was held to be his individual property.[7]

Where one partner holds an office, the emoluments of the office are generally presumed to be individual property;[8] but the emoluments may be assets if the general scope of the

[1] Tiernan *v.* Doran, 19 Neb. 492.

[2] Collins *v.* Butler, 14 Cal. 223.

[3] Bread *v.* Lynn, 126 Mass. 367.

[4] Blakeley *v.* Le Duc, 22 Minn. 476.

[5] Blackiston's Appeal, 81½ Pa. St. 339.

[6] Fowler *v.* Tuttle, 24 N. H. 9.

[7] Campbell *v.* Mullett, 2 Swanst. 551. See Thompson *v.* Ryan, 2 id. 565, that if the property itself be restored, its joint character has continued. Moffat *v.* Farquharson, 2 Bro. C. C. 338.

[8] Alston *v.* Sims, 24 L. J. Ch. 553; 1 Jur. N. S. 458; Starr *v.* Case, 59 Iowa, 491 (§ 224).

partnership business include it, and it takes time belonging to the firm,[1] or if the course of dealing between the partners may show that they were regarded as partnership assets.[2] And in such case the holder of the office will, upon dissolution, be left in the office and charged with its value as an asset.[3]

A license to one partner to sell liquors being a matter of personal confidence will not authorize a sale to his copartner, nor is the latter his agent, but agent of the firm.[4] A license to a firm will authorize the continuing partner to act alone;[5] but *quære* had the change been by taking in a new partner.[6]

§ **270. Insurance cases.**—The question as to the nature of the title of the partners and the firm, and the effect of changes of membership, frequently arises to perplex the courts under the clauses in policies of insurance against alienation and change of title or assignment of the policy. When a partner retires or a new one comes in, the adjustment of the insurance policies are put away out of sight and out of mind, least thought of and most easily overlooked; it is to be wished that these often distressing complications might be set at rest by the companies themselves or by appropriate legislation.

§ **271. —— taking in a partner.**—In Malley *v.* Atlantic Ins. Co. 51 Conn. 222, M., having an established business, took in N. as partner, who was to put in $10,000 during the first year, but never did so. Although N.'s interest in the firm may be worthless because the firm owed to M. the entire value of the stock, yet the property contributed by M. has ceased to be his alone, and his insurance policy, which contained a clause of avoidance in case of change of title or possession, or if M. ceased to have the entire and unconditional ownership for his own use, became void. The dis-

[1] Collins *v.* Jackson, 31 Beav. 645, of one attorney holding a clerkship.

[2] Caldwell *v.* Leiber, 7 Paige, 483, where one partner acted as deputy postmaster, but the firm's clerks did the work.

[3] Ambler *v.* Bolton, L. R. 14 Eq. 427; Smith *v.* Mules, 9 Hare, 556.

[4] Webber *v.* Williams, 36 Me. 512; Shaw *v.* State, 56 Ind. 188.

[5] United States *v.* Glab, 99 U. S. 225; State *v.* Gerhardt, 3 Jones' L. 178, of a liquor license. *Contra*, Harding *v.* Hagar, 63 Me. 515, of a license to act as broker.

[6] United States *v.* Glab, *supra*.

senting opinions do not deny the principle, but claim, first, that no partnership was to be formed until N. put in his money; second, that an actual and not technical change of title was intended, and N.'s ownership was a mere fiction and not one for all purposes; and, third, that the partnership was in the profits and not in the stock.[1]

But in Cowan v. Iowa State Ins. Co. 40 Iowa, 551 (20 Am. Rep. 583), which the preceding case denies, the clause against alienation in a policy was construed to mean alienation of the entire interest, and taking in a partner was held not to vitiate the policy to the extent of the original owner's interest. This is inconsistent with the theory that a firm is an entity distinct from its members.[2]

§ 272. —— **retirement of one of several partners.**— A sale by a retiring partner of his interest in the firm to his copartners was held not to vitiate the policy, either as a violation of the clause against assignment of the policy or any interest therein, or as an alienation of the property, for a partner has no interest in any aliquot part of the whole, but merely a share in the surplus, and there may be no surplus; or, as other cases put it, each owns *per my et per tout*, and the policy necessarily contemplates that certain circumstances may place the entire interest in one partner or some less than all, such as death or bankruptcy of one, or where, on dissolution, one partner is debtor and others may become entitled to the whole surplus as creditors.[3]

[1] The same consequence of avoiding the policy was held to follow the introduction of a new partner in an existing firm, in Drennen v. London Assur. Corp. 20 Fed. Rep. 657; reversed on other grounds, s. c. 116 U. S. 461. In Liverpool, London & Globe Ins. Co. v. Verdier, 35 Mich. 395, the company treated the policy as valid after the assured had taken in a partner, hence the point did not arise; and in Card v. Phœnix Ins. Co. 4 Mo. App. 424, S. & N., after procuring insurance, took in K. as a partner, and afterwards S. sold out to N. & K. and the policy was held void.

[2] So in Scanlon v. Union F. Ins. Co. 4 Biss. 511. That an individual partner has an insurable interest in the partnership property, Converse v. Citizens' Mut. Ins. Co. 10 Cush. 37; Manhattan Ins. Co. v. Webster, 59 Pa. St. 227.

[3] Hoffman v. Ætna F. Ins. Co. 32 N. Y. 405; West v. Citizens' Ins. Co. 27 Oh. St. 1; 22 Am. Rep. 294; Pierce v. Nashua F. Ins. Co. 50 N. H. 297; Texas Banking & Ins. Co. v. Cohen, 47 Tex. 406; 26 Am. Rep. 298; Drennen v. London Assur. Corp. 20 Fed. Rep. 657 (*dictum*). *Contra*, Dix v. Mercantile Ins. Co. 22 Ill. 272; Hartford F. Ins. Co. v. Ross, 23 Ind. 179.

The theory that the company may have relied upon the watchfulness of the particular partner who had retired was said to amount to nothing, because watchfulness was not stipulated for, and he could abstain, even while a partner, from care or attention for anything in the policy.[1]

§ 273. —— retirement of one of two partners.— And the same reasoning was adopted to show that a sale by one of two partners of all his interest in the firm to his copartner, thus converting the assets from joint to separate property, did not avoid the insurance.[2]

§ 274. Possession.— As the partnership property belongs to all the partners, one partner has as much right to its possession as the others; hence, while the exclusion of one

Nor a change of interests, leaving the possession where it was. Drennen *v.* London Assur. Corp. 20 Fed. Rep. 657 (*dictum*); reversed on other points, 116 U. S. 461. Other cases deny recovery on the technical ground that no number less than all those originally contracted with can sue, and all cannot sue, because one has no interest remaining. Baltimore F. Ins. Co. *v.* McGowan, 16 Md. 45; Tate *v.* Mutual F. Ins. Co. 13 Gray, 79; Tillou *v.* Kingston Mut. Ins. Co. 5 N. Y. 405 (rev. s. c. 7 Barb. 570). This ground is answered in West *v.* Citizens' Ins. Co. 27 Oh. St. 1, sustaining a suit under the code in the name of the continuing partners, and is ignored in Powers *v.* Guardian Ins. Co. 136 Mass. 108, sustaining suit in the names of all the original insured.

[1] Powers *v.* Guardian Ins. Co. 136 Mass. 108; 49 Am. Rep. 20; Hoffman *v.* Ætna F. Ins. Co. 32 N. Y. 405; West *v.* Citizens' Ins. Co. 27 Oh. St. 1; 22 Am. Rep. 294.

[2] Burnett *v.* Eufaula Home Ins. Co. 46 Ala. 11; 7 Am. Rep. 581; Dermani *v.* Home Mut. Ins. Co. 26 La. Ann. 69; Powers *v.* Guardian Ins. Co. 136 Mass. 108; 49 Am. Rep. 20 (the clause here was against a sale and not against change of title, and sale was said to mean sale of the whole; this case also suggests the entity theory, holding that the firm is contracted with as one person and internal changes are not considered); Pierce *v.* Fire Ins. Co. 50 N. H. 297; 9 Am. Rep. 235; Combs *v.* Shrewsbury Ins. Co. 34 N. J. Eq. 403, 411–12; Hoffman *v.* Ætna F. Ins. Co. 32 N. Y. 405 (aff'g 1 Robt. 501; 19 Abb. Pr. 235); Wilson *v.* Genesee Mut. Ins. Co. 16 Barb. 511; Hobbs *v.* Memphis Ins. Co. 1 Sneed (Tenn.), 444, here a transfer or sale of property was not forbidden, but only an assignment of the policy; hence the buying partner can recover for his own original interest. Texas Ins. Co. *v.* Cohen, 47 Tex. 406. *Contra,* Finley *v.* Lycoming Mut. Ins. Co. 30 Pa. St. 311, forbidding alienation by sale; Buckley *v.* Garrett, 47 id. 204; Keeler *v.* Niagara F. Ins. Co. 16 Wis. 523. A dissolution and division of goods was held a change of title, avoiding a policy, Dreher *v.* Ætna Ins. Co. 18 Mo. 128.

partner by another is a violation of his rights for which equity will afford a remedy, yet a recovery of possession cannot be had by replevin or detinue, for the plaintiff is as little entitled to take possession as the defendant; the possession of each is equally rightful.[1] Nor can one maintain trover against the other,[2] unless there was a destruction of the property or what amounts to a destruction of it, as far as the plaintiff is concerned.[3]

§ 275. **Applications.**— Hence, if the partnership stock was all furnished by one partner and was to remain his property, and profits and losses were to be divided, he cannot sustain replevin nor show an exclusive title by proof that there were no profits, and hence that the other partner had no interest, for this is equivalent to having an accounting in a law case.[4]

In Crabtree *v.* Clapham, 72 Me. 473, it was held that if a partner gets possession of the joint property from his copartner by replevin, and has sold it, judgment must be rendered against him, but for the whole value and not half the value. His undertaking was to return the whole property in case he was not entitled to the possession. The presumption that partners are equal owners in the absence of evidence will not obtain (and in this respect the former case of Clapham *v.* Crabtree, 67 Me. 326, is certainly overruled), and the burden is on the plaintiff to show that less than the entire amount is sufficient. Otherwise, any insolvent and debtor partner could get all the property by paying one-half to his defrauded copartner, and the latter would only have a worthless judgment for

[1] Buckley *v.* Carlisle, 2 Cal. 420; Kuhn *v.* Newman, 49 Iowa, 424; Whitesides *v.* Collier, 7 Dana, 283; Crabtree *v.* Clapham, 67 Me. 326; Clapham *v.* Crabtree, 72 id. 473; Azel *v.* Betz, 2 E. D. Smith, 188; Whelen *v.* Watmough, 15 S. & R. 153; Portsmouth *v.* Donaldson, 32 Pa. St. 202; Course *v.* Prince, 1 Mill (S. Ca.), 413 (12 Am. Dec. 649).

[2] Fox *v.* Hanbury, Cowp. 445; Harper *v.* Godsell, L. R. 5 Q. B. 422; Robinson *v.* Gilfillan, 15 Hun, 267; Morganstern *v.* Thrift, 66 Cal. 577; Kellogg *v.* Fox, 45 Vt. 348; Smith *v.* Small, 54 Barb. 223; Smith *v.* Book, 5 Up. Can. Q. B. (O. S.) 556. See Martyn *v.* Knowles, 8 T. R. 146.

[3] Jacobs *v.* Seward, L. R. 5 H. L. 464; Mayhew *v.* Herrick, 7 C. B. 229, where a sale of the whole on an execution against one was held to be such a destruction by the sheriff. And see Execution, § 1108. Cubitt *v.* Porter, 8 B. & C. 257; Stedman *v.* Smith, 8 E. & B. 1.

[4] Kuhn *v.* Newman, 49 Iowa, 424. And see Remington *v.* Allen, 109 Mass. 47.

his balance at the end of a suit for an accounting. It was queried, however (pp. 477–8), whether the plaintiff had not, by replevying, estopped himself to claim that it was partnership property and therefore must pay in full. If the other partner was abusing the property, an injunction or receiver should have been asked for.

So, where the plaintiff leased ground for a nursery to X. for five years, and X. sold out his lease and business to plaintiff and defendants, who formed a partnership in the nursery, and near the end of the term plaintiff notified defendants to deliver possession at the end of the term and divide the trees, leaving his share in the land or to sell them all, but the defendants removed the trees to another nursery, no rights of the plaintiff have been violated, because the possession of one is the possession of all.[1]

So where S. and H., partners, being sued on their notes, H. pleaded that they assigned a large amount of property to one A., to pay their creditors, and that the creditors, including the plaintiffs, took the property from the assignee's hands and delivered it to S. to dispose of for the creditors without H.'s knowledge, and thereby he suffered damage, this is no defense for a restoration of possession to one partner, and his acceptance is within his powers. The defense is also bad as being a set-off in favor of one partner in an action against both.[2]

Where J. bought corn of M., not disclosing that it was for the firm of J. & C., C. has the right to take possession, if the contract is completed, without being liable for a conversion. In such case, if he got possession by replevying in his own name instead of in the joint names of J. & C., the possession so obtained will be referred to the right of property and he is not liable *ex delicto*.[3]

So one partner cannot sue another in trespass for any action of his in relation to the property,[4] even if one sold the entire stock against the will of the other, and he and the buyer broke into the store and took the goods.[5] As one partner cannot replevy from another, so he cannot replevy from the bailee of the other partner.[6]

[1] Portsmouth *v.* Donaldson, 32 Pa. St. 202.

[2] Cooley *v.* Sears, 25 Ill. 613.

[3] Conklin *v.* Leeds, 58 Ill. 178.

[4] Whitesides *v.* Collier, 7 Dana, 283.

[5] Montjoys *v.* Holden, Litt. Sel. Cas. 447 (12 Am. Dec. 331), suggesting that had the goods been actually destroyed perhaps an action might lie; Dana *v.* Gill, 5 J. J. Mar. 242; 20 Am. Dec. 255; Whitesides *v.* Collier, 7 Dana, 283; Mason *v.* Tipton, 4 Cal. 276.

[6] Per HUNT, C. J., Tell *v.* Beyer,

§ 276. We have seen that in certain cases the partners could sell the entire stock, but in case of fraudulent collusion between the seller and buyer the other partner's right to the possession is not taken away and he can sue the vendee in trover. He is not to be embarrassed by the theory that at least the interest of the seller passed because it deprives him of the benefit of the *delectus personarum.*[1] A sale by one partner of his entire interest in the firm to a third person is a dissolution of the partnership, and the remaining partner has the right to the possession in order to wind up.[2]

Injunction against the buyer and the guilty partner will be granted.[3]

§ 277. **No crime against possession.**— For the same reasons a partner cannot commit a crime by any acts relating to the possession of the partnership property; for example, he cannot be guilty of embezzlement of the funds, for he is both principal and agent;[4] or larceny or burglary.[5] So if a

38 N. Y. 161, 162; but in this case the defendant did not deny the plaintiff's ownership, but merely his own possession, and hence could not rely on the other partner's title. See Keegan *v.* Cox, 116 Mass. 289.

[1] Fox *v.* Rose, 10 Up. Can. Q. B. 16. See, also, Canal Co. *v.* Gordon, 6 Wall. 561, abstracted in § 383.

[2] Meaher *v.* Cox, 1 Sel. Cas. Ala. 156; 37 Ala. 201; Nichol *v.* Stewart, 36 Ark. 612, 621; Miller *v.* Brigham, 50 Cal. 615; Reece *v.* Hoyt, 4 Ind. 169; Chase *v.* Scott, 33 Iowa, 309; Flynn *v.* Fish, 7 Lansing, 117; Horton's Appeal, 13 Pa. St. 67; Montjoys *v.* Holden, Litt. Sel. Cas. 447; 12 Am. Dec. 331; Mason *v.* Tipton, 4 Cal. 276; Crosby *v.* McDermitt, 7 Cal. 146; Blaker *v.* Sands, 29 Kan. 551, 558. The buyer has no right to participate in the management, and his only remedy is by suit for an accounting to have the seller's share ascertained and paid over; and this principle was held to apply even where one partner had agreed that the other might sell his interest, for this is not an agreement to give up the right of property, and the buyer cannot sue the other partner for conversion if he sells. Chase *v.* Scott, 33 Iowa, 309.

[3] Sloan *v.* Moore, 37 Pa. St. 217; High *v.* Lack, Phil. (N. Ca.) Eq. 175; Halstead *v.* Shepard, 23 Ala. 558, 573.

[4] Soule *v.* Hayward, 1 Cal. 345; State *v.* Butman, 61 N. H. 511; Napoleon *v.* State, 3 Tex. App. 522. Here N. and R. were to become partners with equal capitals. R. handed his contribution to N., who kept the money and abandoned the enterprise. N. was held guilty of embezzlement, on the ground that no partnership had been consummated.

[5] Jones *v.* State, 76 Ala. 8, where one partner killed the other while the latter was trying to take money

partner entitled to commissions from the firm falsely represent that he has made a sale, and so got the commission, he cannot be indicted for false pretenses, but it is merely an item in the account.[1] So, also, one partner cannot arrest his copartner on an allegation of fraudulent removal or embezzlement of the partnership property.[2] But, as the crime of conspiracy may consist in doing a civil wrong, if a partner conspires with a person to swindle the firm by false accounts, he is indictable for conspiracy, although had he so acted alone it would not have been a crime;[3] and a partner who forcibly ejects a copartner, and threatens him if he ever enter again, may be bound over to keep the peace.[4]

If a partnership asset has become individual property, it can then, of course, become the subject of crime by a copartner.[5]

Generally if property belonging to the firm or placed in its possession is taken by a third person from the manual possession of one partner, all the partners and not he alone must bring the replevin to recover it.[6] There may, however, be cases where the title still remains in one partner, in which case he can maintain replevin in his own name.[7]

from the drawer, and this was held not to reduce the crime from murder to manslaughter. Alfele v. Wright, 17 Oh. St. 238, one partner saying of the other that he broke into the store and carried away the goods, is not slanderous *per se*, for it charges no crime. In Becket v. Sterrett, 4 Blackf. 499, a charge of pilfering out of the store was held actionable, because it might not refer to partnership money alone. Chancellor Zabriskie expressed himself as not satisfied that a partner could not be guilty of larceny of the goods of the firm, when, being indebted to it, he stealthily removes and appropriates them, Sieghortner v. Weissenborn, 20 N. J. Eq. 172, 185 (rev. on other points, 21 id. 483); but the chancellor is in a minority.

[1] Reg. *v.* Evans, 9 Jur. N. S. 184.

[2] Cary *v.* Williams, 1 Duer, 667; Soule *v.* Hayward, 1 Cal. 345.

[3] Reg. *v.* Warburton, L. R. 1 Cr. Cas. 274; 11 Cox, C. C. 584.

[4] The Queen *v.* Mallinson, 16 Q. B. 367.

[5] Thus, in Sharpe *v.* Johnston, 59 Mo. 557, partners dissolved, adjusting their affairs, and to one was allowed certain drafts and notes as cash; the other being subsequently employed to collect them, does so as mere agent; hence, a prosecution for embezzlement, if he converts the proceeds, is not malicious.

[6] Saul *v.* Kruger, 9 How. Pr. 569.

[7] In Boynton *v.* Page, 13 Wend. 425, one partner was to find stock for harness making and the other was to work it up; a third person

§ 278. Exclusive right of possession in one.— But if the partners have agreed that one of their number shall have exclusive possession, as they may do, whether it be by covenant in the articles or subsequent delivery by a debtor partner as security to the creditor partner, this right of possession, if violated, may be enforced by replevin, not only against third persons,[1] but against copartners,[2] or those holding for them.[3]

And notice of dissolution, and that one would thereafter conduct the business, is evidence of such possession;[4] or an action against the copartner can be brought in covenant, if the right of exclusive possession is given under seal; but an action on case will not lie.[5]

When the goods have been divided and the joint ownership severed, each taking part in severalty, trover will lie by one for his share against the bailee from the other, who had wrongfully pledged the share after division.[6]

having taken possession of the stock before it was worked up, the partner who was to furnish the stock replevied it in his own name alone; it was held that he could do so, for the stock might be considered as his until work had begun upon it, since any other stock would have sufficed the copartner. The defense, however, did not plead that title was in the firm.

[1] Bostick v. Brittain, 25 Ark. 482.

[2] Ivey v. Hammock, 68 Ga. 428; Belcher v. Van Dusen, 37 Ill. 281.

[3] Harkey v. Tillman, 40 Ark. 551; Kahle v. Sneed, 59 Pa. St. 388; Bartley v. Williams, 66 id. 329; Jenkins v. Howard, 21 La. Ann. 597; Hunt v. Morris, 44 Miss. 314.

[4] Kelly v. Murphy (Cal.), 12 Pac. Rep. 467.

[5] Clay v. Grubb, 1 Litt. (Ky.) 222.

[6] Williams v. Barton, 3 Bing. 139; aff'g 5 B. & Ald. 395.

CHAPTER III.

REAL ESTATE.

§ 279. The subject of the partnership real estate, its treatment as converted into personal property when held as part of the capital or stock of a partnership, its consequent devolution in case of death, and the effect on the treatment of the legal title, are so important as to require a separate chapter. The English law and our own are in general harmony upon the subject, except that with us equity, in the absence of a clear intention to the contrary, treats the real estate as converted into personalty only to the extent of partnership necessities, and not for mere purposes of division of the surplus beyond those necessities, whereas, in England, the conversion is out and out, and the surplus goes to the personal representative and not to the heir.

The first thing to be determined is whether land is converted into personalty at all; that is, whether it is partnership property or held as individual property in a tenancy in common. Land may be either an adjunct to a partnership which deals in other things or it may itself be the commodity dealt in. This last kind of partnership is necessarily post-feudal. Under the influence of the feudal system, where land was reserved as the reward of the soldier or as the basis of the military organization of the community, placing it beyond the control of the occupant or the reach of his creditors, such a partnership could not exist. But as these influences relaxed and real estate became gradually emancipated from feudal restrictions, land became more and more a mere auxiliary to commercial enterprise, and may now be the commodity or stock dealt in by a partner-

ship formed for the purpose of such dealing generally or for the disposition of a designated tract.[1]

But when land is a mere incident or investment in an ordinary partnership it becomes somewhat difficult to ascertain whether it is partnership property or not.

§ 280. **When it is part of the joint stock.**— The legal title of real estate, if in the name of more than one partner, is always held by them as tenants in common, but in equity it may be partnership property.

And there is as much difference between individual and partnership real estate as in personal property. In the one case partnership creditors may have their usual priorities in distribution in equity, and a creditor partner a lien for his advances; on dissolution the liquidating or surviving partner has a right to resort to the property. A mortgage by a partner will bind his individual share if it be individual property, but if it is partnership property, will reach only a share in the surplus after paying all partnership debts, subsequent as well as prior. So partition may be had of property owned in individual shares as individuals, but if it be partnership real estate a court of equity will no more grant partition than it would decree a partial accounting, unless there are no debts or equities *inter se* to be adjusted, and a variety of other differences would doubtless occur on reflection.

That real estate is held in the joint names of several persons, and that those persons are in partnership, does not make the property partnership assets if not shown to have been bought with the joint funds for partnership purposes.[2] Whether real estate is partnership or individual property is

[1] For example, the following were real estate partnerships: Darby *v.* Darby, 3 Drew. 495; *In re* Warren, 2 Ware, 322; Clagett *v.* Kilbourne, 1 Black, 346; Thompson *v.* Bowman, 6 Wall. 316; Dudley *v.* Littlefield, 21 Me. 418; Sage *v.* Sherman, 2 N. Y. 417, 432; Chester *v.* Dickerson, 54 id. 1 (13 Am. Rep. 550); 52 Barb. 349; 45 How. Pr. 326; Gray *v.* Palmer, 9 Cal. 616.

[2] Thompson *v.* Bowman, 6 Wall. 316. See § 287.

purely a question of the intention of the partner, and as this is rarely expressed in the deed, becomes — except in Pennsylvania[1] — a matter of inference and evidence. The most usual and most controlling considerations when the articles are silent are the ownership of the funds with which the property was paid, the uses to which it was put, or how it was entered and carried in the accounts of the firm. These evidences must be examined separately.

§ 281. —— **procured with partnership funds.**— Real estate bought or leased with partnership funds for partnership purposes, and applied to partnership uses, is deemed to be partnership property whether the title is in all the partners as tenants in common, or in less than all, in the absence of any agreement. There is no necessity for any agreement in such cases. The statute of frauds has no application, but the title is held in trust for the firm.[2]

[1] § 289.

[2] Crawshay *v.* Maule, 1 Swanst. 495, 518; Hoxie *v.* Carr, 1 Sumner, C. C. 173; Shanks *v.* Klein, 104 U. S. 18; Offutt *v.* Scott, 47 Ala. 104, 125; Little *v.* Snedecor, 52 id. 167; Hatchett *v.* Blanton, 72 id. 423; Espy *v.* Comer, 76 id. 501; McCauley *v.* Fulton, 44 Cal. 355; Sigourney *v.* Munn, 7 Conn. 11; Matlock *v.* Matlock, 5 Ind. 403; Morgan *v.* Olvey, 53 id. 6; Loubat *v.* Nourse, 5 Fla. 350; Robertson *v.* Baker, 11 id. 192; Price *v.* Hicks, 14 id. 565; Buck *v.* Winn, 11 B. Mon. 320; Divine *v.* Mitchum, 4 id. 488; 41 Am. Dec. 241; Scruggs *v.* Russell, McCahon (Kan.), 39; Bryant *v.* Hunter, 6 Bush, 75; Burnam *v.* Burnam, 6 id. 389; Spalding *v.* Wilson, 80 Ky. 589; Buffum *v.* Buffum, 49 Me. 108; Burnside *v.* Merrick, 4 Met. 537; Dyer *v.* Clark, 5 id. 562; 39 Am. Dec. 697; Howard *v.* Priest, 5 id. 582; Scruggs *v.* Blair, 44 Miss. 406; Carlisle *v.* Mulhern, 19 Mo. 56; Crow *v.* Drace, 61 Mo. 225, 227; Willet *v.* Brown, 65 id. 138; 27 Am. Rep. 265; Hogle *v.* Lowe, 12 Nev. 286; Jarvis *v.* Brooks, 27 N. H. 37; 59 Am. Dec. 359; Cilley *v.* Huse, 40 id. 358; Messer *v.* Messer, 59 id. 375; Matlack *v.* James, 13 N. J. Eq. 126; National Bank *v.* Sprage, 20 id. 13 (reversed on other points, 21 id. 530); Campbell *v.* Campbell, 30 id. 415; Fairchild *v.* Fairchild, 64 N. Y. 471, 479 (aff. 5 Hun, 407); Buchan *v.* Sumner, 2 Barb. Ch. 165; Smith *v.* Tarlton, id. 336; Delmonico *v.* Guillaume, 2 Sandf. Ch. 366; Cox *v.* McBurney, 2 Sandf. 561; Deming *v.* Colt, 3 id. 284; Rank *v.* Grote, 50 N. Y. Superior Ct. 275; Hanff *v.* Howard, 3 Jones (N. Ca.), Eq. 440; Summey *v.* Patton, 1 Winst. (N. Ca.) Eq. 52; Bank *v.* Sawyer, 38 Oh. St. 339, 342; Greene *v.* Greene, 1 Oh. 535; 13 Am. Dec. 642; Page *v.* Thomas, 43 Oh. St. 38; Tillinghast *v.* Champlin, 4 R. I. 173; Bowman *v.* Bailey, 20 S. Ca. 550; Hunt *v.* Benson, 2 Humph. (Tenn.) 459; Willis *v.* Freeman, 35

So of property originally contributed as stock, or if originally paid for by each out of his separate means, or brought into the use of the firm at its formation, and subsequently agreed to be converted into partnership property, it becomes part of the capital.[1]

§ 282. —— **improvements out of joint fund.**—If the land is owned in undivided interests by persons who compose a firm, but had been paid for by the individual funds of the owners, but is improved out of partnership funds for partnership purposes, or part of the purchase money is paid for with the firm's assets, and the property is used for partnership purposes, it is partnership property.[2]

And so, though the land belonged to one partner, yet, if the firm places valuable and permanent improvements upon it for firm purposes, and essential to the firm, this shows an intention to make it firm property, and the firm owes him the value at the time of the appropriation;[3] though

Vt. 44; Dewey *v.* Dewey, 35 id. 555; Pierce *v.* Trigg, 10 Leigh (Va.), 406; Brooke *v.* Washington, 8 Gratt. 248 (56 Am. Dec. 142); Diggs *v.* Brown, 78 Va. 292; Hardy *v.* Norfolk Mfg. Co. 80 id. 404; Martin *v.* Smith, 25 W. Va. 579; Bird *v.* Morrison, 12 Wis. [138]; Bergeron *v.* Richardott, 55 Wis. 129; Martin *v.* Morris, 62 id. 418; Conger *v.* Platt, 25 Up. Can. Q. B. 277. And if bought by one partner in the name of a third person, it can be followed and recovered if no *bona fide* right intervene. See §§ 544–546. In Spalding *v.* Wilson, 80 Ky. 589, on a contest between partnership creditors and individual creditors of a partnership in a distillery, as to whether six hundred acres of land bought with partnership funds, and conveyed to the partners as tenants in common and used to raise corn for the distillery, was individual or partnership property, it is held that the land was an incident to the distillery, and that the disillery might well be an incident to the land, and that the creditors of the firm were entitled to priority.

[1] Sigourney *v.* Munn, 7 Conn. 11; Hogle *v.* Lowe, 12 Nev. 286; Way *v.* Stebbins, 47 Mich. 296; Wiegand *v.* Copeland, 14 Fed. Rep. 118; s. c. 7 Sawy. 442; Arnold *v.* Wainwright, 6 Minn. 358.

[2] Roberts *v.* McCarty, 9 Ind. 16; Smith *v.* Danvers, 5 Sandf. 669; Lane *v.* Taylor, 49 Me. 252; Collins *v.* Decker, 70 id. 23; Deveney *v.* Mahoney, 23 N. J. Eq. 247; Godfrey *v.* White, 43 Mich. 171; Bopp *v.* Fox, 63 Ill. 540; Geopper *v.* Kinsinger, 39 Oh. St. 429; Winslow *v.* Chiffelle, Harp. (S. Ca.) Eq. 25. See Newton *v.* Doran, 3 Grant's Ch. (Up. Can.) 353.

[3] Ballantine *v.* Frelinghuysen, 38 N. J. Eq. 266; Lane *v.* Tyler, 49 Me. 252, 253. That it may be considered as partnership property to the extent of the value of the improvements,

merely using his land without paying him for it, or giving him a credit on the books, would not show such intention,[1] or making mere temporary improvements on land held in common with partners, as against written references by and between the partners to the land as held in common.[2] Or paying incidentally a single instalment of purchase money out of partnership funds on a prior contract on separate account gives no right except to reimbursement.[3]

§ 283. —— **taken for debt.**— Real estate taken by partners in satisfaction of a debt, or received in the collection of a claim, or purchased on foreclosure of a mortgage securing a partnership debt, is deemed to be partnership property, and held in the proportion of their interest in the firm, in the absence of evidence showing a conversion of it into separate property.[4]

§ 284. **Books show intention.**— But if purchased by one partner in his own name, with partnership funds, and a charge against him is made on the ledger for its reasonable value, this shows a conversion into individual property;[5] or

Kendall *v.* Rider, 35 Barb. 100; Averill *v.* Loucks, 6 Barb. 19, 470; King *v.* Wilcomb, 7 Barb. 263. A lease by one partner to the firm, and improvements by them, makes distinct interests, and a mortgage by the lessor would not cover the firm's interest. Kerr *v.* Kingsbury, 39 Mich. 150.

[1] Ballantine *v.* Frelinghuysen, *supra;* Chamberlin *v.* Chamberlin, 12 J. & Sp. (N. Y.) 116.

[2] Frink *v.* Branch, 16 Conn. 260; Robertson *v.* Corsett, 39 Mich. 777.

[3] Wheatley *v.* Calhoun, 12 Leigh (Va.), 264 (37 Am. Dec. 654). In Parker *v.* Bowles, 57 N. H. 491, it was held that property not purchased with partnership funds, and therefore held as tenants in common, could not be turned into partnership property by oral agreement, and that using partnership funds in improving it was equivalent merely to dividing and converting so much assets into separate property. And see Deloney *v.* Hutcheson, 2 Rand. (Va.) 183, 187.

[4] Putnam *v.* Dobbins, 38 Ill. 394; Moran *v.* Palmer, 13 Mich. 368; Morgan *v.* Olvey, 53 Ind. 6; Paton *v.* Baker, 62 Iowa, 704; Flanagan *v.* Shuck, 82 Ky. 617; Whitney *v.* Cotten, 53 Miss. 689; Morrison *v.* Mendenhall, 18 Minn. 232; Buchan *v.* Sumner, 2 Barb. Ch. 165; Leinsinring *v.* Black, 5 Watts, 303; Collumb *v.* Read, 24 N. Y. 505; Smith *v.* Ramsey, 6 Ill. 373.

[5] Homer *v.* Homer, 107 Mass. 82; Collumb *v.* Read, 24 N. Y. 505, 511; Fairchild *v.* Fairchild, 64 N. Y. 471 (aff. 5 Hun, 407); Bergeron *v.* Richardott, 55 Wis. 129; Harvey *v.* Pennypacker, 4 Del. Ch. 445. And

if being owned by him it is credited to him on the books, this shows it is partnership property;[1] or if the other partner had half the cost charged against him on the books.[2] If bought with partnership funds, but is used for residences of the partners, but is treated as partnership property on the books, it will be so regarded, though the dwellings were built at individual expense, but the property was undivided.[3] If bought on the credit of the firm, with funds raised by its notes, with the intention of using it for the firm's business, which was never done, and the expense of discounting the note and its payment and the taxes, are charged against one partner, it is his property, the credit of the firm being loaned to him for the purpose, and profits on a resale are therefore his.[4]

If the deed described the parties as partners this justifies the inference that the land is partnership property.[5]

§ 285. **Use of funds not conclusive.**— The mere fact that partnership funds have gone into a purchase of real estate is very inconclusive as to the intention of the partners, for they may have desired to make an investment of surplus funds. It might be supposed that in the absence of evidence of intention the legal estate would control, and the grantees hold as tenants in common and not as partners; yet this cannot be safely affirmed in view of the authorities. All the circumstances must be looked to, such as the manner of treating the purchase on the books, the use of the

see *Ex parte* McKenna, 3 De G. F. & J. 659; Smith *v.* Smith, 5 Ves. 189; Leinsinring *v.* Black, 5 Watts, 303. *Contra*, if the books show no light on the intention. King *v.* Weeks, 70 N. Ca. 372.

[1] Robinson *v.* Ashton, L. R. 20 Eq. 25.

[2] Collins *v.* Charlestown Mut. F. Ins. Co. 10 Gray, 155.

[3] *Ex parte* McKenna, 3 DeG. F. & J. 645.

[4] Hay's Appeal, 91 Pa. St. 265.

[5] Offutt *v.* Scott, 47 Ala. 104, 126. If land is bought with the joint funds, in the name of one partner, who afterwards died, the presentation by the surviving partner of a claim for his advances in the purchase of the property against the estate of the decedent does not estop him to withdraw, and claim the property to be joint, where presentation was not intended as an abandonment of it as such. Way *v.* Stebbins, 47 Mich. 269.

property, who collected the rents, paid insurance or taxes; yet none of these are alone conclusive.[1]

If the use were conclusive of the question, the land might be real estate at one time and personalty at another. The use is not the test, but is only evidence of the intention of the parties, which is the test.[2]

If such purchase was within the usual scope of the partnership business, as where the partnership are dealers or speculators in land, the purchase with partnership funds would no doubt be deemed as partnership property unless the contrary were shown.[3]

§ 286. —— **use of property not conclusive.**—If payment of purchase money out of joint fund is alone weak evidence of intent to hold the property as joint, the mere use made of property is, alone, still weaker. Thus, that a single partner devotes his individual property to the business does not make it partnership property.[4] So, if the property belonged

[1] Phillips *v.* Phillips, 1 Myl. & K. 649; Hanson *v.* Eustace, 2 How. 653; Hanks *v.* Hinson, 4 Porter (Ala.), 509; Wood *v.* Montgomery, 60 Ala. 500; Brewer *v.* Browne, 68 id. 210; Hatchett *v.* Blanton, 72 id. 423; McGuire *v.* Ramsey, 9 Ark. 518; Tillotson *v.* Tillotson, 34 Conn. 335; Price *v.* Hicks, 14 Fla. 565; Matlock *v.* Matlock, 5 Ind. 403; Indiana Pottery Co. *v.* Bates, 14 id. 8; Morgan *v.* Olvey, 53 id. 6; Buck *v.* Winn, 11 B. Mon. 320; Dyer *v.* Clark, 5 Met. 562, 579; 39 Am. Dec. 697; Richards *v.* Manson, 101 Mass. 482, 484–5; Smith *v.* Jackson, 2 Edw. Ch. 28; Collumb *v.* Read, 24 N. Y. 505, 511; Tarbel *v.* Bradley, 7 Abb. New Cas. 273; Baird *v.* Baird, 1 Dev. & Bat. (N. Ca.) Eq. 524; King *v.* Weeks, 70 N. Ca. 372; Ross *v.* Henderson, 77 id. 170; Lefevre's Appeal, 69 Pa. St. 122; 8 Am. Rep. 229; Providence *v.* Bullock, 14 R. I. 353; Gaines *v.* Catron, 1 Humph. (Tenn.) 514.

[2] Holmes *v.* Self, 79 Ky. 297; Hatchett *v.* Blanton, 72 Ala. 421; Sumner *v.* Hampson, 8 Oh. 328; 32 Am. Dec. 722; Fall River Whaling Co. *v.* Borden, 10 Cush. 458, 462–3. That the method of charging it upon the books will control the use, see *Ex parte* McKenna, 3 DeG. F. & J. 645.

[3] See Johnson *v.* Clark, 18 Kan. 157; Converse *v.* Citizens' Mut. Ins. Co. 10 Cush. 37; Sumner *v.* Hampson, 8 Oh. 328; 32 Am. Dec. 722; Wooldridge *v.* Wilkins, 3 How. (Miss.) 360; Pugh *v.* Currie, 5 Ala. 446; Allen *v.* Withrow, 110 U. S. 119, 130. Declarations of the partners that land is partnership property is evidence of the fact. Rust *v.* Chisholm, 57 Md. 376. So is payment of mortgages upon it from partnership funds, and this may be shown without producing the mortgages. Fairchild *v.* Fairchild, 64 N. Y. 471, 480 (aff. 5 Hun, 407).

[4] Burdon *v.* Barkus, 4 DeG. F. & J.

to or was furnished by all the partners as tenants in common, using it for partnership purposes, as carrying on the business upon it, does not impress upon it the character of partnership property.[1]

Thus, if two persons are tenants in common of a colliery and work it in partnership, this, as distinguished from acquiring it for such purpose, does not make it partnership property.[2]

In Gordon *v.* Gordon, 49 Mich. 501, two of three partners in farming owned the farm, and the articles of partnership gave the third partner a right to a conveyance of one-third of the farm on payment of one-third of the cost; and it was held that the farm was not partnership property before such payment, and hence the lien of a mortgagee of the share of one was good against the claim of the other partners for advances, and that, in a suit for an accounting between the partners, the land could not be considered.

In Deloney *v.* Hutcheson, 2 Rand. 183, an allegation that partners bought land on which their store was situated and held it as joint stock, but not averring that it was bought with partnership funds, was held consistent with payment by each of his proportion out of his separate funds, and was not, therefore, sufficient.

Taking insurance in the firm name is evidence, but not conclusive.[3] Payment of taxes by the firm, and charging them to the individual account of the partner who owned the land, is of course evidence.[4]

§ 287. Co-owners going into business on their land.— But if two co-owners of land subsequently go into partnership

42; Waithman *v.* Miles, 1 Stark. 181; Colnaghi *v.* Bluck, 8 C. & P. 464; Rapier *v.* Gulf City Paper Co. 64 Ala. 330; Goepper *v.* Kinsinger, 39 Oh. St. 429; Chamberlin *v.* Chamberlin, 12 J. & Sp. (N. Y.) 116.

[1] Ware *v.* Owens, 42 Ala. 412; Griffie *v.* Maxey, 58 Tex. 210; Theriot *v.* Michel, 28 La. Ann. 107; Reynolds *v.* Ruckman, 35 Mich. 80; Gordon *v.* Gordon, 49 id. 501; Hogle *v.* Lowe, 12 Nev. 286; Deloney *v.* Hutcheson, 2 Rand. (Va.) 183; Moody *v.* Rathburn, 7 Minn. 89.

[2] Crawshay *v.* Maule, 1 Swanst. 495, 518, 523.

[3] Hogle *v.* Lowe, 12 Nev. 286.

[4] Goepper *v.* Kinsinger, 39 Oh. St. 429, 443. And see Hay's Appeal, 91 Pa. St. 265. Statements of some of the partners that it is partnership property were admitted in Winslow *v.* Chiffelle, Harp. (S. Ca.) Eq. 25, but held to be mere opinion, especially where another, by mortgaging his share, has treated it otherwise, in Hogle *v.* Lowe, 12 Nev. 286.

in a business carried on upon the land, this is not sufficient to make them partners as to the real estate.

Thus, where two bought land jointly, and one, with the other's consent, put a building upon it, the fact that they became partners in carrying on a boarding-house therein will not prevent one from suing the other for half the cost of the land and house.[1]

Where A. sold to B. and C. the undivided two-thirds of real estate owned by him, under agreement to go into partnership with them in a livery-stable and saw-mill business upon the land, and the partnership was formed, this is not of itself sufficient to convert the land into stock; hence it can be partitioned before the partnership is wound up.[2]

Two owners of a still-house were partners in the business carried on therein; this is not sufficient to show a partnership in the property; hence, if they sold it and one receives all the purchase money, the other can sue him at law for his share.[3]

In Wheatley *v.* Colhoun, 12 Leigh (Va.), 264 (37 Am. Dec. 654), it was said that real estate of milling, mining or farming partnerships is not deemed part of the stock, unless the intent is distinctly manifested; hence the widow of one of a milling partnership was held dowable in his moiety.[4]

If a person carrying on a business by himself upon his own land devises the land to his children, together with his business, which they continue, the land may or may not be partnership property. If the land is "substantially involved" in the business, as it is where a nurseryman devises the land and business to this children, who continue, it is partnership property.[5] Yet even where the land so devised is held as tenants in common and not as partnership property, new land purchased with the profits or earnings of the firm is partnership property.[6] In fact, whatever is purchased with the funds or profits of a business is presumptively part-

[1] Sikes *v.* Work, 6 Gray, 433.

[2] Alexander *v.* Kimbro, 49 Miss. 529.

[3] Coles *v.* Coles, 15 Johns. 159; 8 Am. Dec. 231.

[4] Heirs buying lands at a sale of the estate and subsequently planting in partnership are not partners in the land. Pecot *v.* Armelin, 21 La. Ann. 667.

[5] Waterer *v.* Waterer, L. R. 15 Eq. 402, per JAMES, L. J.

[6] But see Steward *v.* Blakeway, L. R. 4 Ch. App. 603.

nership property, although in the name of one partner, whether it be land[1] or even other property, as railroad stock, if bought on account of the firm, though without authority.[2]

§ 288. **Incoming partners.**— Where three partners owning land took in a fourth partner, and thereupon deeded the land to the four, the court said that whether a deed in which the grantors were also grantees changed the character of the property it operated as a grant of an undivided one-quarter from each to the new partner.[3]

Where a firm of two partners, owning land in which the business was carried on as partnership property, took in a new partner and the new firm paid rent to the two original partners, the property thereupon ceased to be partnership property and became real estate.[4] If the new firm, composed of the original partners with a new partner, simply use the property, it does not become the property of the new firm, not having been paid for by their funds.[5] But if it was put into the new firm as part of the capital contributed by the original partners, it becomes partnership property of the new firm.[6]

If partnership real estate is sold the presumption is that the purchase money has gone to the use of the firm; hence, a mortgage back to secure the purchase money is partnership property.[7] And if such real estate is in the name of one of three partners, and upon dissolution he conveys to another partner the part representing his interest, this will be deemed a conversion of the whole into separate property and not of an undivided part only; hence he holds the rest for himself and part for the third partner as tenants in common of the equitable title.[8]

§ 289. **Pennsylvania rule.**— In Pennsylvania, the usual rules as to the conversion of real estate of a partnership into personalty

[1] *Ex parte* McKenna, 3 DeG. F. & J. 645; Merot *v.* Burnand, 4 Russ. 247; 2 Bli. N. S. 215.

[2] *Ex parte* Hinds, 3 DeG. & Sm. 613; and *supra*, § 261.

[3] McFarland *v.* Chase, 7 Gray, 462; such a deed is perfectly good Henry, *v.* Anderson, 77 Ind. 361.

[4] Rowley *v.* Adams, 8 Jur. 994.

[5] Hatchett *v.* Blanton, 72 Ala. 423.

[6] Andrews *v.* Brown, 21 Ala. 437; 56 Am. Dec. 252; Bergeron *v.* Richardott, 55 Wis. 129; Marsh *v.* Davis, 33 Kan. 326. And the statute of frauds does not apply whether the real estate was put into the new firm at its formation or subsequently purchased, the title being in the names of the original partners. Marsh *v.* Davis, 33 Kan. 326.

[7] Lincoln *v.* White, 30 Me. 291.

[8] Smith *v.* Ramsey, 6 Ill. 373.

apply as between the partners, but as to strangers the evidence or fact of such conversion must appear in writing and be recorded, otherwise they are not bound by it; hence a judgment against one partner, or a mortgage by him on his undivided share, in the absence of such record is a lien on his moiety, superior to the equities of his copartners or the priority of partnership creditors on distribution. The cases in Pennsylvania are very numerous; the following are but a part of them.[1]

§ 290. Consequences of conversion — Heirship — Dower.— To the extent in which real estate is converted into partnership stock, all the incidents attach to it which belong to any other stock, in so far as is consistent with the technical rules of conveyancing; for example, each partner has a lien upon the real estate, not only for the payment of creditors, but also for advances made by him, and for his share of surplus on winding up, prior to all claim of separate creditors, or incumbrancers of other partners, the same as in case of personal property.[2]

If the partner dies there can be no dower, or inheritance,

[1] Shafer's Appeal, 106 Pa. St. 49; Kepler *v.* Erie Dime Sav. & Loan Co. 101 id. 602; Du Bree *v.* Albert, 100 id. 483; Holt's Appeal, 98 id. 257; Black's Appeal, 89 id. 201; Geddes' Appeal, 84 id. 482; Appeal of Second Nat'l Bk. 83 id. 203; Foster *v.* Barnes, 81 id. 377; Foster's Appeal, 74 id. 391; 15 Am. Rep. 553; 3 Am. Law Rec. 230; Meily *v.* Wood, 71 id. 488; 10 Am. Rep. 719; Jones' Appeal, 70 id. 169; Ebbert's Appeal, 70 id. 79; Lefevre's Appeal, 69 id. 122; 8 Am. Rep. 229; McDermot *v.* Laurence, 7 S. & R. 438; 10 Am. Dec. 468; Hale *v.* Henrie, 2 Watts, 143; 27 Am. Dec. 289.

[2] This is sufficiently obvious from the rest of this chapter; nevertheless, it was specifically ruled in these cases. Taylor *v.* Farmer (Ill.), 4 N. E. Rep. 370; Roberts *v.* McCarty, 9 Ind. 16; Evans *v.* Hawley, 35 Iowa, 83; Pennypacker *v.* Leary, 65 id. 220; Thrall *v.* Crampton, 9 Ben. 218; 16 Bankr. Reg. 261; Duryea *v.* Burt, 28 Cal. 569; Divine *v.* Mitchum, 4 B. Mon. 488 (41 Am. Dec. 241); Hewitt *v.* Sturdevant, 11 id. 453, 459; Bryant *v.* Hunter, 6 Bush, 75; Spalding *v.* Wilson, 80 Ky. 589; Burleigh *v.* White, 70 Me. 130; Dyer *v.* Clark, 5 Met. 562; 39 Am. Dec. 697; Howard *v.* Priest, 5 id. 582; Fall River Whaling Co. *v.* Borden, 10 Cush. 458, 461; Arnold *v.* Wainwright, 6 Minn. 358; Dilworth *v.* Mayfield, 36 Miss. 40; Whitney *v.* Cotten, 53 id. 689; Priest *v.* Chouteau, 85 Mo. 398; Hiscock *v.* Phelps, 49 N. Y. 97; Tarbel *v.* Bradley, 7 Abb. New Cas. 273; Mendenhall *v.* Benbow, 84 N. Ca. 646; Boyers *v.* Elliott, 7 Humph. 204; Williams *v.* Love, 2 Head, 80; Jones *v.* Jones, 9 Lea, 627; Diggs *v.* Brown, 78 Va. 292.

or distributive share claimed; the real estate or its proceeds until creditors are paid and copartners' claims adjusted, and dispositions of partnership real estate, whether before or after the death of a partner, are free from any incumbrance of inchoate dower, whether the sale be by the act of the partners, or on foreclosure, or under execution, or by an assignee in insolvency, or a receiver in winding up, or by a surviving partner. And whether the title be in all the partners or some of them, or solely in the husband of the claimant, is wholly immaterial.[1] If, under the jurisprudence of any state, dower is a legal, and not an equitable, estate. so that a legal title would devolve upon the widow, she would hold such title in trust for the purposes of the partnership.

[1] Andrews *v.* Brown, 21 Ala. 437, 442; 56 Am. Dec. 252; Loubat *v.* Nourse, 5 Fla. 350; Price *v.* Hicks, 14 id. 565; Bopp *v.* Fox, 63 Ill. 540; Simpson *v.* Leech, 86 Ill. 286; Trowbridge *v.* Cross, 117 id. 109; Matlock *v.* Matlock, 5 Ind. 403; Hale *v.* Plummer, 6 id. 121; Huston *v.* Neil, 41 id. 504; Grissom *v.* Moore, 106 Ind. 296; Paige *v.* Paige (Iowa), 32 N. W. Rep. 360; Galbraith *v.* Gedge, 16 B. Mon. 630; Goodburn *v.* Stevens, 1 Md. Ch. 420; Dyer *v.* Clark, 5 Met. 562; 39 Am. Dec. 697; Burnside *v.* Merrick, 4 id. 537, 544; Wooldridge *v.* Wilkins, 3 How. (Miss.) 360; Robershaw *v.* Hanway, 52 Miss. 713; Collins *v.* Warren, 29 Mo. 236; Willet *v.* Brown, 65 id. 138; 27 Am. Rep. 265; Uhler *v.* Semple, 20 N. J. Eq. 288; Stroud *v.* Stroud, Phil. (N. Ca.) L. 525; Greene *v.* Greene, 1 Oh. 535; 13 Am. Dec. 642; Sumner *v.* Hampson, 8 id. 328; 32 Am. Dec. 722; Foster's Appeal, 74 Pa. St. 391; 15 Am. Rep. 553; 3 Am. Law Rec. 230; Richardson *v.* Wyatt, 2 Desaus. (S. Ca.) 471; Williamson *v.* Fontain, 7 Baxter, 212; Martin *v.* Smith, 25 W. Va. 579; *In re* Ransom, 17 Fed. Rep. 331; Conger *v.* Platt, 25 Up. Can. Q. B. 277; Wylie *v.* Wylie, 4 Grant's Ch. (Up. Can.) 278; Sanborn *v.* Sanborn, 11 id. 359. Hence the wife of a partner need not join in a mortgage made by the firm, and is not a necessary party to its foreclosure. Huston *v.* Neil, 41 Ind. 504. But in a suit in which the question of whether land is partnership property or not is to be decided, a wife of one of the partners, claiming the property as homestead, is a necessary party. Rhodes *v.* Williams, 12 Nev. 20. The subsequent taking in of a partner by a man owning land, and conveying the property to the firm, does not divest inchoate dower, and if she join in conveying half to the other partner, her inchoate dower in the other half remains. Grissom *v.* Moore, 106 Ind. 296. But as to land which is partnership property for the purposes of the partnership, a subsequent out and out conversion of it into personalty does not need the consent of the wife. West Hickory Min. Ass'n *v.* Reed, 80 Pa. St. 38, 50.

§ 291. —— **sales and incumbrances of share.**— Hence, where one partner for his own benefit, and under the appearance of being tenant in common, sells or mortgages an undivided share in the property, or, if he has the whole title, he or his heirs sell or mortgage the whole, the vendee or mortgagee, unless he can claim as a *bona fide* buyer without notice that it is partnership property, can only obtain the partner's interest, which is his proportion in the surplus after payment of all debts, both prior and subsequent, including the claims of the other partners;[1] but if he is such *bona fide* buyer without notice he is protected.[2]

[1] §§ 180, 185.

[2] Cavander *v.* Bulteel, L. R. 9 Ch. App. 79; Hoxie *v.* Carr, 1 Sumner, C. C. 173; Frink *v.* Branch, 16 Conn. 260; Sigourney *v.* Munn, 7 Conn. 324; Dupuy *v.* Leavenworth, 17 Cal. 263; Duryea *v.* Burt, 28 id. 569; McNeil *v.* Congregational Soc. 66 id. 105; Reeves *v.* Ayers, 38 Ill. 418; Whitney *v.* Cotten, 53 Miss. 689; Divine *v.* Mitchum, 4 B. Mon. 488 (41 Am. Dec. 241); Churchill *v.* Proctor, 31 Minn. 129; Buck *v.* Winn, 11 B. Mon. 320; Flanagan *v.* Shuck, 82 Ky. 617; Arnold *v.* Wainwright, 6 Minn. 358; Priest *v.* Chouteau, 85 Mo. 398; 12 Mo. App. 252; Crow *v.* Drace, 61 Mo. 225; Cowden *v.* Cairns, 28 id. 471; Hogle *v.* Lowe, 12 Nev. 286; Messer *v.* Messer, 59 N. H. 375; Matlack *v.* James, 13 N. J. Eq. 126; Van Brunt *v.* Applegate, 44 N. Y. 544; Hiscock *v.* Phelps, 49 N. Y. 97 (below, 2 Lans. 106); Tarbel *v.* Bradley, 7 Abb. New Cas. 273; Ross *v.* Henderson, 77 N. Ca. 170; Miller *v.* Proctor, 20 Oh. St. 442, 448; Bank *v.* Sawyer, 38 Oh. St. 339; Tillinghast *v.* Champlin, 4 R. I. 173; Boyers *v.* Elliott, 7 Humph. 204; Fowler *v.* Bailley, 14 Wis. 125; Bergeron *v.* Richardott, 55 id. 129; Mason *v.* Parker, 16 Grant's Ch. (Up. Can.) 230. In Cottle *v.* Harrold, 72 Ga. 830, a mortgage by four out of five partners was held to convey the title of the four; but this is not consistent with the above. It seems to have been thought in Hogle *v.* Lowe, 12 Nev. 286, that a mortgagee of one partner with notice took subject only to existing and not to subsequent partnership debts. This is not elsewhere the law. See § 185. In Van Brunt *v.* Applegate, 44 N. Y. 544, it was held that a conveyance of his moiety by one partner, in payment of a partnership debt, vested a good title to the moiety in the grantee, and that the grantee did not become a trustee for the firm. Two judges dissented, and the case is perhaps doubted, in Staats *v.* Bristow, 73 N. Y. 264. And so if one holds the entire title, a mortgage by him, the proceeds of which went to pay partnership debts, was deemed authorized by all, from their having allowed the title to remain in him alone. Chittenden *v.* German Amer. Bk. 27 Minn. 143. Where the title of real estate of W., B. and C. was in W., B.'s mortgage of his interest is not an incumbrance as against a

Such incumbrance imposes no actual lien upon the property, as against a subsequent buyer of the interest of the entire firm for partnership purposes, whether before or after dissolution;[1] though it may be enforced as a priority upon the debtor's surplus, if any is left for him.

Thus a judgment against one partner for his individual debt is, after all creditors are paid, and it only remains to make settlement between the partners, a lien to the extent of his surplus in land, so that a subsequent mortgage by him on his share is postponed to it.[2]

The doctrines which apply to the levy of an execution on the interest of a single party, at the suit of his individual creditor, apply to a levy by such creditor on the real estate, whether the title be in the debtor alone or in common.[3]

§ 292. **The legal title — Conveyances of it.**— Real estate converted into personalty is so only in equity and not in law, and a conveyance or mortgage, if in a court of law, is neither a transfer of personalty nor a chattel mortgage, but is governed by the statutes applicable to conveyancing of real estate.[4] And so a judgment against the firm is a lien upon real estate held in the names of the partners.[5]

corporation into which the firm was turned, the members receiving stock for their shares. Tarbell *v.* West, 86 N. Y. 280. In Jones *v.* Neale, 2 Patt. & H. (Va.) 339, a conveyance by one partner of real estate in trust, to secure a partnership creditor, was held to pass good title to an undivided moiety, both in law and equity, giving the creditor priority over other joint creditors. *Contra*, had it been to secure a private creditor.

[1] See § 186 and Tarbel *v.* Bradley, 7 Abb. New Cas. 273; Bank *v.* Sawyer, 38 Oh. St. 338. But see Treadwell *v.* Williams, 9 Bosw. 649.

[2] Hewitt *v.* Rankin, 41 Iowa, 35; Johnson *v.* Rogers, 15 Bank. Reg. 1.

[3] Page *v.* Thomas, 43 Oh. St. 38; Bryant *v.* Hunter, 6 Bush, 75; McCauley *v.* Fulton, 44 Cal. 355; Ensign *v.* Briggs, 6 Gray, 329; Collins *v.* Warren, 29 Mo. 236; Blake *v.* Nutter, 19 Me. 16; Cowden *v.* Cairns, 28 Mo. 471; Lang *v.* Waring, 17 Ala. 145; s. c. 25 id. 625; Caldwell *v.* Parmer, 56 id. 405. As to judgment liens, see Foster *v.* Barnes, 81 Pa. St. 377; Lauffer *v.* Cavett, 87 Pa. St. 479; Stadler *v.* Allen, 44 Iowa, 198; and Bank of Louisville *v.* Hall, 8 Bush, 672. See, also, Averill *v.* Loucks, 6 Barb. 19, 470.

[4] Lawrence *v.* Taylor, 5 Hill, 107; Miller *v.* Proctor, 20 Oh. St. 442, 448; Piatt *v.* Oliver, 3 McLean, 37 (aff'd on other grounds, 3 How. 333); Moreau *v.* Saffarans, 3 Sneed, 595.

[5] *Re* Codding, 9 Fed. Rep. 849. And see Overholt's Appeal, 12 Pa. St. 222; Erwin's Appeal, 39 id. 535.

Where an individual partner conveys the property, using the names of all in a proper legal instrument which purports to be the act of each, the instrument satisfies the law, leaving only the question of his authority open, and such authority, even where seals are necessary, may be granted by parol or ratified by subsequent parol assent, and both authority and assent may be implied from circumstances. This has been more fully shown in treating of the power to seal.[1] The cases referring to real estate alone are those in the note.[2]

In Sage *v.* Sherman, 2 N. Y. 417, 432, Strong, J., says: "I see no reason why a valid general power for each to execute deeds as attorney for the others might not be inserted in the articles of partnership. The trust would not be greater nor more liable to abuse than that which now exists in relation to the disposition of personal property." Such a power may undoubtedly be so granted, but the objection to granting it is that the grant of power ought to appear of record for the protection of the grantee.

In Morrison *v.* Mendenhall, 18 Minn. 232, the articles of a partnership formed to loan money and buy and sell real estate provided that the business was to be transacted by S., one of the partners, and this was held sufficient to authorize S. to assign the mortgage made to the partners, which act requires a seal in that state. None of the partners, however, were contesting the act; the ruling related to the assignee's title in a foreclosure suit.

In Napier *v.* Catron, 2 Humph. 534, 536, it was queried whether a grant of power to bind the firm by deed was authority as to land owned as tenants in common before the partnership was formed.

[1] §§ 416, 417.

[2] Lawrence *v.* Taylor, 5 Hill, 107; Smith *v.* Kerr, 3 N. Y. 144; Holbrook *v.* Chamberlin, 116 Mass. 155, and cases cited; Haynes *v.* Seachrest, 13 Iowa, 455; Herbert *v.* Hanrick, 16 Ala. 581; Grady *v.* Robinson, 28 id. 289; Gunter *v.* Williams, 40 id. 561; Peine *v.* Weber, 47 Ill. 41; Stroman *v.* Varn, 19 S. Ca. 307. And see Darst *v.* Roth, 4 Wash. C. C. 471, of a sealed agreement to sell signed by one with assent of all. Moran *v.* Palmer, 13 Mich. 368, where the partner conveyed in his own name alone, but put the proceeds into the firm. But an acknowledgment by one for both before a notary is void, Lemmon *v.* Hutchins, 1 Ohio C. C. 388, 391. But see Wilson *v.* Hunter, 14 Wis. 683.

This depends, of course, on whether it was made partnership property.

§ 293. **—— same in case of death.**— Although partnership real estate is devoted to pay debts, including the claims of creditor partners, and is considered personalty for that purpose, the devolution of the title in case of death is governed by the legal rules applicable to real estate, and if wholly or partly in one partner descends *pro tanto* upon his heirs in trust for the settlement of the partnership. In other words, the *jus accrescendi* applicable to personal estate does not apply to the legal title of realty to place the title in the surviving partner.[1]

§ 294. **—— surviving partner aided by equity.**— The surviving partner, therefore, in exercising his right to sell the property in order to wind up the concern and pay the debts, though he can convey only his own interest in the legal title, can sell the entire beneficial interest, and a court of equity, at the suit of the grantee, will compel the widow and heirs to convey their legal title to him.[2]

[1] See, for example, Pugh *v.* Currie, 5 Ala. 446; Andrews *v.* Brown, 21 id. 437 (56 Am. Dec. 252); Caldwell *v.* Parmer, 56 id. 405; Abernathy *v.* Moses, 73 id. 381; Percifull *v.* Platt, 36 Ark. 456; McNeil *v.* Congregational Soc. 66 Cal. 105; Loubat *v.* Nourse, 5 Fla. 350; Price *v.* Hicks, 14 id. 565; Cobble *v.* Tomlinson, 50 Ind. 550; Galbraith *v.* Gedge, 16 B. Mon. 630; Buffum *v.* Buffum, 49 Me. 108; Dyer *v.* Clark, 5 Met. 562 (39 Am. Dec. 697); Howard *v.* Priest, id. 582; Whitman *v.* Boston & Me. R. R. 3 Allen, 133; Merritt *v.* Dickey, 38 Mich. 41; Dilworth *v.* Mayfield, 36 Miss. 40; Whitney *v.* Cotten, 53 id. 689; Buchan *v.* Sumner, 2 Barb. Ch. 165; King *v.* Weeks, 70 N. Ca. 372; Pierce *v.* Trigg, 10 Leigh (Va.), 406, and cases under § 290. Hence, an action to recover damages as against a railroad for the value of partnership land upon which the road is located must be brought in the name of the heirs and surviving partner jointly if the legal title is in them jointly. Whitman *v.* Boston & Maine R. R. 3 Allen, 133. So of ejectment; the holders of the legal title, and not the surviving partner as such, can maintain it. Percifull *v.* Platt, 36 Ark. 456.

[2] Shanks *v.* Klein, 104 U. S. 18; Burnside *v.* Merrick, 4 Met. 537; Dyer *v.* Clark, 5 Met. 562; Howard *v.* Priest, 5 Met. 582; Keith *v.* Keith, 143 Mass. 262; Tillinghast *v.* Champlin, 4 R. I. 173; Pugh *v.* Currie, 5 Ala. 446; Andrews *v.* Brown, 21 id. 437; 56 Am. Dec. 252; Murphy *v.* Abrams, 50 id. 293; Dupuy *v.* Leav-

Unless the price was grossly inadequate and there was probably some collusion,[1] or the sale was not made for the purpose of winding up, nor as surviving partner;[2] and the decree need not give the minor heirs a day after coming of age to show cause against the decree.[3]

If the partners only have an equity and not a legal title, proceedings to subject it need only be against the surviving partner.[4]

Where a surviving partner, with the consent of the administratrix, continued the business and invested partnership funds in real estate, and afterwards took in the minor heirs as partners, and later the partnership was converted into a corporation, and stock was given the minor heirs represented by their guardians for their interest, and the corporation became insolvent and assigned for benefit of creditors, the assignee was held entitled to obtain a decree releasing the title of the minor heirs in the real estate, it being personal property, for payment of debts.[5]

So, in case of death, the surviving partner was held entitled to a similar decree,[6] and so was an execution creditor.[7]

enworth, 17 Cal. 263; Galbraith *v.* Gedge, 16 B. Mon. 630; Dilworth *v.* Mayfield, 36 Miss. 40; Whitney *v.* Cotten, 53 id. 689; Matthews *v.* Hunter, 67 Mo. 293; Easton *v.* Courtwright, 84 id. 27; Griffey *v.* Northcutt, 5 Heisk. 746; Pierce *v.* Trigg, 10 Leigh (Va.), 406; Conger *v.* Platt, 25 Up. Can. Q. B. 277.

[1] Lang *v.* Waring, 25 Ala. 625; 60 Am. Dec. 533.

[2] McNeil *v.* Congregational Soc. 66 Cal. 105; Martin *v.* Morris, 62 Wis. 418.

[3] Creath *v.* Smith, 20 Mo. 113. It has also been held that in the absence of a necessity for sale, as if there are no debts, the heirs could retain the title undisturbed and the land would be divided, in Way *v.* Stebbins, 47 Mich. 296; Lang *v.* Waring, 25 Ala. 625; 60 Am. Dec. 533; Buchan *v.* Sumner. 2 Barb. Ch. 165, 206. And see Strong *v.* Lord, 107 Ill. 25; and Godfrey *v.* White, 43 Mich. 171; but see § 974.

[4] McCaskill *v.* Lancashire, 83 N. Ca. 393.

[5] Sprague Mfg. Co. *v.* Hoyt, 29 Fed. Rep. 421; Francklyn *v.* Sprague, 121 U. S. 215.

[6] Gray *v.* Palmer, 9 Cal. 616. And see Hanway *v.* Robertshaw, 49 Miss. 758. In Gray *v.* Palmer, 9 Cal. 616, it seems that the surviving partner was allowed to file a bill against the administrator and heirs to get possession of real estate held in the decedent's name, in order to pay debts and for partition of the balance. No presentation for allowance to the administrator is necessary.

[7] Scruggs *v.* Blair, 44 Miss. 406, 413. Some cases have held that the right of the surviving partner to resort to the real estate is limited by the necessity of so doing, that is, the personal property proper must be first resorted to and exhausted. Easton *v.* Courtwright, 84 Mo. 27; Stroud *v.* Stroud, Phil. (N. Ca.) L. 525; Fos-

Where the administrator of the deceased partner brought proceedings to sell real estate of which the decedent held the title, and under a decree of the probate court the property was sold, the surviving partner, if he consented to such sale, may compel the administrator to account to him for the purchase money.[1] If a trustee under the will of a partner has the legal title, and in conjunction with the surviving partner sells the property, a valid title is conveyed.[2]

Where different tracts of land were bought in the name of different partners, their recovery against administrators and heirs cannot be obtained in the same suit, since the heirs of some of the defendants would have a title and interest in some of the lands, and others in others.[3]

§ 295. Notice to third persons.— The foregoing doctrines raise the very important question of what is notice of the partnership equities to one receiving title to a share of the real estate from or through a single partner, for if without notice of the partnership equities he acquires a good title. A brief notice of all the partnership cases upon this question will be given.[4]

A recital in a deed that the conveyance is to S. and M., partners as S. & Co., or other similar description, is sufficient to put a mort-

ter's Appeal, 74 Pa. St. 391, 396; 3 Am. Law Rec. 230; 15 Am. Rep. 553. But this is contrary to the principle that winding up will not be by piecemeal, therefore these cases are anomalous. §§ 974–977. And *contra* in Tennessee by statute.

[1] Dyer *v.* Clark, 5 Met. 562; 39 Am. Dec. 697; Merritt *v.* Dickey, 38 Mich. 41. And see Burnside *v.* Merrick, 4 Met. 537, 544, and Greene *v.* Graham, 5 Oh. 264; Mendenhall *v.* Benbow, 84 N. Ca. 646.

[2] West of England, etc. Bk. *v.* Murch, L. R. 23 Ch. D. 138; Corser *v.* Cartwright, L. R. 7 H. L. 731.

[3] Keith *v.* Keith, 143 Mass. 262.

[4] Dupuy *v.* Leavenworth, 17 Cal. 262; Reeves *v.* Ayers, 38 Ill. 418; Hiscock *v.* Phelps, 49 N. Y. 97 (2 Lans. 105); Miller *v.* Proctor, 20 Oh. St. 442, 448; Mason *v.* Parker, 16 Grant's Ch. (Up. Can.), 230, and cases cited in the succeeding notes. *Contra* in N. Ca. Ross *v.* Henderson, 77 N. Ca. 170. But a mortgagee for an antecedent separate debt is not a *bona fide* buyer as against partnership creditors. Lewis *v.* Anderson, *supra*. But see Reeves *v.* Ayers, 38 Ill. 418. Nor is a judgment creditor of one partner a *bona fide* buyer, either as against prior or subsequent creditors, mortgagees or buyers. See §§ 184, 291.

gagee of one of them on inquiry.[1] If the title is in one partner a purchaser from the other in whom is no legal title has notice.[2]

Where the father of one of the partners was the purchaser the court set aside the deed in favor of the firm's assignee, for the benefit of creditors, because he must have had notice.[3]

Where the partnership used and occupied the property for its business, this was held of itself sufficient notice to a mortgagee that he could only take subject to equities.[4]

But the contrary was ruled in two earlier Michigan cases, on the ground that this is consistent with individual ownership; and it is common knowledge that firms occupy real estate either without title or as tenants in common, and the buyer can rely on the record.[5]

Whether the occupancy ought to convey notice was held a question of mixed law and fact, because not inconsistent with a tenancy in common.[6]

Where the surviving partner, having the legal title to an undivided half of the land, sold the undivided half to a person who knew it was partnership property, instead of selling it all as a surviving partner may do, such sale of part, it was held, should have given the buyer presage of the intent of the seller to convert the

[1] Sigourney *v.* Munn, 7 Conn. 324; Brewer *v.* Browne, 68 Ala. 210; Martin *v.* Morris, 62 Wis. 418, 429; Boyce *v.* Coster, 4 Strob. Eq. 25, of a recital of an agreement.

[2] Williams *v.* Love, 2 Head, 80.

[3] Matlack *v.* James, 13 N. J. Eq. 126. If the mortgagee by inquiry of the tenant in possession would have learned of the firm's ownership, she is affected with notice. Baldwin *v.* Johnson, 1 N. J. Eq. 441.

[4] Cavander *v.* Bulteel, L. R. 9 Ch. App. 79; Duryea *v.* Burt, 28 Cal. 569; Reeves *v.* Ayres, 38 Ill. 418; Divine *v.* Mitchum, 4 B. Mon. 488 (41 Am. Dec. 241); Buck *v.* Winn, 11 id. 320, 323; Kerr *v.* Kingsbury, 39 Mich. 150; Churchill *v.* Proctor, 31 Minn. 129; Mechanics' Bank *v.* Godwin, 5 N. J. Eq. 334; Bergeron *v.* Richardott, 55 Wis. 129; Hoxie *v.* Carr, 1 Sumn. 173, 193. In North Carolina it makes no difference whether the vendee of the interest of a partner had notice or not that it was partnership property; he takes subject to debts. Ross *v.* Henderson, 77 N. Ca. 170.

[5] Hammond *v.* Paxton, 58 Mich. 393; Reynolds *v.* Ruckman, 35 id. 80. And in Frink *v.* Branch, 16 Conn. 260, 271; Forde *v.* Herron, 4 Munf. (Va.), 316, and all the Pennsylvania cases.

[6] In Parker *v.* Bowles, 57 N. H. 491; and the point was raised but not decided in Cowden *v.* Cairns, 28 Mo. 471, and Bank *v.* Sawyer, 38 Oh. St. 339.

proceeds to his own use, and the buyer attempting to acquire title to a part only, takes it at his peril.[1]

§ 296. Conveyances in a firm name.— Strictly speaking, the title to land can only be held by or conveyed to a legal person, natural or artificial, and cannot be held by a conventional person not recognized as a distinct entity in the law; hence, a deed or mortgage to or by such person, whether the name be wholly fictitious or composed of surname & Co., or surnames combined, passes nothing at law, partly because of the technical absence of a legal grantee and partly because public policy requires a certainty in titles, and a surname may apply to many persons, and often there are several in the same firm of the same surname.[2]

If the firm name contains the name of an individual with "& Co.," thus W. W. Phelps & Co., the individual receives the title, and equity will hold him as a trustee for the firm.[3]

Thus, in Chavener *v.* Wood, *supra*, J. D. Haines, of J. D. Haines & Bro., mortgaged real estate of the firm in the firm name with the assent of the other partner, and the investment was held a good legal mortgage as against him, and an equitable mortgage as to the interest of the other; but that a subsequent legal mortgage signed by both to a person without notice of the former mortgage was a prior lien as to the interest of the other partner.[4]

A deed invalid at law because made to an indefinite grantee, as a deed to Todd, Gorton & Co., or to any unincorporated society in its society name, will found an equity in the members of the firm.[5]

[1] Tillinghast *v.* Champlin, 4 R. I. 173, 218–220. See Martin *v.* Morris, 62 Wis. 418. *Contra*, Offutt *v.* Scott, 47 Ala. 104.

[2] Tidd *v.* Rines, 26 Minn. 201; 10 Cent. L. J. 102; Percifull *v.* Platt, 36 Ark. 456, 464; Rammelsberg *v.* Mitchell, 29 Oh. St. 22, 52. And see McMurry *v.* Fletcher, 24 Kan. 574; 28 id. 337.

[3] Arthur *v.* Weston, 22 Mo. 378; Percifull *v.* Platt, 36 Ark. 456, 464; Moreau *v.* Saffarans, 3 Sneed, 595; Lindsay *v.* Jaffray, 55 Tex. 626, 641; Chavener *v.* Wood, 2 Oregon, 182.

[4] And see Brunson *v.* Morgan, 76 Ala. 593.

[5] Tidd *v.* Rines, 26 Minn. 201; 10 Cent. L. J. 102; Douthitt *v.* Stinson, 73 Mo. 199; Byam *v.* Bickford, 140 Mass. 31.

But in many states this rule has been relaxed, and a deed or mortgage to A. & B. or A. & Co. has been held valid, or at least not void for uncertainty on proof of identity, doubtless on the principle of *id certum quod reddi certum potest;* and probably in all states such a deed or mortgage to or by partners in the firm name would be enforced in equity, where the defect could be cured, where the litigation is between partners, or between a firm and its grantee or mortgagee, and there is no dispute as to priorities of other liens.[1]

And so in Hoffman *v.* Porter, 2 Brock. 158, a deed was made to Peter Hoffman & Son, a firm, and John Hoffman, the son, brought a suit as surviving partner for breach of the covenant for quiet enjoyment; it was held that the recital of the fact of partnership sufficiently designates which son is intended, and such son can take under the deed and maintain the suit. And in Jones *v.* Neale, 2 Pat. & H. (Va.) 339, 350, a deed to two persons by their firm name of Neale & Bennett was held valid even to convey the legal title to them as partnership property.

§ 297. **Surplus is real estate in this country.**— The great point of difference between the English and American law is in the degree of conversion. In England it seems to be now settled that a partner's share in the assets of the firm is personal property for all purposes, no matter of what it consists; and that, after satisfying partnership liabilities and equities, the balance is still divisible as personalty and goes to the representative and not to the heir, and is not subject to dower.[2]

[1] Hoffman *v.* Porter, 2 Brock. 158; Beaman *v.* Whitney, 20 Me. 413; Lindsay *v.* Hoke, 21 Ala. 542, 544; Slaughter *v.* Doe ex d. Swift, 67 id. 494; Brunson *v.* Morgan, 76 id. 593. And see Elliott *v.* Dycke, 78 id. 150, 156; Chicago Lumber Co. *v.* Ashworth, 26 Kan. 212; Orr *v.* How, 55 Mo. 328; Donaldson *v.* Bank of Cape Fear, 1 Dev. Eq. 103; Hunter *v.* Martin, 2 Rich. (S. Ca.) L. 541; Morse *v.* Carpenter, 19 Vt. 613; Baldwin *v.* Richardson, 33 Tex. 16; Jones *v.* Neale, 2 Pat. & H. (Va.) 339, 350; Hunter *v.* Smith, 14 Wis. 683; Sherry *v.* Gilmore, 58 id. 324. And see Printup *v.* Turner, 65 Ga. 71; Batty *v.* Adams County, 16 Neb. 44. A lease signed in the firm name by one partner, after occupancy by the firm and payment of rent for two years, was enforced as an agreement for a lease, in Kyle *v.* Roberts, 6 Leigh (Va.), 495.

[2] Darby *v.* Darby, 3 Drewry, 495; Murtagh *v.* Costello, 7 Irish L. R. 428; Att'y Gen'l *v.* Hubbuck, 10 Q. B. D. 473; 13 id. 275. And so appar-

But the now unanimous American doctrine is, that after the partnership demands are satisfied the unexhausted surplus is real estate. The basis of absolute or partial conversion into personalty is the presumed intention, and equity will not go further and convert it into personalty for additional purposes, such as for the mere purpose of division, unless the intention to convert for more than partnership purposes appears; hence, in this country, the widow has dower out of a partner's share in the surplus, and the share goes to the heir and not to the executor.[1]

§ 298. **Out and out conversion into personalty.**— But the partners can, if they choose, convert their real estate into personalty out and out,[2] so that the surplus is personalty and goes to the administrator and next of kin as against the heirs.

They have been held to have done so in a partnership to deal in land, the real estate being a commodity.[3] Or if by

ently in Canada, Wylie *v.* Wylie, 4 Grant's Ch. 278; Sanborn *v.* Sanborn, 11 id. 359.

[1] Logan *v.* Greenlaw, 25 Fed. Rep. 299; Murrett *v.* Murphy, 11 Bankr. Reg. 131; Offutt *v.* Scott, 47 Ala. 104; Brewer *v.* Browne, 68 id. 210, 213; Espy *v.* Comer, 76 id. 501; Lenow *v.* Fones, 48 Ark. 557; Strong *v.* Lord, 107 Ill. 25; Hale *v.* Plummer, 6 Ind. 121; Matlock *v.* Matlock, 5 id. 403; Grisson *v.* Moore, 106 Ind. 296; Galbraith *v.* Gedge, 16 B. Mon. 630, and Lowe *v.* Lowe, 13 Bush, 688, limiting intervening cases; Buffum *v.* Buffum, 49 Me. 108, 110–12; Goodburn *v.* Stevens, 5 Gill (Md.), 1; S. C. 1 Md. Ch. 420; Shearer *v.* Shearer, 98 Mass. 107; Wilcox *v.* Wilcox, 13 Allen, 252; Scruggs *v.* Blair, 44 Miss. 406; Holmes *v.* McGee, 27 Mo. 597; Campbell *v.* Campbell, 30 N. J. Eq. 415; Buckley *v.* Buckley, 11 Barb. 43; Buchan *v.* Sumner, 2 Barb. Ch. 165; Fairchild *v.* Fairchild, 64 N. Y. 471 (aff. 5 Hun, 407); Rank *v.* Grote, 50 N. Y. Superior Ct. 275; Summey *v.* Patton, 1 Winst. (N. Ca.) Eq. 52; Ferguson *v.* Hass, Phil. (N. Ca.) Eq. 113; Stroud *v.* Stroud, Phil. (N. Ca.) L. 525; Greene *v.* Graham, 5 Oh. 264; Rammelsberg *v.* Mitchell, 29 Oh. St. 22, 53; Foster's Appeal, 74 Pa. St. 391; 15 Am. Rep. 553; 3 Am. Law Rec. 230; Leaf's Appeal, 105 Pa. St. 505; Bowman *v.* Bailey, 20 S. Ca. 550; Piper *v.* Smith, 1 Head (Tenn.), 93; Williamson *v.* Fontain, 7 Baxter, 212; Griffey *v.* Northcutt, 5 Heisk. 746; Diggs *v.* Brown, 78 Va. 292; Martin *v.* Morris, 62 Wis. 418. *Contra*, see Hoxie *v.* Carr, 1 Sumner, 173 (*dictum*). The former contrary rule in Kentucky, Buck *v.* Winn, 11 B. Mon. 320; Bank of Louisville *v.* Hall, 8 Bush, 676, has been limited by Lowe *v.* Lowe, 13 Bush, 688.

[2] Davis *v.* Christian, 15 Gratt. 11.

[3] Galbraith *v.* Gedge, 16 B. Mon. 630; Ludlow *v.* Cooper, 4 Oh. St. 1. *Contra*, Strong *v.* Lord, 107 Ill. 25, Hewitt *v.* Rankin, 41 Iowa, 35.

the articles of partnership or agreement the surviving or other partner on dissolution may take the entire assets, there is no reconversion into realty and the deceased partner's share is personalty.[1] Or if the articles, or even an oral agreement, require the real estate to be held solely for partnership purposes, this has been regarded as an out and out conversion.[2] The agreement to convert into personalty for all purposes, so that a surplus is not realty, must be clear.[3]

§ 299. Power of individual partners to bind firm as to real estate.— The power of disposition of real estate in an individual partner has not yet been treated, for it is a question independent of the power to use a seal or the form of the conveyance, for the want of a power to bind under seal does not exist in several states, and the question of the validity of a contract to convey must be solved independent of the doctrine of seals and independent of the form of legal conveyances requiring the signatures of each. The solution of the question requires a distinction to be made between partnership real estate held as part of the capital

[1] Leaf's Appeal, 105 Pa. St. 505; West Hickory Min. Ass'n *v.* Reed, 80 id. 38, 50; Maddock *v.* Astbury, 32 N. J. Eq. 181.

[2] Rammelsberg *v.* Mitchell, 29 Oh. St. 22, 53 (one judge dissenting); Collumb *v.* Read, 24 N. Y. 505 (but much of the language in this case seems not consistent with the Fairchild case in 64 N. Y. 471, which professes to approve it). See, also, Goodburn *v.* Stevens, 5 Gill, 1; and such agreement may be implied from the nature and use of the property, Cornwall *v.* Cornwall, 6 Bush, 369; Bank of Louisville *v.* Hall, 8 id. 672; but these three cases must be read with Lowe *v.* Lowe, 13 Bush, 688, which professes to approve, but limits them; — a most carefully considered case, in which the court believes it has found the doctrine that will reconcile the American cases.

[3] Flanagan *v.* Shuck, 82 Ky. 617, 620; Lenow *v.* Fones, 48 Ark. 557, 562. In Berry *v.* Folkes, 60 Miss. 576, 604–5, an agreement by which two persons bought a plantation on credit, to work and improve it, using the profits each year to pay the purchase price, and, when paid for, to divide it, was said to be a partnership, converting land into personalty only for a certain time, the lands being partnership lands so far as to be bound for debts of the firm. But when the partnership ends a tenancy in common begins, and the lands would then go to heirs, and are to be partitioned, not sold.

or for the occupation and use of the business of the firm, and that acquired by the firm as a commodity.[1]

1st. A partner has no implied power to sell or incumber the real estate of a firm not engaged in the business of buying and selling real estate, or to bind the others by a contract to do so, and such attempted contract will not be specifically enforced. I have elsewhere urged[2] that the partnership power of selling, which is loosely said to be a power to sell the entire property of the firm, is confined to property acquired for the purposes of sale.[3]

2d. Where the real estate is not a mere incident of a commercial partnership, but is the distinct substratum of its business, as where that consists in the buying and selling of real estate, or the subdivision and sale of a tract, so that such real estate becomes partnership stock in the sense

[1] In Moran *v.* Palmer, 13 Mich. 367, a deed by one partner in his own name of partnership real estate in the name of all the partners, with the firm's knowledge and acquiescence, the firm receiving the avails, was held valid against heirs of a subsequently dying partner.

[2] §§ 403-405.

[3] Robinson *v.* Crowder, 4 McCord (S. Ca.), L. 519, 536; 17 Am. Dec. 762; Ruffner *v.* McCannel, 17 Ill. 212; 63 Am. Dec. 362; Lawrence *v.* Taylor, 5 Hill, 107; Dillon *v.* Brown, 11 Gray, 179, 180; Sutlive *v.* Jones, 61 Ga. 676; Willey *v.* Carter, 4 La. Ann. 56; Keck *v.* Fisher, 58 Mo. 532, 535; Arnold *v.* Stevenson, 2 Nev. 234; McWhorter *v.* McMahan, Clarke, Ch. 400; 10 Paige, 386. See Elliott *v.* Dycke, 78 Ala. 150, 156; Donaldson *v.* Bank of Cape Fear, 1 Dev. Eq. 103. Leases made by one partner in the prosecution of the business were recognized where the nature and object of the partnership necessarily implied an authority, Mussey *v.* Holt, 4 Foster (24 N. H.), 248 (55 Am. Dec. 234); Shaw *v.* Farnsworth, 108 Mass. 357. There are many other cases where an attempted conveyance or incumbrance by one partner under seal was held or stated *obiter* to be invalid as against all the partners except the signer, on the ground that he could not bind the firm under seal. These cases, therefore, do not help us. Such cases will be found elsewhere; among those particularly relating to real estate are, Dillon *v.* Brown, 11 Gray, 179; Weeks *v.* Mascoma Rake Co. 58 N. H. 101; Baldwin *v.* Richardson, 33 Tex. 16; Anthony *v.* Butler, 13 Pet. 423. The power of contracting to sell land which may exist in a surviving or liquidating partner rests on the power to wind up and is elsewhere treated, or where a partner has absconded, see Assignment for Creditors.

of a commodity, and the rules of an ordinary commercial partnership apply, each partner, by the great preponderance of authority, can bind the firm by contracts for its disposition, since the very scope of the business implies the existence of such power.[1]

In Chester *v.* Dickerson, *supra*, a firm possessed a privilege or bond for the purchase of land; one partner poured coal oil on the property and passed it off to plaintiff as oil lands, and the entire firm was held bound by the contract to sell, and consequently liable for the deceit.[2]

But it must be conveyed as real estate in all cases, that is, in the name of each partner, whether it be converted out and out into personalty or not.[3]

§ 300. Surviving partner.— The surviving partner has more than a mere lien to have the property applied to paying debts, but an equitable estate; he has the right to control the property, and to treat it as personalty in order to wind up.[4] He can sell the entire beneficial interest without proceedings to get a decree for that purpose,[5] and the buyer is not obliged to see to the application of the purchase money, as such burden would greatly reduce the value;[6] or convey

[1] Thompson *v.* Bowman, 6 Wall. 316; Sage *v.* Sherman, 2 N. Y. 417, 431; Chester *v.* Dickerson, 45 N. Y. 326; 54 id. 1; 13 Am. Rep. 550 (aff. 52 Barb. 349); Robinson *v.* Crowder, 4 McCord (S. Ca.), L. 519, 536–7; 17 Am. Dec. 762 (per Johnson, J.); Batty *v.* Adams County, 16 Neb. 44; Baldwin *v.* Richardson, 33 Tex. 16. But see Lawrence *v.* Taylor, 5 Hill, 107.

[2] It was said, however, in Foster's Appeal, 74 Pa. St. 391, 396–7; 15 Am. Rep. 553; 3 Am. Law Rec. 230, per Sharswood, J., to result from the statute of frauds, that real estate never became so far stock as to give one partner implied power to dispose of the entire interest of the firm in it. In Morse *v.* Richmond, 6 Ill. App. 166 (aff'd, 97 Ill. 303), an express power to borrow, granted to one member of a firm dealing in real estate, was held to carry the power to give a mortgage, the title being in such partner as trustee.

[3] Davis *v.* Christian, 15 Gratt. 11.

[4] Cobble *v.* Tomlinson, 50 Ind. 550; Merritt *v.* Dickey, 38 Mich. 41, 44. And see cases cited under § 294.

[5] Sbanks *v.* Klein, 104 U. S. 18; Easton *v.* Courtwright, 84 Mo. 27; 17 Cal. 262; Tillinghast *v.* Champlin, 4 R. I. 173; Griffey *v.* Northcutt, 5 Heisk. 746 (by statute in Tennessee).

[6] See Tillinghast *v.* Champlin, *supra;* Griffey *v.* Northcutt, *supra.*

to secure or compromise debts.[1] Hence rents derived from the property between the death and the time of sale go to the surviving partner.[2]

§ 301. **Statute of frauds.**— Where a partnership holds land not as the chief purpose of its existence, but as an incident to its business, the statute of frands does not apply, and the land may be shown to be part of the partnership stock and affected with partnership equities by oral evidence. The partnership requires no writing to prove it, and exists outside of the ownership of real estate.[3]

But the contrary is also held to some extent, and that lands acquired in the name of one member of an oral partnership could not be shown to be partnership lands.[4]

[1] Murphy *v.* Abrams, 50 Ala. 293; Breen *v.* Richardson, 6 Colorado, 605; Van Staden *v.* Kline, 64 Iowa, 180. And see § 731.

[2] Dyer *v.* Clark, 5 Met. 562; 39 Am. Dec. 697; Cilley *v.* Huse, 40 N. H. 358; Hartnett *v.* Fegan, 3 Mo. App. 1.

[3] *Re* Farmer, 18 Bankr. Reg. 207; Lyman *v.* Lyman, 2 Paine, C. C. 11, 22; Causler *v.* Wharton, 62 Ala. 358; Scruggs *v.* Russell, McCahon (Kan.), 39; Marsh *v.* Davis, 33 Kan. 326; Fall River Whaling Co. *v.* Borden, 10 Cush. 458; Sherwood *v.* St. Paul & Chic. R'y, 21 Minn. 127; Baldwin *v.* Johnson, 1 N. J. Eq. 441; Persónette *v.* Pryme, 34 id. 26; Fairchild *v.* Fairchild, 64 N. Y. 471 (aff. 5 Hun, 407); Smith *v.* Tarlton, 2 Barb. Ch. 336; Thompson *v.* Egbert, 3 N. Y. Supreme Ct. 474; Knott *v.* Knott, 6 Oreg. 142; Brooke *v.* Washington, 8 Gratt. 248; 56 Am. Dec. 142; McCully *v.* McCully, 78 Va. 159; Newton *v.* Doran, 3 Grant's Ch. (Up. Can.) 353. *Contra*, that real property not bought with partnership funds, and held, therefore, as tenants in common, cannot be converted into partnership property by oral agreement because of the statute of frauds, nor on the doctrine of resulting trusts, because the trust does not arise by implication of law, Parker *v.* Bowles, 57 N. H. 491. Personette *v.* Pryme, 34 N. J. Eq. 26, seems to be opposed to this, where two tenants in common of a firm orally formed a partnership in the land and its management. Where a partnership orally agreed to extend its dealings into real estate, if the land was bought in the names of all, it could be shown to be partnership property, for this is not inconsistent with the title, but if bought in the name of one, it could not be, was held in Bird *v.* Morrison, 12 Wis. [138]. Several of the above cases are directly opposed to the latter proposition.

[4] Smith *v.* Burnham, 3 Sumn. 435; Bird *v.* Morrison, 12 Wis. 153 [138]; York *v.* Clemens, 41 Iowa, 95; Everhart's Appeal, 106 Pa. St. 349. Also, Larkins *v.* Rhodes, 5 Porter, 195, and Rowland *v.* Boozer, 10 Ala. 690, in both of which cases relief was granted on other grounds. Dunbar

§ 302. —— **same as to partnership to trade in lands.**—The authorities are divided on the question whether a partnership to trade in lands may be proved by parol in order to affect the lands with partnership liabilities and equities. The preponderance is in favor of considering that the statute does not apply if the land was or is to be purchased with the joint fund, whether the title be taken in one or all.[1]

That recognition of the partnership claim in letters to third persons, written transactions, books of account and schedules of property is sufficient to satisfy the statute.[2] Third persons are not confined to written proof of the existence of a partnership to deal in

v. Bullard, 2 La. Ann. 810; Benton *v.* Roberts, 4 id. 216; Gray *v.* Palmer, 9 Cal. 616, 639 (a *dictum*). Question raised but not decided in Fall River Whaling Co. *v.* Borden, 10 Cush. 458. That relief will be granted on the ground of a resulting trust if the evidence is clear and certain. Larkins *v.* Rhodes, 5 Porter, 195; Piatt *v.* Oliver, 2 McLean, 267. But after sale of the lands, oral proof of an interest in the proceeds on the part of the copartners was permitted as being personalty. Everhart's Appeal, 106 Pa. St. 349. And damages for breach of an agreement to contribute a certain share of the capital in an oral partnership to buy a certain tract was allowed, not being an action to convey title or recover price. Meason *v.* Kaine, 63 Pa. St. 335. And land bought with individual funds and owned by the partners as tenants in common, upon which the partnership conducts its business, cannot be subsequently converted into partnership personalty without writing; hence partition cannot be defeated by such oral evidence. Alexander *v.* Kimbro, 49 Miss. 529.

[1] Dale *v.* Hamilton, 5 Hare, 369; Essex *v.* Essex, 20 Beav. 442; Bunnel *v.* Taintor, 4 Conn. 568; Chester *v.* Dickerson, 54 N. Y. 1; 13 Am. Rep. 550; 52 Barb. 369; Traphagen *v.* Burt, 67 id. 30; Williams *v.* Gillies, 75 id. 197, 201 (rev. 13 Hun, 422); Richards *v.* Grinnell, 63 Iowa, 44; 50 Am. Rep. 727; Pennybacker *v.* Leary, 65 id. 220; Holmes *v.* McCray, 51 Ind. 358; 19 Am. Rep. 753; Clagett *v.* Kilbourne, 1 Black, 346; Hunter *v.* Whitehead, 42 Mo. 524; Springer *v.* Cabell, 10 id. 640; Harbour *v.* Reeding, 3 Montana, 15. And see Snyder *v.* Walford, 33 Minn. 175; Wormser *v.* Meyer, 54 How. Pr. 189; Bissell *v.* Harrington, 18 Hun, 81; Knott *v.* Knott, 6 Oregon, 142; Piatt *v.* Oliver, 2 McLean, 267; 3 How. 401; Smith *v.* Tarlton, 2 Barb. Ch. 336. See Carr *v.* Leavitt, 54 Mich. 540. *Contra*, Smith *v.* Burnham, 3 Sumner, 435, 458 (this case and Dale *v.* Hamilton, *supra*, are the two great leading adversary cases on the whole subject); Gantt *v.* Gantt, 6 La. Ann. 677; Pecot *v.* Armelin, 21 id. 667.

[2] See Fall River Whaling Co. *v.* Borden, 10 Cush. 458; Montague *v.* Hayes, 10 Gray, 609; Rowland *v.* Boozer, 10 Ala. 690.

real estate to affect the property; the statute of frauds only applies *inter se.*[1]

That a parol agreement by the buyer of lands to admit another into partnership with him is void under the statute of frauds, as not different from the contract of buyer and seller.[2] A difference between these cases and those in the note above must be noticed. In those the partnership was formed to deal in land, but was not itself a transfer of the title, the land not being bought by the contract of partnership, but in pursuance of it and out of the partnership funds. In the present class of cases the contract itself purports to be a transfer of interest.

[1] *In re* Warren, 2 Ware, 322.

[2] Henderson *v.* Hudson, 1 Munf. (Va.) 510; *In re* Warren, 2 Ware, 322. Directly *contra* is York *v.* Clemens, 41 Iowa, 95; Holmes *v.* McCrary, 51 Ind. 358; 19 Am. Rep. 735.

CHAPTER IV.

DUTY TO OBSERVE GOOD FAITH.

§ 303. The partners owe to each other the most scrupulous good faith. Each one has a right to know all that the others know, and their connection is one of great confidence; and the *uberrima fides* of a fiduciary relation will be the standard of fidelity exacted from them.

For example: A partner employed to buy goods for the firm, if he buy for them goods of his own at the market price, must account to them for the profit, for otherwise he would be tempted, if a skilful buyer, to use his judgment as to the fluctuations of the market for his own benefit.[1]

In Burton *v.* Wookey, 6 Madd. 367, B. & W. formed a partnership to deal in lapis calaminaris, which W. was to buy from the miners on behalf of the firm. W. was a shop-keeper, and the miners were many of them his customers; but he paid cash for the mineral and they paid cash for his goods, and after the partnership had been in existence for some time, he adopted the course of paying for the mineral in goods out of his store, the change being alleged to be on account of hard times, but charged B. as for cash paid out. Sir John Leach, V. C., held that as W. stood in a relation of trust and confidence towards B., and as the profit of purchasing the mineral cheap would be divided between him and B., but the profit of paying a high price for it in store goods would be exclusively his own, he would be biassed against duly discharging his duty to B., and must therefore account to B. for profits upon the goods, and he was compelled to divide those profits.

Any secret agreement by one partner on behalf of his firm, made with another firm in which he has an interest, prejudicial to his copartners will not bind them.[2] Nor can a partner buy from the firm without his copartner's assent. His power to sell is not a power to sell to himself, and no title is conveyed by such transfer.[3] Even

[1] Bentley *v.* Craven, 18 Beav. 75.

[2] Goodwin *v.* Einstein, 51 How. Pr. 9.

[3] Comstock *v.* Buchanan, 57 Barb. 127.

in an auction sale of damaged goods of the firm, if one partner purchase it will be deemed as on joint account, and he must account for profits upon it.[1]

Bad faith, however, will not be presumed; and where a partner received money of the firm to buy goods for it, and was never heard of afterwards, the loss must fall upon the firm in a controversy between the other partner and a person appointed administrator of the absentee on a presumption that he was dead.[2]

So where M. & J. were partners as storage merchants, and M. as manager had received for storage a lot of grain receipting for it in the firm name, and, it having been lost or converted, gave a partnership note for it, the fact that J. did not know of the transaction, and that M. and the owner had separate transactions together, and the owner wrote to M. individually, does not show the note to be the liability of M. alone.[3]

§ 304. **In all stages of their connection.**— The same strict degree of good faith is required of partners who are such only in a single enterprise as a general partnership.[4] So of partners negotiating to form a partnership. While in bargaining with each other they may have the rights of strangers with adverse interests, and each obtain as large a share in the contemplated firm as he justly can, for here the rule of *caveat emptor* applies,[5] yet in buying from third persons the land or stock which the proposed partnership is designed to manage, he cannot retain a secret advantage.[6] So of partners who have dissolved but not yet wound up the business. Until their connection with their former associates is completely severed, their conduct will be tested by the same principles.[7]

[1] Zimmerman *v.* Huber, 29 Ala. 379. A., who was largely in debt, took B. into partnership. B. brought in no capital, but the firm assumed A.'s debts, and made immense profits. A debt of A. of $800,000 was compromised at $200,000, and other debts in like proportion. Here A. does not become creditor of the firm for half the difference between that and the original amount, but the compromise inures to the firm's benefit, Iddings *v.* Bruen, 4 Sandf. Ch. 223.

[2] Jenkins *v.* Peckinpaugh, 40 Ind. 133.

[3] Pierce *v.* Jackson, 21 Cal. 636.

[4] Yeoman *v.* Lasley, 40 Oh. St. 190; Hulett *v.* Fairbanks, 40 id. 233.

[5] Uhler *v.* Semple, 20 N. J. Eq. 288.

[6] Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43, 50.

[7] Lees *v.* Laforest, 14 Beav. 250; Clegg *v.* Fishwick, 1 Mac. & G. 294;

§ 305. Buying interests in firm's property.— If one partner buys an outstanding adverse title to property belonging to the firm, or acquires an interest in its property without his copartner's assent, which would be beneficial to the firm, the purchase is deemed to be for the firm.[1]

A partner who clandestinely obtains in his own name a renewal of the lease of the premises used by the firm must hold it as partnership property.[2] So, though the renewal is for a term beyond the agreed duration of the partnership, it inures to the benefit of the estate of the other partner who has since died;[3] and though he notifies his copartners of his intended action beforehand and the partnership is at will.[4] And even if the renewal is to begin from the expiration of the partnership, yet if the partnership had made improvements and enhanced its value by creating a good will, having built a hotel thereon, and though the lessor might not have granted the new lease to the firm or to the other partners, the renewal must inure to the benefit of all.[5]

Clements *v.* Hall, 2 DeG. & J. 173; Warren *v.* Schainwald, 62 Cal. 56. Jones *v.* Dexter, 130 Mass. 380; 39 Am. Rep. 459; Beam *v.* Macomber, 33 Mich. 127; Betts *v.* June, 51 N. Y. 274, 278. Thus, if continuing partners who are to account for collections to a retiring partner, neglect to get in the debts, or think fit to enter into new arrangements with debtors by which they become debtors of the new firm, such partners are liable to the retiring partner for the amount of the debts the same as if collected. Lees *v.* Laforest, 14 Beav. 250.

[1] Kinsman *v.* Parkhurst, 18 How. 289 (of a patent); Eakin *v.* Shumaker, 12 Tex. 51; Forrer *v.* Forrer, 29 Gratt. 134 (by a surviving partner); Gillett *v.* Gaffney, 3 Colorado, 351. The above cases are of purchases of adverse interests. See, also, Burn *v.* Strong, 14 Grant's Ch. (Up. Can.) 651; and Washburn *v.* Washburn, 23 Vt. 576. And the same rule applies to the obtaining of any other exclusive use of a right beneficial to the firm. Weston *v.* Ketcham, 39 N. Y. Superior Ct. 54. But if the firm had merely a possessory title, and the surviving partner bought the interest of the deceased in this from the administrator, his purchase of the fee will not be for the benefit of the heirs. Blatchley *v.* Coles, 6 Colorado, 349.

[2] Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 311; Clegg *v.* Fishwick, 1 Macn. & G. 294; Struthers *v.* Pearce, 51 N. Y. 357; Clements *v.* Hall, 2 De G. & J. 173; Alder *v.* Fouracre, 3 Swanst. 489.

[3] Leach *v.* Leach, 18 Pick. 68; Clegg *v.* Fishwick, 1 Macn. & G. 294.

[4] Clegg *v.* Edmondson, 8 De G. M. & G. 787, 807.

[5] Mitchell *v.* Read, 61 N. Y. 123; 19 Am. Rep. 252 (reversing 61 Barb. 310);

But in such case the pivotal fact is underhand or secret dealing; and if this element is absent and the firm is dissolved, as where one partner in a hotel business dies and the surviving partner procures a renewal of the lease, he is not obliged to hold it for the joint benefit, for he cannot be expected to run all the risk and divide the contingent profits.[1] And so even though a representative of the estate is willing to join as partner in continuing the business, for that would be forcing a partner upon him.[2] And the same rules apply to a renewal of a lease by the surviving partner in his own name before his connection with the representative of the deceased is ended.[3]

And so carefully does the law guard against abuses of this fiduciary relation that if the lease contains no privilege of renewal, yet the expectation, opportunity or chance of renewal will be treated as an asset, and a new lease by one partner in his own name will be held to be in trust for the firm.[4]

These principles do not apply where the property interest in a lease is not in the firm but exclusively in the partner himself.

s. c. 84 N. Y. 556 (affirming 19 Hun, 418).

[1] Chittenden *v.* Witbeck, 50 Mich. 401.

[2] Id. 419, 420.

[3] Clements *v.* Hall, 2 De G. & J. 173, 186; Betts *v.* June, 51 N. Y. 274, 278; Clegg *v.* Fishwick, 1 Macn. & G. 294; Leach *v.* Leach, 18 Pick. 68.

[4] Spiess *v.* Rosswogg, 16 Jones & Sp. 135; 63 How. Pr. 401; Johnson's Appeal (Pa. 1887), 8 Atl. R. 36. And so of partners in agencies, as for insurance companies, where one on dissolution procures a renewal of the agencies for himself. although the other designs going out of business. See Read *v.* Nevitt, 41 Wis. 348, abstracted in § 239. But there must be limit to the incapacity of a partner to buy, as where he has endeavored with the utmost industry and good faith to sell at an advance the joint property in which the partners had a privilege of purchase within a limited time, and after the partnership has proved an utter failure he buys the property with his private means to save the forfeiture, he was not held to account for half to his copartner. Kayser *v.* Maugham, 8 Colorado, 232; s. c. id. 339. In American Bank Note Co. *v.* Edson, 56 Barb. 84 (1 Lans. 388), where a partner purchased a patent right in an article useful for the business and offered to sell it to the firm at an advance, not disclosing the purchase price, but they preferred to pay a royalty, it was held that any original right to claim the benefit of the purchase expired at dissolution.

R. & S. P., being lessees for three years longer of three stone quarries, with a privilege of renewal for three years, formed a partnership with P. to prepare stone for building, the partnership to continue for three years and so much longer as R. & S. P. should continue lessees under such lease. At the end of the three years R. & S. P. refused to renew the lease, but took a new lease of two of the quarries and formed a new partnership with another person. Held, the first partnership expired by limitation at the end of the three years. The articles did not oblige R. & S. P. to renew the lease, as they might have done, and the court cannot add such provision. The lease did not belong to the firm, the articles of partnership only providing that the lessees should furnish the firm with stone at cost. R. & S. P. could refuse to renew the lease for the purpose of ending the partnership if they desired. The partnership is as if it were for three years, renewable for three more at S. & R.'s option. And so, although they may have spoken and acted during the partnership as if they expected to renew the lease, but not so as to amount to a new contract.[1]

§ 306. **Competing with firm.**— If a partner speculate with the firm's funds or credit he must account to his copartners for the profits, and bear the whole losses of such unauthorized adventures himself.[2] And if he go into competing business, depriving the firm of the skill, time or diligence or fidelity he owes to it, so he must account to the firm for the profits made in it;[3] and a managing partner

[1] Phillips *v.* Reeder, 18 N. J. Eq. 95. Whether a partner can buy in for his own use the reversion of land occupied by the firm under a term of years, or *per autre vie*, is not clear on the authorities. It was held that a managing partner could not do so in Laffan *v.* Naglee, 9 Cal. 662, and that an ordinary partner could do so in Batchelor *v.* Whitaker, 88 N. Ca. 350; general language to the effect that he can do so in Anderson *v.* Lemon, 8 N. Y. 236 (reversing 4 Sandf. 552), was disapproved in Mitchell *v.* Read, 61 N. Y. 123, 142, and by the above California case, and was a *dictum*, for the case decides that where the other partner is negotiating for the same purchase for the firm, with the concurrence of the copartner, the latter cannot obtain the property for himself, though the renewal of the partnership is not fully adjusted as to terms.

[2] See under ACCOUNTING, § 792.

[3] Todd *v.* Rafferty, 30 N. J. Eq. 254; Bast's Appeal, 70 Pa. St. 301; McMahon *v.* McClernan, 10 W. Va. 419; Fletcher *v.* Ingram, 46 Wis. 191; Lockwood *v.* Beckwith, 6 Mich. 168.

will be enjoined from carrying on the same business for his own benefit.[1]

A partner cannot prefer his own interest to the firm's. He cannot keep the benefit of a good bargain to himself; and any private advantages he may obtain by secret stipulations of this kind must be shared with his copartners.[2]

The assent of the other partners must be very clear, and will not be inferred from slight circumstances,[3] nor even from several years' delay if they reasonably thought he might ultimately account.[4]

Mere ownership in a similar business may not be inconsistent with the duties of a partner. Thus, a person may be a partner in many newspapers.[5] So in a partnership to store cotton, if the other partner refuses to engage further warehouses, a managing partner doing so at his own expense, without neglecting his duties as partner, is not accountable for the profits.[6] And a dormant or silent partner who only lends capital or credit to the firm may consistently have an antagonistic interest if there is no deception.[7]

A partner may traffic outside of the scope of the business for his own benefit. Thus, a partner, authorized to collect a debt secured by mortgage, bought in the land for himself at the foreclosure. The debt being paid in full, he was held not to be accountable for profits, especially as the other partners intended to "bluff the creditors," having liens adverse to them, and get the land at an undervalue; equity will not aid them against their copartner.[8] And if copartners consent to a partner spending his time, and perhaps their materials, in making improvements, from which they get a benefit, on machines dealt in by the firm, his inventions are his own, though the articles of partnership required each to devote his time to the business, even if he has violated his agreement.[9]

Injunction will be granted against a partner who has covenanted to "exert himself for the benefit of the partnership" from break-

[1] Marshall *v.* Johnson, 33 Ga. 500.

[2] Lowry *v.* Cobb, 9 La. Ann. 592.

[3] Todd *v.* Rafferty, 30 N. J. Eq. 254, 256.

[4] Bast's Appeal, 70 Pa. St. 301.

[5] Glassington *v.* Thwaites, 1 Sim. & Stu. 124, 132.

[6] Parnell *v.* Robinson, 58 Ga. 26.

[7] Pierce *v.* Daniels, 25 Vt. 624, 634.

[8] Wheeler *v.* Sage, 1 Wall. 518. See Dean *v.* Macdowell, 8 Ch. D. 245.

[9] Belcher *v.* Whittemore, 134 Mass. 330.

ing the agreement by engaging in the same trade with others,[1] or not to engage in any other business,[2] and against using what belongs to the partnership in competition with it, but not against a mere temptation to do so.[3]

§ 307. **Commissions obtained from those dealing with firm.** Where a firm is formed for the purpose of purchasing and dealing in a tract of land, or where a firm buys land, a secret arrangement between the seller and one partner by which the latter obtains a reward for inducing the firm to buy, or a commission on the sale, or where such partner, having an option to buy, sells to the firm at an advance, he will of course be compelled to account for his gains.[4]

But where one partner, without objection from the other, employed another firm in which he was a partner to sell the firm's commodities on commission, whereby the firm's expenses of transportation were diminished, and also sold to the other firm, in order to enable them to fill contracts, at a larger price than they paid, he will not be compelled to account for his share of the profits made by such other firm.[5]

§ 308. **Buying out or selling to copartner.**— There is no principle of law that prevents one partner buying out the interest of the other or selling to him in good faith, provided he acquires no secret benefit for himself at the expense of

[1] Kemble *v.* Kean, 6 Sim. 333.

[2] Dean *v.* Macdowell, 8 Ch. D. 345.

[3] Glassington *v.* Thwaites, 1 Sim. & Stu. 124.

[4] Fawcett *v.* Whitehouse, 1 Russ. & M. 131; Hodge *v.* Twitchell, 33 Minn. 389; Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43, 50; Short *v.* Stevenson, 63 Pa. St. 95; Emery *v.* Parrott, 107 Mass. 95; Dunlop *v.* Richards, 2 E. D. Smith, 181; Grant *v.* Hardy, 33 Wis. 668; Faulds *v.* Yates, 57 Ill. 416; Delmonico *v.* Roundebush, 2 McCrary, C. C. 18. And the fact that such partner was to divide his commissions with a third person, and therefore does not realize the whole, will not relieve him for accounting for it all; that is his own loss. Grant *v.* Hardy, 33 Wis. 668; and see Bast's Appeal, 70 Pa. St. 301. The copartners can withdraw and recover their capital if they desire. Short *v.* Stevenson, *supra.* But whether they can, without dissolving, compel repayment of the excess, see Faulds *v.* Yates, *supra.* A person with whom the wrong-doer goes into partnership to assist in effecting the scheme, if cognizant of the improper conduct, is liable jointly and severally with the partner to the other associates. Emery *v.* Parrott, 107 Mass. 95.

[5] Freck *v.* Blakiston, 83 Pa. St. 474.

his copartner by suppressing information or concealing facts which the latter was entitled to know.

In Cassels *v.* Stewart, L. R. 6 App. Cas. 64, it was so ruled even though there was a clause in the articles that an assignment of his share by a partner should be null, and that the others should have the option of buying, when this was merely to prevent the interference of strangers in the firm.

Geddes' Appeal, 80 Pa. St. 482, decides that if partners desirous of selling get their price, it makes no difference that the purchaser is secretly buying for the other partners, where there was no misrepresentation, although, in fact, the relations of the partners not being amicable, the seller would have charged them more, and though one of the selling partners was paid $2,000 more than the other.

Bradbury *v.* Barnes, 19 Cal. 120, decides that he may even buy the interest of the other at sheriff's sale if with his own funds.

§ 309. But deception of any kind, or the non-disclosure of material facts, especially by a managing partner, will vitiate the sale.[1]

In O'Connor *v.* Naughton, 13 Grant's Ch. (Up. Can.) 428, where a partner was induced to agree on a dissolution and settlement under an erroneous impression that one of the others was about to retire, and was therefore equally interested with himself in having a fair valuation, whereas such partner had secretly agreed with the rest to continue after settling with the first, the sale was held not binding by reason of the deceit.

Maddeford *v.* Austwick, 1 Sim. 80,[2] ruled that a managing partner cannot buy out his copartner for a consideration which he knows is inadequate, but conceals the fact.[3]

So if a surviving partner refuses information to enable representatives to determine whether to sell.[4]

In Brooks *v.* Martin, 2 Wall. 70, it was held that to sustain a purchase by a managing partner from a copartner ignorant of the

[1] In White *v.* Cox, 3 Hay. (Tenn.) 79, one bought out the other at an unreasonable price by getting him drunk, and the court required an accounting.

[2] Affirmed without opinion in 2 Myl. & K. 279.

[3] S. P. Brigham *v.* Dana, 29 Vt. 1; Stephens *v.* Orman, 10 Fla. 9; Hopkins *v.* Watt, 13 Ill. 298; Sexton *v.* Sexton, 9 Gratt. 204.

[4] Clements *v.* Hall, 2 De G. & J. 173.

state of business, the price must be at least approximately adequate, and that all information possessed by him necessary to enable the seller to form a sound judgment must have been communicated.[1]

In Pomeroy *v.* Benton, 57 Mo. 531 (s. c. 14 Am. Law Reg. N. S. 306); s. c. 77 Mo. 64, the managing partner used the credit of the firm in outside speculations, and by a false balance sheet not mentioning these, induced his copartner to sell out to him, the sale was reopened, although the selling partner had not been vigilant.

In Jones *v.* Dexter, 130 Mass. 380; 39 Am. Rep. 459, it was held that a partner acting for his copartner in winding up the partnership, who at his own sale of the remaining assets procures another person to buy for him, even at public auction, and though the other partner also bid, must account to him as if no sale had been made.

It was, however, held in Geddes' Appeal, 80 Pa. St. 482, that where a selling partner was requested by the buyer to examine the books, and could have done so but did not, and sold his share to a person who was secretly buying for the other partner for $28,000, when it was worth $34,000, this is not so inadequate nor such fraud that a court would set it aside after six years' delay, although the business was so prosperous afterwards that the share was paid for out of profits.

In Nicholson *v.* Janeway, 16 N. J. Eq. 285, the court, recognizing that concealment is as bad as misrepresentation, said it must be as to a material fact; and that where the selling partner was induced to agree to an accounting, or promise to receive notes for the balance found due, the managing partners having become convinced that nothing would be found due, but not telling him so, is not ground for decreeing his reinstatement in the firm, for he received all he was entitled to and the other partners have been deprived of his aid during the interim.

In Kintrea *v.* Charles, 12 Grant's Ch. (Up. Can.) 117, the partner who had charge of the books and finances sold out to the other, but by mistake of the book-keeper, of which the buying partner was innocent, but should have been aware, the latter appeared as creditor of the firm when he was really debtor, he was required to account to the seller.[2]

[1] And so in Heath *v.* Waters, 40 Mich. 457, of a purchase by a surviving partner from an executrix.

[2] The cases of an agreed settlement between partner being opened for fraud, but not disturbed for mere mistake, are numerous and will be found in §§ 759–763; and for purchases by a

§ 310. A partner who purchases the interest of another partner, in this case in a mine, without the knowledge of his copartners, violates no trust or confidence towards his other partners merely by so doing.[1] But a partner may buy out one of several other partners, although with perfect fairness between buyer and seller, yet under such circumstances as to be held accountable to the other partners for the purchased share as if bought for joint benefit, if he by deception prevents them from buying.

In Warren *v.* Schainwald, 62 Cal. 56, certain partners proposed to buy out the interest of a deceased partner, but were prevented from doing so by the false statement of one of their number that he had already bought it; his subsequent purchase was held to inure to the joint benefit after reimbursing him for the outlay. But in Bissell *v.* Foss, *supra*,[1] nearly the contrary was held in the case of a mining partnership, where one of the other partners had expected that one of the purchasers would buy for him and had been led by the latter so to expect.[2]

§ 311. Buying at execution sale.— There does not seem to be any reason why a partner may not be a purchaser on his own behalf at an execution sale of the partnership property.

Yet it has been held that a partner is disabled to become a purchaser of the firm's property at an execution sale against the firm, except in trust for the partnership, and a purchaser from him with notice occupies the same position.[3] Certainly if he pays by check-

surviving partner from the administrator of the deceased partner, see § 743.

[1] Bissell *v.* Foss, 114 U. S. 252 (aff'g s. c. sub. nom. First Nat'l B'k *v.* Foss, 4 Fed. Rep. 694, and 2 McCrary, 73).

[2] And see, also, Blaylock's Appeal, 73 Pa. St. 146.

[3] Lamar *v.* Hale, 79 Va. 147, 158; s. P. Farmer *v.* Samuel, 4 Litt. (Ky.) 187; 14 Am. Dec. 106; Evans *v.* Gibson, 29 Mo. 223. In this case it was likened to a tenant in common buying in an outstanding incumbrance which inures to all. But in Bradbury *v.* Barnes, 19 Cal. 120, it was said that one partner could buy at a sheriff's sale on execution levied on the interest of his copartner in the firm; this, however, was a mining partnership. And in McKenzie *v.* Dickinson, 43 Cal. 119, it was held that one partner engaged in settling up after dissolution could buy a judgment rendered against his copartner and enforce it by levy and sale of the debtor's interest in the firm. and by buying thereat become sole owner of the assets; and this was placed on the ground

ing on the firm's deposit, the sale will be set aside and will not be even a dissolution.[1] And so, if he has in his hands more money of the firm than the amount of the judgments, unless the other partner choose to insist on the sale.[2] Certainly, if there is the least collusion or procurement of the forced sale by the buying partner to get the property at a discount,[3] or to force a dissolution.[4]

B. & W., being embarrassed, dissolved, putting all the assets in W.'s hands in trust to wind up, with power to mortgage the partnership real estate for that purpose. The firm was indebted to W.'s father, who died, and W. was one of his executors. A mortgage by W. to his co-executors to secure the debt was held valid, and at foreclosure sale, under the mortgage, W.'s purchase for the benefit of the estate, he being the only executor who had qualified in this state, is valid, being in good faith and for a fair price, although he was interested as devisee. His purchase is not as trustee, but as agent of the mortgagees.[5]

§ 312. Abandonment or neglect by complaining partner.— If a partner abandons the enterprise and leaves his associates to bear the burden alone, the original degree of obligation towards him does not subsist;[6] and the inequitable

that, outside of the conduct of the business, each could traffic for his own profit without restraint.

[1] Helmore *v.* Smith, 35 Ch. D. 436.

[2] Bradbury *v.* Barnes, 19 Cal. 120. See, also, Hulett *v.* Fairbanks, 40 Oh. St. 233, where a partner, having the funds of the firm, held them back so as to force a forfeiture of a contract to buy land, in order to buy up the forfeited rights himself. And in Catron *v.* Shepherd, 8 Neb. 308, a partner who, having a large surplus of partnership profits in his possession, bought up a claim against his copartner for twenty-five cents on the dollar, was allowed to turn it in on accounting only for what he gave for it. In Blaylock's Appeal, 73 Pa. St. 146, a special partner purchased on execution against the firm, but as he had promised to buy for joint benefit and the general partners had, therefore, not prepared for the sale, he was on this account compelled to carry out his promise. In Perens *v.* Johnson, 3 Sm. & G. 419, the sheriff concealed the fact that a seam of coal in mining property was nearly reached.

[3] Pierce *v.* Daniels, 25 Vt. 624.

[4] Renton *v.* Chaplin, 9 N. J. Eq. 62. So bankruptcy of one partner will not dissolve the firm, if brought about by the other for that purpose. Amsinck *v.* Bean, 22 Wall. 395.

[5] Wilson *v.* Bell, 17 Minn. 61. W was more interested as partner than as executor.

[6] Reilly *v.* Walsh, 11 Irish Eq. 22; McLure *v.* Ripley, 2 Macn. & G. 274.

conduct of the injured partner may be such as to deprive him of the right to complain that his copartner had retained to himself the benefit of advantageous transactions.[1]

In Rhea *v.* Tathem, 1 Jones (N. Ca.), Eq. 290, A., B., C. and D., several persons, formed a partnership to buy lands of the estate and mine, A. and B. alone giving a title bond for the lands. B., C. and D. abandoned the works for several years, and A. in good faith surrendered the land to the state, and afterwards obtained a preemption right on it as an actual settler, and sold it, and he was held not to be accountable for the purchase money.

§ 313. **Duty to keep accounts.**— It is the right of each partner that precise and accurate accounts be kept of the business and transactions of the firm, always ready for inspection at its place of business and free of access.[2] Where no partner has the specific charge of the accounts, but each keeps the memorandum of his own transactions, he will be held to the strictest account for the non-performance of his duty that the proofs will justify.[3] And if one partner has the duty of keeping the books, and does not do so properly, every presumption will be against him; he may be charged with interest if no account of profits can be given; he will be charged with sums coming into his hands unless their application to joint benefit is most satisfactorily proved.[4]

§ 314. **Access to books.**— The books should be kept at the place of business, and though their removal without con-

[1] Lowry *v.* Cobb, 9 La. Ann. 592.

[2] On the general duty to keep accounts, see Goodman *v.* Whitcomb, 1 Jac. & W. 589, 593; Rowe *v.* Wood, 2 id. 553, 558–9; *Ex parte* Yonge, 3 Ves. & B. 31, 36; Chandler *v.* Sherman, 16 Fla. 99. The importance of keeping proper books is too obvious to need argument or illustration. In one case an eminent judge was led to say: "Nearly all the questions we are called on to determine should have been easily settled by the partnership books, had they been kept as they ought to have been." Godfrey *v.* White, 43 Mich. 171, 174. And in other cases the court have, after repeated attempts to do justice between the partners, been compelled to dismiss the bill and divide the costs. Vermillion *v.* Bailey, 27 Ill. 230. And may do this rather than grope in darkness in undertaking to establish claims on mere contingencies and possibilities. Hall *v.* Clagett, 48 Md. 223.

[3] Pierce *v.* Scott, 37 Ark. 308.

[4] See § 765.

sent of a partner is not ground for dissolution and receiver,[1] it is ground for injunction.[2]

In Greatrex *v.* Greatrex, 1 De G. & S. 692, the books when last seen were being carried down the road in a wheelbarrow by defendant. The injunction was not mandatory to bring them back, but was against his keeping them at any other place than the counting house.

It is the right of each partner to have free access to the books, and make copies or extracts from them.

Hence, where a person called on for discovery makes answer that the information was contained in books of a firm to which he belonged, and that, on applying to his partners for permission to make extracts, they refused, this is not sufficient; he was not obliged to ask permission unless he had given up his right of access by contract.[3]

And though a person entitled to receive a share of the profits has by contract agreed that he was to have no right to see the books and accounts, but will take the defendant's word, yet if there is a dispute as to what per cent. of profits it was agreed he should have, and the books will settle the dispute, the court will not permit the defendant to withhold the evidence.[4] Nor can a partner who keeps the accounts in a private book of his own, though he transcribe them into the partnership books for inspection, withhold such private book from the inspection of his partners.[5] And if the copartners permit a partner to keep his accounts of outside matters, as of an estate of which he is executor, in the partnership books, they must submit to his being compelled to produce them.[6]

[1] Goodman *v.* Whitcomb, 1 Jac. & W. 589, 593.

[2] Charlton *v.* Poulter, cited in note to Norway *v.* Rowe, 19 Ves. 144, 149; Greatrex *v.* Greatrex, 1 DeG. & S. 692; Taylor *v.* Davis, cited in note to Whittaker *v.* Howe, 3 Beav. 383, 388, where, however, there was an express stipulation in the articles.

[3] Stuart *v.* Lord Bute, 12 Sim. 460; Taylor *v.* Rundell, 1 Ph. 222 (affg. 1 Y. & C. C. C. 128.) An antiquated case, Ward *v.* Apprice, 6 Mod. 264, has held that a court of law could not enforce a partner's right to have the books produced at a trial between the partners.

[4] Turner *v.* Bayley, 34 Beav. 105, affg. s. c. as Turney *v.* Bayley, 4 DeG. J. & S. 332.

[5] Toulmin *v.* Copland, 3 Y. & C. Ex. 625, 660-1.

[6] Freeman *v.* Fairlie, 3 Mer. 24, 43.

CHAPTER V.

IMPLIED POWERS OF EACH PARTNER.

§ **315. General principles.**— Every partner is the general agent of the firm to carry out its objects and transact its business in the usual and ordinary way. He is not the agent of each partner individually, and hence cannot bind them severally, or any member of them less than all;[1] but unless his power is limited by the articles, and the restriction is known, he represents all the powers of the firm within the scope of its ordinary business.

The authority of a partner as affecting third persons may be of two kinds: the real authority derived from the articles, or nature of the business in the absence of articles, and the apparent authority derived from the nature of the business, though withheld by the articles. If, for example, the nature of the business does not warrant supposing a power to exist, but the articles grant such power, a person in ignorance of the articles, dealing with a partner in such matter, can hold the firm, for the partner is acting within his actual authority. If, however, the articles forbid to a single partner the exercise of a power which the apparent scope of the business warrants, a person dealing with him in ignorance of the secret restrictions of the articles can hold the firm.

Hence one of the most important matters in partnership law is to ascertain what is included in the apparent scope of the business. Scope may be generally described as including what is reasonably necessary for the successful conduct

[1] Elliot *v.* Davis, 2 B. & P. 338; Gillow *v.* Lillie, 1 Bing. N. C. 695; Terrell *v.* Hurst, 76 Ala. 588; Shaw *v.* State, 56 Ind. 188; Ryerson *v.* Hendrie, 22 Iowa, 480; Sherman *v.* Christy, 17 Iowa, 322. And see Marlett *v.* Jackman, 3 Allen, 287, 291; Snow *v.* Howard, 35 Barb. 55; Marvin *v.* Wilber, 52 N. Y. 270.

of the business, measured by the nature of the business, the usages of those engaged in the same, occupation in the same locality, and subject to be enlarged also by the known habits and conduct of the particular firm itself. Each of these elements must be particularly examined.

The fact that to one partner is assigned the care of one department of the business, as buying or selling, does not prevent another partner binding the firm by a contract in such department.[1] And appointing a partner special agent to manage the business does not necessarily limit his powers as a partner, but he retains them the same as if not constituted an agent;[2] and the fact that a partner has contributed services only, and not capital, does not affect his powers.[3]

§ 316. Nature of the business.— The most important element to be relied upon by persons dealing with the firm through one partner, to determine his authority, is the nature of the particular business in which it is engaged. Every occupation has certain essential characteristics determining, in the absence of notice to the contrary, what powers a partner may be assumed to possess; and the articles almost never enumerate a partner's powers, and are rarely, if ever, seen; hence the public can judge only by appearances, and the articles cannot be used to control the apparent scope of the business as against one who had no notice of them.

Where a partnership business was the manufacture and selling of hulless oats, the restriction as to the kind of oats dealt in being kept secret, a purchase by one partner or an agent of common oats, being within the apparent scope, is binding.[4] So where the business was the buying and selling of hogs, a person justified in believing the business included the sale of hogs on commission can hold the firm on a contract with a partner who received his hogs to sell on commission and failed to account for the proceeds.[5]

In Maltby *v.* Northwestern Va. R. R. Co. 16 Md. 422, where the

[1] Barker *v.* Mann, 5 Bush, 672; Sweet *v.* Morrison, 103 N. Y. 235; Morans *v.* Armstrong, Arms. M. & O. Irish N. P. Rep. 25.

[2] Hoskisson *v.* Eliot, 62 Pa. St. 393.

[3] Kennedy *v.* Kennedy, 3 Dana, 239.

[4] McNeish *v.* Hulless Oat Co. 57 Vt. 316.

[5] Jackson *v.* Todd, 56 Ind. 406, and Todd *v.* Jackson, 75 id. 272; but there was proof that the other partners were aware of the contract.

principal business of the firm was the packing and transporting of oysters to the west, but the partners had formerly owned a line of wagons, bought and sold real estate in their joint names, owned vessels and employed them in the coasting trade, and subscribed for and bought and sold railroad stock, a jury was held warranted in finding that a particular subscription to railroad stock by one partner in the firm name was within the scope of the business.[1]

§ 317. —— **same as against third persons.**— On the other hand, the nature of every business implies certain intrinsic restrictions, to exceed which requires express authority, and which third persons dealing with a partner must observe. The powers of a partner do not extend beyond what may fairly be regarded as coming within the ordinary necessities of the business.[2] A partner can only bind the firm within the scope of the business, and a firm is not bound by a purchase of goods by one partner which is outside the real or apparent scope. When that limit is departed from the act is analogous to the act of a member of a non-trading firm, and every person must take notice of this fact.[3] Almost all partnerships are, in one sense, particular partnerships. It is very rare that more than one branch of business is in view or that all varieties of trade are embraced;[4] and the intrinsic characteristics of well-known callings are recognized by the court as presumptive

[1] And if specially authorized the subscription may be in the firm name, though each subscriber is by statute required to subscribe his name. Ogdensburgh, etc. R. R. v. Frost, 21 Barb. 541; Union Hotel Co. *v.* Hersee, 79 N. Y. 454. And if not authorized the signer is himself liable. Union Hotel Co. *v.* Hersee, *supra.*

[2] Hotchin *v.* Kent, 8 Mich. 526.

[3] Irwin *v.* Williar, 110 U. S. 499, 505; U. S. Bank *v.* Binney, 5 Mason, 176; Thompson *v.* Head, 2 Ind. 245; Wayne *v.* Clay, 1 A. K. Mar. 257; Maltby *v.* Northwestern Va. R. R. Co. 16 Md. 422; Goode *v.* Linecum, 1 How. (Miss.) 422; Livingston *v.* Roosevelt, 4 Johns. 251 (4 Am. Dec. 273); Briggs *v.* Hubert, 14 S. Ca. 620; Venable *v.* Levick, 2 Head, 351; Bankhead *v.* Alloway, 6 Cold. 56; Goode *v.* McCartney, 10 Tex. 193; Fraser *v.* McLeod, 8 Grant's Ch. (Up. Can.) 268. Scope was said to be a question of law in Banner Tobacco Co. *v.* Jenison, 48 Mich. 459; and of fact in Taylor *v.* Jones, 42 N. H. 25; Hodges *v.* Ninth Nat'l B'k, 54 Md. 406.

[4] Livingston *v.* Roosevelt, 4 Johns. 251, 277 (4 Am. Dec. 273); Walden *v.* Sherburne, 15 id. 409, 422.

limitations.[1] And some extreme examples will now be given, showing that scope is a proper matter of judicial cognizance; and though scope may in general be a question of fact, yet many acts have become settled, as matter of law, to be within or without the implied powers of a partner.

Thus it is not within the scope of a grocery firm to buy dry goods;[2] nor of millers and grain dealers to deal in futures for purposes of speculating on the market;[3] nor of partners in an iron furnace to buy a distillery and give the firm's note for it;[4] nor of a printing and newspaper office to accept an agency to sell pianos;[5] nor of a mercantile partnership to furnish railroad ties;[6] nor of machinists to subscribe to an association to keep a harbor open and free from ice;[7] nor of a storage and commission house to engage in cotton speculation;[8] nor of a firm formed to buy hides and furs in Montana and sell them in Chicago to purchase groceries.[9] A member of a partnership in a patent right for the navigation of steam vessels cannot bind the firm by a contract to build steamboats.[10] The active partner in a planting and farming business cannot bind his copartner by opening a store to sell merchandise;[11] nor can one of a firm of millers open a grocery;[12] nor one of a firm to build and run a railroad buy a competing road — the objects of the partnership are confined to a definite purpose;[13] nor is it in the scope of a warehouse, commission, receiving and forwarding business to receive uncurrent bank-notes for sale and conversion into current funds;[14]

[1] With this caution, however, that as all acts beyond such limits may be binding by express authority or subsequent ratification, or known usage of the firm, the objection should be raised at the trial, where these replies can be made. Shaw *v.* McGregory, 105 Mass. 96, 102.

[2] Ferguson *v.* Shepherd, 1 Sneed (Tenn.), 254.

[3] Irwin *v.* Williar, 110 U. S. 499.

[4] Waller *v.* Keyes, 6 Vt. 257.

[5] Boardman *v.* Adams, 5 Iowa, 224.

[6] Rimel *v.* Hayes, 83 Mo. 200.

[7] Wells *v.* Turner, 16 Md. 133.

[8] Freeman *v.* Bloomfield, 43 Mo. 391.

[9] Taylor *v.* Webster, 39 N. J. L. 102.

[10] Lawrence *v.* Dale, 3 Johns. Ch. 23.

[11] Humes *v.* O'Bryan, 74 Ala. 64, 82.

[12] Banner Tobacco Co. *v.* Jenison, 48 Mich. 459. In this case a stock of goods had been taken by one partner for a debt and the debtor employed as an agent to sell them, but for four years the agent, under the direction of the partner, had bought new goods to replenish the stock and did business in the name of the firm, and it was held that slight circumstances, such as not dissenting, would be sufficient to show ratification.

[13] Roberts' Appeal, 92 Pa. St. 407.

[14] Goodman *v.* White, 25 Miss. 163.

nor of a sugar refining firm to give a note for brandy,[1] though a note for wine was deemed within the apparent scope of a manufacturer of cider and vinegar.[2]

One of a partnership to buy and sell merchandise cannot undertake the collection of notes or moneys for others.[3] Thus in Toof *v.* Duncan, 45 Miss. 48, F., one of a firm to ship and sell cotton, being on a trading expedition for the firm, was asked by D. to collect a draft for him. F. indorsed the draft to his firm and asked to have it put to his credit. The firm collected the draft, and F. withdrew the amount and did not pay it to D., and the other partners were held not liable to D. for it. The court said that had D. drawn the draft payable to the firm, instead of to F. alone, the firm would have been liable. This is no doubt true, since it passed through their hands; but had F. collected it himself without their knowledge, the mere form of the draft would not have affected them, for, being outside the scope of the business, their knowledge is necessary to an assent. Or receive a deposit of bonds. A habit of receiving deposits of money and paying interest on them does not give the authority to receive bonds, for money would be a benefit to it.[4] And hence, too, where a ferry boat operated in partnership cannot run by reason of low water, a partner is not authorized to bind the firm by a contract to assist in swimming cattle across, and if the cattle are drowned the other partner is not liable.[5]

In Battle *v.* Street (Tenn.), 2 S. W. Rep. 384, a firm bought and paid for property; the vendor then deposited the money with one partner without the knowledge of the rest, to be held until the buyers were satisfied with the title; the firm was held not responsible for the money.

§ 318. **Usages of similar firms.**— The usages of those engaged in a similar pursuit is an element in determining the scope of a business, because each partner is presumed to have intended to clothe his copartners with all the powers incidental to and usually exercised in the same business in that locality, for the public can only measure a partner's

[1] Livingston *v.* Roosevelt, 4 Johns. 251; 4 Am. Dec. 273.

[2] Augusta Wine Co. *v.* Weippert, 14 Mo. App. 483.

[3] Pickels *v.* McPherson, 59 Miss. 216; Hogan *v.* Reynolds, 8 Ala. 59; Toof *v.* Duncan, 45 Miss. 48; Hutchins *v.* Gilman, 9 N. H. 359.

[4] Hatheway's Appeal, 52 Mich. 112.

[5] Einstman *v.* Black, 14 Ill. App. 381.

powers by the nature of the business in connection with such usage, and can assume that the business is to be conducted in the usual and ordinary manner. Hence the common and usual dealings of persons engaged in the same business in the locality are competent to show the nature and scope of a partnership;[1] and their common opinion and usage furnishes the only practical and safe rule to determine it.[2] The scope of the business may be one thing in Brazil, another in Indiana, and another in Baltimore. It may be different where the business is alone from one in connection with a mill in a town.[3]

Where the usage of river carriers, when freights are dull, is to purchase cargoes of salt to be sold on the return up trip, such purchase by a partner binds the firm to pay the seller.[4] So if the usage of boatmen on a particular river, as an incident to the procuring of freight, is not only to carry, but, if requested, to sell the cargo and bring back the proceeds, a partner in a boating firm, who so sells on request and fails to account for the proceeds, is acting as partner and not as the owner's agent, and the firm is accountable,[5] although but for the usage such a contract would have been entirely outside the limits of the business.[6]

It has been held that the usage must be sufficiently notorious, common and public, that the copartners can be presumed to have had notice of it.[7]

§ 319. Usage of the same firm.— And within powers granted by the articles may be included powers granted by implication from a general usage or habit of the firm, acquiesced in by all the partners, for this is equivalent to an agreed enlargement of the articles.

Acts, declarations and the course of business determine its nature and extent.[8] In so far as scope is to be determined

[1] Smith *v.* Collins, 115 Mass. 388; Irwin *v.* Williar, 110 U. S. 499; Pierce *v.* Jarnagin, 5 Miss. 107.

[2] Galloway *v.* Hughes, 1 Bail. (S.Ca.) L. 553, 562.

[3] Per MATTHEWS, J., in Irwin *v.* Williar, 110 Mass. 499.

[4] Waring *v.* Grady, 49 Ala. 465.

[5] Galloway *v.* Hughes, 1 Bail. (S. Ca.) L. 553.

[6] Nichols *v.* Hughes, 2 Bail. (S. Ca.) L. 109.

[7] Prince *v.* Crawford, 50 Miss. 344.

[8] Waller *v.* Keyes, 6 Vt. 257, 264; Kelton *v.* Leonard, 54 id. 230; McNeish *v.* Hulless Oat Co. 57 id.

from the habit of the particular partnership, an act or contract must appear to have been authorized by the general course of dealing,[1] but by these a firm formed for a dry goods and grocery business may, by a habit of trading in everything, become liable for a purchase of hogs in its name by one partner.[2] Hence prior similar acts, or habit of the firm, are evidence of authority.[3] But the partners are not liable merely because they have sometimes done a thing of unusual or rare occurrence.[4]

So where one partner in a newspaper and printing office undertook to sell pianos for the firm, after both partners had accepted an agency for the sale of the pianos, each became liable for the acts of the other in the scope of the new business.[5]

And where a firm is formed to sell on consignments alone, that is, without power to buy, a managing partner having for two years purchased stock upon credit, the ignorance of the other partner was held to be no defense, and the firm appearing to be an ordinary commercial firm, the right to buy on credit to replenish stock was implied.[6]

§ 320. Necessity as an element of scope.— The phrase necessities of the business, used above in defining the term scope, is not a necessity arising from peculiar exigencies nor an exceptional and individual emergency, but means what is necessary to carry on the business in the ordinary way. A partner's power is to do only what is usual, and not what is unusual because necessary.[7] For example, if the borrowing power is not necessary to the conduct of the business in the

316; Lyman *v.* Lyman, 2 Paine, C. C. 11, 15; Irwin *v.* Williar, 110 U. S. 499, 505.

[1] Catlin *v.* Gilders, 3 Ala. 536, 546.

[2] Id.

[3] Pahlman *v.* Taylor, 75 Ill. 629; Folk *v.* Wilson, 21 Md. 538; Hamilton *v.* Phœnix Ins. Co. 106 Mass. 395; Holt *v.* Simmons, 16 Mo. App. 97; McGregor *v.* Cleveland, 5 Wend. 477; Hoskisson *v.* Eliot, 62 Pa. St. 393; Lee *v.* Macdonald, 6 Up. Can. Q. B. (Old Ser.) 130. Restrictions in the articles may be entirely abrogated by the practice of the firm assented to by all the partners. See § 211.

[4] Fraser *v.* McLeod, 8 Grant's Ch. (Up. Can.) 268.

[5] Boardman *v.* Adams, 5 Iowa, 224; Williar *v.* Irwin, 11 Biss. 57 (reversed on other points in 110 U. S. 499).

[6] Ala. Fertilizer Co. *v.* Reynolds, 79 Ala. 497.

[7] See Ricketts *v.* Bennett, 4 C. B. 686; Berry *v.* Folkes, 60 Miss. 576, 609.

ordinary way, an extraordinary emergency rendering it necessary to have money enough to save it from ruin will not create the power or render the firm liable for a loan;[1] nor, *vice versa*, that a firm is rich and does not need money does not deprive a partner of the borrowing power.[2]

In Berry *v.* Folkes, 60 Miss. 576, two persons agreed to buy a plantation on credit, manage it in partnership, use the profits to pay for it, and then divide it. One of the partners died, requesting by his will that the partnership continue. The plantation was going to waste, and the surviving partner, with the assent of the administrator and widow, to save it, made a contract with H., by which H. was to carry on and improve the plantation for a salary and was to have one-third of it at the end of five years, or a proportion for a less time. This contract was held beyond the partner's powers and not binding on the heirs, for, if he could sell part, he could sell the whole.

It was held, however, in Seaman *v.* Ascherman, 57 Wis. 547, where a firm occupied part of plaintiff's building and the exigencies of their business made the whole of the building necessary to carry on the business in the ordinary way, this fact made binding upon the whole firm a contract on its behalf by one partner to take a five years' lease of the entire building. But so, where a firm added to its business an iron foundry situated upon leasehold property, at the expiration of the lease, one partner has no implied power to renew it or to lease other premises; and, *semble*, it would be the same if the premises burned down: one could not contract to rebuild in the name of the firm without authority.[3]

Though necessity will not create a non-existent power, yet the limits of existing powers may expand or contract according to exceptional emergencies in the exercise of a *bona fide* discretion.[4] Thus the frequent absence of one partner may enlarge the ordinary

[1] Hawtayne *v.* Bourne, 7 M. & W. 595; *Ex parte* Chippendale, 4 DeG. M. & G. 19. Both of these cases were of loans to obtain money to pay arrears of wages, for which distress warrants had been obtained against the property. Pierce *v.* Jarnagin, 57 Miss. 107, 111.

[2] Pierce *v.* Jarnagin, *supra*.

[3] Clements *v.* Norris, 8 Ch. D. 129.

[4] As in the case of Woodward *v.* Winship, 12 Pick. 430, abstracted in the next section. Arnold *v.* Brown, 24 Pick. 89; 35 Am. Dec. 296; *Ex parte* Chippendale, 4 DeG. M. & G. 19; Burdon *v.* Barkus, 4 DeG. F. & J. 35, 40, 51.

powers of the other.[1] So where partners in the business of buying cattle in Texas and bringing them to Virginia to sell, found the price in Virginia very low, and could neither sell nor obtain pasturage. Thereupon some of the partners contracted to sell the cattle, guarantying a certain profit at the end of the next year, and this was held, under the circumstances, not to be in excess of their powers.[2]

§ 321. Incidental benefit.— As unforeseen emergencies do not enlarge the usual scope of implied powers, so the mere fact of benefit being derived does not render a contract in the firm name by one partner binding upon it.

Thus, a member of a partnership in the manufacture of paper, who is to sell the paper and buy stock, cannot bind the firm by the purchase of a bale of cloth, intending to exchange it for paper rags at a profit for common benefit, for which he gave the firm's note.[3] So a member of a firm engaged in transporting passengers by a line of stages cannot bind the firm by a contract to convey a person a certain distance within a specified time.[4] Where the custom of a person cannot be retained in any other way than by allowing his debt to the firm to be canceled by set-off of the debt of one partner to him, this gives the debtor partner no power so to do;[5] but the usage of country stores to trade out debts may render such contracts valid;[6] nor can one partner guaranty in the firm's name for a third person, even though reasonable and convenient for the purposes of the business.[7]

Where a firm had a mortgage on a crop, and a creditor of the mortgagee attached the crop, and one of the partners procured a person to become surety on a forthcoming bond to release the attachment, as being for the firm's benefit, this was said not to be binding on the other partner.[8]

So where the firm of K. & M. were creditors of W., an insolvent, whose assignee had sold property of the estate to the plaintiff, and some of W.'s creditors, denying the assignee's right to sell, had re-

[1] Lamb *v.* Durrant, 12 Mass. 54, 56; 7 Am. Dec. 31; Forkner *v.* Stuart, 6 Gratt. 197.

[2] Jordan *v.* Miller, 75 Va. 442.

[3] Thomas *v.* Harding, 8 Me. 417.

[4] Walcott *v.* Canfield, 3 Conn. 194.

[5] Cotzhausen *v.* Judd, 43 Wis. 213; 28 Am. Rep. 539.

[6] Eaton *v.* Whitcomb, 17 Vt. 641.

[7] Brettel *v.* Williams, 4 Exch. 623.

[8] Moore *v.* Stevens, 60 Miss. 809; Russell *v.* Annable, 109 Mass. 72.

plevied the goods from plaintiff, and thereupon M. promised plaintiff that if he would sue the replevying creditors, instead of the assignee, the firm of K. & M., being interested in sustaining the assignee's title, would indemnify him against loss if his action failed, this promise does not bind the firm.[1]

C., of B. & C., partners in the lumbering business, subscribed the name of the firm to stock for a plank road, which would benefit the firm's business. B. is of course not bound.[2] So in a partnership to build, equip and operate a railroad, no part of the partners less than all can bind the firm to purchase a competing road, however desirable.[3]

In Andrews *v.* Congar (Supreme Ct. U. S. 1881), 20 Am. Law Reg. (N. S.) 328; Lawyers' Coop. Book 26, page 90, where partners owned a majority of the stock of a corporation, it was held that the guaranty by the firm name, by one partner, of notes of the corporation to protect and improve the stock, bound the firm, because it was for the common benefit. If this decision is correct, it must be not because of the benefit, but because of a right to protect the joint property. The report however is meager, and does not even show whether the stock was held jointly or individually. The same ruling has just been made in Morse *v.* Hagenah (Wis.), 32 N. W. Rep. 634, where partners in several kinds of trading and manufacturing business took stock in a woolen mill, and one partner was held to have power to sign the firm name to a note with other stockholders to raise money to run the mill.[4]

In Woodward *v.* Winship, 12 Pick. 430 (the same firm of John Winship, as in Winship *v.* Bank of U. S. 5 Pet. 529), the business being the manufacture of soap and candles and exporting them to foreign markets, and the purchase of a return cargo, Winship, the managing partner, shipped all he had on hand, chartering a schooner for the purpose, and as the cargo was not completed, he filled it up by a purchase of pork and flour, for the price of which the note sued on was given. It was held proper to instruct the jury that this purchase *prima facie* was not within the scope of the business, but that if exportation was within the scope, and the purchase was in behalf of the firm and to promote this principal object, and

[1] Macklin *v.* Kerr, 28 Up. Can. C. P. 90.

[2] Barnard *v.* Lapeer, 6 Mich. 274.

[3] Roberts' Appeal, 92 Pa. St. 407.

[4] See Hodges *v.* Ninth Nat. Bk. 54 Md. 406, where a somewhat similar question was left to the jury.

Winship acted *bona fide* and in the exercise of a reasonable discretion, he might be considered as acting within the scope. This is not making his discretion the standard, but permits an exercise of discretion at peril, within the general intent of the partnership.

§ 322. Restrictions in the articles not binding on third persons.— It follows, from the fact that the public judges of the scope of a partner's powers from the nature of the business and the usage of similar occupations, and the acts and habits of the firm, that restrictions contained in the articles or partnership contract limiting the powers that are incident to the occupation or trade do not affect the public, who are not made aware of them.[1] This is not inconsistent with the rule that one dealing with a special agent must

[1] Cox *v.* Hickman, 8 H. C. L. 304; U. S. Bank *v.* Binney, 5 Mason, 176; Winship *v.* Bank of U. S. 5 Pet. 529; Kimbro *v.* Bullitt, 22 How. 256, 266; Michigan Ins. Bank *v.* Eldred, 9 Wall. 544; Andrews *v.* Congar (Supreme Ct. U. S. 1881), 20 Am. Law Reg. (N. S.), 328; s. c. Lawyers' Coop. Ed. Bk. 26, p. 90; Humes *v.* O'Bryan, 74 Ala. 64, 84; Guice *v.* Thornton, 76 id. 466; Ala. Fertilizer Co. *v.* Reynolds, 79 id. 497; Manville *v.* Parks, 7 Colorado, 128; Bradley *v.* Camp, Kirby (Conn.), 77; 1 Am. Dec. 13; Everitt *v.* Chapman, 6 Conn. 347; Butler *v.* American Toy Co. 46 Conn. 136; Pursley *v.* Ramsey, 31 Ga. 403; Stark *v.* Corey, 45 Ill. 431; Devin *v.* Harris, 3 G. Greene (Iowa), 186; Medberry *v.* Soper, 17 Kan. 369; Miller *v.* Hughes, 1 A. K. Mar. (Ky.) 181; Bank of Ky. *v.* Brooking, 2 Litt. 41; Barker *v.* Mann, 5 Bush, 672; Williams *v.* Rogers, 14 Bush, 776; White *v.* Kearney, 2 La. Ann. 639; Maltby *v.* Northwestern Va. R. R. 16 Md. 422; Brent *v.* Davis, 9 Md. 217; Taylor *v.* Hill, 36 id. 494, 501; Stimson *v.* Whitney, 130 Mass. 591; Perry *v.* Randolph, 6 Sm. & Mar. 335; Davis *v.* Richardson, 45 Miss. 499, 507; Prince *v.* Crawford, 50 id. 344; Bloom *v.* Helm, 53 id. 21; Pierce *v.* Jarnagin, 57 id. 107, 111; Lynch *v.* Thompson, 61 id. 354; Cargill *v.* Corby, 15 Mo. 425; Lomme *v.* Kintzing, 1 Montana, 290; Bromley *v.* Elliot, 38 N. H. 287, 302; Elliot *v.* Stevens, 38 id. 311; Corning *v.* Abbott, 54 id. 469; Wagner *v.* Freschl, 56 id. 495; Bank of Rochester *v.* Monteath, 1 Den. 402; 43 Am. Dec. 681; Tradesmen's Bank *v.* Astor, 11 Wend. 87, 90; Frost *v.* Hanford, 1 E. D. Smith, 540; Nat'l Union Bk. *v.* Landon, 66 Barb. 189 (affd. on other points, 45 N. Y. 410); Sage *v.* Thomas, 2 N. Y. 417, 426-7; Seybold *v.* Greenwald, 1 Disney, 425; Benninger *v.* Hess, 41 Oh. St. 64; Tillier *v.* Whitehead, 1 Dall. 269; Churchman *v.* Smith, 6 Whart. 146; Hoskisson *v.* Eliot, 62 Pa. St. 393; Nichols *v.* Cheairs, 4 Sneed, 229; Coons *v.* Renick, 11 Tex. 134, 138; Waller *v.* Keyes, 6 Vt. 257, 264; Barrett *v.* Russell, 45 id. 43; Kelton *v.* Leonard, 54 id. 230; McNeish *v.* Hulless Oat Co. 57 id. 316.

ascertain the extent of his powers, for a partner is presumably a general agent for all the legitimate purposes of the firm, and his powers are almost never enumerated in the articles, and arise from the relation of partner and the general principles of the commercial law, and not from any special grant.

§ 323. —— **unless known.**—If restrictions or limitations on the powers of the partners, or of some or one of them, are known to a person, his attempt to deal with a partner in violation thereof would be a fraud upon or an invasion of the rights of the others, and he will be deemed to have treated with such partner in his individual capacity, and cannot look to the partnership, although it received the benefit of such dealing.[1]

For example, the restrictions may be on the power of all but one to make or indorse notes and bills; a person knowing this is bound,[2] even though it be in renewal.[3] Or the restrictions may be upon the right to dispose of property; a buyer knowing this gets no title in violation of it;[4] or if it

[1] Alderson *v.* Pope, 1 Camp. 404; *Ex parte* Holdsworth, 1 M. D. & D. 475; N. Y. F. Ins. Co. *v.* Bennett, 5 Conn. 597, 598; Urquhart *v.* Powell, 54 Ga. 29; Radcliffe *v.* Varner, 55 id. 427; Knox *v.* Buffington, 50 Iowa, 320; Williams *v.* Barnett, 10 Kan. 455; Combs *v.* Boswell, 1 Dana, 473; Brent *v.* Davis, 9 Md. 217; Bailey *v.* Clark, 6 Pick. 372; Boardman *v.* Gore, 15 Mass. 339; Wilson *v.* Richards, 28 Minn. 337; Langan *v.* Hewett, 21 Miss. 122; Pollock *v.* Williams, 42 id. 88; Cargill *v.* Corby, 15 Mo. 425; Nolan *v.* Lovelock, 1 Montana, 224; Dow *v.* Sayward, 12 N. H. 271, 275; Bromley *v.* Elliot, 38 id. 287, 303; Ensign *v.* Wands, 1 Johns. Cas. 171; Gram *v.* Cadwell, 5 Cow. 489; Mason *v.* Partridge, 66 N. Y. 633; Baxter *v.* Clark, 4 Iredell L. 127; Anthony *v.* Wheatons, 7 R. I. 490; Hastings *v.* Hopkinson, 28 Vt. 108; Chapman *v.* Devereux, 32 id. 616; 9 Am. Law Reg. (O. S.) 419; Coleman *v.* Bellhouse, 9 Up. Can. C. P. 31. And see further §§ 325, 326. Where a client knows that a law partnership is formed to do business in a certain city, he cannot hold the firm on a receipt in its name by one partner of a note for collection elsewhere. Brent *v.* Davis, 9 Md. 217.

[2] Cargill *v.* Corby, 15 Mo. 425; Wilson *v.* Richards, 28 Minn. 337. See Guice *v.* Thornton, 76 Ala. 466.

[3] Wilson *v.* Richards, *supra.*

[4] Radcliffe *v.* Varner, 55 Ga. 427; Williams *v.* Barnett, 10 Kan. 455; Anthony *v.* Wheatons, 7 R. I. 490. And see Ensign *v.* Wands, 1 Johns. Cas. 171; Chapman *v.* Devereux, 32 Vt. 616; 9 Am. Law Reg. (O. S.) 419,

be upon the right to purchase necessaries or hire labor, a contract in known violation thereof creates an individual and not a partnership debt.[1] Or the restriction may be a limitation of the liability of one partner within a certain amount. Here a knowledge of the limitation must be accompanied by a knowledge of its violation, for in the nature of things notice of such limitation is not a contract by a creditor not to collect his entire debt.[2] The court in subjecting the individual property of partners may observe this restriction, even if not known, by selling in the order of liability,[3] or the purchases must be for cash.[4]

§ 324. —— **proof of knowledge.**— As to what is sufficient proof of notice to or knowledge of such restriction on the

where the restriction was against selling on credit, and a custom that thirty days' time is the same as cash was held void.

[1] Urquhart *v.* Powell, 54 Ga. 29; Radcliffe *v.* Varner, 55 id. 427; Dow *v.* Sayward, 12 N. H. 271, 275; Lynch *v.* Thompson, 61 Miss. 354; Miller *v.* Hughes, 1 A. K. Mar. 181; Frost *v.* Hanford, 1 E. D. Smith, 540; Pollock *v.* Williams, 42 Miss. 88, where a contractor knew that one partner was to furnish the labor at his own expense.

[2] Butler *v.* American Toy Co. 46 Conn. 136; Nichols *v.* Cheairs, 4 Sneed, 229; Mason *v.* Partridge, 66 N. Y. 633; Lomme *v.* Kintzing, 1 Montana, 290. See Greenwood's Case, 3 DeG. M. & G. 476; The State F. Ins. Co., Meredith's Case, 1 B. & P. New Rep. 510. But if the agreement be that a person held out as a partner shall have no interest or liability of any kind, or a limited liability, he is not a partner to those cognizant thereof, but is to every one else. Phillips *v.* Nash, 47 Ga. 218; Saufley *v.* Howard, 7 Dana, 367; Ala. Fertilizer Co. *v.* Reynolds, 79 Ala. 497; Williams *v.* Rogers, 14 Bush, 776; Perry *v.* Randolph, 6 Sm. & Mar. 335.

[3] Kent *v.* Chapman, 18 W. Va. 485.

[4] Johnson *v.* Bernheim, 76 N. Ca. 139, and s. c. Johnston *v.* Bernheim, 86 id. 339; Hotchin *v.* Kent, 8 Mich. 526. In the latter case it was held that the reception of the goods by the guilty partner, who was manager, is not a ratification, because he could not ratify his own wrong, and the other partners may have thought the goods were paid for. Sir N. Lindley, in his admirable work on Partnership, p. 332, suggests the ingenious distinction that notice of a stipulation between partners, that one or all shall not have a certain usual power, is not notice that they will not be answerable for the acts of a member beyond these limits, but is *inter se* only; and he examines the English cases with reference to this, and finds their statements to the contrary to be *dicta*, and that the question is still open. The American cases above given, however, seem to exclude this distinction.

part of the person dealing with a partner, such proof may be circumstantial, as from publication of the objects of the partnership, its sign and usual business.[1] Thus, it has been held that one partner's having for many years had the exclusive conduct of the business, and that his interest was known to be large and the other's small, was evidence.[2] Though merely that one partner usually signed the notes and checks is not sufficient.[3]

Information of facts which should have led a reasonably prudent and cautious man to inquire has been said to be sufficient.[4] So, also, that the partnership, one of a peculiar and widely known class, based on the principle of purchasing for cash only, as in the case of certain co-operative stores or protective unions.[5]

If a partner seeks to prove a restriction in the articles, he must do so by producing the articles themselves and not by the testimony of a copartner;[6] though creditors probably could prove it independently of the articles, and clearly so after notice to produce them.[7]

It has been held that merely telling a third person that one has ceased to be a partner, but that his name is to continue for a certain time, is not a sufficiently distinct warning or disclaimer of future contracts and debts.[8]

§ 325. Revocation of power by dissent of one partner; certainly in a partnership of two where each has an equal voice.— A partner may, within certain limits, revoke or restrict a copartner's power as to future or executory con-

[1] Livingston *v.* Roosevelt, 4 Johns. 251; 4 Am. Dec. 273. Though merely constructive or implied notice, never really brought to the attention of the third party, is not sufficient, it is like actual notice of dissolution. Devin *v.* Harris, 3 G. Gr. (Iowa) 186.

[2] Anthony *v.* Wheatons, 7 R. I. 490.

[3] Tilford *v.* Ramsey, 37 Mo. 563, 566.

[4] Bromley *v.* Elliot, 38 N. H. 287, 303. And see Wagner *v.* Freschl, 56 id. 495.

[5] Chapman *v.* Devereux, 32 Vt. 616; 9 Am. Law Reg. (O. S.) 419. And see Skinner *v.* Dayton, 19 Johns. 513; 10 Am. Dec. 286 (rev. s. c. 5 Johns. Ch. 351).

[6] Hastings *v.* Hopkinson, 28 Vt. 108.

[7] Id. 117; Bogart *v.* Brown, 5 Pick. 18.

[8] Brown *v.* Leonard, 2 Chit. 120.

tracts, or can dissent from a particular contract, and, by notice to the non-partner, can relieve himself from liability as to it if made in disregard of such dissent.[1] It may be suggested, however, that such dissent is only possible of the implied powers of a partner, and not of those given by express contract in the articles, as to which the only revocation is by dissolution.

The intention thus to interfere must be clear and beyond reasonable doubt.[2] But a notice by a person that he is not a partner and would not be responsible for the debts is good though he was and continued to be a partner, unless he adopts or receives a benefit from the contract.[3] The fact that the avails of a contract, for example, a purchase of goods forbidden by one partner, came to the use of the firm, does not necessarily benefit the dissenting partner, for the bargain may be a losing one though the firm used them, and if he should be compelled to pay for a purchase by which the firm is ruined because the goods came into the firm, his right of disclaimer would be defeated.[4] But the fact of benefit received has been held to bind the firm on a sale for its legitimate use.[5]

Where the partnership consists of more than two persons it has been held that on a dissent of one a third person acts

[1] Willis *v.* Dyson, 1 Stark. 164; Galway *v.* Mathew, 10 East, 264; S. C. as Galway *v.* Matthew, 1 Camp. 403; Rooth *v.* Quin, 7 Price, 193; Minnet *v.* Whitney, 5 Bro. P. C. 489; Anon. *v.* Layfield, 1 Salk. 291; Griswold *v.* Waddington, 16 Johns. 438, 491; Yeager *v.* Wallace, 57 Pa. St. 365; Williams *v.* Roberts, 6 Coldw. 493; Monroe *v.* Conner, 15 Me. 178; 32 Am. Dec. 148; Matthews *v.* Dare, 20 Md. 248; Knox *v.* Buffington, 50 Iowa, 320; Tyler *v.* Scott, 45 Vt. 261; Hastings *v.* Hopkinson, 28 id. 108, 117; Leavitt *v.* Peck, 3 Conn. 124; 8 Am. Dec. 157; Noyes *v.* N. Haven, etc. R. R. 30 id. 1, 14; Bowen *v.* Clark, 1 Biss. 128, 133; Bull *v.* Harris, 18 B. Mon. 195; Wilcox *v.* Jackson, 7 Colorado, 521. *Contra*, see Graser *v.* Stellwagen, 25 N. Y. 315, and Campbell *v.* Bowen, 49 Ga. 417.

[2] Tyler *v.* Scott, 45 Vt. 261; Seaman *v.* Ascherman, 57 Wis. 547, 553. See Cannon *v.* Wildmann, 28 Conn. 472, 493.

[3] Matthews *v.* Dare, 20 Md. 248; Leavitt *v.* Peck, 3 Conn. 124; 8 Am. Dec. 157. See Brown *v.* Leonard, 2 Chit. 120, noticed under § 324.

[4] Monroe *v.* Conner, 15 Me. 178; 32 Am. Dec. 148. See Hotchin *v.* Kent, 8 Mich. 526, noticed under § 323.

[5] Campbell *v.* Bowen, 49 Ga. 417; Johnson *v.* Bernheim, 76 N. Ca. 139; S. C. as Johnston *v.* Bernheim, 86 id. 339. *Contra*, Galway *v.* Matthew, 1 Camp. 402.

at his peril, and cannot hold the dissenting partner liable, unless the liability arises from the articles or nature of the partnership, but that in all matters within the scope of the business, the majority must control, and the minority cannot stop the business.[1]

§ 326. —— **limit on the right to dissent.**— The power to forbid a person to deal with a copartner cannot be exercised to prevent a debtor of the firm paying his debt to such partner, for if so the other partner or partners, by a similar notice, could disable the debtor from being able to make a payment or tender to any one, and no debts could be collected at all.[2]

A debtor of the firm has nothing to do with quarrels between the partners, and if relief is necessary between them a court of equity must be applied to.

In Noyes *v.* New Haven, etc. R. R. 30 Conn. 1, N., the partner of a firm engaged on a contract to build a road, and being the partner with whom the defendant had generally dealt, told the defendant not to pay the final estimate to his copartner, E., but the defendant and E. secretly met, keeping watches out to see that N. did not come upon them, arranged the amount of the final estimate, and E. received nearly the whole of it in final settlement, and E. after paying some debts kept the balance. In an action for the amount in the name of N. & E. the payment was held valid, and a promise by the president of the defendant to N. not to pay E. was held not to be a binding promise, nor could it be said that

[1] Johnston *v.* Dutton, 27 Ala. 245; Nolan *v.* Lovelock, 1 Montana, 224, 227. See §§ 431–435. Both these cases however, recognize the duty not to make a contract from which a copartner dissents if the firm consists of two only. In Johnson *v.* Bernheim, 76 N. Ca. 139, where one partner in a firm of two had power to purchase either for cash or on time, it was held that the other could not limit this by notice forbidding purchases on time; or, *vice versa*, if one offer to buy for cash, he cannot require the seller to sell on time; the court ruling that, in the absence of restrictions in the articles, one partner cannot limit the exercise of the other's legitimate powers.

[2] Noyes *v.* New Haven, etc. R. R. 30 Conn. 1; Granger *v.* McGilvra, 24 Ill. 152; Steele *v.* First Nat'l B'k, 60 Ill. 23; Carlisle *v.* Niagara Dock Co. 5 Up. Can. Q. B. (Old Ser.) 660, where each partner forbade payment to the other. And see Cannon *v.* Wildman, 28 Conn. 472, 493.

the transaction was a fraud, for E. may have been entitled to the whole.

In Ayer *v.* Ayer, 41 Vt. 346, one partner placed the accounts in the hands of an attorney, and absconded. The other partner notified a debtor to pay no one but himself, but the debtor paid the attorney; and the absconding partner approved it after an action in the name of the firm had been begun against such debtor. The action was sustained; the court holding that the attorney was agent of the firm and not of one partner, and was accountable to either, and was subject to the control of one as much as of the other, and the partner had the right to demand back the accounts, discharge the attorney and do his own collecting, and the notice not to pay was such discharge, and that the subsequent approval of the other partner could not give efficacy to the attorney's unauthorized act.

In Wilkins *v.* Pearce, 5 Den. 541, a person had indorsed for the accommodation of the firm, and one partner had agreed in the firm name to indemnify him, and it was held that the disssent of the other partner at the time did not affect the right to act in defiance of such dissent.[1]

§ 327. What are trading partnerships.—In determining what is the scope of a business, a distinction is nearly universal between what are called trading and non-trading partnerships. Trading partnerships are frequently also called commercial or mercantile partnerships, but these terms seem to be somewhat too narrow, for among trading partnerships, as we shall see, are included manufacturing and mechanical partnerships, the test being founded, not on the nature of the articles they deal in, but in the character of their dealings.

Buying and selling has been said to be the test of a trading partnership.[2] But that a partnership is formed to sell is no test at all; and it is difficult to conceive of a partnership in which purchases are not sometimes necessary, and in many non-trading firms constantly necessary; thus, farmers must

[1] The case was affirmed but on other grounds in Pearce *v.* Wilkins, 2 N. Y. 469.

[2] MARSHALL, C. J., in Winship *v.* Bauk of U. S. 5 Pet. 529, 561; CLIFFORD, J., in Kimbro *v.* Bullitt, 22 How. 256; Holt *v.* Simmons, 16 Mo. App. 97; Pinkerton *v.* Ross, 33 Up. Can. Q. B. 508, 514.

constantly buy their seeds, miners their blasts, lawyers their stationery. It should rather be said that, if the partnership contemplates the periodical or continuous or frequent purchasing, not as incidental to an occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured state, it is a trading partnership, otherwise it is not.

§ **328.** For example, the following have been held to be trading partnerships involving the power to borrow and sign mercantile paper. It will be seen that they include retail dealers as well as large concerns and manufacturers. Some of the cases are also of partnerships in occupation, but here the cases are not unanimous, and each must stand on its peculiar objects.

Buying and selling of cattle;[1] of pork, hogs and meat;[2] buying and killing cattle for sale and dealing in vegetables;[3] in a country store;[4] dry goods.[5] Parties casually met together and agreed to buy what goods they could jointly or separately, and on reaching market sell for joint benefit; this is a trading partnership, with a right to borrow and give notes and bills.[6] Drugs, partnership to sell.[7]

Manufacturers for sale of soap and candles;[8] of pressed brick;[9] of refrigerators and saloon fixtures;[10] of carriages;[11] of cooperage combined with farming;[12] saw-mill, including buying and selling of lumber;[13] steam saw-mill combined with farming;[14] merchant tailors;[15] clothing and furnishing;[16] wholesale lumber dealers;[17] sugar refinery.[18]

[1] Smith *v.* Collins, 115 Mass. 388.

[2] Gano *v.* Samuel, 14 Oh. 592.

[3] Wagner *v.* Simmons, 61 Ala. 143.

[4] Dow *v.* Moore, 47 N. H. 419.

[5] Walsh *v.* Lennon, 98 Ill. 27; 38 Am. Rep. 75.

[6] Howze *v.* Patterson, 53 Ala. 205; 25 Am. Rep. 607.

[7] Gregg *v.* Fisher, 3 Ill. App. 261; Lindh *v.* Crowley, 29 Kan. 756.

[8] Winship *v.* Bank of U. S. 5 Pet. 529; Deitz *v.* Regnier, 27 Kan. 94.

[9] Hoskisson *v.* Eliot, 62 Pa. St. 393.

[10] Holt *v.* Simmons, 16 Mo. App. 97.

[11] Coward *v.* Pulley, 11 La. Ann. 1.

[12] McGregor *v.* Cleveland, 5 Wend. 477 (*dictum*).

[13] Copley *v.* Lawhead, 11 La. Ann. 615.

[14] Kimbro *v.* Bullitt, 22 How. 256. See Johnston *v.* Dutton, 27 Ala. 245. *Contra*, partners in a steam saw-mill were also held not to constitute a trading firm, Lanier *v.* McCabe, 2 Fla. 32; 48 Am. Dec. 173.

[15] Ah Lep *v.* Gong Choy, 13 Oregon, 205.

[16] Palmer *v.* Scott, 68 Ala. 380.

[17] Feurt *v.* Brown, 23 Mo. App. 332.

[18] Twibill *v.* Perkins, 8 La. Ann. 132.

Pork packers;[1] tannery and finishing-shop.[2]

Whether wharfigers and forwarders constitute a trading partnership is a question which has been raised but not decided.[3]

§ 329. **Non-trading firms.**— On the other hand the following have been held to be non-trading partnerships. It will be noticed that they are all partnerships in occupation. All of the following, like the preceding cases, arose on questions of the borrowing power and the right to sign mercantile paper.

These partnerships in occupations, however, which generally imply non-trading concerns, may be so constituted as to be in reality mercantile concerns. This has several times been ruled in the case of mining firms.[4]

Attorneys or solicitors do not constitute a trading firm, and one has no implied authority to bind the firm by note.[5]

Brokers, who merely negotiate contracts for others, relative to property not in their custody.[6]

Contractors to build a road are not.[7]

Farming or planting partnerships are non-commercial ones, and the members have no implied power to sign negotiable paper.[8]

[1] Benninger *v.* Hess, 41 Oh. St. 64.

[2] Stimson *v.* Whitney, 130 Mass. 591. *Contra*, Newell *v.* Smith, 23 Ga. 170 (*dictum*).

[3] Roth *v.* Colvin, 32 Vt. 125, 132; Van Brunt *v.* Mather, 48 Iowa, 503.

[4] Thicknesse *v.* Bromilow, 2 Cr. & J. 425; CHANNELL, B., in Brown *v.* Kidger, 3 H. & N. 853, 859; Decker *v.* Howell, 42 Cal. 636.

[5] Levy *v.* Pyne, Car. & M. 453; Harman *v.* Johnson, 2 E. & B. 61 (rev. s. c. 3 Car. & K. 272); Garland *v.* Jacomb, L. R. 8 Ex. 218; Hedley *v.* Bainbridge, 3 Q. B. 316; Forster *v.* Mackreth, L. R. 2 Ex. 163; Friend *v.* Duryee, 17 Fla. 111; 35 Am. Rep. 89; Miller *v.* Hines, 15 Ga. 197; Breckinridge *v.* Shrieve, 4 Dana, 375; Marsh *v.* Gold, 2 Pick. 285; Pooley *v.* Whitmore, 10 Heisk. 629, 636; 27 Am. Rep. 733; Smith *v.* Sloan, 37 Wis. 285; 19 Am. Rep. 757; Workman *v.* McKinstry, 21 Up. Can. Q. B. 623, 625; Wilson *v.* Brown, 6 Ont. App. 411.

[6] First Natl. Bk. *v.* Snyder, 10 Mo. App. 211.

[7] McCord *v.* Field, 27 Up. Can. C. P. 391. See Gavin *v.* Walker, 14 Lea (Tenn.), 643; and Roberts' Appeal, 92 Pa. St. 407.

[8] Greenslade *v.* Dower, 7 B. & C. 635; 1 Man. & Ry. 640; Brown *v.* Byers, 16 M. & W. 252; Kimbro *v.* Bullitt, 22 How. 256, 267; McCrary *v.* Slaughter, 58 Ala. 230; Ulery *v.* Ginrich, 57 Ill. 531; Davis *v.* Richardson, 45 Miss. 499, 507; Prince *v.* Crawford, 50 id. 344; Hunt *v.* Chapin, 6 Lans. 139; Pooley *v.* Whitmore, 10 Heisk. 629, 636; 27 Am. Rep. 733.

Mining or quarrying partnerships are not in a trading business, and a partner has *prima facie* no authority to bind the concern on mercantile paper.[1]

Livery-stable.[2]

Pottery ware manufacturers cannot make notes.[3]

Printing establishment.[4]

Real estate, insurance and collecting.[5]

Single enterprise. Generally, in a partnership in a single enterprise, one partner has no power to make notes.[6]

So of *stevedores.*[7]

Tavern-keepers.[8]

Theater. Partnership to conduct, is a non-trading firm.[9]

Threshing machine. Partners in are non-trading.[10]

Some cases seem to ignore the difference between trading and non-trading partnerships, and adopt the single test of scope of the business. In Hoskisson *v.* Eliot, 62 Pa. St. 393, the managing partner of a firm in the business of making pressed brick borrowed money on the firm's note. The court held that no distinction was

[1] Dickinson *v.* Valpy, 10 B. & C. 128; Brown *v.* Kidger, 3 H. & N. 853; Skillman *v.* Lachman, 23 Cal. 199; Jones *v.* Clark, 42 id. 180; Decker *v.* Howell, 42 id. 636; Charles *v.* Eshelman, 5 Colorado, 107; Manville *v.* Parks, 7 id. 128; Higgins *v.* Armstrong (Col. 1886), 10 Pac. Rep. 232; Judge *v.* Braswell, 13 Bush, 67; 26 Am. Rep. 185; Shaw *v.* McGregory, 105 Mass. 96, 102, a quarrying firm; Pooley *v.* Whitmore, 10 Heisk. 629, 636; 27 Am. Rep. 733.

[2] Hickman *v.* Kunkle, 27 Mo. 401, 404 (overruled on other points by Deardorf *v.* Thacher, 78 id. 128); Levi *v.* Latham, 15 Neb. 509; 48 Am. Rep. 361.

[3] Bradley *v.* Linn, 19 Ill. App. 322.

[4] Bays *v.* Conner, 105 Ind. 415. *Contra,* Porter *v.* White, 39 Md. 613.

[5] Deardorf *v.* Thacher, 78 Mo. 128; 47 Am. Rep. 95. In Freeman *v.* Carpenter, 17 Wis. 126, a partnership "in the general business of land agents, money and commission brokers," where the articles provided for paying interest on any excess of the agreed cash capital furnished by one partner, and securities for money were to be approved by all, and no funds were to be drawn out, unless there is sufficient to meet liabilities, these provisions were held to show more than a mere brokerage business, but that the facts of funds, a cash capital and loans of money imply a power in each to borrow on the credit of the firm, especially as the business of making loans may frequently require a borrowing.

[6] Gray *v.* Ward, 18 Ill. 32; Bentley *v.* White, 3 B. Mon. 263; 38 Am. Dec. 185.

[7] Benedict *v.* Thompson, 33 La. Ann. 196.

[8] Cocke *v.* Branch Bank, 3 Ala. 175.

[9] Pease *v.* Cole, 53 Conn. 53.

[10] Horn *v.* Newton City Bank, 32 Kan. 518.

to be made between mechanical, manufacturing and commercial partnerships, and the necessity for borrowing may be as great in the former as in the latter. In this case the jury found that borrowing was within the scope of the bnsiness, and moreover, there was evidence of a usage of the firm to borrow, known to the other partners.

CHAPTER VI.

PARTICULAR POWERS BEFORE DISSOLUTION.

Following are specific applications of the foregoing principles, and an alphabetical enumeration of the most frequently occurring examples in which it is sought to invoke an implied power in an individual partner to bind the rest. Powers after dissolution will be hereafter considered.

§ **330. Accounts.**— A statement by or in the handwriting of one partner, made during the existence of the partnership, is competent against the other as to the correctness of the balance, as being an account stated by the firm.[1] And so of his admission that a debt once due to the firm has been paid.[2] So an admission by one partner of an amount due is competent against the firm.[3]

§ **331. Admissions.**— The competency of an admission or declaration of a person to prove his partnership with another, or to prove that a transaction in his name was on account of his firm, will be elsewhere considered. But conceding or having proved *aliunde* the existence of the partnership, the competency of the admissions of one member as evidence against the firm is founded on the agency of a partner and may be therefore treated here.

It is well settled that the acts, admissions or declarations of a partner during the existence of the partnership, while engaged in transacting its business, or relating to matters within the scope of the partnership, are evidence against the firm.[4]

[1] Ferguson *v.* Fyffe, 8 Cl. & Fin. 121; Burgan *v.* Lyell, 2 Mich. 102; 55 Am. Dec. 53; Cunningham *v.* Sublette, 4 Mo. 224; Cady *v.* Kyle, 47 id. 346.

[2] Munson *v.* Wickwire, 21 Conn. 513.

[3] Gulick *v.* Gulick, 14 N. J. L. 578; Phillips *v.* Purinton, 15 Me. 425; Wickham *v.* Wickham, 2 K. & J. 491.

[4] Wood *v.* Braddick, 1 Taunt. 104; Thwaites *v.* Richardson, 1 Peake, 23 [16]; Nicholls *v.* Dowding, 1 Stark.

For example: Declarations of the partners that their men were to be paid for the time they were idle if they remained with the firm are competent.[1]

An admission of one partner that the firm could pay in full, where the other partners by misrepresenting its condition had procured a settlement of thirty-three cents on the dollar, is competent in impeachment of the release.[2]

An admission by a partner that an agent who signed the firm name to a note was authorized to do so is good evidence, even though one partner could not have subsequently ratified such signing if not authorized.[3]

A person about to buy a partnership note, and on inquiry being told by a partner that it would be paid, can use such declaration to prevent the partners defending on the ground that it was given to pay a purchase made on misrepresentations.[4]

Where partners had collected insurance money by fraudulent

81; Sangster *v.* Mazarredo, 1 id. 161; Wright *v.* Court, 2 C. & P. 232; Wickham *v.* Wickham, 2 K. & J. 478, 491; Rapp *v.* Latham, 2 B. & Ald. 795; Corps *v.* Robinson, 2 Wash. C. C. 388; Fail *v.* McArthur, 31 Ala. 26; Smitha *v.* Cureton, 31 id. 652; Jemison *v.* Minor, 34 id. 33; Talbot *v.* Wilkins, 31 Ark. 411; Munson *v.* Wickwire, 21 Conn. 513; McCutchen *v.* Banston, 2 Ga. 244; Dennis *v.* Ray, 9 id. 449; Clayton *v.* Thompson, 13 id. 206; Drumright *v.* Philpot, 16 id. 424; 60 Am. Dec. 738; Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15; Hurd *v.* Haggerty, 24 Ill. 171; Boor *v.* Lowrey, 103 Ind. 468; First Nat'l Bk. *v.* Carpenter, 34 Iowa, 433; Wiley *v.* Griswold, 41 id. 375; Spears *v.* Toland, 1 A. K. Mar. 203; Boyce *v.* Watson, 3 J. J. Mar. 498; Phillips *v.* Purinton, 15 Me. 425; Gilmore *v.* Patterson, 36 id. 544; Fickett *v.* Swift, 41 id. 65; Doremus *v.* McCormick, 7 Gill, 49; Harryman *v.* Roberts, 52 Md. 64, 77; 20 Am. Law Reg. (N. S.) 373; Odiorne *v.* Maxcy, 15 Mass. 39; Collett *v.* Smith (Mass.), 10 N. E. Rep. 173; Burgan *v.* Lyell, 2 Mich. 102; 55 Am. Dec. 53; Faler *v.* Jordan, 44 Miss. 283; Cunningham *v.* Sublette, 4 Mo. 224; Cady *v.* Kyle, 47 Mo. 346; Henslee *v.* Cannefex, 49 id. 295; McCann *v.* McDonald, 7 Neb. 305; Jones *v.* O'Farrel, 1 Nev. 354; Webster *v.* Stearns, 44 N. H. 498; Gulick *v.* Gulick, 14 N. J. L. 578; Ruckman *v.* Decker, 23 N. J. Eq. 283 (reversal in 28 id. 614. is on other grounds); Hoboken Bank *v.* Beckman, 36 N. J. Eq. 83 (affd. 37 id. 331); Fogerty *v.* Jordan, 2 Robt. (N. Y.) 319; Hilton *v.* McDowell, 87 N. Ca. 364; Allen *v.* Owens, 2 Spears (S. Ca.), 170; Fisk *v.* Copeland, 1 Overton (Tenn.), 383; Adams *v.* Brownson, 1 Tyler (Vt.), 452; Western Assur. Co. *v.* Towle, 65 Wis. 247.

[1] Wiley *v.* Griswold, 41 Iowa, 375.

[2] Doremus *v.* McCormick, 7 Gill, 49.

[3] Odiorne *v.* Maxcy, 15 Mass. 39.

[4] Henslee *v.* Cannefex, 49 Mo. 295.

proofs of loss, and an action to recover it again was brought by the insurer, admission of a partner that he had set the property on fire is competent.[1]

§ 332. And it makes no difference that the declarant is a dormant partner;[2] and the fact that the admission or declaration, if within the scope of the business, was honestly or dishonestly intended, or in hostility to his copartner or not, goes to its credibility and not to its competency.[3]

But admissions or declarations not in the scope of the business, or relating to matters outside of the scope, are not competent either as to such matters or to bring them within the partnership business.[4]

In Boor *v.* Lowrey, 103 Ind. 468, two physicians were employed to treat a patient. In an action by the patient for malpractice, opinions of one, made after the conclusion of the employment, in regard to the propriety of the treatment, are not competent against

[1] Western Assur. Co. *v.* Towle, 65 Wis. 247. The admission may be made in the answer of one partner in chancery. Hutchins *v.* Childress, 4 Stew. & Por. 34; Dennis *v.* Ray, 9 Ga. 449; Clayton *v.* Thompson, 19 id. 206; Williams *v.* Hodgson, 2 Har. & J. 474, 477; Chapin *v.* Coleman, 11 Pick. 331. But the others must be alive and able to contradict it. Parker *v.* Morrell, 2 Ph. 453; Dale *v.* Hamilton, 5 Hare, 369, 393. And unless the complainant stands in the shoes of the declarant, and the declaration is not against the firm but against the other partner, as where a judgment creditor of one partner files a bill to reach the debtor's interest in the firm, and the debtor's answer claims that a large balance is coming to him from the firm, this is not evidence against his copartner, for it is his own favor. Lewis *v.* Allen, 17 Ga. 300. Or in a garnishee process, Anderson *v.* Wanzer, 5 How. (Miss.) 587.

[2] Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15; Weed *v.* Kellogg, 6 McLean, 44. See Shepard *v.* Ward, 8 Wend. 542.

[3] Webster *v.* Stearns, 44 N. H. 498; Western Assur. Co. *v.* Towle, 65 Wis. 247. The mere order of evidence is immaterial provided the existence of the partnership is proved. Its proof after the admission has gone in cures the error. Lea *v.* Guice, 13 Sm. & Mar. 656; Fogerty *v.* Jordan, 2 Robt. (N. Y.) 319. And the preliminary evidence of the existence of the partnership is within the discretion of the judge, and, like matters of *voir dire*, is not subject to review. Hilton *v.* McDowell, 87 N. Ca. 364.

[4] Boor *v.* Lowrey, 103 Ind. 468; Stockton *v.* Johnson, 6 B. Mon. 408; Wells *v.* Turner, 16 Md. 133; Heffron *v.* Hanaford, 40 Mich. 305; Jones *v.* O'Farrel, 1 Nev. 354; McLeod *v.* Lee, 17 id. 103; McLeod *v.* Bullard, 84 N. Ca. 515; Oakley *v.* Aspinwall, 2 Sandf. 7.

the other. The report is not clear as to whether the defendants were general partners or only in this one case. And an admission by a partner is not evidence to establish the extent of his own powers,[1] or to prove that he was partner of another.[2]

§ 333. **As agents of others.**— If partners are appointed the agents of a person or employed for a certain business the question arises whether an execution by a single one is sufficient. If the power is granted to them as individuals its exercise must be by the concurrent act of all. But where the power or agency is within the scope of the ordinary business of the firm, an act of a single partner in executing it is an act in the management of the general business of the firm and in its behalf, and binds both the firm and the principal. A joint exercise is not necessary, but each can act in the name of and with the powers of all.

Thus in a firm of insurance agents each can bind the company within their powers, the same as the firm, as by signing instruments, making oral insurances or otherwise.[3]

So if a firm of attorneys employed to litigate a claim is authorized to compromise it, either may exercise the power even after dissolution.[4] And so, though the letter of instructions be addressed to but one of the firm (of attorneys) and the other receives and acts upon it, the principal is bound.[5] So if corporate shares are assigned to two copartners, with a power to both to transfer them on the books of the company, and by a by-law shares are transferable only at the office by the holder personally, a demand for transfer by one partner for both is sufficient.[6]

But where a deed of trust was made providing that, on the trustee's ceasing to act, B. D. B. and J. T. P., partners under the

[1] *Ex parte* Agace, 2 Cox, 312.

[2] See § 1146.

[3] Kennebec Co. *v.* Augusta Banking Co. 6 Gray, 204; Purinton *v.* Ins. Co. 72 Me. 22; Gordon *v.* Buchanan, 5 Yerg. 71. And see Newman *v.* Springfield F. & M. Ins. Co. 17 Minn. 123, where, however, one partner alone had the certificate of agency, but the company had recognized both.

[4] Jeffries *v.* Mut. L. Ins. Co. 110 U. S. 305. In this case the employment to litigate was on a share of proceeds and hence like a power coupled with an interest, but I do not think that affects the principle.

[5] Beck *v.* Martin, 2 McMull. (S. Ca.) 260.

[6] Sargent *v.* Franklin Ins. Co. 8 Pick. 90.

name of B. & P., should appoint a successor, an appointment of a successor by one partner in the firm name is not valid, for a partner is not an agent of the firm, except in its ordinary business, and the power here was to them as individuals and both must concur in the act.[1]

That a partner in one firm is also a member of another firm does not make the latter agent of the former or its acts binding on the former. This is well illustrated by the case of Wright *v.* Ames.[2]

B. & C. were warehousemen, and C. had wheat, his individual property, stored with them, and a firm composed of C., D. and E., doing business under the name of D. & E., also had wheat stored with them. C. sold his own wheat to the defendants, but surreptitiously removed and converted part of it, in consequence whereof B., his copartner in the warehouse, delivered to defendants some of the wheat of the firm of D. & E., thus, in effect, paying C.'s private debt with their property. It was held that D. & E.'s title was not divested and they could recover it from the defendants.

§ 334. **Agents and employees of the firm.**— Each partner in the prosecution of the business has implied power to employ labor or engage services, such as are necessary to conduct the ordinary business of joint enterprise.[3] The principle that an agent cannot delegate his powers does not apply in so far as the partner acts as partner, because he is a principal, although in so far as powers are in excess of the usual powers of a partner, and are derived from some special delegation or appointment from the firm, it doubtless would apply.

Thus, each member of a mining partnership has authority to employ laborers.[4] So of a partnership to cut and sell timber — persons employed by an active partner to carry on the business can recover from the firm.[5] So if land or goods be taken by a partnership for a debt, one partner can employ a broker or agent to obtain

[1] Cummings *v.* Parish, 39 Miss. 412.

[2] 2 Keyes, 221; 4 Abb. App. Dec. 644.

[3] Beckham *v.* Drake, 9 M. & W. 79; Carley *v.* Jenkins, 46 Vt. 721; Mead *v.* Shepard, 54 Barb. 474; Smith *v.* Cisson, 1 Colorado, 29.

[4] Nolan *v.* Lovelock, 1 Montana, 224; Burgan *v.* Lyell, 2 Mich. 102; 55 Am. Dec. 53; Potter *v.* Moses, 1 R. I. 430, 441.

[5] Mead *v.* Shepard, 54 Barb. 474; Coons *v.* Renick, 11 Tex. 134, 138; 60 Am. Dec. 230.

a purchaser for it.[1] One partner can employ an attorney to appear and represent the firm in suits.[2] *Contra*, in a mining partnership, for this is not a necessary part of its business.[3]

A partner can employ a person to perform services to be compensated by a division of the proceeds of the employee's labor, as to buy and ship cattle on a share of the profits; but here the other partners sued the employee for the proceeds and he claimed a partnership;[4] or to furnish wool and oversee its manufacture and sell.[5]

Where an iron-foundry concern, in arrears to its workmen for wages, was sold to the defendant partnership, and one of the partners, to induce the men to continue working, promised to pay them the same wages as before at the end of each week, and that the arrears should be paid, one-half in the following January and one-half in February, the promise was held to be within the scope of the business and the firm is bound by it.[6]

Where some of the partners went to California to prosecute the mining with hands hired by the firm, on a share of the profits, and they deserted, it was doubted whether those partners could engage new hands at wages instead of a share of profits.[7] In Carnes *v.* White, 15 Gray, 378, a member of an insolvent manufacturing firm which had on hand unfinished articles was held authorized, in order to finish them, to contract with a person to finish the articles at his own expense and sell them to reimburse himself his advances.[8]

§ **335.** An agent or employee is equally accountable to and subject to the control of one partner as much as of

[1] Durgin *v.* Somers, 117 Mass. 55; Banner Tobacco Co. *v.* Jenison, 48 Mich. 459.

[2] Wheatley *v.* Tutt, 4 Kan. 240.

[3] Charles *v.* Eshelman, 5 Colorado, 107.

[4] Frye *v.* Sanders, 21 Kan. 26; 30 Am. Rep. 421.

[5] Swan *v.* Stedman, 4 Met. 548, 553, but the powers of each partner were unlimited; he could engage in anything that he deemed of mutual interest.

[6] Wills *v.* Cutler, 61 N. H. 405.

[7] Potter *v.* Moses, 1 R. I. 430, 441.

[8] A partner may appoint and depute a clerk or agent to act for the firm. Harvey *v.* McAdams, 32 Mich. 472; Bank of N. A. *v.* Embury, 21 How. Pr. 14, by a sole resident partner about to be absent. In Tillier *v.* Whitehead, 1 Dall. 269, a partner was held to have power to authorize a clerk to sign checks, notes, etc., for the firm; but in Emerson *v.* The Providence Hat Mfg. Co. 12 Mass. 237, 242, it was doubted whether one partner alone could authorize another person to give a note in the firm's name.

another, subject to the powers of the majority, which are elsewhere considered. And where the firm consists of two partners only, each has the power, in the absence of dissent by the other, to discharge a person employed by the other.[1]

And so, if a partner employ a clerk and pay him, he is entitled to reimbursement where the other partner does not dissent from the employment, although he disapproved.[2] But an employment of an incompetent relative by one partner without the other's knowledge was held not to bind the latter to pay him.[3] The only limitation that can be laid down upon the power to employ or discharge where the partners are equally divided, and there is positive dissent, is that those in favor of things remaining as they are must control.

ARBITRATION.

§ 336. **No power to submit to.**— A partner has no implied power to bind the firm by a submission to arbitration. This falls within the category of sealed instruments, and like them, and especially like a confession of judgment, its *rationale* is that a partner ought not to have the power to bind not only the joint estate but also the individual property of a copartner, with the additional reason that a submission excludes resort to the regular tribunals, cuts off the rights of appeal or error, and is a delegation of power to others. The power of a partner is of necessity dangerously broad and should not be extended beyond what is requisite to carry on the business in the ordinary way, and a power to submit to arbitration is not necessary to any business. Certainly, if a partner cannot enter an appearance for the firm, or where service upon one partner gives no jurisdiction over the copartners, as is so in many states, there can be no power to create a court for them and bind the firm by its decision.[4]

[1] Ayer v. Ayer, 41 Vt. 346; Donaldson v. Williams, 1 Cr. & M. 343.

[2] Holloway v. Turner, 61 Md. 217.

[3] Beste v. His Creditors, 15 La. Ann. 55.

[4] Strangford v. Green, 2 Mod. 228; Stead v. Salt, 3 Bing. 101; s. c. 10 Moore, 389; Karthaus v. Ferrer, 1 Pet. 222–228; Hall v. Lanning, 1 Otto, 160, 170; Fanchon v. Bibb Furnace Co. (Ala.) 2 So. Rep. 268; Jones v. Bailey, 5 Cal. 345; Woody

The authority may be conferred by parol, and need not, therefore, appear on the record.[1] Or a subsequent ratification may cure the want of authority.[2]

v. Pickard, 8 Blackf. 55; Armstrong *v.* Robinson, 5 Gill & J. 412; Buchoz *v.* Grandjean, 1 Mich. 367; Backus *v.* Coyne, 35 Mich. 5; Walker *v.* Bean (Minn. 1886), 26 N. W. Rep. 232; Buchanan *v.* Curry, 19 Johns. 137; 10 Am. Dec. 200; McBride *v.* Hagan, 1 Wend. 326; Harrington *v.* Higham, 13 Barb. 660; s. c. 15 id. 524; Wood *v.* Shepherd, 2 Patt. & H. (Va.) 442; Martin *v.* Thrasher, 40 Vt. 460. *Contra*, Hallack *v.* March, 25 Ill. 48; Taylor *v.* Coryell, 12 S. & R. 243; Gay *v.* Waltman, 89 Pa. St. 453; Southard *v.* Steele, 3 Mon. (Ky.) 435. Of the above cases, the following limit the want of power to a submission under seal: Armstrong *v.* Robinson, 5 Gill & J. 412; Buchanan *v.* Curry, 19 Johns. 137; 10 Am. Dec. 200. While the following concede this power, assigning as the reason that a seal is not necessary: Hallack *v.* March, 25 Ill. 48; Gay *v.* Waltman, 89 Pa. St. 453. Southard *v.* Steele, 3 Mon. 435, and Taylor *v.* Coryell, 12 S. & R. 243, that a submission, if not sealed, is in the power of each. But the Vermont case puts it on the ground that the exigencies and convenience of business do not require a partner to possess any such power, and that the question of seal or no seal is of no consequence. Martin *v.* Thrasher, 40 Vt. 460; Harrington *v.* Higham, 13 Barb. 660; Stead *v.* Salt, 3 Bing. 101; s. c. 10 Moore, 389. It was held that a partner had this power in Wilcox *v.* Singletary, Wright (O.), 420; but in that case the partners were suing on the award, and it was merely objected to by defendant that proof of a previous assent by the partner who had not signed had not been offered, so that the case virtually decided that assent need not be shown by the plaintiffs.

[1] Davis *v.* Berger, 54 Mich. 652. See Wilcox *v.* Singletary, Wright (O.), 420; and see Karthaus *v.* Ferrer, 1 Pet. 222, 231. That one of the partners had kept a ship insured for several years by time policies containing an arbitration clause without objection, was held evidence of authority to submit to arbitration a claim for loss under a like policy. Hamilton *v.* Phœnix Ins. Co. 106 Mass. 395. Thus, if the other partner had previously read and approved the submission, and was in the store at the time it was signed, this is sufficient to bind both. Mackay *v.* Bloodgood, 9 Johns. 285.

[2] Perhaps so, even when an acknowledgment is required, provided the one who executed acknowledged in the name of both, but not if only in his own name. Abbott *v.* Dexter, 6 Cush. 108, 110. All the partners joining in a writ of error to the award is a ratification. Davis *v.* Berger, 54 Mich. 652. So receiving the avails of it by the partner who executed it is either a ratification by the firm, or an accord and satisfaction. Buchanan *v.* Curry, 19 Johns. 137; 10 Am. Dec. 200. The presence and participation of the other partner at the hearing is an assent (Hallack *v.* March, 25 Ill. 48); but may not be conclusive, as where the other is a foreigner and does not understand what is going on. Martin *v.* Thrasher, 40 Vt. 460.

The submission, however, has been held to bind the one that executed it, for he promised on behalf of the firm, and his partner's refusal is a breach by him,[1] unless the defect is want of a statutory acknowledgment and not want of authority, since the one who signed did not agree to submit by himself alone.[2]

The question refers not merely to a formal submission to arbitration, but includes any agreement of reference of a dispute to a third person;[3] but a mere agreement by a partner purchasing logs to adopt the run at the mill as the measure of quantity is not an arbitration and binds the firm.[4]

§ 337. A surviving partner can submit to an arbitration with the administrator of the deceased partner as to the state of accounts between the partners.[5] But he cannot arbitrate these matters with the widow, he, himself being also the administrator; for she is neither debtor nor creditor, and he represents both, being in a double capacity.[6] An administrator of both partners can submit to arbitration with a creditor of the firm, and an award may be against the estate of the last surviving partner, and the costs a charge on the partnership funds.[7]

An award against the firm in the firm name, not showing who the partners were, was held bad because it might compel the court to try over again the question of who constituted the firm.[8] But this objection would doubtless not hold in states where partners can be sued in the firm name.

If all have assented to the submission a notice to one is thereafter notice to all. Haywood *v.* Harmon, 17 Ill. 477. But as the award must be mutual, it was held that a subsequent ratification against the will of the other party does not bind him. Buchoz *v.* Grandjean, 1 Mich. 367. *Contra*, see dissenting opinion of Dwight, J., in Becker *v.* Boon, 61 N. Y. 317.

[1] Jones *v.* Bailey, 5 Cal. 345; Armstrong *v.* Robinson, 5 Gill & J. 412; Strangford *v.* Green, 2 Mod. 228; McBride *v.* Hagan, 1 Wend. 326; Harrington *v.* Higham, 15 Barb. 524; Wood *v.* Shepherd, 2 Patt. & H. (Va.) 442.

[2] Abbott *v.* Dexter, 6 Cush. 108.

[3] For example see Backus *v.* Coyne, 35 Mich. 5; Brink *v.* New Amsterdam Ins. Co. 5 Robt. (N. Y.) 104, as to the extent of loss under an insurance policy.

[4] Perkins *v.* Hoyt, 35 Mich. 506.

[5] Clanton *v.* Price, 90 N. Ca. 96.

[6] Boynton *v.* Boynton, 10 Vt. 107.

[7] Whitney *v.* Cook, 5 Mass. 139.

[8] Wesson *v.* Newton, 10 Cush. 114.

ASSIGN FOR CREDITORS.

§ 338. Cannot assign for creditors.— The implied power of a partner over the assets of the firm, which is so great as to enable him to convey the whole of that part of them intended for disposition, is limited to a transfer in the conducting of the business of the firm, and does not extend to a transfer which *ipso facto* is a dissolution and destructive, as distinguished from a transfer, which, like a transfer of all assets held for sale, may lead to a dissolution, though not such *per se.* The difference is that the latter is in the exercise of a power to preserve, and the former is exercising a power to destroy, and is not acting as agent, but is appointing an agent irrevocably, who supersedes the other principals. Hence it is by the weight of authority not within the implied power of one partner, or of any number less than all, to assign the entire effects of the firm for the benefit of creditors, when the other partners can be consulted or are within communicable distance. It is not within the scope of the business to deprive all the copartners of the possession and control of the partnership property.[1]

[1] Bowen *v.* Clark, 1 Biss. 128; Pearpoint *v.* Graham, 4 Wash. C. C. 232, 234; Wooldridge *v.* Irving, 23 Fed. Rep. 676; Dunklin *v.* Kimball, 50 Ala. 251; Wilcox *v.* Jackson, 7 Colorado, 521; Loeb *v.* Pierpoint, 58 Iowa, 469; 43 Am. Rep. 122; Bull *v.* Harris, 18 B. Mon. 195; Maughlin *v.* Tyler, 47 Md. 545, 550; Kirby *v.* Ingersoll, 1 Doug. (Mich.) 477 (aff'g s. c. Harr. Ch. 172); Stein *v.* La Dow, 13 Minn. 412; Hughes *v.* Ellison, 5 Mo. 463; Hook *v.* Stone, 34 id. 329; Steinhart *v.* Fyhrie, 5 Montana, 463; Pettee *v.* Orser, 6 Bosw. 123; 18 How. Pr. 442; Haggerty *v.* Granger, 15 How. Pr. 243; Paton *v.* Wright, 15 id. 481; Welles *v.* March, 30 N. Y. 344, 350; Fish *v.* Miller, 5 Paige, 26; Havens *v.* Hussey, 5 Paige, 30; Hitchcock *v.* St. John, Hoff. Ch. 511; Kelly *v.* Baker, 2 Hilt. 531; Deming *v.* Colt, 3 Sandf. 284, foll. by Hayes *v.* Heyer, id. 293; Fisher *v.* Murray, 1 E. D. Smith, 341; Wetter *v.* Schlieper, 4 id. 707; 15 How. Pr. 268; Coope *v.* Bowles, 42 Barb. 87; 18 Abb. Pr. 442; Palmer *v.* Myers, 43 Barb. 509; 29 How. Pr. 8; Holland *v.* Drake, 29 Oh. St. 441; Ormsbee *v.* Davis, 5 R. I. 442; Petition of Daniels, 14 id. 500; Henderson *v.* Haddon, 12 Rich. (S. Ca.) Eq. 393; Williams *v.* Roberts, 6 Cold. (Tenn.) 493, 497; Dana *v.* Lull, 17 Vt. 391, 393-4; Brooks *v.* Sullivan, 32 Wis. 444; Rumery *v.* McCulloch, 54 id. 565; First Nat'l B'k *v.* Hackett, 61 id. 335, 343; Coleman *v.* Darling, 66 id. 155; Cameron *v.* Stevenson, 12 Up. Can. C. P. 389; Stevenson *v.* Brown, 9 L. J. Chy. (Up. Can.) 110; 2 Bell's Com.

There are a few decisions, however, that hold it to be within the implied power of a partner to make a general assignment for the benefit of creditors, seeming to consider this as a necessary consequence of the power of disposition of the entire partnership property.[1]

§ 339. Ratification.— Prior authority or subsequent ratification of the copartners will validate the act, as in other cases of acts beyond authority.[2]

Thus in Osborne *v.* Barge, 29 Fed. Rep. 725, B. & K., partners, had agreed to assign for benefit of creditors, and had

(Scotland) 615. In Wooldridge *v.* Irving, 23 Fed. Rep. 676, the power was denied though the firm was hopelessly insolvent, the other partner an imbecile, and the assigning partner had a power of attorney to transact all business. The assignment was, however, held void on other grounds also.

[1] Hennessy *v.* Western Bank, 6 Watts. & S. 300; 40 Am. Dec. 560; Robinson *v.* Crowder, 4 McCord (S. Ca.), 519, 538, where, however, the assignment was held invalid on other grounds; Gordon *v.* Cannon, 18 Gratt. 387, 404; Scruggs *v.* Burruss, 25 W. Va. 670; Lasell *v.* Tucker, 5 Sneed (Tenn.), 33 (regretted in Barcroft *v.* Snodgrass, 1 Coid. 430, 440, and is distinguishable because the non-assenting partner was, in fact, absent; and in Williams *v.* Roberts, 6 Cold. 493, 497, it was said that if one partner is present the other cannot assign without his assent). See Graves *v.* Hall, 32 Tex. 665, and Donoho *v.* Fish, 58 Tex. 164, where the question whether a managing partner could so assign was said not to arise "because it does not appear that he had not authority." Whether the general partner, even of a limited partnership, can make an assignment without the assent of a special partner, is very doubtful. See authorities collected in Bates on Limited Partnership, pp. 189 to 192. In Whitworth *v.* Patterson, 6 Lea (Tenn.), 119, holding that where there was no actual partnership, but a mere holding out, the real owner could assign for creditors, it was said that the same rule would obtain in case the non-assenting partner were a dormant one; and the same suggestion was made in Drake *v.* Rogers, 6 Mo. 317. A single partner may apply to the court of insolvency for proceedings against the firm, Durgin *v.* Coolidge, 3 Allen, 554, 555; or may sign for the firm a petition for its bankruptcy, Pleasants *v.* Meng, 1 Dall. 380.

[2] Pearpoint *v.* Graham, 4 Wash. C. C. 232; Dunklin *v.* Kimball, 50 Ala. 251; Rumery *v.* McCulloch, 54 Wis. 565; Adee *v.* Cornell, 93 N. Y. 572 (aff. 25 Hun, 78); Wiles *v.* March, 30 N. Y. 344, and cases cited in the next sentence; Baldwin *v.* Tynes, 19 Abb. Pr. 32; Ely *v.* Hair, 16 B. Mon. 230; Sheldon *v.* Smith, 28 Barb. 593; Roberts *v.* Shepard, 2 Daly, 110; McNutt *v.* Strayhorn, 39 Pa. St. 269; Baldwin *v.* Tynes, 19 Abb. Pr. 32.

directed their attorney to draw the papers. A day or two afterwards, at 8 A. M., B. executed the assignment, and at 10 A. M. K. made a chattel mortgage to the plaintiff to secure a partnership debt. It was held that the assignment executed by one partner, having been agreed upon by both, was valid, and the power to make the mortgage was gone.[1] The ratification cannot relate back to interfere with intervening liens.[2] The failure of the non-assenting partner to repudiate when told of the assignment, and his allowing the assignee to make sales of the firm property, was held not to estop him to resist replevin by the assignee to get possession of partnership property in his hands.[3]

If one partner cannot so assign before dissolution, *a fortiori* he cannot after it.[4] But where one partner sells his interest in the firm to a third person, the other partners may afterwards assign for benefit of creditors, for the sale was a dissolution. The retired partner has no further authority, and his vendee has only a claim to a share of the surplus after payment of debts.[5]

An attempted assignment by one partner is an unauthorized exclusion of the copartner which will justify the appointment of a receiver and an injunction against the assignee.[6]

[1] In Steinhart *v.* Fyhrie, 5 Montana, 463, it was said that the act was so important and solemn that public policy requires that the authority be given in advance, and under such circumstances that no question can arise as to it; and in Holland *v.* Drake, cited in the next note, it was said that a ratification could not relate back, because attaching creditors might go on in ignorance of it and perhaps be finally defeated by the ratification and left to pay costs; a reason which requires a public and not a secret ratification.

[2] Stein *v.* La Dow, 13 Minn. 412; Holland *v.* Drake, 29 Oh. St. 441; Coleman *v.* Darling, 66 Wis. 155. And see Loeb *v.* Pierpoint, 58 Iowa, 469; 43 Am. Rep. 122; and Steinhart *v.* Fyhrie, 5 Montana, 463. But see Adee *v.* Cornell, 93 N. Y. 572.

[3] Brooks *v.* Sullivan, 32 Wis. 444. See, also, Steinhart *v.* Fyhrie, 5 Montana, 463.

[4] Deckert *v.* Filbert, 3 Watts & S. 454; Holland *v.* Drake, 29 Oh. St. 441; Mygatt *v.* McClure, 3 Head (Tenn.), 495.

[5] Clark *v.* Wilson, 19 Pa. St. 269; Clark *v.* McClelland, 2 Grant's Cas. 31.

[6] Ormsbee *v.* Davis, 5 R. I. 442.

§ 340. Absence of copartner an authorization.— Where, however, the other partner is absent, and his whereabouts is unknown, or if very distant and the emergency is such that he cannot be communicated with, such power is deemed to exist in the resident partner. Thus, where the other partner had absconded under such circumstances as to imply an abandonment, and consent to the exclusive control of the other, the latter may assign in the firm name for the benefit of creditors.[1] Or where he was absent, no one knew where, and was believed to have absconded, and a crisis had to be met, the assignment was held good, though the absentee afterwards returned.[2] So where the other partners are absent at a great distance, as in Europe, leaving the assignor as the sole manager in this country, and an exigency arises, his assignment for the benefit of creditors to prevent involuntary preferences is valid.[3]

But mere temporary absence of the other partner from the state is not sufficient.[4] Where the absentee lived only seventy-five miles away, with telegraph and daily mail communication between the towns, the assignment is unauthorized.[5] Though the absentee

[1] Newhall *v.* Buckingham, 14 Ill. 405; National Bk. of Balt. *v.* Sackett, 2 Daly, 395; Welles *v.* March, 30 N. Y. 344; Kemp *v.* Carnley, 3 Duer, 1; Palmer *v.* Myers, 43 Barb. 509; 29 How. Pr. 8; Sullivan *v.* Smith, 15 Neb. 476; 47 Am. Rep. 354; Deckard *v.* Case, 5 Watts, 22; 30 Am. Dec. 287; Rumery *v.* McCulloch, 54 Wis. 565. See, also, Dupuy *v.* Leavenworth, 17 Cal. 263. But not even then with preferences, Wetter *v.* Schlieper, 4 E. D. Smith, 707; 15 How. Pr. 268.

[2] Petition of Daniels, 14 R. I. 500.

[3] Harrison *v.* Sterry, 5 Cranch, 289; Anderson *v.* Tompkins, 1 Brock. 456; Robinson *v.* Crowder, 4 McCord (S. Ca.), L. 519; 17 Am. Dec. 762; Forbes *v.* Scannell, 13 Cal. 242; Williams *v.* Frost, 27 Minn. 255; Robinson *v.* Gregory, 29 Barb. 560 (the action of the court of appeals on this case is stated in Wells *v.* Marsh, 30 N. Y. 344, 350).

[4] Dunklin *v.* Kimball, 50 Ala. 251; Pettee *v.* Orser, 6 Bosw. 123; 18 How. Pr. 442, where the assignment was with preferences. But in McCullough *v.* Sommerville, 8 Leigh, 415, an assignment with preferences by a managing partner was upheld, the other partners being resident in another state. And where the articles provided for equal payment to all creditors, an assignment with preference by one partner, in violation thereof, was held void in Marsh *v.* Bennett, 5 McLean, 117.

[5] See Hunter *v.* Waynick, 67 Iowa, 555.

is the most active member of the firm, and his absence was in another state, and was unexpectedly protracted, and the partnership was deeply involved and creditors were urging payment, these facts will not support the assignment, for there is no extraordinary emergency here.[1]

An assignment in good faith by one partner in the other's absence, to prevent one creditor from seizing the entire assets, has been upheld.[2]

BILLS AND NOTES.

§ 341. In trading firms.— One of the most ordinary incidents of the business of any trading firm, and closely allied to the power to borrow and to buy on credit, is the power to make, draw, accept or indorse mercantile paper; hence, as part of the usual routine of business, each partner in a trading firm has authority to sign the name of the firm to negotiable paper.[3]

In Davison *v.* Robertson, 3 Dow. 218, each of two partners gave a bill in the name of the firm without the knowledge of the other for the same debt, and the firm was held liable on both to a *bona fide* holder.

In Wilson *v.* Richards, 28 Minn. 337, a partner who had bought lumber from his firm gave his note to it, and the firm indorsed the note and got it discounted. A renewal of the note by such partner and indorsement of the firm was held to be within the scope of his authority, and not using the firm name for his private debt, for it was a debt of the firm.

[1] Stein *v.* La Dow, 13 Minn. 412.

[2] In Graves *v.* Hall, 32 Tex. 665, but here the other partner made no complaint. And see Lasell *v.* Tucker, 5 Sneed, 33. The right of a surviving partner stands on a different basis, for he is in legal contemplation the sole owner, and his power to assign for creditors is generally conceded. See § 732.

[3] Pinkney *v.* Hall, Ld. Raym. 175 (1 Salk. 126); Smith *v.* Bailey, 11 Mod. 401; *Ex parte* Bonbonus, 8 Ves. 540; Davison *v.* Robertson, 3 Dow. 218; Brown *v.* Kidger, 3 H. & N. 853; Stephens *v.* Reynolds, 5 id. 513; *Ex parte* Darlington Banking Co. 4 DeG. J. & S. 581; Sutton *v.* Gregory, 2 Peake, 150; Lewis *v.* Reilly, 1 Q. B. 349; Swan *v.* Steele, 7 East, 210; 3 Smith, 199; Winship *v.* Bank of U. S. 5 Pet. 529; Kimbro *v.* Bullitt, 22 How. 256; Cocke *v.* Branch Bank, 3 Ala. 175; Howze *v.* Patterson, 53 id. 205 (25 Am. Rep. 607); Wagner *v.* Simmons, 61 id. 143; Palmer *v.* Scott, 68 id. 380; Storer *v.* Hinkley, Kirby (Conn.), 147; Champion *v.* Mumford,

And the power to renew a note is the same as the power to give one,[1] but is no greater; and as one partner cannot enlarge an extraneous liability, he cannot renew an accommodation note where the firm is surety, or extend the time,[2] or alter the note of a non-trading firm.[3]

But a partner can alter the note of a trading firm by inserting a place of payment,[4] or destroy it and substitute another,[5] and can waive demand and notice.[6] And where debts of a prior firm have been assumed, the same right to give notes for them exists as for other debts.[7]

The power must be exercised, however, in the usual course of business, otherwise a payee knowing this cannot hold the firm upon it.

Thus, in Whitman *v.* Leonard, 3 Pick. 177, one of two partners had absconded, and thereupon the other partner gave to a creditor a new note in the name of the firm, payable on demand, in place of a note not due, to enable him to attach, and this was held not in the usual course of business, and the attachment would be set aside at the instance of other creditors. Although, if such absconding be a dissolution,[8] the creditor had no notice of the dissolu-

id. 170; Pease *v.* Cole, 53 Conn. 53; Dow *v.* Phillips, 24 Ill. 249; Walsh *v.* Lannan, 98 id. 27 (38 Am. Rep. 75); Gregg *v.* Fisher, 3 Ill. App. 261; Sherwood *v.* Snow, 46 Iowa, 481 (26 Am. Rep. 155); Deitz *v.* Regnier, 27 Kan. 94; Lindh *v.* Crowley, 29 id. 756; Smith *v.* Turner, 9 Bush, 417; Judge *v.* Braswell, 13 Bush, 67, 75 (26 Am. Rep. 185); Coursey *v.* Baker, 7 Har. & J. 28; Richardson *v.* French, 4 Met. 577; Smith *v.* Collins, 115 Mass. 388; Stimson *v.* Whitney, 130 id. 591; Carrier *v.* Cameron, 31 Mich. 473; Faler *v.* Jordan, 44 Miss. 283; Holt *v.* Simmons, 16 Mo. App. 97; Feurt *v.* Brown, 23 id. 332; Roney *v.* Buckland, 4 Nev. 45; Dow *v.* Moore, 47 N. H. 419; Benninger *v.* Hess, 41 Oh. St. 64; Hoskisson *v.* Eliot, 62 Pa. St. 393; Moorehead *v.* Gilmore, 77 id. 118; Crosthwait *v.* Ross, 1 Humph. 23, 29 (34 Am. Dec. 613); Crozier *v.* Kirker, 4 Tex. 252 (51 Am. Dec. 724); Michael *v.* Workman, 5 W. Va. 391. For the power to indorse as involved in the power of disposition of paper belonging to the firm, § 401. As involved in a power to give security, § 349.

[1] Tilford *v.* Ramsey, 37 Mo. 563.

[2] Milmine *v.* Bass, 29 Fed. Rep. 632; Tilford *v.* Ramsey, 37 Mo. 563, 567.

[3] Horn *v.* Newton City Bank, 32 Kan. 518.

[4] Pahlman *v.* Taylor, 75 Ill. 629.

[5] Moseley *v.* Ames, 5 Allen, 163.

[6] See §§ 397–400.

[7] See § 347.

[8] Which was denied in Arnold *v.* Brown, 24 Pick. 89.

tion, for notice is either not necessary in such case or is implied in the nature of the transaction.

In Hicks *v.* Russell, 72 Ill. 230, one firm gave a note secured by the individual mortgage of one partner to another firm; then both firms dissolved without giving notice of dissolution, and the partner of the maker firm who gave the mortgage made new notes in the firm's name and delivered them to one of the payee firm, who released the mortgage. This was held not in the ordinary course of trade and neither firm is bound; and there is no power to issue a note or bill in blank, as where an acceptance is issued without any drawer, and only a *bona fide* buyer of such paper after the insertion of the name could sue upon it.[1]

§ **342.** The fact that the articles forbid any or all partners to make negotiable paper does not affect the validity of the paper in the hands of a payee who was not aware of the restriction, as we have seen, § 322.[2]

Even if a partner draw bills on the firm in fictitious names and raise money for the firm by using its name on such paper, all the partners are liable.[3]

In Burgess *v.* Northern Bank of Ky. 4 Bush, 600, a draft was drawn in the forged name of E. B. as drawer, on the firm of J. & B., and accepted by J., who then forged the name of E. B. as payee and procured the plaintiff bank to discount it, and then, by forging a check in E. B.'s name, drew from the bank the proceeds of the discount. It was urged that the bank had no title because it claimed through a forged indorsement, and that a firm is not liable for the crime of a partner; but it was held that as a partner issued the paper the firm was estopped to deny the genuineness of the indorsement.

Where partners own property as tenants in common and not as partnership property, the implied power of a partner does not extend to making negotiable paper in relation to it. Thus, one partner cannot bind the firm by a note for a premium of insurance upon a vessel owned as tenants in common.[4]

[1] The power to indorse over paper made to the firm involves the power of disposition and is treated under § 401. Hogarth *v.* Latham, 3 Q. B. D. 643.

[2] Bloom *v.* Helm, 53 Miss. 21; Benninger *v.* Hess, 41 Oh. St. 64.

[3] Thicknesse *v.* Bromilow, 2 Cr. & J. 425.

[4] Lime Rock F. & M. Ins. Co. *v.* Treat, 58 Me. 415.

§ 343. In non-trading firms.— The general rule in non-trading partnerships is that no authority to sign mercantile paper is implied, and it makes no difference that it was for the benefit of the firm. Nevertheless, there are a number of cases in which mercantile paper has been held binding on such firms. The test seems to be whether the paper is essential to carry into effect an ordinary purpose for which the partnership was formed. By such test it would seem that a note to pay a debt or to borrow money, even though it be borrowed to pay a debt or make a purchase, may not be binding without proof of assent of the other partners or a usage of such business. Yet no doubt each partner can draw a sight check[1] on the firm's deposits or a draft on a debtor of the firm, or indorse over paper which belongs to and is payable to the firm. But each partnership must stand largely on the nature of its peculiar business, and no rule of universal application is possible.

In Pooley *v.* Whitmore, 10 Heisk. 629 (27 Am. Rep. 733), it was held error to charge a jury that if the nature of the business was such that a partner might or might not sign negotiable paper, the partners are liable upon a note made by one partner in the hands of a *bona fide* holder. In other words, in case of doubt the power is not deemed to exist.

In Sherman *v.* Kreul, 42 Wis. 33, it was held that a power in a non-trading firm to buy on credit does not involve the power to bind by a negotiable note, and hence, in an action on a note given by one partner in the firm name for a span of horses, a charge to the jury that if the copartners had authorized the purchase on credit the verdict should be for the plaintiff is erroneous.[2]

It makes no difference that the consideration of the note was applied to the benefit of the firm or to pay a debt owed by it. If

[1] That he can do so in a trading firm, Forster *v.* Mackreth, L. R. 2 Ex. 163; Bull *v.* O'Sullivan, L. R. 6 Q. B. 209; Commercial Bank *v.* Proctor, 98 Ill. 558. It must be remembered that a post-dated check is equivalent to a time draft, and a member of a strictly non-trading firm, as a firm of lawyers, cannot issue it.

[2] The same ruling was made in Bradley *v.* Linn, 19 Ill. App. 322; and also in Skillman *v.* Lachman, 23 Cal. 199, where, however, the note was for three per cent. a month.

giving a note is outside the scope of the business, the note is not binding unless authority to issue it was given or is implied from the usage of the firm or the business.[1] Hence, if the firm can be sued upon the original consideration, damages upon the protested paper cannot be included in the recovery.[2]

In Horn *v.* Newton City Bank, 32 Kan. 518, as a partnership in the operation of a threshing machine is not a trading one, an alteration of the purchase money note given for the machine, by substituting another payee by consent of one partner, was held not binding, and to be a release of the other partner from the note.[3]

A partner in a farming partnership cannot bind the firm by a note;[4] nor of a firm of tavern keepers;[5] nor one of a steam saw-mill firm.[6] So of a partnership in a patent to clarify sugar, even though bound for the consideration of the note.[7] And if the partnership is to buy and sell to Indians in the Indian territory, this was held of itself to show that a partner had no power to make a note.[8]

[1] Hedley *v.* Bainbridge, 3 Q. B. 316, of a law firm to pay a debt due to a client. Greenslade *v.* Dower, 7 B. & C. 635, of a farming partnership to pay a debt for the property. Smith *v.* Sloan, 37 Wis. 285; 19 Am. Rep. 757, of a law firm to pay office rent which they owed. Bays *v.* Conner, 105 Ind. 415, for a loan to pay a debt. SHERWOOD, J., in Deardorf *v.* Thacher, 78 Mo. 128, 133; 47 Am. Rep. 95; Breckinridge *v.* Shrieve, 4 Dana, 375, to borrow to pay a debt. Benton *v.* Roberts, 4 La. Ann. 217, of a planting partnership to pay for the land held in common. Prince *v.* Crawford, 50 Miss. 344, of a planting partnership for necessaries. Ulery *v.* Ginrich, 57 Ill. 531, of a farming partnership in part to pay debts. Hermanos *v.* Duvigneaud, 10 La. Ann. 114; McCord *v.* Field, 27 Up. Can. C. P. 391. But Hickman *v.* Kunkle, 27 Mo. 401, held that one of livery-stable keepers, *prima facie*, could give a note for a stove; and Doty *v.* Bates, 11 Johns. 544, that the note of a firm engaged in tanning, currying and shoemaking was presumed to be authorized. Lanier *v.* McCabe, 2 Fla. 32, 40; 48 Am. Dec. 173, hints that the note might have been good if it had been to pay a debt.

[2] Hermanos *v.* Duvigneaud, 10 La. Ann. 114.

[3] Greenslade *v.* Dower, 7 B. & C. 635; 1 Man. & Ry. 640.

[4] Greenslade *v.* Dower, 7 B. & C. 635; Benton *v.* Roberts, 4 La. Ann. 216; Prince *v.* Crawford, 50 Miss. 344; Hunt *v.* Chapin, 6 Lans. 139; Ulery *v.* Ginrich, 57 Ill. 531.

[5] Cocke *v.* Branch Bank at Mobile, 3 Ala. 175.

[6] Lanier *v.* McCabe, 2 Fla. 32; 48 Am. Dec. 173.

[7] Hermanos *v.* Duvigneaud, 10 La. Ann. 114.

[8] Cargill *v.* Corby, 15 Mo. 425.

So a firm in the dry goods business, which also carries on a plantation, is as to the latter a non-trading firm, and a note given to carry on the plantation is presumptively unauthorized, unless in the hands of a *bona fide* buyer.[1] So of the note of a partnership in the operation of a furnace, given for the purchase of a distillery.[2] So of a note for a lightning rod to the mill.[3]

§ **344.** There are, however, a number of cases holding that a note for the purchase of supplies by a member of a non-trading partnership is valid.

In Johnston *v.* Dutton, 27 Ala. 245, a purchase on credit by one partner in a steam saw-mill firm of groceries and provisions necessary for the hands, and giving a note therefor, is within the scope. So in Gavin *v.* Walker, 14 Lea, 643, a note to borrow money for supplies was held binding on a firm formed to grade a railroad line.

In Miller *v.* Hines, 15 Ga. 197, 201, it was said that a note given by a member of a law firm for the purchase of law books for the firm would be binding.

And in Crosthwait *v.* Ross, 1 Humph. 23 (34 Am. Dec. 613), the same was held of a purchase by note of medicines, instruments, etc., by one of a medical firm.

In Newell *v.* Smith, 23 Ga. 170, proof that a note of a tannery firm was given by one partner for the hire of labor was held to remove the onus of proving authority.

In Pease *v.* Cole, 53 Conn. 53, 72, it was said that proof that the firm got the benefit of the note would perhaps tend to show that it was the firm's note.

In Hickman *v.* Kunkle, 27 Mo. 401, 404 (a case overruled in several respects in 78 id. 128), it was said that a note by a member of a livery-stable firm for $71 for stoves was not necessarily outside the scope, as it might need one or more stoves for heating, whereas for a purchase of fifty or a hundred stoves would be clearly outside.

And in Levi *v.* Latham, 15 Neb. 509 (48 Am. Rep. 361), also a livery-stable firm, the court, in ruling the note to be void where the signing partner kept the proceeds, seem to say that if the

[1] Hunt *v.* Chapin, 6 Lans. 139.

[2] Waller *v.* Keyes, 6 Vt. 257.

[3] Graves *v.* Kellenberger, 51 Ind. 66, the other partner owned the mill.

holder could show that the note is necessary to carry on the business, this would show power to make it.

In Voorhees *v.* Jones, 29 N. J. L. 270, the note of a firm whose business was a contract to build a railroad was held binding on all the partners.

In Davis *v.* Cook, 14 Nev. 265, 283, the opinion of the court is to the effect that a power to purchase being given involves the power to give notes for the purchase, where, as in the example put by the court, the purchase of a hotel, the transaction is so large as to involve deferred payments; but the actual controversy in the case was over the purchase of a stock to open a branch store, clearly a trading firm; and so of Brooke *v.* Washington, 8 Gratt. 248, of notes by managing partners of an iron manufacturing partnership to buy timber land to get fuel from. The notes were held valid. The power to buy the land seems to have been assumed, and the only question was on whose credit it was bought.

In Deardorf *v.* Thacher, 78 Mo. 128, 135 (47 Am. Rep. 95), it was said by HENRY, J., that if the holder could have shown that the consideration of the note was articles or labor necessary in the business of the firm, the firm would have been bound; whereas SHERWOOD, J., p. 133, said that the note would not be binding, even if given for the purposes of the firm and though the firm would be charged with the debt created.

In Brayley *v.* Hedges, 52 Iowa, 623, one of a firm of agents to sell machines gave a note to pay a debt, and it was held valid. So in Van Brunt *v.* Mather, 48 Iowa, 503, of a storage, forwarding and collecting firm.

§ 345. —— doctrine of bona fide buyer does not cure.— The doctrine of *bona fide* buyer does not apply to the purchaser of the note of a non-trading firm. If there was no authority to make the note, the payee cannot convey a greater title than he had, and the buyer takes it at his peril, for he must inquire whether the nature of the business involves the power to issue mercantile paper, and if it does not he has, by law, notice of that fact.[1]

[1] Dickinson *v.* Valpy, 10 B. & C. 128; Cocke *v.* Branch Bank, 3 Ala. 175; Pease *v.* Cole, 53 Conn. 53 (a very carefully considered case); Benedict *v.* Thompson, 33 La. Ann. 196; Levi *v.* Latham, 15 Neb. 509 (48 Am. Rep. 361); Deardorf *v.* Thacher, 78 Mo. 128 (47 Am. Rep. 95); Prince *v.* Craw-

As in case of all other powers, want of implied power is supplied by previous express authorization or subsequent ratification; hence if T. agrees to convey land to E. & S., partners, payable in their notes, a tender of notes signed by E., in the firm name, is a good tender.[1] But an express authority given to a partner to indorse over notes received in payment, in order to turn them into money, will not bind the firm by an accommodation indorsement outside the scope of the business, in the hands of an innocent holder for value.[2]

§ 346. **Joint and several notes.**— As a partner represents the firm, and is not the agent of each partner separately, it follows that he has no implied power to bind by a joint and several note, or to bind each individually, or any number less than all.[3]

Such note, however, whether made expressly as a joint and several note, or using the phrase "I promise" with the individual names appended, is, if possible, construed as a valid joint note;[4] but where the signatures are so placed that the apparent interests and legal obligations of the partners would be different, as where one appears as maker, and the other as surety, it is doubtful whether the non-assenting one is bound at all.[5]

The signing partner, however, is bound severally as well as jointly, though the firm name be signed;[6] but though the words "I promise" signed by several, import a joint and several promise, yet if the signature is in a firm name, the

ford, 50 Miss. 344; Lynch *v.* Thompson, 61 id. 354; Judge *v.* Braswell, 13 Bush, 67 (26 Am. Rep. 185). See, also, Greenslade *v.* Dower, 7 B. & C. 635; Williams *v.* Thomas, 6 Esp. 18. Or to waive homestead exemptions in individual property or any other personal privilege. Terrell *v.* Hurst, 76 Ala. 588.

[1] Smith *v.* Jones, 12 Me. 332.

[2] Hotchkiss *v.* English, 4 Hun, 369; 6 N. Y. Supreme Ct. 658.

[3] Perring *v.* Hone, 4 Bing. 28, 32; 2 C. & P. 401; Sherman *v.* Christy, 17 Iowa, 322, 324; Marlett *v.* Jackman, 3 Allen, 287, 291; Snow *v.* Howard, 35 Barb. 55.

[4] Maclae *v.* Sutherland, 3 El. & B. 36; Doty *v.* Bates, 11 Johns. 544; Sherman *v.* Christy, 17 Iowa, 322.

[5] Stroh *v.* Hinchman, 37 Mich. 490.

[6] Elliot *v.* Davis, 2 B. & P. 338; Sherman *v.* Christy, 17 Iowa, 322; Fulton *v.* Williams, 11 Cush. 108, 109; Snow *v.* Howard, 35 Barb. 55. See, also, Gillow *v.* Lillie, 1 Bing. N. Cas. 695.

note is joint only, and even the signer himself cannot be sued alone.[1]

But if on a joint and several note, signed in the firm name, the name of a third person is also added, the words jointly and severally apply to bind the firm as one person, and the other signer as another person severally, but not the partners severally apart from each other.[2]

The firm is liable, but only jointly, whether the note be "I promise" and signed by "A. B." or "A. B., C. D., E. F.;"[3] or we jointly and severally promise for the firm.[4]

§ 347. Bill or note for separate debt.— A partner cannot bind the firm by giving a note to pay his separate debt, unless authorized by his copartners, and this fact is a perfect defense except as against a *bona fide* indorsee of the creditor. Such a note is a gross fraud on the copartners.[5]

[1] *Ex parte* Buckley, 14 M. & W. 469; 1 Ph. 562 (overruling Hall *v.* Smith, 1 B. & C. 407); s. c. as *Ex parte* Clarke, DeGex, 153; (reversing s. c. as *Ex parte* Christie, 3 M. D. & DeG. 736); Brown *v.* Fitch, 33 N. J. L. 418; Doty *v.* Bates, 11 Johns. 544; Van Tine *v.* Crane, 1 Wend. 524.

[2] Van Tine *v.* Crane, 1 Wend. 524; *Re* Holbrook, 2 Low. 259.

[3] Galway *v.* Matthew, 1 Camp. 403; *Ex parte* Buckley, 14 M. & W. 469; 1 Ph. 562; *Ex parte* Clarke, DeG. 153, reversing *Ex parte* Christie, 3 M. D. & DeG. 736; Doty *v.* Bates, 11 Johns. 544.

[4] Maclae *v.* Sutherland, 3 E. & B. 1; *Re* Holbrook, 2 Low. 259; Brown *v.* Fitch, 33 N. J. L. 418; Van Tine *v.* Crane, 1 Wend. 524; Snow *v.* Howard, 35 Barb. 55.

[5] See, for example, Scott *v.* Dansby, 12 Ala. 714; Freeman *v.* Ross, 15 Ga. 252; Gray *v.* Ward, 18 Ill. 32; Wittram *v.* VanWormer, 44 Ill. 525; Taylor *v.* Hillyer, 3 Blackf. 433 (26 Am. Dec. 430); Hagar *v.* Mounts, 3 Blackf. 57, 261; Hickman *v.* Reineking, 6 Blackf. 387; Flagg *v.* Upham, 10 Pick. 147, 148–9; Adams Bank *v.* Jones, 16 id. 574; Roberts *v.* Pepple, 55 Mich. 367; Robinson *v.* Aldridge, 34 Miss. 352; Klein *v.* Keyes, 17 Mo. 326; Ferguson *v.* Thacher, 79 Mo. 511; Davis *v.* Cook, 9 Nev. 134; Davenport *v.* Runlett, 3 N. H. 386; Williams *v.* Gilchrist, 11 id. 535; Dob *v.* Halsey, 16 Johns. 34, 39 (8 Am. Dec. 293); Williams *v.* Walbridge, 3 Wend. 415; Gansevoort *v.* Williams, 14 id. 133; Rust *v.* Hauselt, 9 Jones & Sp. 467 (affd. 76 N. Y. 614); Gale *v.* Miller, 54 N. Y. 536; Atlantic State Bank *v.* Savery, 82 N. Y. 291 (affg. 18 Hun, 36); Cotton *v.* Evans, 1 Dev. & Bat. Eq. 284; Weed *v.* Richardson, 2 Dev. & Bat. L. 535; Miller *v.* Richardson, 2 Ired. L. 250; Himelright *v.* Johnson, 40 Oh. St. 40; Baird *v.* Cochran, 4 S. & R. 397; 397; Porter *v.* Gunnison, 2 Grant's Cas. 297; McKinney *v.* Bradbury, Dallam (Tex.), 441; Van Alstyne *v.* Bertrand, 15 Tex. 177; Poindexter *v.*

Nor has he any right to issue the note of a new firm to pay the debts of a prior firm composed in part of the same individuals, whether with or without new partners;[1] or for a loan to himself or other individual purpose.[2]

But if the new firm assume the debts of the old firm, one partner may give a note for them.[3] And a new firm getting goods purchased before by one partner and agreeing to take and pay for them assumes the debt for a valuable consideration, and one partner can give a note for the price.[4]

That a note for a separate debt includes a small firm debt does not make it valid;[5] but the note can be enforced to the extent of the valid consideration, there being no fraud.[6]

A power to use the firm name for private purposes is implied, if necessary to perfect a joint transaction; as where partners divided notes payable to the firm, each can indorse over to himself the

Waddy, 6 Munf. (Va.) 418 (8 Am. Dec. 749); Beals v. Sheldon, 4 Up. Can. Q. B. (Old Ser.) 302. And see § 1038. And accommodation parties upon the paper are not estopped to dispute its validity in the hands of the creditor of one partner. Garland v. Jacomb, L. R. 8 Ex. 216. And see Russell v. Annable, 109 Mass. 72 (12 Am. Rep. 165); but see § 423.

[1] Shirreff v. Wilks, 1 East, 48; Hester v. Lumpkin, 4 Ala. 509; Bryan v. Tooke, 60 Ga. 437; Waller v. Davis, 59 Iowa, 103; Elkin v. Green, 13 Bush, 612; Spaunhorst v. Link, 46 Mo. 197; Howell v. Sewing Machine Co. 12 Neb. 177; Guild v. Belcher, 119 Mass. 257. And see further, §§ 557, 558. *Contra*, if composed of part of the same individuals without new partners, Foster v. Hall, 4 Humph. 346; but where the new firm is indebted to the old and to its members, a note by one partner in the name of the new to a creditor of the old was held valid. Hester v. Lumpkin, 4 Ala. 509.

[2] Newman v. Richardson, 4 Woods, C. C. 81; 9 Fed. Rep. 865; Rutledge v. Squires, 23 Iowa, 53; *Re* Forsyth, 7 Bankr. Reg. 174; Potter v. Dillon, 7 Mo. 228; 37 Am. Dec. 185; Bank of Commerce v. Selden, 3 Minn. 155; Stainer v. Tysen, 3 Hill, 279, Noble v. McClintock, 2 W. & S. 152; Gullat v. Tucker, 2 Cranch, C. C. 33.

[3] Randall v. Hunter, 66 Cal. 512; Shaw v. McGregory, 105 Mass. 96.

[4] Markham v. Hazen, 48 Ga. 570; Morris v. Marqueze, 74 id. 86; Silverman v. Chase, 90 Ill. 37; Johnson v. Barry, 95 id. 483.

[5] Bell v. Faber, 1 Grant's Cas. (Pa.) 31; King v. Faber, 22 Pa. St. 21.

[6] Wilson v. Lewis, 2 M. & G. 197; s. c. as Wilson v. Bailey, 9 Dowl. 18; Gamble v. Grimes, 2 Ind. 392; Guild v. Belcher, 119 Mass. 257; Ellston v. Deacon. L. R. 2 C. P. 20, but here the court amended the declaration by adding a count for the consideration. Perhaps this would not be so in case of collusion. See Snyder v. Lunsford, 9 W. Va. 223, given under § 410.

notes allotted to him.[1] And on the same principle, if a firm of mechanics assign a claim to one partner, he can use the firm's name to perfect a lien on the debtor's property.[2]

§ 348. —— subsequent misappropriation distinguished.— If a partner borrow money or buy goods for the firm on a note made by the firm, or lead the lender or seller to believe that the transaction is for the firm, the subsequent misappropriation of the avails by such partner does not affect the payee's right against the firm, where borrowing or buying is within the scope of the firm's business.[3] And so if a person signs as surety for the firm at the request of a partner, supposing he is signing for the firm, he is a creditor of the firm, though such partner misappropriates the note or its proceeds.[4]

[1] Mechanics' Bank *v.* Hildreth, 9 Cush. 356.

[2] Jones *v.* Hurst, 67 Mo. 568; Busfield *v.* Wheeler, 14 Allen, 139.

[3] Bond *v.* Gibson, 1 Camp. 185; Kimbro *v.* Bullitt, 22 How. 256; Winship *v.* Bank of U. S. 5 Pet. 529, 566; Howze *v.* Patterson, 53 Ala. 205; 25 Am. Rep. 607; Carver *v.* Dows, 40 Ill. 374; Stark *v.* Corey, 45 id. 431; Gregg *v.* Fisher, 3 Ill. App. 261; Davis *v.* Blackwell, 5 id. 32; Rend *v.* Boord, 75 Ind. 307; Sherwood *v.* Snow, 46 Iowa, 481; 26 Am. Rep. 155; Lemon *v.* Fox, 21 Kan. 152, 159; Lindh *v.* Crowley, 29 id. 756; Warren *v.* French, 6 Allen, 317; Hayward *v.* French, 12 Gray, 453; Littell *v.* Fitch, 11 Mich. 525; Sylverstein *v.* Atkinson, 45 Miss. 81; Bascom *v.* Young, 7 Mo. 1; Bank *v.* St. Jos. Lead Co. 12 Mo. App. 587; Wagner *v.* Freschl, 56 N. H. 495; Church *v.* Sparrow, 5 Wend. 223; Whitaker *v.* Brown, 16 id. 505; Onondaga Co. Bank *v.* De Puy, 17 id. 47; Bank of St. Albans *v.* Gilliland, 23 Wend. 311; 35 Am. Dec. 566; National Bank *v.* Ingraham, 58 Barb. 290; Miller *v.* Manice, 6 Hill, 114, 119; Wharton *v.* Woodburn, 4 Dev. & Bat. L. 507; Dickson *v.* Alexander, 7 Ired. L. 4; Kleinhaus *v.* Generous, 25 Oh. St. 667; Haldeman *v.* Bank of Middletown, 28 Pa. St. 440; Windham Co. Bank *v.* Kendall, 7 R. I. 77; Crosthwait *v.* Ross, 1 Humph. 23, 29; 34 Am. Dec. 613; Venable *v.* Levick, 2 Head, 351; Van Alstyne *v.* Bertrand, 15 Tex. 177; Gilchrist *v.* Brande, 58 Wis. 184; Simpson *v.* McDonough, 1 Up. Can. Q. B. 157.

[4] Capelle *v.* Hall, 12 Bankr. Reg. 1; Deitz *v.* Regnier, 27 Kan. 94; Littell *v.* Fitch, 11 Mich. 525; Bank of St. Albans *v.* Gilliland, 23 Wend. 311; 35 Am. Dec. 566; Stockwell *v.* Dillingham, 50 Me. 442; Wilkins *v.* Pearce, 5 Den. 541 (aff'd in 2 N. Y. 469). Though the note was under seal, Wharton *v.* Woodburn, 4 Dev. & Bat. L. 507; Purviance *v.* Sutherland, 2 Oh. St. 478. But whether a surety who has not paid a sealed note can claim the want of authority apparent on the face of the paper, see § 423.

In Stockwell *v.* Dillingham, 50 Me. 442, D. advanced his note to a person represented by one of the partners as a person who had loaned him money to pay bills of the firm, and now wanted it back. D. may properly suppose the person's claim to be a debt of the firm. And if a partner borrows for the use of the firm, if not expressly on his individual liability, it is a firm debt and D. can hold the firm.

§ 349. Signing firm name for security or accommodation. A partner has no implied authority to use the name of the firm as security for others. It is no part of the business of a partnership or the agency of a partner to guaranty the debts of others or to lend their credit by giving accommodation paper or going surety, and such act by one partner without the consent of the others is a fraud on them; and a payee of a bill or note who knows that the name is signed as surety by a partner is not a *bona fide* holder, and cannot recover against the partnership,[1] even though reasonable

[1] Crawford *v.* Stirling, 4 Esp. 207; Duncan *v.* Lowndes, 3 Camp. 478; Brettel *v.* Williams, 4 Ex. 623; Hasleham *v.* Young, 5 Q. B. 833; *Re* Irving, 17 Bankr. Reg. 22; Rolston *v.* Click, 1 Stew. 526; Mauldin *v.* Branch Bk. at Mobile, 2 Ala. 502, 513; Hibbler *v.* De Forest, 6 id. 92; Lang *v.* Waring, 17 id. 145; Hendrie *v.* Berkowitz, 37 Cal. 113; N. Y. Firemen's Ins. Co. *v.* Bennett, 5 Conn. 574 (13 Am. Dec. 109); Mix *v.* Muzzy, 28 id. 186; Mayberry *v.* Bainton, 2 Harr. (Del.) 24; Marsh *v.* Thompson Natl. Bk. 2 Ill. App. 217; Davis *v.* Blackwell, 5 id. 32; Beach *v.* State Bank, 2 Ind. 488; Whitmore *v.* Adams, 17 Iowa, 567; Clark *v.* Hyman, 55 id. 14; Silvers *v.* Foster, 9 Kan. 56; Wagnon *v.* Clay, 1 A. K. Mar. (Ky.) 257; Chenowith *v.* Chamberlin, 6 B. Mon. 60 (43 Am. Dec. 145); Vredenburg *v.* Lagan, 28 La. Ann. 941; Darling *v.* March, 22 Me. 184; Rollins *v.* Stevens, 31 id. 454; Redlon *v.* Churchill, 73 Me. 146 (40 Am. Rep. 345); Hopkins *v.* Boyd, 11 Md. 107; Sweetser *v.* French, 2 Cush. 309 (48 Am. Dec. 666); Butterfield *v.* Hemsley, 12 Gray, 226; Natl. Bk. of Commonwealth *v.* Law, 127 Mass. 72; Freeman's Natl. Bk. *v.* Savery, 127 id. 75; Heffron *v.* Hanaford, 40 Mich. 305; Moynahan *v.* Hanaford, 42 id. 329; Selden *v.* Bank of Commerce, 3 Minn. 166; Osborne *v.* Stone, 30 id. 25; Osborne *v.* Thompson, 35 id. 229; Andrews *v.* Planters' Bank, 7 Sm. & Mar. 192 (45 Am. Dec. 300); Langan *v.* Hewett, 13 id. 122; Sylverstein *v.* Atkinson, 45 Miss. 81; Bloom *v.* Helm, 53 id. 21; Kidder *v.* Page, 48 N. H. 380; Livingston *v.* Roosevelt, 4 Johns. 251 (4 Am. Dec. 273); Foot *v.* Sabin, 19 Johns. 154; Schermerhorn *v.* Schermerhorn, 1 Wend. 119; Laverty *v.* Burr, 1 id. 529; Boyd *v.* Plumb, 7 id. 309; Mercein *v.* Andrus, 10 id. 461; Joyce *v.* Williams, 14 id. 141;

and convenient for the purposes of the business; no mere benefit can suspend a restriction so essential.[1]

The partner who signed the firm name without authority is himself bound, the same as if he had signed his own name.[2]

Wilson *v.* Williams, 14 id. 146 (28 Am. Dec. 518); Stall *v.* Catskill Bank, 18 id. 466 (aff. s. c. 15 id. 364); Gansevoort *v.* Williams, 14 id. 133; Elliott *v.* Dudley, 19 Barb. 326; Mechanics' Bank *v.* Livingston, 33 id. 458; Fielden *v.* Lahens, 9 Bosw. 436 (2 Abb. Dec. 111); Butler *v.* Stocking, 8 N. Y. 408; Chemung Canal Bank *v.* Bradner, 44 id. 680; Atlantic State Bk. *v.* Savery, 82 id. 291 (aff. 18 Hun, 36); Long *v.* Carter, 3 Ired. (N. Ca.) L. 238; Smith *v.* Loring, 2 Oh. 440; Gano *v.* Samuel, 14 id. 592, 600; Sutton *v.* Irwine, 12 S. & R. 13; Bell *v.* Faber, 1 Grant's Cas. (Pa.) 31; Bowman *v.* Cecil Bank, 3 id. 33: McQuewans *v.* Hamlin, 35 Pa. St. 517; Kaiser *v.* Fendrick, 98 Pa. St. 528; Shaaber *v.* Bushong, 105 id. 514; Berryhill *v.* McKee, 1 Humph. 31, 37; Whaley *v.* Moody, 2 Humph. (Tenn.) 495; Bank of Tenn. *v.* Saffarrans, 3 id. 597; Scott *v.* Bandy, 2 Head, 197; Pooley *v.* Whitmore, 10 Heisk. 629 (27 Am. Rep. 733); Huntington *v.* Lyman, 1 D. Chip. (Vt.) 438 (12 Am. Dec. 716); Jones *v.* Booth, 10 Vt. 268; Tompkins *v.* Woodyard, 5 W. Va. 216; Avery *v.* Rowell, 59 Wis. 82; Harris *v.* McLeod, 14 Up. Can. Q. B. 164; Henderson *v.* Carveth, 16 id. 324; Macklin *v.* Kerr, 28 Up. Can. C. P. 90; McConnell *v.* Wilkins, 13 Ont. App. 438; Stewart *v.* Parker, 18 New Brunswick, 223. *Contra:* that a partner has a right to sign the name of the firm as accommodation, holding the contrary rule to be an obstacle to commerce, Flemming *v.* Prescott, 3 Rich. (S. Ca.) L. 307 (45 Am. Dec. 766); *Ex parte* Gardom, 15 Ves. 286. And if a firm has become surety, a partner cannot alter the contract, as by extending the time, § 341. A sole manager under no written articles and of presumed unlimited authority was held authorized to bind the firm by recognizing an agent's notes, given as security for a third person, in Odiorne *v.* Maxcy, 15 Mass. 39. In First Natl. Bk. *v.* Carpenter, 41 Iowa, 518, the question was submitted to the jury whether the guarantying a customer's paper was within the scope of the business of a banking firm. But see Selden *v.* Bank of Commerce, 3 Minn. 166.

[1] Brettel *v.* Williams, 4 Ex. 623, where one of a firm of contractors guarantied that a subcontractor would pay for goods delivered.

[2] Myatts *v.* Bell, 41 Ala. 222, 232; Eliot *v.* Davis, 2 B. & P. 338; Ramsbottom *v.* Lewis, 1 Camp. 279; Owen *v.* Van Uster, 20 L. J. C. P. 61; 10 C. B. 318; Nicholls *v.* Diamond, 9 Ex. 154; First Natl. Bk. *v.* Carpenter, 34 Iowa, 433; Silvers *v.* Foster, 9 Kan. 56; Fowle *v.* Harrington, 1 Cush. 146; Wiggin *v.* Lewis, 12 id. 486; Brown *v.* Broach, 52 Miss. 536; Ferguson *v.* Thacher, 79 Mo. 511; Merchant *v.* Belding, 49 How. Pr. 344; Parker *v.* Jackson, 16 Barb. 33; Stiles *v.* Meyer, 64 Barb. 77; 7 Lans. 190; Hubbard *v.* Matthews, 54 N. Y. 43, 48 (13 Am. Rep. 562); Avery *v.*

§ 350. The same principle applies to using the firm name as security in other ways. Thus, signing it as security upon an appeal bond for others is unauthorized, and the signer alone is bound.[1] Where the firm is prosecuting or defending a suit on its own behalf, one partner can give necessary attachment or appeal bonds in the firm name or procure sureties upon the credit of the firm;[2] but where a firm is acting for other persons, as where attorneys are prosecuting or defending an action for clients, one attorney cannot bind his partners by agreeing to indemnify one who will become surety on an injunction bond,[3] or to indemnify an officer for making an attachment or arrest,[4] or promise to pay a debt in order to get the client out of jail.[5]

It has been held that, where a firm is a member of another firm, a partner can bind it by a guaranty of a debt to be incurred by the latter in the prosecution of its business; as where one of a stage company guaranties that another company of which it is a member will pay tolls.[6]

In Andrews *v.* Congar,[7] it seems to have been held, where partners own a majority of the stock of a corporation, that it is within the scope of the powers of each to guaranty a note made by the corporation to protect its stock, because for the common benefit, although the articles of partnership forbade assuming liabilities outside the business. The report, however, does not show whether they owned the stock as a firm or individually, nor the business of the firm, or of the corporation, or how the note benefited the firm.

§ 351. Real transaction considered.— The form of a note, however, is of the slightest *prima facie* evidence of the true relation of the parties, for the actual debtor may appear as surety, acceptor, indorser, etc., as well as maker. Hence, where the partnership name appears as surety, but is not

Rowell, 59 Wis. 82; Wilson *v.* Brown, 6 Ont. App. 411. And see §§ 421, 694.

[1] Charman *v.* McLane, 1 Oregon 339.

[2] Dow *v.* Smith, 8 Ga. 551; Durant *v.* Rogers, 87 Ill. 508.

[3] White *v.* Davidson, 8 Md. 169.

[4] Marsh *v.* Gould, 2 Pick. 285.

[5] Hasleham *v.* Young, 5 Q. B. 833; Dav. & Mer. 700.

[6] Princeton & Kingston Turnpike Co. *v.* Gulick, 16 N. J. L. 161, 169. See Hodges *v.* Ninth Nat'l B'k, 54 Md. 406.

[7] Supreme Ct. U. S. 1881; 20 Am. Law Reg. N. S. 328; Lawyers' Coop. Book 26, page 90, not reported in the regular series. And see cases cited with this under § 370.

really such, the actual nature of the transaction, and not its apparent character, governs.

Thus if the firm name is indorsed on the note of a third person by one partner apparently as security, but in fact for a debt of or loan to the firm, all the partners are bound.[1]

Thus in Trullinger *v.* Corcoran, 81½ Pa. St. 395, Croft was furnishing goods to defendants' firm, and purchasing the goods from plaintiff, and, by arrangement of all parties, plaintiff furnished the goods directly to the defendants, and were paid by defendants' notes made to Croft's order. These notes were afterwards renewed by Croft's notes made to his own order, on which the defendants' firm name was indorsed by the acting partner, who gave as a reason that he did not wish any more of the firm's paper to be out. This was held sufficient, and that plaintiff was not put upon inquiry as to the *bona fides* of the notes, although the defendants' name appeared as accommodation, yet being in fact so for their own benefit.

So a partner in selling notes payable to the firm can guaranty them,[2] or under the borrowing power may exchange accommodation acceptances.[3]

Where the financial partner of defendants exchanged the firm's note with N., who obtained money upon it from plaintiff, as the partners are liable upon this, since plaintiff had no notice of their credit being so used, they were held liable on another note used to take it up, made by N., on which their name appeared as indorsers.[4] And where a partner who had made a purchase from his firm gave it his note, which the firm indorsed and got discounted, a renewal of the note by such partner indorsing the firm name is not giving the firm name for his private debt, and is in the scope of his power.[5]

[1] Langan *v.* Hewett, 13 Sm. & Mar. (Miss.) 122; Day *v.* McLeod, 18 Up. Can. Q. B. 256; Saltmarsh *v.* Bower, 22 Ala. 221; Bank of Commonwealth *v.* Mudgett, 44 N. Y. 514 (aff. 45 Barb. 663); Faler *v.* Jordan, 44 Miss. 283; Winship *v.* B'k of U. S. 5 Pet. 529, 566; Davis *v.* Blackwell, 5 Ill. App. 32 (*dictum*); Gano *v.* Samuel, 14 Oh 592.

[2] Day *v.* McLeod, 18 Up. Can. Q. B. 256.

[3] § 372.

[4] Steuben Co. Bank *v.* Alburger (N. Y. 1886), 4 N. E. Rep. 341.

[5] Wilson *v.* Richards, 28 Minn. 337.

§ 352. Bona fide holder protected.— A *bona fide* holder or indorsee, that is one for value, in due course of business, before maturity and without notice, can recover against the firm, the scope of whose business includes the issuance of negotiable paper or paper signed with its name by one partner, in fraud of the rights of his copartners. That is to say, the signature is not, like a forgery, wholly void; but being capable of ratification, and by one who is a principal as well as an agent, is voidable only, and the usual rules of mercantile paper apply. That is to say, if the firm's business is such that the making of any notes is in its scope, a *bona fide* buyer can hold the firm, and need not inquire whether the note was issued within the scope of the business or not, or whether it was to pay or secure a separate debt of a partner, or was for the accommodation of a third person, or for a loan to the signing partner, or in any other way in fraud of the rights of copartners. The doctrine is also frequently rested on the principle that when one of two innocent parties must suffer, the loss falls upon the one who has put it in the power of the guilty person to perpetrate the fraud.[1]

But if the scope of the business does not authorize the making of notes by one partner, the paper is as invalid in the hands of an in-

[1] Lewis *v.* Reilly, 1 Q. B. 349; Bush *v.* Crawford, 7 Bankr. Reg. 299; Mauldin *v.* Branch Bk. at Mobile, 2 Ala. 502, 513; Knapp *v.* McBride, 7 id. 19; Rich *v.* Davis, 4 Cal. 22; s. c. 6 id. 141; Beach *v.* State Bank, 2 Ind. 488; Freeman *v.* Ross, 15 Ga. 252; Wright *v.* Brosseau, 73 Ill. 381; Walworth *v.* Henderson, 9 La. Ann. 339; Waldo Bank *v.* Lumbert, 16 Me. 416; Boyd *v.* McCann, 10 Md. 118; Hopkins *v.* Boyd, 11 id. 107; Boardman *v.* Gore, 15 Mass. 331; Connecticut River Bk. *v.* French, 6 Allen, 313; Blodgett *v.* Weed, 119 Mass. 215; Nichols *v.* Sober, 38 Mich. 678; Bloom *v.* Helm, 53 Miss. 21; Murphy *v.* Camden, 18 Mo. 116; Livingston *v.* Roosevelt, 4 Johns. 251; Stall *v.* Catskill Bank, 18 Wend. 466 (aff'g, s. c. as Catskill Bk. *v.* Stall, 15 id. 364); Wells *v.* Evans, 22 id. 324; Lockw. Rev. Cas. 390 (rev. 20 Wend. 251); Austin *v.* Vandermark, 4 Hill, 259; Mechanics' Bank *v.* Foster, 19 Abb. Pr. 47; 44 Barb. 87; 29 How. Pr. 408; First Nat. Bk. *v.* Morgan, 73 N. Y. 593 (aff'd, 6 Hun, 346); Atlantic State Bank *v.* Savery, 82 N. Y. 291 (aff'g, 18 Hun, 36); Cotton *v.* Evans, 1 Dev. & Bat. Eq. 284; Sedgwick *v.* Lewis, 70 Pa. St. 217; Moorehead *v.* Gilmore, 77 id. 118; 18 Am. Rep. 435; Parker *v.* Burgess, 5 R. I. 277; Hawes *v.* Dunton, 1 Bailey (S. Ca.), 146; 19 Am. Dec. 663; Duncan *v.* Clark, 2 Rich. L. 587; Roth *v.* Colvin, 32 Vt. 125.

nocent holder for value as it was in the hands of the original payee. The buyer of a note signed in the name of a non-trading firm buys at his peril.[1]

§ 353. —— **who is a bona fide buyer.**—As already said, the rules of mercantile paper apply to determine who are entitled to the rights of *bona fide* purchaser. Thus a purchaser after maturity is not a *bona fide* buyer in this sense.[2] But if his assignor was a *bona fide* holder, the assignee or indorsee gets the assignor's title, though he himself knew of the fraud or want of authority.[3]

In Grubb *v.* Cottrell, 62 Pa. St. 23, H., a member of two firms, without the knowledge of his copartners in either, drew a draft in the name of H. & G. on a person who accepted it in favor of H., C. & E., and indorsed it in their names and procured a bank to discount it and kept the proceeds. The bank sued the indorsers, H., C. & E., and C. and E. paid the draft and now sue G. for contribution. It was held that the money got by H. from the discount was the money of H., C. & E.; the other parties were accommodation parties for H., C. & E., and though H. intended to defraud them all, he only defrauded H., C. & E., and C. and E. did not get the bank's superior title as innocent purchasers, but only their own old title back again, and could not recover.

A payee's belief, on loaning money, that it was for the private use of the partner, does not prevent his recovery on the note signed in the firm name, if the loan really was for the firm and used for its benefit; an intent to do an unjust act being of no effect unless the fact correspond with the intention.[4]

Where a partner states to the lender that he desires the money in order to retire the notes of certain customers without his copartners' knowledge, this is notice that he is giving the firm name in accommodation by making his copartners believe that the notes are paid, and the lender cannot recover on the partnership note from them.[5] And where C., of the firm of C. & U., made an unauthorized note in the firm name to V., who used it to take up a note made by C., on which he (V.) was an indorser, the bank which held the

[1] § 345.

[2] Rich *v.* Davis, 4 Cal. 22; Freeman *v.* Ross, 15 Ga. 252.

[3] Boyd *v.* McCann, 10 Md. 118.

[4] Hamilton *v.* Summers, 12 B. Mon. 11; 54 Am. Dec. 509.

[5] McConnell *v.* Wilkins, 13 Ont. App. 438.

former note is affected with notice and U. is not liable on the note.[1]

Knowledge of the indorsee that the note made in the firm name had been given to pay for land is not sufficient notice that it was not authorized, for partners often buy land.[2]

The fact that plaintiff knew that the guilty partner had previously given firm notes for his private purposes is admissible, as tending to show plaintiff's knowledge that the note in suit was unauthorized.[3] But the mere fact of a lender having had previous dealings with such partner on his individual account, but in his own name, carries no notice of an intent to appropriate the proceeds of a partnership note discounted by the lender.[4]

In Clark *v.* Johnson, 90 Pa. St. 442, O., the acting partner of J. & O., dealers in drugs, paints, etc., bought of plaintiff, who lived in another city, four barrels of spirits at different times in the name of the firm. At the time of buying one of the barrels he ordered it sent to Y. & Co., a firm in which he was a partner but J. was not, and it never was entered on J. & O.'s books; the court said that, in view of a frequent custom of dealers in merchandise to have goods sent to a customer direct from the person from whom they themselves buy, the fact of such order creates no presumption to put a prudent vendor on inquiry, and J. is liable with O. for the purchase.

§ 354. —— **negligent buyer of paper.**—In some cases it has been held that, although the holder did not have actual notice, but by the exercise of proper diligence would have had notice, or where the facts would have put him on inquiry but for his culpable negligence, he cannot claim to be a *bona fide* buyer.[5]

But on this question treatises on bills and notes should be examined, and partnership paper examined by the light of the general law of mercantile paper, the rules of which have been of late years, in most jurisdictions, changed in favor of its free circulation and the necessities of commerce,

1 Union Bank *v.* Underhill, 21 Hun, 178.

2 Dudley *v.* Littlefield, 21 Me. 418.

3 Eastman *v.* Cooper, 15 Pick. 276; 26 Am. Dec. 600.

4 Hayward *v.* French, 12 Gray, 453.

5 N. Y. Firemen's Ins. Co. *v.* Bennett, 5 Conn. 574, 580 (13 Am. Dec. 109); Cotton *v.* Evans, 1 Dev. & Bat. Eq. 284.

so as to exclude evidence of slight circumstances putting a person upon inquiry to affect his title. Thus, mere circumstances which might have aroused a prudent buyer's suspicion are not sufficient to defeat the buyer's claim upon the firm.[1]

In Roth *v.* Colvin, 32 Vt. 125, the purchaser of notes signed by a firm knew that the firm was in New York and were wharfingers, needing but little money, and that the partner living in Vermont was not an active partner, and that the payee was insolvent, and the notes were for a large amount and for even numbers. A finding that the purchaser had not exercised due diligence to ascertain whether the firm and the Vermont partner had authorized the notes was held proper.

In Royal Canadian Bank *v.* Wilson, 24 Up. Can. C. P. 362, the firm's acceptance was in the handwriting of the partner who drew the bill, and the firm was located at a distant place, but the draft, being dated on the same day, shows that the buyer knew the acceptance was written by the drawer.

§ 355. **—— broker is not agent of buyer.**— A note broker in whose hands the note was placed by the payee for sale is agent of the seller and not of the buyer, though the buyer has had previous dealings with him; hence, although purchasing direct from the payee would have shown that the defendants were sureties only, their firm name being indorsed after that of the payee's by a partner common to both firms, persons buying of note brokers need not inquire whom they represented; it would hamper commerce.[2]

§ 356. **—— usury.**— That the purchaser from a broker of a note signed by the firm name buys it at a usurious rate of discount does not afford a reasonable cause to suspect fraud any more than if the partner had sold it,[3] nor

[1] Freeman's Nat'l Bk. *v.* Savery, 127 Mass. 75; Stimson *v.* Whitney, 130 id. 591, 595; Nichols *v.* Sober, 38 Mich. 678; Walker *v.* Kee, 14 S. Ca. 142; Cotton *v.* Evans, 1 Dev. & Bat. Eq. 284.

[2] Moorehead *v.* Gilmore, 77 Pa. St. 118; 18 Am. Rep. 435; Emerson *v.* Harmon, 14 Me. 271; Freeman's Bank *v.* Savery, 127 Mass. 75; Redlon *v.* Churchill, 73 Me. 146; 40 Am. Rep. 345; 14 Centr. L. J. 412; Parker *v.* Burgess, 5 R. I. 277.

[3] Connecticut River B'k *v.* French, 6 Allen, 313; Sprague *v.* Zunts, 18 Ala. 382.

that the note calls for usurious interest[1] and is payable on demand.[2]

§ 357. —— **renewals.**— Where a firm note, signed as accommodation by a partner, is in the hands of an innocent buyer and enforcible by him, renewals of the same with accrued interest, made by the same partner at a time when such holder had notice of the defects in the note, were held also enforcible, for if not, his title in the original would be made valueless.[3]

In Mix *v.* Muzzy, 28 Conn. 186, plaintiff signed an accommodation note, payable to the firm of M. & H., and delivered it to M., supposing it was to be used for the firm's benefit, and M. made the firm's note to him in exchange, and gave his note to one G. in payment of a private debt, G. knowing all the facts. Plaintiff, learning the fraudulent use of his note, took it up when due by giving another to G. direct, and surrendered to M. the note of M. & H., receiving back another note made by M. in the name of M. & H. Plaintiff paid his note to G. when it came due and sued M. & H. Held, 1st, G. could not have sued the firm or plaintiff on the first note; it was a fraud on the firm. 2d. Plaintiff, knowing all the facts when he gave the second note and took a new one, cannot recover on the latter. 3d. As he knew he was not bound to pay G. on the original note, his doing so gave him no right against the firm as for money paid to its use.

§ 358. **Notice from form of the paper.**— The paper itself may convey notice that the firm are merely sureties upon it, either by so stating, or by the position of the name upon the paper, as where it is not in the chain of title, which is as distinct a notice that their liability is secondary as if the word sureties had been appended. In any of these cases it is manifest that no one could be an innocent buyer. Thus the word "sureties" opposite the name of the firm is notice to every buyer of the paper that the signature will not bind the firm unless authorized by all the partners.[4]

So in National Security Bank *v.* McDonald, 127 Mass. 82, where K., on procuring plaintiff to discount for him a note made by G.,

[1] Hurd *v.* Haggerty, 24 Ill. 171; Blodgett *v.* Weed, 119 Mass. 215.

[2] Blodgett *v.* Weed, *supra.*

[3] Hopkins *v.* Boyd, 11 Md. 107.

[4] Foot *v.* Sabin, 19 Johns. 154 (10 Am. Dec. 208); Rollins *v.* Stevens, 31 Me. 454; Marsh *v.* Thompson Nat'l Bk. 2 Ill. App. 217.

gives plaintiff as collateral a note made by the defendant partnership, payable to K., on the back of which K. had signed a memorandum, "this note is held by me for a note signed by G.," this memorandum was held to carry notice to plaintiff that the partnership note was made as security only, and that the consent of all the partners, or that it was given in the course of the firm's business, is necessary.

That an indorsement of the firm's name is not in the chain of title carries the presumption that it is signed for accommodation or as security only.[1]

Thus in Wilson *v.* Williams,[2] D. purchased goods, and gave in payment to the seller his note, on which W., of W. & Co., indorsed the name of W. & Co. This carries notice to the payee that W. & Co.'s signature is for accommodation or security. That the payee parted with his goods on the faith of it is, of course, immaterial, for the liability of the other partners of W. & Co. is a question not of good faith, but of contract.

So in National Bank of Commonwealth *v.* Law,[3] a partner made a note in his individual name payable to a third person, and indorsed the name of the firm above the payee's indorsement. This carries notice that the indorsement is for accommodation, and puts the payee on inquiry.

So where a borrower or purchaser gives a draft on a firm which is accepted by one partner, the lender or seller has notice that the firm name is signed as surety.[4]

Hence, also, if paper on which the name of a firm is indorsed is received from the maker himself, or from a broker known by the buyer to be selling it for the maker, this is notice that the firm's name is signed as accommodation.[5]

In Mecutchen *v.* Kennady, 27 N. J. L. 230, a note in the firm

[1] Bowman *v.* Cecil Bank, 3 Grant's Cas. (Pa.) 33; Harris *v.* McLeod, 14 Up. Can. Q. B. 164; St. Nicholas Bank *v.* Savery, 13 Jones & Sp. (45 N. Y. Super.) 97; per Walworth, C., in Stall *v.* Catskill Bank, 18 Wend. 466, 478; Chenowith *v.* Chamberlin, 6 B. Mon. 60 (43 Am. Dec. 145). And a seal has been held to to import notice of want of authority. See § 423.

[2] 14 Wend. 146 (28 Am. Dec. 518).

[3] 127 Mass. 72; S. P. Moynahan *v.* Hanaford, 42 Mich. 329.

[4] Joyce *v.* Williams, 14 Wend. 141, explained in Stall *v.* Catskill Bank, 18 Wend. 466; Bloom *v.* Helm, 53 Miss. 21. It must be remembered that a partner can bind the firm by accepting a draft on it in his own name. § 441.

[5] Hendrie *v.* Berkowitz, 37 Cal. 113; Tevis *v.* Tevis, 24 Mo. 535 (*dictum*).

name payable to a third person and indorsed by him was used by a partner to pay his own debt. This was presumed in fraud of the firm. Had the creditor received it from the payee this might have been otherwise; but in the hands of the partner, even if he got it from the payee, the presumption is that the firm's name is for accommodation or the property of the firm. But *contra*, if the maker is one of the partners, and the note payable to the firm is indorsed with its name, for the note is then presumably the property of the firm, and as any partner has the power to dispose of property of the firm when not palpably so doing for his own purposes.[1]

In Bank of Commerce *v.* Selden, 3 Minn. 155, a check was drawn by a member of a banking firm on the firm, which he accepted in the firm name, to get money from a third person who claimed that the loan was for the firm and not for the partner. As a check purports to be on the drawer's own deposit, it is presumably a loan to the partner, and is not like a note made by a partner to the order of the firm on which he indorses the firm's name.

But where the unauthorized indorsement of the firm name is in the chain of title, a purchaser of the paper from a person other than one of the parties to it, prior to the unauthorized indorsement, has no notice from the paper itself. Thus, in Redlon *v* Churchill,[2] a partner made a note in his own name to his own order, then indorsed his own name, and then indorsed his firm's name after his own, and delivered it to a broker to sell, from whom plaintiff bought it. Here the firm's name being in the chain of title, the form of the note gives no notice, and the broker may be supposed by the buyer to be, if not the owner, the agent of the last indorser, and the fact that the maker was a member of the firm of last indorsers affords no conclusive presumption.

In Moorehead *v.* Gilmore,[3] A. made a note to W. & Co., who indorsed it, and then the name of M., A. & Co. was indorsed by A., and the paper was placed in the hands of a third person, who sold it to plaintiff. The fact that the name of A. occurred as maker and as a member of the second indorser firm, and in the same hand-

1 Manning *v.* Hays, 6 Md. 5; Tevis *v.* Tevis, *supra;* Wait *v.* Thayer, 118 Mass. 473, where the maker also filled up blanks in the plaintiff's presence, but it was left to a jury to say whether there was notice.

2 73 Me. 146 (40 Am. Rep. 345; 14 Centr. Law Jour. 412).

3 77 Pa. St. 118, 123 (18 Am. Rep. 435).

writing, was held not sufficient to put the buyer on notice that the firm name was misused, or that the partner was acting in bad faith, for the power of a partner in a trading firm to raise money for the firm extends to indorsing as well as making notes.

§ 359. —— member of several firms.— A member of several firms may draw and indorse the same paper, as the representative of each, without affecting a holder with suspicion that his action in behalf of one firm is in bad faith towards another.

In Freeman's Natl. Bk. *v.* Savery, 127 Mass. 75, the note of an individual partner payable to his firm, with their names indorsed thereon, was indorsed after their names by such partner with the name of the defendant firm, in which also he was a member, in fraud of their rights. The fact that the holder purchased the note from a broker or from another member of the payee firm does not put the holder on notice of the fraud on the defendant firm, for he may fairly assume that the person selling the paper holds it individually by blank indorsement from the last indorsing firm.[1]

In Walker *v.* Kee, 14 S. Ca. 142, Kee had made notes payable to the firm of S. & C., on which C. indorsed the firm name of the payees, and then, as member of another firm of C., A. & Co., transferred them to plaintiff as security for advances to C., A. & Co. Plaintiff's title is good against assignees for the creditors of S. & C., for he could assume that S. & C. transferred the notes to C., A. & Co.

§ 360. —— illustrations.— In Chemung Canal Bank *v.* Bradner, 44 N. Y. 680, Carroll, of Bradner & Carroll, a firm, dissolved without notice of dissolution, of which he had been the active partner, signed its name as drawers to a draft, of which the drawee, payee and amount were left blank, and delivered it to Lowrey, of Lowrey, Strong & Co., for the accommodation of the latter firm. Lowrey took it to the plaintiff for discount, and in plaintiff's presence filled in the names of Lowrey, Strong & Co. as drawees, himself as payee, and inserted the amount, and plaintiff discounted it, and Lowrey, Strong & Co. afterwards accepted the draft and received

[1] See, also, Stimson *v.* Whitney, 130 Mass. 591; Ihmsen *v.* Negley, 25 Pa. St. 297; Miller *v.* Consolidation Bank, 48 Pa. St. 514; Babcock *v.* Stone, 3 McLean, 172, where he drew a bill in the name of one firm on the other, payable to himself, and accepted it in the drawee's name.

the avails of it, and the drawers, Bradner & Carroll, were held liable. For had Bradner signed the drawers' name, and Carroll given it to Lowrey, certainly Bradner & Carroll, the drawers, would have been liable, and the bank had therefore no reason to suppose that Bradner & Carroll did not authorize it; and there is nothing in the fact of Lowrey's possession to show that it was made for his or his firm's accommodation; for the natural inference was that the drawers' desired to transfer to him their funds in the hands of Lowrey, Strong & Co., or desired him to raise for them the amount of the draft.[1]

In Darlington *v.* Garrett, 14 Ill. App. 238, a draft in the firm name on a debtor of the firm, payable to one partner, was held binding; because each partner has power to collect debts, although the partner absconded with the money, and although the draft was for more than the drawee owed, and was therefore *pro tanto* a borrowing, and the debtor could recover of the firm the overpayment. And that the fact that the draft was drawn away from the home office in another city has nothing suspicious in it, to put the drawee on inquiry. The court give the additional reason for the shape of the paper not being notice, namely, that the payee partner might be borrowing to repay himself an advance to the firm. But is not this latter reason objectionable, for it assumes that a person may pay a partner for the purpose of enabling him to appropriate the amount, and convert joint into separate property, independent of the consent of the copartners?[2]

In Adams *v.* Ruggles, 17 Kan. 237, a note in the firm name, made by one partner, payable to his own order, and indorsed by him to the plaintiff, was held presumptively valid against the firm, and

[1] See, also, Tutt *v.* Addams, 24 Mo. 186, where D. & T. S. McDonnell a firm, paid a debt due by them to plaintiff, by a draft drawn on McDonnell & Addams, which was accepted in their names by T. S. McDonnell, who was a partner in both firms. This was held not to be notice to the creditor of an improper use of the acceptors' names. A note made by a partner individually to his own order, on which he indorsed the firm's name, stating it to be for the firm's benefit, and discounted by plaintiff, who had discounted previous similar notes, which had been paid, was held good in his hands without proof of assent, in Bank of Commonwealth *v.* Mudgett, 44 N. Y. 514 (affg. 45 Barb. 663). But a similar note was held bad, in Davis *v.* Blackwell, 5 Ill. App. 32.

[2] See on this latter point Royal Canadian Bank *v.* Wilson, 24 Up. Can. C. P. 362; *Ex parte* Darlington Banking Co. 4 DeG. J. & S. 581.

collectible out of their insolvent estate, in the absence of evidence rebutting the presumption; but the creditor of an individual partner, recovering from him in payment a note of the firm, payable to the debtor's order, is of course not a *bona fide* holder as against the firm.[1]

From the fact that a note is signed as maker by one partner, who misappropriated the proceeds, and also by the firm name after his, as co-makers, no inference can be drawn that the latter are sureties.[2] But this fact, on a note reading "I promise," was regarded a circumstance to be considered in connection with others to ascertain if the plaintiff should have taken notice.[3]

§ 361. Burden of proof; presumed given for firm.— Assuming the firm to be one in which each partner has the power to use the joint name on mercantile paper for the purposes of the firm, the firm name on such paper is presumptively placed there by authority; if as makers, it is presumptive evidence of a joint debt; if as indorsers in the chain of title, it is presumptive evidence of a transfer by the firm, or by one partner, for partnership purposes, or with authority. The fact of good faith between the partners, or that the name was used as a joint undertaking in the regular course of business, is presumed; that is, the note is taken to be what it purports to be, and the burden of proof is on the defendants, the partners, to show the contrary; as, for example, if the credit or name of the firm was used by the signing partner to pay his own debt, or as accommodation or security for others, or to obtain a loan for himself, or is for a purchase or a purpose outside the scope of the business, this is matter of defense, and the burden, therefore, up to this point, is upon the partners resisting payment to show this state of facts and the payee's knowledge of it.[4]

[1] Gale *v.* Miller, 54 N. Y. 536.

[2] Sylverstein *v.* Atkinson, 45 Miss. 81.

[3] In Sherwood *v.* Snow, 46 Iowa, 481 (26 Am. Rep. 155).

[4] Le Roy *v.* Johnson, 2 Pet. 186, 197; Jones *v.* Rives, 3 Ala. 11; Knapp *v.* McBride, 7 id. 19, 27; Jemison *v.* Dearing, 41 id. 283; Ensminger *v.* Marvin, 5 Blackf. 210; Miller *v.* Hines, 15 Ga. 197, 200; Gregg *v.* Fisher, 3 Ill. App. 261; McMullan *v.* Mackenzie, 2 G. Greene (Iowa), 368; Adams *v.* Ruggles, 27 Kan. 237; Deitz *v.* Regnier, 17 id. 94; Lindh *v.* Crowley, 29 id. 756; Rochester *v.* Trotter, 1 A. K.

§ 362. —— **shifting of this presumption.**— When the firm is sued upon their signature placed upon an instrument by one partner in fraud of the firm, whether it be for his separate debt or for the accommodation of another, or for a purpose outside of the scope of the business, and the other partners make the issue of want of authority, the instrument, under the foregoing authorities, not being presumed to have been issued for a separate debt, or as security, or for other unauthorized purpose, but being taken *prima facie* to represent a partnership transaction, the partners first rebut this presumption by showing the fact that it was not on a partnership consideration. Frequently the paper will speak for itself, as already shown; and so also if given for an individual debt the creditor cannot fail to know the want of authority; or if the partnership is not a commercial or trading one, this fact is notice that a note not assented to by all is unauthorized. This proof, then, having been given, and the presumption in favor of the regularity of the instrument rebutted, it devolves upon the holder, if he is not an innocent buyer before maturity, without notice, to prove that the partners authorized the issue of the paper or ratified it subsequently.

Mar. (Ky.) 54; McGowan *v.* Bank of Ky. 5 Litt. 271; Magill *v.* Merrie, 5 B. Mon. 168; Hamilton *v.* Summers, 12 id. 11 (54 Am. Dec. 509); Walworth *v.* Henderson, 9 La. Ann. 339; Waldo Bank *v.* Greely, 16 Me. 419; Barrett *v.* Swann, 17 id. 180; Davenport *v.* Davis, 22 id. 24; Thurston *v.* Lloyd, 4 Md. 283; Manning *v.* Hays, 6 id. 5; Porter *v.* White, 39 id. 613; Manufacturers', etc. Bank *v.* Winship, 5 Pick. 11; Littell *v.* Fitch, 11 Mich. 525; Carrier *v.* Cameron, 31 id. 373 (18 Am. Rep. 192); Robinson *v.* Aldridge, 34 Miss. 352; Laler *v.* Jordan, 44 id. 283; Sylverstein *v.* Atkinson, 45 id. 81; Hickman *v.* Kunkle, 27 Mo. 401 (overruled on other points in Deardorf *v.* Thacher, 78 id. 128); Davis *v.* Cook, 14 Nev. 265; Drake *v.* Elwyn, 1 Caines, 184; Doty *v.* Bates, 11 Johns. 544; Vallett *v.* Parker, 6 Wend. 615; Whitaker *v.* Brown, 16 id. 505; Farmers', etc. Bank *v.* Butchers', etc. B'k, 16 N. Y. 125, 135; First Nat'l B'k *v.* Morgan, 73 N. Y. 593 (aff. 6 Hun, 346); Nat'l Union B'k *v.* Landon, 66 Barb. 189; Cotton *v.* Evans, 1 Dev. & Bat. (N. Ca.) Eq. 284; Chaffin *v.* Chaffin, 2 id. 255; Foster *v.* Andrews, 2 Pa. 160; Hogg *v.* Orgill, 34 Pa. St. 344; McKinney *v.* Bradbury, Dallam (Tex.), 441; Crozier *v.* Kirker, 4 Tex. 252 (51 Am. Dec. 724); Powell *v.* Messer, 18 id. 401; City of Glasgow Bank *v.* Murdock, 11 Up. Can. C. P. 138; Stewart *v.* Parker, 18 New Brunswick, 223.

The rule imposing this burden upon the holder is nearly universal.[1] Many of the earlier American decisions an-

[1] Leverson *v.* Lane, 13 C. B. N. S. 278; *Re* Riches, 5 N. R. 287; Rolston *v.* Click, 1 Stew. 526; Mauldiu *v.* Branch B'k at Mobile, 2 Ala. 502, 513; Hibbler *v.* De Forest, 6 id. 92; Scott *v.* Dansby, 12 id. 714; Tyree *v.* Lyon, 67 id. 1; Guice *v.* Thornton, 76 id. 466; Hendrie *v.* Berkowitz, 37 Cal. 113; N. Y. Firemen's Ins. Co. *v.* Bennett, 5 Conn. 574, 580 (13 Am. Dec. 109); Miller *v.* Hines, 15 Ga. 197, 200; Bryan *v.* Tooke, 60 id. 437; Lucas *v.* Baldwin, 97 Ind. 471; Chenowith *v.* Chamberlin, 6 B. Mon. 60; Mech. & Traders' Ins. Co. *v.* Richardson, 33 La. Ann. 1308; 39 Am. Rep. 290; Mutual Nat'l Bank *v.* Richardson, id. 1312; Darling *v.* March, 22 Me. 184; Chazournes *v.* Edwards, 3 Pick. 5; Eastman *v.* Cooper, 15 Pick. 276 (25 Am. Dec. 600); Sweetser *v.* French, 2 Cush. 309 (48 Am. Dec. 666); National Security B'k *v.* McDonald, 127 Mass. 82; Heffron *v.* Hanaford, 40 Mich. 305; Selden *v.* Bank of Commerce, 3 Minn. 166; Osborne *v.* Stone, 30 Minn. 25; Robinson *v.* Aldridge, 34 Miss. 562; Deardorf *v.* Thacher, 78 Mo. 128 (47 Am. Rep. 95); Davenport *v.* Runlett, 3 N. H. 386; Mecutchen *v.* Kennady, 27 N. J. L. 230; Livingston *v.* Hastie, 2 Caines, 246; Dob *v.* Halsey, 16 Johns. 34, 39 (8 Am. Dec. 293); Foot *v.* Sabin, 19 id. 154 (10 Am. Dec. 208); Schermerhorn *v.* Schermerhorn, 1 Wend. 119; Laverty *v.* Burr, 1 id. 529; Williams *v.* Walbridge, 3 id. 415; Boyd *v.* Plumb, 7 id. 309; Gansevoort *v.* Williams, 14 id. 133; Wilson *v.* Williams, 14 id. 146 (28 Am. Dec. 518); Butler *v.* Stocking, 8 N. Y. 408; Rust *v.* Hauselt, 9 Jones & Sp. 467 (aff'd 76 N. Y. 614); St. Nicholas B'k *v.* Savery, 13 Jones & Sp. 97; Weed *v.* Richardson, 2 Dev. & Bat. L. 535; Himelright *v.* Johnson, 40 Oh. St. 40; Porter *v.* Gunnison, 2 Grant's Cas. (Pa.) 297; Bowman *v.* Cecil Bank, 3 id. 33; Bank of Tennessee *v.* Saffarrans, 3 Humph. 597; Powell *v.* Messer, 18 Tex. 401; Goode *v.* McCartney, 10 id. 193; Young *v.* Read, 25 Tex. Sup. 113; Huntington *v.* Lyman, 1 D. Chip. (Vt.) 438 (12 Am. Dec. 716); Waller *v.* Keyes, 6 Vt. 257; Tompkins *v.* Woodyard, 5 W. Va. 216; Royal Canadian Bank *v.* Wilson, 24 Up. Can. C. P. 362 (but see Henderson *v.* Carveth, 16 Up. Can. Q. B. 324). *Contra*, Flemmiug *v.* Prescott, 3 Rich. (S. Ca.) L. 307 (45 Am. Dec. 766), holding the contrary rule to be an obstacle to commerce; and in First Nat'l B'k *v.* Carpenter, 34 Iowa, 433; s. c. 41 id. 518, holding that a banking firm's guaranty is presumably by authority. Fuller *v.* Scott. 8 Kan. 25, where an indorsement of a firm name not in the chain of title, and therefore as guarantors, was said to be presumed to have been made in the firm's business, but this was not necessary to the decision, for there was evidence that it was in fact in the business, and the other partner's answer was of want of consideration for the indorsement and not want of authority. In Chazournes *v.* Edwards, 3 Pick. 5, it was held that accommodation indorsers on a note made by one partner in the name of the firm for his separate debt, and therefore in fraud of the copartners, are presumed to have intended to indorse for the firm and not for the guilty partuer, and the burden of proof is on the creditor to show that

nounce it as an American rule, and that the English rule is otherwise. This notion as to the English rule is erroneous. It was founded on the supposed authority of Ridley *v.* Taylor, 13 East, 175, and that case has consequently been again and again denied in this country. The English rule, however, is now settled to be the same as ours.

The burden is also on the plaintiff to show that he is a *bona fide* holder for value.[1]

§ 363. **Ratification.**— Precedent authority or subsequent ratification need not be proved by express words, or direct and positive proof, but may be sustained by circumstantial evidence; thus, it may be inferred from the common course of business, previous dealings between the parties, or their acts or omissions after knowledge is brought home to them.

The rule against using the firm name in accommodation or for other unauthorized purposes is not to be nullified by presuming assent on slight and inconclusive circumstances.[2] But entering the transaction on the books, charging it to that partner, or crediting the third person with goods sold by the partner, are sufficient; the court in this case saying that slight evidence of assent is sufficient.[3]

In Howell *v.* Sewing Machine Co. 12 Neb. 177, the fact that a new partner said he had no loose money about him and would like to give new notes for the old ones was held not to be assent, the court saying that mere willingness to lend credit is not authority.

A written ratification by one partner of a purchase by another outside the scope of the business, which writing shows that the partner thought the purchase was to be paid for by the notes of all the partners, shows that he thought it was to bind all or none, and, therefore, does not render him individually liable, all not being bound.[4]

they knew the note was made for a separate debt, and were therefore indorsing a note inherently bad, or he cannot recover from them. See Williams *v.* Walbridge, 3 Wend. 415.

[1] Heath *v.* Sansom, 2 B. & Ad. 291; Hogg *v.* Skeen, 18 C. B. N. S. 426; Wright *v.* Brosseau, 73 Ill. 381; Munroe *v.* Cooper, 5 Pick. 412; Bank of St. Albans *v.* Gilliland, 23 Wend. 311 (35 Am. Dec. 566); Clark *v.* Dearborn, 6 Duer, 309.

[2] Wilson *v.* Williams, 14 Wend. 146; 28 Am. Dec. 518; Gray *v.* Ward, 18 Ill. 32; Sutton *v.* Irwine, 12 S. & R. 13.

[3] Warder *v.* Newdigate, 11 B. Mon. 174 (52 Am. Dec. 567).

[4] Roberts' Appeal, 92 Pa. St. 407.

§ 364. —— **by habit or usage.**—A habit of the partners to exercise such authority with the knowledge of all without dissent by them, or interchanges of partnership names with other firms, so frequent as to imply a knowledge of the other partners, or a practice of paying private debts with joint funds, known to all, or a habit of indorsing for the same party with the copartners' knowledge, will be sufficient evidence of authority.[1] So the fact that the other partner had done the same on other occasions with the knowledge of this partner tends to prove mutual authority.[2]

§ 365. —— **by acknowledgment.**—A statement of the copartner to others that he had the note to pay and would pay it, and had paid a similar note before, and a promise to pay, is evidence of ratification.[3] So of a statement on a prior occasion that the use of the firm name was all right, and, after failure of the accommodated party, stated that he did not know the extent of his liability on account of such party.[4] So a promise to pay, inducing the payee to forbear suit,[5] or a promise to see it paid in consideration that the holder would lend the note to the innocent partner to try to collect, thus suspending the holder's control of the note.[6]

But a letter regretting that the firm would lose is not a ratification or proof of authority;[7] nor is a promise to pay, if he could get the books and accounts from the guilty party, sufficient evidence of ratification;[8] but accepting an indemnity against the guaranty was held to ratify it.[9]

[1] Duncan *v.* Lowndes, 3 Camp. 478; Pahlman *v.* Taylor, 75 Ill. 629; Ditts *v.* Lonsdale, 49 Ind. 521; First Nat'l Bk. *v.* Breese, 39 Iowa, 640; Bank of Ky. *v.* Brooking, 2 Littell, 41; Darling *v.* March, 22 Me. 184; Porter *v.* White, 39 Md. 613; Hayner *v.* Crow, 79 Mo. 293; Holt *v.* Simmons, 16 Mo. App. 97; Bank of Rochester *v.* Bowen, 7 Wend. 158; Gansevoort *v.* Williams, 14 Wend. 133; Steuben Co. Bank *v.* Alburger (N. Y. 1886), 4 N. E. Rep. 341; Bank of Tennessee *v.* Saffarans, 3 Humph. 597; Scott *v.* Bandy, 2 Head, 197; Pooley *v.* Whitmore, 10 Heisk. 629; 27 Am. Rep. 733; Workman *v.* McKinstry, 21 Up. Can. Q. B. 623.

[2] Levy *v.* Pyne, Car. & Marsh. 453; Workman *v.* McKinstry, 21 Up. Can. Q. B. 623.

[3] Jones *v.* Booth, 10 Vt. 268.

[4] Butler *v.* Stocking, 8 N. Y. 408.

[5] Wheeler *v.* Rice, 8 Cush. 205; Rice *v.* Barry, 2 Cranch, C. C. 447.

[6] Flagg *v.* Upham, 10 Pick. 147.

[7] Berryhill *v.* McKee, 1 Humph. 31.

[8] Burleigh *v.* Parton, 21 Tex. 585.

[9] Clark *v.* Hyman, 55 Iowa, 14.

A guaranty signed in the firm name by one partner is not void as to the others, under the statute of frauds, if authority is shown;[1] but a subsequent verbal promise by the innocent partner was held void under the statute of frauds.[2]

A new firm with an incoming partner is not liable upon an oral promise to pay the debts of the old firm.[3] The question is, however, whether the old debts have been assumed by the new firm on a new consideration, so as to become their debts, and such assumption may be oral, and the release of an outgoing partner may be the consideration.[4]

In Stearns *v.* Burnham, 4 Me. 84, one partner made a note in the firm name for his separate debt, after dissolution of the firm, known to the creditor. A suit on the note against both was compromised, the innocent partner giving his note for half the debt and subsequently paying part on the new note; he was held not liable for the balance of the new note.

§ 366. —— by acting under the unauthorized act.— Acting under or taking any advantage of the fraudulent signature is a ratification.

Thus, where a firm note was given by one partner for the unauthorized purchase of land out of the scope of the business, the title of which is taken in the name of both, the other partner joining in a contract to convey it to others, though stating that he

[1] Duncan *v.* Lowndes, 3 Camp. 478; and see §§ 363, 364; Moran *v.* Prather, 23 Wall. 492; and see Princeton & Kingston Tp. Co. *v.* Gulick, 16 N. J. L. 161; Cockroft *v.* Claflin, 64 Barb. 464 (affd. in 53 N. Y. 618); Butler *v.* Stocking, 8 N. Y. 408.

[2] In Taylor *v.* Hillyer, 3 Blackf. 433 (26 Am. Dec. 430), and Wagnon *v.* Clay, 1 A. K. Mar. (Ky.) 257. *Contra*, McGill *v.* Dowdle, 33 Ark. 311; Marsh *v.* Gold, 2 Pick. 285; Jones *v.* Booth, 10 Vt. 268; and see Greenleaf *v.* Burbank, 13 N. H. 454. An oral promise by one partner to pay a debt of his copartner, in consideration of the creditor's forbearance to levy upon the firm's assets, was held valid in Rice *v.* Barry, 2 Cranch, C. C. 447. And if the contract of purchase of goods by a firm be that the price may be credited upon the debt of one partner, it is valid, though oral, of course, as an original contract designating the mode of payment, Rhodes *v.* McKean, 55 Iowa, 547. If an act in the name of the firm by one partner outside the scope of the business is adopted by the firm, or they receive the benefit of it, their oral ratification or promise is good, Succession of Arick, 22 La. Ann. 501.

[3] Paradise *v.* Gerson, 32 La. Ann. 532. *Contra*, Wilson *v.* Dosier, 58 Ga. 602.

[4] See § 505.

had no interest and only did so for his partner's benefit, ratifies the purchase and notes, for he has alienated the property.[1]

So where the innocent partner borrows the note from the holder in order to pursue the guilty partner, who had moved to another state, and collect it, and guarantying its payment in consideration thereof.[2]

So where one partner bought a store and stock in another town, though taking the title in his own name, the other partners proclaiming by their acts that they had opened a store in that place is evidence of ratification or of prior authority.[3]

§ 367. By silence.— Mere silence or failure to make prompt denial of the copartner when informed of the existence of the unauthorized note, without any element of estoppel in it, is not of itself evidence of ratification.[4]

Yet failure to repudiate or deny in a reasonable time has been held evidence of ratification.[5]

§ 368. Prior authority deviated from.— Where the plaintiff relies upon an express authority given by the firm to one partner, the contract sued upon must be within the terms of the powers granted to the same extent that obtains in other cases of agency. Hence, express or implied authority to make accommodation indorsements is not authority to sign as co-maker or surety.[6] Nor does an agreement of a firm of agents to sell, to "guaranty all notes good when taken," give a partner authority to sign the firm's name as co-makers with the principal debtor.[7] Nor does authority to sign a note authorize the individual names of the partners to be

[1] Dudley *v.* Littlefield, 21 Me. 418; Porter *v.* Curry, 50 Ill. 319.

[2] Flagg *v.* Upham, 10 Pick. 147; for other assumptions of the debt see Cockroft *v.* Claflin, 64 Barb. 464 (aff'd, without opinion, in 53 N. Y. 618); *Re* Dunkle, 7 Bankr. Reg. 107.

[3] Davis *v.* Cook, 14 Nev. 265.

[4] Tyree *v.* Lyon, 67 Ala. 1; Hendrie *v.* Berkowitz, 37 Cal. 113; Marsh *v.* Thompson Nat'l Bk. 2 Ill. App. 217; Hayes *v.* Baxter, 65 Barb. 181. *Contra*, if the firm was benefited, silence is a ratification, Stewart *v.* Caldwell, 9 La. Ann. 419.

[5] Reubin *v.* Cohen, 48 Cal. 545; Roberts *v.* Barrow, 53 Ga. 314; Sweetser *v.* French, 2 Cush. 309, 315 (48 Am. Dec. 666); Foster *v.* Andrews, 2 Pa. 160; Woodward *v.* Winship, 12 Pick. 430.

[6] Early *v.* Reed, 6 Hill, 12; McGuire *v.* Blanton, 5 Humph. 361 (the statute of limitations being different in this state as to indorsers and co-makers).

[7] Brayley *v.* Hedges, 52 Iowa, 623, 625.

so placed as to render their apparent legal obligations *inter se* hostile, such as signing the name of one as maker and one as surety.[1]

So, also, written authority given to one partner to sign the name of the firm or the separate name of one partner is not authority to pay a bond given in his separate name for a joint debt.[2]

So authority to indorse to the extent of $150 is not authority to indorse a note for $600 as security for $150.[3]

A power to receive a deposit of money and paying interest on it does not include a power to bind the firm by receiving a deposit of bonds, because money, unlike bonds, would be a benefit to the firm.[4]

So a note made by all the partners for one purpose is not a debt of the firm when applied to another purpose.[5] And where both the partners joined in making a note payable to a bank, to be discounted, in order to pay partnership debts, and one of the partners delivered it to his separate creditor without authority, and the bank refused to discount the note or allow the creditor to sue in its name, the creditor cannot recover from the partners. Both partners must assent to the issuing as well as signing, to constitute it a note.[6]

§ 369. —— declarations.— The declarations of the guilty partner at the time of giving the firm's note for the debt of another firm, that the former had asssumed the debts of the latter, or had received a consideration, are not admissible against his copartners.[7]

Nor is a prior agreement to guaranty, signed in the handwriting of the partner who subsequently gave the guaranty.[8]

Conversations and transactions between the partners at dissolution and attempted settlement in the absence of the payee, showing that the innocent partner did not know such paper was outstanding, are competent in his own favor to rebut any inference of assent drawn from such occurrences.[9]

BORROWING POWER.

§ 370. In trading firms.— This is the most dangerous of powers and yet one of the very necessary ones in a com-

[1] Stroh *v.* Hinchman, 37 Mich. 490.

[2] United States *v.* Astley, 3 Wash. C. C. 508.

[3] Mercein *v.* Andrus, 10 Wend. 461.

[4] Hatheway's Appeal, 52 Mich. 112.

[5] Guice *v.* Thornton, 76 Ala. 466.

[6] Adams Bank *v.* Jones, 16 Pick. 574. *Contra,* Chenango Bank *v.* Hyde, 4 Cow. 567.

[7] Kaiser *v.* Fendrick, 98 Pa. St. 528; Heffron *v.* Hanaford, 40 Mich. 305.

[8] Osborne *v.* Stone, 30 Minn. 25.

[9] Gale *v.* Miller, 54 N. Y. 536 (affg. 1 Lans. 451; 44 Barb. 420).

mercial partnership. It is very closely allied to the power to make notes and bills; seems to be always accompanied by the latter power,[1] and generally by the power to pledge or mortgage to secure the loan.[2] It is, of course, a much broader power than that to obtain goods or supplies on credit, and hence is broader than a power to incur debts, and is not, therefore, included in the latter. In a trading partnership, however, the power is deemed always to exist by implication, and to follow as a legal consequence when that relation is established, unless the lender has notice of the purpose for which it is wanted and that purpose is not within the scope.[3]

And it seems that the power to borrow extends to assisting the running of other enterprises in which the firm has taken an interest, as for a mill in which it owns stock.[4]

We have elsewhere seen [5] that money borrowed on the individual credit of one partner does not become a debt of the firm by being applied to its use.

[1] See *supra*, Bills and Notes.

[2] See § 406.

[3] Rothwell *v.* Humphreys, 1 Esp. 406; Thicknesse *v.* Bromilow, 2 Cr. & J. 425; Lane *v.* Williams, 2 Vern. 277, 292; Denton *v.* Rodie, 3 Camp. 493; *Ex parte* Bonbonus, 8 Ves. 540; Lloyd *v.* Freshfield, 2 C. & P. 333; Brown *v.* Kidger, 3 H. & N. 853; Winship *v.* Bank of U. S. 5 Pet. 529, 563; 5 Mason, 176; Saltmarsh *v.* Bower, 22 Ala. 221; Howze *v.* Patterson, 53 Ala. 205 (25 Am. Rep. 607); Wagner *v.* Simmons, 61 id. 143; Decker *v.* Howell, 42 Cal. 636; Pahlman *v.* Taylor, 75 Ill. 629; Walsh *v.* Lennon, 98 Ill. 27 (38 Am. Rep. 75); Gregg *v.* Fisher, 3 Ill. App. 261; Hunt *v.* Hall, 8 Ind. 215; Leffler *v.* Rice, 44 id. 103; Sherwood *v.* Snow, 46 Iowa, 481 (26 Am. Rep. 155); Deitz *v.* Regnier, 27 Kan. 94; Lindh *v.* Crowley, 29 id. 756; Emerson *v.* Harmon, 14 Me. 271; Etheridge *v.* Binney, 9 Pick. 272; Smith *v.* Collins, 115 Mass. 388; Faler *v.* Jordan, 44 Miss. 283; Bascom *v.* Young, 7 Mo. 1; Roney *v.* Buckland, 4 Nev. 45; Church *v.* Sparrow, 5 Wend. 223; Whitaker *v.* Brown, 16 id. 505; Onondaga Co. Bank *v.* DePuy, 17 id. 47; Miller *v.* Manice, 6 Hill, 119; Seybold *v.* Greenwald, 1 Disney, 425; Gano *v.* Samuel, 14 Oh. 592; Kleinhaus *v.* Generous, 25 Oh. St. 667; Benninger *v.* Hess, 41 id. 64; Hoskisson *v.* Eliot, 62 Pa. St. 393; Steel *v.* Jennings, Cheves (S. Ca.), 183; Ford *v.* McBryde, 45 Tex. 498; Michael *v.* Workman, 5 W. Va. 391. See, also, the cases cited under Power to Give Bills and Notes, § 341.

[4] Morse *v.* Hagenah (Wis.), 32 N. W. Rep. 634; Andrews v. Congar (Supreme Ct. U. S. 1881), 20 Am. Law Reg. (N. S.) 328; Lawyers' Coop. Book, 26, p. 90, noticed fully under § 349.

[5] § 446.

And that where one partner borrows money not expressly upon his individual credit, and it is shown to have been borrowed for and used for the firm, the firm will be liable;[1] and if the name of one partner is the name of the firm, what circumstances make the loan a firm debt.[2]

And that a loan on the credit of the firm is a partnership debt, although the money is misapplied by the borrowing partner to his own purposes, if the lender did not participate in the misuse.[3]

§ 371. **Non-trading firm.**— The borrowing power, however, is confined strictly to trading partnerships, and does not exist in non-trading firms unless specially granted, either by the articles or for the occasion, or by specific authority or by subsequent ratification;[4] and the same rule applies where the articles of partnership have forbidden borrowing and the lender has notice of the restriction.[5]

But there is no implied power to borrow in order to found the partnership, and if an express power is granted the authority does not extend beyond the terms of the power. Thus, where A. and B. agreed to buy a farm of C. in partnership, to be paid for in bills at three and six months, and B., by agreement with C., drew the bills at six and twelve months without A.'s knowledge, A. is not liable upon the bills.[6]

Nor is there any agency in partners for each other to borrow in order to increase the fixed capital of the firm, and a lender knowing this is the purpose of the loan cannot charge the other partners with the loan.[7]

1 § 447.

2 § 443.

3 § 348.

4 Forster *v.* Mackreth, L. R. 2 Ex. 163; Plumer *v.* Gregory, L. R. 18 Eq. 621; Pease *v.* Cole, 53 Conn. 53; Ulery *v.* Ginrich, 57 Ill. 531; Bays *v.* Conner, 105 Ind. 415; Breckinridge *v.* Shrieve, 4 Dana, 375; Davis *v.* Richardson, 45 Miss. 499; Prince *v.* Crawford, 50 id. 344; Hunt *v.* Chapin, 6 Lans. 139; Crosthwait *v.* Ross, 1 Humph. 23 (34 Am. Dec. 613; McCord *v.* Field, 27 Up. Can. C. P. 391; Wilson *v.* Brown, 6 Ont. App. 411. See Freeman *v.* Carpenter, 17 Wis. 126.

5 *Re* Worcester Corn Exchange Co. 3 DeG. M. & G. 180. And see § 322. *Contra*, if for the purchase of supplies essential to prosecution of the enterprise. Gavin *v.* Walker, 14 Lea. 643.

6 Greenslade *v.* Dower, 7 B. & C. 635. See, also, § 446.

7 Fisher *v.* Tayler, 2 Hare, 218. The apparent inconsistency in the phrase borrow to increase capital,

§ 372. Form of borrowing.— A partner's right to raise money for the firm extends to indorsing notes as well as making them,[1] or to borrow indorsements,[2] or to borrow a note or signature in accommodation,[3] or exchange notes or acceptances,[4] or borrow securities, as United States bonds.[5]

And in a partnership to buy and sell oats, one partner borrowed oats, the loan to be repaid in oats. This was held valid.[6] And a member of a manufacturing firm having unfinished articles on hand may deliver them to another to finish and sell to reimburse himself his advances.[7]

A borrowing at a usurious rate, being illegal, was held not binding on the non-assenting partners, except to the extent of the principal and legal interest.[8]

And it has been said that a partner can contract to pay a share of profits in lieu of interest;[9] but a managing partner's contract to pay twenty-five per cent. of the net profits in lieu of interest on a loan of $2,000, where the aggregate capital is $16,000, and the interest would amount to more than the lender's proportion of profits, if a partner, would have amounted to, was held not within his authority.[10]

BUYING.[11]

§ 373. In trading firms.— Each member of a trading partnership, part of whose ordinary business is the purchasing of goods, has implied authority to purchase in the name

because the increase is balanced by the debt, and is, therefore, delusive unless the borrowing is on individual credit, is noticed by Mr. Lindley, Partnership, p. 274.

1 Miller *v.* Consolidation Bank, 48 Pa. St. 514; Moorehead *v.* Gilmore, 77 Pa. St. 118; 18 Am. Rep. 435; Manning *v.* Hays, 6 Md. 5; Emerson *v.* Harmon, 14 Me. 271.

2 Deitz *v.* Regnier, 27 Kan. 94; Roney *v.* Buckland, 4 Nev. 45; Hutchins *v.* Hudson, 8 Humph. 426.

3 Johnson *v.* Peck, 3 Stark. 66; Faler *v.* Jordan, 44 Miss. 283; Sorg *v.* Thornton, 1 Cin. Super. Ct. Rep. 383. See Hogan *v.* Reynolds, 8 Ala. 59.

4 Gano *v.* Samuel, 14 Oh. 592.

5 Roney *v.* Buckland, 4 Nev. 45.

6 Adee *v.* Demorest, 54 Barb. 433.

7 Carnes *v.* White, 15 Gray, 378.

8 Dillon *v.* McRae, 40 Ga. 107. See Chandler *v.* Sherman, 16 Fla. 99.

9 Ford *v.* McBryde, 45 Tex. 498.

10 Chandler *v.* Sherman, 16 Fla. 99.

11 As to when the power to purchase begins and as to the right to buy before the partnership is formed, but in contemplation of it, has been treated under the head of Inchoate Partnerships, § 80.

of the firm whatever is necessary to carry on its business in the usual way, and may pledge its credit for payment.[1]

If the purchase is outside the real and apparent scope of the partnership business, the firm is not bound by it, unless all the partners assented, for all firms are to some extent limited, and outside the scope they stand on the same plane as non-trading firms.[2]

§ 374. **In non-trading firms.**— It is difficult to conceive of a partnership which does not require some purchases to be made in the usual course of its business, and in this power there is less difference between trading and non-trading firms than in other powers; and in a non-commercial partnership, the power to purchase on credit such articles as are necessary to a prosecution of the business or enterprise in the ordinary way, or to carry into effect the purposes for which it was created, as distinguished from purchases to enlarge the business or for mere convenience, seems clearly to exist. Not that a mere *bona fide* sale to one partner binds the firm to pay the seller, but that the existence of authority which the seller must prove may be shown by the nature of the business itself, and if not, then the further fact of necessity for the ordinary purposes of the business will establish it without proof of express authority.

In Gardiner *v.* Childs,[3] printers and publishers in partnership in the profits of a publication to be made are all liable for a purchase of paper by the publishers for the purpose of the publication. *Contra* if each is to purchase his own supplies and contribute them as part of his share in the enterprise.[4]

[1] Hyat *v.* Hare, Comb. 383; Bond *v.* Gibson, 1 Camp. 185, where one of a firm of harness makers bought on the firm's credit bits for making bridles, but appropriated them to his own use; Ala. Fertilizer Co. *v.* Reynolds, 79 Ala. 497; Dickson *v.* Alexander, 7 Ired. L. 4; Venable *v.* Levick, 2 Head, 351.

[2] Irwin *v.* Williar, 110 U. S. 499, 505; U. S. Bank *v.* Binney, 5 Mason, 176; Wagnon *v.* Clay, 1 A. K. Mar. 257; Maltby *v.* Northwestern Va. R. R. Co. 16 Md. 422; Goode *v.* Linecum, 1 How. (Miss.) 281; Livingston *v.* Roosevelt, 4 Johns. 251; 4 Am. Dec. 273; Briggs *v.* Hubert, 14 S. Ca. 620; Venable *v.* Levick, 2 Head, 351; Bankhead *v.* Alloway, 6 Cold. 56; Fraser *v.* McLeod, 8 Grant's Ch. (Up. Can.) 268.

[3] 8 C. & P. 345.

[4] Wilson *v.* Whitehead, 10 M. & W. 503.

In McCrary *v.* Slaughter, 58 Ala. 230, two persons, each owning an undivided half of a plantation, formed a partnership, one to furnish the mules and half the laborers and the other his services and half the laborers, neither to have power to bind the other by any contract. One of the partners made a purchase of mules on the credit of the firm, and this was held not to bind his copartner. The court said that a purchase of mules was not necessary or appropriate to the business; that no contract by one, except for something necessary to the successful conduct of the business, would be supported; that if this contract was within the scope, a contract for the purchase or rent of land or purchase of a gin would be, and that it was better to let the power to contract stand on express authority than to indulge implications to support it.

In Burnley *v.* Rice, 18 Tex. 481, 494, in a partnership for the cultivation of cotton, a debt incurred by one with a view to cultivating sugar was within the apparent scope of the business as planters, but in this case there was abundant evidence of ratification.

In Lynch *v.* Thompson, 61 Miss. 354, a partnership was formed for a single enterprise, the raising and selling the material of a sunken steamer, and the power to buy on credit was exercised by one partner and was sustained by the court. It was ruled that, to have an implied power to purchase, the partners need not be general traders; that the scope was to be judged by the nature of the business; and as the purchase on credit of appliances, or of whatever is essential to promote the enterprise, may be required, the necessary authority to make them is implied and need not be inquired into by a person dealing with one partner.

One of a mining firm can bind it for purchases essential to carry on and accomplish the purposes of the business;[1] one of a firm of stone masons with contracts for building may order stone from the owner of a quarry;[2] one of a firm of contractors to build or grade a railroad route may purchase supplies;[3] one of a firm running a saw-mill may purchase necessary groceries and supplies for the hands.[4] In a partnership to buy a single drove of cattle to be shipped to the southern market, the power of purchasing is ex-

[1] Jones *v.* Clark, 42 Cal. 180; Manville *v.* Parks, 7 Colorado, 128. And see Higgins *v.* Armstrong, 10 Pac. Rep. 232.

[2] Kenney *v.* Altvater, 77 Pa. St. 34.

[3] Gavin *v.* Walker, 14 Lea, 643.

[4] Johnston *v.* Dutton, 27 Ala. 245.

hausted when the drove is bought, and a partner who, on the way to the market, makes additional purchases in the name of the firm, does not bind his copartner thereby.[1]

In Tate *v.* Clements, 16 Fla. 76 (26 Am. Rep. 709), the managing partner in a saw-mill bought a lot of chopped corn, representing that it was required in the business; and this, with proof that it was actually used in the business, was held sufficient to establish a presumption that the purchase was in the scope of the business, and the jury might decide whether it was legitimately connected therewith or not. The court further stated that it would be equally difficult to say if the purchase of horses would be necessary to haul logs, and so of feed for the horses. Yet there was no direct evidence in the case that the firm used cattle.

In Leffler *v.* Rice, 44 Ind. 103, and Folk *v.* Wilson, 21 Md. 538, a purchase of middlings and grain for the mill by one partner was held to be reasonably and properly connected with the business.

In Judge *v.* Braswell, 13 Bush, 67 (26 Am. Rep. 185), in a partnership to prospect for and mine ore on the partnership's lands, and on other lands which it might secure, and to sell these privileges, the articles forbidding any number less than all to buy lands, one partner purchased additional lands in the name of the firm, and drew on the others for the purchase money, and the vendors brought an action on their refusal to pay the drafts. It was held that, being a non-commercial partnership, the plaintiff must show the authority of a single partner to make the contract sued on; and as no proof of authority by usage of similar partnerships is shown, and as no rule of law gives such authority, all the power a partner has to make such contract is derived from the articles, and the articles putting such purchases within the scope of the business, at the same time withhold such power from a single partner, and the plaintiff cannot recover.

In a partnership to buy and sell lands any partner has the right to buy land for the firm, and bind the members for payment.[2]

In Davis *v.* Cook, 14 Nev. 265, it was held that authority given to a partner to open a store in another place involves authority to purchase a store and stock of goods there on credit. The court, putting certain supposititious cases, which are not of trading partnerships, though this difference is not noted, says that a partner-

[1] Bentley *v.* White, 3 B. Mon. 263 (38 Am. Dec. 185).

[2] Sage *v.* Sherman, 2 N. Y. 417, 432.

ship formed in one place to keep a hotel in another impliedly gives power to the managing partner to buy a hotel on credit there. And that a managing partner in a stage line has implied power to make a purchase of barns. So in Stillman *v.* Harvey, 47 Conn. 26, a partnership being formed to carry on a brewing business, but having no brewery, a purchase by one partner of the unexpired lease of a brewery, in the firm name, was held to be within the scope of his powers. In this case, however, the firm took possession and prosecuted their business in it, which of course cured any defect of power.

A few cases have gone further, and permitted the purchase on credit of appliances convenient rather than strictly necessary, to effect the purposes of the partnership; as stoves in a livery-stable,[1] law books for a law firm,[2] medicines by a medical firm.[3] And in a partnership to manufacture iron, the acting and only resident partners were held authorized to buy timber land, to get fuel for the business.[4]

If one partner is deprived of all authority to buy supplies, and the other is to furnish all tools, but refuses to do so, this was held to constitute an implied assent to the former's purchase of them, and he will be reimbursed out of the crops.[5]

§ 375. Delivery to one partner.—Delivery to one partner of goods ordered by the partnership is delivery to the firm;[6] and so of delivery of a deed;[7] hence delivery to one partner cannot be in escrow.[8]

In Byington *v.* Gaff, 44 Ill. 510, a firm contracted to buy a steamboat, the defendant guarantying payment, and the vendor made out a bill of sale to one partner alone and delivered the boat to him. The defendant claimed this was a new sale, but being apparently intended in fulfillment of the contract, the guarantor was held liable; both partners had assented to the delivery, however.

In Cameron *v.* Blackman, 39 Mich. 108, the managing partner

[1] Hickman *v.* Kunkle, 27 Mo. 401, 404.

[2] Miller *v.* Hines, 15 Ga. 197, 201.

[3] Crosthwait *v.* Ross, 1 Humph. 23 (34 Am. Dec. 613).

[4] Brooke *v.* Washington, 8 Gratt. 248.

[5] Nichol *v.* Stewart, 36 Ark. 612; but see Morgan *v.* Pierce, 59 Miss. 210.

[6] Kenney *v.* Altvater, 77 Pa. St. 34; Crosswell *v.* Lehman, 54 Ala. 563.

[7] Henry *v.* Anderson, 77 Ind. 361.

[8] Moss *v.* Riddle, 5 Cranch, 351.

authorized the vendor to deliver goods to one F. C., a young relative of the partners and once in their employ, and the firm was held liable, on the doctrine that it is usual and proper for merchants in different businesses to furnish each other's customers with articles, which are charged to the house and not to the buyer, and the court will take judicial notice of such custom. No one thinks of asking why such credits are sought, or whether the partnership articles contemplate it, and whether the goods are desired for clerks or customers or strangers does not concern the seller; he has a right to presume such dealings are within the power of all business houses.[1]

§ 376. —— varying the contract.—The power of one partner to vary a contract of purchase made by the firm is treated under the power of control over its property.[2] If goods are sold and delivered to a firm on credit, one partner has power to return them on account of the inability of the firm to pay.[3] So if the firm having agreed to sell goods deliver inferior articles, a partner may agree to take them back and return the consideration.[4] So where a partner authorized to sell sold with warranty of soundness, and proving unsound, he can take them back and bind the firm to return the price.[5]

Other branches of the law of partnership as applied to purchases have been considered under other heads. Thus, where purchases on credit are forbidden and this is known to the seller.[6] When purchases by a single partner inure to the benefit of the firm, see under Good Faith.[7] When an unknown partner is bound, see Dormant Partner;[8] and when the partnership name has not been used.[9] As to purchases by a partner to contribute as his share of the capital, or by one who subsequently takes in a partner.[10] As to what purchases are in the scope of the business generally.[11] When a partner purchases for his own use in the name of the firm.[12] When a partner purchases without stating for whom the

[1] But *contra*, see Pinckney *v.* Keyler, 4 E. D. Smith, 469.

[2] See § 408, and Leiden *v.* Lawrence, 2 N. R. 283; Detroit *v.* Robinson, 42 Mich. 198.

[3] De Tastet *v.* Carroll, 1 Stark. 88.

[4] Wilson *v.* Elliott, 57 N. Y. 316.

[5] Huguley *v.* Morris, 65 Ga. 666.

[6] See § 322.

[7] § 305 *et seq.*

[8] § 156.

[9] § 205.

[10] §§ 80, 446.

[11] §§ 316–329.

[12] § 447.

goods are intended.[1] When a partner subsequently misappropriates the purchase to his own use.[2]

Checks.— Power to draw.[3]

CONFESSIONS OF JUDGMENT BY ONE PARTNER.

§ 377. No such power, and why.— The rule is nearly universal that one partner cannot execute a power to confess a judgment against the firm without the consent of his copartners. I have not been able to ascertain the origin of the rule; although some cases put it upon the want of power to bind the firm by a sealed instrument, yet this cannot be the true reason. No seal was needed at common law to such an instrument. Nor is there any such magic in a scrawl; and as there is no difference in effect or consequences whether the judgment was on a power, with or without seal, the reason is unworthy.

Money is generally not paid without deliberation, but promises may be very rashly made, and the true grounds are probably more practical ones, and are three: 1st. It enables one partner to create liens on the private and individual property of his copartners; this objection is removed where the partnership can be sued in the firm name. 2d. Such a power is not necessary to the management of the joint enterprise, and is capable of great abuse, for it is an unlimited power to alienate, incumber and materially change, not only the transitory property of the firm, but its permanent investments, and enables one partner alone to plunge the firm into inextricable debt, which might absorb the whole fund and the private fortunes of each. 3d. It deprives the other partners of opportunity to make a defense, and cuts off a resort to the regular tribunals quite as effectually as the power to submit to arbitration, which is also denied to a partner. And being capable of such abuse, the proper ground for denying the power is that it is outside the scope

[1] § 447.

[2] § 348.

[3] See Forster v. Mackreth, L. R. 2 Ex. 163; Bull v. O'Sullivan, L. R. 6 Q. B. 209; Commercial Nat. Bank v. Proctor, 98 Ill. 558.

of the business and beyond the true limits of the partnership relation.

It is true that in many states, when a firm has been sued, judgment may be rendered to bind the partnership property, though but one partner has been served with process; but there is in that case, at least, time and opportunity to learn of the suit. This will be treated hereafter. What follows here relates wholly to warrants of attorney to confess judgment given when there is no suit pending.[1]

Code provisions allowing a confession of judgment only apply to pending cases, and do not apply to warrants of attorney.[2]

Of the above cases, the following base the invalidity of the judg-

[1] The following are the authorities denying to a partner the power to execute a warrant to confess judgment against the firm without the assent of the copartners: Hambridge v. De la Crouee, 3 C. B. 742; Hall v. Lanning, 91 U. S. 160, 170; Elliott v. Holbrook, 33 Ala. 659; Wilcoxson v. Burton, 27 Cal. 228; Green v. Rand, 2 Conn. 254; Sloo v. State Bank of Ill. 2 Ill. 428; Barlow v. Reno, 1 Blackf. 252; Hopper v. Lucas, 86 Ind. 43; Christy v. Sherman, 10 Iowa, 535; Edwards v. Pitzer, 12 Iowa, 607; North v. Mudge, 13 Iowa, 596; Rhodes v. Amsinck, 38 Md. 345, 354; Soper v. Fry, 37 Mich. 236; Hull v. Garner, 31 Miss. 145; Morgan v. Richardson, 16 Mo. 409; 57 Am. Dec. 235; Flannery v. Anderson, 4 Nev. 437; Ellis v. Ellis, 47 N. J. L. 69; Green v. Beals, 2 Caines, 254; Crane v. French, 1 Wend. 311; Stoutenburgh v. Vandenburgh, 7 How. Pr. 229; Everson v. Gehrman, 10 id. 301; Lambert v. Converse, 22 id. 265; Bridenbecker v. Mason, 16 id. 203; McKee v. Bank of Mt. Pleasant, 7 Oh. 2d pt. 175; McNaughten v. Partridge, 11 Oh. 223; Richardson v. Fuller, 2 Oreg. 179; Gerard v. Basse, 1 Dall. 119; Bitzler v. Shunk, 1 Watts & S. 340; 37 Am. Dec. 469; Cash v. Tozer, 1 Watts & S. 519; Harper v. Fox, 7 W. & S. 142; York Bank's Appeal, 36 Pa. St. 458; Trenwith v. Meeser, 12 Phila. 366; Hoskisson v. Eliot, 62 Pa. St. 393; Mills v. Dickson, 6 Rich. (S. Ca.) L. 487; Shedd v. Bank of Brattleboro, 32 Vt. 709; Remington v. Cummings, 5 Wis. 138; Holme v. Allan, Tayl. (Up. Can.) 348; Huff v. Cameron, 1 Up. Can. Prac. Rep. 255; Canada Lead Mine Co. v. Walker, 11 Low. Can. 433, 435. Even the borrowing power in a trading partnership will not authorize one member to secure the loan by a sealed power to confess judgment. Hoskisson v. Eliot, 62 Pa. St. 393. Even if the warrant to confess is signed by two persons, it is presumably for their individual indebtedness, unless proved to be for partnership debt. McKenna's Estate, 11 Phila. 84; Ellinger's Appeal (Pa.), 7 Atl. Rep. 180.

[2] Richardson v. Fuller, 2 Oreg. 179.

ment on the want of power in one partner to bind another under seal.[1]

That the copartner had absconded does not, it seems, authorize the confession of judgment. See facts in Gerard *v.* Basse, 1 Dall. 119. Compare, however, the doctrine of an assignment for the benefit of creditors by one partner in such cases.[2]

§ **378. Assent and ratification.**— Prior parol assent of the other partner is sufficient authority.[3]

The *cognovit* or judgment may be ratified by the other partner, and this may be proved by circumstances showing assent;[4] as delay to object to the judgment for eighteen months;[5] or admitting that it was "all right;"[6] but is only good from the date of ratification.[7]

§ **379. Valid against the partner in fault.**— The judgment, however, is valid against the party who executed the power, and binds his individual property and his individual interest in the partnership property, the same as any other separate judgment.[8]

[1] Gerard *v.* Basse, 1 Dall. 119; Green *v.* Beals, 2 Caines, 254; McNaughten *v.* Partridge, 11 Oh. 223; Remington *v.* Cummings, 5 Wis. 138; Ellis *v.* Ellis, 47 N. J. L. 69. And the warrant was also under seal in Ellis *v.* Ellis, 47 N. J. L. 69; Hoskisson *v.* Eliot, 62 Pa. St. 393; Shedd *v.* Bank of Brattleboro, 32 Vt. 709; Cash *v.* Tozer, 1 Watts & S. 519.

[2] In Pennsylvania, although the earlier decisions denied the power, under the later ones, a judgment on a *cognovit* note, by one partner, not under seal, is good against the partnership property. Kneib *v.* Graves, 72 Pa. St. 104; Ross *v.* Howell, 84 Pa. St. 129. Even if the partner confessed the judgment in favor of himself as guardian. Hamilton's Appeal, 103 Pa. St. 368. Only the other partners and not the creditors can complain, for the former may ratify. Hamilton's Appeal, 103 Pa. St. 368; Grier *v.* Hood, 25 id. 430. But if the confession is in favor of the separate creditor of the individual partner, it is a fraud on the creditors of the firm, and they can attack it collaterally on distribution of the fund realized. McNaughton's Appeal, 101 Pa. St. 550.

[3] Brutton *v.* Burton, 1 Chit. 707.

[4] Bivingsville Cotton Mfg. Co. *v.* Bobo, 11 Rich. (S. Ca.) L. 386; Cash *v.* Tozer, 1 Watts & S. 519; Overton *v.* Tozer, 7 Watts, 331.

[5] Brown *v.* Cinqmars, 2 Up. Can. Prac. Rep. 205.

[6] Record *v.* Record, 21 New Brunswick, 277.

[7] Wilcoxson *v.* Burton, 27 Cal. 22[illegible].

[8] Gerard *v.* Basse, 1 Dall. 119; Hopper *v.* Lucas, 86 Ind. 43; North *v.* Mudge, 13 Iowa, 506; Rhodes *v.* Am-

Hence, if one partner without authority confesses a judgment against the firm, and then both confess judgment in favor of another creditor, the latter has a priority over the other on distribution.[1]

If the individual names are not given, the judgment cannot be a lien on the land, even of the signing partner.[2]

§ 380. Remedy of the non-assenting partner.— The English rule has been said to be, if an attorney has confessed judgment on the unauthorized warrant executed by one partner and is in solvent circumstances, to uphold the judgment against the firm, and leave the other partner to his remedy against the attorney.[3]

This rule seems in every way unreasonable. It is a trap for the lawyer, and gives the innocent partner the expense of a law-suit, and that too against an officer of the court, incumbers judicial records with an additional action, and perhaps discriminates against the needy ones of the lawyers. Such rule was not applied where an execution against the person instead of against the property of the other partner was issued, because he could not be compensated for the loss of his liberty, and justice would not be complete without setting aside the judgment, which was done.[4]

The rule in the United States, however, distinctly, is to relieve the non-assenting partner.

Some cases hold that the judgment will be set aside as to the non-consenting partner;[5] others that execution will be restrained

sinck, 38 Md. 345, 354; Flannery *v.* Anderson, 4 Nev. 437; Green *v.* Beals, 2 Caines, 254; Crane *v.* French, 1 Wend. 311; York Bank's Appeal, 36 Pa. St. 458; Mair *v.* Beck (Pa.), 2 Atl. Rep. 218; Bitzer *v.* Shunk, 1 Watts & S. 340; 37 Am. Dec. 469. And see § 421. But see Trenwith *v.* Meeser, 12 Phila. 366.

[1] Crane *v.* French, 1 Wend. 311. In so far as this case holds the judgment to merge the liability of the other partners for the debt, it is not the general rule. See Merger.

[2] York Bank's Appeal, 36 Pa. St. 458. Under a statute making void all powers of attorney to confess judgment, the judgment was held wholly void and not merely voidable, and third persons can impeach it. Mills *v.* Dickson, 6 Rich. (S. Ca.) L. 487.

[3] See Hambridge *v.* De la Crouee, 3 C. B. 732.

[4] Hambridge *v.* De la Crouee, *supra*. And so where three partners had agreed to give the warrant of attorney, and only two signed it, the judgment was set aside as to them for imperfect execution. Harris *v.* Wade, 1 Chit. 322.

[5] Gerard *v.* Basse, 1 Dall. 119;

as against individual property of the other partner.[1] Or, as there is a remedy in the court rendering the judgment, a remedy cannot be sought in chancery;[2] nor in the court of error;[3] nor by collateral impeachment, as when sued in an action on the judgment.[4]

The court will not infer without proof that the confession was unauthorized.[5]

McKee *v.* Bank of Mt. Pleasant, 7 Oh. 2d pt. 175. And see Morgan *v.* Richardson, 16 Mo. 409; 57 Am. Dec. 235; Thompson *v.* Emmert, 15 Ill. 415; Everson *v.* Gehrman, 10 How. Pr. 301.

[1] Morgan *v.* Richardson, 16 Mo. 409; 57 Am. Dec. 235; Ellis *v.* Ellis, 47 N. J. L. 69; Christy *v.* Sherman, 10 Iowa, 535; Green *v.* Beals, 2 Caines, 254.

[2] McKee *v.* Bk. of Mt. Pleasant, 7 Oh. 2d pt. 175; Shedd *v.* Bk. of Brattleboro, 32 Vt. 709.

[3] Remington *v.* Cummings, 5 Wis. 138.

[4] Elliott *v.* Holbrook, 33 Ala. 659. In an action already pending against the firm, since the statute in New York allowing judgment to be rendered against a firm, where all the partners have been sued though service is had on but one, that one can execute a warrant to confess judgment against the firm. Grazebrook *v.* McCreedie, 9 Wend. 437; Pardee *v.* Haynes, 10 Wend. 631; Waring *v.* Robinson, Hoff. (N. Y.) Ch. 524; Blodget *v.* Conklin, 9 How. Pr. 442; Leahey *v.* Kingon, 22 How. Pr. 209; s. c. as Lahey *v.* Kingon, 13 Abb. Pr. 192; Binney *v.* Le Gal, 19 Barb. 592; 1 Abb. Pr. 283. But even this rule as to pending cases does not apply where the partner seeks to confess in person and not by attorney, for there is no presumption of authority then. Binney *v.* Le Gal, *supra.* The English rule was applied where there was no suggestion that the attorney was irresponsible, the court refusing to go behind the record to inquire into the authority. Hammond *v.* Harris, 2 How. Pr. 115. *Contra,* if he is irresponsible. Groesbeck *v.* Brown, 2 How. Pr. 21. In St. John *v.* Holmes, 20 Wend. 609, the court refused to set aside the judgment on the application of creditors, or of the partner who executed the warrant, saying that only the party aggrieved could complain; and in Stoutenburgh *v.* Vandenburgh, 7 How. Pr. 229, the judgment was said to be void as to those who did not authorize it; and on confession in a pending action the non-assenting partner was let in to defend, the judgment standing, however, as security, in Grazebrook *v.* McCreedie, 9 Wend. 437; and Sterne *v.* Bentley, 3 How. Pr. 331. And see Everson *v.* Gehrman, 10 How. Pr. 301; 1 Abb. Pr. 167, where the judgment was against the explicit and known wishes of the other partner. Of course, in case of collusion, the creditors could attack the judgment. Stoutenburgh *v.* Vandenburgh, *supra.* An appearance in admiralty by a proctor for all the defendants is sufficient, although no authority for one is shown. Hills *v.* Rose, 3 Dall. 331.

[5] Edwards *v.* Pitzer, 12 Iowa, 607; Remington *v.* Cummings, 5 Wis. 138; Elliott *v.* Holbrook, 33 Ala. 659. If the record states that the *cognovit* was "by the defendants," this is

After dissolution there is, of course, no such power, for the party is no longer a partner and cannot bind the firm to any new liability.[1]

Contracts.—See §§ 376 and 392; to convey real estate, § 299.

DEBTS.

§ 381. Power to collect and receipt for debts due to firm. Each partner in every firm has implied power to collect the debts due the firm. This follows from necessity, for the power must be exercised by some one, and it would be too inconvenient and perhaps impossible for it to be by the joint act of all; hence payment to any one partner extinguishes the debt, whether before or after dissolution.[2]

And this is true even after another partner has directed the debtor to pay to a particular partnership creditor.

As where a firm procured advances from a bank to buy goods, and a factor who held the proceeds of the goods for the firm after sale was ordered to pay them to the bank, the factor's subsequent

construed to mean by all who were served with process. Hull *v.* Garner, 31 Miss. 145.

[1] Rathbone *v.* Drakeford, 4 Moo. & P. 57; Mitchell *v.* Rich. 1 Ala. 228; Waring *v.* Robinson, Hoffm. (N. Y.) 524; Mair *v.* Beck (Pa. 1886), 2 Atl. Rep. 218; Bennet *v.* Marshall, 2 Miles (Pa.), 436; Canada Lead Mine Co. *v.* Walker, 11 Low. Can. 433; but see Taylor *v.* Hill, 36 Md. 494. Hence a surviving partner cannot confess judgment in the firm name, and execution against the firm property thereon will be set aside. Castle *v.* Reynolds, 10 Watts, 51; but query, had he confessed in his own name. Id.

[2] Anon. 12 Mod. 446; Duff *v.* East India Co. 15 Ves. 198; Brasier *v.* Hudson, 9 Sim. 1; King *v.* Smith, 4 C. & P. 108; McKee *v.* Stroup, Rice, 291; Tomlin *v.* Lawrence, 3 Moo. & P. 555; Porter *v.* Taylor, 6 Moo. & S. 156; Stead *v.* Salt, 3 Bing. 103; *Re* Barrett, 2 Hughes, 444; Williams *v.* More, 63 Cal. 50; Brown *v.* Lawrence, 5 Conn. 397; Noyes *v.* New Haven, etc. R. R. 30 id. 1; Gregg *v.* James, Breese, 107; Gordon *v.* Freeman, 11 Ill. 14; Granger *v.* McGilvra, 24 id. 152; Steele *v.* First Nat'l B'k, 60 id. 23, 26; Yandes *v.* Lefavour, 2 Blackf. 371; Selking *v.* Jones, 52 Ind. 409; White *v.* Jones, 14 La. Ann. 681; Codman *v.* Armstrong, 28 Me. 91; Vanderburg *v.* Bassett, 4 Minn. 242; Morse *v.* Bellows, 7 N. H. 568; Black *v.* Bird, 1 Hayw. (N. Ca.) 273; Salmon *v.* Davis, 4 Bin. (Pa.) 375; Allen *v.* Farrington, 2 Sneed, 526; Scott *v.* Trent, 1 Wash. (Va.) 77; Carlisle *v.* Niagara Dock Co. 5 Up. Can. Q. B. (Old Series) 660. Hence a note to one partner of a creditor firm by a debtor of the partnership has the same

payment to another partner discharges him, the bank having no lien upon the fund.[1]

And if a note is made to one partner, expressing on its face to be a firm debt, and the payee assigns it to another partner, yet being partnership property, and hence held for the firm, payment to any of the partners is valid.[2]

If a creditor firm has a partner in common with another firm and transfers the debt to the latter, payment to the former firm will disqualify the latter from suing upon it. Thus an accepted bill between third persons was indorsed to the firm of Blair & Jacaud, and by this firm to Jacaud & Gordon, these two firms having a common partner, Jacaud. Before maturity, the drawer paid to Blair & Jacaud securities for the extinguishment of this paper, but Blair & Jacaud appropriated the property to their own use and did not notify Jacaud & Gordon of the deposit so made by the maker. Jacaud & Gordon sued the acceptor. Lord Ellenborough held that Jacaud, as a partner of Blair, must be deemed to have received the funds from the drawers to take up this bill, and cannot, as a partner of Gordon, contravene his own act and sue upon it when it is already satisfied as to him. His individuality cannot be severed.[3]

We have elsewhere[4] seen that the right to pay any partner cannot be restricted by notice from the other partners not to do so, for if such revocation of authority were permitted the whole concern could be stopped and a debtor would be unable to pay at all.

§ 382. Payments not in money.[5]— A partner may take a bill in payment of a debt,[6] even in his own name,[7] and pay-

effect as a note to the firm. Coursey *v.* Baker, 7 Har. & J. 28. One joint lessor can appoint a bailiff to distrain for rent due to all. Robinson *v.* Hofman, 4 Bing. 562; 1 Moo. & P. 474. So one partner can agree that a bank account due the firm may be transferred to the bank's successor. Beale *v.* Caddick, 2 H. & N. 326.

[1] Steele *v.* First Nat'l Bank, 60 Ill. 23.

[2] Black *v.* Bird, 1 Hayw. (N. Ca.) 273. But this does not apply to a note made to the firm and indorsed by it to one partner, and thus made his individual property, and the amount ought not to be paid to another partner where the maker has notice of the transfer. Stevenson *v.* Woodhull, 19 Fed. Rep. 575.

[3] Jacaud *v.* French, 12 East, 317.

[4] § 326.

[5] For the power to trade out debts in property for separate use, see § 411.

[6] Heartt *v.* Walsh, 75 Ill. 200.

[7] Tomlin *v.* Lawrence, 3 Moo. & P. 555; Coursey *v.* Baker, 7 Har. & J. 28;

ment of such note or of a judgment confessed to one partner on a firm debt satisfies the partnership debt.[1]

As it is not in the scope of business to take notes for collection, if a partner receives the note of a third person from a debtor of the firm to collect, pay the firm and give the debtor the balance, but uses the balance in the business of the firm, he, and not the firm, is debtor for the balance.[2] But where a debtor gives a partner notes to collect and apply the proceeds on the debt, and the partner collects one and indorses the amount upon the debtor's note to the firm, this binds the firm, although the notes were receipted for by the partner in his individual name.[3]

A partner has power also to compromise debts due to the firm;[4] hence, one partner can bind an absent partner by approval of an extent of insurance loss,[5] and can settle the loss.[6] And the power to collect implies the power to perfect a mechanic's lien to secure the debt.[7]

Authority to receive payment of a debt in money is certainly not authority to receive it in any other way, and it has been stated to be a general rule that one partner cannot receive payment of a debt in property.[8] But such rule is subject to many qualifications, for the nature of the business or usage of the trade may allow debts to be traded out or sales to be made payable in goods.[9] Or the other

Hogarth *v.* Wherley, L. R. 10 C. P. 630.

[1] Chapin *v.* Clemitson, 1 Barb. 311. But an agent of the firm cannot do so.

[2] Pickels *v.* McPherson, 59 Miss. 216. See Hogan *v.* Reynolds, 8 Ala. 59.

[3] Brown *v.* Lawrence, 5 Conn. 397.

[4] Noyes *v.* Newhaven, etc. R. R. 30 Conn. 1; Doremus *v.* McCormick, 7 Gill, 49; Pierson *v.* Hooker, 3 Johns. 70; Cunningham *v.* Littlefield, 1 Edw. Ch. 104. This doctrine is, however, so entangled with the doctrine that one partner having by settlement with a debtor disqualified himself from suing, the firm is also disabled to sue, because he, as a necessary co-plaintiff, is thus in the position of a person repudiating his own act, as to make the limits of the power difficult to ascertain.

[5] Brink *v.* New Amsterdam Ins. Co. 5 Robt. (N. Y.) 104.

[6] Brown *v.* Hartford F. Ins. Co. 117 Mass. 479.

[7] German Bank *v.* Schloth, 59 Iowa, 516.

[8] Lee *v.* Hamilton, 12 Tex. 413. *Contra*, see *dictum* in Vanderburgh *v.* Bassett, 4 Minn. 242.

[9] Lee *v.* Hamilton, 12 Tex. 413, 418; Warder *v.* Newdigate, 11 B. Mon. 174, 177; 52 Am. Dec. 567.

partners, by retaining the property thus acquired, may ratify the transaction.[1]

Although the right to take land in compromise and settlement of a sale of stock may exist in an emergency where there is no time to consult, yet if there is ample time and no emergency, and a partner takes the deed in his own name, though in good faith, the courts are not willing to recognize the right to do so and will treat him as a trustee who buys in the trust property, and compel him to account in money and not in a share of the land.[2]

The power to collect a debt by process of law is involved in the ordinary power of collection, but in resorting to coercive measures the tortious employment of extortionate methods does not render the innocent partners liable.[3]

Any partner can act in relation to the proof of debts in bankruptcy of the debtor, and can vote upon the choice of an assignee and sign the certificate.[4]

§ 383. Releases.— One partner has power to release a claim due to the firm and to bind the other partners thereby, whether it be a claim on contract or in tort, or before or after dissolution, provided there be no fraud or bad faith or collusion.[5]

After an action by the firm has been begun, one partner can release the claim to recover which it is brought,[6] even

[1] Michigan Air Line R'y *v.* Mellen, 44 Mich. 321; Lowery *v.* Drew, 18 Tex. 786. In Banner Tobacco Co. *v.* Jenison, 48 Mich. 459, it was said that a partner in the milling business could take a stock of groceries in payment; the question was not squarely presented, however, for it arose four years afterwards in seeking to hold the other partner on new purchases to replenish the stock of groceries.

[2] Russell *v.* Green, 10 Conn. 269.

[3] See §§ 465–468.

[4] *Ex parte* Mitchell, 14 Ves. 597; *Ex parte* Hodgkinson, 19 id. 291, 293; *Ex parte* Shaw, 1 Glyn & Jam. 127; *Ex parte* Bank of England, 2 id. 363; *Ex parte* Hall, 1 Rose, 2; *Ex parte* Bignold, 2 Mont. & A. 633, 655; *Re* Barrett, 2 Hughes, 444; *Re* Purvis, 1 Bankr. Reg. 163; Emerson *v.* Knower, 8 Pick. 63.

[5] Hawkshaw *v.* Parkins, 2 Swanst. 539; Arton *v.* Booth, 4 J. B. Moore, 192; Furnival *v.* Weston, 7 id. 356; Metcalfe *v.* Rycroft, 6 M. & S. 75; Wallace *v.* Kelsall, 7 M. & W. 264; Phillips *v.* Clagett, 11 id. 84; Nottidge *v.* Prichard, 2 Cl. & Fin. 379; Dyer *v.* Sutherland, 75 Ill. 583; Emerson *v.* Knower, 8 Pick. 63; Bulkley *v.* Dayton, 14 Johns. 387. And see § 396.

[6] Barker *v.* Richardson, 1 Younge & J. 362, 366; Arton *v.* Booth, 4 Moore,

where such partner had agreed not to interfere with the collection of debts,[1] and can release the judgment if not fraudulently done.[2] But if there was fraud and collusion the courts will protect the other partners and not allow the defense to be pleaded;[3] and if the protection of the copartner requires it, the court will not permit one partner to discontinue an action.[4] A release by one partner by fraudulent connivance or collusion with the defendant is void.[5]

Where a canal company owed two contractors, partners, over $100,000 for construction of the canal, and procured a secret release from one for a consideration of about $5,000, this was held to be a gross fraud upon the other partner, and his action in his own name to recover for work and labor and foreclose a mechanic's lien was sustained, the court saying that the other partner was not a necessary party because in the position of one who had assigned his interest.[6]

On the other hand, on proof of collusion between the debtor and some of the partners, it is held in New York that the other partners cannot set aside the settlement and recover the debt or their share of it, but only damages for waste of partnership funds, to be ascertained on accounting. That they have the right to be placed as if the full debt were honestly paid and they had their aliquot shares,

192; Furnival *v.* Weston, 7 id. 356; Langdale *v.* Langdale, 13 Ves. 167; Jones *v.* Herbert, 7 Taunt. 421; Perlberg *v.* Gorham, 10 Cal. 120; Wilson *v.* Mower, 5 Mass. 411; Noonan *v.* Orton, 31 Wis. 265.

1 Arton *v.* Booth, 4 Moo. 192.

2 Romain *v.* Garth, 3 Hun, 214.

3 Barker *v.* Richardson, 1 Y. & J. 362; Jones *v.* Herbert, 7 Taunt. 421; Phillips *v.* Clagett, 11 M. & W. 84; Loring *v.* Brackett, 3 Pick. 403; Noonan *v.* Orton, 21 Wis. 265; Sloan *v.* McDowell, 71 N. Ca. 356, 359-61. And see Skaife *v.* Jackson, 1 B. & C. 421.

4 Cunningham *v.* Carpenter, 10 Ala. 109; Daniel *v.* Daniel, 9 B. Mon. 195; Loring *v.* Brackett, 3 Pick. 403. And see Holkirk *v.* Holkirk, 4 Madd. 50, and Winslow *v.* Newlan, 45 Ill. 145. But where a statute provides that a non-consenting joint claimant may be made defendant, the objecting partner may be allowed to withdraw and the court will permit the other partners to make him a defendant. Noonan *v.* Orton, 31 Wis. 265.

5 Barker *v.* Richardson, 1 Younge & J. 362; Beatson *v.* Harris, 60 N. H. 83; Sweet *v.* Morrison, 103 N. Y. 235; Noonan *v.* Orton, 31 Wis. 265. And see Loring *v.* Brackett, 3 Pick. 403.

6 Canal Co. *v.* Gordon, 6 Wall. 561.

and can make the debtor pay this when ascertained, even if they had to pay the full amount less the part paid.[1]

A covenant not to sue is not, however, a release, and will not constitute a defense.[2] So of an agreement by one partner to pay the debt and save him harmless,[3] for these are not actual releases; the debtor's remedy is by action for breach of contract against the partner; though to avoid circuity of action, if no injustice would be done, it might be treated as a release in a proper case, just as a set-off, possibly, against one partner, might be allowed in some cases. A covenant by all the partners not to sue would, however, operate as a release.[4]

In Richards *v.* Fisher, 2 Allen, 527, the firm of T., B. & F. made a demand note to the partner B.; afterwards F. retired from the firm, H. taking his place, and T., B. & H. gave F. a bond that they would pay all the debts of the late firm; an indorsee of the note sued the old partners upon it, including F., who claimed that the bond released him. It was held that the bond was no release of the note, but was merely equivalent to a covenant not to sue, and such covenants are only good as releases to avoid circuity of action when no injustice will be done. If here judgment went against T. and B. alone they could not recover from H., for in the bond H. only agreed to save F., whereas if judgment is rendered against F., he can, by suit on his bond, compel H. as well as T. and B. to pay.

A release by a partner after he had sold his interest to a third person is fraudulent.[5] So a release by one partner of

[1] Sweet *v.* Morrison, 103 N. Y. 235. See Longman *v.* Pole, 1 Moo. & M. 223, that the other partners can jointly sue a third person who colluded with a partner to injure them. This subject is complicated with the doctrine that a partner who has disqualified himself to sue cannot, as co-plaintiff, seek to repudiate his own act, and hence the action is defeated as to all. See §§ 1035–1048.

[2] Walmsley *v.* Cooper, 11 A. & E. 216; 3 Per. & Dav. 149; Emerson *v.* Baylies, 19 Pick. 55. And see § 385.

[3] Emerson *v.* Baylies, 19 Pick. 55.

[4] Deux *v.* Jeffries, Croke's Eliz. 352.

[5] Brayley *v.* Goff, 40 Iowa, 76. Here two persons bought a machine in partnership, with warranty, and gave a note in payment. In an action on the note one can set up breach of warranty, although the other refuses to defend, and a release of damages by the latter after he had sold his interest in the machine was held fraudulent. Duncklee *v.* Greenfield Steam Mill Co. 3 Foster, 245, where a partner, after the firm had sold a claim, attempted

a firm debt in consideration of a discharge of his separate debt due to the partnership debtor is a fraud upon the copartners.[1]

And after a partner has sold to his copartner all his interest in the assets, his discharge of a debt without consideration will not bind the buyer.[2] And where, after dissolution, it is agreed that one partner shall collect the debts, a release by the other in order to defeat an action and to subserve his private ends will not be permitted to be set up as a defense.[3]

§ 384. Debts due from the firm.— Each member of the firm has implied power to pay its debts.[4]

In Bray *v.* Morse, 41 Wis. 343, B. sued M. and P., former partners, on notes made by the firm. P. made default, but M. pleaded

to release it by dating the release back.

[1] Kendal *v.* Wood, L. R. 6 Ex. 243; Farrar *v.* Hutchinson, 9 Ad. & El. 641; Barker *v.* Richardson, 1 Younge & J. 362; Piercy *v.* Fynney, L. R. 12 Eq. 69; Harper *v.* Wrigley, 48 Ga. 495; Casey *v.* Carver, 42 Ill. 225; Bennett *v.* District Twp. of Colfax, 53 Iowa, 689; Jackson *v.* Holloway, 14 B. Mon. 108; Williams *v.* Brimhall, 13 Gray, 462; Craig *v.* Hulschizer, 34 N. J. L. 363; Chase *v.* Buhl Iron Works, 55 Mich. 139; Gram *v.* Cadwell, 5 Cow. 489; Everughim *v.* Ensworth, 7 Wend. 326; Beudel *v.* Hettrick, 45 How. Pr. 198; Broaddus *v.* Evans, 63 N. Ca. 633; Thomas *v.* Pennrich, 28 Oh. St. 55; Clark *v.* Sparhawk (Pa.), 2 Weekly Notes, 115; Viles *v.* Bangs, 36 Wis. 131; and see §§ 410, 411. As to ratification, see § 427. *Contra*, sustaining the power to do so: Combs *v.* Boswell, 1 Dana, 473 (*dictum*); Owings *v.* Trotter, 1 Bibb, 157; Beckham *v.* Peay, 2 Bailey (S. Ca.), L. 133; Hells *v.* Coe, 4 McCord, L. 136. In Lamb *v.* Saltus, 3 Brev. (S. Ca.) 130, the court were equally divided.

[2] Lunt *v.* Stevens, 24 Me. 534. And see Gram *v.* Cadwell, 5 Cow. 489; Combs *v.* Boswell, 1 Dana, 473. See Legh *v.* Legh, 1 B. & P. 447.

[3] Barker *v.* Richardson, 1 Younge & J. 362; Gram *v.* Cadwell, 5 Cow. 489. A composition of the debts of an insolvent debtor was signed by his creditors, among them by E., but it did not appear whether his signature was intended to apply to a debt due him individually or a debt due his firm. It was considered to include the latter, and the burden is on the firm to show the contrary. Emerson *v.* Knower, 8 Pick. 63. See Rice *v.* Woods, 21 Pick. 30; and Halsey *v.* Whitney, 4 Mason, 206, 231.

[4] Innes *v.* Stephenson, 1 Moo. & Ry. 145; Cheap *v.* Cramond, 4 B. & Ald. 663; Cannon *v.* Wildman, 28 Conn. 472, 493; Murrell *v.* Murrell, 33 La. Ann. 1233; Averill *v.* Lyman, 18 Pick. 351; Tapley *v.* Butterfield, 1 Met. 515; 35 Am. Dec. 374; Osborn *v.* Osborn, 36 Mich. 48; Tyson *v.* Pollock, 1 Pa. 375; Moist's Appeal, 74 Pa. St. 166; Scott *v.* Shipherd, 3 Vt. 104. And see cases under § 386 *et seq.*

that the firm had given B. collaterals on part of which he had realized, but had not credited the amount on the firm's notes. It appeared that P., who was B.'s son-in-law, and an executor of her husband's estate, and her manager, had taken notes and mortgages made to the firm and set them aside as collaterals to the firm's debt to B., and had received payments on them, for which, however, he had not accounted to B., and had received a conveyance to himself in payment of one of the mortgages. B. never had possession of any of the collaterals and never authorized P. to hold them for her. M. now claimed credit for the payments and deed to P. *Held*, after the dissolution, one partner cannot act as agent of a creditor in holding obligations due the firm as collateral for the creditor; he cannot act as agent for both sides. Such conveyance and payment may inure to the benefit of the firm, but not of B.[1]

A promise by one partner, after dissolution, to pay a debt due by the firm is the promise of the firm. As where a debtor of the firm, in payment, transferred his claim against another firm, one of the partners in which promised the creditor firm to pay it to them;[2] or where partners are engaged with others in operating a lottery scheme, and the plaintiff delivered his lottery ticket to one partner, who promised to pay him the benefits, the whole firm is liable for the prize drawn by it.[3]

§ 385. Release of one partner by creditor.— The general rule, both of law and equity, that a release of one joint debtor from liability releases all, a *fortiori* applies to discharge copartners.[4]

[1] Whether a partner can keep a debt alive for his own benefit after he has paid it, see § 531.

[2] Lacy *v.* McNeile, 4 Dow. & Ry. 7; Peyton *v.* Stratton, 7 Gratt. 380.

[3] Anon. *v.* Layfield, Holt, 434. As to the effect of a promise by one partner upon the statute of limitations, see §§ 702–705.

[4] Cocks *v.* Nash, 9 Bing. 341; Cheetham *v.* Ward, 1 B. & P. 630; United States *v.* Thompson, Gilpin, 614; Willings *v.* Consequa, Pet. C. C. 301, 307; Gray *v.* Brown, 22 Ala. 262; Elliott *v.* Holbrook, 33 Ala. 659, 667; Kendrick *v.* O'Neil, 48 Ga. 631; Williamson *v.* McGiunis, 11 B. Mon. 74; Tuckerman *v.* Newhall, 17 Mass. 581; American Bank *v.* Doolittle, 14 Pick. 123, 126; Rice *v.* Woods, 21 id. 30, 33; Le Page *v.* McCrea, 1 Wend. 164; 19 Am. Dec. 469; Burson *v.* Kincaid, 1 Pa. (Pen. & W.) 57. To be effectual, such a release must have a consideration, but the promise of the other partners to be solely responsible is a consideration. See § 505. Whether release of a per-

Only a technical release of one joint debtor is available as a defense to his co-debtors. A mere promise to release a partner, where the promise is not acted on, and no security is parted with, is a *nudum pactum*, and no defense, either for such partner or his copartners, unless under seal so as to import consideration.[1] An agreement to save harmless or indemnify is not a release, and, therefore, no defense to the copartner; even though, to save circuity of actions, it might be so treated if there were only two persons concerned.[2] A covenant not to sue one partner does not release the other, for its effect is merely an agreement to indemnify against the consequences of a suit.[3]

An agreement of partnership creditors to look only to the partnership property and to discharge one partner does not give the separate creditors any additional rights, for it does not injure them, nor does it bind the other partner if he pays.[4]

son includes debts owed by him jointly with another depends on the intention of the parties as shown by the terms of the release. A release of all causes of actions, suits, debts, etc., which the releasors now have or ever have had in respect to any matter from the beginning of the world, includes liabilities as partner, Hall v. Irons, 4 Up. Can. C. P. 351. A release of a partner from all claims individually, and as one of the firm, is a discharge of him in his capacity of surviving partner, the copartner having subsequently died, Beam v. Barnum, 21 Conn. 200. A release of all demands, made to a debtor after he had assigned all of his property to a preferred creditor, for the benefit of his creditors, is void for fraud, if such preferred creditor was the debtor's dormant partner and this fact was concealed. Carter v. Connell, 1 Whart. 392.

[1] Evans v. Carey, 29 Ala. 99; Fagg v. Hambel, 21 Iowa, 140.

[2] Berry v. Gillis, 17 N. H. 9 (43 Am. Dec. 584); Kendrick v. O'Neil, 48 Ga. 631; Shotwell v. Miller, 1 N. J. L. 95 [81].

[3] Dean v. Newhall, 8 T. R. 168; Walmesly v. Cooper, 11 Ad. & El. 216; Roberts v. Strang, 38 Ala. 566; Mason v. Jouett, 2 Dana, 107; Walker v. McCulloch, 4 Me. 421; Lunt v. Stevens, 24 id. 534; McLellan v. Cumberland Bank, 24 Me. 566; Shaw v. Pratt, 22 Pick. 305; Bemis v. Hoseley, 16 Gray, 63; Berry v. Gillis, 17 N. H. 9 (43 Am. Dec. 584); Harrison v. Close, 2 Johns. 448; Rowley v. Stoddard, 7 id. 207; Catskill Bank v. Messenger, 9 Cow. 37; Bank of Chenango v. Osgood, 4 Wend. 607; De Zeng v. Bailey, 9 id. 336; Hosack v. Rogers, 8 Paige, 229. See, also, Clayton v. Kynaston, 2 Salk. 573; Lacy v. Kynaston, id. 575; 1 Ld. Raym. 688; Hutton v. Eyre, 6 Taunt. 289; Price v. Barker, 4 E. & B. 760; Durell v. Wendell, 8 N. H. 369; Couch v. Mills, 21 Wend. 424.

[4] Witter v. Richards, 10 Conn. 37.

§ 386. —— **reserving claim against rest.**— If the release is clearly intended not to prevent an action against all the debtors including the releasee, and is for his benefit alone, it is no discharge of the debt, as where there is a reservation of the right to sue all. This is in effect an agreement not to make the debt out of the private property of the releasee.[1]

So if one of the partners is severally as well as jointly liable, as where one partner is drawer or acceptor of a bill on or by the firm, a release of the other partners is not a release of him,[2] nor is a release of the drawer a release of his liability in the capacity of one of the drawee firm.[3]

In Gilpatrick *v.* Hunter, 24 Me. 18, it was held that, in case of tort against the person, the damages can be neither estimated nor divided, and a release of one releases all; but in McCrillis *v.* Hawes, 38 Me. 566, it was held that if the tort was conversion of property, a settlement with one partner for his half did not preclude an action against the other, and the declaration could be for conversion of half, although it was agreed that under such declaration but half of the half could be recovered.

A release of a partner, reserving the claim against the other, is no discharge of the latter's liability on whatever remains due.[4]

§ 387. **Statutes.**— Many of the United States have statutes enabling a creditor to compromise and settle with or

[1] Solly *v.* Forbes, 2 Brod. & Bing. 38. And see the following cases: Thompson *v.* Springall, 3 C. B. 540; Willis *v.* DeCastro, 3 C. B. N. S. 216; Price *v.* Barker, 4 E. & B. 760. And see Bateson *v.* Gosling, L. R. 4 C. P. 9.

[2] Hartley *v.* Manton, 5 Q. B. 247.

[3] Pearce *v.* Wilkins, 2 N. Y. 469.

[4] Browning *v.* Grady, 10 Ala. 999; Northern Ins. Co. *v.* Potter, 63 Cal. 157; Beam *v.* Barnum, 21 Conn. 200; Seymour *v.* Butler, 8 Iowa, 304; Gardner *v.* Baker, 25 id. 343; Clagett *v.* Salmon, 5 Gill & J. 314, 351; Shed *v.* Pierce, 17 Mass. 623; Goodnow *v.* Smith, 18 Pick. 414; Chandler *v.* Herrick, 19 Johns. 129; Bank of Chenango *v.* Osgood, 4 Wend. 607; Greenwald *v.* Kaster, 86 Pa. St. 45; Williams *v.* Hitchings, 10 Lea (Tenn.), 326. And see Kirby *v.* Taylor, 6 Johns. Ch. 242; Lysagt *v.* Phillips, 5 Duer, 106. But see Parmelee *v.* Lawrence, 44 Ill. 405. A release of all claims against J. S. was held not to be a release of J. S.'s firm, in Reading R. R. *v.* Johnson, 7 W. & S. 317. The other partners are only liable for the balance, although their ratable proportion exceeds it. Lowell Nat'l B'k *v.* Train, 2 Mich. Lawyer, 27.

release one joint debtor without prejudice to his claim against the rest.[1]

These statutes apply to partnerships, for partners are joint debtors.[2]

If one partner is thus released *pendente lite* and dismissed from the case the issue is not changed, and depositions already taken are competent, and if notes are sued upon they in effect stand for the balance due.[3]

Under these statutes a release may be made in and under the law of one state and sought to be availed of in another state. In such case its construction, at least *inter se*, would be governed by the law under which it purported to be made.[4] But its effect on the other partner would be controlled by the law of the forum.[5]

§ 388. Inter se.— In Lord *v.* Anderson, 16 Kan. 185, a partner sued his equal copartners for an accounting and settlement, and pending suit settled with one of them for $100 for his share of the estimated balance. It turned out that the entire balance due the complainant from the two defendants was $1,281. It was of course held that this released one-half the debt, and he could only recover $640.50 from the other defendant.

[1] This is true of CALIFORNIA, CONNECTICUT, DAKOTA, KANSAS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW YORK, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, VERMONT, VIRGINIA, WISCONSIN. And that the settlement is in full of each partner's entire share of liability, whether in fact so or not, is enacted in MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, OHIO, RHODE ISLAND, SOUTH CAROLINA, VERMONT. The copartners' right to call upon such partner for their proportion is reserved in KANSAS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEW JERSEY, NEW YORK, OHIO, PENNSYLVANIA, SOUTH CAROLINA.

[2] Northern Ins. Co., *v.* Potter, 63 Cal. 157; Grant *v.* Holmes, 75 Mo. 109. And although the consideration of the release was taken out of partnership funds. Stitt *v.* Cass, 4 Barb. 92. That "joint debtors" in a statute includes partners is shown elsewhere by the cases on statutes allowing service of summons on one joint debtor to bind the rest.

[3] Holdridge *v.* Farmers' & Mech. Bank, 16 Mich. 66.

[4] Seymour *v.* Butler, 8 Iowa, 304; Holdridge *v.* Farmers' & Mech. Bank, 16 Mich. 66.

[5] Seymour *v.* Butler, *supra;* Greenwald *v.* Kaster, 86 Pa. St. 45; but see Beam *v.* Barnum, 21 Conn. 200; Rice *v.* McMartin, 39 id. 573; Holdridge *v.* Farmers' & Mech. B'k, 16 Mich. 66, which seem to regard the effect of the release on the other partners as not a matter of remedy and to be governed by the *lex loci contractus.*

In a foot-note the reporter suggests a supposed case, viz.: Had the partners believed that $1,200 would be found due the complainant and one of them had settled with him for $600, and it was found that but $400 in all was due him, would he be allowed to recover half of this from the other partner and thus receive $800 where only $400 was due? Clearly the payment by the released partner was at his own peril, and whether he could recover it back or not is, as to the other defendant, *res inter alios acta.*[1]

NOTICE TO ONE.

§ 389. —— is notice to all.—Resulting from the agency of a partner, it follows that notice to one member of a firm of matters within the scope of the business, or in reference to a partnership transaction, and which it is his duty to communicate to his copartners, if he is within reach and able to tell them, is notice to all. In such cases, if he fail to notify the other partners, they cannot avail themselves of their ignorance of the transactions of one of their number in acting as their agent.

Thus, notice served upon one of the defendant partners to take depositions is notice to all;[2] and notice of appeal by one partner is notice to all.[3] If partners have signed a submission to arbitration, notice to one partner thereafter is sufficient.[4] Notice to one of a firm of consignees or factors to sell is notice to all.[5] If partners are lessees, no doubt notice to one to terminate the tenancy is sufficient.[6] Plaintiff's acceptance of a guaranty made by a firm, notified to the partner who delivered it to him, is notice to the firm of the acceptance.[7]

So of a demand on the firm in the scope of its business; as where a firm of attorneys receives money belonging to a client who demands it of one, this is a demand on the firm.[8] And if partners are

[1] A mere majority has no power to release the liability of one partner to the firm. § 432.

[2] Cox *v.* Cox, 2 Porter (Ala.), 533; Spaulding *v.* Ludlow Woolen Mill, 36 Vt. 150.

[3] Miller *v.* Perrine, 1 Hun, 620.

[4] Haywood *v.* Harmon, 17 Ill. 477.

[5] Howland *v.* Davis, 40 Mich. 545.

[6] See Walker *v.* Sharpe, 103 Mass. 154.

[7] New Haven Co. Bk. *v.* Mitchell, 15 Conn. 206, 219.

[8] McFarland *v.* Crary, 8 Cow. 253 (aff'd, 6 Wend. 297).

mortgagees, a request to one to cancel the mortgage is a request to all, so as to make them liable to a statutory penalty.[1]

So demand upon and refusal by one partner is competent evidence of a conversion by the firm.[2]

§ 390. So of knowledge of one partner.— Where one partner of a legal firm had drawn up the defendants' articles of partnership and knew that certain partners were not liable for the services sued for, this is knowledge on the part of all the plaintiffs.[3]

Where the debtor of a firm paid the debt to one partner, but told another that he had not paid, whereupon the other, in winding up the firm, sued him, he is not precluded to deny his latter statement; the other should have known.[4]

Where D. bought land of a person, giving his notes with sureties, and agreed with the sureties to secure the notes by shipping bark to the firm of B. & Co., the proceeds to be applied to take up the notes, and B. had notice of the purpose of the shipments, B. & Co. having bought the notes, cannot sue the sureties in violation of the agreement.[5]

A firm bought logs on credit and sought a rescission on the ground that it was represented that the logs were afloat, but one partner knew they were not afloat; this is knowledge on the part of all.[6]

F. was trustee of Mrs. T. to manage a fund free from her husband's control; he loaned the trust money to his firm, who secured it by a note and mortgage payable to Mrs. T. Payments were made on the note to her husband without her authority. F.'s knowledge of the husband's disability to control her property is notice to the firm.[7]

A. & B., partners, bought lumber of the defendant. B. measured the lumber before dissolution and found a deficiency in quantity.

[1] Renfro *v.* Adams, 62 Ala. 302.

[2] Nisbet *v.* Patton, 4 Rawle, 120; Holbrook *v.* Wight, 24 Wend. 169; Mitchell *v.* Williams, 4 Hill, 13; except where the taking or detention is not a partnership act, as in Taylor *v.* Jones, 42 N. H. 25. So if the firm purchases property from a person whom one partner knows to have obtained it by trespass, as where the seller cut plaintiff's timber and made it into ties or staves and the firm purchased it after one partner had notice. Tucker *v.* Cole, 54 Wis. 539; Gerhardt *v.* Swaty, 57 id. 24.

[3] Burritt *v.* Dickson, 8 Cal. 113.

[4] Bigelow *v.* Henniger, 33 Kan. 362.

[5] Baugher *v.* Duphorn, 9 Gill, 314.

[6] Hubbardston Lumber Co. *v.* Bates, 31 Mich. 158.

[7] Tucker *v.* Bradley, 33 Vt. 324.

A., after dissolution, paid the note. The knowledge of the former is that of the latter; A. cannot sue for money had and received. The court say B. knew it, therefore A. knew it.[1]

§ 391. Notice before the partnership is formed.— Incoming partners may be likewise affected.

Where H. contracted to deliver glass to defendants at a certain price, and afterwards proposed a different price, to which they did not accede, and H. then transferred the contract to his firm, and they, supposing the price to be that last mentioned, filled the order, they are affected with notice of all that he knew, and can only recover the contract price.[2]

Where W. was tenant in common of oyster beds with R., who lived in another town, and W. took in D. as a partner, and shipped R.'s share of the oysters to D., W.'s knowledge is notice to D., and R. can compel D., as surviving partner, to account.[3]

But notice before the firm is formed is not sufficient.

Where M. and G. were negotiating to form a firm, pending which G. was negotiating to buy premises for the future firm, and on the day before the purchase M. learned that the seller was defrauding his creditors in this disposition of his property, this does not affect G. The court say the authorities are limiting the doctrine of constructive notice, and that they will not stretch it to affect an innocent man who pays cash down, even though the other partner was to get an interest in the purchase.[4]

And where a person holds property with notice of an unrecorded license to use it, and another, without such notice, is about to form a partnership with him, and buys an undivided interest in the property, to be held by both for the use of the firm, he holds his share free from the incumbrance, for they were not then partners; but if he afterwards buys out his partner, he holds as tenant in common with the licensee, having had notice on buying the second half.[5]

§ 392. On purchases of property.— So, where partners make a purchase, the knowledge of one of their number

[1] Snarr *v.* Small, 13 Up. Can. Q. B. 125.

[2] Holton *v.* McPike, 27 Kan. 286.

[3] Ruckman *v.* Decker, 23 N. J. Eq. 283, 289 (reversed on other points, in 28 id. 614).

[4] Duffill *v.* Goodwin, 23 Grant's Ch. (Up. Can.) 431.

[5] Herbert *v.* Odlin, 40 N. H. 267.

of a claim or lien upon the property is knowledge of the firm. Thus, where partners took a mortgage upon land, and one partner knew of a prior mortgage upon it, the record of which was not constructive notice because of defective execution, this is notice to all.[1]

B. owed H. $205, and in payment conveyed land to him, taking back a bond for reconveyance on repayment, but never recorded the bond, and conveyed the land to the defendant firm, in payment of his debt to them, C., the active partner, having notice of the bond. B. paid C. the $205, and C. agreed that a reconveyance should be made, instead of which the firm dissolved, C. deeply indebted to another partner, J., to whom he conveyed the land, J. having no knowledge of the bond or the payment. J. is affected with notice, and is bound to carry out C.'s agreement to reconvey.[2]

§ 393. Of defenses to mercantile paper.— So, where a partnership becomes possessed of mercantile paper, the knowledge of defenses on the part of one partner is notice to the firm. As where one partner knew that a note discounted by him for the firm was void for usury,[3] or where an accommodated party is a member of a firm to whom the paper subsequently comes, the firm has notice that it is accommodation paper.[4] So, if a note is made to one partner, and he transfers it to the other, or to his firm, the latter is not a *bona fide* holder without notice.[5]

In Liddell *v.* Crain, 53 Tex. 549, it was held that, where one partner made false representations in a sale of his individual interest in the partnership property, for which he received the buyer's note, the other partner could have the rights of an innocent holder

[1] Watson *v.* Wells, 5 Conn. 468; Herbert *v.* Odlin, 40 N. H. 267.

[2] Barney *v.* Currier, 1 D. Chip. (Vt.) 315 (6 Am. Dec. 739); and another example of such notice will be found in Marietta & Cin. R. R. *v.* Mowry, 28 Hun, 79.

[3] Powell *v.* Waters, 8 Cow. 669, 691.

[4] Sparrow *v.* Chisman, 9 B. & C. 241; Quinn *v.* Fuller, 7 Cush. 224.

[5] Otis *v.* Adams, 41 Me. 258; McClurkan *v.* Byers, 74 Pa. St. 405; Stockdale *v.* Keyes, 79 id. 251; Pease *v.* McClelland, 2 Bond, 42, where they were partners for that transaction only; Hubbard *v.* Galusha, 23 Wis. 398. In Stockdale *v.* Keyes, where a factor of a firm collusively procured the firm's signature to an accommodation note, and a banking partnership in which he was a member discounted it, his knowledge was held to be theirs.

of the note, if he had no notice, because the sale, being of his individual interest, and not of partnership property, was not a transaction in the scope of the business.

Where the burden of proof is upon partners who are plaintiffs, as indorsees of a note, in an action upon it, to show that they took it in good faith, they must prove that all the partners were ignorant of the fraud or defense between the maker and payee, for, as notice to one is notice to all, ignorance of one cannot be ignorance of all. Otherwise an ignorant partner could be put forward to purchase because of his innocence.[1]

§ 394. Knowledge obtained in other capacities.— Where a partner was the director and vice-president of a bank, in which the firm owned stock, and the firm sold its stock to one H., who was indebted to the bank, and H. sold the stock to the bank, and got credit for money to pay the firm for it, upon which he checked in favor of the firm, the director partner is affected with knowledge that H. had no funds, except what he got from the sale of the stock, and the bank had no power to buy its own stock; therefore, the bank can compel the firm to take back the stock and return the money to it.[2]

Transfer of a note to a firm, one of its members being trustee of the company owning the note, is with notice of want of authority in the company to transfer it.[3]

D. was a director in a corporation which was indebted to the firm of D. & Co., of which he was a member, and the corporation made a note payable to a bank, agreeing that if its discount was procured they would pay D. & Co. their debt. The note was delivered to D. to procure such loan, and the bank discounted it and handed him the proceeds; but he paid only part of the debt to D. & Co., and used the balance for other purposes. Here it was held that the debt was not paid, because D. took the note, and received the money in the capacity of director, and not of partner, and it was therefore the defendant's money.[4]

So where one firm receives a note indorsed by another firm, in payment of the individual debt of a member of the latter, and therefore knows the note is unauthorized, and the firm sold the

[1] Frank *v.* Blake, 58 Iowa, 750.

[2] Savings Bank *v.* Wulfekuhler, 19 Kan. 60. See, also, Merchants' Bank *v.* Rudolf, 5 Neb. 527.

[3] Smith *v.* Hall, 5 Bosw. 319.

[4] Duncklee *v.* Greenfield Steam Mill Co. 3 Foster (23 N. H.), 245.

note to a bank in which one of its partners was director, his knowledge is not its knowledge, because not acquired in its business.[1]

§ 395. As affected by scope of business.— The notice to a partner, to affect the firm, must be a notice in reference to a transaction within the scope of the business.[2]

In Bignold *v.* Waterhouse,[3] one member of a firm of carriers collusively agreed, for a consideration for his own benefit, to carry parcels for B. free of charge. B. was aware of a rule of the firm not to be liable for parcels of over £5 value, without notice of the fact and entry of the parcel as such. Here the agreement to carry free of charge being outside the scope of the partner's authority, such partner's knowledge of the value of the parcel is not notice to the firm.[4]

So where he has trust funds in his hands, and uses them for the firm, his knowledge as trustee of the abuse of trust is not notice to the firm of the nature of the funds.[5]

And for the same reason notice to a firm will not, as a constructive notice, affect the separate individual interests or rights of a member not connected with those of the firm.[6] Of course where an averment charges partners with notice, the default of one partner is not an admission of notice against copartners who plead want of it.[7]

And *vice versa* if one partner is the agent of a third person, his knowledge of the limitations upon the powers of the partners is not knowledge of such person in matters not relating to the agency. As where T. & Co., being agents of the plaintiff, dissolved, and T. formed the new firm of W., T. & Co., the new firm agreeing not to deal in repairs, and T. then obtained a renewal of the agency from the plaintiff, and receipted to the plaintiff for work done in repairing, T.'s knowledge as a member of the firm is not the knowledge

[1] Atlantic State B'k *v.* Savery, 82 N. Y. 291 (aff. 18 Hun, 36).

[2] Coon *v.* Pruden, 25 Minn. 105.

[3] 1 M. & S. 255.

[4] And see Lacey *v.* Hill, 4 Ch. D. 537, that knowledge of the clerks of the firm, of the guilty partner's conduct, is not notice to the firm.

[5] See § 481. Nor is notice to another partner of the character of the funds, notice to the firm. Evans *v.* Bidleman, 3 Cal. 435.

[6] Coon *v.* Pruden, 25 Minn. 105; Bolling *v.* Anderson, 4 Baxt. (Tenn.) 550.

[7] Pengnet *v.* McKenzie, 6 Up. Can. C. P. 308; Petty *v.* Hannum, 2 Humph. 102.

of the plaintiff, for in contracting to form the relation of principal and agent, they are in antagonistic positions.[1]

Where a member of two firms made a note in the name of one firm, payable to a member of the other for a loan by him to it, and the articles of the maker firm were claimed in argument to exclude the power to borrow, it was urged that the knowledge of the common partner was notice to the payee, but a recovery was allowed by the court without noticing the point.[2]

A., being indebted to B. & C., proposed that B. & C. should make advances to him against consignments by him to his agents abroad, the proceeds of sales above the advances to be credited on the debt. And B. & C. accordingly made the advances, and afterwards directed the consignees to remit to the firm of C. & D., bankers, instead of to themselves; C. being a common partner in both firms. B. & C. became bankrupt. It was held that C. & D. had notice through the common partner that the remittances were appropriated: 1st, to repay the advances (which had been made by acceptances); 2d, to discharge the old claim against A.[3]

§ 396. As affected by duty and opportunity to communicate.— The knowledge of an absent partner, where it is not of a matter which it was his duty to communicate to his copartners, as in some business done or commenced by him, is not constructive notice to the firm.

Thus, where defendant buys goods of a firm, without disclosing that he is buying as agent of another, he is personally liable therefor, although on a previous occasion he had notified the now absent partner that he desired to buy as such agent, which was then refused because the firm did not have the goods on hand.[4]

So, where the firm of R., H. & E. having hay to sell, the defendant L. asked R. to sell to him, stating that he desired to purchase as the agent of K. R. replied that the hay was not ready, and L. said he would call again. Four weeks afterwards L. bought the hay of H., another partner, not disclosing that he purchased as agent. L. was held personally liable as an agent dealing in his own name,

[1] Aultman & Taylor Mfg. Co. *v.* Webber, 4 Ill. App. 427.

[2] Moore *v.* Gano, 12 Oh. 300. It was subsequently held, however, in Gano *v.* Samuel, 14 Oh. 592, that the partner had power to borrow,

[3] Steele *v.* Stuart, L. R. 2 Eq. 84.

[4] Baldwin *v.* Leonard, 39 Vt. 2 0.

the agency being unknown. The prior conversation with R. is not part of the bargain, because R. was not in duty bound to communicate it, and could assume that L. would notify the other partners if he bought from them.[1]

§ 397. **Protesting notes, etc.; demand on one.**— If the firm is the maker of a note or acceptor of a bill, presentation to one partner or demand of payment upon one is sufficient to charge the indorsers.[2]

And after dissolution a demand upon one is a demand upon all to charge indorsers. This follows from the authority of each partner to wind up, and in so doing to pay debts, and hence each represents all.[3]

§ 398. —— **notice to one of indorsing firm.**— If the firm is an indorser, notice of non-payment or protest served upon one partner binds the firm.[4]

If, however, one partner lives where the note is protested, and the other has moved away, it is not due diligence to send notice only to the one abroad, and the one at home is not bound by it.[5]

Where C., in San Francisco, was a partner in the house of Page, Bacon & Co., of St. Louis, and drew a draft in their names, notice of dishonor on the firm in St. Louis binds the partners there.[6]

[1] Baldwin *v.* Leonard, 39 Vt. 260.

[2] Porthouse *v.* Parker, 1 Camp. 82; Mt. Pleasant Branch of State Bank *v.* McLeran, 26 Iowa, 306; Shed *v.* Brett, 1 Pick. 401; Hunter *v.* Hempstead, 1 Mo. [67], 48 (13 Am. Dec. 468); Erwin *v.* Downs, 15 N. Y. 575.

[3] Brown *v.* Turner, 15 Ala. 832; Barry *v.* Crowley, 4 Gill, 194; Gates *v.* Beecher, 60 N. Y. 518 (19 Am. Rep. 207) (*infra*, 3 Th. & C. 404); Fourth National Bank *v.* Heuschen, 52 Mo. 207. And demand upon the agent of one partner when both are absent is sufficient. Brown *v.* Turner, *supra*. Demand after death should, of course, be upon the survivor. Cayuga Co. Bank *v.* Hunt, 2 Hill, 635. So under the old English practice, in an action against joint makers, who suffer judgment by default, service of a rule *nisi* upon one of the defendants to compute principal and interest is service upon all, because they are as to it partners. Collyer on Part. § 443, citing Figgins *v.* Ward, 2 Cr. & M. 424; Carter *v.* Southall, 5 M. & W. 128.

[4] Hume *v.* Watt, 5 Kan. 34; Nott *v.* Douming, 6 La. 684; Magee *v.* Dunbar, 10 id. 546; Dabney *v.* Stidger, 4 Sm. & Mar. 749 (with a doubt, however, in case the indorsement is not joint); Bouldin *v.* Page, 24 Mo. 594; Miser *v.* Trovinger, 7 Oh. St. 281, 287; Burnet *v.* Howell, 8 Phila. 531.

[5] Hume *v.* Watt, 5 Kan. 34.

[6] Bouldin *v.* Page, 24 Mo. 594.

Statutes making partnership contracts joint and several affect the remedy only, and do not alter the rule that notice to one is notice to all.[1]

And notice of protest to one partner of non-payment of a note or bill maturing after dissolution is notice to all, for the same reason that demand upon one is demand upon the firm.[2] And after death of a partner, notice to the surviving partner binds the estate of the decedent.[3]

§ 399. —— **dispensed with.**— One partner of an indorsing firm may waive demand and notice,[4] even after dissolution, provided the note be not yet matured, because it is not a new contract, but a dispensing with certain evidence;[5] or may direct the particular mode or place of notice.[6]

If the drawer is partner of the acceptor firm, or if a partner draws upon his firm, the dishonor of the bill need not be notified to the drawer; the knowledge of the firm is his knowledge.[7] So of a draft by the firm upon one partner.[8]

[1] Dabney *v.* Stidger, 4 Sm. & Mar. 749.

[2] Coster *v.* Thomason, 19 Ala. 717; Nott *v.* Douming, 6 La. 684; Slocumb *v.* Lizardi, 21 La. Ann. 355; Hubbard *v.* Matthews, 54 N. Y. 43 (13 Am. Rep. 562), where the dissolution was by war, and the partner in hostile territory was held bound by notice on the residents; Bank of Commonwealth *v.* Mudgett, 44 N. Y. 514, on the facts; Burnet *v.* Howell, 8 Phila. 531.

[3] Dabney *v.* Stidger, 4 Sm. & Mar. 749. See Cocke *v.* Bank of Tenn. 6 Humph. 51.

[4] Star Wagon Co. *v.* Swezey, 52 Iowa, 394; S. C. 59 id. 609; Darling *v.* March, 22 Me. 184; Farmers' & Mer. Bk. *v.* Lonergan, 21 Mo. 46; Windham Co. Bank *v.* Kendall, 7 R. I. 77.

[5] Darling *v.* March, 22 Me. 184; Star Wagon Co. *v.* Swezey, 52 Iowa, 394; S. C. 59 id. 609; Seldner *v.* Mt. Jackson Nat'l Bk. 66 Md. 488. Hence, an admission of liability by one partner was held competent evidence as tending to prove notice or waiver. First Nat'l Bk. *v.* Carpenter, 34 Iowa, 433. If the note was indorsed for accommodation, and the holder knew this, it was held that one partner could not bind another by any promise as to its payment, because as to this they are not partners. Baer *v.* Leppert, 12 Hun, 516.

[6] Nutt *v.* Hunt, 4 Sm. & Mar. 702; Windham Co. Bk. *v.* Kendall, 7 R. I. 77.

[7] Porthouse *v.* Parker, 1 Camp. 82; Rhett *v.* Poe, 2 How. 457; Fuller *v.* Hooper, 3 Gray, 334; Gowan *v.* Jackson, 20 Johns. 176; West Branch Bank *v.* Fulmer, 3 Pa. St. 399; Harwood *v.* Jarvis, 5 Sneed (Tenn.), 375.

[8] Porthouse *v.* Parker, 1 Camp. 82; N. Y. & Ala. Contrac. Co. *v.* Meyer, 51 Ala. 325.

§ 400. —— partner common to two firms.— So if a partnership draws on another partnership and the latter accepts, if one of the partners is a member of both firms, no notice of dishonor is necessary to charge the drawers.[1]

Where one partner made a note to the order of his firm and they indorsed it over, but the maker did not pay it and it was not protested, the release of the firm by not protesting does not release him as the original promisor; nor does his knowledge of the dishonor bind them, for his promise as maker is distinct from their liability as a firm. Their contract is to be liable on condition of demand and notice, and performance of the condition is not excused by the relation between them. The firm would not have been charged by actual information of dishonor.[2]

And if one firm makes a note to another firm having a partner common to both, the latter firm are not liable as indorsers unless there has been due demand and notice.[3]

So if maker and indorser are or had formerly been partners and the note was for a partnership debt.[4]

The difference between the last three cases and those which precede is this: In the last, *non constat* but that if the note had been presented it would have been paid, for the parties previously liable may have funds of which the drawer or indorser has no knowledge. But in the former cases of a draft by a partner on his firm, he knows at the time of drawing whether they are solvent or not, or whether they have funds belonging to him with which to meet the paper.

Deeds.— See Sealed Instruments, § 413.

Delivery.— § 375; tender to one partner, § 390.

Guaranty, security and accommodation.— The want of power in a partner to use the firm name for such purposes

[1] N. Y. & Ala. Contracting Co. *v.* Selma Sav. Bk. 51 Ala. 305; 23 Am. Rep. 552; Woodbury *v.* Sackrider, 2 Abb. Pr. 402; West Branch Bank *v.* Fulmer, 3 Pa. St. 399. In Taylor *v.* Young, 3 Watts, 339, the bill by an outgoing partner upon his firm was professedly on his own behalf and protest was held necessary.

[2] Coon *v.* Pruden, 25 Minn. 105.

[3] Dwight *v.* Scovil, 2 Conn. 654; Foland *v.* Boyd, 23 Pa. St. 476. That the indorser was a member of the maker firm does not excuse want of protest, though the firm was insolvent and the indorser knew the note was not paid. *Re* Grant, 6 Law Reporter, 158.

[4] Morris *v.* Husson, 4 Sandf. 93.

as these was considered, for the sake of convenience, with the power to make bills and notes.[1]

Indorse, power to.— As a power of disposition, § 401; in accommodation, § 349.

Insure.— Power to procure insurance on property, § 409.

To mortgage personal property, §§ 403, 406 *et seq.*

To pay.— See § 384, *et seq.*

To pledge.— § 406.

PERSONAL PROPERTY, POWER OVER.

§ **401. Power to sell.**— Each partner has, by reason of his agency, power to sell any specific part of the partnership property which is held for the purpose of sale, and make a valid transfer of the entire title of the firm in it.[2]

Some of the cases and many of the *dicta* seem to apply this rule to chattels of every kind, whether held by the firm for purposes of sale or not.[3] Thus, a sale or mortgage of a ship by one partner in the firm name has been held good.[4] But I have no doubt but that the power of sale must be confined to those things held for sale, and that the scope of the business does not include the sale of property held for the purposes of the business and to make a profit out of it, and that this only is the true rule.[5]

The power of disposition is not confined to tangible chattels, but extends to choses in action. Each partner has the same power to sell and assign them that he has over other

[1] § 349 *et seq.*

[2] For power to contract to convey real estate, see § 299.

[3] Clark *v.* Rives, 33 Mo. 579.

[4] *Ex parte* Howden, 2 Mont. D. & De G. 574; Lamb *v.* Durant, 12 Mass. 54, 57 (7 Am. Dec. 31); Patch *v.* Wheatland, 8 Allen, 102 (*contra*, Hewitt *v.* Sturdevant, 4 B. Mon. 453); The Wm. Bagaley, 5 Wall. 377, 406. But a sale by a partner in charge of a ship at sea will give title as against a prior sale of the partner at home. Lamb *v.* Durant, *supra.*

[5] Hewitt *v.* Sturdevant, 4 B. Mon. 453, that a sale of a steamboat owned for profit is void. Cayton *v.* Hardy, 27 Mo. 536, that a sale of working oxen by one of a farming partnership is void. Mussey *v.* Holt, 24 N. H. 248 (55 Am. Dec. 234), of a lease of partnership real estate by one partner. Hudson *v.* McKenzie, 1 E. D. Smith, 358. These questions have more frequently arisen on attempts to sell the entire effects of the firm and will be considered more fully in treating of such attempts.

personal property;[1] as to change the bank account of a firm conducted in the name of one partner to a distinctively firm account.[2]

So a member of a mining partnership can agree that ore shall be delivered to a mill in sufficient quantities.[3]

Each partner has the same right to sell and indorse over mercantile paper belonging to the firm that he has to sell any other property before dissolution.[4]

An indorsement of a note payable to the firm by one partner in his individual name, though it does not convey the legal title in the note, is a good assignment and conveys the entire beneficial interest of all the partners.[5]

So where a note was payable to Propeller Ira Chaffee, an indorsement of it in that name by the managing partner binds the firm.[6]

An indorsement thus: "I hereby assign," etc., signed in the firm name, conveys the firm's title.[7]

Where the partners divide the notes of the firm between them, each can indorse the firm name on his own notes to perfect his own title.[8]

As attorneys sell claims when authorized, a sale of notes by one of the firm, if within the apparent scope of the business, may bind the owner of them and the copartners, although there was in fact no right to sell them.[9]

Where a note was made to partners in their individual names,

[1] Cullum *v.* Bloodgood, 15 Ala. 34; Caulfield *v.* Sanders, 17 Cal. 569; Mills *v.* Barber, 4 Day, 428; Randolph Bank *v.* Armstrong, 11 Iowa, 515, assignment of a judgment; Everit *v.* Strong, 5 Hill, 163; McClelland *v.* Remsen, 36 Barb. 622; 14 Abb. Pr. 331; 23 How. Pr. 175; 3 Keyes, 454; 3 Abb. App. Dec. 74; Kull *v.* Thompson, 38 Mich. 685; Clarke *v.* Hogeman, 13 W. Va. 718.

[2] Commercial Nat'l B'k *v.* Proctor, 98 Ill. 558.

[3] Pearson *v.* Post, 2 Dak. 220, 249.

[4] Planters' & Mer. B'k *v.* Willis, 5 Ala. 770; Cullum *v.* Bloodgood, 15 id. 34; Halstead *v.* Shepard, 23 id. 558; Alabama Coal Min. Co. *v.* Brainard, 35 id. 476; Manning *v.* Hays, 6 Md. 5; First Nat'l B'k *v.* Freeman, 47 Mich. 408; Commercial B'k *v.* Lewis, 13 Sm. & Mar. 226; Windham Co. B'k *v.* Kendall, 7 R. I. 77; Walker *v.* Kee, 14 S. Ca. 142; 16 id. 76; Barrett *v.* Russell, 45 Vt. 43.

[5] Planters' & Mer. Bank *v.* Willis, 5 Ala. 770; Alabama Coal Min. Co. *v.* Brainard, 35 id. 476. See § 194.

[6] First Nat'l B'k *v.* Freeman, 47 Mich. 408.

[7] George *v.* Tate, 102 U. S. 564.

[8] Mechanics' B'k *v.* Hildreth, 9 Cush. 356.

[9] Pierce *v.* Jarnagin, 57 Miss. 107.

and the partner assigns it by indorsing the firm's name, this proves title in the assignee as against the maker.[1]

§ 402. —— **sales with warranty.**— The usual rule of agency, that a power to sell implies a power to warrant quality or soundness, obtains in sales by one partner.[2]

So of a sale of notes falsely stating the indorser and maker to be worth a certain sum. The firm was held liable on the warranty.[3] But the contrary has been held of a sale of a judgment guarantying its payment without proof of usage.[4]

In Jordan *v.* Miller, 75 Va. 442, a partnership was formed to buy cattle in Tennessee, and bring them to Virginia for sale, and cattle were purchased, but the price in Virginia was found to be very low, and neither sales nor pasturage could be obtained. Under these circumstances some of the partners made a contract to sell the cattle, guarantying a certain profit at the end of the next year, and under the circumstances this was held not to be in excess of powers.

§ 403. **Power to sell the whole property.**— As a partner has the power to sell whatever is held for sale, and as it is impossible to say at what point the power ceases, it follows that he has the power to sell all such property in bulk or as an entirety. But one of the reasons which forbid him to assign all the property for the benefit of creditors without the consent of his copartners, if they are accessible, viz.: that this is not transacting the business of the firm, but destroying it, applies here to limit the power of selling to carrying out the business of the firm, and furthering its objects.

On principle it would seem to make no difference whether the property is real or personal. If it is property in the continued use of which the transaction of the firm's business depends, he has no implied power to sell it, whether it be the store or factory in which the trade is carried on, or the office furniture or safe, or partnership books,[5] or the ploughs,

[1] Mick *v.* Howard, 1 Ind. 250.

[2] Drumright *v.* Philpot, 16 Ga. 424; 60 Am. Dec. 738.

[3] Sweet *v.* Bradley, 24 Barb. 549.

[4] Hamilton *v.* Purvis, 2 Pa. 177.

[5] The case of Dore *v.* Wilkinson, 2 Stark. 287, is not to the effect that a partner can sell the books, but the *dictum* is that if the purchaser from a partner had bought a new set of

horses or implements of a farming partnership, or the tools and machinery of a mechanical occupation, or the library and instruments of a professional one.

It is, or until a recent date was, a very common assertion, that each partner had the power to dispose of the entire partnership effects. In the note are collected not only the decisions, but most of the *dicta* sustaining this power more or less broadly.[1]

A partner has a power to mortgage the entire stock, subject to the same limitations, doubtless, as in selling the whole.[2]

Many authorities, recognizing that this assertion is entirely too broad, have stated it in a narrower shape, namely, that every part-

books, even as agent of the selling partner, he would have a lien on them to the extent of his outlays made in the business since his purchase.

[1] Lambert's Case, Godbolt, 244; Fox *v.* Hanbury, Cowp. 445, 448; Pearpoint *v.* Graham, 4 Wash. C. C. 232; Anderson *v.* Tompkins, 1 Brock. 456, 459; Halstead *v.* Shepard, 23 Ala. 558, 573; Hyrschfelder *v.* Keyser, 59 id. 338; Mills *v.* Barber, 4 Day, 428, 430; Drake *v.* Thyng, 37 Ark. 228; Mason *v.* Tipton, 4 Cal. 276; Crites *v.* Wilkinson, 65 id. 559; Williams *v.* Barnett, 10 Kan. 455; Lamb *v.* Durant, 12 Mass. 54, 56; Montjoys *v.* Holden, Litt. Sel. Cas. 447; 12 Am. Dec. 331; Arnold *v.* Brown, 24 Pick. 89; 35 Am. Dec. 296; Tapley *v.* Butterfield, 1 Met. 515; 35 Am. Dec. 374; Kirby *v.* Ingersoll, 1 Doug. (Mich.) 477, 488 (aff. s. c. Har. Ch. 172) (see Sirrine *v.* Briggs, 31 Mich. 443, 444); Whitton *v.* Smith, 1 Freem. (Miss.) Ch. 231; Cayton *v.* Hardy, 27 Mo. 536; Holt *v.* Simmons, 16 Mo. App. 97, 114; Mabbett *v.* White, 12 N. Y. 442 (explained in Pettee *v.* Orser, 6 Bosw. 123, 137; and Bowen *v.* Clark, 1 Biss. 128, 136); Graser *v.* Stellwagen, 25 N. Y. 315; Wetter *v.* Schlieper, 4 E. D. Smith, 707, 717; Willett *v.* Stringer, 17 Abb. Pr. 152. See High *v.* Lack, Phil. (N. Ca.) Eq. 175; McGregor *v.* Ellis, 2 Disney, 286; Deckard *v.* Case, 5 Watts, 22, 24; 30 Am. Dec. 287; Dickinson *v.* Legare, 1 Desaus. 537; Mygatt *v.* McClure, 1 Head, 495, 497; Barcroft *v.* Snodgrass, 1 Cold. 430. 444; Williams *v.* Roberts, 6 id. 493; Lasell *v.* Tucker, 5 Sneed, 33, 36; Schneider *v.* Sansom, 62 Tex. 201; 50 Am. Rep. 521; Williams *v.* Sommerville, 8 Leigh, 415, 430; Forkner *v.* Stuart, 6 Gratt. 197; Fox *v.* Rose, 10 Up. Can. Q. B. 16; Paterson *v.* Maughan, 39 id. 371.

[2] Osborne *v.* Barge, 29 Fed. Rep. 725; Wilcox *v.* Jackson, 7 Colorado, 521; McCoy *v.* Boley, 21 Fla. 803; Bull *v.* Harris, 18 B. Mon. 195; Tapley *v.* Butterfield, 1 Met. 515; 35 Am. Dec. 374; Holt *v.* Simmons, 16 Mo. App. 97; Willett *v.* Stringer, 17 Abb. Pr. 152; Arnold *v.* Morris, 7 Daly, 498; Paterson *v.* Maughan, 39 Up. Can. Q. B. 371.

ner has the power to sell or transfer the entire *personal* property, excluding the real estate, thus seeming to put a generally just and proper restriction on the power of sale upon the mistaken ground of the nature of the property and the technical rules of conveyancing, which require a deed signed by each partner who holds the legal title, instead of on the ground of want of power to act outside of the scope of the business.[1]

Other authorities have sought to find the limit to the general power of selling in the doctrine that the power is to be exercised in subordination to the joint benefit.[2] This limitation, in so far as it applies, extends to sales of property held for sale where the general power of disposition is undisputed, for even of such property a conveyance to pay a private debt of the selling partner, or with an intent to defraud the other partners known to the buyer, is not within the power; but the limitation as above expressed would permit the sale of any property provided it be for joint benefit, and under it a partner could transfer property held for continued use to pay debts or to raise money to pay debts, without the assent of his copartners.

§ **404.** The true principle, undoubtedly, is that stated above (§ 401), that the scope of the business gives an implied power of sale only of the property held for the purpose of sale, or which appears to the buyer to be such, and that property owned for continued use cannot be sold without express authority from the copartners. The following cases, as well as the doctrine against the power to assign for benefit of creditors, explain and enforce this doctrine.

In Sloan *v.* Moore, 37 Pa. St. 217, the partnership was in running a newspaper, and being about to close, or having already closed, one partner sold out the whole concern. It was ruled that

[1] Barcroft *v.* Snodgrass, 1 Cold. (Tenn.) 430, 444; Williams *v.* Roberts, 6 id. 493; McCullough *v.* Sommerville, 8 Leigh, 415, 430; Tapley *v.* Butterfield, 1 Met. 515, 519 (35 Am. Dec. 374); Goddard *v.* Renner, 57 Ind. 532; Keck *v.* Fisher, 58 Mo. 532, 535; Weld *v.* Peters, 1 La. Ann. 432.

[2] Williams *v.* Barnett, 10 Kan. 455, 458; Halstead *v.* Shepard, 23 Ala. 558, 573; Williams *v.* Roberts, 6 Cold. 493. A sale of the whole, being an unusual transaction, may excite suspicion and may be found not to be *bona fide.* Stegall *v.* Coney, 49 Miss. 761. And if sold at half price, notice that it is not in the course of business may be implied. Wallace *v.* Yeager, 4 Phila. 251.

where a partnership is formed not to buy or sell, but for a business in which continued ownership is indispensable, neither can sell, even to pay creditors, and an injunction was allowed.

In Myers *v.* Moulton (Cal.), 12 Pac. Rep. 505, it was held that a partner had no power to sell a stallion kept for breeding, the only property of the firm, because it was not merchandise.

In Cayton *v.* Hardy, 27 Mo. 536, a partner in a farming partnership attempted to sell a yoke of working oxen. It was held that this was not within the scope of the business, which did not contemplate such sales, and that the sale was void. The court said the same rule would apply to an attempt to sell the farm, the brood mares and the utensils.

In Drake *v.* Thyng, 37 Ark. 228, one partner in the business of making brick, in the temporary absence of his copartner, sold the whole concern, including bricks made and partly made, implements, lease, fire-wood, etc., the buyer knowing it was partnership property. It was held that if selling is in the scope of the business one partner could sell part or all of the effects intended for sale, but not the business itself, nor the effects, including the means necessary to carry it on, and that the buyer would be held to a strict accountability as a trustee for the assets of the firm that had come to his hands, and the sale would be canceled.

So in Crossman *v.* Shears, 3 Ont. App. 583, it was held that one of the partners in managing a hotel could not sell out the lease and furniture, and that the other was not estopped by having remained passive.[1]

In Blaker *v.* Sands, 29 Kan. 551, in a partnership at will in the increase and improvement of a flock of sheep, there being no sales intended, except of culls of the flock, it was said that one partner had no power of sale of the flock, being indispensable to the firm, for there is no agency in one partner to destroy the firm by stripping it of its property, and the sale does not bind the copartner.

In Shellito *v.* Sampson, 61 Iowa, 40, the question was raised whether one partner can bind the firm by an agreement to rescind a contract, the business under which constitutes the whole business of the firm, and a rescission of which would work a practical dissolution.

[1] See, also, Goddard *v.* Renner, 57 Ind. 532, holding that a partner in a brewery could not sell the brewery lot.

In Hunter *v.* Waynick, 67 Iowa, 555, it was said that one partner has no power to sell the entire property of the firm where the other partner lived only seventy-five miles away, with a telegraph and daily mail communication between the towns.

In Henderson *v.* Nicholas, 67 Cal. 152, it was held that one partner could not convey the interest of both in a water right acquired by them by appropriation.

§ 405. The power to sell even property held for sale must be exercised in the course of business; hence if the dissent of the copartner in a firm of only two is known to the buyer, the power is revoked;[1] or if the sale or transfer is to pay the private debt of the selling partner,[2] or if there is fraudulent collusion, the sale is void.[3]

Hence, a sale of the whole stock by a single partner while abroad, to secure a creditor, is void in the absence of assent by the copartners.[4] A sale, in order to break the firm, has been held void,[5] and it has been doubted whether a partner could terminate the partnership by a sale of all its effects.[6]

In Arnold *v.* Brown, 24 Pick. 89 (35 Am. Dec. 296), the firm's business was to buy goods and sell them at retail; one partner absconded and creditors were threatening, and the remaining partner sold the entire stock as an entirety to one person. The court said that while the ordinary business of the firm was to buy in large quantities and sell in small quantities, yet this could not restrain the general power to buy and sell; that the authority to sell will expand or contract according to emergencies that may arise; thus, if a favorable opportunity occurred, one partner could sell a great part or the whole at once, and here an exigency had arisen which rendered a sale highly expedient, and the sale was held valid.[7]

[1] See § 325.

[2] § 410.

[3] Hale *v.* Railroad, 60 N. H. 333; Edgar *v.* Donnally, 2 Munf. (Va.) 387; Fox *v.* Rose, 10 Up. Can. Q. B. 16.

[4] Dickinson *v.* Legare, 1 Desaus. 537.

[5] Kimball *v.* Hamilton F. Ins. Co. 8 Bosw. 495. This was an action on a fire insurance policy, and one defense was want of insurable interest, one partner having previously sold out the insured property.

[6] Pearpoint *v.* Graham, 4 Wash. C. C. 232; Osborne *v.* Barge, 29 Fed. Rep. 725. See Sirrine *v.* Briggs, 31 Mich. 443, 444.

[7] And see, also, as to absence affecting authority, Lamb *v.* Durant, 12 Mass. 54, 56 (7 Am. Dec. 31); Hunter *v.* Waynick, cited in the previous

§ 406. Power to pledge or mortgage.— The power to borrow and the power to pay debts both imply a power to pledge or give a mortgage upon the property of the firm which is held for sale, or any part of it,[1] or to secure future advances of merchandise,[2] or work to be performed upon the articles pledged to secure payment for the work,[3] and for this purpose may assign notes and claims,[4] or may sell and deliver goods to a creditor in payment.[5]

A tender by one partner is tender by the firm,[6] and a refusal to pay by one partner on demand of the creditor, though the firm had previously tendered the amount, is a refusal by the firm.[7]

The power of one partner to make a chattel mortgage is the same as a power to pledge, and is involved in the power of a partner to sell and pay debts,[8] and the power to incumber the entire stock is involved in the power to sell the whole stock.[9]

section; Forkner *v.* Stuart, 6 Gratt. 197. For the remedy of the injured partners, see §§ 276, 1035–1048.

[1] Nelson *v.* Wheelock, 46 Ill. 25; Fromme *v.* Jones, 13 Iowa, 474; Galway *v.* Fullerton, 17 N. J. Eq. 389; McGregor *v.* Ellis, 2 Disney, 286; Cullum *v.* Bloodgood, 15 Ala. 34; Mills *v.* Barber, 4 Day, 428; McClelland *v.* Remsen, 3 Keyes, 454; 3 Abb. App. Dec. 74; 36 Barb. 622; 23 How. Pr. 175; 14 Abb. Pr. 331; George *v.* Tate, 102 U. S. 564; Milton *v.* Mosher, 7 Met. 244; Roots *v.* Salt Co. 27 W. Va. 483, 493; Tapley *v.* Butterfield, 1 Met. 515, 518 (35 Am. Dec. 374); Holt *v.* Simmons, 16 Mo. App. 97; Arnold *v.* Morris, 7 Daly, 498. And see Richardson *v.* Lester, 83 Ill. 55; Morse *v.* Richmond, 6 Ill. App. 166 (aff'd, 97 Ill. 303), of a real estate mortgage to secure a loan.

[2] Keegan *v.* Cox, 116 Mass. 289; McGregor *v.* Ellis, 2 Disney, 286.

[3] Carnes *v.* White, 15 Gray, 378.

[4] Cullum *v.* Bloodgood, 15 Ala. 34; Mills *v.* Barber, 4 Day, 428; Commercial B'k *v.* Lewis, 13 Sm. & Mar. 226; McClelland *v.* Remsen, 36 Barb. 622; 14 Abb. Pr. 331; 23 How. Pr. 175; 3 Keyes, 454; 3 Abb. App. Dec. 74.

[5] Scott *v.* Shipherd, 3 Vt. 104; Boswell *v.* Green, 25 N. J. L. 390; Forkner *v.* Stuart, 6 Gratt. 197.

[6] Douglas *v.* Patrick, 3 T. R. 683.

[7] Peirse *v.* Bowles, 1 Stark. 323.

[8] Gates *v.* Bennett, 33 Ark. 475; Wilcox *v.* Jackson, 7 Colorado, 521; McCoy *v.* Boley, 21 Fla. 803; Fromme *v.* Jones, 13 Iowa, 474; Nelson *v.* Wheelock, 46 Ill. 25; Stockwell *v.* Dillingham, 50 Me. 442; Tapley *v.* Butterfield, 1 Met. 515; 35 Am. Dec. 374; Patch *v.* Wheatland, 8 Allen, 102; Keck *v.* Fisher, 58 Mo. 532; Holt *v.* Simmons, 16 Mo. App. 97; Willett *v.* Stringer, 17 Abb. Pr. 152; Roots *v.* Salt Co. 27 W. Va. 483, 492.

[9] As to which, see § 403. As to the power of a surviving partner, see below, § 731. The power of

And it was held that each partner could mortgage the entire personal property of the firm as security for debts.[1]

§ 407. Execution of the mortgage.— Where both partners are named individually as mortgagors, giving also the firm name, a signature in the firm name is sufficient;[2] and if signed in the firm name the acknowledgment or affidavit of one partner in his own name is sufficient.[3] *Contra*, if signed by the individuals.[4] That the affidavit may be by such partner in the firm name was held sufficient.[5] The mortgage may be executed by the partner's signing the individual names of all the copartners instead of the firm name.[6]

As a chattel mortgage does not require a seal, the act of one partner in putting on a seal is like the use of an unnecessary seal on other instruments and does not invalidate it, and it was so held.[7]

The mortgage by a partner in his own name passes no title to the property,[8] and as a mortgage on his separate interest it is not a mortgage on "goods and chattels," and filing it is not notice; and it only covers the balance due the mortgagor after paying all joint debts.[9] But while a mortgage by a partner of his interest in the

all the partners to give a mortgage to pay the debt of one partner involves the question of fraudulent conveyances, which is treated in § 565.

[1] Reid *v.* Hollinshead, 4 B. & C. 867; Donald *v.* Hewitt, 33 Ala. 534, 551; Tapley *v.* Butterfield, 1 Met. 515 (35 Am. Dec. 374); Clark *v.* Rives, 33 Mo. 579, 582; Willett *v.* Stringer, 17 Abb. Pr. 152. Unless the lender knows the partner will appropriate the avails to his own use. *Ex parte* Bonbonus, 8 Ves. 540. For a similar power in surviving partners, see § 731. And see Power after Dissolution, § 686. *Contra*, if it practically terminates the business. Osborne *v.* Barge, 29 Fed. Rep. 725. And see § 405. Whether one partner could pledge the property of the firm to secure a debt due to another firm, in which also he had a large interest as partner, was doubted by SNYDER, J., in Roots *v.* Salt Co. 27 W. Va. 483, 493.

[2] McCoy *v.* Boley, 21 Fla. 803; Sloan *v.* Owens, Lane & Dyer Mach. Co. 70 Mo. 206.

[3] McCoy *v.* Boley, 21 Fla. 803. See Gibson *v.* Warden, 14 Wall. 244.

[4] Sanders *v.* Pepoon, 4 Fla. 465.

[5] Randall *v.* Baker, 20 N. H. 335. *Contra*, Sloan *v.* Owens, Lane & Dyer Mach. Co. 70 Mo. 206.

[6] Patch *v.* Wheatland, 8 Allen, 102; Tapley *v.* Butterfield, 1 Met. 515 (35 Am. Dec. 374). And see § 200.

[7] Sweetzer *v.* Mead, 5 Mich. 107; Milton *v.* Mosher, 7 Met. 244; Tapley *v.* Butterfield, 1 Met. 515 (35 Am. Dec. 374); Woodruff *v.* King, 47 Wis. 261. And see § 418.

[8] Clark *v.* Houghton, 12 Gray, 38.

[9] Tarbel *v.* Bradley, 7 Abb. New Cas. 273. And see § 183.

firm to his separate creditor is, as against the claims of the firm's creditors, both prior and subsequent, and of copartners for their balances, a nullity, yet any surplus coming to the mortgagor after satisfying those claims will be appropriated to the mortgagee as against other separate creditors of the mortgagor or his assignee in bankruptcy or insolvency.[1]

As to the filing of chattel mortgages, see § 179.

§ 408. **Power over contracts.**[2] — Where a firm filled orders with inferior articles, a contract by one partner to take them back and pay for them is within the scope of his powers.[3] So where a sale was with warranty of soundness, if the article prove unsound a partner can take it back and give a note for the price in the name of the firm.[4]

So one partner may extend the time for filling a contract with the firm.

Thus in Leiden *v.* Lawrence, 2 New Rep. 283 (Ex.), Lawrence, the inventor of an ice machine, having an exclusive grant from the emperor of Brazil to use it there for ten years, contracted with the firm of Leiden & Rautenfeld, in consideration of £3,300, of which £1,100 was cash, to give them the exclusive right of using it in the province of Rio de Janeiro, and contracted to make a machine for them by the end of January following. In an action by Leiden to recover back the cash payment, he having rescinded the agreement because the machine was not ready on time, proof that Rautenfeld had extended to Lawrence the time for completing it was held a defense; the court further saying that one partner had power to exonerate the defendant from the terms of the contract.[5]

But where the contract is an extraneous liability outside of the scope of the business, one partner, it seems, has no power to alter it; for example, to alter a note made by non-trading partners, or to consent to an extension of time where the firm is surety.[6]

[1] See § 183.

[2] See, also, § 376.

[3] Wilson *v.* Elliott, 57 N. H. 316. And see Torrey *v.* Baxter, 13 Vt. 452.

[4] Huguley *v.* Morris, 65 Ga. 666.

[5] See, also, Holton *v.* McPike, 27 Kan. 286, noticed under § 391. And where a city had agreed to pay to a firm a royalty on every square yard of its patent pavement used, it is not in the scope of a partner's powers to vary the contract, as by agreeing to put down a street of such pavement and pay the royalty himself. Detroit *v.* Robinson, 42 Mich. 198; but it is difficult to reconcile this case with Leiden *v.* Lawrence, *supra.*

[6] See under Bills and Notes, § 341.

§ 409. To insure or protect property.— A partner's right to procure insurance on the entire property, unlike that of a part owner, would seem to be clear on principle as well as authority. Insurance is so general a precaution that the want of it in one having the management of property would be deemed an imprudence.[1]

A partner can give notice of abandonment for the firm,[2] and can consent to the cancellation of a policy of insurance and bind his copartner thereby,[3] and can settle a loss;[4] but as to his authority to act for the firm under the arbitration clause of a policy.[5]

§ 410. Use of assets to pay separate debts.— From the fact that a partner's power of disposition is confined to so doing in the prosecution of the business of the firm, and for its benefit, as well as from the fact that a partner has no specific ownership in any chattel, and the copartners have an equity for the application of the property to the debts, and adjustment of mutual accounts, it follows that a partner's attempt, without the assent of his copartners, to use an asset of the firm to pay his separate creditor, is a fraud on the firm.[6]

A partner cannot appropriate assets of the firm without

[1] Hooper *v.* Lusby, 4 Camp. 66; Armitage *v.* Winterbottom, 1 M. & G. 130; per Marshall, C. J., Graves *v.* Boston Mar. Ins. Co. 2 Cranch, 419, 439; Pennsylvania Ins. Co. *v.* Murphy, 5 Minn. 36. And see Clement *v.* British Amer. Assur. Co. 141 Mass. 298, of a limited partnership; Robinson *v.* Gleadow, 2 Bing. N. Cas. 156, where there was evidence of authority.

[2] Hunt *v.* Royal Exchange Assur. Co. 5 M. & S. 47.

[3] Hillock *v.* Traders' Ins. Co. 54 Mich. 531.

[4] Brown *v.* Hartford F. Ins. Co. 117 Mass. 479; Brink *v.* New Amsterdam Ins. Co. 5 Robt. (N. Y.) 104.

[5] See § 337. Where one partner owns the mill in which the firm conducted its business of milling, the other partner has no power to bind the firm for the expense of a lightning rod to protect the mill, for this power is not necessary to carry on the business in the ordinary way, and a note for it is not good against the other partner. Graves *v.* Kellenberger, 51 Ind. 66.

[6] Cook *v.* Bloodgood, 7 Ala. 683; Fall River Un. B'k *v.* Sturtevant, 12 Cush. 372; Chase *v.* Buhl Iron Works, 55 Mich. 139; Clark *v.* Sparhawk, 2 W. N. (Pa.) 115; Vance *v.* Campbell, 8 Humph. 524; Converse *v.* McKee, 14 Tex. 20. And see §§ 347-8, 383, 1035-1048.

his copartner's assent, even to pay a debt which both owe, individually, and not as partners.[1]

Where a debtor partner has not delivered assets or money of the firm, in payment of his separate debt, but has merely promised that he would do so, his creditor, who is also debtor to the firm, cannot insist on a credit, on account of such promise, when sued by the firm,[2] or credited the amount.[3]

If the fraudulent transferee of partnership property, who received it from one partner with knowledge of his want of authority, transfers it to another person, who has notice or gives no consideration, the latter also holds in trust for or subject to the rights of the firm.[4]

In Flanagan *v.* Alexander, 50 Mo. 50, a partner told his private creditor to take whisky of the firm, then in bond, pay the tax and sell it to pay his individual debt; the pledge was held valid to the extent that the creditor paid the tax, and void only as to the balance.

In Snyder *v.* Lunsford, 9 W. Va. 223, the firm owned a privilege of purchase of real estates; one partner procured the deed to be made to his private creditor. This was held void *in toto*, and not even good for a partnership debt which formed part of the consideration. But see the cases of a note enforced to the extent of a valid consideration, in § 347.

[1] Hilliker *v.* Francisco, 65 Mo. 598. See, also, Johnson *v.* Hersey, 73 Me. 291.

[2] See Pierce *v.* Pass, 1 Porter (Ala.), 232; Harlow *v.* Rosser, 28 Ga. 219; Price *v.* Hunt, 59 Mo. 258; Armistead *v.* Butler, 1 Hen. & M. (Va.) 176.

[3] Minor *v.* Gaw, 11 Sm. & Mar. 322. A firm of attorneys employed to collect a claim, having got judgment on it, the debtor gave up to the sheriff notes he held against one of the firm, and the judgment was receipted as paid. It was held that the client could have repudiated such payment and had the receipt vacated, or could claim the amount from both of the partners, as the other partner could not gainsay the receipt, but would have a remedy against his partner, or any remedies the client would have, such as execution. Cook *v.* Bloodgood, 7 Ala. 683, 688.

[4] Croughton *v.* Forrest, 17 Mo. 131; Forney *v.* Adams, 74 Mo. 138; Vance *v.* Campbell, 8 Humph. 524; Fall River Un. Bank *v.* Sturtevant, 12 Cush. 372, holding that knowledge of the cashier of an indorsee bank is notice to the bank. See, also, §§ 544–546. For remedy, see §§ 1035–1048.

§ 411. Trading out debts.— The fact that the creditor of one partner is induced by him to trade out the debt with the firm, or take out the debt in goods, and that the goods were received on this condition, and perhaps would not have been otherwise purchased, will not bind the non-assenting partuer.[1]

A person can make a purchase from a firm, under a contemporaneous agreement to pay in some other currency than money, such as goods, and it will be a valid contract, provided he intends the articles for the firm, and it is within the apparent scope of the business to receive them, and he does not know of a design on the part of the partner with whom he is bargaining to accept them for his own use.[2]

The same rule against appropriating firm assets to pay private debts applies where the chief feature of the partnership business is the labor or services of the partners, as in a mechanical or professional partnership. Such services belong to the firm, and an agreement by one partner, to pay his private debt by rendering services, is as much a fraud on the firm as if he had appropriated joint property.[3]

When the creditor of a person is not aware of the partnership,

[1] Harper *v.* Wrigley, 48 Ga. 495; Todd *v.* Lorah, 75 Pa. St. 155; Warder *v.* Newdigate, 11 B. Mon. 174; Cadwallader *v.* Kroesen, 22 Md. 200; Johnson *v.* Crichton, 56 id. 108, 112; McNair *v.* Platt, 46 Ill. 211; Broaddus *v.* Evans, 63 N. Ca. 633; Liberty Savings B'k *v.* Campbell, 75 Va. 534; Ramey *v.* McBride, 4 Strob. (S. Ca.) L. 12. *Contra*, Tyler *v.* Scott, 45 Vt. 261; Strong *v.* Fish, 13 Vt. 277; Mitchell *v.* Sellman, 5 Md. 376, but here the partner had been authorized to arrange the mode of payment for the new purchases. Arnold *v.* Brown, 24 Pick. 89 (35 Am. Dec. 296), (but see Williams *v.* Brimhall, 13 Gray, 462.) Kirkpatrick *v.* Turnbull, Addison (Pa.), 259; McKee *v.* Stroup, Rice (S. Ca.), 291, but the three last cases may be explained as cases of payment in goods.

[2] Warder *v.* Newdigate, 11 B. Mon. 174 (53 Am. Dec. 567); Lemon *v.* Fox, 21 Kan. 152, 159; Hood *v.* Riley, 15 N. J. L. 127; Liberty Sav. Bank *v.* Campbell, 75 Va. 534. The above is probably the true reconciliation of the cases cited, and yet some have gone much further. Thus, in White *v.* Toles, 7 Ala. 569, a contract with one partner that the firm should do work for the party, to be paid for by boarding such partner, was sustained. See, also, Greeley *v.* Wyeth, 10 N. H. 15.

[3] Williams *v.* Brimhall, 13 Gray, 462; Ramey *v.* McBride, 4 Strob. (S. Ca.) L. 12.

and employs the services of the partner for the purpose of extinguishing the debt, or where a person employs a partner, not being aware of his partnership, and by the contract is to pay him in articles, which are for his own use alone, such payment is a good discharge or set-off,[1] on the same principle that allows a set-off against the ostensible partner in a dormant partnership.

§ 412. —— **appropriation of payments.**—If a person is creditor of the firm and of one partner also, payments by the latter with partnership funds will be credited on the partnership debt.

Campbell *v.* Mathews, 6 Wend. 551, where a partner paid a judgment against him with partnership property, and the creditor, with the consent of the other partner, applied the payment upon the partnership debt and issued execution on the judgment, notwithstanding his receipt that the payment was applied upon the judgment.

Downing *v.* Linville, 3 Bush, 472, where a surety of D. & W. and of W. individually received partnership funds and was directed by W. to apply them to his debt, and did so, but having afterwards paid the partnership debts with his own money, was held to be deemed to have paid them with the partnership funds which he had undertaken to credit upon W.'s debt.[2]

And the same principle, as far as possible, will be applied where the firm and also one partner are creditors of the same person.

In Eaton *v.* Whitcomb, 17 Vt. 641, W. was indebted to E. & S., and S., having authority from the firm to trade out the debt, agreed that W. might furnish lumber to him individually in payment. W. furnished lumber to him and also to the firm and overpaid the debt, and it was held that his delivery to the firm must be first credited and the delivery to S. next, and hence the overplus after discharging the debt became a claim against S. alone.

Scott *v.* Trent, 1 Wash. (Va.) 77, where, in an action by partners, the defendant put in set-off receipts signed by one partner, but

[1] Bryant *v.* Clifford, 27 Vt. 664; McBain *v.* Austin, 16 Wis. 87; Strong *v.* Fish, 13 Vt. 277.

[2] See, also, Cornells *v.* Stanhope, 14 R. I. 97; Davis *v.* Smith, 27 Minn. 390.

as they did not specify the payments to be on partnership account, they were disallowed.

Release, power to.—See Debts, § 383; Under Seal, § 415.

SEALED INSTRUMENTS.

§ 413. A partner has no implied power to bind the firm by an instrument under seal. This rule is universal. It originated in the doctrine that, if he could do so, it would enable him to convey the real estate of the firm or create liens upon it to the preference of favorite creditors, and thus enlarge partnership functions beyond the limits of chattel interests and personal estate and the course of trade. The original statement of the rule was that a partner could not, unless authorized, bind another by deed. The deeds spoken of undoubtedly meant such as reach real estate, and the enlargement of the word deed to include any specialty was a subsequent interpretation of the older cases.

These reasons are not sufficient to justify the rule, because the legal title of real estate, if in the name of more than one partner, is held by them as tenants in common, and a tenant in common can convey only his own share; and so of creating liens if by mortgage; and if by confession of judgment, it is only necessary to say that, at common law, no seal was necessary to a warrant for such purpose, and the want of a power to execute such an instrument must therefore rest on other grounds; though the doctrine is often resorted to in such cases as the foundation of the court's opinion, in place of searching for the truer and worthier reason that the act is intrinsically beyond the scope of the partnership relation, whether sealed or unsealed. And if the limitation on the power to do these acts is not based on a better reason, the curious result will follow that the abolition in fourteen of our states of all difference between sealed and unsealed instruments has unavoidably enlarged the implied powers of partners already quite large enough. A more substantial reason, though seldom referred to, is that the seal imports a consideration, and to that extent forestalls inquiry. But in proportion as the policy of the courts reduces the import

of a seal to a mere *prima facie* presumption of consideration this reason fails.[1]

§ **414.** With the introduction of scrawl seals, the doctrine denying the power to seal becomes still more technical and fallacious; and where the reasons for the rule have ceased to exist, its retention is a mere survival, productive of no advantage; and a very cursory examination of the cases will convince that to attribute such magic to a scrawl has more frequently defeated than promoted the just intent of the parties, has led to frequent injustice, and has been a snare and a trap, because the misstep is rarely discovered until the instrument is placed in professional hands for coercive proceedings.

Although the rule has been relaxed so as to let in releases and to permit authorization by parol, yet the rule itself everywhere remains, excepting only as influenced by the entire abolition of seals in certain states.[2]

All the cases cited in this chapter recognize and enunciate the doctrine that a partner has no implied power to bind the firm under seal.[3]

The fact that the articles are under seal gives a partner no power to bind the firm under seal.[4] The question is not as

[1] Where the statute raises notes to the dignity of sealed instruments it does not limit the power of a partner to make a note. Southard *v.* Steele, 3 Mon. 438; Montgomery *v.* Boone, 2 B. Mon. 244.

[2] Opinions giving reasons for sustaining the rule will be found in Green *v.* Beals, 2 Caines, 254, 255; McBride *v.* Hagan, 1 Wend. 326, 334; Fisher *v.* Tucker, 1 McCord (S. Ca.), Ch. 169; McDonald *v.* Eggleston, 26 Vt. 154, 160 (60 Am. Dec. 303); Doe *ex dem.* Smith *v.* Tupper, 4 Sm. & Mar. 261 (43 Am. Dec. 483); McKnight *v.* Wilkins, 1 Mo. 308, 309. Opinions criticising the rule will be found in Gram *v.* Seton, 1 Hall, 262; Drumright *v.* Philpot, 16 Ga. 424 (60 Am. Dec. 738); Gwinn *v.* Rooker, 24 Mo. 290, 292; Sloo *v.* State Bank of Ill. 2 Ill. 428, 442–4; Henry County *v.* Gates, 26 Mo. 315, 317; Montgomery *v.* Boone, 2 B. Mon. 244; Straffin *v.* Newell, T. U. P. Charlton (Ga.), 163 (4 Am. Dec. 705).

[3] In addition are the following cases which have not been cited more particularly: Dodge *v.* McKay, 4 Ala. 346; Posey *v.* Bullitt, 1 Blackf. 99; Albers *v.* Wilkinson, 6 Gill & J. 358; People *v.* Judges of Duchess, 5 Cow. 34; Anonymous, 2 Hayw. (N. Ca.) 99; Anonymous, Tayl. (N. Ca.) 113; McKee *v.* Bank of Mt. Pleasant, 7 Oh. 2d pt. 175; Gerard *v.* Basse, 1 Dall. 119; Trimble *v.* Coons, 2 A. K. Mar. 375; McCart *v.* Lewis, 2 B. Mon. 267; Nunnely *v.* Doherty, 1 Yerg. (Tenn.) 26, 30.

[4] Harrison *v.* Jackson, 7 T. R. 207.

to the form in which the power is created, but whether it exists at all.

§ **415. Release under seal.**— A well settled limitation on the denial of the right to execute a sealed instrument was early established and ever since maintained, namely, a partner may execute a release under seal.[1] The ground of this is that the release creates no obligation, and imposes no fresh burthen, for it only bars a right of action, and results merely from the right to collect debts.

§ **416. Parol authority or assent.**— If the specialty is executed by one partner in the presence of the rest, signing their names by their direction, it is their act, and all are bound.[2] But in England, and in a few American cases, it is held that the authority to bind a partner not present by seal must be conferred by a sealed instrument, and that an authority or ratification by parol was not sufficient.[3] But there has been a steady and progressive relaxation of this

[1] Hockless *v.* Mitchell, 4 Esp. 86; Hawkshaw *v.* Parkins, 2 Swanst. 539; Halsey *v.* Whitney, 4 Mason, 206, 231; United States *v.* Astley, 3 Wash. C. C. 508; McLane *v.* Sharpe, 2 Harr. (Del.) 481; Morse *v.* Bellows, 7 N. H. 549 (28 Am. Dec. 372); Smith *v.* Stone, 4 Gill & J. 310; Allen *v.* Cheever, 61 N. H. 32; Pierson *v.* Hooker, 3 Johns. 68 (3 Am. Dec. 467); Bruen *v.* Marquand, 17 Johns. 58; Wells *v.* Evans, 20 Wend. 251 (reversed in part in Evans *v.* Wells, 22 Wend. 324); Beach *v.* Ollendorf, 1 Hilt. 41; Perlberg *v.* Gorham, 10 Cal. 120; Gates *v.* Pollock, 5 Jones (N. Ca.), L. 344; and *dicta* in Fox *v.* Norton, 9 Mich. 207, 208; McBride *v.* Hagan, 1 Wend. 326, 334. But see Waldo Bank *v.* Lumbert, 16 Me. 416, 419. In Wells *v.* Evans, 20 Wend. 251 (reversed on other points in Evans *v.* Wells, 22 id. 324; Lockw. Rev. Cas. 390), it was held that as a partner could release a debtor under seal he could delegate this power by executing a power of attorney under seal to discharge the debt.

[2] Ball *v.* Dunsterville, 4 T. R. 313; Burn *v.* Burn, 3 Ves. 578.

[3] Steiglitz *v.* Egginton, Holt, N. P. 141; Harrison *v.* Jackson, 7 T. R. 207; Cummins *v.* Cassily, 5 B. Mon. 74; Doe *v.* Tupper, 12 Miss. 261; Bentzen *v.* Zierlein, 4 Mo. 417; Turbeville *v.* Ryan, 1 Humph. 113, 129 (34 Am. Dec. 622); Little *v.* Hazzard, 5 Harr. (Del.) 291; Sellers *v.* Streater, 5 Jones, L. 261; Fisher *v.* Pender, 7 id. 483; Tappan *v.* Redfield, 1 Halst. (N. J.) Ch. 339; Trimble *v.* Coons, 2 A. K. Mar. 375. And if granted in articles of partnership, under seal, the dissolution revokes it, and a renewal of the firm, in order to wind up, does not revive the power. Napier *v.* Catron, 2 Humph. 534.

rule, and several of the above decisions are inconsistent with later cases in the same states; and it is now virtually a universal American doctrine, that the prior assent or subsequent ratification may be by parol, and may be implied from declarations or from circumstances, as being present at the execution without objection, or knowingly acting under and receiving the benefits of the transaction.[1]

The ratification may be after dissolution, and no more express acts are necessary than before.[2] The assent or ratification need not be simultaneous by all, but may be by one at one time, and another at another.[3]

[1] Gibson *v.* Warden, 14 Wall. 244; Anthony *v.* Butler, 13 Pet. 423; United States *v.* Astley, 3 Wash. C. C. 508; Darst *v.* Roth, 4 Wash. C. C. 471; Hawkins *v.* Hastings Bank, 1 Dill. 462; 4 Bankr. Reg. 108; *Re* Lawrence, 5 Fed. Rep. 349; Henderson *v.* Barbee, 2 Blatchf. 26; Herbert *v.* Hanrich, 16 Ala. 581; Grady *v.* Robinson, 28 Ala. 289; Gunter *v.* Williams, 40 Ala. 561; Lee *v.* Onstott, 1 Ark. 206; Hobson *v.* Porter, 2 Colorado, 28; Jeffreys *v.* Coleman, 20 Fla. 536; Drumright *v.* Philpot, 16 Ga. 424 (60 Am. Dec. 738); Sutlive *v.* Jones, 61 id. 676; Peine *v.* Weber, 47 Ill. 41; Wilcox *v.* Dodge, 12 Ill. App. 517; Modisett *v.* Lindley, 2 Blackf. 119; Price *v.* Alexander, 2 G. Greene (Iowa), 427 (52 Am. Dec. 526); Haynes *v.* Seachrest, 13 Iowa, 455; Craig *v.* Alverson, 6 J. J. Mar. (Ky.) 609; Daniel *v.* Toney, 2 Met. (Ky.) 523; McCart *v.* Lewis, 2 B. Mon. 267; Pike *v.* Bacon, 21 Me. 280 (38 Am. Dec. 259); Herzog *v.* Sawyer, 61 Md. 344; Cady *v.* Shepherd, 11 Pick. 400 (22 Am. Dec. 379); Swan *v.* Stedman, 4 Met. 548; Russell *v.* Annable, 109 Mass. 72; Holbrook *v.* Chamberlin, 116 id. 155; Sweetzer *v.* Mead, 5 Mich. 107; Fox *v.* Norton, 9 id. 207; Shirley *v.* Fearne, 33 Miss. 653; Gwinn *v.* Rooker, 24 Mo. 290; Mackay *v.* Bloodgood, 9 Johns. 285; Skinner *v.* Dayton, 19 id. 513; Gates *v.* Graham, 12 Wend. 53; Gram *v.* Seton, 1 Hall, 262; Pettis *v.* Bloomer, 21 How. Pr. 317; Smith *v.* Kerr, 3 N. Y. 144; Person *v.* Carter, 3 Murph. (N. Ca.) 321; Fichthorn *v.* Boyer, 5 Watts, 159; Purviance *v.* Sutherland, 2 Oh. St. 478; Bond *v.* Aitkin, 6 Watts & S. 165 (40 Am. Dec. 550); Taylor *v.* Coryell, 12 S. & R. 243, 249; Johns *v.* Battin, 30 Pa. St. 84; Schmertz *v.* Shreeve, 62 Pa. St. 457 (1 Am. Rep. 439); Fleming *v.* Dunbar, 2 Hill (S. Ca.), L. 532; Lucas *v.* Sanders, 1 McMull. 311; Fant *v.* West, 10 Rich. L. 149; Stroman *v.* Varn, 19 S. Ca. 307; Lambden *v.* Sharp, 9 Humph. 224 (34 Am. Dec. 642); Lowery *v.* Drew, 18 Tex. 786, 792; Baldwin *v.* Richardson, 33 Tex. 16; McDonald *v.* Eggleston, 26 Vt. 154, 161 (60 Am. Dec. 303); Black *v.* Campbell, 6 W. Va. 51; Wilson *v.* Hunter, 14 Wis. 683; Moor *v.* Boyd, 15 Up. Can. C. P. 513; Bloomley *v.* Grinton, 9 Up. Can. Q. B. 455; Howell *v.* McFarland, 2 Ont. App. 31.

[2] Swan *v.* Stedman, 4 Met. 548; Gwinn *v* Rooker, 24 Mo. 290.

[3] Sweetzer *v.* Mead, 5 Mich. 107, 110.

§ 417. Assent as to conveyances of real estate.— The title and the conveyance of real estate constitute an independent branch of law. The title must stand in the name of an actual, whether real or fictitious, and not a conventional person, as a partnership is, and therefore cannot be held in the firm name. The partners who hold the title hold it as tenants in common in law, and partnership rights affect only the beneficial interest recognizable in equity.

So, too, conveyances of real estate are governed by the law of conveyancing and not by the principles of partnership law. This is treated of in the chapter on real estate, and is mentioned here lest the foregoing doctrine be pushed too far, for it must not be thought that a parol ratification of or authority for an act done in the firm name can be a substitute for a deed of real estate.[1]

[1] § 292. Nevertheless, in Robinson *v.* Crowder, 4 McCord (S. Ca.), L. 519, 536-7 (17 Am. Dec. 762), it was said that if the business of the firm was dealing in lands as a commodity, one partner might bind the firm by a transfer; but the question was rather of scope of authority than of form. And in Haynes *v.* Seachrest, 13 Iowa, 455, and Herbert *v.* Hanrick, 16 Ala. 581, parol ratification was held to make a deed good against the partners; and in Grady *v.* Robinson, 28 Ala. 289, that a sealed contract to sell lands could be ratified or authorized by parol; and in Baldwin *v.* Richardson, 33 Tex. 16, that the parol assent created an equity enforcible against the partners. In Dillon *v.* Brown, 11 Gray, 179, it was held that one partner could not give a lease, but that all must sign; but in Peine *v.* Weber, 47 Ill. 41, and Smith *v.* Kerr, 3 N. Y. 144, the contrary was held; and in Holbrook *v.* Chamberlin, 116 Mass. 155, and Kyle *v.* Roberts, 6 Leigh (Va.), 495, that a lease to a firm executed in its name by one partner, where all went into possession, was thereby ratified. And real estate mortgages executed in the firm name by one partner were held validated by parol assent or ratification in Gunter *v.* Williams, 40 Ala. 561; and see Stroman *v.* Varn, 19 S. Ca. 307; Anthony *v.* Butler, 13 Pet. 423; Holdeman *v.* Knight, Dallam (Tex.), 556. But these cases do not impugn the general rule that conveyances of real estate, in the absence of statutory provision, must be in the name of all of the partners, whether signed by each for himself or by procuration and not in the firm name, except that in some states leases for short terms, given in a firm name, have been recognized by the courts. A real estate conveyance purporting to be of the property of two partners, but executed by one only, was held validated by the acknowledgment of the other before a notary that his partner was authorized, Holdeman *v.* Knight, Dallam (Tex.), 556. And where one partner executed the con-

§ 418. **Unnecessary seal as surplusage.**— Where the act is in the ordinary scope of the partnership business, that is, does not require a seal, the mere addition of the seal is held in many cases not to vitiate the contract, except in a state, as Pennsylvania, where a different statute of limitations applies to a contract under seal, in which case the nature of the contract is changed; but if not changed in its nature the act is still a partnership act.[1]

An executed contract, such as a bill of sale accompanied by delivery, stands on a different ground, for the delivery consummates the transaction and the instrument is the mere evidence of it, and a seal added does not affect the title.[2]

veyance in the firm name, and the official acknowledgment was by him as his free act and deed on behalf of the firm, this was held valid on evidence of authority by the copartners. Wilson *v.* Hunter, 14 Wis. 744. *Contra,* Lemmon *v.* Hutchins, 1 Ohio Cir. Ct. 388, 391.

[1] Hunter *v.* Parker, 7 M. & W. 322; Gibson *v.* Warden, 14 Wall. 244; Anderson *v.* Tompkins, 1 Brock. 456; Hawkins *v.* Hastings Bank, 1 Dillon, 462; 4 Bankr. Reg. 108; Drumright *v.* Philpot, 16 Ga. 424 (60 Am. Dec. 738); Walsh *v.* Lennon, 98 Ill. 27 (38 Am. Rep. 75); Price *v.* Alexander, 2 G. Greene (Iowa), 427 (52 Am. Dec. 526); Van Deusen *v.* Blum, 18 Pick. 229 (29 Am. Dec. 582); Tapley *v.* Butterfield, 1 Met. 515 (35 Am. Dec. 374, a chattel mortgage); Milton *v.* Mosher, 7 id. 244 (a chattel mortgage); Sweetzer *v.* Mead, 5 Mich. 107 (a chattel mortgage); Moore *v.* Stevens, 60 Miss. 809, 815; Henry County *v.* Gates, 26 Mo. 315, 317; Human *v.* Cuniffe, 32 Mo. 316; Despatch Line *v.* Bellamy Man. Co. 12 N. H. 205, 235 (a corporation); Purviance *v.* Sutherland, 2 Oh. St. 478; Patten *v.* Kavanagh, 11 Daly, 348; Everit *v.* Strong, 5 Hill, 163 (aff'd, 7 id. 585); Deckard *v.* Case, 5 Watts, 22 (30 Am. Dec. 287); Dubois' Appeal, 38 Pa. St. 231; Schmertz *v.* Shreeve, 62 Pa. St. 457 (1 Am. Rep. 439); Robinson *v.* Crowder, 4 McCord, 519 (17 Am. Dec. 762); Lasell *v.* Tucker, 5 Sneed (Tenn.), 33 (a bill of sale); McDonald *v.* Eggleston, 26 Vt. 154 (60 Am. Dec. 303); McCullough *v.* Sommerville, 8 Leigh, 415; Woodruff *v.* King, 47 Wis. 261 (a chattel mortgage); Bloomley *v.* Grinton, 9 Up. Can. Q. B. 455. See, also, article in 9 Am. Law Reg. N. S. 264, May, 1870. That the seal will be regarded as added by mistake where it is unnecessary and was intended to bind the firm, Wharton *v.* Woodburn, 4 Dev. & Bat. L. 507; Purviance *v.* Sutherland, 2 Oh. St. 478. In Dillon *v.* Brown, 11 Gray, 179, a sealed lease by one partner in the name of the firm for a short term, for which no seal is required, was held not to pass the estate of the other partners; but this was because of the law governing real estate, as to which the partners are tenants in common, and therefore all must have signed or assented even had there been no seal.

[2] Schmertz *v.* Shreeve, 62 Pa. St. 457, 460 (1 Am. Rep. 439); Deckard

So in states where all distinctions between sealed and unsealed instruments are abolished, a contract by one partner under seal is valid.[1]

§ 419. **A single seal for all.**— Where an authorized sealed instrument is made in the firm name there is rarely more than one seal affixed. But it is of importance in averring upon such an instrument to note the exact meaning of this seal. A firm has no common seal; and while the single seal is perfectly valid, it is so, not as the seal of the firm, but of each member, the partners having adopted the same seal. Hence it must not be averred that the firm sealed with their seal, for the firm has none; but that the partners in the firm name sealed.[2]

§ 420. **Merger.**— It has been said by very high authority that a sealed note executed in the firm name by one partner extinguished the original debt as to all, by merging it in the higher security.[3]

v. Case, 5 Watts, 22 (30 Am. Dec. 287); Dubois' Appeal, 38 Pa. St. 231; Everit *v.* Strong, 5 Hill, 163; 7 id. 585; Forkner *v.* Stuart, 6 Gratt. 197; McClelland *v.* Remsen, 3 Keyes, 454; 3 Abb. App. Dec. 74; 36 Barb. 22; 23 How. Pr. 175; 14 Abb. Pr. 331; Anderson *v.* Tompkins, 1 Brock. 456; Hennessy *v.* Western Bank, 6 Watts & S. 300 (40 Am. Dec. 560); Moore *v.* Stevens, 60 Miss. 809, 815; Petition of Daniels, 14 R. I. 500. In McDonald *v.* Eggleston, 26 Vt. 154, 159–60 (60 Am. Dec. 303), it is intimated, but I believe erroneously, that disregarding an unnecessary seal is confined to transactions that transfer an interest, and does not apply to one creating an obligation.

[1] Pearson *v.* Post, 2 Dakota, 220, 248. Seals have been abolished in Arkansas, California, Dakota, Indiana, Iowa, Kansas, Kentucky, Mississippi, Montana, Nebraska, Ohio, Oregon, Tennessee, Texas.

[2] That a single seal is sufficient is expressly ruled in the following cases: Ball *v.* Dunsterville, 4 T. R. 313; Henderson *v.* Barbee, 6 Blatch. 26; Lee *v.* Onstott, 1 Ark. 206; Day *v.* Lafferty, 4 id. 450; Massey *v.* Pike, 20 id. 92; Witter *v.* McNeil, 4 Ill. 433, 436–7; Modisett *v.* Lindley, 2 Blackf. 119; Price *v.* Alexander, 2 G. Greene (Iowa), 427; 52 Am. Dec. 526; Pike *v.* Bacon, 21 Me. 280; 38 Am. Dec. 259; McKnight *v.* Wilkins, 1 Mo. 220; Mackay *v.* Bloodgood, 9 Johns. 285; Pettis *v.* Bloomer, 21 How. Pr. 317; Button *v.* Hampson, Wright (O.), 93; Lambden *v.* Sharp, 9 Humph. 224; 34 Am. Dec. 642; Moor *v.* Boyd, 15 Up. Can. C. P. 513 (but the ruling was doubted in Moor *v.* Boyd, 23 Up. Can. Q. B. 459). And see cases generally under § 416.

[3] Morris *v.* Jones, 4 Harr. (Del.) 428; Williams *v.* Hodgson, 2 Har. & J. (Md.) 474; Davidson *v.* Kelly, 1 Md. 492; Settle *v.* Davidson, 7 Mo.

But the point was not necessary to be decided in any one of these cases. It might be more reasonable to urge that the instrument being made and taken as binding all, and failing in its design, binds no one, not even the signer, who would be held only on an implied warranty that he was authorized. It does, however, bind the signer, as is shown by the authorities cited in the next section.

But by the overwhelming weight of authority and reason such unauthorized sealed instrument in the firm name does not merge the debt as against the other partners, for the creditor did not intend to release, but to bind them.[1]

If, however, the sealed obligation of one partner is in his

604; Gwinn *v.* Rooker, 24 id. 291; Clement *v.* Brush, 3 Johns. Cas. 180; Skinner *v.* Dayton, 19 Johns. 513, 531; Spear *v.* Gillet, 1 Dev. (N. Ca.) Eq. 466; Bond *v.* Aitkin, 6 W. & S. 165; Harris *v.* Miller, Meigs (Tenn.), 158; 33 Am. Dec. 138; Nunnely *v.* Doherty, 1 Yerg. 26; Waugh *v.* Carriger, id. 31. That it is presumed to be intended to merge the debt, McNaughten *v.* Partridge, 11 Oh. 223, 232; 38 Am. Dec. 731.

[1] Walsh *v.* Lennon, 98 Ill. 27; Daniel *v.* Toney, 2 Met. (Ky.) 523; Doniphan *v.* Gill, 1 B. Mon. 199; Van Deusen *v.* Blum, 18 Pick. 229; 29 Am. Dec. 582; Despatch Line *v.* Bellamy, 12 N. H. 205, 235; Walden *v.* Sherburne, 15 Johns. 409; Blanchard *v.* Pasteur, 2 Hayw. (N. Ca.) 393; Spear *v.* Gillet, 1 Dev. Eq. 466, if the contract is joint and several, but not otherwise; Horton *v.* Child, 4 Dev. L. 460; Purviance *v.* Sutherland, 2 Oh. St. 478; Hoskisson *v.* Eliot, 62 Pa. St. 393; Fleming *v.* Lawthorn, Dudley (S. Ca.), L. 360; Pierce *v.* Cameron, 7 Rich. L. 114; Pelzer *v.* Campbell, 15 S. Ca. 582; Sale *v.* Dishman, 3 Leigh (Va.), 548. And see Froneberger *v.* Henry, 6 Jones, L. (N. Ca.), 348, and Despatch Line *v.* Bellamy Man. Co. 12 N. H. 205, 235. And in Walsh *v.* Lennon, 98 Ill. 27; Daniel *v.* Toney, 2 Met. (Ky.) 523; Van Deusen *v.* Blum, 18 Pick. 229; 29 Am. Dec. 582; and Despatch Line *v.* Bellamy Man. Co. 12 N. H. 205, 235, it was held not even to be a merger as to the signing partner, and that all the partners could be sued on the original consideration as on an implied contract. In Doniphan *v.* Gill, 1 B. Mon. 199, it was held that a plea of *non est factum* to an action on the sealed note was an estoppel to claim a merger in an action on the original debt. In Van Deusen *v.* Blum, 18 Pick. 229, 231 (29 Am. Dec. 582), where the unauthorized seal was upon a contract to build a dam for the firm, for a purpose within the scope of the business, it was said that the firm, having received a benefit, was liable on an implied promise to pay; that the express contract does not exclude the implied one that the plaintiff is not bound to rely on his remedy against the executory partner alone; that as there was no contract binding on the firm in existence, the services were not rendered in performance of the contract.

own name, it extinguishes the simple contract debt of the firm in the higher security and makes it his separate debt.[1]

But if the debt be a judgment, the bond is no higher security, and therefore may or may not be a satisfaction, for it may be merely collateral, and evidence is necessary to show which.[2]

A sealed note, made by the ostensible partner in his own name, the firm having no other name, does not merge the original cause of action against the secret partner, for if it did, the latter could always escape liability.[3]

§ 421. **The executing partner is bound.**— The partner who has executed an instrument in the firm name under seal without authority, although the firm is not bound by it, is himself bound.[4]

The instrument must be averred to be the bond of the individual partner, and it is improper to declare on it as the joint covenant of all,[5] for it is not that; and so if executed in the name of such

[1] United States *v.* Astley, 3 Wash. C. C. 508; Settle *v.* Davidson, 7 Mo. 604; Reed *v.* Girty, 6 Bosw. 567; Baxter *v.* Bell, 19 Hun, 367 (reversed, 86 N. Y. 195); Bennett *v.* Cadwell, 70 Pa. St. 253, 260; Jacobs *v.* McBee, 2 McMull. 348. See §§ 535–539. Niday *v.* Harvey, 9 Gratt. 454; *In re* International Contract Co. L. R. 6 Ch. App. 525. But see Dickinson *v.* Legare, 1 Desaus. (S. Ca.) 537.

[2] Bennett *v.* Cadwell, 70 Pa. St. 253.

[3] Chamberlain *v.* Madden, 7 Rich. L. 395. And see Robinson *v.* Wilkinson, 3 Price, 538. The contrary was said to be the rule, however, in Davidson *v.* Kelly, 1 Md. 492; Anderson *v.* Levan, 1 W. & S. 334, and Ward *v.* Motter, 2 Rob. (Va.) 536.

[4] Elliot *v.* Davis, 2 B. & P. 338; Layton *v.* Hastings, 2 Harr. (Del.) 147; Morris *v.* Jones, 4 id. 428; Williams *v.* Hodgson, 2 Har. & J. (Md.) 474; Armstrong *v.* Robinson, 5 Gill & J. 412; Herzog *v.* Sawyer, 61 Md. 344; Fletcher *v.* Vanzant, 1 Mo. 196; Bentzen *v.* Zierlein, 4 id. 417; Settle *v.* Davidson, 7 id. 604; Weeks *v.* Mascoma Rake Co. 58 N. H. 101; Green *v.* Beals, 2 Caines, 254; Clement *v.* Brush, 3 Johns. Cas. 180; Skinner *v.* Dayton, 19 Johns. 518; McBride *v.* Hagan, 1 Wend. 326; Gates *v.* Graham, 12 id. 53; James *v.* Bostwick, Wright (O.), 142; McNaughten *v.* Partridge, 11 Oh. 223; Pierce *v.* Cameron, 7 Rich. L. 114; Pelzer *v.* Campbell, 15 S. Ca. 581; Sloo *v.* Powell, Dallam (Tex.), 467; Regina *v.* McNaney, 5 Up. Can. P. C. 438. And see the cases cited under § 379. *Contra,* because not made as his own act and deed, Sellers *v.* Streater, 5 Jones, L. 261; Fisher *v.* Pender, 7 id. 483; Hart *v.* Withers, 1 Pa. 285; Lucas *v.* Sanders, 1 McMull. 311.

[5] Herzog *v.* Sawyer, 61 Md. 344; Lucas *v.* Sanders, 1 McMull. (S. Ca.) 311; Henry County *v.* Gates, 26 Mo.

partner alone and purporting to bind him only, though expressed to be for the firm, and is approved by the other partner, it can only be declared on as the act of both.[1]

§ 422. Remedy in equity.— In states where the sealed instrument merged the debt against the partner executing it, but not that of the copartners, it followed that they could not be sued in *assumpsit* against objection because of the non-joinder of the executing partner, and he could not be joined because only liable in covenant, so that in effect the debt against all would be merged. To avoid this it has been held that equity will give the creditor a remedy against the other partners;[2] or equity will enforce the debt on the ground of mistake.[3] And in such case the sealed instrument becomes evidence that the transaction is a partnership matter, and of the amount of the debt as an admission.[4]

In Horton *v.* Child, 4 Dev. (N. Ca.) L. 460, a bond in the firm name was given for a purchase of goods, but on learning that it did not bind the firm, the executing partner, with the obligee's consent, erased the seal and redelivered it, and it was held valid against the firm as a note.

If the sealed note was in fraud of the other partner a judgment taken on it against both partners will be relieved against in equity.[5]

§ 423. Rights of a surety on the instrument.— Where the unauthorized sealed instrument is signed also by a third person as surety, it is held in some cases that the surety's knowledge of the seal prevents his raising the question of want of authority or claiming exoneration, because of having erroneously supposed the

315, 317; Hart *v.* Withers, 1 Pa. 285 (21 Am. Dec. 382).

[1] Tuttle *v.* Eskridge, 2 Munf. (Va.) 330, of a lease from one partner in his own name.

[2] James *v.* Bostwick, Wright (O.), 142; Blanchard *v.* Pasteur, 2 Hayw. (N. Ca.) 393; Boston, etc. Smelting Co. *v.* Smith, 13 R. I. 27 (43 Am. Rep. 3); Niday *v.* Harvey, 9 Gratt. 454.

[3] Wharton *v.* Woodburn, 4 Dev. & Bat. 507; McNaughten *v.* Partridge, 11 Oh. 223 (38 Am. Dec. 731); Purviance *v.* Sutherland, 2 Oh. St. 478; Sale *v.* Dishman, 3 Leigh (Va.), 548; Weaver *v.* Tapscott, 9 id. 424; Brooke *v.* Washington, 8 Gratt. 248. And see Hoskisson *v.* Eliot, 62 Pa. St. 393.

[4] Purviance *v.* Sutherland, 2 Oh. St. 478; Foster *v.* Rison, 17 Gratt. 321; Hoskisson *v.* Eliot, 62 Pa. St. 393; Froneberger *v.* Henry, 6 Jones, L. 548. *Contra*, Hart *v.* Withers, 1 Pa. 285 (21 Am. Dec. 382); United States *v.* Astley, 3 Wash. C. C. 508.

[5] Morgan *v.* Scott, Minor (Ala.), 81 (12 Am. Dec. 35).

firm bound by the signature.[1] On the other hand, it is held that if the principal, namely, the firm, is not bound the surety also is not bound.[2]

To sell personal property, § 401 *et seq.;* real property, § 299.

To warrant property sold, § 402.

RATIFICATION AND AUTHORITY.

§ **424.** This subject has already been considered incidentally,[3] and it is only necessary here to state the general principles.

Whatever is in the power of one partner to do, may, if done by an agent, be made to bind the firm by the ratification of one partner.[4] So, also, an act which a majority cannot do, cannot be ratified by the majority.

But the act relied on as a ratification must have been done on behalf of the firm, that is, in the capacity of a partner, otherwise it will not bind the firm; for example, where a clerk without authority made and signed a note in the firm name to one partner, who

[1] Harter *v.* Moore, 5 Blackf. 367; Stewart *v.* Behm, 2 Watts, 356; Pelzer *v.* Campbell, 15 S. Ca. 581.

[2] Russell *v.* Annable, 109 Mass. 72 (12 Am. Rep. 665); and see Garland *v.* Jacomb, L. R. 8 Ex. 216. See §§ 347, 351. In Purviance *v.* Sutherland, 2 Oh. St. 478, it was ruled that, as equity will give a remedy against all the partners, a surety who has been compelled to pay the debt was held to have a remedy in *assumpsit* against the firm, of which he could not be deprived by the creditor's obtaining judgment against the executing partner alone, and this reason also influenced the court in Pelzer *v.* Campbell, *supra.* And where one became surety on a bond in the firm name made by one partner, professedly for the firm, but really for himself, and paid it voluntarily, he can recover from the firm; the seal was used by mistake in this case, and Wharton *v.* Woodburn, 4 Dev. & Bat. L. 507. That the surety on the bond can sue the firm for money which he lent to the executing partner to take up the bond, but not if he had taken up the bond himself, Walden *v.* Sherburne, 15 Johns. 409.

[3] By an infant, § 145; of deviation from the firm name, § 203; of an assignment for creditors, § 339; of unauthorized notes, § 363 *et seq.;* of confessions of judgment, § 378; of sealed instruments, § 413.

[4] Lyell *v.* Sanbourn, 2 Mich. 109, of borrowing by an agent to pay a firm debt. And see Odiorne *v.* Maxcy, 15 Mass. 39, 43.

indorsed it over, this act of the partner being in his own behalf does not prove authority in the clerk.[1] So an agent without authority to accept bills is not invested with authority by the fact of the bills being drawn upon him by one of the partners in his capacity as partner of another firm, for his act is as a member of the drawer and not of the drawee firm.[2]

And a written ratification by one partner, the terms of which show that he thought the unauthorized contract was to bind all or none, does not bind him if the rest refuse to ratify.[3]

If the partners desire to ratify and hold the other party, they must ratify the contract as made; they cannot modify its terms or ratify in part.[4]

And no new consideration moving to the firm or the other partner is necessary to such assent.[5] Nor does the statute of frauds apply to permission to charge to the firm supplies furnished to one partner, for the firm is not a person apart from its members, and such sale is in fact to the firm, though for the benefit of one partner.[6]

The partnership books and accounts showing that the appropriation of assets to pay a separate debt was charged to the account of the partner is evidence of the assent of the copartner.[7]

If an unauthorized executory contract has been ratified, and then is not performed, the other partner can recover from both partners the payments made by him, though the money was received by the one alone who had made the contract.[8]

§ 425. **Creditor partner's authority.**— Where the partner who pays his private debt out of the assets of the firm is a creditor of the firm to a larger amount than he pays out, and acts in good faith, and the outside debts of the firm are all paid, the other partner suffers no injury, and the appropriation has been sustained in such case.[9]

[1] Miller *v.* House, 67 Iowa, 737.

[2] Bank of Montreal *v.* Page, 98 Ill. 109.

[3] Roberts' Appeal, 92 Pa. St. 407.

[4] Frye *v.* Sanders, 21 Kan. 26, 30 (30 Am. Rep. 421).

[5] Foster *v.* Fifield, 29 Me. 136; Wilson *v.* Dargan, 4 Rich. L. 544. But see §§ 565, 566.

[6] Davis *v.* Dodge, 30 Mich. 267. See § 365.

[7] Foster *v.* Fifield, 29 Me. 136, 139; Hood *v.* Riley, 15 N. J. L. 127.

[8] Lawrence *v.* Taylor, 5 Hill, 107.

[9] Corwin *v.* Suydam, 24 Oh. St. 209; Sloan *v.* McDowell, 71 N. Ca. 356, 359–61 (citing Piercy *v.* Fynney, L. R. 12 Eq. 69, 74, in which the plaintiff

§ 426. **Knowledge necessary.**— No acts will amount to a ratification unless the partner has knowledge of what he is ratifying;[1] and if the alleged prior authority is by way of estoppel, as in the nature of holding the partner out as authorized, it must have been known and relied upon by the plaintiff.[2]

§ 427. **Prior acts.**— Prior similar acts are evidence of the scope of the business, if doubtful, and a habit of the firm is evidence of authority.[3] Thus, a habit or usage between the members of the firm to settle their private accounts by delivering goods of the firm, is evidence of authority.[4]

And such custom may be incident to the business; as a neighborhood custom in a country store to trade out debts may be evidence of authority in a partner to collect by receiving articles for his own use.[5]

Yet such custom, practiced by a sole managing partner without the knowledge of the copartner, is no proof of the latter's assent.[6]

A single prior act outside of the scope is not a habit nor proof of authority.[7]

But merely that such payment of an individual debt in goods is necessary to retain the creditor's custom is no evidence of author-

sued only for his share). *Contra*, Stewart *v.* McIntosh, 4 Har. & J. (Md.) 233.

[1] Andrews *v.* Planters' Bk. of Miss. 7 Sm. & Mar. 192 (45 Am. Dec. 300); Norton *v.* Thatcher, 8 Neb. 186; Biggs *v.* Hubert, 14 S. Ca. 620; Gray *v.* Ward, 18 Ill. 32; Hotchin *v.* Kent, 8 Mich. 526. In Woodward *v.* Winship, 12 Pick. 430, knowledge of a purchase was held a ratification though there was no knowledge that it was on credit. But see Hotchin *v.* Kent, 8 Mich. 526.

[2] Wilson *v.* Brown, 6 Ont. App. 411.

[3] Gray *v.* Ward, 18 Ill. 32; Folk *v.* Wilson, 21 Md. 538; Hamilton *v.* Phœnix Ins. Co. 106 Mass. 395; Holt *v.* Simmons, 16 Mo. App. 97; McGregor *v.* Cleveland, 5 Wend. 477; Carter *v.* Beeman, 6 Jones (N. Ca.), L. 44; Hoskisson *v.* Eliot, 62 Pa. St. 393; Lee *v.* Macdonald, 6 Up. Can. Q. B. (Old Ser.) 130.

[4] Tay *v.* Ladd, 15 Gray, 296, 298; Davis *v.* Dodge, 30 Mich. 267; Everghim *v.* Ensworth, 7 Wend. 326; Carter *v.* Beeman, 6 Jones (N. Ca.), L. 44. And is binding on the firm after a new partner has been admitted if the private creditor was not aware of the change. Tay *v.* Ladd, *supra*.

[5] Eaton *v.* Whitcomb, 17 Vt. 641.

[6] Thomas *v.* Stetson, 62 Iowa, 537 (49 Am. Rep. 148).

[7] Levi *v.* Latham, 15 Neb. 509 (48 Am. Rep. 361), where a non-trading firm once before borrowed and gave a note.

ity, for the firm, and not the debtor partner, must decide on such application of property.[1]

The mere fact that one partner had occasionally drawn orders on the firm to pay his separate debts, not amounting to a uniform practice and not known to the creditor, is no proof of assent to the other's using the funds.[2] A custom between the partners, when one owes a debt, to charge his account with it and assume the debt, is not broad enough to authorize his use of joint property to pay his debt.[3] Nor will a custom to allow debts due by one partner to be set off against claims of the firm apply only to demands that could be legally collected against the firm, and not to an illegal tavern bill.[4]

§ 428. **Failure to dissent.**— After the act has been done, a failure to dissent, on being informed, is not a recognition of liability, though it may be evidence tending to show it, if he is silent when he ought to speak;[5] and delay of a copartner to repudiate at an early moment the use of assets to pay a private debt ratifies it.[6]

But the acquiescence must be voluntary and not enforced; thus, if a partner obtains the exclusive use of a right which he ought to hold for the firm, the omission of the other partners to complain is not an assent.[7]

Remaining passive after the sale of a hotel business, lease and furniture by one partner was held not to be an estoppel;[8] nor is

[1] Cotzhausen *v.* Judd, 43 Wis. 213 (28 Am. Rep. 539).

[2] Brewster *v.* Mott, 5 Ill. 378.

[3] Forney *v.* Adams, 74 Mo. 138.

[4] Evernghim *v.* Ensworth, 7 Wend. 326. A habit of the active partner to indorse for the accommodation of others, where the other partner, though he frequented the store, was not a manager, and is not shown to have known of it or of the notices coming to the store, is not sufficient to show an assent. Andrews *v.* Planters' Bank of Miss. 7 Sm. & Mar. 192 (45 Am. Dec. 300).

[5] Barnard *v.* Lapeer, 6 Mich. 274; Ferguson *v.* Shepherd, 1 Sneed, 254; Bankhead *v.* Alloway, 6 Cold. 56, 96; Hewes *v.* Parkman, 20 Pick. 90; Todd *v.* Lorah, 75 Pa. St. 155. See Livingston *v.* Pittsb. & Steub. R. R. 2 Grant's Cas. 219; Lowery *v.* Drew, 18 Tex. 786; Miller *v.* Dow, 17 Vt. 235.

[6] Casey *v.* Carver, 42 Ill. 225; Marine Co. *v.* Carver, 42 id. 67; Cotzhausen *v.* Judd, 43 Wis. 213, 216 (28 Am. Rep. 539).

[7] Weston *v.* Ketcham, 39 N. Y. Superior Ct. 54.

[8] Crossman *v.* Shears, 3 Ont. App. 583.

knowledge of an intended sale of the whole assets by one partner an assent.[1]

§ 429. Acting under unauthorized contract.— Accepting the benefits or acting under the disputed contract tends to prove a ratification,[2] but not if in ignorance of the source of the benefit;[3] and so of acquiescence in one partner engaging the firm in a new enterprise with others.[4]

An offer by the other partner in trying to collect the amount due the firm to allow the set-off, if the debtor will pay the balance, is not a ratification,[5] but paying a subsequent debt so created is evidence of assent.[6]

§ 430. Practice.— Assent of the copartner may be shown to validate the appropriation, and a subsequent ratification is as effectual as prior assent;[7] but an assent after an assignment by the firm for the benefit of creditors is too late, and will not relate back.[8] The bur-

1 Sloan *v.* Moore, 37 Pa. St. 217.

2 Drumright *v.* Philpot, 16 Ga. 424 (60 Am. Dec. 738), dividing proceeds of an unauthorized contract of sale; Michigan Air Line R'y *v.* Mellen, 44 Mich. 321, dividing bonds taken for a debt in lieu of cash, by one partner; Banner Tobacco Co. *v.* Jenison, 48 Mich. 459; Levick's Appeal (Pa.), 2 Atl. Rep. 532, dividing the avails of an unauthorized sale of the whole assets; Waller *v.* Keyes, 6 Vt. 257, accepting a deed for an unauthorized land purchase; Lynch *v.* Flint, 56 Vt. 46; Burnley *v.* Rice, 18 Tex. 481, 494.

3 Briggs *v.* Hubert, 14 S. Ca. 620; Hotchin *v.* Kent, 8 Mich. 526, of a silent partner drawing share of profits partly derived from unauthorized speculations; Eaton *v.* Taylor, 10 Mass. 54, partial payments on a note given after dissolution; Clark *v.* Hyman, 55 Iowa, 14, accepting security against an unauthorized guaranty given by one partner in the firm name; Holmes *v.* Kortlander (Mich.), 31 N. W. Rep. 532, partial payments to an attorney employed by the other partner in a matter not strictly in the scope of business but beneficial to it; Jones *v.* Clark, 42 Cal. 180, paying interest on a note given by the managing partner of a mine for a purchase of property; Livingston *v.* Pittsb. & Steub. R. R. 2 Grant's Cas. (Pa.) 219, permitting stock subscribed for without authority to be voted; Porter *v.* Curry, 50 Ill. 319, selling a chattel bought by the copartner without authority or for himself.

4 Tabb *v.* Gist, 1 Brock. 33; Mason *v.* Connell, 1 Whart. 381; Wood *v.* Connell, 2 id. 542; Buckingham *v.* Hanna, 20 Ind. 110.

5 Hurt *v.* Clarke, 56 Ala. 19 (28 Am. Rep. 751).

6 Carter *v.* Beeman, 6 Jones (N. Ca.), L. 44.

7 Noble *v.* Metcalf, 20 Mo. App. 360.

8 Clark *v.* Sparhawk, 2 Weekly Notes (Pa.), 115. But see the case cited, *supra*, p. 122, notes.

den of proof is on the person claiming the existence of such authority or assent to show it, for such appropriation is *prima facie* fraudulent and collusive.[1] That the assent must be clearly and distinctly proved.[2] If the property delivered to one partner is such as he would need for partnership purposes, as provisions where he boarded the shop hands, assent will be presumed.[3] Where the action is on a note signed in the firm name, an answer of one partner that it was made by the other partner, without knowledge and consent, for his separate debt, is sufficient without averring that the firm did not assume it. The plaintiff must reply the assumption in order to rely upon it.[4]

The fact of ratification is a question for the jury,[5] and whether the act was in the scope of the business is a question for the jury.[6]

1 Johnston *v.* Crichton, 56 Md. 108; Kemeys *v.* Richards, 11 Barb. 312; Corwin *v.* Suydam, 24 Oh. St. 209.

2 Hamilton *v.* Hodges, 30 La. Ann. Part II, 1290; Haynes *v.* Sechrest, 13 Iowa, 455; Wise *v.* Copley, 36 Ga. 508; Gray *v.* Ward, 18 Ill. 32; Kemeys *v.* Richards, 11 Barb. 312.

3 Greeley *v.* Wyeth, 10 N. H. 15.

4 Fordice *v.* Scribner, 108 Ind. 85.

5 Johnson *v.* Crichton, 56 Md. 108; Hewes *v.* Parkman, 20 Pick. 90; Windham Co. Bank *v.* Kendall, 7 R. I. 77; Jones *v.* Booth, 10 Vt. 268.

6 Maltby *v.* Northwestern Va. R. R. Co. 16 Md. 422; Hodges *v.* Ninth Natl B'k, 54 id. 406; Briggs *v.* Hubert, 14 S. Ca. 620; Crozier *v.* Kirker, 4 Tex. 252 (51 Am. Dec. 724); McNeish *v.* Hulless Oat Co. 57 Vt. 316.

CHAPTER VII.

POWER OF A MAJORITY.

§ **431. As to third persons.**— Whatever a single partner can do a majority can do. The power of an individual partner to bind the firm to third persons depends on the nature or scope of the business, as well as upon the powers conferred, and this subject has been treated of in the preceding pages. But the converse of this is not so true, that is, it cannot be said always that the revocation of power, which one partner can exercise in a firm of two, would bind the majority. This is particularly noticeable in two aspects. In a firm of two, one partner may prevent a change of the internal arrangement or management, because of the principle of *in re communi potior est conditio prohibentis;* and yet a majority could overrule such objection, if it be one not fundamental.

Again, one partner in a firm of two can, by notice to third persons, revoke the agency of the other in minor matters, in which a majority could overrule the objection.[1]

§ **432. Inter se.**— The power of a majority of the partners to act against the wishes of the minority must be considered in two classes:

1st. In matters of administration of the business.

2d. In matters of a permanent or fundamental character.

As to the transaction of the ordinary business of the firm, and the carrying out of the declared objects of its formation, in the usual way, within the scope of the business, it follows of necessity that the majority must control, and that the minority cannot arrest the business or suspend its operations. If there are no stipulations or covenants as to

[1] Nolan *v.* Lovelock, 1 Montana, 224, 227; Johnston *v.* Dutton, 27 Ala. 245; Western Stage Co. *v.* Walker, 2 Iowa, 504. See Anon. *v.* Layfield, 1 Salk. 292; and Carrithers *v.* Jarrell, 20 Ga. 842.

particular practices or mode of conducting ordinary transactions, or regulating the internal affairs of the partnership, the majority must decide.[1]

A majority may order a division of profits, while debts are unprovided for,[2] but not a dividend out of capital, no profits being made;[3] or may settle and agree upon an account of the profits of a voyage,[4] but not for a return of capital.[5]

So, if the majority decide to sell the stock which is held for sale, the decision being in perfectly good faith and not to oppress the minority, they are not accountable for not getting a better price than they did.[6]

§ 433. Illustrations.—In Kirk *v.* Hodgson, 3 Johns. Ch. 400, the firm employed a clerk for two years, with an agreement for an increase of his compensation as business increased. During the third year he was found to have appropriated moneys; nevertheless the majority continued him in the firm's employ, and he was held entitled to the increased compensation. The act of the majority binds, good faith being all that can be required, and their continuing him is an admission that he has not forfeited the increase.

So, where partners in the business of conducting a newspaper had agreed that a publisher should be selected for a term not exceeding five years, they have fixed the maximum and not the minimum term, and a publisher having been selected for no fixed time, and he neglects his duties and is engaged in other enterprises, the action of the majority in turning him out and selecting another publisher must control the minority.[7]

In a mining partnership the majority can control the method of

1 Const *v.* Harris, Turn. & R. 496; Blisset *v.* Daniel, 10 Hare, 493; Johnston *v.* Dutton, 27 Ala. 245; Western Stage Co. *v.* Walker, 2 Iowa, 504; Nolan *v.* Lovelock, 1 Montana. 224, 227; Zabriskie *v.* Hackensack & N. Y. R. R. 18 N. J. Eq. 178, 183; Kirk *v.* Hodgson, 3 Johns. Ch. 400, and cases cited below.

2 Stevens *v.* South Devon R'y Co. 9 Hare, 313, 326.

3 Macdougall *v.* Jersey Imperial Hotel Co. 2 Hem. & M. 528.

4 Robinson *v.* Thompson, 1 Vernon, 465; and see Stupart *v.* Arrowsmith, 3 Sm. & G. 176.

5 Gansevoort *v.* Kennedy, 30 Barb. 279.

6 Staples *v.* Sprague, 75 Me. 458; Western Stage Co. *v.* Walker, 2 Iowa, 504.

7 Peacock *v.* Cummings, 46 Pa. St. 434; also reported in 5 Phila. 253. But the majority in certain cases may not have power to change the management. C., B. & Q. R. R. *v.* Hoyt, 1 Ill. App. 374.

working and the conduct of the business, provided the exercise of such power is within the limits of what is necessary and proper to carry on the enterprise for the benefit of all.[1]

The majority, however, must exercise its powers, whether expressly conferred or existing by implication of law, in good faith for the interest of the firm, and not for the interest of any part of the members or from personal motives.[2] The dissenting partner has a right to be heard and an opportunity to urge his objection.[3] Thus, an agreement between some of the partners to overrule the rest, whatever they might wish, is not in good faith, and the court could compel them to rescind such agreement.[4]

§ 434. —— in fundamental matters.— While the limits of justifiable deviation are difficult to define, there are certain conditions in the relationship of partners of the character and authority of permanent constitutional restrictions or fundamental limitations, and whether they belong to this class from the nature of the partnership or by the express provisions of the articles, they bind all as a solemn contract, alterable only by unanimous concurrence.

Even if the articles provide that the majority shall govern,[5] or that a general meeting may amend, alter or annul the articles, it seems that this class of limitations cannot be invaded by any number less than the whole.[6]

A majority cannot take up a new kind of business or change the nature of the business. The partnership being formed to pursue one kind of business, the right to confine it to that is a fundamental part of the contract rights of

[1] Dougherty *v.* Creary, 30 Cal. 290. Where the majority of stockholders in a mining corporation which had leased its land bought out the lessee and formed a partnership, agreeing to work together as shareholders in electing directors favorable to themselves, and not to sell or buy its stock except on joint account, this is not against public policy, but a prudent management, no other stockholder being injured or complaining. Faulds *v.* Yates, 57 Ill. 416.

[2] Const *v.* Harris, Turn. & Russ, 496, 518, 525; Blisset *v.* Daniel, 10 Hare, 493, 522, 527.

[3] Const *v.* Harris, Turn. & R. 496; Western Stage Co. *v.* Walker, 2 Iowa, 504.

[4] Const *v.* Harris, Turn. & R. 496, 518.

[5] Livingston *v.* Lynch, 4 Johns. Ch. 573.

[6] Smith *v.* Goldsworthy, 4 Q. B. 430, where it was sought to reduce the capital.

each partner;[1] or engage the firm in another partnership;[2] or reorganize the partnership and increase the number of shares,[3] or reduce the capital;[4] or agree to dissolve and repay one funds he had advanced;[5] or make a loan outside the scope of the business.[6]

If persons subscribe to form a joint stock partnership and the majority procured the incorporation of the company, the subscriptions cannot be collected from those who did not assent.[7]

A stipulation against trading in spirituous liquors, if put in the articles, is made fundamental and material, and if the majority change it a non-assenting partner may withdraw and dissolve the firm.[8]

Nor can a majority release a partner from his contingent liability to the firm.[9]

Nor will a final settlement of accounts between two of three partners bind the third.[10]

§ **435.** We have elsewhere shown that a majority cannot convert the joint assets into separate property by dividing up any part of it, for the equitable lien of each partner extends to the whole property.

Thus, two of three partners in the purchase and subdivision of a tract of land cannot, without the consent of the third, agree that one of them shall have a particular part of it, although the court may protect his improvements by awarding him this part if consistent with the rights of the third partner;[11] nor assign a claim to one partner if there is a dissenting partner.[12] If the articles

[1] Natusch *v.* Irving, 2 Cooper's Ch. 358; Const *v.* Harris, Turn. & R. 517, the two leading cases, both by Lord Eldon; Zabriskie *v.* Hackensack & N. Y. R. R. Co. 18 N. J. Eq. 178, 183.

[2] Tabb *v.* Gist, 6 Call (Va.), 279.

[3] Livingston *v.* Lynch, 4 Johns. Ch. 573.

[4] Smith *v.* Goldsworthy, 4 Q. B. 430.

[5] Gansevoort *v.* Kennedy, 30 Barb. 279.

[6] Cooke *v.* Allison, 30 La. Ann. Part II, 963.

[7] Southern Steam Packet Co. *v.* Magrath, McMull. (S. Ca.) Eq. 93.

[8] Abbot *v.* Johnson, 32 N. H. 9.

[9] Bill *v.* Porter, 9 Conn. 23.

[10] Chadsey *v.* Harrison, 11 Ill. 151; Cooper *v.* Frederick, 4 G. Greene, 403; Lamalere *v.* Caze, 1 Wash. C. C. 435. See Gansevoort *v.* Kennedy, 30 Barb. 279.

[11] Cooper *v.* Frederick, 4 G. Greene (Iowa), 403. And see Gregory *v.* Patchett, 33 Beav. 595.

[12] Bird *v.* Fake, 1 Pin. (Wis.) 290; Horback *v.* Huey, 4 Watts, 455; Bun *v.* Morris, 1 Caines, 54.

provide that in case of sale of the firm's mill before dissolution the proceeds should be divided equally between the three partners, this is made a property right, and two cannot give the proceeds to one of them and deprive the third of his agreed share, though he had assigned his share as security to such one;[1] nor agree that a purchaser from the firm could settle his debt by crediting it on his individual account against one partner.[2] Nor can a general meeting transfer the available property to certain shareholders in lieu of their shares, practically putting an end to the company and throwing the debts on the rest.[3]

So there are other rights and duties, as the duty to observe good faith and not to compete, etc., of which no number of partners less than all can permit a violation.[4] So no majority could bind the members of the firm jointly and severally by contracts even in the scope of the business, but jointly only. So no majority could admit a new member.[5]

The non-consenting partner or partners may retire,[6] or may obtain an injunction;[7] but failure to object after knowledge, if amounting to acquiescence, will supply the want of authority.[8]

[1] Moore *v.* Knott, 12 Oregon, 260.

[2] Harter *v.* Wrigley, 48 Ga. 495.

[3] Gregory *v.* Patchett, 33 Beav. 595.

[4] See generally under Good Faith.

[5] In the English decisions are many interesting cases as to the powers of a majority in joint stock associations. These are analogous rather to the doctrine of *ultra vires* in corporations than to the powers of partners. They can be found in Lindley on Partnership, pp. 604–5.

[6] Abbot *v.* Johnson, 32 N. H. 9.

[7] Natusch *v.* Irving, 2 Cooper's Ch. 358.

[8] Natusch *v.* Irving, *supra;* Tabb *v.* Gist, 6 Call (Va.), 279. And see Abbot *v.* Johnson, 32 N. H. 9.

CHAPTER VIII.

CONTRACTS WITH ONE PARTNER.

§ **436. General rules of agency.**— 1st. On contracts not under seal and other than negotiable paper, if the principals are disclosed it is their contract, and so if the fact of agency is disclosed but not the name of the principal. If the fact of agency is not disclosed and the agent acts as if he were principal, the person dealing with him may, on discovery of the principal, hold either at his election.

2d. If the contract is under seal, and is executed by the agent in his own name, he alone can sue or be sued upon it, even if the fact that he is but an agent be disclosed.

3d. If the contract be negotiable paper, only the persons named in it can sue or be sued on the paper, though the paper does not necessarily merge the liability on the original consideration.

The case of a partner contracting in his own name, though generally called a case of undisclosed principal, is not strictly such, but is rather a case of an agent of two principals, one an individual and the other composed of several joint principals, including the individual principal, thus raising the question whether he acted for his sole principal or for the body. For a partner is not agent of the others or of each of them, but for the firm as a body, including himself, and either represents all or himself alone.

§ **437. Simple contracts other than mercantile paper.**— Apart from sealed instruments and mercantile paper, simple contracts entered into in the name of one partner will bind the firm, if he was in fact acting on its behalf, although the other party was not aware of the existence of the partnership. This is on the ground that such partner is an agent acting for an undisclosed principal.

So if a partner makes an oral contract, saying nothing as to whether it is for himself or for the firm, if it be in fact

on behalf of the firm, or in the scope of its business, it will be deemed to be a partnership transaction. Thus a sale to a partner of goods for the firm is *prima facie* a sale to the firm.[1] A sale by a partner of merchandise of the firm is a sale by the firm.[2] A contract by a partner with reference to the business is the contract of the firm.[3]

An employment of one partner in the scope of the business is deemed to be the employment of the firm.

Thus, where a person employs an attorney, it is ordinarily an employment of the firm, so that the client may pay any partner, and any partner may perform the services.[4] The employment, of course, may specially stipulate that one partner alone is to perform the service, and in such case if another partner attend to the case it is a breach of contract, but the damages are only nominal, if no injury is sustained, the value of the services not being in the name, as in a work of art; and if the particular partner die, the client may go elsewhere, on payment to the survivor for the services as far as rendered.[5] But the contract is partnership property, although one partner is specially employed, and all must sue upon it.[6]

In Spruhen *v.* Stout, 52 Wis. 517, plaintiff was in the employ of a partnership in work upon a mill, and part of the time was directed by one partner to get brick from ruins belonging to such partner, some of which material did not go into the mill. There was no notice to the plaintiff that this work was for the partner individually, and he was held entitled to assume that he was in the partnership employ all the time, and can look to the firm and have a lien upon their building for the whole amount.

So a contract made by one partner in his own name, if in fact a partnership transaction, must be enforced in the names of all the partners.[7] And any promise to one partner inures to the benefit

[1] Mills *v.* Barber, 4 Day, 430; Dougal *v.* Cowles, 5 id. 515; Booe *v.* Caldwell, 12 Ind. 12; Walden *v.* Sherburne, 15 Johns. 422; Augusta Wine Co. *v.* Weippert, 14 Mo. App. 483. So of a loan, Sherwood *v.* Snow, 46 Iowa, 481; 26 Am. Rep. 155.

[2] Lambert's Case, Godbolt, 244; Badger *v.* Daenieke, 56 Wis. 678.

[3] Anon. *v.* Layfield, 1 Salk. 291; De Tastet *v.* Carrol, 1 Stark. 88; Clement *v.* British Amer. Assur. Co. 141 Mass. 298.

[4] Williams *v.* More, 63 Cal. 50; Harris *v.* Pearce, 5 Ill. App. 622; Eggleston *v.* Boardman, 37 Mich. 17.

[5] Smith *v.* Hill, 13 Ark. 173.

[6] Jackson *v.* Bohrman, 59 Wis. 422.

[7] Gage *v.* Rollins, 10 Met. 348; Jackson *v.* Bohrman, 59 Wis. 422.

of all;[1] hence, a law firm may sue upon the special employment of one partner.[2]

The most usual instances of contracts by one partner upon which the entire firm is held arise where the copartners are either actually dormant, or the existence of the partnership is unknown to the other party, in which case they are treated as dormant as to him.

§ 438. Sealed instruments in the name of one partner.— It is to be noticed that we are considering the liability on contracts made in the name of a single partner. If the contract is in the name of the firm, it purports on its face to be intended as a partnership act, and the question then raised is as to the power of a partner. For this subject see Sealed Instrument.

Applying the rules stated in § 436 to partnerships, if a partner contracts in his own name under seal, he alone and not the firm is bound.[3] Thus where a partner gives his individual bond or note under seal, it cannot be shown that credit was given to the firm.[4] So of a lease by one partner in his own name,[5] or a purchase, and bond and mortgage to secure the price, all in the name of one partner.[6]

1 White *v.* Williams, Willm. Woll. & Hod. 52. This subject will appear more fully when we come to consider who may be plaintiffs. § 1019.

2 Jackson *v.* Bohrman, 59 Wis. 422. But where an attorney keeps an office in a town other than that in which he practices, which is in charge of a clerk, and the attorney is employed in that town, but the entire service is performed by the clerk, collection of fees was defeated either on the ground of public policy, the courts desiring to keep the profession pure, and not allow employments to be attended to by clerks, who should be with the attorney receiving instruction, or on the ground that there was a partnership between the attorney and the clerk, which is illegal. Hopkinson *v.* Smith, 1 Bing. 13.

3 Hancock *v.* Hodgson, 4 Bing. 269; Hall *v.* Bainbridge, 1 M. & G. 42.

4 Tom *v.* Goodrich, 2 Johns. 213; Willis *v.* Hill, 2 Dev. & Bat. (N. Ca.) L. 231; Moore *v.* Stevens, 60 Miss. 809; United States *v.* Astley, 3 Wash. C. C. 508; North Pennsylvania Coal Co.'s Appeal, 45 Pa. St. 181; Krafts *v.* Creighton. 3 Rich. (S. Ca.) L. 273; and see Walden *v.* Sherburne, 15 Johns. 423; Butterfield *v.* Hemsley, 12 Gray, 226; Harris *v.* Miller, Meigs (Tenn.), 158 (33 Am. Dec. 138).

5 Tuttle *v.* Eskridge, 2 Munf. 330.

6 Williams *v.* Gillies, 75 N. Y. 197 (rev. 13 Hun, 422). *Contra*, if he was authorized to make the transaction, Morse *v.* Richmond, 97 Ill. 303 (aff. 6 Ill. App. 166).

This rule does not apply if the copartner was secret, else the latter could always escape liability.[1]

§ 439. Negotiable paper made in the name of one partner. A firm name being the agreed symbol representing all the partners, whether named in it or not, is the signature of all, whether they be ostensible or dormant or nominal (see under NAME), even though the firm name be the name of one partner alone, as to which see hereafter. But where there is a firm name which is other than the name of the partner, and a creditor takes negotiable paper bearing the name of one partner alone, the general rule is that the firm cannot be held as parties to such paper.[2]

Thus, where a note was taken in the name of one partner, evidence of the maker's declarations at the time cannot be given to show a loan to the firm, where the other partner had not consented to notes being given in the name of one alone, and the payee knew the firm name was not that of such partner.[3]

[1] Chamberlain *v.* Madden, 7 Rich. L. 395. *Contra,* see Davidson *v.* Kelly, 1 Md. 492.

[2] Siffkin *v.* Walker, 2 Camp. 308; Emly *v.* Lye, 15 East, 7; Lloyd *v.* Ashby, 2 C. & P. 138; *Ex parte* Bolitho, Buck. 100; Bevan *v.* Lewis, 1 Sim. 376; Driver *v.* Burton, 17 Q. B. 989; Nicholson *v.* Ricketts, 2 E. & E. 497; Williams *v.* Thomas, 6 Esp. 18; Murray *v.* Somerville, 2 Camp. 99; Bottomley *v.* Nuttall, 5 C. B. (N. S.) 122; Miles' Claim, L. R. 9 Ch. 635; Le Roy *v.* Bayard, 2 Pet. 186; Coote *v.* Bank of U. S. 3 Cranch, C. C. 95; *Re* Herrick, 13 Bankr. Reg. 312; Ripley *v.* Kingsbury, 1 Day, 150, n. *a;* Strauss *v.* Waldo, 25 Ga. 641; Macklin *v.* Crutcher, 6 Bush, 401; Ostrom *v.* Jacobs, 9 Met. 454; Uhler *v.* Browning, 28 N. J. L. 79; Graeff *v.* Hitchman, 5 Watts, 454; Farmers' Bank *v.* Bayless, 35 Mo. 428; Dryer *v.* Sander, 48 id. 400; Coster *v.* Clarke, 3 Edw. Ch. 411; Allen *v.* Coit, 6 Hill, 318; Siegel *v.* Chidsey, 28 Pa. St. 279; National Bank *v.* Thomas, 47 N. Y. 15; Holmes *v.* Burton, 9 Vt. 252; 31 Am. Dec. 621; Cunningham *v.* Smithson, 12 Leigh (Va.), 32; Goldie *v.* Maxwell, 1 Up. Can. Q. B. 424. *Contra,* Seekel *v.* Fletcher, 53 Iowa, 330; Paine *v.* Dwinel, 53 Me. 52; Tucker *v.* Peaslee, 36 N. H. 167; Hill *v.* Voorhies, 22 Pa. St. 68; Puckett *v.* Stokes, 2 Baxter (Tenn.), 442; Burnley *v.* Rice, 18 Tex. 481, 497; Sessums *v.* Henry, 38 id. 37; Foster *v.* Hall, 4 Humph. (Tenn.) 346. Where two establishments in the same place and same business were conducted by the same person as proprietor of one and partner in the other, and he obtains money from a bank on checks signed by him as agent, the firm may show that they do not owe the bank. Mechanics & Traders' Bk. *v.* Dakin, 24 Wend. 411.

[3] Ostrom *v.* Jacobs, 9 Met. 454; Coote *v.* Bank of U. S. 3 Cranch, C.

In Crozier *v.* Kirker, 4 Tex. 252, 257 (51 Am. Dec. 724), it was said that if the note signed by one partner appear on its face to have a joint operation and to be on partnership account, the payee can sue the maker or all the partners at his election.

In Lemon *v.* Fox, 21 Kan. 152, the manager of a bank, authorized to sign certificates of deposit in his own name, omitted the designation "manager" on signing one, with the intention of taking the money as a loan to himself, the depositor, however, intending it as a deposit, and not noticing the change, and all the partners were held liable on the certificate.

If the paper given is not negotiable paper the question does not arise. Thus, weighers' tickets addressed only to the purchasing partners is not an agreement to look to them alone.[1] And so of a receipt in the name of one partner.[2]

§ 440. Liability of firm on original consideration when not bound by the paper.— Where the individual paper of one partner is taken, yet if the sale was made to and upon the credit of the firm, the other partners will be liable for the original consideration as for money lent or goods sold, although they are not liable upon the paper, which is merely collateral.[3]

In Sorg *v.* Thornton, 1 Cint. Super. Ct. Rep. 383, T., P. & Co., who had been in the habit of borrowing from the plaintiff, took in a new partner, D., and the name was changed to P. & Co. T., who was still a partner, applied to the plaintiff for a loan for the

C. 95; Uhler *v.* Browning, 28 N. J. L. 79. Yet whether a personal check for the loan was payment so as to take away recourse on the firm or not was held a question of intention or agreement, to be left to the jury, in Smith *v.* Collins, 115 Mass. 388. As to the effect of an indorsement over by one partner in his own name of a note in the name of the firm, see § 200.

[1] Smith *v.* Smyth, 42 Iowa, 493.

[2] Reevs *v.* Hardy, 7 Mo. 348; Hersom *v.* Henderson, 3 Foster (23 N. H.), 498, 504; Brown *v.* Lawrence, 5 Conn. 397.

[3] *Ex parte* Brown, cited in 1 Atk. 225; Siffkin *v.* Walker, 2 Camp. 308; Denton *v.* Rodie, 3 Camp. 493; Maffet *v.* Leuckel, 93 Pa. St. 468; Burns *v.* Parish, 3 B. Mon. 8; Macklin *v.* Crutcher, 6 Bush, 401; Allen *v.* Coit, 6 Hill, 318; Smith *v.* Collins, 115 Mass. 388; Duval *v.* Wood, 3 Lansing, 489; Graeff *v.* Hitchman, 5 Watts, 454; Hoeflinger *v.* Wells, 47 Wis. 628; Sorg *v.* Thornton, 1 Cint. Super. Ct. Rep. 383; Weaver *v.* Tapscott, 9 Leigh (Va.), 424; Cunningham *v.* Smithson, 12 Leigh, 32. And see Beebe *v.* Rogers, 3 G. Greene (Iowa), 319.

new firm, the plaintiff being ignorant of the change of name, and gave him a note in the name of the old firm. The new firm was held liable for the loan, for T. had power to borrow, and his giving a worthless note does not exonerate the firm from liability for money lent.

So the note of one partner may be taken as collateral and not as payment unless paid.

In Emly *v.* Lye, 15 East, 7, a leading case, Geo. Lye and E. L. Lye, partners as Geo. Lye & Son, employed Horne as their book-keeper, and he procured the discount of bills from one Borrough, some drawn in the firm name and some in the names of G. Lye only and of E. L. Lye only. The proceeds of all the bills were used for the partnership and Borrough believed the firm was held on all. In an action against both partners on bills by E. L. Lye, the count on the bill was abandoned and reliance was placed on the money counts alone, which Lord Ellenborough held to be proper, unless it was desired to pursue E. L. Lye only, as the names of others than the signer could not be supplied by intendment.

So in Siffkin *v.* Walker, 2 Camp. 308, Walker & Roulstone being indebted to the plaintiff, a note for the debt was given him signed by Walker, and both were sued upon it, but it was held that the remedy was either against both on the debt, or against Walker alone on the note as a separate security for a joint debt.

§ 441. Bills on, or to account of, the firm.— As a bill could be accepted orally, an acceptance of a draft upon the firm by one partner in his own name binds the firm, unless the statute requires an acceptance to be in writing.[1] But

[1] Wells *v.* Masterman, 2 Esp. 731; Mason *v.* Rumsey, 1 Camp. 384; Jenkins *v.* Morris, 16 M. & W. 879; Dolman *v.* Orchard, 2 C. & P. 104; May *v.* Hewitt, 33 Ala. 161; Dougal *v.* Cowles, 5 Day, 511, 515; Pannell *v.* Phillips, 55 Ga. 618; Beach *v.* State Bank, 2 Ind. 488; Cunningham *v.* Smithson, 12 Leigh, 32; Tolman *v.* Hanrahan, 44 Wis. 133. But *contra*, where the acceptance is required to be written, *Re* Adansonia Co. L. R. 9 Ch. App. 635; Heenan *v.* Nash, 8 Minn. 407, and Hovey *v.* Cassels, 30 Up. Can. C. P. 230, on the ground that a partner can only bind the firm in the firm name. In the latter case, however, the payee had constructive notice that the acceptance was unauthorized for other reasons. And see Taber *v.* Cannon, 8 Met. 456. In Markham *v.* Hazen, 48 Ga. 570, a bill was drawn upon a firm in its correct name, The Republican Association, whose business was the publication of a newspaper called The Opinion. One partner accepted the bill thus: "Accepted for The Opinion

the accepting partner may be sued separately if his acceptance was unauthorized and not binding on the firm.[1]

Where a partner accepts in the firm name, and adds his own name also, no individual liability is created.[2]

If a partner draws a bill in his own name on his firm for its use, it is, in legal contemplation, an acceptance of the firm, and the firm can be sued upon it.[3]

In Bank of Rochester *v.* Monteath, 1 Den. 402 (43 Am. Dec. 681), the partnership did business in Rochester in the name of John Allen, and in Albany in the name of Wm. Monteath, and the former drew a bill on the latter, who accepted; it was held to be a bill on themselves on which both could be held as drawers or indorsers as well as for money lent.[4]

So if a partner authorized to raise money draw on a debtor or correspondent of the firm, directing the amount to be charged to the firm's account, the payee can recover of the firm on the draft.[5] But the draft of a third person on one partner "on account of" the firm, and accepted by him in his own name, was held to be his personal acceptance only, though the firm might be liable for its amount.[6]

If a bill is drawn upon a firm by an incorrect name, but is accepted in the right name, the firm is bound.[7]

newspaper," and signed his initials. This was held sufficient, but was put upon the ground that it sufficiently identified the firm.

[1] Owen *v.* Van Uster, 10 C. B. 318.

[2] *Re* Barnard, 32 Ch. D. 447; Malcolmson *v.* Malcolmson, 1 Irish L. R. Ch. D. 228, where he accepted for the M. Spinning Co. and self. For cases of use by a partner of a name varying from the firm name, see § 199.

[3] Dougal *v.* Cowles, 5 Day, 511; McKinney *v.* Bradbury, Dallam (Tex.), 441; Beach *v.* State Bank, 2 Ind. 488. And see Denton *v.* Rodie, 3 Camp. 493, where the firm was held liable not on the paper but as for a loan to it.

[4] S. P. Wright *v.* Hooker, 10 N. Y. 51, approving the above case, and disapproving Allen *v.* Coit, 6 Hill, 318, and Rogers *v.* Coit, id. 323, if they are inconsistent with it.

[5] Reimsdyk *v.* Kane, 1 Gall. 630; Farmers' Bank *v.* Bayliss, 41 Mo. 274, 287. And see Beebe *v.* Rogers, 3 Iowa, 319; Morse *v.* Richmond, 97 Ill. 303 (aff'd, 6 Ill. App. 166), where a partner holding the title to real estate was authorized to borrow and signed in his own name as "trustee."

[6] Cunningham *v.* Smithson, 12 Leigh, 32.

[7] As where a bill was drawn upon Ashby & Rowland in the name of Ashby & Co., but accepted as Ashby & Rowland, the acceptance binds all

But a bill drawn upon one partner and accepted by him in the name of the firm will not bind the firm.[1]

§ 442. **Renewal of firm debt by individual note.**— Where a firm debt is renewed on the individual note of a single partner, with the assurance that the other is to sign, and the latter complained of the omission of his name, as showing a design to cheat him out of the profits, the firm continues liable.[2]

After the retirement of a partner known to the creditor, the effect of an extension of the debt to the continuing partner belongs to another subject. See §§ 532–534.

§ 443. **Firm in the name of one partner.** —But the name of one partner may itself, by prior agreement, represent all the partners, as where it is the usual firm name, or has been permitted to be used as such for certain purposes, of which the act in question is one. Where this is the case, his signature to a note or contract, or any other act done by him or in his name, may be an individual act or a partnership act, and hence is necessarily equivocal. The guides for determining whom the name represents are as follows:

1. *Prima facie*, that is, in the absence of all other evidence, the signature of the individual is taken to be what it purports to be, his personal act. In other words, the name presumptively represents the person, and not the firm.[3]

the partners, Lloyd *v.* Ashby, 2 B. & Ad. 23. See Faith *v.* Richmond, 11 A. & E. 339. An order on H., "general partner," and accepted in the firm name, is an order on the firm, which consisted of H. and a special partner, Carney *v.* Hotchkiss, 48 Mich. 276.

[1] Nicholls *v.* Diamond, 9 Ex. 154; Mare *v.* Charles, 5 E. & B. 978.

[2] Horsey *v.* Heath, 5 Oh. 353; McKee *v.* Hamilton, 33 Oh. St. 7.

[3] *Ex parte* Bolitho, Buck. 100; Yorkshire Banking Co. *v.* Beatson, 4 C. P. D. 204; Bank of Rochester *v.* Monteath, 1 Den. 402, 405 (43 Am. Dec. 681); Manufacturers', etc. Bank *v.* Winship, 5 Pick. 11 (16 Am. Dec. 369); Etheridge *v.* Binney, 9 Pick. 272, 274; U. S. Bank *v.* Binney, 5 Mason, 176; Gernon *v.* Hoyt, 90 N. Y. 631; Buckner *v.* Lee, 8 Ga. 285; Strauss *v.* Waldo, 25 Ga. 641; Boyle *v.* Skinner, 19 Mo. 82; Mercantile B'k *v.* Cox, 38 Me. 500, 506; Oliphant *v.* Mathews, 16 Barb. 608 (cited approvingly in Yorkshire Banking Co. *v.* Beatson, 4 C. P. D. 204); Nat'l Bank *v.* Ingraham, 58 Barb. 290; Puckett *v.* Stokes, 2 Baxter, 442; and see Williams *v.* Gillies, 75 N. Y. 197 (rev. 13 Hun, 422). *Contra*, that it is presumably a partnership act, Mifflin *v.* Smith, 17 S. & R. 165 (which was doubted in Burroughs' Appeal, 26 Pa. St. 264, but said in Jones *v.*

In Fosdick *v.* Van Horn, 40 Oh. St. 459, L. & E. were doing several kinds of business in the same firm name, and Fosdick was a dormant partner in one of them, and a note was given in the firm name, and it was held that this note is presumed to be the note of the firm not containing the dormant partner, unless it be proved to have been on the credit or for the business of the other firm, and this may be proved by representations made at the time of borrowing, or by other circumstances; and the dormant partner, on his side, may show that the books of his firm contain no entry of the transaction.[1]

If the partnership is not a trading one, or a partnership where there is implied power to give notes, the note is an individual matter, unless there was special authority to make it; and so if the transaction was not within the scope of the business.[2]

If there is evidence that the transaction was a partnership matter, as where the partner declared the purchase or loan was for the business, or for the firm, if the plaintiff knew there was a firm, or if the plaintiff himself at the time avowed to the partner that he was dealing with him in the capacity of partner or was trusting the firm, this shows the transaction to be a partnership one, and the name then represents and binds all the partners.[3]

So if mercantile paper payable to one partner belongs to the firm, whose name is also his name, the fact of the partnership being concealed, his indorsement of the notes renders his secret partners liable.[4]

Fegely, 4 Phila. 1, 2, never to have been overruled); Yorkshire Banking Co. *v.* Beatson, 4 C. P. D. 204; 5 id. 109, presumed to be for the firm, if maker had no other business.

[1] S. P. *In re* Munn, 3 Biss. 442. So of insurance on partnership property.

[2] As in Marvin *v.* Buchanan, 62 Barb. 468.

[3] Stephens *v.* Reynolds, 5 H. & N. 513; 1 F. & F. 739; 2 id. 147; Yorkshire Banking Co. *v.* Beatson, 4 C. P. D. 204; 5 id. 109; U. S. Bank *v.* Binney, 5 Mason, 176; Winship *v.* B'k of U. S. 5 Pet. 529 532. See Theilen *v.* Haun, 27 Kan. 778; Macklin *v.* Crutcher, 6 Bush. 401; Moale *v.* Hollins, 11 Gill & J. 11; Getchell *v.* Foster, 106 Mass. 42; Thorn *v.* Smith, 21 Wend. 364, 366–7; National Bank *v.* Ingraham, 58 Barb. 290; Crocker *v.* Colwell, 46 N. Y. 212; Gernon *v.* Hoyt, 90 N. Y. 631; Gavin *v.* Walker, 14 Lea, 643.

[4] Mohawk Nat'l B'k *v.* Van Slyck, 29 Hun, 188.

Of course, if there is a firm name, a partner cannot cast upon the firm the burden of loans incurred by himself in his own name by declaring they were for the firm.[1]

If the partner borrows on his own account, merely representing that the money is to be used in the firm's business is not sufficient. The lender must understand that he is dealing with the firm, through the partner.[2]

That insurance upon partnership property of a partnership, where the firm name is the name of one partner, and the insurance is taken in his name without disclosure of the fact of partnership, which was a limited one, will cover the entire interest, and a proof of loss, stating that such partner is the sole owner, is not false swearing, for the property belongs to the firm of that name.[3]

It has been also held that, if the maker has no other business, his signature to a note will be deemed to represent the partnership.[4]

§ **444.** These rules also apply where the partners have not adopted the name of one as their firm name generally, but it is so used with their express or implied authority.[5]

As if the partners sometimes dealt in the name of one partner as a firm name, this may be left to the jury as evidence that it was the firm name in the transaction in question;[6] or where no firm name had been agreed on, each partner can use his individual name to represent the firm;[7] so where the acting partner, no name having been agreed on, introduced a name without the concurrence of the rest.[8]

1 Uhler *v.* Browning, 28 N. J. L. 79; Dryer *v.* Sander, 48 Mo. 400.

2 Ah Lep *v.* Gong Choy, 13 Oregon, 205.

3 Clement *v.* British Am. Assur. Co. 141 Mass. 298. A note given by the ostensible partner in whose name the firm was carried on, to his dormant partner, for the amount of capital the latter had contributed, is the maker's individual note. *Re* Waite, 1 Low. 207.

4 Bank of Rochester *v.* Monteath, 1 Den. 402 (43 Am. Dec. 681); Yorkshire Banking Co. *v.* Beatson, 4 C. P. D. 204; s. c. 5 id. 109. And this reconciles any seeming inconsistency in the decisions as to the liability of the firm of John Winship in Manufacturers', etc. Bank *v.* Winship, 5 Pick. 1 (16 Am. Dec. 369), and Winship *v.* Bank of U. S. 5 Pet. 529.

5 *In re* Warren, 2 Ware, 322; South Carolina Bank *v.* Case, 8 B. & C. 427; 2 Man. & Ry. 459. See Morse *v.* Richmond, 97 Ill. 303 (aff. 6 Ill. App. 166).

6 Le Roy *v.* Johnson, 2 Pet. 186, 200.

7 Kitner *v.* Whitlock, 88 Ill. 513; Getchell *v.* Foster, 106 Mass. 42.

8 Holland *v.* Long, 57 Ga. 36, 40.

In Crocker *v.* Colwell, 46 N. Y. 212, the firm of Colwell & Dimmick kept their bank account in the name of Dimmick alone, and hence all checks were drawn in his name; hence, where Dimmick drew his check, with the amount left blank, for the purchase of stock for the firm, and an agent of the firm filled up the amount and procured the plaintiff to cash it, and the agent claimed to have lost part of the amount, Dimmick's name was held to be the firm name for the purpose of drawing checks, and the firm was held liable on the check.

So if all the partners assent to the use of the name of one to designate the firm in certain transactions, though there be a firm name,[1] or even in a single transaction,[2] or where the bank account is kept in the name of one partner alone, his check on partnership account binds the firm.[3]

§ 445. —— **dormant and undisclosed partnerships.**—If the plaintiff did not know of the existence of a partnership, as where the other partner was a dormant one, or though an active partner was not disclosed to the plaintiff, or the partner was authorized by the firm to use his own name in a class of transactions, and the plaintiff did not know of the existence of a firm, here the rules of agency as to the liability of an undisclosed principal for acts of the agent in his own name, of which the principal gets the benefit, apply.[4] In other words, a person dealing with a firm is presumed to trust to all who composed it, known or unknown.

[1] Palmer *v.* Stephens, 1 Den. 471.

[2] Seekel *v.* Fletcher, 53 Iowa, 330; Sprague *v.* Ainsworth, 40 Vt. 47. And see Folk *v.* Wilson, 21 Md. 538.

[3] Crocker *v.* Colwell, 46 N. Y. 212.

[4] S. Ca. Bank *v.* Case, 8 B. & C. 427; Vere *v.* Ashby, 10 B. & C. 288; Ll. & W. 20; Wintle *v.* Crowther, 1 Cr. & J. 316; 9 L. J. Ex. 65; *In re* Warren, 2 Ware, 322; Palmer *v.* Elliot, 1 Cliff. 63; *Ex parte* Law, 3 Deac. 541; Bigelow *v.* Elliot, 1 Cliff. 28; Bisel *v.* Hobbs, 6 Blackf. 479; Morse *v.* Richmond, 97 Ill. 303 (aff. 6 Ill. App. 166); Richardson *v.* Farmer, 36 Mo. 35; Smith *v.* Smith, 7 Foster (27 N. H.), 244; Tucker *v.* Peaslee, 36 N. H. 167; Baxter *v.* Clark, 4 Ired. (N. Ca.) L. 127; Poole *v.* Lewis, 75 N. Ca. 417; Reynolds *v.* Cleveland, 4 Cow. 282 (15 Am. Dec. 369); Howell *v.* Adams, 68 N. Y. 314, 320; Poillon *v.* Secor, 61 id. 456; Crocker *v.* Colwell, 46 id. 212; Everitt *v.* Chapman, 6 Conn. 347; Graeff *v.* Hitchman, 5 Watts, 454; Mifflin *v.* Smith, 17 S. & R. 165; McNair *v.* Rewey, 62 Wis. 167; Holmes *v.* Burton, 9 Vt. 252 (31 Am. Dec. 621); Strauss *v.* Jones, 37 Tex. 313; Davidson *v.* Kelly, 1 Md. 492; Kennedy *v.* Bohannon, 11 B. Mon. 118; Farr *v.* Wheeler, 20 N. H. 569;

This does not mean that every note by a person having a dormant partner, for a purchase of goods to be put into the firm, is a partnership liability. If the signer intended the note to be his individual liability, the payee must sue the firm on the original liability and not on the note.[1] And so held even when the lender or seller believed it was for the firm, in the absence of any act of the partner inducing such belief.[2]

In Ontario Bank *v.* Hennessey, 48 N. Y. 545, one partner was authorized to draw drafts to pay for purchases and did so. There was no firm name and the lender did not know there any partners. It was held that his name was to all intents the name of the firm and the draft was deemed to be a firm act, and that the question need not be submitted to the jury.[3] In Poole *v.* Lewis, 75 N. Ca. 417, 423, where the firm of P., Y. & Co. was a member of the firm of P., L. & Co., and bought goods to be put into the latter firm, and the vendor charged them to the former firm, it was said that, to show that the vendor credited the buyer also, where the fact of a partnership was not disclosed, he must be proved to have known of the partnership and to have elected to look to the buyer alone, because he will not be supposed to have taken less security than he was entitled to.

In the cases where the fact of partnership was unknown to the other party, he can sue the person who contracted with him alone. (See DEFENDANTS, § 1052.)

§ 446. Firm not liable by getting benefit of contract of partner.— The mere fact that the firm received the benefit of a loan to or purchase by an individual partner does not make it liable. The debt being his debt, his disposition of the proceeds or consideration has no effect on the creditors'

Hersom *v.* Henderson, 3 Foster (23 N. H.), 498, 504. The New Hampshire cases seem to go a little farther than the others in holding the firm liable. Griffith *v.* Buffum, 22 Vt. 181 (54 Am. Dec. 64); Goddard *v.* Brown, 11 Vt. 278, that the partner cannot object to being sued alone. Alexander *v.* McGinn, 3 Watts, 220, that he can object where the other partners, though not disclosed, were not dormant. *Contra*, Miller *v.* Manice, 6 Hill, 114.

[1] Palmer *v.* Elliot, 1 Cliff. 63.

[2] Manufacturers', etc. Bank *v.* Winship, 5 Pick. 11 (16 Am. Dec. 369); Buckner *v.* Lee, 8 Ga. 285. But see § 447.

[3] One judge dissented, and the case is questioned in Williams *v.* Gillies, 75 N. Y. 197.

relations to the debt or debtor, and does not enable the creditor either to look to the firm or to share *pari passu* with partnership creditors in the distribution of its assets. He can look only to the person he trusted, unless that person was in fact an agent, and it is in the determination of this fact that the difficulty lies; but assuming that the contracting partner was acting for himself alone and was the sole debtor, no subsequent enjoyment or benefit of the proceeds implicates the firm, except the partner from whom it receives the contribution.[1] Thus, where a partner borrows money or procures merchandise for the purpose of contributing it as the share of the capital agreed to be paid in by him.[2] So if a person borrows money or purchases goods and afterwards takes in a partner, and the firm gets the benefit of the loan or purchase, this does not make the incoming partner liable.[3]

Thus, where Hunter & Co. had ordered goods for shipment to and sale in the Baltic, and afterwards agreed with Hoffman & Co. to share the profit and loss of the adventure with them, they are not liable to the seller.[4] Even though the purchase was made in the name of the expected firm, if the incoming partner does not

[1] This doctrine is considerably modified in Louisiana, if the firm has received the benefit. Roth v. Moore, 19 La. Ann. 86; Penn v. Kearny, 21 id. 21; Lagan v. Cragin, 27 id. 352.

[2] Evans v. Winston, 74 Ala. 349; Ferson v. Monroe, 1 Foster (21 N. H.), 462; Elliot v. Stevens, 38 N. H. 311, McLinden v. Wentworth, 51 Wis. 170; Logan v. Bond, 13 Ga. 192; Matlack v. James, 13 N. J. Eq. 126, Pollock v. Williams, 42 Miss. 88; Burns v. Mason, 11 Mo. 469; Wittram v. Van Wormer, 44 Ill. 525, Bank v. Sawyer, 38 Oh. St. 339, 342; Valentine v. Hickle, 39 id. 19, 27, Donally v. Ryan, 41 Pa. St. 306; Foster v. Barnes, 81 id. 377; McNaughton's Appeal, 101 id. 550; Stebbins v. Willard, 53 Vt. 665; Robertson v. Jones, 20 New Brunswick, 267. On this principle it was decided in Barton v. Hanson, 2 Taunt. 49, that, if several persons haul with their individual horses the several stages of a coach, sharing the profits, they are not jointly liable for the feed of the horses.

[3] Young v. Hunter, 4 Taunt. 582; Atwood v. Lockhart, 4 McLean, 350; Smith v. Hood, 4 Ill. App. 360: Watt v. Kirby, 15 Ill. 200; Duncan v. Lewis, 1 Duv. (Ky.) 183; Ketchum v. Durkee, Hoffm. (N. Y.) 538; Brooke v. Evans, 5 Watts, 196; Donally v. Ryan, 41 Pa. St. 306; Bank v. Gray, 12 Lea (Tenn.), 459; Taggart v. Phelps, 10 Vt. 318; Howell v. Sewing Machine Co. 12 Neb. 177, 179.

[4] Young v. Hunter, 4 Taunt. 582.

authorize it.[1] But the principle was held not to apply where the delivery of the articles so purchased was made to the firm and on its credit,[2] unless made to the partner alone.[3] Yet if the firm gets the benefit of the transaction, and it is but justice that it assume the debt, such assumption has been held to convert it into a claim against the firm.[4]

So where a partner borrows money on his own responsibility and credit, from one who has knowledge of the existence of the firm, and uses the money for the firm or pays it into the firm, it is his debt alone.[5]

So if a person receives money not in the scope of the business, and uses it for the benefit of the partnership, this does not charge the other partners. In Pickels *v.* McPherson, 59 Miss. 216, P., being indebted to the firm of D. & M., delivered to D. a note made by a third person, to collect, it being outside the scope of the business to take notes for collection; D. agreed to pay the debt due to the firm out of the avails, and give P. the balance; but D. used the balance in the firm's business, by paying its debts with it. The claim for the balance was held to be D.'s individual debt, and for which M. was not liable.[6]

[1] Gaus *v.* Hobbs, 18 Kan. 500. In Evans *v.* Winston, 74 Ala. 349, 352, a mortgage was made by one partner in consideration of $150, loaned by the mortgagee to the mortgagor, "then entering into a partnership with R. in the name of R. & N.," and the court said that this might mean in order to replenish the stock, which would be a partnership debt; or to provide his share of the capital, which would be his individual debt, and there was an equipoise.

[2] Watt *v.* Kirby, *supra*.

[3] Id.; Taggart *v.* Phelps, *supra*.

[4] See § 515.

[5] LeRoy *v.* Johnson, 2 Pet. 186, 199; Smith *v.* Hoffman, 2 Cranch, C. C. 651; Guice *v.* Thornton, 76 Ala. 466; Mechanics' & T. Ins. Co. *v.* Richardson, 33 La. Ann. 1308 (39 Am. Rep. 290); Green *v.* Tanner, 8 Met. 411; Goodrich *v.* Leland, 18 Mich. 110; Wiggins *v.* Hammond, 1 Mo. 121; Asbury *v.* Flesher, 11 Mo. 610; Farmers' Bank *v.* Bayless, 35 Mo. 428; Farmers' Bank *v.* Bayliss, 41 Mo. 274; Tucker *v.* Peaslee, 36 N. H. 167; Coster *v.* Clarke, 3 Edw. Ch. 411; Ryder *v.* Gilbert, 16 Hun, 163; National Bank *v.* Thomas, 47 N. Y. 15; Willis *v.* Hill, 2 Dev. & Bat. (N. Ca.) L. 231; Peterson *v.* Roach, 32 Oh. St. 374 (30 Am. Rep. 607); Bank *v.* Sawyer, 38 Oh. St. 339; Ah Lep *v.* Gong Choy, 13 Oregon, 205; Graeff *v.* Hitchman, 5 Watts, 454; Foster *v.* Hall, 4 Humph. (Tenn.) 346; Union & Planters' Bk. *v.* Day, 12 Heisk. 413; McLinden *v.* Wentworth, 51 Wis. 170, 181; Willis *v.* Bremner, 60 Wis. 622; McCord *v.* Field, 27 Up. Can. C. P. 391.

[6] Hogan *v.* Reynolds, 8 Ala. 59; Dounce *v.* Parsons, 45 N. Y. 180.

So if a sale of goods is made, with knowledge of the existence of the firm, but on the individual credit of one partner alone, though the goods are turned over by him to the firm, or bought with that intention.[1]

One partner purchased flour on his own behalf, but this being the business of the firm, the firm claim the benefits of it; but this right cannot avail any one else, and hence the seller cannot hold the firm.[2]

§ 447. **When the firm is trusted, and when one partner only.**— As already suggested, difficulty, especially on oral contracts, frequently attends determining whether credit was in fact given to the individual partner or to the firm. The question is one of intention to be determined by the jury from the circumstances, unless the contract is written, and is on its face conclusive, which it sometimes is, though oftener not.

If the contract is within the scope of the business, the mere fact that a single partner is dealt with is immaterial, where not expressly on his individual credit, and the contract will be deemed to be with the firm unless the contrary appears.[3]

So a person paying money at the request of a member of a firm for an apparently firm purpose, as on a note signed by the firm, can

[1] Law *v.* Cross, 1 Black, 533, followed without comment in Simpson *v.* Baker, 2 id. 581; Bird *v.* Lanius, 7 Ind. 615; Wittram *v.* Van Wormer, 44 Ill. 525; Lafon *v.* Chinn, 6 B. Mon. 305; Bracken *v.* March, 4 Mo. 74; Gates *v.* Watson, 54 Mo. 585; Nichols *v.* English, 3 Brewster (Pa.), 260; McDonald *v.* Parker, Sneed (Ky.), 208; Macklin *v.* Crutcher, 6 Bush, 401; Venable *v.* Levick, 2 Head (Tenn.), 351; Holmes *v.* Burton, 9 Vt. 252; 31 Am. Dec. 621; Chapman *v.* Devereux, 32 Vt. 616; 9 Am. Law Reg. (O. S.) 419.

[2] Lockwood *v.* Beckwith, 6 Mich. 168. In Louisiana, however, while the contract does not bind the firm, the partners are liable in proportion to their number for the benefits received. Lallande *v.* McRae, 16 La. Ann. 193.

[3] Church *v.* Sparrow, 5 Wend. 223; Walden *v.* Sherburne, 15 Johns. 409; Hamilton *v.* Einer, 20 La. Ann. 391; Stecker *v.* Smith, 46 Mich. 14; Augusta Wine Co. *v.* Weippert, 14 Mo. App. 483; McKinney *v.* Bradbury, Dallam (Tex.), 441; Allen *v.* Owens, 2 Spears (S. Ca.), 170; Stark *v.* Corey, 45 Ill. 431; Steel *v.* Jennings, Cheeves (S. Ca.), 183; Venable *v.* Levick, 2 Head (Tenn.), 351.

hold the firm, unless he knew that it was an individual matter or a forgery.[1]

In Baker *v.* Nappier, 19 Ga. 520, the plaintiff sold goods to K., supposing in the exercise of ordinary care that they were for the firm of K. & A., but K. intended them for K. & B., and it was ruled that he could hold K. & A., the goods being suitable for that firm; though the general rule is that ordinary care on the part of the seller, knowing of the existence of both firms, requires him to inquire which firm is intended, if the buyer does not indicate which.

So of a loan of money; the lender may assume it is for the firm, unless it is stated to be for individual purposes.[2]

In Mills *v.* Bunce, 29 Mich. 364, it was said that in determining whether the firm or one partner was dealt with, a considerable degree of latitude in the proof tending to show that the other partner knew the plaintiff understood himself to be dealing with all should be allowed.

If the contract on which it is sought to hold the firm was a matter not connected with the business, it is presumptively a personal contract with the individual partner, though in the firm name.[3]

§ 448. —— **evidence charging the firm.**— Merely that the other partners were aware that the money was to be borrowed or contract made does not make the borrower an agent of the firm in the matter;[4] nor a mere request that plaintiff become surety on the note of the borrowing partner, for that is not a promise to indemnify, and does not make the loan a partnership debt;[5] yet the acquiescence of the other in plaintiff's performing for the firm services contracted for with one partner is evidence of joint liability.[6]

The firm may assume the debt with the creditor's assent. Here the consideration must be considered to be the release of the in-

[1] Blinn *v.* Evans, 24 Ill. 317.

[2] Sherwood *v.* Snow, 46 Iowa, 481 (26 Am. Rep. 155). In Rose *v.* Baker, 13 Barb. 230, A. & P., in 1847, were partners in buying wheat. C. let A. have $300, which was used to pay for wheat bought for the firm. A few days afterwards A. gave C. his individual note, and a year afterwards, and after dissolution, A. paid a part and gave his individual note for the balance, yet it was held that C. could recover the balance from the firm.

[3] Rutledge *v.* Squires, 23 Iowa, 53; and see generally under Scope of the Business, and §§ 349, 421.

[4] Farmers' Bank *v.* Bayliss, 41 Mo. 274.

[5] Asbury *v.* Flesher, 11 Mo. 610.

[6] Bowne *v.* Thompson, 1 N. J. L. 2.

dividual liability of the borrowing partner, since the past benefit or moral consideration is not sufficient.[1]

In Union Bank *v.* Eaton, 5 Humph. (Tenn.) 501, it was held that if money was borrowed by a partner on his own credit, and his own note was given, but the money went to the use of the firm, it was no fraud on his copartners to substitute the firm note afterwards for his own, and if the money was borrowed for and on the credit of the firm, the firm is liable on a partnership note substituted for the individual note, though there was no proof that the money was actually so applied.[2]

But in McCord *v.* Field, 27 Up. Can. C. P. 391, where a partner borrowed money, giving his individual notes, and used it for the firm, and to secure them signed another note in the firm name, it was held that there could be no recovery on the latter against the firm.[3]

And in Gansevoort *v.* Williams, 14 Wend. 133, it was held that a note of the firm to renew a note of one partner did not have the appearance of being the act of the firm, and that the creditor must show that it was authorized.

In Meader *v.* Malcolm, 78 Mo. 550, the lender took the individual note of the partner, not noticing the signature, and not so intending, but afterwards, on discovering this, immediately insisted upon and procured a note signed in the firm name by such partner, and it was held that the facts could be shown and the firm made liable on the latter note.

And after the partner who made the note has paid it it is extinguished, and an assignee of it from him cannot recover on the naked promise of the other partner to pay it.[4]

In Ostrom *v.* Jacobs, 9 Met. 454, the action was on a note signed by one partner in his own name alone, and evidence that one of the other partners recognized the note as a firm debt, and tried to borrow money to pay it, was held not admissible against a third partner, unless it is shown that he consented to or knew this.

[1] Barcroft *v.* Snodgrass, 1 Cold. (Tenn.) 430; Nichols *v.* English, 3 Brewster (Pa.), 260; Siegel *v.* Chidsey, 28 Pa. St. 279; Smith *v.* Turner, 9 Bush, 417; McCreary *v.* Van Hook, 35 Tex. 631; Hotchkiss *v.* Ladd, 36 Vt. 593; 43 id. 345.

[2] See, also, Hurd *v.* Haggerty, 24 Ill. 171; Davidson *v.* Kelly, 1 Md. 492.

[3] See, also, Guice *v.* Thornton, 76 Ala. 466.

[4] Sprague *v.* Ainsworth, 40 Vt. 47.

In Benninger *v.* Hess, 41 Oh. St. 64, a partner borrowed money, saying it was for the firm, and two days afterwards brought his individual note indorsed in the firm name. This was held not conclusive of notice that he borrowed for himself because the note was not delivered until after the loan was made.

If the borrowing partner give as security the firm's acceptance of another's draft, this is evidence that the loan was made to the firm.[1] Especially where similar prior partnership indorsements had been paid by him.[2]

§ 449. —— **admissions in books and letters.**— That the plaintiff had charged the goods furnished or money loaned on his books to the individual partner is not conclusive to exonerate the firm.[3] And that the firm have the debt entered on their books as a liability is not conclusive against them that it is so. Where the maker of the note is, as to the creditor, the only debtor, the manner of keeping books is not conclusive, though competent evidence, as an admission, as is any evidence that it was treated as a firm debt.[4]

Letters addressed by the lender to the managing partner, who had appropriated the loan to his own use personally, do not show him to be the sole borrower, for it is natural to write to the manager.[5] The stub or counterfoil of the lender's check book was held competent as evidence that the credit was to the firm. The check was payable "to currency."[6] The books of the firm were held competent in their own favor to show that the partner alone was credited with the amount where the creditor was aware that the other partner, who had also signed the note, was surety only and the creditor had extended the time without his consent,[7] or to show that no entry of the transaction was made upon them of any kind.[8]

1 Saltmarsh *v.* Bower, 22 Ala. 221.

2 Bank of Commonwealth *v.* Mudgett, 44 N. Y. 514 (aff. 45 Barb. 663); but see Davis *v.* Blackwell, 5 Ill. App. 32.

3 Richardson *v.* Humphreys, Minor (Ala.), 383; Baring *v.* Crafts, 9 Met. 380; Braches *v.* Anderson, 14 Mo. 441; Gates *v.* Watson, 54 Mo. 585; Bracken *v.* March, 4 Mo. 74, where the clerk made the entry without directions.

4 Tucker *v.* Peaslee, 36 N. H. 167; Strong *v.* Baker, 25 Minn. 442; Willis *v.* Bremner, 60 Wis. 622; Scott *v.* Shipherd, 3 Vt. 104.

5 Stark *v.* Corey, 45 Ill. 431.

6 Id. *sed qu.*

7 Strong *v.* Baker, 25 Minn. 442.

8 Fosdick *v.* Van Horn, 40 Oh. St. 459.

§ 450. —— contemporaneous declarations.— Declarations of the contracting partner, at the time of procuring the goods or money, that it was for the use of the firm, are competent and cogent evidence that the credit was given to the firm.[1]

On the other hand, in Mills *v.* Kerr, 32 Up. Can. C. P. 68, where the payee of a note signed in the firm name refused to treat with the firm, and declared that he looked only to the partner who executed it and would have nothing to do with the others, it was held that he could not rank with creditors of the partnership on distribution.

§ 451. The individual partner and his sureties.— As between the contracting partner who has pledged his sole credit, and his firm, who received the benefit of it, such benefit is regarded as an advance by him to the firm.[2]

It is, of course, inaccurate to say, as some of the cases do, that as between the partners such partner is a creditor of the firm, for that depends upon what a general balance would show, and such balance may fluctuate daily; hence, a surety for such partner who pays his note is not a creditor of the firm, for his principal, the individual partner, is not a creditor.[3] And if such surety became such on the assurance of the contracting partner that it was a firm debt and the usual way of signing partnership notes, and that the copartners would also sign, such surety, after paying the debt, is a

[1] Tremper *v.* Conklin, 44 N. Y. 58 (aff. 44 Barb. 456); Crocker, *v.* Colwell, 46 N. Y. 212; Smith *v.* Collins, 115 Mass. 388; Benninger *v.* Hess, 41 Oh. St. 64; Stockwell *v.* Dillingham, 50 Me. 442; Peterson *v.* Roach, 32 Oh. St. 374 (30 Am. Rep. 607); Maffet *v.* Leuckel, 93 Pa. St. 468. Declarations or admissions of a partner after the fact stand on a different ground. See Admissions, §§ 331-2.

[2] Green *v.* Tanner, 8 Met. 411; Dewey *v.* Dewey, 35 Vt. 555, 559; Sprague *v.* Ainsworth, 40 Vt. 47; Farmers' Bank *v.* Bayliss, 41 Mo. 274.

[3] Peterson *v.* Roach, 32 Oh. St. 374 (30 Am. Rep. 607); Asbury *v.* Flesher, 11 Mo. 610; Moore *v.* Stevens, 60 Miss. 809; Tom *v.* Goodrich, 2 Johns. 213; Krafts *v.* Creighton, 3 Rich. L. 273. In Walden *v.* Sherburne, 15 Johns. 423, it was held that if the debt of the partner is a sealed obligation for customs duties, given by him in his own name because the other partner was abroad, although had the surety on such bond paid it he could have recovered only from such partner, yet if he furnishes the partner with money to pay it, can hold the firm for the loan, since it is a partnership charge.

creditor of the firm; for the request of one partner of the firm within the scope of the business is the request of the firm, and on the principle stated in the preceding section.[1] So, if a partner hire slaves with the consent of and for the firm, but gives his own note, although the firm is not bound by the note, yet the consideration is their debt, and a surety who pays the note can hold the firm.[2] But a mere statement of the contracting partner, to induce one to become surety, that the firm wanted money for its business, is not sufficient to control or vary the written evidence of the individual note.[3]

The question whether the contract is one of the individual partner on behalf of the firm, or on his own behalf, is a question of fact for the jury.[4]

§ 452. **Note signed by each individually.**— Allied to the preceding subject is that of the liability of the firm on notes signed by each and all of the partners individually, instead of in the collective or firm name. The importance of the question arises when the holder of such note seeks to rank with partnership creditors, in insolvency or in any distribution of the assets of the firm; for, if he is a creditor of the individual partners and not of the firm, he cannot share *pari passu* with the creditors of the firm. It may also arise where a partner, on buying out copartners, assumes all the liabilities of the firm.

A note signed by each member of the firm purports, of course, on its face to be the note of a number of individuals, and the mere fact that a partnership exists between them does not connect the note with the firm, and such fact alone is immaterial. *Prima facie*, therefore, the note is the sev-

[1] McKee *v.* Hamilton, 33 Oh. St. 7.

[2] Burns *v.* Parish, 3 B. Mon. 8; Weaver *v.* Tapscott, 9 Leigh (Va.), 424.

[3] Uhler *v.* Browning, 28 N. J. L. 79.

[4] Smith *v.* Collins, 115 Mass. 388; Stecker *v.* Smith, 46 Mich. 14; Bowne *v.* Thompson, 1 N. J. L. 2; Le Roy *v.* Johnson, 2 Pet. 186, 200; Poole *v.* Lewis, 75 N. Ca. 417; Benninger *v.* Hess, 41 Oh. St. 64. The evidence of a witness that the partner contracted individually is not conclusive, for it is matter of opinion rather than of fact, and is the very point in dispute. Stecker *v.* Smith, 46 Mich. 14.

eral obligation of each, whether it be in terms joint, or joint and several.[1]

Separate notes by each partner for his portion of a debt due by the firm are not partnership liabilities,[2] but the debt itself remains a partnership debt.[3]

In Hilliker *v.* Francisco, 65 Mo. 598, a contract in the names of the individual partners, though signed in the firm name, was held to be the contract of the individual partners, and not of the firm, and hence the objection that a third partner should have been co-plaintiff in an action upon it is not sustainable, nor will the partnership assets be applied in equity to pay it.

§ 453. May be shown to be a partnership note.— Such note may, however, be shown to be the note of the firm in certain cases. A mere intention that it shall be a firm debt is sufficient *inter se*, but this is not sufficient as against firm creditors on distribution, unless it is equitable that it should be so by reason of the consideration or use of the note having been for partnership purposes.[4]

[1] *Re* Roddin, 6 Biss. 377; De Jarnette *v.* McQueen, 31 Ala. 230; Freeman *v.* Campbell, 55 Cal. 197; Pahlman *v.* Taylor, 75 Ill. 629; Mack *v.* Woodruff, 87 id. 570; Wellman *v.* Southard, 30 Me. 425; *Ex parte* Weston, 12 Met. 1 (cited in Harmon *v.* Clark, 13 Gray, 114); Ensign *v.* Briggs, 6 Gray, 329; Dunnica *v.* Clinkscales, 73 Mo. 500; Buffum *v.* Seaver, 16 N. H. 160; Turner *v.* Jaycox, 40 N. Y. 470 (*dictum* is explained in Berkshire Woolen Co. *v.* Juillard, 75 N. Y. 535; 31 Am. Rep. 488); Gandolfo *v.* Appleton, 40 id. 533; Ellinger's Appeal (Pa.), 7 Atl. Rep. 180. And see McKenna's Appeal, 11 Phila. 84, and Dabney *v.* Stidger, 4 Sm. & Mar. 749; Fowlkes *v.* Bowers, 11 Lea, 144; Walsh *v.* Moser, 38 Tex. 290. And see cases cited in the next section.

[2] See Emanuel *v.* Martin, 12 Ala. 233.

[3] Taylor *v.* Farmer (Ill.), 4 N. E. Rep. 370. See Gandolfo *v.* Appleton, 40 N. Y. 533.

[4] *Ex parte* Stone, 8 Ch. App. 914; *Re* Warren, 2 Ware, 322; Trowbridge *v.* Cushman, 24 Pick. 310; Maynard *v.* Fellows, 43 N. H. 255; Gay *v.* Johnson, 45 N. H. 587; Kendrick *v.* Tarbell, 27 Vt. 512; Mix *v.* Shattuck, 50 id. 421 (28 Am. Rep. 511); Berkshire Woolen Co. *v.* Juillard, 75 N. Y. 535; 31 Am. Rep. 488 (aff. 13 Hun, 506); Nelson *v.* Healey, 63 Ind. 194; Spalding *v.* Wilson, 80 Ky. 589, 595; Mitchell *v.* D'Armond, 30 La. Ann. P. I, 396; Clanton *v.* Price, 90 N. Ca. 96, 99; Richardson *v.* Huggins, 23 N. H. 122; Carson *v.* Byers, 67 Iowa, 606; McKee *v.* Hamilton, 33 Oh. St. 7, 12; Turner *v.* Jaycox, 40 N. Y. 470; *In re* Waldron, 98 N. Y. 671; Frow, Jacobs & Co.'s Estate, 73 Pa. St. 459; *In re* Thomas, 8 Biss. 139; 17 Bankr. Reg. 54; De Jarnette *v.*

Where no firm name had been adopted, a note signed by each partner for a partnership debt binds the firm.[1] And though they had a firm name, but their customary way of executing partnership notes was in the individual names, and the note in question was so intended.[2] And so of a note or other instrument signed by one partner with the individual names of each, for a partnership purpose, is the same as if the firm name were signed.[3]

But prosecuting an action against one partner alone is treating the note as the debt of the partners and not of the firm;[4] and if such note was made before the partnership was formed, but the avails of it were treated as a partnership fund, it is a partnership debt.[5]

A note signed by one partner and indorsed by the other, if for partnership purposes, may be treated as a debt of the firm.[6] So of a draft by one partner on the other to pay for goods bought on

McQueen, 31 Ala. 230, 231; Crouch *v.* Bowman, 3 Humph. 209. And see Smith *v.* Felton, 43 N. Y. 419; Filley *v.* Phelps, 18 Conn. 294, and Agawam Bank *v.* Morris, 4 Cush. 99. *Contra*, that a joint and several note signed by the partners individually and by other makers is the several note of each, and not provable against the joint estate, *Re* Holbrook, 2 Low. 259. And though the payee refused to receive the note in the firm name, Kendrick *v.* Tarbell, 27 Vt. 512. And so though made after dissolution, De Jarnette *v.* McQueen, 31 Ala. 230. But compare Ensign *v.* Briggs, 6 Gray, 329. Or though substituted after dissolution for a note in the firm name, this does not show an intent to make it an individual debt, the form of negotiable paper being very slight evidence, Maynard *v.* Fellows, 43 N. H. 255. *Contra*, Crooker *v.* Crooker, 52 Me. 267.

[1] *Ex parte* Nason, 70 Me. 363; *Ex parte* First Natl. Bank, 70 Me. 369.

[2] McKee *v.* Hamilton, 33 Oh. St. 7, 12.

[3] Norton *v.* Seymour, 3 C. B. 792; 16 L. J. C. P. 100; 11 Jur. 312; Holden *v.* Bloxum, 35 Miss. 381; Patch *v.* Wheatland, 8 Allen, 102; Crouch *v.* Bowman, 3 Humph. 209; McGregor *v.* Cleveland, 5 Wend. 475. See Austin *v.* Williams, 2 Oh. 61.

[4] Page *v.* Carpenter, 10 N. H. 77; Gay *v.* Johnson, 45 id. 587.

[5] *Re* Thomas, 17 Bankr. Reg. 54; 8 Biss. 139.

[6] City Bank of New Haven's Appeal (Conn.), 7 Atl. Rep. 548; *Ex parte* First Natl. Bank, 70 Me. 369; Smith *v.* Felton, 43 N. Y. 419; Thayer *v.* Smith, 116 Mass. 363. See, also, Booth *v.* Farmers' & Mech. Bank, 74 N. Y. 228 (aff. 11 Hun, 258), where four partners signed the note and the fifth indorsed it; and see Ladd *v.* Griswold, 9 Ill. 25 (46 Am. Dec. 443).

joint account.[1] So if the note for a partnership debt is signed by one partner as principal and the other as surety.[2]

In Filley *v.* Phelps, 18 Conn. 294, three persons formed a partnership in the livery business and bought out a stable, giving their joint and several notes. These were held partnership debts, entitled to rank on the joint estate to the exclusion of separate creditors of each.

So in Frow, Jacobs & Co.'s Estate, 73 Pa. St. 459, the joint and several obligation of continuing partners, signed individually, to the retiring partner, to pay the debts and indemnify him, is inferred from the nature of the transaction to be a partnership and not an individual obligation, and the retiring partner, having paid the unpaid debts, is entitled to a dividend from the assets of the new firm in insolvency.

If the note was given for a purpose not connected with the partnership business it will be treated as the separate debt of the individuals.[3] It was so held where the partners had signed as sureties,[4] and where one partner made a loan, giving his individual note which the other partner also signed or indorsed.[5]

§ 453 a. —— **election to treat it as separate or joint.**— If the note by being for partnership purposes is a debt of the firm, it is such at the election of the creditor — certainly in states where separate creditors of each partner do not have a priority in his individual assets over partnership creditors — and the creditor can rank on the separate or joint estate, but not on both. Suing the members jointly and not as partners is an election to treat the note as a separate debt, for as the note does not appear to be a partnership act, it must be declared on as such to hold the firm.[6]

A note signed both in the individual names and in the firm's

[1] Addison *v.* Burckmyer, 4 Sandf. Ch. 498.

[2] Pollard *v.* Stanton, 5 Ala. 451.

[3] Forsyth *v.* Woods, 11 Wall. 484.

[4] Spalding *v.* Wilson, 80 Ky. 589, 595; *Ex parte* Weston, 12 Met. 1.

[5] Pahlman *v.* Taylor, 75 Ill. 629; Lill *v.* Egan, 89 Ill. 609; Burns *v.* Mason, 11 Mo. 469.

[6] *Re* Bucyrus Machine Co. 5 Bankr. Reg. 303; Drake *v.* Taylor, 6 Blatch. 14; *Ex parte* Stone, L. R. 8 Ch. App. 914; Maynard *v.* Fellows, 43 N. H. 255; Page *v.* Carpenter, 10 id. 77; *Ex parte* First Nat'l Bank, 70 Me. 369. Compare Agawam Bank *v.* Morris, 4 Cush. 99.

name may be held both ways. If the creditor can get the additional security he is is entitled to it.[1]

In Donley *v.* Bank, 40 Oh. St. 47, 51, a note signed in the firm name was indorsed by the partners individually, and it was said that generally such double execution was to dispense with proof of the membership of the firm; but it was also said that the individuals are sureties for the firm.

But in Tuteu *v.* Ryan, 1 Spears (S. Ca.), 240,[2] one of the partners indorsed his individual name on the firm's note, and it was held that he was not chargeable, either as indorser or maker; that nothing was thereby added to his liability.

Where a bill is drawn on a firm and is accepted in the firm name by a partner who adds his individual name underneath, no separate liability is created thereby.[3]

No agreement can be inferred from signing a note for a partnership debt individually, that the parties are to contribute to each other, but the usual rule that one cannot sue the other at law for a firm matter applies.[4]

A letter thus: "We hereby guaranty," signed in the firm name and also by each partner, was held to be the contract of the firm and of each partner separately.[5]

[1] Fowlkes *v.* Bowers, 11 Lea, 144; *Re* Farnum, 6 Law Rep. 21; *Re* Bradley, 2 Biss. 515; *Re* Adams, 29 Fed. Rep. 843; National Bank *v.* Bank of Commerce, 94 Ill. 271.

[2] *Re* Blumer, 13 Fed. Rep. 622; Fayette Nat'l B'k *v.* Kenney, 79 Ky. 133. And see Stevens *v.* West, 1 How. (Miss.) 308.

[3] *Re* Barnard, 32 Ch. D. 447; Malcolmson *v.* Malcolmson, 1 Irish L. R. Ch. D. 228.

[4] De Jarnette *v.* McQueen, 31 Ala. 230, 232; Booth *v.* Farmers' & Mech. Bank, 74 N. Y. 228 (aff. 11 Hun, 258). And see Kendrick *v.* Tarbell, 27 Vt. 512.

[5] *Ex parte* Harding, 12 Ch. D. 557.

CHAPTER IX.

DEGREE OF LIABILITY ON CONTRACTS.

§ 454. Contracts are joint, and not joint and several.— In the eye of the law, as distinguished from equity, partnership contracts are considered to be joint; but it is often said that in equity they are joint and several, and it is certainly true that death does not in equity release the estate of the deceased partner from liability, and, in this sense, the contract is in equity deemed to be joint and several; but it seems not in any other sense, either to permit a set-off in equity of partnership and individual debts or otherwise; and the latest expression of eminent English judges is that the phrase partnership debts are in equity joint and several is not to be understood in the proper and technical sense of the words, but refers only to the remedy and not the nature of the debt.[1]

[1] See the opinions of Lord Cairns, Lord Hatherley, Lord O'Hagan and Lord Selborne in Kendall *v.* Hamilton, L. R. 4 App. Cas. 504; s. c. 3 C. P. D. 403. And see Beresford *v.* Browning, L. R. 20 Eq. 564, 573, 577, where the doctrine of joint and several liability was affirmed as to commercial firms, but the M. R. was non-committal as to any other partnerships. That partnership contracts are at law joint only was held in Harrison *v.* McCormick, 69 Cal. 616; Currey *v.* Warrington, 5 Harr. (Del.) 147; Wiley *v.* Sledge, 8 Ga. 532; Thornton *v.* Bussey, 27 id. 302; Crosby *v.* Jeroloman, 37 Ind. 264; Boorum *v.* Ray, 72 id. 151; Scott *v.* Colmesnil, 7 J. J. Mar. 416; Williams *v.* Rogers, 14 Bush, 776; Irby *v.* Graham, 46 Miss. 425, 427 (but see Keerl *v.* Bridgers, 10 Sm. & Mar. 612); Bowen *v.* Crow, 16 Neb. 556; Tinkum *v.* O'Neale, 5 Nev. 93; Curtis *v.* Hollingshead, 14 N. J. L. 402, 409; Marvin *v.* Wilber, 52 N. Y. 270; Cowdin *v.* Hurford, 4 Oh. 132; Weil *v.* Guerin, 42 Oh. St. 299, 302; Kamm *v.* Harker, 3 Oreg. 208; Wiesenfeld *v.* Byrd, 17 S. Ca. 106, 112–14; Davis *v.* Willis, 47 Tex. 154; Washburn *v.* Bank of Bellows Falls, 19 Vt. 278, 288. As a consequence, all the partners must sue and be sued, and the property of one cannot be attached if he is a non-resident, as will be elsewhere shown. In Strong *v.* Niles, 45 Conn. 52, a firm of four dissolved, three of them forming a new partnership and employing the former

In law a partnership contract is several to the extent that if a single partner or a number less than all are sued and do not plead non-joinder of the others, a recovery against him or them alone may be had.[1]

We have already seen that a partner is agent for all, and not for each, and cannot therefore, without special authority, make joint and several contracts; but if he does so, he is severally liable upon them and the firm jointly only.

§ 455. **Inter se.**— The balance owed by debtor partners to a creditor partner on final accounting is owed by them each for his own amount, and a decree against them jointly is erroneous;[2] except where they have in bad faith excluded him from participation in the business and profits, and from knowledge of the books, in which case they have been held jointly and severally liable for his final balance;[3] or used the assets to pay the debts of their former firm, of which he was not a member;[4] or where surviving partners

book-keeper, who transferred to his own account in the new firm a balance due him by the old for salary. The new firm afterwards paid him their account without knowing that it consisted in part of the debt of the old firm. The payment was partly in cash and partly by a note. In an action by him on the note the defendants attempted to offset the cash, but it was held that the plaintiff could retain the cash payment. The court say this is because they are jointly and severally liable, which is not true. In fact, the assets of the new firm were thus applied to discharge a debt of the partners as individuals and not a firm debt. The word joint, in the sense that death released one of the joint promisors entirely so that his estate was liable neither to the creditor nor to contribute to payments by the survivors, is perhaps nearly obsolete except in so far as it affects the remedy.

[1] Mason *v.* Eldred, 6 Wall. 231, 235; Barry *v.* Foyles, 1 Pet. 311, 317; Woodworth *v.* Spafford, 2 McLean, 168. Lord Mansfield's *dictum* in Rice *v.* Shute, 5 Burr. 2611, that it is joint and several, means so only to the above extent.

[2] Starr *v.* Case, 59 Iowa, 491; Rhiner *v.* Sweet, 2 Lans. 386; Portsmouth *v.* Donaldson, 32 Pa. St. 202; Raiguel's Appeal, 80 Pa. St. 234, 250; 9 Phila. 275. And so where two partners buy out the interest of a third, signing in their individual capacities, each is liable for half, and not *in solido*. Lush *v.* Graham, 21 La. Ann. 159. Unless by the agreement of dissolution, the continuing partners have jointly covenanted with the retiring partner, and he stands on the covenant. Wilmer *v.* Currey, 2 DeG. & Sm. 347; Beresford *v.* Browning, 1 Ch. D. 30, where the covenant was held to be joint and several.

[3] Bloomfield *v.* Buchanan, 14 Oregon, 181; Allison *v.* Davidson, 2 Dev. Eq. 79.

[4] Wentworth *v.* Raiguel, 9 Phila. 275; Raiguel's Appeal, 80 Pa. St. 234.

have divided up the assets among themselves, they are jointly liable to the executor for the decedent's share.[1]

§ 456. **Contra by statute.**—The statutes of several states have, however, made joint debts joint and several, and this applies to partnerships. Such are the statutes of ALABAMA, ARKANSAS, COLORADO, GEORGIA, IOWA, ILLINOIS, KANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, MONTANA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA and TENNESSEE.[2]

A statute that contracts by *several* persons shall be joint and several does not apply to partnerships.[3]

When such a statute is in force, an action on a foreign judgment rendered against partners need not be brought against them all.[4]

§ 457. **In solido.**— Each partner is liable *in solido* for all debts of the firm. This does not mean that one partner can be sued alone, which depends upon whether the liability is joint or several, but means that the entire fortune of each partner, not only that embarked in the business, but whatever he may own, is liable to make good the firm's debts, whether the other partners are able to contribute or not; and regardless of the amount or proportion of his interest in the firm, whether it be large or small, the consequence is the same.[5]

[1] Bundy *v.* Youmans, 44 Mich. 376; Birdsall *v.* Bemiss, 2 La. Ann. 449.

[2] See Conklin *v.* Harris, 5 Ala. 213; Travis *v.* Tartt, 8 id. 574; Pearce *v.* Shorter, 50 id. 318; Hall *v.* Cook, 69 id. 87; Hamilton *v.* Buxton, 6 Ark. 24; Burgen *v.* Dwinal, 11 id. 314; Kent *v.* Walker, 21 id. 411; Cannon *v.* Dunlap, 64 Ga. 680; Williams *v.* Muterbaugh, 29 Kan. 730; Wright *v.* Swayne, 5 B. Mon. 441; Williams *v.* Rogers, 14 Bush, 776; Nutt *v.* Hunt, 4 Sm. & Mar. 702; Miller *v.* Northern Bank, 34 Miss. 412; Wilson *v.* Horne, 37 id. 477; Griffin *v.* Samuel, 6 Mo. 20; Putnam *v.* Ross, 55 id. 116; Gates *v.* Watson, 54 id. 585, 595; Simpson *v.* Schulte, 21 Mo. App. 639; Logan *v.* Wells, 76 N. Ca. 416; Gratz *v.* Stump, Cooke (Tenn.), 493, 496.

[3] Currey *v.* Warrington, 5 Harr. (Del.) 147; Kamm *v.* Harker, 3 Oreg. 208.

[4] Bellerville Sav. Bk. *v.* Winslow, 30 Fed. Rep. 488.

[5] See, for example, Rice *v.* Shute, 5 Burr. 2611; Abbot *v.* Smith, 2 Wm. Bl. 947; Wright *v.* Hunter, 1 East, 20; Doddington *v.* Hallet, 1 Ves. Sr. 497; Rex *v.* Dodd, 9 East, 516; Saltoun *v.* Honstoun, 1 Bing. 433, 444; Medberry *v.* Soper, 17 Kan. 369; Benchley *v.* Chapin, 10 Cush. 173; Morrell *v.* Trenton Mut. L. & F. Ins. Co. 10 Cush. 282; 57 Am. Dec. 92; Hanson *v.* Paige, 3 Gray, 239, 243; Collins *v.* Charlestown Mut. F. Ins. Co. 10 Gray, 155; Nebraska R. R. Co. *v.* Colt, 8 Neb. 251; Judd Linseed & Sperm Oil Co. *v.* Hubbell, 76

Hence a creditor of the firm has an insurable interest in the life of one of the partners, although the other is solvent.[1] And hence if one partner becomes assignee in insolvency of a creditor of the firm, he must charge himself in the account with the full amount of the debt and not with the proceeds merely of a sale of it. Thus, in Benchley *v.* Chapin, 10 Cush. 173, where B., of B. & J., a firm, became assignee in insolvency of one L., and among the assets of L. was a note and mortgage made by B. & J., and B., as such assignee, sold the note at auction, and it was bought for half its amount, and he charged himself with the proceeds in his account, it was held that he must charge himself with the whole amount. For as partner of B. & J. he is liable *in solido* for its debts; therefore it is his own debt. The person to whom he sold is entitled to collect the whole, therefore the creditors would lose one-half, if this sale is allowed, and that, too, through the default of the person who should protect their rights. Hence, also, the lien of a corporation on stock in the name of a person will secure debts owing to it by his firm as well as by himself.[2] And, as we shall see, a judgment creditor of the firm can levy execution for the entire debt upon the property of any of the partners.

§ **458. Joint stock companies.**— This doctrine of unlimited liability applies also to all unincorporated joint stock companies as well as to ordinary partnerships.[3]

§ **459. Limited by contract.**— There is no reason why the liability may not be limited, if so agreed by all parties, in-

N. Y. 543; Allen *v.* Owens, 2 Spears (S. Ca.), 170. In Louisiana, however, partners in commercial partnerships are liable *in solido.* Villa *v.* Jonte, 17 La. Ann. 9; Gumbel *v.* Abrams, 20 id. 568. But in ordinary partnerships each is liable only for his share. Jones *v.* Caperton, 15 La. Ann. 475; Hyams *v.* Rogers, 24 id. 230; Payne *v.* James, 36 La. Ann. 476, a planting partnership; Hardeman *v.* Tabler, 36 La. Ann. 555, a partnership to construct a railroad. But may become liable *in solido* by special contract. Payne *v.* James, 36 La. Ann. 476.

[1] Morrell *v.* Trenton Mut. L. & F. Ins. Co. 10 Cush. 282; 57 Am. Dec. 92.

[2] *Re* Bigelow, 1 Bankr. Reg. 667.

[3] Lindley on Partnership, p. 376. See, also, Hodgson *v.* Baldwin, 65 Ill. 532; Greenup *v.* Barbee, 1 Bibb, 320; Wright *v.* Swayne, 5 B. Mon. 441; Robinson *v.* Robinson, 10 Me. 240; Frost *v.* Walker, 60 id. 468; Hess *v.* Werts, 4 S. & R. 148; Whitman *v.* Porter, 107 Mass. 522, 524; Cutler *v.* Thomas, 25 Vt. 73; First Nat. Bank *v.* Goff, 31 Wis. 77; Coleman *v.* Bellhouse, 9 Up. Can. C. P. 31.

cluding the creditor. A provision in the articles that one partner shall not be generally liable for losses will be of no effect as to creditors who did not have notice of this provision at the time of contracting.[1]

And that the partner whose liability is attempted to be limited is a dormant partner does not relieve him.[2] The stipulation is valid *inter se*, and the partner who is not to share losses may require reimbursement if compelled to pay.[3] And the burden to prove notice of the restriction is upon the partner who claims it. And a particular creditor may agree with one partner not to hold him liable for the debt.[4]

§ 460. Statutory; limited partnerships.— There is a statutory form of partnership based on a limited liability, called limited partnership, provided for by statute in Upper Canada or Ontario, and the District of Columbia, and in all the states of the Union, and in all the organized territories except Arizona, Idaho and New Mexico,[5] in which some of the partners, called special, risk merely their capital, and the others, called general, incur an unlimited liability. Limited partnerships arose in Italy in the early middle ages, and are much in vogue in the continental European countries. They were first introduced here in New York, but in this country they differ from the European system in the great strictness with which statutory requirements of paying in the capital, recording, advertising and non-interference of the special partner and suppression of his name must be observed, for the special partner is not allowed to take any part in the management of the business, lest an appearance of being a general partner be held out.

1 Ala. Fertilizer Co. *v.* Reynolds, 79 Ala. 497; Phillips *v.* Nash, 47 Ga. 218; Saufley *v.* Howard, 7 Dana, 367; Williams *v.* Rogers, 14 Bush, 776; Perry *v.* Randolph, 6 Sm. & Mar. 335; Lynch *v.* Thompson, 61 Miss. 354; Coleman *v.* Bellhouse, 9 Up. Can. C. P. 31.

2 Phillips *v.* Nash, 47 Ga. 218. See Winship *v.* U. S. Bank, 5 Peters, 529.

3 Geddes *v.* Wallace, 2 Bligh's Rep. 270; Gillan *v.* Morrison, 1 DeG. & S. 421.

4 Batty *v.* McCundie, 3 C. & P. 203; Cannop *v.* Levy, 11 Q. B. 769. See Hart's Case, 1 Ch. D. 307. It has been held that a person dealing with a joint stock company of a kind where unlimited liability is generally stipulated against, is affected with notice of such custom, but this doctrine is not favorably regarded.

5 Alaska and the Indian Territory not being organized.

There is also another form of limited association permitted by statute in Michigan, New Jersey, Ohio, Pennsylvania and Virginia, wherein all the partners are special, governed by managers, and the name of which must be followed by the word "limited." There is a large body of law relating to these various limited partnerships, which has been made the subject of a separate treatise by the author of this work.

CHAPTER X.

LIABILITY FOR TORTS.

§ **461.** Each partner being the agent of the firm, the firm is liable for his torts committed within the scope of his agency, on the principle of *respondeat superior*, in the same way that a master is responsible for his servant's torts, and for the same reason the firm is liable for the torts of its agents or servants. On the other hand, if the tort was not committed in the prosecution of the joint business or within its scope, the mere relation of partners does not make the conduct of the individual imputable to the firm, unless it was authorized by the copartners.

The test is often laid down that partners are not liable for each others' wilful torts. Many of the cases in this chapter are entirely inconsistent with such a distinction, unless wilful is strained into the meaning of outside the scope of business. If the partner goes out of his way to commit the tort, whether wilful or not, the other partners are not liable for it.[1]

The effect of subsequent approval, and the consequences if the innocent partners get the benefit of the act, knowingly or not, will be hereafter considered.

§ **462. Illustrations.**— In Moreton *v.* Hardern, 4 B. & C. 223; 6 Dow. & Ry. 275, all members of a firm of stage-coach proprietors are liable to an action on the case for the negligent driving of one who ran into the plaintiff and broke his leg. Trespass would have lain against the negligent partner, but not against the innocent ones. So for injury to a passenger by one owner of a line of coaches.[2] Where one of a firm of common carriers took freight to be put off at a particular place and the boat neglected to stop

[1] Pollock's Dig. of Partn. art. 24.

[2] Champion *v.* Bostwick, 18 Wend. 175 (31 Am. Dec. 376).

there, it was urged that he had no right to so agree, but the act being within the apparent scope of the business all were held liable.[1]

In Fletcher *v.* Ingram, 46 Wis. 191, plaintiff's property in the custody of another was attached as the property of third persons and bought in by the custodian and sold by him to a member of the defendant's firm and paid for out of their funds and resold by the firm; all the partners are liable for the conversion. If a partner borrows a horse to be used in the partnership business, and by negligence loses him, the firm is liable.[2] So if one partner put property hired for the use of the firm to a use not stipulated, both are liable.[3] Or tore out inside partitions of leased property for the benefit of the firm.[4] Where one partner knew that certain lumber was made by a trespasser out of timber belonging to the plaintiff, the firm having bought and received them from the trespasser is liable for conversion.[5]

In Gwynn *v.* Duffield, 66 Iowa, 708, one member of a firm of apothecaries negligently permitted the plaintiff to help himself to a dose of medicine, without paying for it, and by mistake plaintiff took a poison and became sick. The copartner was held not liable, on the ground that giving away medicines was not part of the firm's business. But the tort of a partner of one firm is no defense to an action by another firm, in which there is a partner common to both firms. Thus where the plaintiffs, partners, sued a railroad company for neglect to receive and carry their grain, the fact that another firm, of which one of the plaintiffs was

[1] Heirn *v.* McCaughan, 32 Miss. 17.

[2] Witcher *v.* Brewer, 49 Ala. 119.

[3] Myers *v.* Gilbert, 18 Ala. 467.

[4] Brewing *v.* Berryman, 15 New Brunswick, 515.

[5] Tucker *v.* Cole, 54 Wis. 539; Gerhardt *v.* Swaty, 57 id. 24. In Lucas *v.* Bruce (Louisville Chancery Ct. 1864), 4 Am. Law Reg. (N. S.) 95, a Confederate general took possession of a town where Lucas' pork packing establishment was, and, at the instigation of Bruce, compelled Lucas to rent the premises to Bruce & Co. to cure pork for the Confederate troops, and on the retreat of the latter burned down the establishment to prevent its falling into the hands of the Union army. It was held that Bruce was a co-trespasser with the Confederate general, and he and his non-resident partners, who were innocent of the matter, further than that they had formed the firm to make money out of the Confederates, were liable to Lucas, although Lucas, had he remained, would have also furnished pork to them.

a member, had by its neglect to receive its grain blockaded the railroad, is no defense.[1]

§ 463. Negligence of servants.— A partnership is liable for the negligence of one of its servants acting within the scope of his employment.[2]

In Linton *v.* Hurley, 14 Gray, 191, the defendants were partners as stevedores, and while one partner was unloading a vessel, in the absence of the other, the plaintiff's leg was broken, through the negligence of servants acting under him. It was contended that the absent partner was not liable. But it was held that the firm was liable for injuries by negligence of servants employed by both or by one of the defendants, while acting within the scope of the partnership and transacting the business of the firm.

Even where the servant is employed and paid exclusively by one partner who has sole charge of a branch of the partnership business, as a section of a line of coaches, the copartners are liable.[3]

§ 464. Scope of authority.— The great difficulty is to determine whether the tort was committed within the scope of the partner's representative authority. Upon this it may be said generally that all the partners are liable, if they would be liable had the same act been committed by an agent intrusted with the management of its business. Where one partner purchases goods with the fraudulent intention of not paying for them, the other, who was ignorant of the intent, is liable only on contract, and not for the fraud.[4]

§ 465. —— in collecting debts.— Where a partner is engaged in collecting a debt due to the firm by the usual methods, legal process, and in so doing commits or authorizes the commission of a tort in regard to the subjection of property to the debt, he is deemed to be acting within the scope of his agency, and the firm is liable.

In Loomis *v.* Barker, 69 Ill. 360, a firm of three persons, having got judgment against a person, one of the partners caused execu-

[1] Cobb *v.* I. C. R. R. Co. 38 Iowa, 601.

[2] Stables *v.* Eley, 1 C. & P. 614; Bowas *v.* Pioneer Tow Line, 2 Sawy. 21; White *v.* Smith, 12 Rich. L. 595; Wood *v.* Luscomb, 23 Wis. 287.

[3] Champion *v.* Bostwick, 18 Wend. 175 (31 Am. Dec. 376); Laugher *v.* Pointer, 5 B. & C. 547, 570.

[4] Stewart *v.* Levy, 36 Cal. 159.

tion to be levied upon property in the debtor's hands, which belonged to a third person; the property was sold, and the firm got the proceeds. It was held that the plaintiff was entitled to recover against the firm. The judgment was put not on the ground that the firm received the benefit, in which case they would have been exonerated had the partner appropriated the proceeds, but on the ground that a tort had been committed in the course of business.[1]

In Harvey *v.* Adams, 32 Mich. 472, an execution in favor of a firm was levied, with the assent of one partner, upon property upon which the plaintiff had chattel mortgages, in disregard of the mortgages, and with knowledge of them. It was held that the firm was liable for the sheriff's acts, authorized by one partner, in collecting a debt, and that the firm who desired to get the benefit of the act, if justified, could not repudiate it if tortious.

Rolfe *v.* Dudley, 58 Mich. 208, held that if one member of a creditor firm received property on a void judgment, and refused to give it up, and the other member referred the owner to the former, both were liable; and it was said that whatever one did in the collection of a debt was presumed to be with the assent of the other.

In Kuhn *v.* Weil, 73 Mo. 213, all the partners were held liable for a wrongful attachment by one partner in an action in the name of the firm to collect a debt; and the same ruling was made in Gurler *v.* Wood, 16 N. H. 539, where it was added that any doubt of the liability of the others, arising from their non-concurrence, was removed by the application of the proceeds of sale to the benefit of the firm.

In Taylor *v.* Jones, 42 N. H. 25, however, the sheriff levied upon goods marked with the debtor's name, but, in fact, belonging to a third person, who demanded them of one partner. The latter's neglect or refusal to give them up was held not to make the copartner liable merely because he was partner, but that the question whether the other was acting in the proper scope and business of the partnership must be left to the jury. The tort here was not in the levy, but in the refusal to release.

In Durant *v.* Rogers, 71 Ill. 121, one partner caused the seizing of the property of another person for a debt due the firm, and being sued alone on the appeal bond, his surety had to pay; it was held

[1] S. P. Chambers *v.* Clearwater, 1 Keyes, 310; 1 Abb. App. Dec. 341 (affg. 41 Barb. 200).

that the surety could not recover. But in s. c. 87 Ill. 508, it having appeared that the firm had received the avails of the property, thereby increasing its assets, the other partners were held liable.

In McClure *v.* Hill, 36 Ark. 268, a debtor of a firm mortgaged his horse to the firm as security; on default one partner took the horse illegally by force or fraud. It was held that both were liable, the trespass being committed in the course of the business. In this case the firm got the benefit of the act, for the other partner knowingly participated in its fruits.

Each partner in effecting a compromise of their debts is the agent of the firm, and any dishonest act or misrepresentation in carrying out the agreement avoids it as to both.[1]

In McIlroy *v.* Adams, 32 Ark. 315, a note belonging to a third person came into the hands of a member of a firm of brokers and bankers, and he sued the makers of it in the firm name without knowledge of his copartners, and, by swearing that the firm owned the note, deprived the makers of a good defense available to them against the real owner, and levied execution upon the maker's property, greatly injuring it. The innocent partner was held liable for the injury caused by the unauthorized act. It is, however, difficult to see how the use of the firm name for the convenience of another can be within the scope of the business.

§ **466.** But whatever be the extent of implied authority in collecting a debt, it does not extend beyond the ordinary ways of collection to render an innocent copartner chargeable for unusual methods of extortion.

Thus in Woodling *v.* Knickerbocker, 31 Minn. 268, one member of a firm of furniture dealers put a placard upon a table in the store, thus: "Taken back from W. Moral: Beware of deadbeats." It was held that, there being nothing in the furniture business to warrant one partner to bind another by uttering libel, a partner who did not know of the act is not liable, but one who knew and did not remove the table is liable.

In Rosenkrans *v.* Barker, 115 Ill. 331, the malicious arrest and imprisonment of a debtor of the firm by one partner, in absence and without the consent or knowledge of a copartner, was held not to make him liable, the act failing to be of any benefit to the firm. It

[1] Doremus *v.* McCormick, 7 Gill, 49; Pierce *v.* Wood, 3 Foster (23 N. H.), 519.

was also held that, even if the innocent partner subsequently approve the act, exemplary damages cannot be recovered from him.[1]

Nevertheless, the firm was held liable in the two following cases:

In Robinson *v.* Goings, 63 Miss. 500, a firm had a deed of trust on cotton of plaintiff, grown on certain property, but owed nothing to the firm, and one partner, having met a wagon containing other cotton of plaintiffs, compelled the driver to take it to the firm's warehouse and leave it there, saying they had a deed of trust of it, and would hold it till hell froze over. The cotton was not that covered by the deed of trust, and the plaintiff owed the firm nothing. It was held that the partner acted as agent of the firm, and in the prosecution of its business, and under a claim of title for the firm, and that all the partners were liable and in punitive damages.

In Vanderburg *v.* Bassett, 4 Minn. 242, property had been replevied from a firm, and hence the remedy by replevin had been exhausted; nevertheless, one partner, in the firm name, replevied the property again; his non-resident copartner was held liable for the conversion.

§ 467. —— wilful torts and violations of statutes.— The scope of the business does not generally make copartners liable by imputation for the wilful or malicious torts of one member of the firm, but, as pointed out above, the statement in the following cases, that the copartners are not liable because the tort was wilful, is inaccurate; it is because the tort is not in the scope of employment; such as a malicious prosecution by one partner on a charge of stealing partnership property,[2] committing a libel upon a nonpaying customer;[3] a wrongful ejectment by one of a firm of real estate agents.[4]

In Grund *v.* Van Vleck, 69 Ill. 478, R. & J. had been agents for the owner of property in renting a house. The tenant not paying, J., on behalf of the landlord and in the absence of R., had the tenant expelled and his goods removed. This was held not to be in the ordinary course of business, nor in the nature of a taking which is available to the partnership, and is ratified, and R. was held not

[1] And see Arbuckle *v.* Taylor, 3 Dowl. 160.

[2] Arbuckle *v.* Taylor, 3 Dowl. 160; Rosenkrans *v.* Barker, 115 Ill. 331.

[3] Woodling *v.* Knickerbocker, 31 Minn. 268.

[4] And see Petrie *v.* Lamont, 1 Car. & M. 93.

liable in trespass. It was also said that R. would not have been liable even if he had afterwards sanctioned the act, which, however, he had not done.

In Abraham *v.* Hall, 59 Ala. 386, one partner in a mercantile house took possession of a bale of cotton on which the complainant had a landlord's lien and marked his own initials upon it. The mere fact of partnership does not make the copartners liable unless the act is shown to be in the scope of the business.

In Crumless *v.* Sturges, 6 Heisk. 190, the government postoffice was kept in the store of a partnership by one of the firm's clerks for the absent postmaster. One partner is not liable for the illegal act of the other in using the postoffice money; nevertheless, if clearly committed in the prosecution of the business and for its benefit, all may be liable.

Thus in Lothrop *v.* Adams, 133 Mass. 471 (43 Am. Rep. 528), the business of the firm consisted in the ownership of a newspaper, and all were held liable for a libel published by one partner with malicious intention. The test of liability for a partner's acts was said to be, would they be liable if an agent intrusted with the management of the business had committed the tort? And if the liability of the principal be limited to cases where he derives benefit from the agent's act, there is a benefit in this case shared by all.[1]

§ **468.** An act which is illegal as being contrary to a statute will not be regarded as within the scope of the business to charge the other partner by construction merely.

Thus in Graham *v.* Meyer, 4 Blatchf. 129, where a statute makes a usurious loan void, one partner took a chattel mortgage on a steamboat to secure a usurious loan made by him without the copartner's knowledge. In an action against the partnership as for conversion of the boat, it was held that the innocent partner would not be held liable in tort for a violation of law without proof of authority or ratification, and the loan will not be regarded as in the scope of the business.

So in Schreiber *v.* Sharpless, 6 Fed. Rep. 175, a *qui tam* action was brought against one partner for the act of another in permitting lithographic copies of a copyrighted photograph belonging to a third person to be printed on goods of the firm. The statute under

[1] See, also, Robinson *v.* Goings, 63 Miss. 500.

which the action was brought being penal, the innocent partners were held not liable.

If one partner is guilty of a breach of the revenue laws in conducting the firm's business the copartners are liable for the amount and for penalties whether they knew and consented or not. The penalties in such cases are no doubt regarded as indemnity to the government for its trouble.[1]

In Stockwell *v.* United States, 13 Wall. 531 (aff. 3 Cliff. 284), one partner purchased goods for the firm on which he knew the government had been defrauded of revenue, and the firm received the property and had the profits of its sale. The firm was held liable for the statutory penalty of double the value without proof of knowledge on the part of the other partners, for the goods themselves became liable to seizure, and the act of the partner was an interference with the government rights of property, and the liability is not penal, but indemnity only.[2]

Exemplary or punitive damages, it has been held, can be recovered from the firm for the tort of one partner in a proper case;[3] but as he is not a participant in the fraud of his copartner he is not to be subject to arrest on civil process for fraud,[4] nor to be found guilty of actual fraud,[5] nor liable for penalty,[6] nor subject, if an attorney, to summary application to pay money appropriated by his copartner, he being neither guilty nor negligent.[7]

[1] Attorney-General *v.* Strangforth, Bunb. 97; Attorney-General *v.* Burges, id. 223; Attorney-General *v.* Weekes, id. 223; Rex *v.* Manning, Comyn, 616; Stockwell *v.* United States, 13 Wall. 531 (aff. s. c. 3 Cliff. 284); United States *v.* Thomasson, 4 Biss. 99; Graham *v.* Pocock, L. R. 3 P. C. 345.

[2] But see Rex *v.* Manning, Comyn, 616.

[3] Robinson *v.* Goings, 63 Miss. 500 (in full, § 466); Brewing *v.* Berryman, 15 New Brunswick, 515; here an active partner tore out inside partitions of leased property for the benefit of the firm. The copartner did not know it, but afterwards assented. Exemplary damages were allowed against him. See Peckham Iron Co. *v.* Harper, 41 Oh. St. 100, 109. *Contra*, see Rosenkrans *v.* Barker, 115 Ill. 331.

[4] McNeely *v.* Haynes, 76 N. Ca. 122; National Bank of Commonwealth *v.* Temple, 39 How. Pr. 432.

[5] Stewart *v.* Levy, 36 Cal. 159.

[6] Porter *v.* Vance, 14 Lea, 627, that an attorney is not liable for penalty and disbarment for his partner's failure to pay over collections.

[7] *Ex parte* Flood, 23 New Brunswick, 86.

§ 469. **Ratification.**— On the principle that a person does not make himself liable by ratifying an illegal act of another unless the act was done on his behalf or for his benefit, if a partner commit a tort outside the scope of the business and of no benefit to the firm, nor on its behalf or in its interest, his copartner's subsequent approval of it will not make him liable.[1]

In Riley *v.* Noyes, 45 Vt. 455, plaintiff's cow trespassed upon a farm managed by defendant and his son in partnership. The son, instead of taking the cow to the pound, locked her up in the barn and refused to allow plaintiff to remove her unless he paid for the damage she had done. It was not decided whether the defendant's interest in the damages would have alone rendered him liable for his partner's acts, but his assent to the detention was held to render him liable, because of such joint interest in the detention as a mode of recovering the damages.

§ 470. **Nominal partner.**— In Stables *v.* Eley, 1 C. & P. 614, a retired partner whose name remained on the wagon which was driven over the plaintiff by an employee of the continuing partner was held liable. A person is liable by holding out only upon the ground of estoppel. It cannot be said that if the name had not been on the wagon the plaintiff could have avoided being run over. The only estoppel apparent in the case is that he was induced to sue the retired partner supposing him to be a member of the firm, which is not sufficient, or upon the ground that suffering the name to continue proves a partnership in fact and not by estoppel.

§ 471. **Liability is joint and several.**— The liability of partners for the tort of one member of the firm or for the tort of a servant is, as in all cases of torts, joint and several. This is not a violation of the rule that a partner is the agent of all and not of each, but rests on the usual doctrine of torts that joint principals are jointly and severally liable for torts. Hence the action may be against all the partners or against one, or against some of them less than all.[2]

[1] Wilson *v.* Turnman, 6 M. & G. 236; Grund *v.* Van Vleck, 69 Ill. 478; Rosenkrans *v.* Barker, 115 Ill. 331.

[2] Edmonson *v.* Davis, 4 Esp. 14; Attorney-General *v.* Burges, Bunb. 223; Stockton *v.* Fry, 4 Gill, 406;

FRAUDS AND MISREPRESENTATIONS.

§ 472. Deceit in regard to their own property.— The subject of the liability of partners for the deceits, frauds or misrepresentations of each other is separated from their liability for other torts because, unlike the latter, the liability for deceits cannot be joint and several, but joint only. This seems apparent from the fact that the partners are held to the truth of the appearances they have made, and are not liable to a greater extent for the falsity than they would have been had the appearances been as represented. I have no authorities on the distinction, however.

The firm is liable for the frauds and misrepresentations of one partner in the disposition of partnership property held for sale, for such representations are within the apparent scope of the business.

Thus in Chester *v.* Dickerson, 54 N. Y. 1; 13 Am. Rep. 550 (aff'g 52 Barb. 349), a partnership existed in the business of buying and selling lands. One partner, by pouring coal oil upon a tract of land and passing it off as oil land, procured a sale. All the partners were held liable, although the others are entirely innocent.

So where commodities are agreed to be sold by the firm or by a partner, and one partner substitutes different or inferior articles, the firm is liable.[1]

In Cook *v.* Castner, 9 Cush. 266, 276, the partner making a sale stated to the buyer that his copartner had told him that he (the copartner) had examined the property and found it sound and right, and referred the buyer to the copartner. This is a misrepresentation, and the rule that a person is not bound by statements made as received from another to whom he refers does not apply, for if the copartner had not so informed him both are bound by

Head *v.* Goodwin, 37 Me. 181; McCrillis *v.* Hawes, 38 id. 566; Howe *v.* Shaw, 56 Me. 291; Morgan *v.* Skidmore, 55 Barb. 263; Roberts *v.* Johnson, 58 N. Y. 613; Mode *v.* Penland, 93 N. Ca. 292; White *v.* Smith, 12 Rich. (S. Ca.) L. 595; Wood *v.* Luscomb, 23 Wis. 287; Brewing *v.* Berryman, 15 New Brunswick, 515. And so for fraud or misappropriation or conversion. Sadler *v.* Lee, 6 Beav. 324.

[1] Locke *v.* Stearns, 1 Met. 560 (35 Am. Dec. 382); Wolf *v.* Mills, 56 Ill. 360.

his false statement, and if the copartner had made the statement then the latter's misrepresentation bound both.

In Strang *v.* Bradner, 114 U. S. 555 (aff'g Bradner *v.* Strang, 89 N. Y. 299), plaintiffs, who had been in the habit of lending their notes as an accommodation to the firm of S. & H., by request, delivered to S. & H. four notes, to be used by S. & H. in their business. Afterwards S., without H.'s knowledge, falsely represented that they had been unable to negotiate the notes because made payable at the office of S. & H., and requested other notes in their place, in reliance on which plaintiffs sent other notes, and S. procured the discount of them all and put the avails into the firm's business. The fraud being in the course of business was held to render the innocent partner liable.

In Thwing *v.* Clifford, 136 Mass. 482, a broker employed to sell a house agreed with another broker to divide the commissions if the latter procured a purchaser. The second broker, purporting to represent possible purchasers, got the owner to name a price by assuring him that no other broker had anything to do with the trade, and a sale was effected. The innocent partner's action for commissions prosecuted for joint benefit was held to be defeated by the fraud.

In Hawkins *v.* Appleby, 2 Sandf. 421, plaintiffs sold goods to a firm, and were induced to take the note of a third person in payment on the representation of one partner that it was good, he knowing the maker to be insolvent. All the partners are liable in case for deceit as well as in *assumpsit* for the value of the goods.[1]

So the representations of a partner to third persons about to purchase notes made by the firm,[2] as to their validity, bind the firm; but not if such partner did not know the inquiry was made with a view to purchase.[3] So in selling notes belonging to the firm, representations of a partner as to the maker's solvency bind the firm.[4]

§ 473. Other frauds.— So of other misrepresentations and frauds in the conduct of the business of the firm, all the partners are estopped by the false representations of a partner if they would have bound the firm if true.

[1] See Reynolds *v.* Waller, 1 Wash. (Va.) 164.

[2] French *v.* Rowe, 15 Iowa, 563; McKee *v.* Hamilton, 33 Oh. St. 7.

[3] *In re* Schuchardt, 15 Bankr. Reg. 161.

[4] Sweet *v.* Bradley, 24 Barb. 549.

Rapp *v.* Latham, 2 B. & Ald. 795, is a leading and very severe application of this rule. There the firm of P. & L., liquor merchants, were employed by the plaintiff to buy and sell wine for him. P., the active partner, desiring to raise money, wrote to the plaintiff that the firm had effected a purchase for him, and the plaintiff remitted the necessary money. P. afterwards wrote him that the wine had been sold at a profit, and remitted the profits. A number of purchases and sales were reported as made, and sums were remitted by P. In fact, however, all the purchases and sales were fictitious, but more money had been remitted to the plaintiff than he had advanced; yet it was held that both partners were estopped to deny that the transactions were actual, and were held liable for the reported profits in addition to the original advance.

In Coleman *v.* Pearce, 26 Minn. 123, C. consigned wheat to O. to sell on commission when ordered. O. took in P. as a partner, and both notified D. thereof, and accounts were rendered to him in the firm name, showing that the property and account was transferred to the new firm, in reliance upon which the plaintiff did not order a sale for several months, and then learned that O. had converted the wheat to his own use prior to the formation of the partnership. Both partners were held estopped to deny the truth of their false representations.

In Griswold *v.* Haven, 25 N. Y. 595, the managing partner of a firm of warehousemen issued certificates showing the deposit of grain when none had been deposited. A person who had loaned money to a holder of one of these over-issued certificates upon its security can hold the firm liable for conversion for refusal to deliver the grain, the partners being estopped to deny its existence.

§ **473a.** A partner's fraud in selling an individual interest in the partnership is not chargeable to his copartners, for it is not an act in the conduct of the business, nor a sale of its property, but is in the sale of the property of the individual.

Thus in Schwabacker *v.* Riddle, 84 Ill. 517, F., a member of a firm, persuaded R. to buy out the partners of F., agreeing that he could buy at the invoice price, and fraudulently representing that the invoice was $14,000, when it was in fact but $11,000. The other partners, who were ignorant of the deceit, are not liable, for F. was not their agent in the sale.

In Chamberlin *v.* Prior, 2 Keyes, 539; 1 Abb. App. Dec. 338. a

sale of an interest in a firm was made by the ostensible partners by fraudulent statements. A dormant partner innocent of the fraud was held not to be liable in damages therefor.

MISAPPLICATIONS OF MONEY OR PROPERTY.

§ 474. If the firm has charge or obtains possession of the money or property of others, or, what is the same thing, if property is delivered to one partner as representative of the firm, to dispose of it in a way that is within the apparent scope of the business, all the partners are liable for the misapplication or conversion of the same by one partner to such uses as cause its loss to the owner.[1]

In Sadler *v.* Lee, 6 Beav. 324, stock was sent to a banking firm to receive dividends and sell. One partner clandestinely sold it and the firm had credit for the proceeds. The partners were held liable severally, and the court said would have been held though the proceeds had not been put to the firm's credit.

In Hammond *v.* Heward, 11 Up. Can. C. P. 261, plaintiff made two notes to the order of the firm of H. & G., defendants, brokers, to get discounted for him. The defendants did not get them discounted before dissolution, and after dissolution G. indorsed the firm name, procured a discount of the paper and applied the proceeds to his own use. Both partners were held liable to the plaintiff, who had been compelled to pay the notes.[2]

In Peckham Iron Co. *v.* Harper, 41 Oh. St. 100, one partner of a firm employed to sell the plaintiff's iron, finding the market to be rising, procured a third person to purchase it for the benefit of such partner and reported to the plaintiff that it was sold, the

[1] *Ex parte* Biddulph, 3 De G. & Sm. 587; Sadler *v.* Lee, 6 Beav. 324; Nisbet *v.* Patton, 4 Rawle, 120 (26 Am. Dec. 122); Blair *v.* Bromley, 2 Ph. 354; 5 Hare, 542; St. Aubyn *v.* Smart, L. R. 3 Ch. App. 646; Plumer *v.* Gregory, L. R. 18 Eq. 621.

[2] In Hammond *v.* Heward, 20 Up. Can. Q. B. 36, the facts are about the same as in the foregoing case, except only that the firm's indorsement was made before dissolution. The plaintiff sued H. & G. for money had and received and for negligence in indorsing before dissolution, and were held not liable on either count, for the money was not received by the firm but by G., holding that it was not negligence or breach of duty in G. to discount the notes, that being the purpose for which he held them, and for the wrong of not paying over the proceeds H. was not liable.

other partners being innocent of the facts. All the partners were held liable.

So in Castle *v.* Bullard, 23 How. 172. The firm held goods of the plaintiff to be sold on commission. One or two of the partners induced the plaintiff to consent to a sale of the goods to an insolvent person by false and fraudulent representations as to his character and standing. All the partners were held liable for the loss.

It was on this principle that the series of cases arising out of the Fauntleroy forgeries[1] were decided. Fauntleroy (who was afterwards tried and executed for one of these crimes) and others, being trustees of stock under a will, forged the names of his co-trustees upon the certificates to enable a banking firm in which he was a partner to sell the stock. The bank sold the stock through a broker, who deposited the proceeds to the credit of the bank in another bank, which was its agent and with which its accounts of sales of stock were kept. The proceeds of the sale were thus in the custody of the former bank. Fauntleroy drew it out for his own purposes, on checks made by him in the firm name. On the bankruptcy of the bank the trustees were held entitled to prove the amount against its estate as a debt. Had the money been deposited in the names of the trustees, Fauntleroy could not have drawn it out in his capacity of partner in the bank. The fact that the other partners were not aware of the sale and receipt of the proceeds makes no difference, because it is part of the ordinary business of bankers to sell stock.[2]

§ **475.** Where the property of a person is in the custody

[1] Stone *v.* Marsh, Ry. & Moody, 364; 6 B. & C. 551; 8 Dow. & Ryl. 71; Keating *v.* Marsh, 1 Mont. & A. 582; aff. on app. Marsh *v.* Keating, 1 Bing. N. C. 198; 2 Cl. & Fin. 250; *Ex parte* Bolland, Mont. & Mac. 315; 1 Mont. & A. 570; Hume *v.* Bolland, Ry. & Moody, 370; 1 Cr. & M. 130; 2 Tyr. 575.

[2] This explanation of these cases, that it is because the scope of the business included sales of stock, is not original with me, but is given by Sir N. Lindley and was that given in the later cases. The earlier cases placed the ruling on the ground of negligence, in that the money having come into the custody of the firm the other partners should have known of it; and not having been placed to the account of the trustees, must be taken to have remained in the custody of the house. Mr. Pollock, in his admirable Digest of Law of Partnership, article 24, note, says: "One can hardly see what the knowledge or means of knowledge has to do with it, if covered by the scope of the business."

of a firm and the owner gives to one partner a special authority to act in regard to it, which the other partners do not have, and such partner uses the power to appropriate the property to his own uses, the mere fact that his membership in the firm afforded the opportunity is not sufficient to make the partnership liable.

Ex parte Eyre, 1 Ph. 227 (aff'g 3 Mont. D. & DeG. 12), is the leading case upon this subject. There a customer deposited with his bankers a box containing certain securities, and afterwards loaned some of the securities to one of the partners for his own purposes, upon his substituting in their place other securities to secure the replacement of those borrowed. The borrowing partner afterwards secretly removed the substituted securities for his own purposes and put in their place others of less value. The firm was held not liable for a loss resulting from this conversion, they having received no benefit, and the transaction having been with the partner in his individual capacity, and the securities being in effect in his individual custody.[1]

In Pierce *v.* Jackson, 6 Mass. 242, 245, a firm made a note payable to a company, and one of the partners forged the name of the company upon it to give the plaintiff title to sue upon it; this fraud was held to give the plaintiff no cause of action against the other partner. But see the comments on this case in Locke *v.* Stearns, 1 Met. 564.

§ **476.** If money or property is procured by a partner, ostensibly on behalf of the firm and within the apparent scope of his authority, it is within the custody of the firm, and the firm is liable for it, although he misappropriates it.

Thus, if part of the business of a firm is investing money for others, and money is received to be invested in a mortgage, and one of the partners forges a mortgage without the other's knowledge and keeps the money, the other is liable.[2] So of an attorney who collects money for a client and absconds with it, his partner is liable.[3]

In Alexander *v.* Georgia, 56 Ga. 478, a firm was selling merchan-

[1] See, also, Coomer *v.* Bromley, 5 DeG. & Sm. 532; Bishop *v.* Countess of Jersey, 2 Drew. 143.

[2] Willet *v.* Chambers, Cowp. 814.

[3] McFarland *v.* Crary, 8 Cow. 253; Dwight *v.* Simon, 4 La. Ann. 490.

dise to the W. & A. R. R., the bills being paid by the state. The active partner, by duplicate bills and bogus accounts, defrauded the state out of a large sum; the innocent copartner was held liable to refund, but *contra* of bills outside of and unconnected with the partnership business; and if the paying agent of the state knew the partner was acting in violation of his duty to the firm, the innocent partner would not be liable. It did not appear that the money went into the firm.[1]

§ 477. If money or property comes into the hands of a partner for purposes not within the scope of the business, his misuse of it does not affect the innocent copartners.

Where a firm of solicitors are acting for an estate, and bonds payable to bearer are deposited with one partner individually without the knowledge of the copartners and he misappropriates them, the firm is not liable.[2] So where money is paid to or borrowed by one of a firm of solicitors, to be invested in mortgages, and is misapplied by him, the firm is not liable, without evidence that the scope of the business included investing.[3]

The facts that letters referring to the matter are copied into the firm's letter-book and included in the firm's statement of account to the estate, and that the partner paid some of the interest by drawing a firm check, but on each occasion repaid the amount to the firm by his private check, were held to be too ambiguous to affect the other partners with acquiescence in such partner's custody being the firm's business.[4]

In Dounce *v.* Parsons, 45 N. Y. 180, M., H. & Co. dissolved by the retirement of one partner and the coming in of a new member, the new firm using the same name as the old. B., one of the original and continuing partners, informed plaintiff that the debts of the old firm could be bought at a discount, and plaintiff advanced him money to buy them up. B. then drew up notes in the firm name, dated back, and gave them to plaintiff as being the debts of the old firm. B. placed the money of plaintiff thus obtained in the new firm and got credit for it on their books, and used it to pay the

[1] See, also, Royer *v.* Aydelotte, 1 Cint. Superior Ct. Rep. 80, cited under § 480.

[2] Cleather *v.* Twisden, 24 Ch. D. 731; 28 id. 340.

[3] Harman *v.* Johnson, 2 El. & Bl. 61; Plumer *v.* Gregory, L. R. 18 Eq. 621.

[4] Cleather *v.* Twisden, *supra.*

debts of the old firm. His partners knew nothing of the arrangement or the deception, and the new firm was held liable to plaintiff. There was either a loan to B., outside of the firm's business, or B. was trustee of the money and put it into the new firm as his own. The fraud was not in the procuring of the money, but in the means used to conceal its misappropriation.

In Adams *v.* Sturges, 55 Ill. 468, the owner of shares of stock gave a power of attorney for their sale to a person who then transferred them to his firm, and then in the firm's name transferred them and took them back himself; the copartners, knowing nothing of the matter, are not liable for the conversion.

In Toof *v.* Duncan, 45 Miss. 48, F., a member of a cotton shipping firm, being sent out on a trading expedition for the firm, was asked by one D. to collect a draft for him, which he drew payable to F. F. indorsed the draft to the firm, requesting to have it put to his credit. The firm collected the draft, and F. withdrew the amount and did not pay it over to D. The partners are not liable to D., though had the draft been payable to the firm it would have been otherwise.

In Linn *v.* Ross, 16 N. J. L. 55, R., being indebted to the firm of L. & H., handed a note owned by him to L. to collect for him and either hand him the proceeds or apply it on the debt. L. did not account for the proceeds, and it was held that the firm was not liable.

MONEY OR PROPERTY WRONGFULLY OBTAINED BY ONE PARTNER FOR THE FIRM.

§ **478.** A firm has frequently been held liable for the torts or frauds of a partner, of which it received the benefit, not committed in transacting the business of the firm or within the apparent scope of his agency. As where a partner obtains money by crime or fraud, or converts property and uses the fund for the firm, either by direct contribution or paying its debts, where it is manifestly just that the defrauded person should be deemed a creditor of the firm, and not merely of the guilty partner. Liability in such cases has been sometimes put upon the ground of an implied ratification, arising from receiving a benefit. But this ground is not the true one. Ratification never takes place

without knowledge, and we have already seen that, in cases of contract, a partnership never becomes debtor by receiving the benefit of a transaction made on the credit of an individual partner.

In the case of money which has no ear-marks, and to which, therefore, the wrongful holder can pass a good title, yet the wrongful holder himself cannot be said to have title, and perhaps a gratuitous transferee would have no better right to retain the benefit of it. Where, therefore, a partner wrongfully obtains money for the firm, the innocent partners are obviously not liable *ex delicto*, but the firm is chargeable for money had and received.

In the case of property tortiously obtained for the firm by one partner, without complicity on the part of his copartner, if no title has passed, the firm may be liable for a conversion; and if used by such partner for the firm, or if obtained under such circumstances that the partner could have invested a *bona fide* buyer with title, yet the firm does not stand in the relation of a purchaser for value, and the right of the original owner to rescind and demand back his property must be deemed still available to him. It seems to me that the above is the true explanation of the decisions and *dicta* following.

§ **479.** In the case of money so obtained, a distinction must be made between a conversion for the firm and a conversion by a partner, and a subsequent application of the money to the use of the firm. There is certainly a difference between the case of stealing money or raising it on forged paper for a firm, and a case of so obtaining money and afterwards forming a partnership, contributing such money as capital. Yet in the latter case, had goods been so obtained and contributed, the owner could hold all the partners for a conversion, if they refused to deliver.

Thus, in Rapp *v.* Latham, 2 B. & Ald. 795, the money was procured by the false pretenses of one partner, and used for the firm; the firm was held liable for money received for its use.

In Manufacturers' & Mech. Bank *v.* Gore, 15 Mass. 75 (8 Am. Dec. 83), a partner obtained money on a note signed in the firm name, upon which the name of a third person as indorser was forged, and the proceeds went to the use of the firm. The lender can immediately, without awaiting the maturity of the note, sue both partners for money had and received, lent, etc., although one was innocent.

In Wallace *v.* James, 5 Grant's Ch. (Up. Can.) 163, a person procured money from plaintiff by selling forged paper to him, and put the money into his partnership. The guilty partner absconded, and the other partner assigned for benefit of creditors. The plaintiff has a right to be paid out of the partnership assets.

§ 480. So in the case of goods obtained by fraud, no title in them vests in the firm, as where a partner orders goods with a preconceived design to raise money upon them and absconds.

Thus, in Kilby *v.* Wilson, Ryan & Moo. 178, plaintiffs as brokers purchased cottons for T. & Co., and paid for them with the check of T. & Co., received by them from T., and delivered to T. the warrants for the cotton, which T. then deposited as security with the defendants, and absconded, and the check was dishonored, and T. & Co. became bankrupt. In trover for the cottons, Lord Tenterden instructed the jury that, if T. procured the cottons with a preconceived design of not paying for them, plaintiffs could recover, but not if the design to defraud was formed after he had got possession.[1]

Where a partner wrongfully took the property of a third person and put it into the assets of the firm, thereby increasing them, the firm was held liable.[2] So if procured by fraud.[3]

In Miller *v.* Manice, 6 Hill, 114, 123–4, Walworth, J.: If one partner procures from a third person his note by falsely representing that he can obtain money for him, and then appropriates the note, he alone is liable for the conversion or in *assumpsit* waiving the tort. But if he applies the proceeds of the note to the benefit of his firm, as by paying a partnership debt, all the partners may be held liable or the tort-feasor alone.

In Royer *v.* Aydelotte, 1 Cint. Superior Ct. Rep. 80, P., owning a government voucher for $1,440, transferred it to A., the plaintiff, in payment of a debt she owed him. P. was also indebted to the

[1] Stewart *v.* Levy, 36 Cal. 159, was also an action arising out of the purchase of a partner with the intention of not paying; but the action was for the deceit, and the guilty partner alone was held liable in tort, otherwise the innocent partner would have been liable to imprisonment under a statute.

[2] Durant *v.* Rogers, 87 Ill. 508; Royer *v.* Aydelotte, 1 Cint. Superior Ct. Rep. 80.

[3] Blight *v.* Tobin, 7 Monroe, 612 (18 Am. Dec. 219); Olmsted *v.* Hotailing, 1 Hill, 317.

firm of R., C. & Y., and C., by fraudulent representations, induced A. to let him hold it. C. collected the voucher, paid the debt due from P. to the firm with the proceeds and gave the balance to P., who was insolvent, and thus A. lost it all. R. and Y. were held liable for the full amount, and not merely for what they got. The court place the liability of the defendants on the ground that C. committed the tort in the course of the business, which is hardly tenable.

Receiving a benefit from the fraud of a partner was also mentioned as a reason for holding the firm, including the innocent partners, liable in the following cases.[1]

TRUST FUNDS USED FOR FIRM.

§ 481. Innocent partners not liable.—If a partner has possession of the funds of others in trust, as where he is an executor, guardian, trustee, and the like, and improperly uses the trust funds for the benefit of the firm, the nature of the copartners' liability depends on whether they participated in the breach of trust.

If the trustee, without his copartners knowing that the money is held in trust, uses it to pay debts of the firm,[2] or applies it to other partnership uses,[3] or lends it to the firm,[4] or puts it in as capital,[5] the *cestui que trust* does not become a creditor of the firm, and can neither maintain an action against them or prove against the joint estate in bankruptcy. The transaction is regarded merely as an advance by the guilty partner to his firm. On the other hand, had the use of the money for the firm by the trustee been with the permission of the *cestui*, it would have been a loan by him to the firm and he would have had the rights of a creditor.[6]

[1] Sadler *v.* Lee, 6 Beav. 324; Devaynes *v.* Noble, Clayton's Case, 1 Mer. 575; Devaynes *v.* Noble, Baring's Case, 1 Mer. 611; Castle *v.* Bullard, 23 How. 172, 189; Strang *v.* Bradner, 114 U. S. 555; Gray *v.* Cropper, 1 Allen, 337; Doremus *v.* McCormick, 7 Gill, 49; Fripp *v.* Williams, 14 S. Ca. 502; Gerhardt *v.* Swaty, 57 Wis. 24; *Re* Ketchum, 1 Fed. Rep. 815.

[2] As in *Ex parte* Apsey, 3 Bro. C. C. 265; *Ex parte* White, L. R. 6 Ch. 397.

[3] *Ex parte* Heaton, Buck, 386; Jaques *v.* Marquand, 6 Cow. 497; 8 Wend. 490; Tallmadge *v.* Penoyer, 35 Barb. 120; Willett *v.* Stringer, 17 Abb. Pr. 152.

[4] Evans *v.* Bidleman, 3 Cal. 435.

[5] Harper *v.* Lamping, 33 Cal. 641.

[6] Whitaker *v.* Brown, 16 Wend. 505 (overrules s. c. 11 id. 75).

These principles and authorities show that this liability of the partners is not a proper partnership liability, for those partners alone who were cognizant of the misapplication of the trust are chargeable, and hence the ground of liability is that they are joint wrong-doers, and not that they are partners.[1]

The knowledge of the guilty partner is not the knowledge of the firm, because it is outside of the firm's business. Nor will the fact that one of the other partners knew and agreed to the improper application of the fund make the firm liable.[2]

In Davis *v.* Gelhaus, 44 Oh. St. 69, a public officer put public moneys into the firm, with his partner's knowledge, and both were held liable, although on dissolution the officer took all the assets, and agreed to pay all the debts, and, having paid back the money, it was held that he could not enforce contribution from his copartner, the misappropriation being criminal by statute.

§ 482. Incoming partners.— Where the misuse of the funds has taken place before the admission of a partner into the firm, he would not be liable, because not a participator in the misuse.[3]

Where the new firm has agreed to be liable for all debts for goods, this was held to include a claim for public money applied to pay for the goods by the partner while county treasurer.[4] And if, on the formation of the firm, one partner contributes trust property as his agreed share of the capital, without notice of the trust to his copartners, they are not debtors to the *cestui*, nor can he follow the funds or claim more from the firm than the trustee could have done.[5] But if, on the formation of the firm, one partner's capital was composed of trust funds, and the other knew this, both are liable.[6] And if the copartner knew the fund belonged to another, although he supposed that the owner had loaned it to the partner to enable him to make his contribution, it is a partnership debt.[7]

§ 483. Participants all liable.— But if the other partners have knowledge of the nature of the funds at the time of

[1] And per Lord Cairns, Vyse *v.* Foster, L. R. 7 H. L. 318, 334.

[2] Evans *v.* Bidleman, 3 Cal. 435. And see *Ex parte* Heaton, Buck, 386.

[3] Twyford *v.* Trail, 7 Sim. 92.

[4] Hutchinson *v.* Smith, 7 Paige, 26.

[5] Hollembaek *v.* More, 44 N. Y. Superior Ct. 107.

[6] See Emerson *v.* Durand, 64 Wis. 111, 116.

[7] Houser *v.* Riley, 45 Ga. 126.

such misappropriation, they are implicated in the breach of trust, and become themselves, at the election of the *cestui que trust*, his debtors, or even trustees of the fund, as having connived at the violation.[1]

And if the copartners know the fund belongs to an estate, they are bound to inquire on what trusts it is held, and knowledge of the powers of the trustee partner is imputed to them, whether they had actual notice or not.[2]

In Price *v.* Mulford, 36 Hun, 247, a partner holding a trust fund took an asset of the firm, being a certificate of indebtedness due from a third person, and reported that he had invested the trust money in it, and reimbursed the firm by canceling a balance due to himself from it. Here the firm were held to become trustees, and both partners liable to the *cestui que trust*, although the firm received no benefit from the transaction.[3]

And if the copartners were innocent of the violation of the trust, and the guilty partner subsequently gives the note of the firm to the owner of the fund for the amount, the firm has been held liable upon the note.[4]

§ 484. The liability is a joint and several one,[5] and the succeeding representative of the trust can sue the firm as for a debt,[6] and

[1] Travis *v.* Milne, 9 Hare, 141; *In re* Jordan, 2 Fed. Rep. 319; Trull *v.* Trull, 13 Allen, 407; Colt *v.* Lasnier, 9 Cow. 320; Hutchinson *v.* Smith, 7 Paige, 26; Price *v.* Mulford, 36 Hun, 247; Stoddard *v.* Smith, 11 Oh. St. 581; Davis *v.* Gelhaus, 44 id. 69; Emerson *v.* Durand, 64 Wis. 111, 116. Even if he be a limited partner, who takes no part in the management of the business. Guillou *v.* Peterson, 89 Pa. St. 163 (rev. s. c. 9 Phila. 225). But see comments on the case in Bates on Limited Partnership, p. 82.

[2] Travis *v.* Milne, 9 Hare, 141. And see Houser *v.* Riley, 45 Ga. 126. Or even, it has been said, if by reasonable inquiry he could have ascertained the source of the funds. *In re* Ketchum, 1 Fed. Rep. 815.

[3] Some cases, however, have ruled that the knowledge of the copartners is unimportant, if the partnership received the benefit, and the firm is liable to the owner of money held by one partner as his agent, if it was applied to the business of the firm. Welker *v.* Wallace, 31 Ga. 362; Palmer *v.* Scott, 68 Ala. 380. *Contra*, after dissolution, when there is no power to create new liabilities. Dunlap *v.* Limes, 49 Iowa, 177.

[4] Palmer *v.* Scott, 68 Ala. 380; Richardson *v.* French, 4 Met. 577, where the note was made to a creditor of the *cestui* by agreement.

[5] Flockton *v.* Bunning, L. R. 8 Ch. App. 323; *In re* Jordan, 2 Fed. Rep. 319.

[6] *In re* Jordan, 2 Fed. Rep. 319 (*dictum*); Bush *v.* Bush, 33 Kan. 556.

prove in bankruptcy against the joint estate of the firm, and the separate estate of the trustee partner.[1]

A partner in a banking firm deposited money in the bank as executor of an estate. In his capacity of executor he is a creditor of the firm.[2] And if he takes as security from his firm a note and mortgage payable to his *cestui*, the delivery to him, although he is one of the makers and grantors, is good, he having control of the *cestui's* property, for he receives it as representative.[3]

§ 485. Accountability is for profits or interest.— The rule where a trustee employs the trust funds in trade or speculation, that he must account for profits or interest at the *cestui's* election, applies where he has engaged the funds in a firm of which he is partner.[4]

And although a mere borrower of trust money is not liable for profits made by its use, yet the trustee, who is also a partner, is liable for them. The amount of profits will be the proper share of the trustee. There is great force in the argument that he should account for all the profits which the fund has earned, although he was compelled to allow his copartners to participate in them, but the law is as above stated.[5]

In Seguin's Appeal, 103 Pa. St. 139, a guardian put his ward's money into his firm with the knowledge of his copartner. The ward having declined to elect between interest and profits, it was held not error for the court to elect for her. The profits she is entitled to is what was earned by her capital excluding those attributable to her trustee's skill, industry and labor in conducting the business. Thus she may be awarded a proportion of the gross profits in the ratio of her capital, less proper allowances for carrying on the business, not exceeding what would have been paid to

[1] *In re* Jordan, 2 Fed. Rep. 319.

[2] McCracken *v.* Milhous, 7 Ill. App. 169.

[3] Tucker *v.* Bradley, 33 Vt. 324.

[4] The cases where the trust fund was already in the firm, or is put in as part of the capital, are elsewhere considered. See ACCOUNTING.

[5] Vyse *v.* Foster, L. R. 7 H. L. 318, and 8 Ch. 309; Laird *v.* Chisholm, 30 Scottish Jurist, 582; Jones *v.* Foxall, 15 Beav. 388, 395; Palmer *v.* Mitchell, 2 M. & K. 672; Seguin's Appeal, 103 Pa. St. 139; Long *v.* Majestre, 1 Johns. Ch. 305.

hire the same number of persons as the number of partners to do what they did.[1]

§ 486. Following the fund.— The doctrine that trust funds can be followed into whatever investments they are placed, where the claim of *bona fide* buyer cannot be interposed, applies.

Thus in Vanderwyck *v.* Summerl, 2 Wash. C. C. 41, a claim belonging in part to A. and part to B., having been decided in their favor, the proceeds were remitted to the firm of A. & C., to be credited to A., who was indebted to the firm, but C. knew that B. had an interest in it. B. can recover his proportion from the firm.

So in Carter *v.* Lipsey, 70 Ga. 417, a guardian loaned the trust funds to his firm, and died. His surviving partner, with knowledge of the nature of the claim, assigned for benefit of creditors. It was held that the *cestui* could compel repayment by the assignee in preference to creditors, because he took only the surviving partner's title, and the survivor could not change the nature of the claim.

In Stoddard *v.* Smith, 11 Oh. St. 581, United States land scrip certificates, issued to one in trust for named and unnamed heirs, were used by him and his partners in payment for lands, the named heirs consenting, and the title was taken in the name of another partner. The lands were held chargeable with the trust in favor of the unnamed heirs, notice of the trust appearing on the face of the certificates.

Somewhat similar is Wallace *v.* James, 5 Grant's Ch. (Up. Can.) 163, where a person procured money from plaintiff by selling forged paper to him, and put the money into his firm; he then absconded and the other partner assigned for benefit of creditors. It was held that plaintiff was entitled to be paid out of the assets.

Where an officer of a bank lends its funds to his firm without sufficient security and they become mingled with other partnership property they cannot be followed.[2]

§ 487. Repayment to the trustee.— Where an executor loaned the trust funds to his firm, the other partners knowing the nature of the funds, repayment to him will exoner-

[1] As to accounting for interest, see § 787.

[2] Case *v.* Beauregard, 1 Woods, C. C. 125. (99 U. S. 119.)

ate them, if he has power to receive the amount and release the claim. In fact they have no other way of discharging the debt.[1]

As a factor cannot sell his principal's goods to a firm of which he is a member, the firm having received and sold the goods will *prima facie* be deemed to have the proceeds for the owner; and in such case it has said to be doubtful whether they could be exonerated by accounting to the factor.[2]

But merely turning over to the trustee partner the assets upon dissolution of the firm, and his agreeing to pay the debts, is not such payment as will exonerate the retiring partner.[3]

CRIMES.[4]

§ 488. A partner is not liable to conviction by the state for the crimes of his partner unless he has participated in them, else a good man might be liable for a bad one. Assent or participation is necessary; mutual agency to violate penal laws not being implied.[5] Sometimes, however, the contrary is enacted by statute in cases of illegal sale of intoxicating liquor.[6]

An officer of a national bank who allows his firm to overdraw with intent to defraud the bank is guilty of a misapplication of its money under the Revised Statutes of United States, § 5209.[7]

A partnership cannot be indicted in the firm name; the individual members alone can be indicted and convicted.[8] They may be jointly indicted if their act is joint, as where they made and signed a false

[1] Sherburne *v.* Goodwin, 44 N. H. 271, holding that payments to him from time to time, not stating in what account, and charged to his private account, could, on subsequent adjustment, be debited to him as executor.

[2] Martin *v.* Moulton, 8 N. H. 504.

[3] Smith *v.* Jameson, 5 T. R. 601; Dickenson *v.* Lockyer, 4 Ves. 36; Davis *v.* Gelhaus, 44 Oh. St. 69.

[4] For crimes by one partner against the property of the firm, see § 277.

[5] State *v.* Coleman, Dudley (S. Ca.), L. 32; State *v.* Bierman, 1 Strob. L. 256; Acree *v.* Commonwealth, 13 Bush, 353.

[6] Whitton *v.* State, 37 Miss. 379; State *v.* Neal, 27 N. H. 131.

[7] United States *v.* Fish, 24 Fed. Rep. 585.

[8] Peterson *v.* State, 32 Tex. 477; Allen *v.* State, 34 id. 230.

return to the assessor of internal revenue;[1] or if they sold liquors without a license as a firm.[2]

In an indictment for obtaining goods by false pretenses from a firm, the ownership of the goods may be averred to be in the firm and the misrepresentations made to the former in the firm name;[3] and so of embezzling partnership money.[4]

An indictment for forgery upon several persons who are partners need not allege the partnership name.[5] And an intent to defraud a firm being an intent to defraud each of its members, an indictment for uttering a counterfeit with intent to defraud A. is sustained by proof of intent to defraud the firm of A. & B.[6]

[1] United States *v.* McGinnis, 1 Abb. U. S. 120.

[2] Lemons *v.* State, 50 Ala. 130.

[3] State *v.* Williams, 103 Ind. 235.

[4] State *v.* Mohr, 68 Mo. 303.

[5] Durham *v.* People, 5 Ill. 172.

[6] Stoughton *v.* State, 2 Oh. St. 562.

CHAPTER XI.

PAYMENT, NOVATION AND MERGER.

APPLICATION OF PAYMENTS.

§ 489. The general rules for the application of payments by a person who owes several debts to the same creditor, and pays money on account, are:

I. The debtor may require the appropriation to be made upon any of the debts which it will pay in full, provided he exercises the right at the time of payment.

He need not, however, expressly declare such intent. It is sufficient if the intent can be gathered from circumstances.[1]

Thus if a partner pays money with instructions to credit it upon his individual debt, it cannot be credited upon a debt due from his firm, unless it is partnership money thus used.[2]

If a person is indebted on several accounts to a firm, an agreement with one partner as to which account an intended payment should be applied is admissible to show the intention of a subsequent general payment by him to the firm's book-keeper.[3]

II. If the debtor has not signified the appropriation, the creditor may apply the money as he chooses; but after he has done so, and notified the debtor of it, he cannot change the appropriation.

The creditor need not make the appropriation immediately. He has at least a reasonable time in which to do it before a controversy has begun.[4]

[1] See Shaw *v.* Picton, 4 B. & C. 715; Waters *v.* Tompkins, 2 C. M. & R. 723; Peters *v.* Anderson, 5 Taunt. 596; Wittkowsky *v.* Reid, 82 N. Ca. 116; Lysaght *v.* Davern, 5 Bli. N. R. 1; City Discount Co. *v.* McLean, L. R. 9 C. P. 692.

[2] Bray *v.* Crain, 59 Tex. 649; Miles *v.* Ogden, 54 Wis. 573.

[3] Wittkowsky *v.* Reid, 82 N. Ca. 116.

[4] Fairchild *v.* Holly, 10 Conn. 175, 184; Philpott *v.* Jones, 2 A. & E. 41, Mills *v.* Fowkes, 5 Bing. N. C. 455; Simson *v.* Ingham, 2 B. & C. 65; Alexandria, Mayor of, *v.* Patten, 4 Cranch, 317, 320.

The creditor who has entered the payments in his private books to one account may even subsequently change them to another account, if the debtor has not been informed of the original application of them, for the uncommunicated entries are not conclusive upon the creditor.[1] But after he has notified the debtor he cannot alter the appropriation.[2] If the creditor is an executor of an estate which is surety for the debtor, he cannot, even with the debtor's consent, change an appropriation once made so as to revive a lapsed liability of the estate.[3]

§ 490. Where firm and one partner are creditors.— Where the firm and one partner are creditors of the same person, and a payment is made by him to the creditor partner,[4] it has been suggested that the duty to observe good faith will require him to apply it to the partnership debt.[5] This is no doubt true, if the payment is made in the firm's place of business, or in the course of a partnership dealing, or where the partner is treated or is acting in his capacity as partner. But where the payment is entirely outside of the firm's interests, for example, where the debtor addresses a check to the partner individually, no reason is perceived for such stringency; a partner scarcely owes a greater duty to the firm than to himself, and this is not competing with it.[6]

Where the creditor partner assigns his claim to the firm, payments by the debtor generally may be applied on either account.[7]

In Simson *v.* Ingham, 2 B. & C. 65, the creditor entered the payments in his private book to one account, and subsequently,

[1] Simson *v.* Ingham, noticed *infra*, § 501. And see Field *v.* Carr, 5 Bing. 13, where this was attempted after three years.

[2] Hooper *v.* Keay, 1 Q. B. D. 178; Dorsey *v.* Wayman, 6 Gill, 59; Seymour *v.* Marvin, 11 Barb. 80.

[3] Merriman *v.* Ward, 1 J. & H. 371.

[4] Lindley, Part. p. 432.

[5] See cases under § 412. And possibly this proposition was involved in Wilkins *v.* Boyce, 3 Watts, 39. There C. owed B., and also the firm of A. & B. As agent of A. & B., he sent a bill of exchange which belonged to D. to Philadelphia, and instructed the recipient to pass the proceeds to B.'s account, which was done; yet the payment on B.'s account was held to be a receipt of the money by A. & B. to the use of D., and both are liable to D. for it.

[6] A *dictum* in Codman *v.* Armstrong, 28 Me. 91, would seem to permit an application of such payment to the individual debt.

[7] Badger *v.* Daenieke, 56 Wis. 678.

changed them to another account. It was held that the entries were not conclusive upon him until he had communicated the fact to the debtor.

Where a partner shipped lumber of the firm, and also some of his own to one E., to sell, without notifying E. of the different ownerships, in consequence of which E. kept no separate accounts of the lots, here the last amount paid by E. to such partner will be considered as the avails of the partnership lumber, but here the presumption was raised against the partner because of his negligence.[1]

Where the partners by arrangement with the creditor divide the debt, each assuming half, each is entitled to have subsequent payments made with partnership assets credited equally to each, for one partner alone has no right to dictate the entire appropriation, and such would be the presumed intention of the debtors.[2]

§ 491. Firm and one partner as debtors.— Thus, if the firm and also one partner are debtors of a person, a payment generally by the debtor partner may be applied by the creditor to either debt.[3] And if, after dissolution, one partner continues to deal with a creditor of the firm and makes payments generally, the creditor may apply them to the individual debt.[4]

Where two firms, in both of which one B. was a partner, owe the same creditor, and B. in part payment gives his individual notes to the creditor, if the creditor proves the note against B.'s administrator, disclaiming any particular application, he does not waive his claim against either firm.[5]

[1] Russell *v.* Green, 10 Conn. 269.

[2] Moore *v.* Riddell, 11 Grant's Ch. Up. Can. 69, where one partner gave their creditor a mortgage on his separate property for half the debt, and the other gave an indorsed note for the other half. Subsequent payments out of the firm's assets were applied by the creditor upon the note, but it was held that the mortgagor was entitled to have half of them credited upon his mortgage.

[3] Brown *v.* Brabham, 3 Oh. 275; Logan *v.* Mason, 6 W. & S. 9. And see cases under § 314. If these were partnership funds the payment would undoubtedly be controlled by the rule in § 494.

[4] Sneed *v.* Weister, 2 A. K. Mar. (Ky.) 277; Fitch *v.* McCrimmon, 30 Up. Can. C. P. 183; Simson *v.* Ingham, § 501, *infra.*

[5] Youmans *v.* Heartt, 34 Mich. 397.

§ 493. Partnership money to be applied to partnership debts.— III. It is a general rule that if a person owes debts in two capacities and makes a payment the credit will be upon the debt in the capacity in which the money is held. Where a payment is made by a partner to one who is creditor both of himself and of the firm, if the payment is made with partnership funds it must be credited to the partnership debt. If the creditor knew of the nature of the fund the rule is imperative and controls Rules I and II above, for otherwise the creditor would be participant in a fraudulent use of the funds of the firm.

Thus, S., being indebted to C., took in F. as a partner, S. being the managing partner. C. then sold goods to the firm, and S. made payments to C. upon his individual account in checks signed in the firm name. In an action by C. against the firm it was held that these payments must be credited upon the firm's debt; that C. was put upon inquiry by the signature of the checks.[1]

So, where one who is surety both for a firm and one partner receives partnership funds and applies them to the individual debt, and afterwards pays the partnership debt with his own money, his rights are the same as if he had paid the latter debt with the firm's money.[2]

§ 494. —— if creditor has no notice of nature of the fund.— The rule is doubtless the same when the creditor is not aware of the nature of the fund and attempts to appropriate it to the individual debt of the partner from whom he received it. We shall hereafter see that an unauthorized application of partnership property to pay a separate debt is held in not a few cases to give the creditor no right to hold the property as against the firm, irrespective of his knowledge of the fraud. These cases are all authorities to sustain the above proposition, which, however, may be true without relying upon them, since the court can rectify the fraud without material injury to the creditor by applying the fund to the joint debt.

[1] Cornells *v.* Stanhope, 14 R. I. 97; case is modified in other respects by Davis *v.* Smith, 27 Minn. 390 (this s. c. 29 id. 201).

[2] Downing *v.* Linville, 3 Bush, 472.

In Thompson *v.* Brown, 1 Mood. & Malk. 40, Brown was indebted to the plaintiffs and took Weston into partnership. The plaintiffs continued to furnish goods to the firm. Brown paid the plaintiff on general account a check of £60. The firm was afterwards dissolved, Brown became insolvent, and the plaintiffs sued to recover their claim, claiming that they had a right to apply the check to the oldest item of the account; but Abbot, C. J., rule that if the money paid be the money of the partners the creditor not at liberty to apply it to the payment of the debt of the individual, and left it to the jury to say whose property the check was, and the jury found for the defendants.

So in Wiesenfeld *v.* Byrd, 17 S. Ca. 106, where a surviving partner made payments generally from partnership funds, the creditor must apply them to the partnership debt and not to the surviving partner's individual debt.[1]

So in St. Louis Type Foundry Co. *v.* Wisdom, 4 Lea, 695, where successive firms of the same name, but in part of different members, had a running account with a creditor, payments made during the last firm must be credited to the account of the firm whose funds are thus used.

In Fitch *v.* McCrimmon, 30 Up. Can. C. P. 183, however, C. & L., partners, dissolved, L. agreeing to pay the debts, and C., to whom the firm was indebted, taking the assets and continuing the business. C. made purchases on his own account from a creditor of the firm, and payments by him, it was held, could be credited upon his individual account, although with money derived from the sales of the partnership goods. L., however, assented.

§ **495. —— individual money.**— In the case of individual money it is a little different. No doubt a payment by a partner is presumptively on private account.[2]

[1] See, also, McClean *v.* Miller, 2 Cranch, C C. 620.

[2] So held in Gass *v.* Stinson, 3 Sumn. 98, 109. And see Sneed *v.* Wiester, 2 A. K. Mar. 277; Baker *v.* Stackpoole, 9 Cow. 420 (18 Am. Dec. 508). Such would be the rule as to a payment by one who owes individually and as executor. Goddard *v.* Cox, 2 Stra. 1194; Sawyer *v.* Tappan, 14 N. H. 352; Fowke *v.* Bowie, 4 Harr. &. J. 566. See Scott *v.* Ray, 18 Pick. 360, where a payment to an assignee for creditors, who was also himself a creditor, was ordered credited on both accounts equally.

But even then it would not be applied to such individual debts as were afterwards created.[1]

Where a partner gives security to pay both debts, its proceeds have been held first applicable to discharge his individual items.[2]

In Johnson *v.* Boone, 2 Harr. (Del.) 172, it was held that as a payment generally, if of partnership money, must be applied to the joint debt, so, *vice versa*, if out of individual money it must be applied on the individual debt, unless the debtor's assent to the contrary application is shown. This, however, is not consistent with the cases under § 491.

§ 496. If neither party specify appropriation.— IV. In the absence of intention appearing from the acts of the parties, the law will presume an intention to appropriate as follows:

1. To pay interest before principal.
2. To pay an unsecured debt before a secured debt, unless the security be a third person or his property;[3] but money realized from a security. will be applied to the debt it secures.[4]
3. To pay legal and not illegal items.[5]
4. To pay matured as against unmatured debts.[6]
5. To pay the earlier items of an entire account in preference to the later.

§ 497. Running account.— The rule applying general payments to the earliest items of an entire account, or, as otherwise expressed, the presumed intent that the first credit item shall go to discharge the first debit item, raises the very important question in partuership matters, what constitutes a running account in case of dissolution when the business is continued?

The various cases under the head of Devaynes *v.* Noble, 1 Mer. 529 (aff'd 2 R. & M. 495), are leading cases on this sub-

[1] Baker *v.* Stackpoole, *supra;* Miles *v.* Ogden, 54 Wis. 573.

[2] Lee *v.* Fontaine, 10 Ala. 755 (44 Am. Dec. 505).

[3] Garrett's Appeal, 100 Pa. St. 597; The Schooner Steelman, 5 Hughes, C. C. 210.

[4] Sanders *v.* Knox, 57 Ala. 80; Jones *v.* Benedict, 83 N. Y. 79.

[5] Dunbar *v.* Garrity, 58 N. H. 575.

[6] Richardson *v.* Coddington, 49 Mich. 1.

ject. There were five partners in the banking business; one, Devaynes, died, and the surviving partners continued business in the old name, without opening new books or making a rest in the accounts. On becoming bankrupt, those who had been customers, both of the old and new firm, claimed the right to resort to Devaynes' estate for the balances on their running accounts. These creditors were divided into classes. In Sleech's Case, Miss Sleech had continued to deal with the new firm, by drawing out and not depositing. No appropriation of these payments having been made at the time, it was held to be too late then to make them, and they were applied to extinguish the balance as it stood at Devaynes' death, and his estate was held to be subject to the residue. In Clayton's Case, which represented the class of creditors whose continued dealings consisted both in drawing out and paying in, the balances constantly fluctuating, but on the whole being increased, no specific appropriation of payments having been made, it was held that the payments made not only before further deposits must be credited, as in Sleech's Case, on the old balance, but that the payments made after additional deposits were also to be credited to the oldest items, and as they exceeded the old balance, Devaynes' estate was wholly discharged.

Under the same principle, where, on the death of a person, his account with a creditor was balanced, and formed the first item of the new account with his widow, who continued the business, payments by her go to discharge the estate of the decedent.[1] So where a partner retires, and another partner continues the business, making purchases from an old creditor, the accounts being blended in an unbroken series, payments may be credited on the firm's debt.[2] So if a continuing partner assumed the old debts.[3] So in case of a dormant partner, the dealings being continued after his retirement as an unbroken account, payments will be applied

[1] Sterndale v. Hankinson, 1 Sim. 393.

[2] Smith v. Wigley, 3 Moo. & Sc. 174; Hooper v. Keay, 1 Q. B. D. 178; City Discount Co. v. McLean, L. R. 9 C. P. 692, 701; Alcott v. Strong, 9 Cush. 323; Birkett v. McGuire, 31 Up. Can. C. P. 430; Fitch v. McCrimmon, 30 id. 183.

[3] Baker v. Stackpoole, 9 Cow. 420 (18 Am. Dec. 508); Lockw. Rev. Cas. 380.

to the earlier items, although this relieves the partner of whose existence the creditor was ignorant,[1] or if the creditor does not know of the addition of the incoming partner.[2]

In Toulmin *v.* Copland, 2 Cl. & Fin. 681; 3 Younge & C. Ex. 636, one partner was to contribute, as his share of capital, £40,000 in good debts, and persons owing him this amount to become customers of the firm, and their old and new debts were kept in a continuous account. Payments by such customers to the extent of £40,000 were made, and it was held that they should be applied to the earliest items, and therefore in discharge of the partner's obligation, and not of the later debts due the firm.

So where a person is surety to P., for advances to be made by him to J. & T. T. having died, and thus released the surety from liability for further advances, but the dealings being continued as if nothing had happened, subsequent remittances not specifically appropriated will be applied to the earlier items, thus relieving the surety.[3]

§ 498. Change in debtor firm.— Where the change in the debtor firm is by the introduction of a new partner, payments generally by the new firm cannot be credited upon the old account, without the incoming partner's assent to a blending of the accounts.

Thus, where A. buys out B.'s business, and assumes his debts, and continues to deal with a creditor of B., a general payment on account by A. cannot be credited on the debt of B., without A.'s consent;[4] unless the accounts are blended with his assent. See Beale *v.* Caddick, § 499, and two cases where the change of the debtor firm was by it becoming incorporated, the corporation assuming the debts of the firm.[5]

§ 499. Change in a creditor firm.—The same principles apply where the change is in the creditor firm.

So where a person owes a firm, and, one member dying, he subsequently incurs a debt to the surviving partner, payments by him not appropriated by either party will be credited upon the older account.[6]

[1] Brooke *v.* Enderby, 2 Brod. & B. 70; Newmarch *v.* Clay, 14 East, 239.

[2] Scott *v.* Beale, 6 Jur. N. S. 559.

[3] Simson *v.* Cooke, 1 Bing. 452.

[4] Burland *v.* Nash, 2 F. & F. 687.

[5] Whitwell *v.* Warner, 20 Vt. 425; Allen *v.* Frunet Min. & Smelt. Co. 73 Mo. 688.

[6] Starr *v.* Case, 59 Iowa, 491.

In Bodenham *v.* Purchas, 2 B. & Ald. 39, P., being indebted to the firm of B., C. & D., bankers, gave them a bond, with surety, to pay the debt, and such other sums as they might advance. D. died, and G. was taken into the firm and the name was changed, but the old balances were carried into the new account without change. Payments after D.'s death were required by the court to be credited on the old account. Whether these payments were before G. became a partner does not appear, but that this makes no difference was held in the following cases, if the account is continuous:

In Pemberton *v.* Oakes, 4 Russ. 154, A. was indebted to B., C. & D., bankers; B. died, and E. took his place in the firm, and A. continued dealing with them. It was urged that his payments to the new firm, having a new partner, could not be applied by mere intendment of law to the debt of the old firm, but it was held the rule in Clayton's Case applied, and the oldest items were discharged by it. If a new partner is added, and a debt against an old customer is carried forward and treated as part of the accounts of the new firm, general payments by him will be applied to the old balance if no rights of sureties or third persons are involved.[1]

In Beale *v.* Caddick, 2 H. & N. 326, the firm of H. & C. owed R., its banker; R. transferred the account to the M. bank, H. assenting, which one partner has the right to do; the M. bank had an option to decline any account within a year. Subsequent payments to the M. bank must be credited on the old account, and the bank cannot thereafter exercise the option and credit the payments to their own loans to H. & C.

§ 500. —— account not continuous.— But where the account does not appear to be continuous the new firm is entitled to appropriate general payments.

In Jones *v.* Maund, 3 Younge & Coll. 347, the change was in the creditor firm. A. owed a secured debt to B., C. & D., coal merchants, trading as B. & Co. B. and C. died, and D. afterwards retired, selling her interest to E., who, with F., continued the business as B. & Co., and A. continued dealing with them and made payments. It not being shown that A.'s debt to the original firm had been made an item in the new account, it was held that A.

[1] Morgan *v.* Tarbell, 28 Vt. 498; Bradley *v.* Richardson, 23 id. 720.

had no right to require his general payments to be credited on the old secured debt.

In Taylor *v.* Post, 30 Hun, 446, A. borrowed money from a firm, giving it a mortgage for $4,000 for the present debt and future advances; one partner died, and his administrators and surviving partners, together with new partners, continued the business, and it was agreed that the mortgage should secure further loans. Payments by A. cannot be applied to the old debt, for the second firm is not the same as the old, nor a continuation of it.

§ **501.** —— The creditor, however, may dissent from continuing the account. If he does not assent to making the old balance an item in the new account, payments will not necessarily go upon the old account. Following is the leading case on this point.

B. & J. Ingham, bankers, at Huddersfield, were indebted to Bruce & Co., bankers, in London, on a running account for advances to them and their customers on their account. B. Ingham died, but his surviving partners continued business. Bruce & Co. at first continued the account without a break, crediting subsequent payments generally, but without notifying the debtors thereof; but by the advice of their solicitors changed this and sent an account to the debtors thus, "Debtors, Messrs. B. & J. Ingham & Co. (old account), in account with Bruce & Co., creditors," and the first item on the debit side was the last balance sent previous to the death of B. Ingham. They also sent a second account in the same form, styling it the "new account," and kept the accounts separate on their books. The debtors did not object to this, but on their own books kept but one account. The court held that where the account is continued without a break by both parties payments must go against the oldest item; but that the plaintiffs had the right to distinguish, and were not precluded by the entries in their private books not communicated to the debtors.[1]

In Burns *v.* Pillsbury, 17 N. H. 66, a person who had made consignments to a firm, and was its creditor on account thereof, continued to consign after dissolution, of which he had notice, to the continuing partner. A distinction was made between the case and

[1] Simson *v.* Ingham, 2 B. & C. 65; 3 Dow. & R. 249. See, also, Morgan *v.* Tarbell, 28 Vt. 498, 501, of a change in creditor firm by the addition of a partner, the accounts being separated.

cases of banking houses, which are often continued through generations, and it was held that the consignor was not compelled to credit remittances to the old account unless proved to be of money of the old firm. This case proceeds on the basis that transactions, after a change of firm, are *prima facie* deemed to be the independent transactions of the new firm, except in banking houses, and that merely striking a balance and carrying it to the new account does not affect the original debt. This distinction might also reconcile Pemberton *v.* Oakes and Jones *v.* Maund, *supra.*

In Botsford *v.* Kleinhaus, 29 Mich. 332, plaintiffs were shipping wheat to B., B. & H. as their factors; afterwards H. retired and the firm became B. & B. Plaintiffs continued their shipments, and B. & B. transferred the old account to their books and continued it without change. On the old firm being sued by plaintiffs, it was held that plaintiffs' assent to the transfer and continuance of the account must be shown in order to include inquiry into the dealings with the new firm in the action, and that the plaintiffs had a right to assume that the business would be kept separate and were not bound by the unauthorized entries.

NOVATION.

§ **502.** When a firm dissolves, whether the dissolution be by the retirement of an old partner or the introduction of a new one, or both, and one partner or the new firm assumes the debts of the old, the dissolution and agreement do not *ipso facto* release the old liability to the creditor nor create a new one. To accomplish that result action or assent on the part of the three parties: the original debtors, the person or persons who assume the debts, and the creditor, is necessary.

We have already seen that the release of one partner by a creditor may release the entire firm,[1] when not accompanied by a promise of the other partners to pay or a reservation of rights as against them.[2] The question in this chapter is, what is a sufficient substitution of debtors or agreement to look to some of the partners and discharge the others?

§ **503. Creditor must assent.**— An agreement between the old and new partners that the latter will assume or will

[1] § 385. [2] § 387.

pay their share of the debts, or that the new firm will assume the debts, if made without the creditor being a party, or without notice to or consultation with and assent by him, cannot be taken advantage of by him. It does not convert the separate into a joint debt, but is merely like the agreement of one partner with another to pay a debt of the firm. The principle that a promise made to one person for the benefit of another can be sued upon by the latter does not apply, for this is clearly not a promise between the partners for the benefit of the creditor, but is purely for their own benefit, and as to him is *res inter alios acta.*[1]

Where the joint property is a leasehold, and one assigns his interest to the other, the landlord may recover the entire rent from the latter, for he is liable for half as tenant in common by privity of estate and of contract, and half by privity of estate.[2]

In Wild *v.* Dean, 3 Allen, 579, it was held that the rule that a creditor cannot prove his debt against the separate estate of a partner who had bought out his copartner and given him a bond to pay all the debts is not changed by the creditor's having notified such partner, or both of them, that he elected to treat it as the separate debt of such partner, without proof of the latter's assent.

[1] Following are cases where the new firm included an incoming partner: *Ex parte* Williams, Buck, 13; *Ex parte* Freeman, id. 471; *Ex parte* Fry, 1 Gl. & J. 96; *Ex parte* Parker, 2 M. D. & D. 511; *Ex parte* Peele, 6 Ves. 602; Vere *v.* Ashby, 10 B. & C. 288; *Re* Isaacs, 3 Sawy. 35; 6 Bankr. Reg. 92; Lee *v.* Fontaine, 10 Ala. 755; 44 Am. Dec. 505; Hicks *v.* Wyatt, 23 Ark. 55; Goodenow *v.* Jones, 75 Ill. 48; Locke *v.* Hall, 9 Me. 133; Manny *v.* Frasier, 27 Mo. 419; Parmalee *v.* Wiggenhorn, 5 Neb. 322; Morehead *v.* Wriston, 73 N. Ca. 398; Torrens *v.* Campbell, 74 Pa. St. 470; Kountz *v.* Holthouse, 85 id. 233; Piano Co. *v.* Bernard, 2 Lea, 358, 360; McKeand *v.* Mortimore, 11 Up. Can. Q. B. 423.

Following are cases where the dissolution was by the retirement of a partner without the addition of a new one: *Ex parte* Bradbury, 4 Deac. 202; Robb *v.* Mudge, 14 Gray, 534; Wild *v.* Dean, 3 Allen, 579; Fowle *v.* Torrey, 131 Mass. 289; Ayres *v.* Gallup, 44 Mich. 13; Spaunhorst *v.* Link, 46 Mo. 197; Merrill *v.* Green, 55 N. Y. 270; Macintosh *v.* Fatman, 38 How. Pr. 145; Campbell *v.* Lacock, 40 Pa. St. 448. In Shoemaker *v.* King, 40 Pa. St. 107, a firm sold out its entire business to a third person, who assumed the debts, and a creditor attempted to sue the buyer and failed.

[2] Dwight *v.* Mudge, 12 Gray, 23.

As the debtor cannot convert a joint into a separate debt without the creditor's assent, neither can the creditor without the debtor's assent. The agreement is only a private executory agreement between the partners, to regulate their duties between themselves, to which the creditors were neither parties nor privies. The cases which have gone the farthest show a promise by the partner to take on himself the burden of payment.

In Parmalee *v.* Wiggenhorn, 5 Neb. 322, C. had agreed to sell all the produce of his mill for a year to the plaintiff. He then sold half the mill to W. and formed a partnership with him and continued to deliver to plaintiff. He then sold the other half to G., who knew of the contract and assumed all C.'s responsibilities, and W. & G. agreed to continue to deliver the produce, but afterwards refused to do so. These facts were held not to show a cause of action against the new firm in favor of plaintiff, for there must be a novation of all the parties, extinguishing the old contract and creating a new liability on some consideration, and a mere receipt of payment by the new firm does not raise a presumption of an agreement to be liable for the breach.[1]

§ 504. —— **contrary authorities.**—Some other states, however, repudiate this doctrine, in part at least, that the creditor cannot take advantage of the agreement between the new and old firms, by which the latter assumes the debts and agrees to pay them.[2]

And others hold that where the new firm receives assets for which their assumption of the debts was part considera-

[1] Where a partner, indebted to one Y., retired, in consideration of which the remaining partners assumed this debt to Y., and Y. thereupon orally released the retiring partner, and an agent of the remaining partners by mistake placed the amount of the debt on the books to the credit of X. & Y., instead of to Y. alone, but X. claimed no interest in it, Y. can avail himself of the credit and hold the remaining partners. There is a complete novation. York *v.* Orton, 65 Wis. 6.

[2] Following are the cases where there was no incoming partner: Hood *v.* Spencer, 4 McLean, 168; Hoyt *v.* Murphy, 18 Ala. 316, allowing a set-off of the claim; Devol *v.* McIntosh, 23 Ind. 529; Hardy *v.* Blazer, 29 id. 226; Dunlap *v.* McNeil, 35 id. 316; Haggerty *v.* Johnston, 48 id. 41; Way *v.* Fravel, 61 id. 162; Powers *v.* Fletcher, 84 id. 154. Following are the cases where there was an incoming partner: Poole *v.* Hintrager, 60 Iowa, 180; Colt *v.* Wilder, 1 Edw. Ch. 484; Arnold *v.* Nichols, 64 N. Y. 117. See Smead *v.* Lacey, 1 Disney, 239, noticed fully under § 510.

tion, and agrees to apply these assets to the debts, this promise inures to creditors.[1]

In Arnold *v.* Nichols, 64 N. Y. 117, a person in business by himself took in a partner and transferred the assets to the firm in consideration that the firm would pay the debts of the business and apply the assets to such debts. It was held that a creditor could sue the firm on such an agreement, as being made for his benefit, for the agreement was not primarily for the benefit of the original debtor.[2]

In Osborn *v.* Osborn, 36 Mich. 48, C., of A., B. & C., sold his interest to D., who assumed C.'s share of the liabilities and took his place in the firm. A creditor of A., B. & C. then sued A., B. & D., averring a promise by them to pay the debt, and it was held she could recover, but that this was not on the principle of a promise made between the partners for her benefit, and that payments on the debt by the new firm was evidence of a substitution by consent of both parties. That her husband, who was also a member of the firm, made the payments is immaterial, since this is supposed to be known to all the partners where no circumstances of secrecy are shown. It is to be noticed of this case, however, that the retiring partner had assigned to the creditor all claim he had against the new partners on the agreement between them.

In Francis *v.* Smith, 1 Duv. 121, the retiring partner having obtained a judgment against the incoming partner on his agreement to pay debts, a creditor of the firm was, on the retiring partner's consenting thereto, entitled to be substituted to such judgment.

§ **505. Consideration.**— The creditor's promise to one partner to release him, although made after dissolution upon

[1] See Torrens *v.* Campbell, 74 Pa. St. 470, 474–6; Kountz *v.* Holthouse, 85 Pa. St. 233; and Arnold *v.* Nichols, 64 N. Y. 117. And see Hopkins *v.* Johnson, 2 La. Ann. 842; Sedam *v.* Williams, 4 McLean, 51; Marsh *v.* Bennett, 5 id. 117. A firm indebted for legal services was dissolved by decree fixing the shares of each partner, and adjudging that one partner on paying this debt should take the effects. On taking the effects he becomes liable to the attorneys. McKillip *v.* Cattle, 12 Neb. 477.

[2] S. P. Turner *v.* Jaycox, 40 N. Y. 470, 474; but *contra*, where there was no incoming partner, Merrill *v.* Green, 55 N. Y. 270. Possibly Alabama and Michigan also make a distinction between cases where there is and is not an incoming partner. Compare the foregoing list of cases.

the retirement of such partner, when not accompanied by a promise of the other partner to the creditor to assume the entire debt, or by a change of security, is a *nudum pactum*, because founded on no consideration whatever.[1] So a mere promise by the new concern to pay the debt is a *nudum pactum;* as where a firm indebted to the plaintiff became incorporated, the president of the corporation promised a creditor of the firm that it would pay the debt, the promise is without consideration.[2] But if the other partner promise the creditor to assume and pay the entire debt, and the creditor promises to look to him alone, a substitution of debtors is effected, and the other partner is released. This is founded on the doctrine that the sole liability of one of two debtors may, under many circumstances, be more beneficial and convenient than the joint liability of two, and therefore the change is founded upon a valuable consideration; and whether it was actually a benefit in each particular case will not be looked into, but the agreement will be sustained.[3]

§ 506. Original debtor still liable.— In the absence of a novation, the original debtor or debtors continue liable, of course, for a debtor cannot affect his own sole liability by

[1] Thomas *v.* Shillabeer, 1 M. & W. 124; Clark *v.* Billings. 59 Ind. 508; Eagle Mfg. Co. *v.* Jennings, 29 Kan. 657 (44 Am. Rep. 658); Chase *v.* Vaughan, 30 Me. 412; Wildes *v.* Fessenden, 4 Met. 12; Walstrom *v.* Hopkins, 103 Pa. St. 118; Collyer *v.* Moulton, 9 R. I. 90.

[2] Georgia Co. *v.* Castleberry, 43 Ga. 187.

[3] Thompson *v.* Percival, 5 B. & Ad. 925; Lyth *v.* Ault, 7 Ex. 667; *Re* Clap, 2 Low. 226; Backus *v.* Fobes, 20 N. Y. 204; Collyer *v.* Moulton, 9 R. I. 90; Ætna Ins. Co. *v.* Peck, 28 Vt. 93. *Contra*, that being merely a promise to pay his own debt, it is no consideration for a release of the copartner where no new note or extension of time or other change is made, Early *v.* Burt, 68 Iowa, 716; Wild *v.* Dean, 3 Allen, 579, 581. And see Walstrom *v.* Hopkins, 103 Pa. St. 118; and Clark *v.* Billings, 59 Ind. 508. Clark *v.* Brooks (Pa. Com. Pl. 1887), 19 Weekly Notes, 333, that a release of retiring partner, and taking note of the new firm, is not sustained by any consideration if no new partner has come in. The cases of Lodge *v.* Dicas, 3 B. & Ald. 611, and David *v.* Ellice, 5 B. & C. 196; 7 Dow. & Ry. 690; aff'g 1 C. & P. 368, which also held that such mere promise, no note being given, was not a consideration, are in this respect overruled by Thompson *v.* Percival, 5 B. & Ald. 925; Lyth *v.* Ault, 7 Ex. 667, and Hart *v.* Alexander, 2 M. & W. 484.

going into partnership. And the same principle applies to executory contracts; as where services are agreed to be rendered to a person, or goods supplied to him, and he takes in a partner, and the services or goods are received by the partnership, the original debtor still continues chargeable on the contract.

Thus, where the plaintiff contracted to enter the employment of defendant, and defendant took in a partner; or, if a firm, and it took in a new partner, and the services were then rendered to the firm, the original contract is not extinguished, and a new one with the firm substituted, and the continuance of his duties by the employee is not a waiver of the contract.[1]

So, where T. engaged P. to board one of his hands, and T. afterwards took in C. as a partner, and the hand became the employee of the firm, P. can sue T. alone for subsequent board, until he has knowledge of such facts as render it imperative upon him to change his mode of charging.[2]

So, if a tenant from year to year takes in a partner in the business for which the premises were used, this does not alter his sole liability to his landlord.[3]

§ 507. Incoming partner not liable for old debts.— The more difficult question arises, what facts are sufficient to show an agreement by the creditor to discharge some of the partners and look to the rest as his sole debtors? A substitution of debtors does not require an express agreement, but results from the intention of the parties gathered from their acts and declarations, inconsistent with a continuance of the original liability.

A person becoming a member of an existing firm, or forming a partnership with another in the latter's existing business, does not thereby become liable for the debts already incurred, nor does the new firm become liable for them. An agreement, express or implied, is necessary to create such liability, not only between the creditors and the new firm but also as between the partners; that is to say, the pre-

[1] Fifield *v.* Adams, 3 Iowa, 487; Froun *v.* Davis, 97 Ind. 401.

[2] Taggart *v.* Phelps, 10 Vt. 318.

[3] Barlow *v.* Wainwright, 22 Vt. 88 (52 Am. Dec. 79). See § 508.

sumption is against the assumption of such liability, and the burden to prove it is upon the one who asserts it. This is like the principle governing the cases where a contract is made with one partner, or a credit is extended to one of a firm, upon which the copartners are not liable.[1]

In Gaus *v.* Hobbs, 18 Kan. 500, P. and H. met on September 9th, and conversed about forming a partnership but came to no agreement. Shortly afterwards P. bought from plaintiffs the goods for which this action was brought, in the name of P. & H. On October 19th, P. and H. met again and formed a partnership, P. putting in the goods as part of his capital, H. being ignorant of the facts of the purchase, and it was held that H. was not liable. It was further said, p. 504, that even had H. learned of the facts, he would not have been bound to repudiate accountability, for an incoming partner is not obliged to act to prevent responsibility, but must act in order to incur one.

In Shafer's Appeal, 99 Pa. St. 246, Shafer owed the banking firm

[1] Atwood *v.* Lockhart, 4 McLean, 350; Butler *v.* Henry, 48 Ark. 551; Citizens' Bank *v.* Hine, 49 Conn. 236; Bryan *v.* Tooke, 60 Ga. 437; Bracken *v.* Ellsworth, 64 id. 243; Morris *v.* Marqueze, 74 id. 86; Watt *v.* Kirby, 15 Ill. 200; Wright *v.* Brosseau, 73 id. 381; Goodenow *v.* Jones, 75 id. 48; Smith *v.* Hood, 4 Ill. App. 360; Wheat *v.* Hamilton, 53 Ind. 256; Tifield *v.* Adams, 3 Iowa, 487; Sternburg *v.* Callanan, 14 id. 251; Cadwallader *v.* Blair, 18 id. 420; Waller *v.* Davis, 59 id. 103; Cross *v.* National Bank, 17 Kan. 336; Gaus *v.* Hobbs, 18 id. 500; Duncan *v.* Lewis, 1 Duv. (Ky.) 183; Meador *v.* Hughes, 14 Bush, 652; Mosseau *v.* Thebens, 19 La. Ann. 516; Beall *v.* Poole, 27 Md. 645; Guild *v.* Belcher, 119 Mass, 257; Lake *v.* Munford, 4 Sm. & Mar. 312; Fagan *v.* Long, 30 Mo. 222; Deere *v.* Plaut, 42 id. 60; Wilgus *v.* Lewis, 8 Mo. App. 336; Parmalee *v.* Wiggenhorn, 6 Neb. 322; Howell *v.* Sewing Machine Co. 12 id. 177; Durand *v.* Curtis, 57 N. Y. 7; Sizer *v.* Ray, 87 id. 220; Fuller *v.* Rowe, 57 id. 23; Pierce *v.* Alspaugh, 83 N. Ca. 258; Brooke *v.* Evans, 5 Watts, 196; Babcock *v.* Stewart, 58 Pa. St. 179; Shamburg *v.* Ruggles, 83 id. 148; Hart *v.* Kelley, 83 id. 286; Morrison's Appeal, 93 id. 326; Shafer's Appeal, 99 id. 246; Holmes *v.* Caldwell, 8 Rich. (S. Ca.) L. 247; Piano Co. *v.* Bernard, 2 Lea (Tenn.), 358; Bank *v.* Gray, 12 id. 459; Adkins *v.* Arthur, 33 Tex. 431, 440; Hart *v.* Tomlinson, 2 Vt. 101; Poindexter *v.* Waddy, 6 Munf. 418 (8 Am. Dec. 749); Peters *v.* McWilliams, 78 Va. 567; McLinden *v.* Wentworth, 51 Wis. 170, 181; Hine *v.* Beddome, 8 Up. Can. C. P. 381; McKeand *v.* Mortimore, 11 Up. Can. Q. B. 428. For Louisiana law as to liability of widow who has accepted the succession of her husband for prior debts of the firm, see Henderson *v.* Wadsworth, 115 U. S. 264.

of D. & Co. on a note on which he had paid them usurious interest. One of the partners having died the survivors and another formed a new firm under the old name, but assumed none of the old debts. Shafer borrowed money of the new firm wherewith to pay his debts to the old. It was held that he could not compel the application of the usury paid the old firm on account of the debt to the new. The new partner cannot be prejudiced by the claim against the old firm.

In Morrison's Appeal, 93 Pa. St. 326, B., of B. & L., bought out L., but, while still in debt to L. for part of the purchase money, failed. While B. was still in business he gave accommodation notes to L., then trading under the name of L. & W., which L. agreed to protect. Afterwards L. took in T. and M. as partners, still under the name of L. & W. As the note matured, B. gave other notes to L. & W. to take up the old ones, and the new firm indorsed and used them for that purpose, and when B. failed these notes were proved against his estate. As the new firm of L. & W. received none of the proceeds of the renewal notes, it was held that they owed nothing to B., and therefore could prove against his estate a claim for goods sold by them to B.

Where a claim was placed for collection in the hands of a firm of attorneys who afterwards dissolved and formed a new firm with another partner, and the new firm dissolved before any steps to collect the claim were taken, and the collection was then made by the original partner of the new firm, the incoming partner was held not to be liable to the client for the amount.[1]

§ **508.** Even where the partners have before forming the partnership made contracts, each upon his individual credit, though with the intention and under the agreement to contribute the goods or money thereby obtained to the projected firm, and has brought them in as agreed, the firm or the other partners are not liable on such contracts. The partnership until actually formed is inchoate, and the agency of each partner to act for the others has not begun. The fact that the new firm received the benefit of the contracts does not create a liability. These principles have been examined in treating of contract with one partner, and inchoate partnerships.

[1] Ayrault *v.* Chamberlin, 26 Barb. 83.

A quite usual application of the doctrine is where a person leases property for the purposes of his business, and then takes in partners. The latter do not thereby become liable for the rent merely by becoming partners and occupying.[1]

Where the order is for a definite quantity of goods, the incoming partners are, of course, not liable for subsequent deliveries under the contract under the principles stated in the foregoing sections;[2] but even here, if the subsequent delivery be made to and on the credit of the firm, and received by them, not on behalf of the original contractor, but on joint account, at the request of the original contractor, for the latter, such request renders the firm liable for the price, for the contractor has the same power to receive them on joint account, where the title has not already passed to him, that he has to make a new contract of purchase for the firm.[3]

Where the contract is not for the delivery of a definite number or amount of goods, but is a continuing contract for delivery at a certain price, the goods supplied after the partnership has been formed are deemed to be delivered as upon a tacit contract with the new firm.[4]

And in such cases, if the change is in the retirement of a partner, he is not exonerated by the fact of notice to the shipper that the

[1] Durand *v.* Curtis, 57 N. Y. 7; Pierce *v.* Alspaugh, 83 N. Ca. 258; Brooke *v.* Evans, 5 Watts, 196; Barlow *v.* Wainwright, 22 Vt. 88 (52 Am. Dec. 79). And see Lucas *v.* Coulter, 104 Ind. 81; Wilgus *v.* Lewis, 8 Mo. App. 336; Jackson *v.* Salmon, 4 Wend. 327.

[2] Goodenow *v.* Jones, 75 Ill. 48; Duncan *v.* Lewis, 1 Duv. 183; Beale *v.* Mouls, 10 Q. B. 976.

[3] Smith *v.* Hood, 4 Ill. App. 360; Watt *v.* Kirby, 15 Ill. 200; Johnson *v.* Barry, 95 id. 483.

[4] Dyke *v.* Brewer, 2 Car. & K. 828, where bricks were to be supplied by plaintiff to A. at a certain price, but of no definite quantity. A. took B. into partnership. Subsequent deliveries were held to be on the credit of the firm and on its implied agreemen to pay for them; although had A. contracted at first for the entire quantity, he alone would have been liable for them. Helsby *v.* Mears, 5 B. & C. 504 (as explained in Beale *v.* Mouls, 10 Q. B. 976), where the owner of certain coaches contracted with B. for the carriage of parcels which B. was in the habit of sending to various places. This contract was held to bind incoming partners. Compare, also, Winston *v.* Taylor, 28 Mo. 82, noticed at the end of this section.

property so bailed is turned over to the new firm, for he cannot release himself without the consignor's assent.[1]

But in Winston *v.* Taylor, 28 Mo. 82, where cattle were delivered to be herded, and some were lost after one bailee had retired, it was held that if property is not bailed for a definite time, the bailor, on notice of retirement of a partner, must remove his property within a reasonable time, or look to the new firm alone. Directing the new firm to sell and remit was held to be taking a control that absolves the ex-partner.[2]

And where a person holds the merchandise or other property of another for sale for him, for example, as agent or factor, and takes in partners, and the new firm sells the goods so consigned, they are liable for the proceeds to the consignor or owner, for the firm only takes the title of the original consignee.[3]

§ 509. —— **note of new firm without consent of incoming partner.**— If, after the new partner is taken in, one or all of the original partners make a note or bill in the name of the new firm for a debt of the old, without the assent of the incoming partner who had not assumed the old debts, this note is in violation of the rights of the new firm, and is governed by the same rules that apply to any other note or use of the partnership name by one partner without authority for his own benefit. That is, the note does not bind the non-assenting partners in the hands of the payee or any one holding under him, other than a *bona fide* indorsee before maturity without notice.[4]

Where, however, the members of C. & Co., with other persons, formed another firm of H. & Co., and C. & Co. had a sum standing to

[1] Dean *v.* McFaul, 23 Mo. 76; Holden *v.* McFaul, 21 id. 215; Hall *v.* Jones, 56 Ala. 493.

[2] Hall *v.* Jones, 56 Ala. 493.

[3] Dix *v.* Otis, 5 Pick. 38; Piano Co. *v.* Bernard, 2 Lea, 358.

[4] Shirreff *v.* Wilks, 1 East, 48; *Ex parte* Goulding, 2 Gl. & J. 118; Wilson *v.* Lewis, 2 M. & G. 197; S. C. as Wilson *v.* Bailey, 9 Dowl. P. C. 18; Citizens' Bank *v.* Hine, 49 Conn. 236; Baxter *v.* Plunkett, 4 Houst. 450; Bryan *v.* Tooke, 60 Ga. 437; Wright *v.* Brosseau, 73 Ill. 381; Waller *v.* Davis, 59 Iowa, 103; Guild *v.* Belcher, 119 Mass. 257; Fagan *v.* Long, 30 Mo. 222; Howell *v.* Sewing Machine Co. 12 Nebr. 177.

its credit on the books of H. & Co., and C., of both firms, drew on the new firm in favor of a creditor of C. & Co. for an amount less than the credit on the books, and accepted the draft in the name of the new firm, the new firm is bound by the draft, for this is merely paying the debt of the new firm to the old.[1]

Where the new note includes a debt of the new firm with that of the old, the payee can recover upon it against the new firm to the extent of the valid consideration, the payee having acted in good faith in receiving the note.[2]

§ 510. —— **may adopt old debts.**— The incoming partner may, however, become liable for the existing indebtedness by an express promise to pay it, or by an assumption of the debt on proper consideration.[3]

[1] Hester *v.* Lumpkin, 4 Ala. 509.

[2] Guild *v.* Belcher, 119 Mass. 257; Wilson *v.* Lewis, 2 M. & G. 197; S. C. as Wilson *v.* Bailey, 9 Dowl. P. C. 18.

[3] Burritt *v.* Dickson, 8 Cal. 113; Markham *v.* Hazen, 48 Ga. 570; Wilson *v.* Dozier, 58 id. 602; Bracken *v.* Ellsworth, 64 id. 243; Morris *v.* Marqueze, 74 id. 86; Warren *v.* Dickson, 30 Ill. 363; Goodenow *v.* Jones, 75 id. 48; Silverman *v.* Chase, 90 id. 37; Johnson *v.* Barry, 95 id. 483; Frazer *v.* Howe, 106 id. 563; McCracken *v.* Milhous, 7 Ill. App. 169; Lucas *v.* Coulter, 104 Ind. 81; Sternburg *v.* Callanan, 14 Iowa, 251; Preusser *v.* Henshaw, 49 id. 41; Poole *v.* Hintrager, 60 id. 180; Cross *v.* National Bank, 17 Kan. 336; Beall *v.* Poole, 27 Md. 645; Shaw *v.* McGregory, 105 Mass. 96; Botsford *v.* Kleinhaus, 29 Mich. 332; Osborn *v.* Osborn, 36 Mich. 48; Coleman *v.* Pearce, 26 Minn. 123; Mueller *v.* Wiebracht, 47 Mo. 468; Baum *v.* Fryrear, 85 id. 151; Parmalee *v.* Wiggenhorn, 5 Neb. 322; Howell *v.* Sewing Machine Co. 12 id. 177; Morrison *v.* Blodgett, 8 N. H. 238 (29 Am. Dec. 653); Colt *v.* Wilder, 1 Edw. Ch. 484; Durand *v.* Curtis, 57 N. Y. 7; Arnold *v.* Nichols, 64 id. 117; Bate *v.* McDowell, 17 Jones & Sp. 106; Abpt *v.* Miller, 5 Jones (N. Ca.), L. 32; Broaddus *v.* Evans, 63 N. Ca. 633; Morehead *v.* Wriston, 73 N. Ca. 398; Smead *v.* Lacey, 1 Disney, 239; Torrens *v.* Campbell, 74 Pa. St. 470; Shamburg *v.* Ruggles, 83 id. 148; Hart *v.* Kelley, 83 id. 286; Kountz *v.* Holthouse, 85 id. 233; White *v.* Thielens, 106 id. 173; Earon *v.* Mackey, 106 id. 452; Updike *v.* Doyle, 7 R. I. 446; Piano Co. *v.* Bernard, 2 Lea (Tenn.), 358; Wallace *v.* Freeman, 25 Tex. Sup. 91; Allen *v.* Atchison, 26 Tex. 616, 628; Hobbs *v.* Wilson, 1 W. Va. 50; Jones *v.* Bartlett, 50 Wis. 589; Hine *v.* Beddome, 8 Up. Can. C. P. 381. In Smead *v.* Lacey, 1 Disney, 239, this assumption of old debts by the new firm was held inferable from the facts that the course of business was to pay old debts indiscriminately, without charging them up to the old firm, and no account of stock was taken on the new partner coming in, or any change made in the books or new ones opened, and old and new creditors were held to be payable equally

A mere promise by the incoming partner alone to a creditor to pay the debt where the original liability of the former partners is not released is within the statute of frauds as a promise to pay the debt of another.[1] There must be a promise to the creditor upon a new consideration or a release of the prior individual or former firm.[2] A promise, however, by the new firm which the creditor accepts, and in doing so releases the former debtor or debtors, is not collateral and not within the statute of frauds.[3]

§ **511. Assumption shown by acts; estoppel.**— But the assumption of the debts in favor of the creditor may be implied from acts and conduct towards the creditor.[4]

The incoming partner may also become liable by so acting towards the creditor as to be estopped to deny an assumption of the debt by him.

In Burritt *v.* Dickson, 8 Cal. 113, the creditor demanded his debt, and the new partner, knowing the creditor did not know whether the new firm was or was not liable, did not deny the liability, and the creditor was thus induced to sue the new firm. This was ruled to constitute an estoppel, though on rehearing the judgment was set aside, as the plaintiff was found to have drawn the partnership articles and therefore knew that there was no liability.

In Coleman *v.* Pearce, 26 Minn. 123, C. consigned wheat to O., to be sold when ordered by him, on commission. Before order to sell, O. took in P. as partner, both of them notifying C. thereof, and accounts were rendered in the firm name to C., showing that C.'s account and the consigned property had been transferred to the firm. C., trusting to the firm's responsibility, did not order

on the insolvency of the new firm. It nowhere appears from the report that the old creditors assented to the novation.

[1] Bracken *v.* Ellsworth, 64 Ga. 243; Sternburg *v.* Callanan, 14 Iowa, 251. But see Poole *v.* Hintrager, 60 Iowa, 180. But after payments by the new firm, credited by their agreement on the old account, it is too late to raise the question of the statute of frauds. Mueller *v.* Wiebracht, 47 Mo. 468.

[2] Morris *v.* Marqueze, 74 Ga. 86; Goodenow *v.* Jones, 75 Ill. 48; Shoemaker *v.* King, 40 Pa. St. 107.

[3] Wallace *v.* Freeman, 25 Tex. Supp. 91; Shoemaker *v.* King, 40 Pa. St. 107. See White *v.* Thielens, 106 Pa. St. 173.

[4] McCracken *v.* Milhous, 7 Ill. App. 169; Lucas *v.* Coulter, 104 Ind. 81; Beall *v.* Poole, 27 Md. 645; Updike *v.* Doyle, 7 R. I. 446; Piano Co. *v.* Bernard, 2 Lea, 358, 360.

sale for several months, and then learned that O. had converted the wheat to his own use prior to forming the partnership. It was held that both partners were estopped to deny the truth of their false representations.

Slight evidence will be sufficient to warrant the court in inferring that the incoming partner or the new firm has assumed the debts of the old, especially if he or they have received the benefit of those debts.[1]

If, on the death of a partner, his widow takes his place in the firm, intending there shall be no change in the business operations, and a current contract is continued to be carried out, and she derives a benefit from it, the conclusion may be drawn that she intended to assume the same burdens that the husband would, if living, have had;[2] and if she gives a mortgage for his partnership debts, it will be presumed that she intended to become liable for them; and that the mortgage is on valid consideration, as against other creditors.[3] So writing to the creditor, recognizing the debt, and scheduling it as a partnership debt, shows an assumption.[4]

But a mere statement by the new partner, that he would like to give new notes for the old, and had no loose money about him, is not an assent to the making of notes, any more than a willingness to lend credit is authority to use the firm name;[5] and agreeing with the former partners, that the cost of fitting up the premises shall be considered as expenses, before dividing profits, is not assuming the debt therefor, except so far as there may be profits out of which to pay it.[6]

A rendering of an annual account, by the new firm, with the old balance as part of it, does not make the new firm liable;[7] but if so done at the creditor's suggestion, or with his assent, is evidence of his adoption of the new firm as his debtors, if they had assumed the debt.[8]

[1] *Ex parte* Peele, 6 Ves. Jr. 602, 604; *Ex parte* Jackson, 1 id. 131; Wheat *v.* Hamilton, 53 Ind. 256; Cross *v.* National Bank, 17 Kan. 336. See Smead *v.* Lacey, 1 Disney, 239, abstracted in § 510. *Contra*, that he should not be held liable on slight circumstances, Bracken *v.* Ellsworth, 64 Ga. 243; Beall *v.* Poole, 27 Md. 645.

[2] Frazer *v.* Howe, 106 Ill. 563.

[3] Preusser *v.* Henshaw, 49 Iowa, 41.

[4] White *v.* Thielens, 106 Pa. St. 173.

[5] Howell *v.* Sewing Machine Co. 12 Nebr. 177.

[6] Hart *v.* Kelley, 83 Pa. St. 286.

[7] *Ex parte* Parker, 2 M. D. & D. 511.

[8] Hine *v.* Beddome, 8 Up. Can. C. P. 381.

So payment of interest, or a partial payment, to the creditor, by the new firm, though it may be some evidence of an assumption by it of the debt, as between the partners, is not with the creditor.[1] And where the new firm agreed with the retiring partner to continue delivery of produce, under a contract with plaintiff, the mere receipt of payments from the plaintiff does not raise a presumption that the new firm had agreed to be liable to the plaintiff for refusal to continue delivery.[2]

§ 512. —— **entries on books of new firm.**— Entering the old debt in the books as a debt of the new concern fixes upon the incoming partner the consequences of a knowledge that it is claimed to be their debt, and is evidence that it is so;[3] but *contra* if the incoming partner had no access to the books, and did not know of such entries.[4]

So carrying on the accounts of the new firm in the old books, without any line of demarcation or distinction between the payments, balances, debts or assets of the old and new concerns, as a continuous business, may be evidence of an assumption of the earlier part of a continuing unbroken account.[5]

The doctrine of the application of payments, where an account is kept on in an unbroken line, through changes in the membership of firms, has been already considered.

[1] *Ex parte* Parker, 2 M. D. & D. 511; Beale *v.* Mouls, 10 Q. B. 976; Morehead *v.* Wriston, 73 N. Ca. 398; Shamburg *v.* Ruggles, 83 Pa. St. 148. *Contra*, that it is evidence of a novation by consent of both parties. Osborn *v.* Osborn, 36 Mich. 48; Cross *v.* National Bank, 17 Kan. 336.

[2] Parmalee *v.* Wiggenhorn, 5 Neb. 322. And see Goodenow *v.* Jones, 75 Ill. 48.

[3] *Ex parte* Kedie, 2 Deac. & C. 321; *Ex parte* Whitmore, 3 M. & A. 627; 3 Deac. 365; S. C. on appeal as *Ex parte* Jackson, 2 M. D. & D. 146; Rolfe *v.* Flower, L. R. 1 P. C. 27; *Ex parte* Griffin, 3 Ont. App. 1; Cross *v.* National Bank, 17 Kan. 336; Abpt *v.* Miller, 5 Jones (N. Ca.), L. 32; Updike *v.* Doyle, 7 R. I. 446; Piano Co. *v.* Bernard, 2 Lea, 358; Hine *v.* Beddome, 8 Up. Can. C. P. 381.

[4] *Ex parte* Peele, 6 Ves. 602; Piano Co. *v.* Bernard, 2 Lea, 358.

[5] Rolfe *v.* Flower, L. R. 1 P. C. 40; Bate *v.* McDowell, 17 Jones & Sp. 106; Smead *v.* Lacey, 1 Disney, 239; Shamburg *v.* Ruggles, 83 Pa. St. 148; Earon *v.* Mackey, 106 Pa. St. 452; Updike *v.* Doyle, 7 R. I. 446. But will not control other improbabilities, *Ex parte* Sandham, 4 Deac. & Ch. 812.

§ 513. —— examples of agreements inter se.— A written agreement between the owner of a business carried on in a store leased by him and an incoming partner, that the partners should be equally liable for debts and liabilities suffered or created on account of the firm, does not include the rent accruing after dissolution of the new firm, and the incoming partner is not liable for it, although there had been a prior parol agreement that the firm should be liable for the rent during the whole unexpired term.[1]

Where H. bought half of B.'s business and went into partnership with him, agreeing to assume and pay half the debts owing on the stock, but having failed to do so, and B. having paid nearly all the debts, it was held that a debt due from B. for work in the store could be proved against the firm's assignee for creditors; that the words owing on the stock should not receive a narrow construction, but should be held to mean incurred on account of the concern.[2]

Where one partner of an existing firm assigns part of his interest to a person by agreement, constituting such person "a partner in the firm to the amount of one-eighth of all its profits and losses from the time the firm began business," and such person is received by the firm as a member, he is a partner from the beginning and liable for existing debts. No other construction is reasonable, especially where there is no change of name or of accounts or new books.[3]

Where a person bought out the business of Z. & C., a partnership, and C. & T. then formed a partnership and bought out from him the same business under articles providing that C. & T. would assume the debts of Z. & C., it was held that T. could show by parol that he was induced to enter the contract by C.'s exhibiting to him a list of the debts of Z. & C., from which one debt was omitted, as evidence that, as between the partners, that debt was not assumed.[4]

§ 514. —— fraud on the incoming partner.— Where fraud has been practiced on the incoming partner to induce him to enter the firm and assume part of the debts, he can make any defense against the claim of a creditor of the former firm that he could if his copartner were suing him on the contract to assume, where the creditor is seeking to recover on the contract between the

1 Durand *v.* Curtis, 57 N. Y. 7.

2 Jones *v.* Bartlett, 50 Wis. 589.

3 Earon *v.* Mackey, 106 Pa. St. 452.

4 Torrens *v.* Campbell, 74 Pa. St. 470, 474.

partners, for the creditor's claim is subject to any weakness in such contract, as fraud, mistake, want of consideration, and the like.[1]

But the incoming partner must have repudiated or rescinded the contract on discovery of the fraud, otherwise he cannot make such defense, for he cannot retain the fruits of it, especially where the assets transferred were sufficient to pay the debts, and refuse to perform.[2]

§ 515. —— **note for debt assumed by new firm.**— If a partnership is formed before goods purchased by one of the partners are paid for, and the partners agree that the new firm shall use and pay for the goods, and one of them gives the firm's note or acceptance to the seller in payment, this binds the firm. It is held to be on a perfectly good consideration, and it is but just that the firm should assume the debt.[3]

If a note is given by one partner for the debt of the prior firm, a recognition of the note and promise to the creditor to pay it on the part of the new partner is evidence that he assumed the debts and makes the note valid.[4] Or an assent to the issuing of the new note by being present when its propriety was discussed.[5]

If, after a partner has sold out to a third person who forms a new firm with the continuing partner, execution against the old firm is levied on the goods, and the new firm receipts to the sheriff and promises to pay or re-deliver, the promise is good, for the goods ought to pay the debt.[6]

§ 516. —— **assent of creditor.**— Except in those few states where the creditor can sue the new firm on their assumption of the debts of the old without his being a party to such change, a request to the creditor and his assent are necessary in the above cases to render the new firm liable

[1] Torrens *v.* Campbell, 74 Pa. St. 470, 474. And see Morris *v.* Marqueze, 74 Ga. 86.

[2] Arnold *v.* Nichols, 64 N. Y. 117.

[3] Markham *v.* Hazen, 48 Ga. 570; Morris *v.* Marqueze, 74 id. 86; Silverman *v.* Chase, 90 Ill. 37; Johnson *v.* Barry, 95 id. 483; Rice *v.* Wolff, 65 Wis. 1.

[4] Wilson *v.* Dozier, 58 Ga. 602; Cross *v.* National Bank, 17 Kan. 336.

[5] See Shaw *v.* McGregory, 105 Mass. 96.

[6] Morrison *v.* Blodgett, 8 N. H. 238; 29 Am. Dec. 653.

to him on its agreement to pay the debts of the old. Without this there is no novation.

Such assent may be proved by acts. Thus, where the creditor, on request of the new firm, made up his account and drew on the new firm for the amount, this is evidence of assent.[1] A former attachment by the creditor for the same debt against the new firm is evidence of his intent to release the retiring partner and charge the new firm.[2]

It is too late for the creditor to assent to holding the new firm liable in place of the old after the incoming partner has retired from the new firm;[3] or after the bankruptcy of the new firm, for they cannot then contract.[4]

The fact that the creditor was a lunatic makes no difference.[5]

§ 517. —— practice.— A declaration against four persons as partners for goods sold and delivered, money lent, work done, etc., will sustain proof that the debts were incurred by two partners, and that the other two subsequently joined the firm, and the new firm agreed to pay. This is not a variance, it not being averred that they were partners at the date of the delivery or lending.[6]

But where there are retired partners, as well as new ones, there can be no action against all jointly unless there was a joint promise by all, for either the old firm or the new is liable.[7]

§ 518. Change without incoming partners.— Where a firm is dissolved by the retirement of a partner, no new partner coming in, a creditor's continued dealing with the

[1] *Ex parte* Jackson, 2 M. D. & D. 146; s. c. in the court below as *Ex parte* Whitmore, 3 M. & A. 627; 3 Deac. 365; or included the old balance in the new account at his request, Hine *v.* Beddome, 8 Up. Can. C. P. 381.

[2] Baum *v.* Fryrear, 85 Mo. 151.

[3] McKeand *v.* Mortimore, 11 Up. Can. Q. B. 428.

[4] *Ex parte* Freeman, Buck, 471.

[5] *Ex parte* Parker, 2 M. D. & D. 511.

[6] Beall *v.* Poole, 27 Md. 645.

[7] See Scarf *v.* Jardine, L. R. 7 App. Cas. 345. This is not directly in point, but illustrates the principle. There S., of R. & Co., retired and B. took his place, the firm name remaining the same, but no notice of dissolution was given, and an old customer, ignorant of the change, sold goods to the last firm. It was held that the liability of the old firm was by estoppel to deny a continuance of the agency of the partners to bind it, and that of the new firm was on the facts, and there could not be a joint liability of old and new partners, but the creditor must elect.

new firm is not alone sufficient to show an intention on his part to deprive himself of a right to resort to the retired partner and to look to the new firm alone; and where the dissolution is without a continuance of the business and no new dealing, his treating a partner who had assumed the debts as his sole debtor would seem to be still less final as an evidence of such intention.

Where several persons were in partnership and one dies or retires, customers who, knowing of the change, continue to deal with the surviving partners who carry on the same business without a break, can hold the estate of the deceased partner liable for the balance due at his death, deducting subsequent payments.[1] Such estate is liable for securities wrongfully sold in the life-time of the decedent, for the additional reason that the customer could not elect to discharge it without knowledge of the misappropriation.[2]

Where the creditor, after dissolution, by which one partner assumed the debts, had transferred upon his books the account against the firm to the account of such partner, with whom he had had intermediate dealings without the privity of any of the partners, this does not prevent his recharging the firm and holding them.[3]

So where the creditor stated an account against the partner who had assumed the debts, this does not discharge the other partner; nor although in stating an account against the firm he omitted such debt;[4] or drew upon him;[5] or dealt with him in finishing a contract of employment made with the firm as attorneys to conduct a suit.[6]

§ 519. And slight circumstances only are required to justify a finding that a creditor of the former firm, who had knowledge of

[1] Devaynes *v.* Noble, Sleech's Case, 1 Mer. 539, 569; id. Clayton's Case, id. 572, 604; Botsford *v.* Kleinhaus, 29 Mich. 332.

[2] Clayton's Case, 1 Mer. 579.

[3] Barker *v.* Blake, 11 Mass. 16, it was said that there was no consideration for the change; but this is not so.

[4] Averill *v.* Lyman, 18 Pick. 346.

[5] Skannel *v.* Taylor, 12 La. Ann. 773.

[6] Waldeck *v.* Brande, 61 Wis. 579. Where partners claim in defense that the plaintiff had agreed to transfer the amount due him to the account of one partner as a debt due the latter from the others, their book was held admissible in evidence to show performance of the agreement on their part. Moore *v.* Knott, 14 Oregon, 35.

the dissolution and assumption of debts, has accepted the new firm in place of the old as his debtor.[1]

Merely crediting the new firm, which had assumed the debts of the old, with payments by them, is no evidence that the creditor relinquished his claim against the old firm and the retiring partners,[2] nor is expressing satisfaction at the change.[3] Merely accepting payments from the continuing partners, though at an increased rate of interest, does not show an agreement to release the retired partner,[4] or even taking new security from them.[5]

In Wildes *v.* Fessenden, 4 Met. 12, F. & S. owed W. for loans, and F. also had an individual account with him. S., who had funds in F.'s hands, requested F. to remit them to W. and close the account of F. & S. F. remitted to W. with a request to credit the remittances to F. generally, and to debit the loans of F. & S. to F. individually. S. saw these letters. W. answered that he had received the letter and "noted its contents." F. failed, largely indebted to S., and after four and one-half months of silence, W. sued both F. & S. on his account. W.'s letter was held not to be an agreement to discharge S. The phrase "contents noted" does not imply a

[1] Regester *v.* Dodge, 6 Fed. Rep. 6; 19 Blatchf. 79; 61 How. Pr. 107, holding that proving the debt in bankruptcy against the new firm, and an omission during the life-time of the retiring partner to allege a claim against him, and a delay of five years to look to his estate, by which the retiring partner had been deprived of the opportunity to participate in the distribution in bankruptcy, were held sufficient. Shaw *v.* McGregory, 105 Mass. 96, 102, holding that receiving and discussing the old and new bills without objection was sufficient. Both these cases state that slight evidence will justify the inference that the new firm assumed the old debt.

[2] Hall *v.* Jones, 56 Ala. 493, where the creditor demanded payment from the new firm, and received payments from them, and made no demand on the ex-partner, was held not to exonerate him. Scull *v.* Alter, 16 N. J. L. 147. See Botsford *v.* Kleinhaus, 29 Mich. 332.

[3] Smith *v.* Rogers, 17 Johns. 340; Clark *v.* Billlngs, 59 Ind. 508; Chase *v.* Vaughan, 30 Me. 412; Lewis *v.* Westover, 29 Mich. 14; Walstrom *v.* Hopkins, 103 Pa. St. 118.

[4] Heath *v.* Percival, 1 P. Wms. 682; 1 Stra. 403. Here E. & P., partners, dissolved in 1693, dividing the stock between them, and giving notice to creditors either to receive their money or look to E., who had agreed with P. to pay all debts. In 1708 a bond creditor renewed his debt with E., at six per cent. interest. In 1711 E. became insolvent. The creditor could have collected his debt before. It was held that P. was still liable, but only at five per cent. And see Harris *v.* Farwell, 15 Beav. 31.

[5] Thompson *v.* Percival, 5 B. & Ad. 925.

promise, and if he had promised there was no consideration to support the promise.

And the course of dealing may be looked to to ascertain the intent, and if thus shown, an agreement need not be proved.[1] Thus, proving a debt against the estate of the partner who had assumed the debts might be equivocal, but receiving a dividend discharges all claim against the other partner.[2] Receiving a dividend and releasing the new firm releases the retiring partner,[3] unless the creditor shows that he did not know of the dissolution and thought it was the old firm that had gone into insolvency.[4] A former attachment against the new firm for the same debt is evidence of an intent to release the retired partner.[5]

In Gates *v.* Hughes, 44 Wis. 332, it was said that if the evidence was conflicting as to whether the note of a former partner was taken as payment, the amount and value of the property received by him, he having agreed to assume the debts, and his ability to pay the creditor, is material evidence as to whether the creditor discharged the other partner.

Where a new note has been taken from the continuing partners when they have assumed payment of the debts, to the prejudice of the retired partner, another element is introduced, viz., as to how far a retired partner can claim the rights of a surety, which has been elsewhere considered. (§§ 532–534.)

§ 520. We have elsewhere seen that an incoming partner does not become liable for the old debts, unless he expressly agree to be so. But if the new firm does assume the debts of the old, a tacit agreement on the part of the creditor, to substitute them as his debtors, and discharge the retired partners, can be perhaps more easily inferred.

In Shaw *v* McGregory, 105 Mass. 96, 102, holding that slight evidence would justify the inference that the new firm assumed the debt of the old, it was ruled that receiving and discussing the old and new bill together, without objection that part was for the old firm, was sufficient.

1 Bell *v.* Barker, 16 Gray, 62.

2 Bucklin *v.* Bucklin, 97 Mass. 256; that proving the debt is sufficient, Regester *v.* Dodge, 19 Blatchf. 79; 6 Fed. Rep. 6; 61 How. Pr. 107.

3 Bank of Wilmington *v.* Almond. 1 Whart. 169.

4 Buxton *v.* Edwards, 134 Mass 567.

5 Baum *v.* Fryrear, 85 Mo. 151.

In Hart *v.* Alexander, 2 M. & W. 484 (7 C. & P. 746), A., B., C. and D. were bankers, as A. & Co. A. retired and E. took his place. The plaintiff, a depositor with the original firm, constantly received accounts current from the new firm, and they paid him interest from time to time at varying rates. The court found that the creditor had knowledge that A. had retired, and that the new firm had assumed the debts, and held that the discharge of A. followed from the new dealings, with knowledge of this fact.[1]

Oakeley *v.* Pasheller, 10 Bligh, N. R. 548; 4 Cl. & Fin. 207, is like Hart *v.* Alexander, except that the dissolution was by death of a partner, in whose place a new partner was taken in, and the plaintiff thereafter received accounts in which the old and new debts were united, and was paid interest.

In Harris *v.* Lindsay, 4 Wash. C. C. 98, 271, A. & B. dissolved, A. assuming the debts, of which plaintiff, a creditor, had notice. A. formed a new partnership, to which the plaintiff gave credit, and it dissolved in debt to him. Notes were given for the consolidated amounts of the old and new debts, but none of the notes corresponded with any of the balances due from A. & B., and the plaintiff agreed to credit A. with the notes when paid. B. was held to be discharged.

In Watts *v.* Robinson, 32 Up. Can. Q. B. 362, where one partner retired, and a third person took his place, and the new firm assumed the debts, a creditor of the old firm taking the note of the new, with knowledge of these facts, releases the retiring partner.

In Heroy *v.* Van Pelt, 4 Bosw. 60, Van Pelt and N. E. Smith were partners, as Van Pelt & Smith. Smith retired, and J. B. Smith became partner in his place; the old name being retained. Van Pelt gave plaintiff a note signed in the firm name, for a debt of the old firm. Plaintiff sued the old firm for goods sold, and N. E. Smith claimed the note was a payment. This question was left to the jury. Here it appeared that plaintiff did not know of the change of membership.

Where a firm indebted to the plaintiff took in a new partner, who brought in no capital, and the new firm assumes the debts of the old, and the accounts are continued without change, and

[1] Parke, B., p. 492, doubts David *v.* Ellice, 5 B. & C. 196; 7 D. & R. 690, and Kirwan *v.* Kirwan, 2 C. & M. 617; 4 Tyr. 491, and says that the former and Lodge *v.* Dicas are much shaken by Thompson *v.* Percival, 3 Nev. & M. 167; 5 B. & Ad. 925.

the creditor is partly paid out of the blended assets of the new and old firms, and continues his dealing, knowing of the change, and treating the new firm as his debtors, he can hold them liable for the balance.[1]

In Thomas *v.* Shillabeer, 1 M. & W. 124, the plaintiff, an employee of S. & M., a firm, deposited with it a sum of money, as security for good conduct. The firm dissolved and divided the business, each partner agreeing to employ part of the servants, and pay part of the debts; M. to take the plaintiff and pay his debt. A verdict was ordered for the plaintiff against S. *non obstante*, on a plea that plaintiff had assented to discharge S.; for a mere assent is not an agreement, whereby, in consideration of releasing one partner, the other undertakes to pay.

§ 521. **Old firm must be discharged.**—But evidence of a willingness on the part of the creditor to look to the new firm is not sufficient without some evidence of an intention to discharge the old firm, and of an intention on the part of the new firm to be liable to him, shown by acts that extend beyond merely carrying out their agreement with the old firm, to assume the debts.

In Kirwan *v.* Kirwan, 2 Cr. & M. 617, plaintiff had money deposited with a firm of three partners, A., B. & C., and annual accounts were rendered to him. B. and C. successively retired, and A. took in K. as a new partner, with a large amount of capital. The plaintiff's account was transferred to the new firm, and plaintiff said he had no claim upon the retired partners. The firm sent annual accounts, and paid interest and part of the principal to the plaintiff. There was held to be no evidence of assent by the plaintiff to look to the new firm alone, and in the absence of such assent it could not be inferred that K. intended to assume the debt. Bolland, J., said that it was conceivable, also, that K. may have known nothing about the account, and doubted whether plaintiff could have sued the new firm.[2]

In Lewis *v.* Westover, 29 Mich. 14, a debtor of a firm sold an interest owned by him, to one of the partners, on his personal account, the partner agreeing, as part payment, to settle the debtor's

[1] Rolfe *v.* Flower, L. R. 1 P. C. 27. And see Smead *v.* Lacey, 1 Disney, 239, noticed in § 510.

[2] See, also, Gough *v.* Davies, 4 Price, 200; Blew *v.* Wyatt, 5 C. & P. 397.

note held by the firm. The fact that the firm was pleased with the arrangement, and hoped payment of the note from it, and permitted delay in that hope, does not show an agreement to accept the partner as their debtor, in place of the maker, and the maker and indorsers are still liable.

§ 522. **As against sureties.**— As against sureties, however, a more plain expression of intention than appears from mere inference may be required.

In Cochrane *v.* Stewart, 63 Mo. 424, the firm of S. & A. owed plaintiffs, among other persons, for sewing machines. H. bought out A.'s interest, and the firm of S. & H. was formed, and the new firm received the machines from the old firm, and assumed its debts. S. & H. then gave a bond to plaintiffs, conditioned to pay them all the debts of the new firm existing or to be incurred. It was held that the bond would not be construed to bind the sureties for the debts of S. & A. to plaintiffs.

See, also, Childs *v.* Walker, 2 Allen, 259, where C. & C. had given notes for a firm debt, and then W. joined the firm, which then became C., C. & Co., and the new firm assumed the payment of the notes. Afterwards one of the C.'s retired, and the two others, C. and W., gave him a bond to pay the debts of C., C. & Co. The retired partner was compelled to pay one of the notes, and thereupon sued on the bond. It was held he could not recover; the reason given being that the assumption by C., C. & Co. of the debts of C. & C. did not bring those debts within the terms of the bond until the creditors had agreed to the substitution.

§ 523. **Note or bill as evidence of novation.**— It is certain, however, that if the agreement to accept one partner as sole debtor and release the other is accompanied by a change in the form of the debt, or by new security or additional or other sureties, the substitution is valid. Thus, if the creditor promises to release one partner and takes the note of the other for the entire debt, it is a valid substitution of debtors and the other partner is released.[1]

[1] Thompson *v.* Percival, 5 B. & Ad. 925; Evans *v.* Drummond, 4 Esp. 89; Reed *v.* White, 5 id. 122; Kirwan *v.* Kirwan, 2 Cr. & M. 617; Hart *v.* Alexander, 2 M. & W. 484; Harris *v.* Farwell, 15 Beav. 31; Benson *v.* Hadfield, 4 Hare, 32; Harris *v.* Lindsay, 4 Wash. C. C. 98 and 271; *Re* Clap, 2 Lowell, 226; Tillotson *v.* Tillotson, 34 Conn. 335; West *v.* Chasten, 12 Fla.

The creditor's agreement with one partner, that, if he gives notes for one-half the debt and pays them, he will release him from the other half, is on valuable consideration and binding. The reasons assigned in the case cited below are that it gives the creditor equality in the separate estate with individual creditors, and the maker's time being extended, he cannot pay and sue his partner for contribution.[1] It may be observed of these two reasons that the former would apply to a mere promise to release when there were but two partners, and the latter reason would not apply when cash instead of notes is given.

An agreement between two partners and a creditor to submit to arbitration to divide the assets and determine which partner should pay the creditor is sufficient consideration for the creditor's release of the other.[2]

§ 524. **Note of one partner before dissolution.**— Merely taking the individual note of one partner while the firm is going on is not deemed to be payment of a partnership debt so as to be evidence of an intention or agreement to release the copartners, but collateral merely, and if taken in renewal of a firm note is not deemed a payment unless such intention is proved; while an original transaction contracting with or charging one partner or sending an account to him personally has great force in showing that credit was given to him alone. But the taking security for an existing partnership debt, or changing the form of the original charge, is of very little weight.[3] Even though such partner give ad-

315; Hopkins *v.* Carr, 31 Ind. 260; Macklin *v.* Crutcher, 6 Bush, 401; Smith *v.* Turner, 9 id. 417; Turnbow *v.* Broach, 12 id. 455; Williams *v.* Rogers, 14 id. 776; Hoopes *v.* McCan, 19 La. Ann. 201; Meyer *v.* Atkins, 29 id. 586; Folk *v.* Wilson, 21 Md. 538; Hotchin *v.* Secor, 8 Mich. 494; Keerl *v.* Bridgers, 10 Sm. & Mar. 612; Moore *v.* Lackman, 52 Mo. 323; Titus *v.* Todd, 25 N. J. Eq. 458; Waydell *v.* Luer, 3 Den. 410; Gandolf *v.* Appleton, 40 N. Y. 533; Ludington *v.* Bell, 77 N. Y. 138 (33 Am. Rep. 601); Bank *v.* Green 40 Oh. St. 431; Hoskisson *v.* Eliot, 62 Pa. St. 393; Nichols *v.* Cheairs, 4 Sneed, 229; Stephens *v.* Thompson, 28 Vt. 77; Bowyer *v.* Knapp, 15 W. Va. 277; Gates *v.* Hughes, 44 Wis. 332; Hoeflinger *v.* Wells, 47 id. 628; Port Darlington Harbour Co. *v.* Squair, 18 Up. Can. Q. B. 533.

[1] Ludington *v.* Bell, 77 N. Y. 138 (33 Am. Rep. 601). See, also, Maxwell *v.* Day, 45 Ind. 509.

[2] Backus *v.* Fobes, 20 N. Y. 204.

[3] Loveridge *v.* Larned, 7 Fed. Rep. 294; Tyner *v.* Stoops, 11 Ind. 22; Maxwell *v.* Day, 45 Ind. 509; Lingen-

ditional security, as a mortgage upon his own individual property.[1]

The individual note of one or all the partners may be payment, and the debt of all may become the debt of one if so agreed by the creditor. The question of such intent is one of fact for the jury.[2]

§ 525. **Note of ostensible partner.**—Taking the note of ostensible partners is no discharge of a dormant partner, for the creditor cannot be regarded as intending to part with a security of which he was ignorant.[3] Nor will any of the

felser *v.* Simon, 49 id. 82; Harrison *v.* Pope (Iowa Dist. Ct. 1855), 4 Am. Law Reg. (O. S.) 313; Folk *v.* Wilson, 21 Md. 538; Hotchin *v.* Secor, 8 Mich. 494; Keerl *v.* Bridgers, 10 Sm. & Mar. (18 Miss.) 612; Rose *v.* Baker, 13 Barb. 230; Wilson *v.* Jennings, 4 Dev. L. 90; Horsey *v.* Heath, 5 Oh. 353; McKee *v.* Hamilton, 33 Oh. St. 7; Tyson *v.* Pollock, 1 Pa. 375; Allen *v.* Owens, 2 Spears (S. Ca.), 170; Nichols *v.* Cheairs, 4 Sneed, 229; Dillon *v.* Kauffman, 58 Tex. 696; Hoeflinger *v.* Wells, 47 Wis. 628; Booth *v.* Ridley, 8 Up. Can. C. P. 464; Port Darlington Harbour Co. *v.* Squair, 18 Up. Can. Q. B. 533. *Contra*, Anderson *v.* Henshaw, 2 Day, 272. In Maine, Massachusetts, Vermont, and formerly in Arkansas (but not now, see Brugman *v.* Maguire, 32 Ark. 733), giving a note is *prima facie* absolute payment, though rebuttable. If paper is outstanding in the hands of third persons, it is to be allowed for as a part payment, Getchell *v.* Foster, 106 Mass. 42.

[1] Loveridge *v.* Larned, 7 Fed. Rep. 294; Maxwell *v.* Day, 45 Ind. 509; Harrison *v.* Pope (Iowa Distr. Ct. 1855), 4 Am. Law Reg. (O. S.) 313; Baxter *v.* Bell, 86 N. Y. 195; Pierce *v.* Cameron, 7 Rich. L. 114; Dillon *v.* Kauffman, 58 Tex. 696. *Contra*, that taking a mortgage from one partner is an extinguishment of the debt, Loomis *v.* Ballard, 7 Up. Can. Q. B. 366.

[2] Thompson *v.* Percival, 5 B. & Ad. 925; Hopkins *v.* Carr, 31 Ind. 260; Maxwell *v.* Day, 45 id. 509; Hotchin *v.* Secor, 8 Mich. 494; Keerl *v.* Bridgers, 10 Sm. & Mar. 612; Mason *v.* Wickersham, 4 W. & S. 100; Tyson *v.* Pollock, 1 Pa. 375; Stephens *v.* Thompson, 28 Vt. 77; Dages *v.* Lee, 20 W. Va. 584; Port Darlington Harbour Co. *v.* Squair, 18 Up. Can. Q. B. 533. In Rose *v.* Baker, 13 Barb. 230, A. & B., being partners in buying wheat, C. let A. have $300 which was used in buying grain for the firm, and was regarded by the court as constituting a partnership debt. A few days afterwards A. gave C. his individual note, and a year afterwards, and after dissolution, A. paid part and gave his individual note for the balance. It was held that C. still had a claim against the firm.

[3] Robinson *v.* Wilkinson, 3 Price, 538; Sneed *v.* Wiester, 2 A. K. Mar. 277; Scott *v.* Colmesnil, 7 J. J. Mar. 416; Baring *v.* Crafts, 9 Met. 380, 394; Watson *v.* Owens, 1 Rich. L. 111; Nichols *v.* Cheairs, 4 Sneed, 229; Vaccaro *v.* Toof, 9 Heisk. 194.

acts which are usually held to be a discharge have that effect upon a dormant partner for the same reason.[1] Perhaps even though the note be under seal.[2]

§ 526. **Note in firm name after dissolution.**— As a partner has no power after dissolution to bind the firm by new contracts, a note in the firm name after dissolution, unless made with the assent of all the partners, binds only the person who made it. Such a note, therefore, does not extinguish the debt, for the firm cannot insist that it is bad to create a debt and yet good to pay one, and the creditor not having what was designed, namely, a partnership note, no intent to release the other partners will be presumed on his part, although he may have surrendered the original paper.[3]

In Miller *v.* Miller, 8 W. Va. 542, M., of M. & Co., in order to raise money for the firm, procured R. M., who did not know who the other partners were, to indorse its paper, and K. cashed the paper, knowing who they were, and the proceeds went into the firm; then C., one of the partners, retired, publishing a notice of dissolution; then K. agreed to renew the note with the same indorser, and R. M. indorsed the renewal, not knowing of any change

[1] Robinson *v.* Wilkinson, 3 Price, 538. Whether a sealed note by one partner in the firm name, without authority, will merge the antecedent or contemporaneously incurred debt, see § 420.

[2] Chamberlain *v.* Madden, 7 Rich. (S. Ca.) L. 395; Beckford *v.* Hill, 124 Mass. 588. *Contra*, that the sealed instrument merges the simple contract debt. Davidson *v.* Kelly, 1 Md. 492; Ward *v.* Motter, 2 Rob. (Va.) 536. But a subsequent firm note revives the original debt again. Davidson *v.* Kelly, 1 Md. 492.

[3] Spenceley *v.* Greenwood, 1 F. & F. 297, where it seems to have been left to the jury; Myatts *v.* Bell, 41 Ala. 222; Rayburn *v.* Day, 27 Ill. 46; Turnbow *v.* Broach, 12 Bush, 455; Perrin *v.* Keene, 19 Me. 355; 36 Am. Dec. 759; Parham Sewing Mach. Co. *v.* Brock, 113 Mass. 194; Goodspeed *v.* South Bend Plow Co. 45 Mich. 237; Yarnell *v.* Anderson, 14 Mo. 619; Moore *v.* Lackman, 52 id. 323; Vernon *v.* Manhattan Co. 22 Wend. 183; 17 id. 524; Gardner *v.* Conn, 34 Oh. St. 187; Burris *v.* Whitner, 3 S. Ca. 510; Seward *v.* L'Estrange, 36 Tex. 295; Torrey *v.* Baker, 13 Vt. 452; Parker *v.* Cousins, 2 Gratt. 372; 44 Am. Dec. 388; Miller *v.* Miller, 8 W. Va. 542. *Contra*, that it merges the debt, Fowler *v.* Richardson, 3 Sneed, 508. In an action upon such note recovery upon the original consideration may be had. Perrin *v.* Keene and Burris *v.* Whitner, *supra.*

in the firm, and ultimately had to pay it. He can recover of the firm, including C., for the renewal is not payment.

In Goodspeed *v.* South Bend Plow Co. 45 Mich. 237, a firm gave an order for goods payable in a note without interest, and the firm dissolved without notice to or knowledge of the vendor, who shipped the goods after dissolution, and the partner who had ordered them sent a note bearing ten per cent. interest after the vendor had notice of the dissolution. The retiring partners are not liable on the note, for, although agreed to be given, it varied from the proposed terms, and hence was not binding after dissolution and is not payment, and they are liable on the original account.

§ 527. Nor is the individual note of one partner after dissolution payment of a firm debt without proof of agreement to that effect,[1] especially if the partnership note is not surrendered.[2]

But a mere neglect to surrender the partnership note does not invalidate an agreement to accept the note of one partner with a third person, as payment, nor constitute failure of consideration.[3]

Acts and declarations inconsistent with an intent to take the note merely as collateral may be shown.[4] And a surrender of the partnership note and marking it canceled, and taking the note of an individual partner, was held to be meaningless unless done for payment;[5] and the note of a third person in exchange for the firm's

[1] Swire *v.* Redman, 1 Q. B. D. 536; Medberry *v.* Soper, 17 Kan. 369; Yarnell *v.* Anderson, 14 Mo. 619; Leabo *v.* Goode, 67 id. 126; Ellswanger *v.* Coleman, 7 Mo. App. 582; Rose *v.* Baker, 13 Barb. 230; Leach *v.* Kagy, 15 Oh. St. 169; Little *v.* Quinn, 1 Cint. Superior Ct. Rep. 379; Estate of Davis, 5 Whart. 530 (34 Am. Dec. 574); Mason *v.* Wickersham, 4 W. & S. 100; Nightingale *v.* Chaffee, 11 R. I. 609 (23 Am. Rep. 531). See, also, Featherstone *v.* Hunt, 1 B. & C. 113; 2 Dow. & Ry. 233. Unless, in many states, he assumed all the debts, so that the other partner became in effect a surety, who is discharged by an extension of time to the primary debtor. § 534. And where a note is considered as higher security than a simple contract debt it may be a merger of it. Isler *v.* Baker, 6 Humph. 85.

[2] Estate of Davis, 5 Whart. 530; 34 Am. Dec. 574; Little *v.* Quinn, 1 Cint. Superior Ct. Rep. 379. And see Kimberly's Appeal (Pa.), 7 Atl. Rep. 75.

[3] Dages *v.* Lee, 20 W. Va. 584.

[4] Bank *v.* Green, 40 Oh. St. 431. And see Hoopes *v.* McCan, 19 La. Ann. 201.

[5] Moore *v.* Lackman, 52 Mo. 323.

paper was held to be a discharge, except where some of the names were forged.[1]

So if the note is accepted as a payment or merger of the debt the other partner is released.[2] Exchanging a partnership note after dissolution for a note signed by each partner was held to have converted the debt into the separate debt of each partner.[3] And so is taking the note of each partner for a proportion of the debt.[4]

Where a firm of two partners assigned for benefit of creditors, with a condition that the assignment should inure to those alone who would look to each partner individually for half the balance, and the creditors covenanted to look to each for the half only, this was held to be no severance of the debt until or unless the partners covenant individually to pay the half, and hence an action must be against both.[5]

§ 528. Of continuing partner who assumed debts.— Where one of the partners retires and the other assumes the debts and continues the business, the creditor taking the paper of the continuing partner shows an assent to the change and will be deemed to look to the latter alone. This also involves in many jurisdictions the position of the retiring partner as a surety, who is released by an extension of time to the principal. This will be next examined.

Thus, in Evans *v.* Drummond, 4 Esp. 89, two partners gave a bill and dissolved, and it was renewed by the continuing partner. The creditor knowing of the change in the firm, the other partner was held to be released.[6]

In Thompson *v.* Percival, 5 B. & Ad. 925, A. & B., partners, dis-

[1] Pope *v.* Nance, 1 Stew. (Ala.) 354; Nance *v.* Pope, id. 220.

[2] Smith *v.* Turner, 9 Bush, 417; Bowyer *v.* Knapp, 15 W. Va. 277; Macklin *v.* Crutcher, 6 Bush, 401.

[3] Crooker *v.* Crooker, 52 Me. 267; Bowyer *v.* Knapp, 15 W. Va. 277; Arnold *v.* Camp, 12 Johns. 409.

[4] Maxwell *v.* Day, 45 Ind. 409; Luddington *v.* Bell, 77 N. Y. 138; 33 Am. Rep. 601 (rev. 11 J. & Sp. 557).

[5] Le Page *v.* McCrea, 1 Wend. 164 (19 Am. Dec. 469).

[6] This was followed in Reed *v.* White, 5 Esp. 122, and Springer *v.* Shirley, 11 Me. 204. In Hoopes *v.* McCan, 19 La. Ann. 201, the note was in full settlement. Townsends *v.* Stevenson, 4 Rich. (S. Ca.) L. 59, but here the firm's notes were surrendered on taking those of the continuing partners. *Contra*, Keating *v.* Sherlock, 1 Cint. Superior Ct. Rep. 257.

solved, B. continuing the business and assuming all the debts, and having sufficient partnership assets left with him for the purpose. C., a creditor, who knew of these facts, was informed that A. did not know that the firm was indebted to him and that he must look to B. alone, and he assented and drew on B., who accepted the bill. This was held evidence to go to the jury of C.'s assent to look to B. alone. The court, Denman, C. J., cites Evans *v.* Drummond and Reed *v.* White, and express disapproval of David *v.* Ellice.[1]

But, even in this case, if the creditor expressly reserves his claim against the other partners, the note is not a payment.[2] And merely drawing on the continuing partners does not establish a novation.[3]

§ 529. Note of surviving partners.— A note by surviving partners' for a partnership debt will not be deemed a payment unless such was the agreement,[4] though the creditor continue to deal with the surviving partner and receive partial payments from him.[5] An agreement to accept the new firm must be clearly proved.[6]

If the creditor did not know of the death or other dissolution, and the new firm is in the same name as the old, their note is, of course, not an extinguishment of the debt.[7]

[1] In David *v.* Ellice, 5 B. & C. 196; 7 D.& R. 690, affirming 1 C. & P. 368, A., B. & C., partners, were indebted to D. A. retired. B. & C. assumed the debts, of which D. had notice and assented to a transfer of his claim upon the books of B. & C. to themselves. He afterwards drew on the new firm and they accepted, paid part, and became insolvent. It was held that A. was liable, and so although D. could have collected his debt before.

[2] Bedford *v.* Deakin, 2 B. & Ald. 210; Boatmen's Sav. Instit. *v.* Mead, 52 Mo. 543.

[3] Skannel *v.* Taylor, 12 La. Ann. 773.

[4] *Re* Clap, 2 Low. 226, although the old note was surrendered; Thompson *v.* Briggs, 8 Foster (28 N. H.), 40; Mebane *v.* Spencer, 6 Ired. L. 423; Leach *v.* Church, 15 Oh. St. 169; Titus *v.* Todd, 25 N. J. Eq. 458; Boatmen's Sav. Instit. *v.* Mead, 52 Mo. 543, but here there was a special stipulation that the estate of the decedent should not be discharged. See Thompson *v.* Percival, 5 B. & Ad. 925.

[5] Hamersley *v.* Lambert, 2 Johns. Ch. 508; Fogarty *v.* Cullen, 49 N. Y. Superior Ct. 397.

[6] Fogarty *v.* Cullen, 49 N. Y. Superior Ct. 169; Leach *v.* Church, 15 Oh. St. 169; Bank *v.* Green, 40 Oh. St. 431. *Contra*, that a note of the new firm is *prima facie* a payment. Lewis *v.* Davidson, 39 Tex. 660.

[7] Mason *v.* Tiffany, 45 Ill. 392; Bernard *v.* Torrance, 5 Gill & J. 383; Buxton *v.* Edwards, 134 Mass. 567; First Nat'l Bk. *v.* Morgan, 73 N. Y. 593 (aff. 6 Hun, 346).

§ 530. Creditor and debtor becoming partners.— Complications of an interesting sort occasionally arise by the formation of a partnership between a debtor and creditor. If the debt is not implicated in the partnership, no reason is perceived why it is not still enforcible at law as any cause of action between partners *dehors* the firm may be, as will be shown hereafter. And if the debt is contributed by the creditor as his share of the capital, the debtor partner is debtor to that extent still, and the note representing his debt is still in force.

In Cunningham *v.* Ihmsen, 63 Pa. St. 351, A. gave to his creditor I. a bond and warrant to confess judgment. A. & I. then formed a partnership, I. contributing the bond as his share of the capital, it being agreed that on dissolution he should have it back. On dissolution and redelivery of it to I., he entered up judgment on it, and issued execution, and a subsequent execution creditor of A. attacked its validity. The court held that, not being fraudulent in fact as to creditors, it was not merged in the partnership, and a stranger could not assail it on that ground.

In Mitchell *v.* Dobson, 7 Ired. Eq. (N. Ca.) 34, A. & B., partners, gave a partnership note to their creditor C., and then dissolved, B. assuming all the debts. B. & C. afterwards formed a partnership, B. contributing the note as part of his capital. The note was held not to be thereby extinguished.

In Gulick *v.* Gulick, 16 N. J. L. 186, A. & B., partners, made a note to the plaintiff. They then dissolved by A. buying out B. and assuming all the debts, and giving his note for the purchase money to B. with the plaintiff as surety. A. and the plaintiff then went into partnership in the same kind of business. It was held that plaintiff could enforce his note against A. & B. His going security for A. & B. does not release their joint liability. He had a right to go into partnership with A., and his doing so does not make the joint liability several.

In an action on a partnership note against the surviving partner, the fact that the plaintiff and the deceased partner had covenanted to indemnify the surviving partner against debts of the firm, and all actions on them, was held a bar to the suit to avoid circuity of actions.[1]

[1] Whitaker *v.* Salisbury, 15 Pick. 534.

Where D., being indebted to O. and others, conveyed all his business to O., who then conveyed it to F., in trust to pay D.'s debts, and hold the balance for D. O. then went into partnership with F. in the business for some years. Losses having occurred, O. was held estopped to enforce the trust, for he has rendered it impossible, and F. having conveyed the property back to D., and hence O.'s creditors cannot enforce the trust and collect payment therefrom.[1]

§ 531. Payment by one extinguishes debt as to all.— Partners being all liable for debts, and being unable to sue each at law, for reasons elsewhere given, it follows that if one partner pays a debt or judgment he cannot keep it alive by subrogation, but the liability is extinguished, and the payment is a mere item in the general account.[2]

There is no reason, however, for extending the rule to the purchase by one firm of a note made by another firm having a common partner with it, and though the former firm is under a disability to sue its indorsee is not.[3]

On the other hand, where the protection of the partner who pays a debt of the firm makes it equitable, he has been allowed to keep the debt alive and to be subrogated to the

[1] Wilkins *v.* Fitzhugh, 48 Mich. 78.

[2] Bartlett *v.* Waring, 4 Ala. 688, where the administrator of a deceased partner paid a judgment against himself and the survivor. (*Contra,* Sells *v.* Hubbell, 2 Johns. Ch. 394); Hogan *v.* Reynolds, 21 Ala. 56 (56 Am. Dec. 236), where one partner furnished money to a stranger to pay the judgment and hold it alive over the others; Le Page *v.* McCrea, 1 Wend. 164 (19 Am. Dec. 469), where the creditor, after compromise by one partner against the other, undertook to keep the other alive. Booth *v.* Farmers' & Mech. Bk. 74 N. Y. 228 (aff. 11 Hun, 258), a judgment on a note signed by four partners, and indorsed by the fifth; the latter paid it; he cannot hold it over the others. Hinton *v.* Odenheimer, 4 Jones, Eq. 406, where the paying partner undertook to keep the judgment alive against the bail of the other partner. Holding also that after such payment the bail cannot arrest the other partner, for the debt is paid. Dana *v.* Conant, 30 Vt. 246, where one of an indorsing firm took up the note, and subsequently reissued it to his individual creditor. Hardy *v.* Norfolk Mfg. Co. 80 Va. 404, where the partner who paid a debt secured by mortgage took assignment of it, and attempted to reassign it to another person. Conrad *v.* Buck, 21 W. Va. 396, where the assignee of one partner for benefit of creditors paid a firm note to prevent its being sued in order that he might sell property at his leisure; he does not become assignee of the note.

[3] Fulton *v.* Williams, 11 Cush. 108.

securities or the judgment incident to the debt. This is not allowed that he may make a profit out of it, but solely as a protection.[1]

Thus where a partner pays a debt of the firm out of his own money which the firm should have paid, he can do so in such a way as to show an intent to keep the debt alive.[2]

So an administrator of a partner who paid the whole of a partnership debt has been substituted to the creditor's place to recover contribution from the surviving partner.[3] Or if a partner pays a mortgage on joint property which the other should have paid, he can require indemnity through the mortgage;[4] and so if he pays a judgment note which it was agreed on dissolution should be paid by the copartner.[5]

Where a note, and mortgage on partnership property securing it, were made by a firm, a partner was deemed entitled to insist on foreclosure before personal judgment against him on the note, and if sued on the note, and has to pay it, it was held would be subrogated to the mortgage.[6]

But a partner who has partnership funds in his hands has no such right. Thus where a firm, with others, became incorporated, but by reason of continuing business in the firm name are made liable to a creditor of the corporation; and after the death of one partner the corporation assigns for the benefit of creditors to the surviving partner, and he pays a judgment creditor in full, having assets of the corporation to do it with, but for fear of being liable

[1] Coleman *v.* Coleman, 78 Ind. 344; Booth *v.* Farmers' & Mech. Bank, 74 N. Y. 228 (aff'g 11 Hun, 258), where a judgment was allowed to stand as security for any balance that might be found due on an accounting.

[2] McIntire *v.* Miller, 13 M. & W. 725, where a member of a joint stock company, making such payment, had the debt transferred to a trustee for himself. Kipp *v.* McChesney, 66 Ill. 460, where a partner in a sort of joint stock concern bought its notes with his own money as an investment, it was held that, though he could not sue upon them, his assignee could. He was not an active partner. Chappell *v.* Allen, 38 Mo. 213, where a partner who had taken up partnership notes with his own money was allowed to assign them to pay his private debt.

[3] In Sells *v.* Hubbell, 2 Johns. Ch. 394; Dahlgren *v.* Duncan, 7 Sm. & Mar. 280; but *contra*, Bartlett *v.* Waring, 4 Ala. 688, *supra*.

[4] Laylin *v.* Knox, 41 Mich. 40.

[5] Brown *v.* Black, 96 Pa. St. 482; Suydam *v.* Cannon, 1 Houst. (Del.) 431, and see the cases cited in the next section.

[6] Warren *v.* Hayzlett, 45 Iowa, 235.

to other creditors of the corporation seeks to charge the payment as made by himself instead of by the fund, and attempts to recover one-half of it from the estate of the deceased partner, it was held that he should have charged the fund and could not recover.[1]

RETIRING PARTNER AS SURETY.

§ 532. Inter se.— Where a partner retires from the firm under an agreement by the continuing partners to assume or pay all liabilities, he acquires as between the partners, irrespective of the rights of creditors, which will be hereafter considered, the rights of a surety. Hence, if he is compelled to pay a debt of the firm, he can set off the amount against the continuing partners' claim against him.[2] And a debt of the firm which he is compelled to pay will be kept alive for his benefit, or he can have the judgment assigned to him;[3] and he is entitled to be subrogated to all securities held by or for the creditor,[4] and to participate with creditors of the new firm on distribution of its assets in insolvency or bankruptcy.[5] On being sued, he can apply to court to compel the continuing partners to pay debts.[6]

If the continuing partners have given the retired partner a bond, with security, conditioned to pay off liabilities and become

[1] Willey *v.* Thompson, 9 Met. 329.

[2] Rodgers *v.* Maw, 15 M. & W. 444; s. c. 4 Dow. & L. 66; or sue them in assumpsit, Shamburg *v.* Abbott, 112 Pa. St. 6; Hupp *v.* Hupp, 6 Gratt. 310.

[3] Suydam *v.* Cannon, 1 Houst. (Del.) 431, of a judgment; Chandler *v.* Higgins, 109 Ill. 602; Laylin *v.* Knox, 41 Mich. 40; Frow, Jacobs & Co.'s Appeal, 73 Pa. St. 459; Brown *v.* Black, 96 id. 482; REDFIELD, C. J., in Ætna Ins. Co. *v.* Wires, 28 Vt. 93. And see Scott's Appeal, 88 Pa. St. 173.

[4] Conwell *v.* McCowan, 81 Ill. 285; Johnson *v.* Young, 20 W. Va. 614; Frow, Jacobs & Co.'s Appeal, 73 Pa. St. 459; Scott's Appeal, 88 id. 173.

[5] Frow, Jacobs & Co.'s Appeal, *supra;* Moody *v.* King, 2 B. & C. 558.

[6] See §§ 554, 634–641, and West *v.* Chasten, 12 Fla. 315; and see Kinney *v.* McCullough, 1 Sandf. Ch. 370; queried but not decided in Croone *v.* Bivens, 2 Head, 339; and so though the others have not assumed the debts, Morss *v.* Gleason, 64 N. Y. 204 (aff. 2 Hun, 31; 4 Thomp. & C. 274); Ketchum *v.* Durkee, Hoff. Ch. 538; and if they misapply the assets are individually bound to reimburse him for payments, Peyton *v.* Lewis, 12 B. Mon. 356.

insolvent, the payee of a firm note may avail himself of the bond as in other cases of securities held by a surety.[1]

Whether, if the continuing partner, who has agreed to pay the debts, goes into bankruptcy, the retired partner can prove his claim as surety as the holder of a contingent claim, and hence, if he fails to do so, the claim is discharged by a discharge in bankruptcy of the debtor.[2]

Where retired partners thus become sureties and the new firm creates a debt, and by collusion with the creditor procures him to recover judgment against them with the new firm, and the retired partners pay part of it in separate sums, it was held that they could join in an action against the actual partners.[3]

§ 533. As to creditors; English cases.— In 1836 the House of Lords, in Oakeley *v.* Pasheller, 4 Clark & Fin. 207; s. c. 10 Bligh, N. R. 548, applied the doctrine of the suretyship of a retired partner to a creditor, and held that if a partner retires, and his copartners, continuing, assume the debts, and a creditor of the firm is aware of this (the syllabus is of course wrong in stating that the creditor had no notice), the continuing partners alone are the principal creditors, and the retiring partner but a surety for them, even as to the creditor, and with the rights of a surety, and therefore a contract between the creditor and continuing partners extending the time of payment releases him. In fact, however, in that case, a third person had become partner with the continuing members, and the creditor's taking the bond of such new firm for the extended debt was a substitution of debtors or novation, and therefore a release independent of the assumption of suretyship of the retiring partner.

In Rodgers *v.* Maw, 15 M. & W. 444; s. c. 4 Dow. & L. 66, the exchequer in 1846 applied the doctrine as between the partners, so

[1] Burnside *v.* Fetzner, 63 Mo. 107; Wilson *v.* Stilwell, 14 Oh. St. 464; and see § 636.

[2] So held in Fisher *v.* Tifft, 127 Mass. 313. *Contra*, Fisher *v.* Tifft, 12 R. I. 56; s. c. with note, 18 Am. Law Reg. (N. S.) 9, and Berry *v.* McLean, 11 Md. 92. For other rulings that the retired partner is *inter se* a surety, see Morss *v.* Gleason, 64 N. Y. 204 (s. c. below, 2 Hun, 31; 4 Thomp. & C. 274); Bays *v.* Conner, 105 Ind. 415.

[3] In Abbot *v.* Johnson, 32 N. H. 9.

that a debt assumed by the continuing partners, which the retired partner had to pay, could be set off by him against their claim, on his agreement to pay them a certain sum in consideration of their assumption of debts. This case is undoubtedly good law here and in England.

In Oakford *v.* European and Am. Steam Shipping Co. 1 Hen. & Mil. 182 (Cases in Chancery, 1863), Oakeley *v.* Pasheller was called, p. 190, a strong decision, and was held not to be extended to discharge the retired partner by reason of acts within the scope of the continuing partners' powers. And where a contract between the original firm and a third person provided for the submission of disputes to arbitrators, one of whom was to be selected by the firm, his selection by the continuing partners alone, and waiving a doubtful point of construction, was held not to discharge the retired partner.

In Wilson *v.* Lloyd, L. R. 16 Eq. 60, the doctrine of Oakeley *v.* Pasheller was applied in 1873, to the effect that a composition in bankruptcy, whereby creditors agreed to take their claims from the continuing partners in instalments, was held to release the retired partner by extending the time. This decision is of doubtful authority in either country, for in *Ex parte* Jacobs, 10 Ch. App. 211, it was disapproved, and a creditor voting to release a debtor in bankruptcy was held not to release a co-debtor. The debt in this case was, however, a several note signed by each.

In 1876, in Swire *v.* Redman, 1 Q. B. D. 536, Cockburn, C. J., reading the opinion explaining Oakeley *v.* Pasheller, and showing that Maingay *v.* Lewis, Irish Reports, 5 Com. L. 229, reversing s. c. 3 id. 495, which had followed the doctrine under protest, and by a bare majority had misunderstood the case in not understanding that the creditor had assented to a substitution of debtors, holds that partners cannot change their relation to their creditor without his assent; and though one may become *inter se* a surety, yet the creditor can treat all as principals, and therefore does not discharge a retired partner by giving time on fresh acceptances to the continuing partner who had agreed to pay debts. This ruling is weakened by his finding that a previous habit of the partners to renew by such acceptances before dissolution was a species of authority (which I submit it is not).

In Bedford *v.* Deakin, 2 B. Ald. 210; s. c. 2 Stark. 178, there had been an express reservation of rights against the retired partner:

and in Little *v.* Quinn, 1 Cint. Super. Ct. 379, the old note had been retained, and the remedy upon it had therefore not been extended.[1]

§ 534. —— **American cases.**— In America the authorities are divided as to whether a retired partner has the rights of a surety against a creditor who knows of the fact that the continuing partner has assumed the debts. Following the supposed doctrine of Oakeley *v.* Pasheller, and holding that he has such right, and is therefore discharged by a binding extension of time on the debt, given without his assent, or a compromise of the debt, or release of security of the principal, are the following.[2]

Voting for the discharge in bankruptcy of the continuing partner on composition of his debts is not regarded as a compromise, but a discharge by operation of law, and does not release the retired partner.[3]

In McClean *v.* Miller, 2 Cranch, C. C. 620, where the continuing partner with the creditor's knowledge received all the effects, and agreed to pay the debts, and the creditor makes new advances to him on his individual account, it was held that the creditor could not in good conscience take a lien on the effects for the new debt, so as to render the retiring partner liable on the old, after the assets were exhausted.

In McNeal *v.* Blackburn, 7 Dana, 170, it was held that when the creditor became security for the continuing to the retiring part-

[1] That neglect to pursue a surviving partner is no discharge of the estate of the deceased partner, see Surviving Partner.

[2] Stone *v.* Chamberlin, 20 Ga. 259; Hoopes *v.* McCan, 19 La. Ann. 201; Barber *v.* Gillson, 18 Nev. 89; Bell *v.* Hall, 5 N. J. Eq. 477; Wilde *v.* Jenkins, 4 Paige, 481; Thurber *v.* Corbin, 51 Barb. 215; s. c. as Thurber *v.* Jenkins, 36 How. Pr. 66; Maier *v.* Canavan, 8 Daly, 272; Savage *v.* Putnam, 32 N. Y. 501; Millerd *v.* Thorn, 56 id. 402; Colgrove *v.* Tallman, 67 id. 95 (23 Am. Rep. 90); (aff. 2 Lans. 97; 5 Hun, 103); Palmer *v.* Purdy, 83 id. 144; Morrison *v.* Perry, 11 Hun, 33; Dodd *v.* Dreyfus, 17 Hun, 600; 57 How. Pr. 319 (latter report is best); Mathews *v.* Colburn, 1 Strob. (S. Ca.) L. 258; Johnson *v.* Young, 20 W. Va. 614; Gates *v.* Hughes, 44 Wis. 332; Birkett *v.* McGuire, 31 Up. Can. Com. Pl. 430. And see Smith *v.* Shelden, 35 Mich. 42, and cases cited in § 532. In Bays *v.* Conner, 105 Ind. 415, the creditor had apparently agreed to the substitution of debtors.

[3] Hill *v.* Trainer, 49 Wis. 537; *Ex parte* Jacobs, 10 Ch. App. 211.

ner that all debts should be paid, he has released the retiring partner.

Agreeing with the latest English doctrine, and holding that mere knowledge on the part of a creditor of the new arrangement of the partners does not make him a party to it, and that they cannot change their relation towards him without his assent, are the cases in the subjoined note.[1]

Nor can he notify the creditor to sue pursuant to the statute, for the statute only applies to those who were sureties from the beginning.[2]

In Rawson *v.* Taylor, *supra*, it was said that such agreement, with notice, would impose on the creditor the duty of acting in good faith and with reasonable diligence in the preservation of liens and application of payments.

In Faulkner *v.* Hill, 104 Mass. 188, partners pledged goods as collateral for a debt then due and dissolved, conveying all the assets to one who agreed to pay all the debts, and they empowered him to wind up, execute releases, etc., of all of which the pledgee had notice, but did not agree to substitute L. as his debtor. L. paid part of the debt and took back from the pledgee what was thought to be a proportional part of the value of the collateral, but in fact a much more valuable part; hence the sale of the rest did not pay the remainder of the demand, L. having died insolvent; but this excessive delivery to L. was held not to be such a dealing with the collateral as to make the pledgee answerable for more than he had received — the syllabus adds, the invoice not showing that it was excessive, but this is not in the opinion.

Where one partner retired, leaving assets with the other partner for the purpose of paying debts, and a creditor covenanted with the latter partner, on receiving security for part of the debt, not to sue him, and consented to his delivering part of the assets to a surety for the firm, this does not release the retired partner beyond the

[1] Mason *v.* Tiffany, 45 Ill. 392; Williams *v.* Boyd, 75 Ind. 286; Aiken *v.* Thompson, 43 Iowa, 506; Smith *v.* Shelden, 35 Mich. 42; 24 Am. Rep. 529; Hayes *v.* Knox, 41 id. 529; Rawson *v.* Taylor, 30 Oh. St. 389; 27 Am. Rep. 464; Whittier *v.* Gould, 8 Watts, 485. See, also, Umbarger *v.* Plume, 26 Barb. 461, and Ward *v.* Woodburn, 27 id. 346, which of course are not law in so far as inconsistent with the holdings of the court of appeals given in a preceding section. See, also, Norton *v.* Richards, 13 Gray, 15, as limited by Fisher *v.* Tifft, 127 Mass. 313.

[2] Fensler *v.* Prather, 43 Ind. 119.

secured part of the debt, because the assets delivered to the surety were not lost to the defendant partner. The fact that the surety did not use them to pay debts makes no difference, for that is not the creditor's fault.[1]

MERGER.

The subject of the merger of a debt in a sealed instrument has already been treated.[2]

§ 535. Judgment against one partner.— The doctrine of the merger of a debt in a higher security applies to a judgment on a partnership debt obtained against one or less than all the partners. The nearly universal rule is that this extinguishes recourse on the partners who were not made parties, though judgment is not collectible on execution. The contrary rule laid down in Sheehy *v.* Mandeville, 6 Cranch, 254, after being disapproved in England and in nearly every state of the Union, has been since in effect overruled by the supreme court of the United States.[3]

[1] Roberts *v.* Strang, 38 Ala. 566.

[2] § 420.

[3] Brown *v.* Wooton, Cro. Jac. 73; Kendall *v.* Hamilton, 4 App. Cas. 504; s. c. below, 3 C. P. D. 403; *Ex parte* Higgins, 3 DeG. & J. 33; Cambefort *v.* Chapman, 19 Q. B. D. 229; Mason *v.* Eldred, 6 Wall. 231; 7 Am. Law Reg. (N. S.) 402; Woodworth *v.* Spafford, 2 McLean, 168; Sedam *v.* Williams, 4 id. 51; *Re* Herrick, 13 Bankr. Reg. 312; Filley *v.* Phelps, 18 Conn. 294, 305; Suydam *v.* Cannon, 1 Houst. 431; Nicklaus *v.* Roach, 3 Ind. 78; North *v.* Mudge, 13 Iowa, 596; Wann *v.* McNulty, 7 Ill. 355; 43 Am. Dec. 58; Thompson *v.* Emmert, 15 id. 415; Crosby *v.* Jeroloman, 37 Ind. 264; Barnett *v.* Juday, 38 id. 86; Holman *v.* Langtree, 40 id. 349; Lingenfelser *v.* Simon, 49 id. 82; Scott *v.* Colmesnil, 7 J. J. Mar. 416; Moale *v.* Hollins, 11 Gill & J. 11; Loney *v.* Bailey, 43 Md. 10; Ward *v.* Johnson, 13 Mass. 148; Tinkum *v.* O'Neale, 5 Nev. 93; Stevenson *v.* Mann, 13 id. 268, 274; Nat'l Bank *v.* Sprague, 20 N. J. Eq. 13, 31 (reversed on other points, in 21 id. 530); Robertson *v.* Smith, 18 Johns. 459; Penny *v.* Martin, 4 Johns. Ch. 566; Peters *v.* Sanford, 1 Den. 224; Averill *v.* Loucks, 6 Barb. 19; Olmstead *v.* Webster, 8 N. Y. 413; Suydam *v.* Barber, 18 id. 468 (rev. 6 Duer, 34); Sloo *v.* Lea, 18 Oh. 279; Anderson *v.* Levan, 1 Watts & S. 334; Smith *v.* Black, 9 Serg. & R. 142; 11 Am. Dec. 686; Nichols *v.* Anguera, 2 Miles (Pa.), 290; Gaut *v.* Reed, 24 Tex. 46, 55; How *v.* Kane, 2 Pin. (Wis.) 531; s. c. 2 Chand. 222; 54 Am. Dec. 152. There are a few authorities to the contrary. Sheehy *v.* Mandeville, 6 Cranch, 254 (now overruled, as already stated); Watson *v.* Owens, 1 Rich. (S. Ca.) L. 111, and Union Bank *v.* Hodges, 11 id. 480, in both of which cases the non-joined part-

Although the partners who were not made parties were secret partners, yet all claim against them individually is merged.[1]

§ **536.** A judgment against ostensible partners nevertheless binds the interest in the partnership assets of dormant partners who were not made parties to the action.[2] And where some of the partners plead the personal privilege of infancy, and judgment is therefore against the adults only, it is a partnership debt, and entitled to share on distribution *pari passu* with judgments where no such plea was interposed.[3]

In Olmstead *v.* Webster, 8 N. Y. 413, it was held that the vacating of the judgment by mutual agreement of the plaintiff and the defendant partner would not revive the cause of action against the other partner. Probably, however, this cannot be so; for as the judgment no longer exists, the doctrine of merger cannot apply; and on the doctrine of election, the right to retract is open until judgment, and besides there could be no election when as here the other partner was unknown.

§ **537. Where partners are jointly and severally liable.**— A judgment against one partner upon a joint and several debt is not a merger of the several liability of the other partners.[4]

ners were unknown to the plaintiff. And, *vice versa*, it has been held that a joint judgment against all the partners bars action on a note given by one or more of them for the same debt. Doniphan *v.* Gill, 1 B. Mon. 199. But see the principle stated in § 537.

[1] Kendall *v.* Hamilton, 4 App. Cas. 504; Lingenfelser *v.* Simon, 49 Ind. 82; Scott *v.* Colmesnil, 7 J. J. Mar. 416; Moale *v.* Hollins, 11 Gill & J. 11; Penny *v.* Martin, 4 Johns. Ch. 566; Robertson *v.* Smith, 18 Johns. 459; Olmstead *v.* Webster, 8 N. Y. 413; Anderson *v.* Levan, 1 Watts & S. 334; Smith *v.* Black, 9 Serg. & R. 142 (11 Am. Dec. 686); Nichols *v.* Anguera, 2 Miles (Pa.), 290; How *v.* Kane, 2 Pin. 531; s. c. 2 Chand. 222 (54 Am. Dec. 152); Mason *v.* Eldred, 6 Wall. 231, 238; 7 Am. Law Reg. (N. S.) 402. *Contra,* Watson *v.* Owens, 1 Rich. (S. Ca.) L. 111, and Union Bank *v.* Hodges, 11 id. 480.

[2] § 1053.

[3] § 149.

[4] King *v.* Hoare, 13 M. & W. 495; Trafton *v.* United States, 3 Story, C. C. 646; Sherman *v.* Christy, 17 Iowa, 322; Pierce *v.* Kearney, 5 Hill, 82; Gilman *v.* Foote, 22 Iowa, 560, where one partner individually signed a note made by his firm, and a judgment on his several liability as maker was held not to merge the

In some states there are statutes providing that a firm debt, either generally or on negotiable paper, shall be regarded as joint and several, or permitting a judgment to be had against some of the joint debtors without operating as a merger, as in ALABAMA, ARKANSAS, COLORADO, DELAWARE, ILLINOIS, KANSAS, KENTUCKY, MARYLAND, MISSISSIPPI, MISSOURI, MONTANA, NEW JERSEY, NEW MEXICO, PENNSYLVANIA and TENNESSEE.[1]

It was held, also, that where the other joint debtor was out of the jurisdiction a judgment against the resident was not a merger.[2]

In Suydam *v.* Barber, 18 N. Y. 468 (reversing 6 Duer, 34), it was held that as a judgment in Missouri against one partner was not a merger the same effect would be given here to the judgment.[3]

§ 538. When the note of one partner is taken as collateral merely, or if the note of a new firm or of one partner after dissolution is not a payment of the original debt, a judgment upon the new note, if not paid, has no greater effect than the note itself had.[4]

claim against the firm. But see the query in Smith *v.* Exchange Bank, 26 Oh. St. 141, 153, as to a judgment against a drawer who is also a member of the firm which accepted a bill.

[1] William *v.* Rogers, 14 Bush, 776; Bryant *v.* Hawkins, 47 Mo. 410, and Suydam *v.* Barber, 18 N. Y. 468, also on the Missouri statute; Loney *v.* Bailey, 43 Md. 10; Hyman *v.* Stadler, 63 Miss. 362; Bennett *v.* Cadwell, 70 Pa. St. 253; Lowry *v.* Hardwicke, 4 Humph. (Tenn.) 188, and Nichols *v.* Cheairs, 4 Sneed, 229; and in Mason *v.* Eldred, *supra*, it is said that a statute of Michigan providing that such judgment is, in favor of the defendant, only evidence of the extent of plaintiff's demand, alters the rule and permits a further recovery against the rest.

[2] Ells *v.* Bone, 71 Ga. 466; Yoho *v.* McGovern, 42 Oh. St. 11; but in the latter state at least, the proper course is to make all the partners parties, take judgment against those on whom service was had, and file a petition to make the others parties to the judgment.

[3] S. P. Mason *v.* Eldred, and Reed *v.* Girty, 6 Bosw. 567, which case is a later stage of Suydam *v.* Barber, *supra.*

[4] Offutt *v.* Scott, 47 Ala. 104, 129; Brozee *v.* Poyntz, 3 B. Mon. 178; Hawks *v.* Hinchcliff, 17 Barb. 492; Bigelow *v.* Lehr, 4 Watts, 378; Davis *v.* Anable, 2 Hill, 339; First Nat'l B'k *v.* Morgan, 73 N. Y. 593 (6 Hun, 346); Kauffman *v.* Fisher, 3 Grant's Cas. (Pa.) 302; Watson *v.* Owens, 1 Rich. L. 111; Haslett *v.* Wotherspoon, 2 Rich. Eq. 395; Carruthers

In one case one partner confessed a judgment against himself alone without the creditor's knowledge or ratification; this was held, of course, not to merge the original right of action against the firm.[1] And it is enacted that a judgment against some of joint debtors shall not bar action against the rest in DISTRICT OF COLUMBIA, IOWA, KENTUCKY, MISSOURI, NEW MEXICO and VERMONT.

§ 539. This rule of merger has no application to a claim against a firm where one partner is alive and the other dead. The rule that the decedent's estate cannot be pursued unless there are no available firm assets nor living solvent partner prevents a merger, for the debt is no longer joint.[2]

v. Ardagh, 20 Grant's Ch. (Up. Can.) 579. See Thurber *v.* Jenkins, 36 How. Pr. 66; S. C. as Thurber *v.* Corbin, 51 Barb. 215, but here the note itself would have discharged the retired partner.

[1] Haggerty *v.* Juday, 58 Ind. 154. See similar authorities under the subject of release of one partner.

[2] Hence in *In re* Hodgson, 31 Ch. D. 177, it was held to make no difference that the creditor could and did pursue the estate first, his remedy against the surviving partner was not thereby merged. See First Nat'l B'k *v.* Morgan, 73 N. Y. 593 (aff'g 6 Hun, 346). That a judgment against the survivor bars proceedings at law against the estate of decedent, leaving a remedy in equity only. Philson *v.* Bampfield, 1 Brev. (S. Ca.) 202.

CHAPTER XII.

CONVERSION OF JOINT INTO SEPARATE PROPERTY.

§ 540. In speaking of the nature of a partner's share or interest in the firm (§ 180), it was shown that such interest was in effect a right to share in the surplus left after discharging all debts, and including the claims of individual partners for advances. Each partner has the right to require that all the assets be applied to the payment of debts, for otherwise his own liability *in solido* for them all would be undiminished. This is a right which appertains to him personally, and not to the partnership creditors. In case the assets pass under the control of the courts for distribution, either by reason of bankruptcy, death, or suit for accounting and dissolution, not only will the rights of the partners to have the debts paid be carried out, but the court will subrogate the creditors to this right, and treat it as an obligation, provided it had not been parted with by the partners at the time the court came into possession of the fund. This doctrine of the partner's lien passing to the creditors, when the court is distributing the funds, is extended further in some jurisdictions than in others, and in many is accompanied by recognizing a correlative priority of separate creditors in individual property. These ramifications of the doctrine will be explained hereafter.[1]

Partners have the same right to terminate their joint interest in any part or all of the property that they have to dissolve by mutual agreement. This can be done by dividing the property among them, or by selling, or giving a part of it to one of their number, or by one buying out his copartners.[2]

[1] § 825.

[2] After the fund has passed into the control of court, as where a suit to settle partnership accounts is pending, the court may refuse to enforce a give or take contract between

§ 541. Inchoate transfers inter se.— An agreement for the conversion into separate property is not effectual to pass title until it is executed. The law of sales rather than of partnership applies to this. While the division is inchoate or conditions unperformed, the property continues joint, although divided into parts.

Thus after a mere dissolution and retirement of a partner, without an assignment of his interest to the continuing partner, the property will be treated in bankruptcy as still joint estate,[1] though accompanied by a request to pay to one partner.[2] *Contra* where the notice announces that the retired partner has sold his interest.[3] And in the case of real estate, mere agreement, not sealed or recorded, does not convert it into separate property, but the title must be divested.[4] Actual separation into parcels, assigning one parcel to each, terminates the joint ownership, so that each can sue the other for possession.[5]

So, where a division is to be accompanied by giving security, the mere separation and taking possession does not divide or vest the title until the agreement is executed.[6] But if the seller allow the buyer to continue to transact business, and dispose of the assets as his own, without giving the indemnity, he cannot recall the property.[7] So if one partner on dissolution takes out what he deems to be his share, but the rest is afterwards lost, he must account to the other partners for the part withdrawn.[8]

If land is conveyed to one of three partners, by a debtor of the

the partners as to parts of the property, if the state of the accounts render this advisable, and one of the partners is resisting it. Buckingham *v.* Ludlum, 29 N. J. Eq. 345, 360.

[1] *Ex parte* Cooper, 1 M. D. & DeG. 358.

[2] *Ex parte* Sprague, 4 DeG. M. & J. 866.

[3] Armstrong *v.* Fahnestock, 19 Md. 58.

[4] Jones *v.* Neale, 2 Patt. & H. (Va.) 339.

[5] Hunt *v.* Morris, 44 Miss. 314; Koningsburg *v.* Launitz, 1 E. D. Smith, 215. *Contra* if the usage of the business (croppers) is to divide the crop into parts, and give each possession of part as his separate crop, without intention to terminate joint ownership, for then the possession of one is the possession of all. Usry *v.* Rainwater, 40 Ga. 328.

[6] Fitzgerald *v.* Cross, 20 N. J. Eq. 90; *Ex parte* Wheeler, Buck, 25; *Ex parte* Wood, 10 Ch. D. 554.

[7] Tracy *v.* Walker, 1 Flip. 41; 3 West Law Month. 574.

[8] Allison *v.* Davidson, 2 Dev. (N. Ca.) Eq. 79. And see Solomon *v.* Solomon, 2 Ga. 18.

firm, in payment of a debt, and the grantee conveys part to one of the other partners as his share, the whole is converted into separate property, not only the part conveyed, but the part held by him for himself and the third partner, for if the share of one ceased to be partnership property the rest did also.[1]

§ 542. To defeat the priority of joint creditors the consummation of an executory contract to sell a share must be clearly proved.

Thus, where G. & A., partners, indebted to K., agreed to continue business until January 1st, and A. should then take the assets and pay the debts, but A. died before that date, appointing G. & M. his executors, G. continued business and paid A. in full, but finding A.'s estate insolvent brought suit against K. for the return of the payment over a *pro rata* dividend, it was held that the transfer to defeat priorities of creditors must be clearly proved, and assets in the hands of G. would be deemed to be held by him as surviving partner and not as executor. Hence, that his payment to K. was as surviving partner, and as in that capacity he need not pay *pro rata*, the payment cannot be got back.[2]

An appropriation may be revoked if not fully executed. Thus, a consent that a partner may apply a check to his individual debt is revocable before such application by notice.[3]

But the transfer is none the less final because accompanied by a stipulation that deficiencies or excess in the final settlement of the interest of such partner shall be equalized by his paying or receiving, or even by his restoration of part of the property, without specifying any particular part.[4]

[1] Smith *v.* Ramsey, 6 Ill. 373. If the title to land is in one partner, and on his death the other partner presents a claim against the estate for his advances in its purchase, he may withdraw the claim and is not estopped thereby, if such presentation and abandonment of the land as partnership property, and an assent to its being regarded as individual, Way *v.* Stebbins, 47 Mich. 296.

[2] Kreis *v.* Gorton, 23 Oh. St. 468.

[3] National Bank *v.* Mapes, 85 Ill. 67.

[4] Mafflyn *v.* Hathaway, 106 Mass. 414; Sharpe *v.* Johnston, 59 Mo. 557; Murchison *v.* Warren, 50 Tex. 27. And see Beckwith *v.* Manton, 12 R. I. 442, where two partners holding the legal title to land give to the third a contract to convey a tract as his estimated share of the profits, and he gives in return a receipt for a sum of money to bear seven per cent. The receipt has become joint prop-

§ 543. Choses in action.— Choses in action may be divided by any assignment that would be sufficient to transfer them from one individual to another as by transfer to each other.[1] Thus the firm may indorse a note payable to it to one partner;[2] or, if a single claim, by release of interest by one to the other, or indorsement by one joint payee to the other;[3] or by procuring the debtor to make a note or other promise to each partner for his proportion of the debt.[4]

So where a person who has collected funds for two partners pays one of them his share, the balance may be regarded as belonging to the other, and his separate creditors can attach it if there do not appear to be any partnership creditors.[5] Or by one partner making his note to the other. Such notes form no part of the firm's assets.[6]

So division may be inferred, as where a firm of attorneys received a claim for collection, and, after dissolving, one does all the work of collecting, the jury may, in a suit by him in his own name, find that it was awarded to him by the terms of dissolution.[7]

Where the firm's bank account was kept in the name of one partner and mixed with his private funds at the wish of the other partners, and they were consulted as to the propriety of leaving the funds in the bank after its paper had begun to depreciate, loss

erty in place of the land, and a conveyance can be required independent of the state of accounts.

[1] Lawrence *v.* Vilas, 20 Wis. 381; McLanahan *v.* Ellery, 3 Mason, 267; Rowand *v.* Fraser, 1 Rich. (S. Ca.) L. 325; Jackman *v.* Partridge, 21 Vt. 558; Belknap *v.* Cram, 11 Oh. 411; Mechanics' Bank *v.* Hildreth, 9 Cush. 356.

[2] Merrill *v.* Guthrie, 1 Pin. (Wis.) 435; Stevenson *v.* Woodhull, 19 Fed. Rep. 575; Baring *v.* Lyman, 1 Story, C. C. 396; Smith *v.* Lusher, 5 Cow. 688; Manegold *v.* Dulau, 30 Wis. 541; and see Kirby *v.* Coggswell, 1 Cai. 505.

[3] Sneed *v.* Mitchell, 1 Hayw. (N. Ca.) 289.

[4] Morse *v.* Green, 13 N. H. 32 (38 Am. Dec. 471); Marlin *v.* Kirkey, 23 Ga. 164; McDougald *v.* Banks, 13 Ga. 451; Shafer's Appeal, 106 Pa. St. 49.

[5] Robinson *v.* Moriarity, 2 G. Gr. (Iowa) 497; Harlan *v.* Moriarty, id. 486.

[6] Lamkin *v.* Phillips, 9 Porter (Ala.), 98; Waterman *v.* Hunt, 2 R. I. 298, 303; Belknap *v.* Cram, 11 Oh. 411; Glynn *v.* Phetteplace, 26 Mich. 383.

[7] Anderson *v.* Tarpley, 6 Sm. & Mar. 507.

by failure of the bank cannot be thrown upon such partner. No appropriation can be inferred.[1]

Where Myers furnished the money to buy a drove of cattle on joint account, and, the objects of the partnership having been completed, each of the other partners handed a certain amount of money to one of their number for Myers, this made it his individual property, and the depositary who had allowed another partner to use part of the fund was held liable to Myers at law therefor.[2]

§ 544. Taking funds without consent of all.— The consent or concurrence of all the partners is necessary to accomplish a severance of the joint title and convert an asset into individual property; one partner cannot appropriate the property to himself or to another partner, nor can a majority do so. The power of each partner to sell and give a good title to a *bona fide* buyer is not a power to appropriate, or permit a copartner to appropriate, an asset without the consent of all, and partnership property thus improperly taken away, or funds invested, can be followed and subjected as held on a resulting trust, unless it comes into the hands of a *bona fide* buyer.[3]

Hence a partner cannot make a note to himself, and charge the firm with it.[4] Or, if he confess judgment against the firm for his separate debt, the creditors can attack the judgment collaterally, on distribution of the fund.[5] And if a partner who has procured a

[1] Campbell *v.* Stewart, 34 Ill. 151.

[2] Myers *v.* Winn, 16 Ill. 135.

[3] West *v.* Skip, 1 Ves. Sr. 239, 242; *Ex parte* Ruffin, 6 Ves. 119; Philips *v.* Crammond, 2 Wash. C. C. 441; Crosswell *v.* Lehman, 54 Ala. 363 (25 Am. Dec. 684); King *v.* Hamilton, 16 Ill. 190; Barkley *v.* Tapp, 87 Ind. 25; Cooper *v.* Frederick, 4 G. Gr. (Iowa), 403; Saylor *v.* Mockbie, 9 Iowa, 209; Wilson *v.* Davis, 1 Montana, 183; Croughton *v.* Forrest, 17 Mo. 131; Uhler *v.* Semple, 20 N. J. Eq. 288; Shaler *v.* Trowbridge, 28 id. 595; Partridge *v.* Wells, 30 id. 176; Bun *v.* Morris, 1 Caines, 54; Rhodes *v.* Williams, 12 Nev. 20· Buford *v.* Neely, 2 Dev. (N. Ca.) Eq. 481; Clement *v.* Foster, 3 Ired. Eq. 213; Eason *v.* Cherry, 6 Jones, Eq. 261; Chipley *v.* Keaton, 65 N. Ca. 534; Thomas *v.* Lines, 83 N. Ca. 191; Moore *v.* Knott, 12 Oreg. 260; Horback *v.* Huey, 4 Watts, 455; McNaughton's Appeal, 101 Pa. St. 550; Hunt *v.* Benson, 2 Humph. (Tenn.) 459; Piano Co. *v.* Bernard, 2 Lea, 358, 364; Wood *v.* Shepherd, 2 Patt. & H. (Va.) 442; Bird *v.* Fake, 1 Pin. (Wis.) 290.

[4] Brown *v.* Haynes, 6 Jones, Eq. (N. Ca.) 49. And see § 347.

[5] McNaughton's Appeal, 101 Pa. St. 550.

loan for a firm, on the security of his individual property, receives partnership assets assigned to him to be appropriated to pay the lender, he cannot use them for any other purpose, nor can a person to whom he assigns them to pay an individual debt.[1]

Charging property to one partner upon the books is evidence of its conversion to his separate estate,[2] or depositing it to his credit in bank.[3] So if property exempt from execution, as the tools of the partners, are delivered to them by the firm's assignee for benefit of creditors, the transfer does not revive the partnership in them.[4] And where ships owned in partnership by persons belonging to different countries are captured by the cruisers of a country at war with that of one of the partners, and not of the others, a sum paid as indemnity to the two latter, excluding the former, is the separate property of the recipients.[5]

§ 545. Following the funds.— Hence, also, if one partner, in fraud of his copartners' rights, abstract funds and invest them in property in his own name, or in that of his wife, or of a third person, or use them to pay off incumbrances upon his own property or that of his wife, the defrauded partners can follow the funds.[6]

But it seems that there must be some element of fraud in

[1] Owens *v.* Miller, 29 Md. 144.

[2] See § 284.

[3] Rhoton's Succession, 34 La. Ann. 893.

[4] Wells *v.* Ellis (Cal.), 9 Pac. Rep. 80.

[5] Campbell *v.* Mullett, 2 Swanst. 551. The doctrine of good faith would seem to require a different rule; but in this case the court perhaps could not grant rights to an alien enemy, not because the property was not joint, but because of his domicile.

[6] Kelley *v.* Greenleaf, 3 Story, 93; Shinn *v.* Macpherson, 58 Cal. 596; Kayser *v.* Maughan, 8 Col. 339; Renfrew *v.* Pearce, 68 Ill. 125; Croughton *v.* Forrest, 17 Mo. 131; Holdrege *v.* Gwynne, 18 N. J. Eq. 26; Howell *v.* Howell, 15 Wis. 60 [55]; Miller *v.* Price, 20 id. 117; Bergeron *v.* Richardott, 55 id. 129; Prentiss *v.* Brennan, 1 Grant's Ch. (Up. Can.) 484. As to accountability for profits made by speculating or trading with funds of the partnership, see §§ 790–801. In Howell *v.* Howell, 15 Wis. 60, this was held not to be a trust, and the statute of limitations began to run as upon an adverse possession. In Russell *v.* Miller, 26 Mich. 1, the action was brought to obtain the benefit of land bought in the name of the defendant, on an allegation of an express agreement to buy for the firm. But it was held that this would not sustain a recovery on the theory of a resulting trust arising from a misuse of partnership funds by investing them in land in defendant's name.

the appropriation; thus mere overdrafts give no right to proceed against the separate estate.[1]

Thus where a partner drew out money and expended it on his wife's land, there was held to be no lien for it unless the taking was surreptitious or in bad faith.[2] So where a partner paid taxes on his own property with partnership funds.[3] And where a partner pays a private debt with partnership funds, if the transaction is small, and there is no reasonable apprehension of injury to others, it may be sustained as an exercise of a right to draw funds for the partner's support.[4] And where a salaried partner whose salary was in arrear drew money, charged it to himself on the books, and invested it in stock, the creditors cannot, upon the firm becoming insolvent, claim the stock to be partnership property.[5]

§ 546. —— **implied assent.**— The assent of the copartners may, however, be implied, as by a habit of all the partners of applying assets to separate use; thus where a partner bought a slave, paying a small part of the price out of partnership funds, the partnership has no lien upon the slave for the amount.[6]

So where some of the partners without objection from the rest largely overdrew their accounts and built themselves fine residences, all supposing the partnership to be prosperous. The firm failed; one of the partners, to whom a balance was due, had been engaged in selling for the firm, and had less opportunity than the rest to know its condition or to know of this use of its funds, but the books were always open to him, and the entries of these transactions were upon them, and it was held in a suit for an accounting that he could not assert a lien upon these houses.[7]

§ 547. **Delivery or change of possession.**— As between partners, as the chattels are already in the possession of each as well as of all, delivery does not so much consist of actual tradition, as in the surrender and relinquishment of the

[1] See § 839.

[2] Sharp *v.* Hibbins, 42 N. J. Eq. 543.

[3] United States *v.* Duncan, 4 McLean, 607, but it was the creditors and not the partners who complained here.

[4] Williams *v.* Barnett, 10 Kan. 455, 462; Crozier *v.* Shants, 43 Vt. 478.

[5] Maybin *v.* Moorman, 21 S. Ca. 346.

[6] Cabaniss *v.* Clark, 31 Miss. 423.

[7] McCormick *v.* McCormick, 7 Neb. 440.

seller's possession, and is rather a matter of form than a substantial part of the conveyance; nevertheless it is necessary when required under the statute of frauds as applied to the law of sales; but of chattels scattered in different places a symbolic delivery is enough, or a delivery of part for all.[1] Yet such conversion into separate property by division, or by sale from one partner to another without change of possession may be valid *inter se* and as to individual creditors; it has nevertheless been held void as to partnership creditors without notice thereof for want of change of possession.[2]

And conversely where a person buys an interest in a firm, no formal delivery is necessary *inter se*.[3]

In Birks *v.* French, 21 Kan. 238, B., of L., W. & B., *bona fide* bought a herd of cattle then in pasture from his firm, and afterwards L., in the name of the firm, sold the same herd to F., a former dealer with the firm, who had no notice of the change of title. F.'s title was held better than B.'s. The reason given was that the sale to B. was a dissolution of partnership as to this herd, and not binding on a prior dealer until notice.

Where the firm shipped articles to a partner who had purchased them from it, and on the same day both went into insolvency, the actual appropriation is sufficient to constitute them part of his separate estate while in transit.[4]

Where one partner goes away, and the other takes possession and pursues and buys out the former, the title of the buyer is complete without further delivery under the statute of frauds as against an attachment.[5]

The mere fact that the purchasing partner by agreement continues business in the same name, sign, business cards and same form of bank account, and employing the outgoing partner as clerk at a salary, was held not to warrant the inference that the property

[1] Shurtleff *v.* Willard, 19 Pick. 202.

[2] Page *v.* Carpenter, 10 N. H. 77; Criley *v.* Vasel, 52 Mo. 445; Newell *v.* Desmond, 63 Cal. 242; *Re* Tomes, 19 Bankr. Reg. 36; Moline Wagon Co. *v.* Rummell, 2 McCrary, 307; 12 Fed. Rep. 658; 14 id. 155; but this case is reversed as Huiskamp *v.* Moline Wagon Co. 121 U. S. 310, because a creditor who has no lien cannot object to changes of ownership; but this is different from change of possession. See § 105.

[3] Ritchie *v.* Kinney, 46 Mo. 298.

[4] Fisher *v.* Minot, 10 Gray, 260.

[5] Boynton *v.* Page, 13 Wend. 425.

was still that of the outgoing partner transferred in fraud of creditors, and is not, therefore, subject to levy by a subsequent creditor.[1]

Where L., of L. & M., who owned lumber in partnership, sold out his interest to D., and the lumber was marked D. & M., and M. thereupon employed L.'s as his agent to take charge of his interest, here L.'s continued possession does not make his sale to D. void as to his creditors, for D. could do no more; he could not exclude M.'s agent from possession.[2]

§ 548. —— sale by one partner to a third person.— Where a partner sells or assigns his share to a third person in a partnership, change of possession is not possible and manual delivery is not essential to the validity of the conveyance. The ground upon which this is based in some of the cases below is not the true one. The parties are not tenants in common, but the assignment conveys a right in the nature of a chose in action not capable of delivery, and notice of the assignment to the holder of the fund or to third persons is all that is essential, and even that as between the assignor and the assignee is not necessary.

In Whigham's Appeal, 63 Pa. St. 194, H., T. & A. were partners in a portable saw-mill, A. being the manager and in possession. H. sold his interest to W. and A. recognized W.'s title, but there was no change of possession. The sale was held valid against creditors of H. because not capable of further delivery, and because the possession of one tenant in common is the possession of all.

In Raiguel's Appeal, 80 Pa. St. 234, 247–8, one partner assigned all his interest in a dissolved partnership to a creditor as security. The master held this to be valid against the execution sale of his interest by another creditor, and the buyer, on execution, took nothing.

In Wallace's Appeal, 104 Pa. St. 559, A., while indebted to S. for $9,500, and having $3,000 capital in a firm, in order to increase his interest in the business borrowed $14,500 of W., and to secure it gave W. a written transfer of all his interest in the firm, with a clause that on default W. could take possession. S. got judgment

[1] Hamill *v.* Willett, 6 Bosw. 533; Criley *v.* Vasel, 52 Mo. 445.

[2] Pier *v.* Duff, 63 Pa. St. 59.

against A. and A.'s interest was sold on execution, his copartners buying it in for $10,000, W. notifying all at the sale that it was pledged to him, and S. was paid in full out of the proceeds. On bill by W. for an accounting, it was held that possession was not necessary to the pledgee's title, being impossible, and this is an exception to the general rule, and that the pledge is good against every one but buyers without notice; that W.'s right to take possession meant a right to call for an account, and A.'s copartners as buyers of his interest only acquired any surplus in it, and must pay W. his claim if they desire to hold A.'s share.[1]

In Collins' Appeal, 107 Pa. St. 590, A. borrowed money of B. for the purpose of forming a limited partnership, and as security pledged all his interest in the future partnership. The partnership was formed, but under another than the then intended name and with additional parties, and at its expiration and winding up A.'s share was paid to his executors. It was held that a pledge could be made of a thing not *in esse*, and the partnership formed being in fact the one intended, the pledge is good against general creditors of A. and against all but buyers without notice, and even against subsequent partnership creditors.

The original draft of a notice of dissolution reading as follows: "B. having disposed of his interest in the firm of A. & B. to A., the firm is this day dissolved," etc., was held a sufficient writing to transfer B.'s interest to A.[2]

In Whittle *v.* Skinner, 23 Vt. 531, an assignment by C., a partner, of all his interest in the firm, or in the unascertained balance that might be due him on settlement, as security for an individual debt, but with the assent of his copartner, was held to be void, because it is an assignment of an unliquidated claim or a virtual sale of suits, which is void for maintenance, and also because an assignment by way of pledge is inoperative without delivery, and is therefore a mere agreement to assign; and hence on subsequent settlement, a balance of $50 in the hands of his copartner being due C., an agreement by C. that it should remain in his hands and be credited on a note of C. to the partner is not interfered with by the attempted prior assignment.

[1] This case had a variety of branches, viz.: in the Orphans' Ct. as Hulse's Estate, 11 Weekly Notes (Pa.), 499; then as Collins' Appeal, 107 Pa. St. 590; and lastly as Wallace's Appeal, 104 id.

[2] Armstrong *v.* Fahnestock, 19 Md. 58.

§ 549. An offer by one partner to sell out to the other at a certain sum, the offer to continue for a certain time, but in the meantime the business to go on, new debts being created and old ones paid, will be construed as an offer to sell the interest as it existed at that date, and an acceptance at the end of the time of the interest as it then stood, at the original price, is no acceptance.[1]

Where a firm had valuable contracts for furnishing articles to be manufactured under its patents, and one partner having died, his executor sold to the surviving partner the decedent's half of the stock, fixtures, etc., according to a schedule, but no reference was made to the contracts, and afterwards sold to him all the decedent's interest in the patents and the lease of the place of business, the survivor assuming the payment of all salaries due since the death, the contracts being of no value apart from the patents, the inference will be drawn that the executor intended to reserve no benefit in the fulfillment of the outstanding contracts and that the survivor's continuance of business was on his own sole account.[2]

An assignment by one partner of all his interest in a contract of partnership "by which he is entitled to one-third the net profits," was held not to transfer his right to a salary and expenses in managing the business.[3] A conveyance of half a partner's interest in a gold company, with a subsequent clause that the buyer was not to be a partner but to have only half the seller's interest in the metals obtained, is modified by the subsequent clause and passes no interest in the outfit.[4]

RETIRING PARTNER'S EQUITABLE LIEN.

§ 550. Retiring partner has no lien.— The right of a partner to have the assets applied to pay the debts ceases when he parts with his interest in the assets, as where partners convert their joint interests into separate interests.

[1] Eggleston *v.* Wagner, 46 Mich. 610.

[2] Collender *v.* Phelan, 79 N. Y. 366.

[3] Stewart *v.* Stebbins, 30 Miss. 66.

[4] Phillips *v.* Jones, 20 Mo. 67. Where partners who, by indenture, had specified how much each should contribute and agreed to continue for five years, but at the end of a year dissolved and sold out to the plaintiff all their rights secured by the indenture, this conveys not only the original contributions for the rest of the five years, but also all subsequent purchases made with partnership funds, Caswell *v.* Howard, 16 Pick. 562.

Hence, where a partner retires from the firm, selling or assigning his interest to the continuing or remaining partners, he loses his equitable right and can no longer apply as partner for an accounting and receiver, but becomes a mere unsecured creditor for whatever may be or become due him, and, like any other creditor, has only the personal security of his former copartners to look to.[1]

Some cases, however, give the retiring partner, as a surety, rights and powers to compel application of assets to debts, which are nearly equivalent to the lien of a partner.[2]

Where one partner sold his entire interest to a third person; the other partner then used partnership funds to buy land in his own name, the retired partner has no lien on the lands.[3] A partner who conveys his interest in partnership land to his copartner is entitled to a vendor's lien for the price, provided there are no joint creditors;[4] but any such lien or a mortgage to secure the purchase money would be subject to the claims of joint creditors.[5] But the mortgage in the hands of an assignee for value was held good against the attachments of joint creditors in Scudder *v.* Delashmut, 7 Iowa, 39.

In Seaman *v.* Huffaker, 21 Kan. 254, M., of H. & M., partners, owning real and personal property, sold in writing all his interest in the property to his partner, H., in consideration of H.'s promise to pay him $1,500 and to pay the debts. The real estate remained in the name of both and was mortgaged by H. to secure a partnership creditor. The creditor, having foreclosed, was held entitled to a decree for the title against both partners, for the entire equitable title being in H., he could mortgage it, and the claim for a firm debt is prior to M's claim for $1,500, which is an individual debt.

In Low *v.* Allen, 41 Me. 248, L. sold out to his partner A. all his interest in the firm of L. & A., A. giving him in payment notes

[1] Lingen *v.* Simpson, 1 Sim. & Stu. 600; *Ex parte* Ruffin, 6 Ves. 119; Jones *v.* Fletcher, 42 Ark. 422; Marlin *v.* Kirksey, 23 Ga. 164; Wilson *v.* Soper, 13 B. Mon. 411 (56 Am. Dec. 573). And see § 189, and cases in the succeeding notes of this topic *passim*, the foregoing being cited here because not elsewhere specifically noticed under this head.

[2] See § 534.

[3] Barkley *v.* Tapp, 87 Ind. 25.

[4] Reese *v.* Kinkead, 18 Nev. 126.

[5] Seaman *v.* Huffaker, 21 Kan. 254; Low *v.* Allen, 41 Me. 248; Savage *v.* Carter, 9 Dana, 408.

and a mortgage upon the partnership property "to secure him for his liability on the debts and for the ultimate payment of the notes." The property being sold by consent and the proceeds coming into L.'s hands, it was held that he could appropriate it to partnership liabilities before applying it to the notes.

§ 551. **Continuing partners assuming debts.**—The fact that the continuing partner, or if a third person, who buys the interest and becomes a partner, assumes the debts and agrees with the retiring partner to indemnify or save him harmless or to pay the debts, does not preserve the lien. The contract is a personal obligation only, and is equivalent merely to deferring the payment of the consideration. Hence the property is converted into separate property and the buyers can deal with it as they please, for the retiring partner is a mere creditor, and not a *cestui que trust.*[1]

[1] *Ex parte* Ruffin, 6 Ves. 119, 126; *Ex parte* Williams, 11 id. 3; Crane *v.* Morrison, 17 Bankr. Reg. 393; Reese *v.* Bradford, 13 Ala. 837, 847; Griffin *v.* Orman, 9 Fla. 22; West *v.* Chasten, 12 Fla. 315; Ladd *v.* Griswold, 9 Ill. 25 (46 Am. Dec. 443); Hapgood *v.* Cornwell, 48 id. 64; Goembel *v.* Arnett, 100 id. 34; Williamson *v.* Adams, 16 Ill. App. 564; Trentman *v.* Swartzell, 85 Ind. 443; Maquoketa, City of, *v.* Willey, 35 Iowa, 323; Griffith *v.* Buck, 13 Md. 102; Armstrong *v.* Fahnestock, 19 id. 58; Robb *v.* Mudge, 14 Gray, 534; Howe *v.* Lawrence, 9 Cush. 553, 558 (57 Am. Dec. 68); Andrews *v.* Mann, 31 Miss. 322; Fulton *v.* Hughes, 63 id. 61; Vosper *v.* Kramer, 31 N. J. Eq. 420; Dayton *v.* Wilkes, 5 Bosw. 655; Cory *v.* Long, 2 Sweeny (N. Y.), 491; Weber *v.* Defor, 8 How. Pr. 502; Parks *v.* Comstock, 59 Barb. 16; Dimon *v.* Hazard, 32 N. Y. 65; Emerson *v.* Parsons, 46 id. 560 (aff'g 2 Sweeny, 447); Stanton *v.* Westover, N. Y. (1886) 4 N. E. Rep. 529; Latham *v.* Skinner, Phil. (N. Ca.) Eq. 292; Rankin *v.* Jones, 2 Jones (N. Ca.), Eq. 169; Allen *v.* Grissom, 90 N. Ca. 90; Miller *v.* Estill, 5 Oh. St. 508, 517–18; Baker's Appeal, 21 Pa. St. 76; Clarke's Appeal, 107 id. 436; Croone *v.* Bivens, 2 Head, 339; Smith *v.* Edwards, 7 Humph. 106; Hollis *v.* Staley, 3 Baxter, 167; White *v.* Parish, 20 Tex. 688; and see Wagner *v.* Wagner, 50 Cal. 76. *Contra,* DeVeau *v.* Fowler, 2 Paige, 400; Olson *v.* Morrison, 29 Mich. 395. It will be remembered that if a continuing partner agrees to pay the debts and not merely to indemnify, the retiring partner has a right of action against him upon non-payment, without himself having first paid anything (§ 636). This, however, is an action at law for money damages and not an equitable right to have the specific assets applied to partnership debts to the exclusion of separate debts, which is what we are here considering, and which carries with it a right to injunction and receiver, and which a court will enforce in favor of the firm creditors in case

Thus, in Griffith *v.* Buck, 13 Md. 102, one partner sold out to the other, who assumed the debts and agreed that the latter should be released therefrom. The continuing partner afterwards sold out the whole concern to G., leaving the debts unpaid. The creditors claimed that the retired partner had a lien to have the debts paid, which lien the creditors could use to set aside the sale to G. But it was held that the partnership effects on voluntary dissolution could be transferred *bona fide* to one or more partners or to a stranger, and though the consideration be that the buyer shall pay the debts this will not aid the creditors.

In Lingen *v.* Simpson[1] the partners dissolved and divided up the tangible property of the firm between them, agreeing that the debts owing to the firm should be appropriated to pay those owing by it. This fund proved deficient, but it was held that neither partner had a lien upon the share of property alloted to the other for the deficiency.

In Langmead's Trusts,[2] one partner retired, assigning all his interest in the firm to the other, subject to debts, the other agreeing to pay debts and indemnify him. The continuing partner afterwards assigned a policy of insurance which had been an asset of the firm to a mortgagee with notice of the terms of dissolution. One judge held that no lien was intended to be reserved; the rest held that, whether intended or not, the mortgagee need not see to the application of the mortgage money.

In Giddings *v.* Palmer,[3] partners on dissolution divided the assets between them and each assumed specified liabilities. B., one of the partners, who had agreed to pay a partnership note due

the assets are being judicially distributed. The above two cases of Deveau *v.* Fowler and Olson *v.* Morrison were covenants to pay the debts, and the courts held that such a covenant recognizes or preserves the lien; in the former case the retiring partner was allowed an injunction and receiver on charges of insolvency and using the assets to pay private debts, and in the latter the firm creditors and the retiring partner jointly obtained injunction and other relief in equity against his vendee, who had also bought out the other partner. It was also held there that the defendant could not insist that the creditors should first obtain judgment against the partners, for he had no right to require those to be pursued whom he had undertaken to relieve. See, also, § 929.

[1] 1 Sim. & Stu. 600; S. P. Whitworth *v.* Benbow, 56 Ind. 194; and see Robertson *v.* Baker, 11 Fla. 192.

[2] 7 De G. M. & G. 353.

[3] 107 Mass. 269.

to his father, instead of applying the assets allotted to him to its payment, devoted them to the discharge of individual debts which he owed his father. The father, who, at the time, knew of the agreement and its violation, brought an action on the note against the other partners. It was held that each partner received his allotted assets absolutely, and not subject to any trust, and each had released his lien to have them applied to debts and relied upon the other's promise, and the father could maintain the action.

§ 552. **Retention of lien by the contract.**— There seems, however, no reason why the retiring partner may not retain a lien by agreement, and if the terms of sale so express, or an intention to that effect appears, the lien will be preserved;[1] and if the purchasing partner agrees to pay the debts with or out of the assets, or to apply the assets or the profits to the debts, a trust fund is created, or rather the retiring party has preserved his equity to insist upon an application of the assets to the debts, and the courts will enforce it.[2]

But a promise to do the best he could with the assets towards the firm debts creates no lien,[3] and it was doubted whether a sale "subject to the payment of debts" with an agreement of indemnity shows an intention to reserve a lien;[4] but if the sale is to a third person on such terms, the title was held not to have passed,

[1] Savage *v.* Carter, 9 Dana, 408; Croone *v.* Bivens, 2 Head, 339; Griffith *v.* Buck, 13 Md. 102, 116; Rogers *v.* Nichols, 20 Tex. 719, 724. As to the rights of a retiring partner in those states where he is regarded as a surety to compel continuing partners to pay the debts, see § 532.

[2] Payne *v.* Hornby, 25 Beav. 280; Kelsey *v.* Hobby, 16 Pet. 269; Matter of Shepard, 3 Ben. 347; Sedam *v.* Williams, 4 McLean, 51; Marsh *v.* Bennett, 5 McLean, 117; Talbot *v.* Pierce, 14 B. Mon. 158; Bowman *v.* Spalding (Ky.), 2 S. W. Rep. 911; Harmon *v.* Clark, 13 Gray, 114; Topliff *v.* Vail, 1 Harr. Ch. (Mich.) 340; Wildes *v.* Chapman, 4 Edw. Ch. (N. Y.) 669; Cory *v.* Long, 2 Sweeny, 491; Robb *v.* Stevens, 1 Clarke, Ch. 195; Rogers *v.* Nichols, 20 Tex. 719; Shackelford *v.* Shackelford, 32 Gratt. 481; and Roop *v.* Herron, 15 Neb. 73, might have been put on this ground. In this case, after a partner had retired, merely assigning his interest to his copartner, who agreed to pay the debts, the firm being insolvent, the counsel of the outgoing partner was regarded as necessary to a transfer of assets to pay the separate debt of the remaining partner.

[3] Hapgood *v.* Cornwell, 48 Ill. 64.

[4] Langmead's Trusts, 7 DeG. M. & G. 353.

and therefore not to be affected by execution for a private debt of the buyer.[1]

If the retiring partner reserves a lien for the payment of debts, such lien extends to the entire assets and not merely to his proportion of them or of the tangible property,[2] but not to subsequent acquisitions.[3]

§ 553. Illustrations.—Where the buying partner agrees to pay all the debts and wind up the business, applying the assets as fast as realized to the debts and keep an account, this shows an intention to preserve the lien, and the contract makes the buyer a trustee; hence on his death that part of his estate consisting of the former partnership assets will be applied to the firm's debts.[4]

In Menagh *v.* Whitwell,[5] it was said by ALLEN, J., that the sale by one partner to another reserves no lien when new rights have attached by reason of such change of interest, as where the transfer is to a sole partner and the rights of his individual creditors have accrued, or the new firm has exercised the *jus disponendi* which they have, or there are creditors of the new firm. But there is no reason why, when no adverse or paramount rights have attached to the joint property, the same equity should not be recognized in the retiring partner as if he had been a continuing partner.[6]

In Harmon *v.* Clark,[7] a dissolution and conveyance by one partner of all the assets to the other, who agreed to pay all the debts, and after their payment to convey one undivided half back to the retiring partner, was held not to be a conveyance and conversion of the joint property into separate property, leaving no duty on it, and taking only the personal agreement of the copartner to pay debts, but it fixes a trust upon the property for the benefit of the retiring partner and creates a clear equity in his favor. The right to enforce this trust devolves, in case of insolvency, on the joint creditors, who can insist that the equitable claim

[1] Stevenson *v.* Sexsmith, 21 Grant's Ch. (Up. Can.) 355.

[2] Northrup *v.* McGill, 27 Mich. 234.

[3] Kerr *v.* Bradford, 26 Up. Can. C. P. 318.

[4] Shackelford *v.* Shackelford, 32 Gratt. 481.

[5] 52 N. Y. 146, 167 (11 Am. Rep. 683).

[6] This idea was also suggested in Shackelford *v.* Shackelford, 32 Gratt. 481, 503.

[7] 13 Gray, 114.

of the partner shall be worked out and the property applied to the payment of the joint debts and not to separate debts.

In Kitchen *v.* Lee,[1] K. & L. were partners, and L. was a minor. They dissolved, K. conveying to L. all his interest in the firm on condition that L. would pay the debts. L. subsequently refused to pay them on the ground of infancy. Here it was held that he could not retain the assets and refuse to pay the debts.[2]

When, however, the retiring partner is to receive a bond to secure the purchase money agreed to be paid to him, the contract is executory until it is given, and his lien continues until then.[3]

§ 554. **Remedies in such case.**— If a lien is reserved it can be enforced against a voluntary transferee.[4] But a purchaser for value of an asset is not bound to see to the application of the purchase money, and is justified in assuming it will be properly applied.[5] The lien being retained, it and a remedy upon it are the same as in case of dissolution without sale,[6] and the rights of firm creditors to be subrogated to it when the court is administering the concern is the same as before.[7]

In Kellogg *v.* Fox,[8] K., of B. & K., sold out his interest in the firm to F. & M., with whom B. then went into partnership as B., F. & Co., the terms of sale being that the interest sold should remain K.'s property until paid for. Afterwards the new firm sold some of

[1] 11 Paige, 107.

[2] Contrary to the above cases it was held in Clarke's Appeal, 107 Pa. St. 436, where the articles of partnership provided that any partner could sell his share, and in that case the continuing partners and the buyer of the share were bound to exonerate him from all debts, and apply the assets to pay the debts. The plaintiffs sold their shares, but were afterwards compelled to pay debts, and applied to equity for reimbursement; that equity had no jurisdiction to wind up and compel a reimbursement; that the plaintiffs were creditors and not partners, the same as any partner who has sold and had an adequate remedy at law, no discovery being sought and the accounts being all on one side, nor could the bill be sustained on the ground of a trust.

[3] See § 540; *Ex parte* Wood, 10 Ch. D. 554; Fitzgerald *v.* Cross, 20 N. J. Eq. 90.

[4] Wildes *v.* Chapman, 4 Edw. Ch. 669.

[5] Per KNIGHT BRUCE, L. J., in Langmead's Trusts, 7 De G. M. & G. 353.

[6] Rogers *v.* Nichols, 20 Tex. 719.

[7] Buck Stove Co. *v.* Johnson, 7 Lea (Tenn.), 282.

[8] 45 Vt. 348.

the property in good faith, but F. & M. appropriated the avails to their own use without paying K., who brought trover. It was held that the action would not lie. The reservation of interest by K. was only as partner of B., and B. had the same power of disposition after as before the dissolution, and F. & M. are not liable for participation in a sale which B. had the right to make.

In McGown *v.* Sprague,[1] it was held that if the partner who buys out the other and assumes the debts, absconds without paying debts, the selling partner could consider himself released from the contract, and a court would release him from it and reinstate him in his original rights as partner and restore his lien, and he could thereupon have the assets applied to the partnership debts prior to the individual debts of the copartner; LIGON, J., dissenting.

A retiring partner who has reserved his lien can file a bill to have the assets applied to the firm's debts in case of breach of duty or contract, or in case of fraud;[2] though not on mere apprehension of loss without misconduct;[3] that he can file such a bill against the administrator of the continuing partner, who is under an insufficient administration bond.[4]

Where on dissolution a partner merely left an amount of assets equal to the debts in the hands of a copartner without selling to him, and the latter agreed to pay the debts but kept on in business, incurred new debts, and after execution had been levied on the stock assigned for the benefit of creditors, the former partner can insist on his lien.[5]

SUCCESSIVE FIRMS.

§ 555. The foregoing principles afford an easy solution to the question of the distribution of the assets of successive partnerships in the same business. These changes of partnership may occur in various ways, as by a partner selling his interest to a third person who is taken into the firm in his place, or by a partner retiring or dying, the business

1 23 Ala. 524.

2 Darden *v.* Crosby, 30 Tex. 150.

3 Walker *v.* Trott, 4 Edw. Ch. 38.

4 Shackelford *v.* Shackelford, 32 Gratt. 481.

5 Parker *v.* Merritt, 105 Ill. 293. And see Williamson *v.* Adams, 16 Ill. App. 564. And see § 105.

being continued, or by a firm taking in a new partner, without the retirement of any member.

In all these cases the property of the old firm is converted into that of the new, and the partners in the new firm have an equitable lien to have it applied to the creditors of the latter firm, which lien the court will use in favor of such creditors until they are paid in full, to the exclusion of creditors of former firms.[1]

§ 556. Illustrations; retirement of old without new partner.— We have already seen that a partner who retires suffering the continuing partners to go on with the old assets as a new firm has lost his equity to compel their application to the debts of the original firm.[2] From this it follows that the original creditors whose priority is worked out through the partners' equity is also gone, and the property will be devoted first to the debts of the new concern.[3]

For example, if, of a partnership of five persons, two retire and the remaining three agree to pay the debts and form a new firm, then one of these retires and the other two form a firm with the remaining assets, but become insolvent and assign for the benefit of their creditors, creditors of the former firms cannot claim any part of the fund until those of the last firm are paid in full.[4]

So where C. & Co., who were indebted to the plaintiff, dissolved, and two of its members formed a new firm as C. & B., taking the assets and assuming the debts, the plaintiff, however, not assenting to the substitution of debtors, and C. & B. assigned for benefit of creditors and as a firm, this was held equivalent to three assignments, and the plaintiff cannot come in as a creditor of the firm of C. & B., for he is a creditor of C. and of B. as individuals.[5]

[1] Camp *v.* Mayer, 47 Ga. 414; Gordon *v.* Cannon, 18 Gratt. 387; Hobbs *v.* Wilson, 1 W. Va. 50; Tracy *v.* Walker, 1 Flip. 41; 3 West Law Month. 574, and the illustrations in next section.

[2] § 550.

[3] That the old creditors can compel the new firm to account if the new firm has no creditors, Dennis *v.* Ray, 9 Ga. 449.

[4] Baker's Appeal, 21 Pa. St. 76.

[5] Scull *v.* Alter, 16 N. J. L. 147. This case also held that plaintiff cannot come upon the separate estates until he has exhausted the partnership assets of C. & Co. or shown that firm also to be insolvent. This is on

Hence, also, the assignment for creditors by the new firm must be for the creditors of the new firm and cannot provide for payment of those of the old on an equality with them.[1]

Where the dissolution is by the death of a partner, and the executor does not part with his equitable right to require debts to be paid, a continuance of business by the survivor with the old assets cannot avail to postpone the old debts to the new ones.[2] And as the property of the creditors of the new firm may have added to the funds, both sets of creditors will share *pari passu*, the representatives of the deceased partner who permitted the business to go on not being allowed to complain.[3]

In Hoyt *v.* Sprague,[4] the lien of the executor of a deceased partner who had acquiesced in the continuance of the business with the old assets is lost as to new property which, in the course of business, takes the place of the old, and he is not even a creditor of the new firm and cannot share *pari passu* with the new creditors; but the opinion seems to regard his lien as continuing to exist in such of the old assets as remain in specie.[5]

§ 557. New partner on retirement of old.— An old firm dissolves, and a partner receives from it a specific portion of the assets, for which he is to pay a certain sum, but never does so, and these assets are transferred to him for the purpose of contributing them as his share of the capital of a new firm, composed of some

the doctrine that a person having a lien upon two funds must exhaust that first on which others have no lien, and is not universally accepted as the rule.

[1] Lester *v.* Pollock, 3 Robt. (N. Y.) 691; s. c. as Lester *v.* Abbott, 28 How. Pr. 488; Smith *v.* Howard, 20 How. Pr. 121.

[2] Deveau *v.* Fowler, 2 Paige, 400. Here there was but one survivor, and hence not a new firm. The act of the executor here would not generally be regarded as a reservation of his lien.

[3] Filley *v.* Phelps, 18 Conn. 294, 304. And see *Ex parte* Chuck, 8 Bing. 469, cited in § 558.

[4] 103 U. S. 613.

[5] In New Hampshire, where the creditors' priority is in some degree inherent in themselves and not worked out through a partner's equity, their paramount right is not intercepted by any management of the surviving partners among themselves, and any property of the original firm which can be traced through successive firms will be devoted to the original creditors, as against later debts or attachments or seizures by creditors of the new firms. And the administrator's assent makes no difference, as he has nothing to do with the assets. Benson *v.* Ela, 35 N. H. 402. This rule would, perhaps, also obtain in Vermont and Missouri.

members of the old firm and others, and are so contributed. But the new firm shortly dissolved, some of the members taking all the assets, and giving him a note for the valuation of all the goods he had so contributed, being the same amount which he owes the old firm for them. The proceeds of this note when collected belong to his personal estate, although the old firm is insolvent and his debt to it has not been paid.[1]

X., of G. & X., sold out to H. all his interest in the firm, H. covenanting to pay debts and hold him harmless, and the partnership of G. & H. was then formed. G. & H. having assigned for the benefit of creditors, the creditors of G. & X. claimed a lien and charge upon the property of G. & X. and a right to follow that property into the new firm as against its creditors. But as the priority of creditors is only through the partners, no such relief can be granted.[2]

Indeed, a person who transfers to another goods for the purpose of being contributed by the latter to the capital of a new firm of which he is becoming a member, cannot reserve a lien or claim or trust in the interest of such person in the new firm or in such property without the assent of the other partners.[3]

But where the property to be contributed is not the entire interest, but a specific share, subject to a purchase money mortgage to the retiring partner, such mortgage will have priority over mortgages by the new firm to subsequent creditors. Thus, where by agreement of both partners of a firm of two, one sold out his interest to a third person, in order that the latter might form a partnership with the continuing partner, and deeded to him an undivided half of the partnership real estate. The new partner mortgaged back the real estate to the retiring partner to secure the price and payment of his share of the debts. The new firm afterwards mortgaged the property to subsequent partnership creditors.

[1] Richardson *v.* Tobey, 3 Allen, 81.

[2] Allen *v.* Grissom, 90 N. Ca. 90. For other cases of one partner going out and a new one coming in, holding as above, see Crane *v.* Morrison, 4 Sawy. 138; 17 Bankr. Reg. 393; Utley *v.* Smith, 24 Conn. 290; Menagh *v.* Whitwell, 52 N. Y. 146; McCauly *v.* McFarlane, 2 Desaus. (S. Ca.) 239; Dayton *v.* Wilkes, 5 Bosw. 655; Ackley *v.* Winkelmeyer, 56 Mo. 562; Hart *v.* Tomlinson, 2 Vt. 101. *Contra*, in New Hampshire, for in that state the creditors' priority is inherent in them and not entirely dependent on the partner's equity. Spurr *v.* Russell, 59 N. H. 338.

[3] Richardson *v.* Tobey, 3 Allen, 81, 83.

The former mortgage was held the superior lien, as not being a mortgage of the mere surplus or individual interest, but the interest in such property had in effect been converted into separate property, and the continuing partner had waived the lien in it as against the mortgage; hence the creditors could assert none.[1]

§ 558. New partner, no old one retiring.— Where a firm takes in another partner, the lien of one of the original partners to have the assets subjected to the debts of the old firm is lost, and after dissolution of the new firm by death of one of the original partners, and a finding by court of the amount due his administrator and its payment to him, such fund cannot be reached on behalf of creditors of the old firm.[2]

So, where C. & D., a firm, incurred a debt, then M. came into the firm, the business being continued in the old name, then the creditor attached; this is governed by the rules applicable to the attachment of the interest of an individual partner for his separate debt, and the claims of the creditors of the new firm, including the claims of the new partner, will be protected as prior.[3]

Where the incoming partner comes in as a secret partner, the assets will be treated as still those of the ostensible partners and both sets of creditors share *pari passu*.[4] And so if the new firm has assumed the debts of the old,[5] but not if the creditor has not

[1] Beecher *v.* Stevens, 43 Conn. 587.

[2] Coffin *v.* McCullough, 30 Ala. 107. And see Meador *v.* Hughes, 14 Bush, 652.

[3] Meyberg *v.* Steagall, 51 Tex. 351. See, also, Childs *v.* Walker, 2 Allen, 259, 262; Locke *v.* Hall, 9 Me. 133; Hurlbut *v.* Johnson, 74 Ill. 64, where a person in business and in debt took in a partner and they bought more goods on credit, at least all the assets, except the original partner's interest in the prior goods so far as they can be identified, must be first used to pay those who sold the new goods. In Vermont, however, as in New Hampshire, where the creditor's priority is independent of the partner's equitable lien, the creditors of the old firm will share equally with those of the new, for all assets and liabilities continue after the admission of a new partner the same as before, and the creditors of the old firm have rather the higher equity. Shedd *v.* Bank of Brattleboro, 32 Vt. 709, 714; Spurr *v.* Russell, 59 N. H. 338.

[4] *Ex parte* Chuck, 8 Bing. 469; and see Filley *v.* Phelps, 18 Conn. 294, 304, cited in § 556.

[5] Smead *v.* Lacey, 1 Disney, 239.

assented to the novation.[1] Hence, where a firm took in a new partner, the new firm receiving all the effects of the old, and the partners agreeing with each other to pay its debts, and the new firm became insolvent, and a creditor of the old attached its stock, and subsequently creditors of the new firm attached, the sheriff is not liable to the creditor of the old for giving priority to the latter attachments. The promise of the partners *inter se* to pay the old debts is not available to the creditor until he knows of and assents to it.[2]

FRAUDULENT CONVEYANCES.

§ 559. **Sale between partners.**—It is clear that while the partnership is solvent and going on, the partners may by unanimous assent or joint act do what they please with the assets, if the act is *bona fide.* The creditor has no equity against the property; and if one partner assigns his interest to the copartner, the creditor can obtain judgment against all, and levy on the property of each, and if the execution is against the partnership effects, he holds them not in respect of any interest as mere joint creditor, but by virtue of the execution. Where the assignment by one partner to the other is on a consideration paid, or, what is equal to consideration, an agreement to pay debts and indemnify against them, it is a change of joint into separate property. The only question is upon the *bona fides* of the transaction. If such an arrangement could not be made a partner never could retire.

In *Ex parte* Ruffin, 6 Ves. 119, before Lord Eldon, 1801, a leading case, Thomas Cooper and James Cooper were partners, and dissolved, Thomas retiring and selling his interest to James at a valuation to be made, James covenanting to pay debts and indemnify Thomas against them, and giving him a bond with surety for £3,000, the estimated value of his interest. A year and a half afterwards, James became bankrupt. The joint creditors claimed a priority on distribution in the partnership effects remaining in specie. Lord Eldon stating that creditors of a partnership had no lien, but only a right to sue, and that in case of dissolution by

[1] Scull *v.* Alter, 16 N. J. L. 147; Locke *v.* Hall, 9 Me. 133; and see § 503.

[2] Locke *v.* Hall, 9 Me. 133.

death or bankruptcy, where the court administers, the joint creditors are first paid, in order to do justice to the partners themselves, the equity being that of the partners and not of the creditors; but where the dissolution is a partner's own act, and, instead of calling on the effects according to his equity to pay the debts, he assigns his interest to the other to deal with as he pleases, the equity is gone, the assignment not being made subject to the payment of debts, but in consideration of a personal obligation of the assignee to pay the debts. The creditors therefore cannot rest upon the equity of the partner going out.[1]

§ 560. —— **authorities holding it valid.**— A sale for valuable consideration by one partner, not made in contemplation of bankruptcy, to his copartner or to a third person, of all his interest in the firm, unlike the case of a gift or payment of the separate debt of a copartner, is as valid to transfer the entire property to the vendee as is a sale between any individuals, although the buyer and seller are insolvent and thus defeat their creditors; and as the firm creditors have no lien, the buyer can dispose of the property as his own and pay his separate creditors, to the exclusion of joint creditors, or *vice versa.*[2]

[1] This case is approved and explained further in *Ex parte* Williams 11 Ves. 3. Also Huiskamp *v.* Moline Wagon Co. 121 U. S. 310 (reversing s. c. as Moline Wagon Co. *v.* Rummell, 2 McCrary, 307; 12 Fed. Rep. 658; 14 id. 155); Fitzpatrick *v.* Flannagan, 106 U. S. 648, 655-6; Shimer *v.* Huber, 19 Bankr. Reg. 414; Austin *v.* Seligman, 21 Blatchf. 506; 18 Fed. Rep. 519; Lamkin *v.* Phillips, 9 Porter (Ala.), 98; Mayer *v.* Clark, 40 Ala. 259; Robertson *v.* Baker, 11 Fla. 192; McDonald *v.* Beach, 2 Blackf. 55; Upson *v.* Arnold, 19 Ga. 190 (63 Am. Dec. 302); Wilson *v.* Soper, 13 B. Mon. 411 (56 Am. Dec. 573); Coakley *v.* Weil, 47 Md. 277; Parish *v.* Lewis, 1 Freem. (Miss.) Ch. 299; Field *v.* Chapman, 15 Abb. Pr. 434; McGregor *v.* Ellis, 2 Disney, 286; Pfirrman *v.* Koch, 1 Cint. Superior Ct. Rep. 460; Gallagher's Appeal (Pa.), 7 Atl. R. 237; Waterman *v.* Hunt, 2 R. I. 298, 303; Shackelford *v.* Shackelford, 32 Gratt. 481.

[2] *Ex parte* Peake, 1 Mad. 346; *Ex parte* Carpenter, Mont. & McA. 1; Parker *v.* Ramsbottom, 3 B. & C. 257; 5 Dow. & Ry. 138; Case *v.* Beauregard, 99 U. S. 119; 1 Woods, C. C. 127; Fitzpatrick *v.* Flannagan, 106 U. S. 648, 655-6; Huiskamp *v.* Moline Wagon Co. 121 U. S. 310 (reversing s. c. as Moline Wagon Co. *v.* Rummell, 2 McCrary, 307; 12 Fed. Rep. 658; 14 id. 155); *Re* Bjornstad, 18 Bankr. Reg. 282; *Re* Downing, 1 Dill. 33; *Re* Wiley, 4 Biss. 214, here all the property was conveyed to one partner and he became bankrupt; Tracy *v.* Walker, 1 Flip. 41; s. c. 3

So one partner may buy out the other, and the property being thus his separate estate, may claim exemptions in lieu of execution or homestead in it.[1]

West. Law Month. 574; Shimer *v.* Huber, 19 Bankr. Reg. 414; Reese *v.* Bradford, 13 Ala. 846; Lamkin *v.* Phillips, 9 Porter (Ala.), 98; McGown *v.* Sprague, 23 Ala. 524; Mayer *v.* Clark, 40 Ala. 259, held to be separate property on contest between an execution creditor of the firm and a mortgagee for a past debt of the transferee partner; Jones *v.* Fletcher, 42 Ark. 422; Allen *v.* Center Valley Co. 21 Conn. 130 (54 Am. Dec. 333), where the firm sold the property and divided the proceeds while insolvent; Upson *v.* Arnold, 19 Ga. 190 (63 Am. Dec. 302), where the buyer subsequently became insolvent; Hapgood *v.* Cornwell, 48 Ill. 64; Goembel *v.* Arnett, 100 Ill. 34; Williams *v.* Adams, 16 Ill. App. 564; Dunham *v.* Hanna, 18 Ind. 270; Trentman *v.* Swartzell, 85 Ind. 443; George *v.* Wamsley, 64 Iowa, 175; Wilson *v.* Soper, 13 B. Mon. 411 (56 Am. Dec. 573); Armstrong *v.* Fahnestock, 19 Md. 58, here all were insolvent and the buyer assigned all to an individual creditor; Coakley *v.* Weil, 47 Md. 277; Guild *v.* Leonard, 18 Pick. 511; Richardson *v.* Tobey, 3 Allen, 81, here the firm was insolvent; Kimball *v.* Thompson, 13 Met. 283; Howe *v.* Lawrence, 9 Cush. 553 (57 Am. Dec. 68), here the firm and both partners were insolvent; Richards *v.* Manson, 101 Mass. 482; Parish *v.* Lewis, 1 Freem. (Miss.) Ch. 299; Fulton *v.* Hughes, 63 Miss. 61, here the buyer turned over the stock to his separate creditor as payment; Robb *v.* Stevens, Clarke, Ch. (N. Y.) 191, here the buyer assigned for creditors; Sage *v.* Chollar, 21 Barb. 596; Dimon *v.* Hazard, 32 N. Y. 65, here the buyer assigned for benefit of his creditors; Stanton *v.* Westover (N. Y. 1886), 4 N. E. Rep. 529, here the buyer was largely a creditor of the firm; the firm was heavily in debt; he transferred to a single joint creditor; Rankin *v.* Jones, 2 Jones (N. Ca.), Eq. 169, here the buyer assigned for benefit of creditors; Potts *v.* Blackwell, 4 Jones, Eq. 58; McGregor *v.* Ellis, 2 Disney, 286; Pfirrman *v.* Koch, 1 Cincinnati Superior Ct. Rep. 460; Wilcox *v.* Kellogg, 11 Oh. 394; Belknap *v.* Cram, 11 id. 411; Miller *v.* Estill, 5 Oh. St. 508, 516–17; Clark *v.* McClelland, 2 Grant's Cas. (Pa.) 31, the buyer became insolvent; Waterman *v.* Hunt, 2 R. I. 298, 303; White *v.* Parish, 20 Tex. 688, 693; Shackelford *v.* Shackelford, 32 Gratt. 481; David *v.* Birchard, 53 Wis. 492, 497. And see Vosper *v.* Kramer, 31 N. J. Eq. 420. See, also, the extreme cases under § 568. In Howe *v.* Lawrence, 9 Cush. 553, 557 (57 Am. Dec. 68), it was said that the right of a partner to sell out his entire interest to a copartner, wholly free from the claims of joint creditors, since they have no lien, although the firm and both partners are insolvent, must be exercised *bona fide* for the purpose of closing the affairs of the partnership.

[1] Burton *v.* Baum, 32 Kan. 641; Worman *v.* Giddey, 30 Mich. 151; State *v.* Thomas, 7 Mo. App. 205; Mortley *v.* Flanagan, 38 Oh. St. 401; Gill *v.* Lattimore, 9 Lea, 381; Griffie *v.* Maxey, 58 Tex. 210. *Contra*, that if the conversion from joint to separate is on the eve of insolvency

In Hapgood *v.* Cornwell, 48 Ill. 64, H., a private creditor of one of three partners, believing his debt to be in danger, persuaded the debtor to buy out his copartners, advancing to him over $10,000 for the purpose, and to turn the stock thus purchased over to him, whereupon a judgment creditor of the firm filed a bill against H. The transaction was held to be legal, and the buying partner to have received the stock discharged of any claim of partnership creditors, they having no lien except through the partners.

In Second Nat'l Bk. *v.* Farr (N. J.), 7 Atl. Rep. 892, a partner personally liable for debts, by false statements of his ability to pay his separate and the firm's debts induced his copartner to sell out to him his interest in the partnership and then assigned for the benefit of creditors, thus letting in his separate creditors first. The sale was set aside at the suit of judgment creditors of the partnership, as in fraud of their rights.

In Hawk Eye Woolen Mills *v.* Conklin, 26 Iowa, 422, J. and V., partners, were indebted to the plaintiff. J. retired, V. agreeing to pay the debts. V. then sold one-half the stock to C., and V. and C. became partners. C. had to borrow to pay for his half, and V. with one M. became his sureties, and V. gave M. a mortgage on the partnership property to secure him as surety and the mortgage was foreclosed. Plaintiffs brought an action, claiming that as J. & V.'s assets or V.'s assets went to pay C.'s debt, he should have a claim against C. This was refused, the court holding that joint creditors have no lien and can work out their priority only through a partner, and if the partners make an absolute sale of the property, the creditors are cut off.

The partners becoming incorporated and transferring the partnership property to the corporation, taking stock in it in their individual names in exchange, is not *per se* fraudulent as to the joint creditors.[1]

or for the purpose of enabling the partners to claim homesteads, it is fraudulent as against the joint creditors. *Re* Sauthoff, 8 Biss. 35; 16 Bankr. Reg. 181; 5 Am. Law Rec. 173; Commercial & Sav. Bk. *v.* Corbett, 5 Sawy. 543; *Re* Melvin, 17 Bankr. Reg. 543; Bishop *v.* Hubbard, 23 Cal. 514; Gill *v.* Lattimore, 9 Lea, 381; Chalfant *v.* Grant, 3 id. 118; Mortley *v.* Flanagan, 38 Oh. St. 401.

[1] Persse & Brooks Paper Works *v.* Willett, 1 Robt. 131; 19 Abb. Pr. 416; Beitman *v.* McKenzie, 11 Ohio Weekly Law Bulletin, 272; and see the facts in Case *v.* Beauregard, 99 U. S. 119, and see Francklyn *v.* Sprague, 121 U. S. 215, 228.

§ **561. Dividing up the assets.**— So if the partners divide up the property between themselves, the same rule applies. This is in effect a sale by each to the other, the release of the separate interests being the consideration; neither has a lien on the share of the other, and the joint creditors therefore can obtain none.[1]

A sale or division of property could not become unlawful as to individual creditors of one of them, for the other partners in effect acquire no property in his share, but only separate their own from his.[2]

§ **562. Authorities restricting the right to sell.**— Many cases hold that if the firm is insolvent, or on the eve of insolvency, and both partners are also insolvent, a purchase by one partner of the interest of the other in consideration of the former's assumption of the debts is upon a consideration which is of no value whatever, and, according to the English and many American authorities, no equivalent having been given, the transfer is in effect voluntary, and its only effect, if sustained, would be to hinder partnership creditors, and hence is deemed ineffectual to convert the joint property into separate property as against the creditors.

[1] Lingen *v.* Simpson, 1 Sim. & Stu. 600; Crane *v.* Morrison, 4 Sawy. 138; 17 Bankr. Reg. 393; Moline Wagon Co. *v.* Rummell, 14 Fed. Rep. 155; 12 id. 658; 2 McCrary, 307 (reversed in part as Huiskamp *v.* Moline Wagon Co. 121 U. S. 310); Robertson *v.* Baker, 11 Fla. 192; Marlin *v.* Kirksey, 23 Ga. 164; Poole *v.* Seney, 66 Iowa, 502, they divided the property and each mortgaged his share for individual debts, held not fraudulent *per se;* Jones *v.* Lusk, 2 Met. (Ky.) 356; Mechanics' Bank *v.* Hildreth, 9 Cush. 356; Giddings *v.* Palmer, 107 Mass. 269; Crosby *v.* Nichols, 3 Bosw. 450; Sigler *v.* Knox Co. Bank, 8 Oh. St. 511; Whitmore *v.* Parks, 3 Humph. 95; Holmes *v.* Hawes, 8 Ired. (N. Ca.) Eq. 21; McKinney *v.* Baker, 9 Oregon, 74 (they divided assets, each assuming certain debts and one assigning his share for the benefit of his creditors); Wiesenfeld *v.* Stevens, 15 S. Ca. 554; Burtus *v.* Tisdall, 4 Barb. 571; and see § 282. *Contra,* Ransom *v.* Van Deventer, 41 Barb. 307; Schiele *v.* Healy, 61 How. Pr. 73; Wilkinson *v.* Yale, 6 McLean, 16.

[2] Atkins *v.* Saxton, 77 N. Y. 195; Weaver *v.* Ashcroft, 50 Tex. 427; Darland *v.* Rosencrans, 56 Iowa, 122; Griffin *v.* Cranston, 10 Bosw. 1; 1 id. 281.

In *Ex parte* Mayou, 4 DeG. J. & S. 664; 11 Jur. N. S. 433; 12 L. T. N. S. 629, the partners were in financial straits and were being sued, and having failed to obtain a renewal of accommodation, determined to dissolve, and one conveyed all his interest to the other, the latter expressing in the deed his intention of continuing the business and covenanting to pay all the debts within three years and to indemnify the other against them; but as both partners were insolvent the covenant was worthless, and hence was not a consideration. A few days afterwards a petition in bankruptcy was filed against them and the deed was attacked as in fraud of creditors. The transfer was held fraudulent under the bankrupt law, and under the statute as to voluntary conveyances, "because it had for its immediate and necessary object and consequence the alteration of the property in such a manner as would defeat or delay the joint creditors."[1]

§ 563. Examples.— In Sanderson *v.* Stockdale, 11 Md. 563, the court stating that partnership creditors have no greater rights or lien than do separate creditors in individual property, and that the joint property may therefore be *bona fide* assigned to one or more partners, say that a fraudulent assignment by an insolvent firm to defraud creditors will be relieved against, holding that on bill by a partnership creditor charging that the firm is insolvent, that the effects

[1] *In re* Caton, 24 Up. Can. C. P. 308, following above case; *Ex parte* Walker, 4 DeG. F. & J. 509; Anderson *v.* Maltby, 2 Ves. Jr. 244; Bulliter *v.* Young, 6 El. & B. 40; *Ex parte* Shouse, Crabbe, 482; Collins *v.* Hood, 4 McLean, 186; Wilkinson *v.* Yale, 6 id. 16; *In re* Waite, 1 Low. 207; 1 Bankr. Reg. 373; *In re* Cook, 3 Biss. 122; *Re* Long, 7 Ben. 141; 9 Bankr. Reg. 227; *Re* Tomes, 19 Bankr. Reg. 36; Johnston *v.* Straus, 26 Fed. Rep. 57; Conroy *v.* Woods, 13 Cal. 626; Saloy *v.* Albrecht, 17 La. Ann. 75; Sanderson *v.* Stockdale, 11 Md. 563; Flack *v.* Charron, 29 id. 311; Phillips *v.* Ames, 5 Allen, 183; Phelps *v.* McNeely, 66 Mo. 554; 27 Am. Rep. 378; Roop *v.* Herron, 15 Neb. 73, and comments on this case in 17 id. 489; Caldwell *v.* Bloomington Mfg. Co. 17 id. 489; Moorehead *v.* Adams (Neb.), 26 N. W. Rep. 242; Tenney *v.* Johnson, 43 N. H. 144; Caldwell *v.* Scott, 54 id. 414; Burtus *v.* Tisdall, 4 Barb. 571; Ransom *v.* Van Deventer, 41 id. 307; Heye *v.* Bolles, 2 Daly, 231; 33 How. Pr. 266; Menagh *v.* Whitwell, 52 N. Y. 146, 163; 11 Am. Rep. 683 (but in Stanton *v.* Westover, 4 N. E. Rep. 529, the transfer was sustained, both parties believing themselves solvent and the buyer's failure not having occurred until five months afterwards, during all of which time the property could have been levied on and he was ready to pay debts); Weaver *v.* Ashcroft, 50 Tex. 427; David *v.* Birchard, 53 Wis. 492, 497.

have been and are being misapplied and appropriated to the private purposes of individual partners, by which the creditors are hindered and defrauded, that a dissolution by the retirement of two partners was in furtherance of the scheme and irreparable damage is threatened; an injunction will be granted to prevent the transfer of all partnership effects, including those in the possession of any individual partner and those belonging to the late firm and conveyed by it to any partner by any act not *bona fide*, and a receiver will be appointed if necessary.[1]

In Phelps *v.* McNeely, 66 Mo. 554 (27 Am. Rep. 378), where the firm was insolvent and one partner sold out to the other and retired, the latter agreeing to pay the debts, and afterwards mortgaged all the assets for an individual debt incurred before dissolution, the dissolution and mortgage was held a nullity as against the prior claims of joint creditors. This case follows Tenney *v.* Johnson, 43 N. H. 144,[2] but it must be remembered that in New Hampshire the partnership creditors' equity is inherent in themselves and not entirely dependent upon the equity of the partners.[3]

In Marsh *v.* Bennett, 5 McLean, 117, the retiring partner assigned all his interest to his copartner, "for the purpose of paying off the creditors," and the vendee's subsequent assignment for creditors with preferences was called a violation of the trust. In this action the firm was much embarrassed at the time of the sale, and eight months afterwards the continuing partner went into bankruptcy, and on distribution of the assets the sale was held void, as depriving the creditors of their priority over the separate creditors of the bankrupt.

In Roop *v.* Herron, 15 Neb. 73,[4] a retirement by one partner and conveyance by him of all his interest to the other, who agreed to pay the debts, but turned over $500 worth of assets in payment of a debt of $250 to his separate creditor, all the parties knowing the

[1] S. P. Johnston *v.* Straus, 26 Fed. Rep. 57; but Coakley *v.* Weil, 47 Md. 277, recognizes an assignment for the equal benefit of joint and separate creditors.

[2] Tenney *v.* Johnson was where partners submitted their disagreements to arbitration and an award was made that one partner should take all the assets and pay all the debts, and thereupon his separate creditors levied attachments, but the partnership creditors were held to have superior rights.

[3] S. P. Collins *v.* Hood, 4 McLean, 186.

[4] And comments on it in Caldwell *v.* Bloomington Mfg. Co. 17 Neb. 489.

firm to be insolvent, was held void as against the joint creditors, who attached subsequently, the court saying that a partner in an insolvent firm could not divest the property of its distinctive character by simply assigning his interest to the copartner.

In *Ex parte* Morley, 8 Ch. App. 1026, by the articles of partnership between T. White, Sr., and his sons, on the death of T. White, Sr., all the property and business was to belong to his representatives, who were to continue the business, paying the junior partners certain amounts for their interests, and the firm was insolvent at the death of T. White, Sr., and one son, who was the executor, continued the business and bought more assets, it was held that the original assets which remained in specie continued joint property; that the deed did not change the right of the surviving partners, they being liable for the debts, to insist on the assets being applied to them. Perhaps in such a case the provision of the articles should be regarded as impliedly conditioned on insolvency of the firm.[1]

In *Re* Walker, 6 Ont. App. 169, the business was continued by one of the partners who assumed the liabilities, and original assets remaining in specie were held primarily applicable to the joint debts. The case follows *Ex parte* Morley, *supra*, but the terms of contract between the outgoing and continuing partners are not given.

In Bank *v.* Smith, 26 W. Va. 541, the partners of an insolvent firm tried to convey away partnership real estate to avoid the judgment of debts, and the conveyances were set aside and the land sold on application of the creditors. The court will grant the relief without decreeing a dissolution or settling the accounts of the partners *inter se*.

A sale of his interest to his copartner by an insolvent copartner is void as in fraud of the bankrupt act, if within the forbidden period.[2]

A conveyance by an insolvent firm to one partner in fraud of the bankrupt law can be assented to by the joint creditors, who can thus come upon the separate estate *pari passu* with the separate creditors.[3]

[1] See *In re* Simpson, 9 Ch. App. 572; *Ex parte* Dear, 1 Ch. D. 519; *Ex parte* Manchester Bank, 12 id. 917; *Ex parte* Butcher, 13 id. 465.

[2] Wilson *v.* Greenwood, 1 Swanst. 471; Crampton *v.* Jerowski, 2 Fed. Rep. 489; *Re* Johnson, 2 Lowell, 129.

[3] *Re* Johnson, 2 Low. 129; *Re* Long, 7 Ben. 141; 9 Bankr. Reg. 227.

§ 564. Withdrawing funds if a gift is fraudulent.—If the firm is insolvent, a withdrawal of the amount of funds or of his original capital by one partner, or otherwise drawing from the joint fund an amount in excess of what he is entitled to, knowing that the joint creditors will not have sufficient, whether this is by gratuitous permission of his copartners or under a right to do so given by the articles of partnership, is, as a matter of course, a conveyance in fraud of the rights of partnership creditors, and doubtless also of the separate creditors of the other partners, for it is in effect a gift; and if the court can get possession of the fund before the retiring partner has collected it, they will treat it as partnership assets.

In *In re* Kemptner, L. R. 8 Eq. 286, K., in the firm of K. & Co. of Yokohama, Japan, being about to go to England, sought to withdraw £4,000, standing to his credit on the books, which under the articles he was entitled to do, and bills for the amount drawn to the firm's order by Japan banks on London banks were purchased with partnership moneys and delivered to him. K. died on the passage over, and the surviving partner having assigned in bankruptcy, their trustees and K.'s executors both claimed the bills. Sir R. Malins, V. C., held that, whether fraudulently intended or not, made no difference; the firm being deeply insolvent, K. must be taken to know this, and cannot treat his firm as solvent. And in such a case if any accident has prevented the partner from possessing himself of the assets of the creditors, the court is bound to exercise all its power to prevent a transaction so grossly improper as this.[1]

[1] *Re* Santhoff, 16 Bankr. Reg. 181; 8 Biss. 35; 5 Am. Law Rec. 173, where on dissolution the partners divided the assets, and one invested his in a homestead; this was held subject to partnership debts. *Re* Melvin, 17 Bankr. Reg. 543, here the partners sold some of the assets and divided the proceeds when insolvent, investing them in property claimed as exempt. Phipps *v.* Sedgwick, 95 U. S. 3, here one partner who had bought property for his wife, and was indebted for buildings upon it, used partnership funds to pay these debts; this was held fraudulent as to creditors. Edwards *v.* Entwisle, 2 Mackey (D. C.), 43, 61, here a partner bought property in his wife's name with firm funds, "thus compelling partnership creditors to pay contribution to separate creditors," and Cartter, C. J., said that the partnership creditors could recover. Ransom *v.* Van Deventer, 41 Barb. 307, here they divided up the assets,

Drawing reasonably small amounts for individual expenses and obligations, although the firm is in some difficulty, but with reasonable hope of extricating it, is not fraudulent so as to sustain attachment.[1] In Turner *v.* Jaycox, 40 N. Y. 470, 475, part of the contract of partnership was that, if either of the partners, who were brothers, owed any debt, it was to be paid out of the common stock, and a note of the firm was given to pay their board bills, and this was held to be a partnership debt which could be preferred in an assignment for creditors.

§ 565. Paying a debt of one partner.— A not uncommon use of the right of absolute disposition of partnership property is to employ firm funds to pay the separate debt of a single partner, or mortgage the joint property to secure it. These are not cases of the attempt of a single partner to pay his debt with joint funds which are elsewhere examined, but of the power of all the partners, or of one by consent of all, to so appropriate their property, and they have the same right to do so that an individual has to give away his property; that is, an unlimited power of disposition except as controlled by statutes against voluntary conveyances in fraud of creditors and the similar provisions of the bankrupt law.[2]

and each used his part to pay separate creditors; held a fraud on the joint creditors and void. Greene *v.* Ferrie, 1 Desaus. (S. Ca.) 164, here they divided up the supposed profits, and one invested his share in real estate; this was ordered resold to pay a creditor of the firm; the court held that their want of knowledge of their insolvency was immaterial. See, also, Richards *v.* Manson, 101 Mass. 482, 485 (*dictum*). *Contra*, Allen *v.* Center Valley Co. 21 Conn. 130, here they sold some of the assets and divided the proceeds, and it was held to be a valid conversion of joint into separate property.

[1] McKinney *v.* Rosenband, 23 Fed. Rep. 785.

[2] Huiskamp *v.* Moline Wagon Co. 121 U. S. 310; Jewett *v.* Meech, 101 Ind. 289; Fisher *v.* Syfers, 109 Ind. 514; Woodward *v.* Horst, 10 Iowa, 120; Fargo *v.* Adams, 45 id. 491; George *v.* Wamsley, 64 id. 175; Jones *v.* Lusk, 2 Met. (Ky.) 356; Schmidlapp *v.* Currie, 55 Miss. 597 (30 Am. Dec. 530); Whitney *v.* Dean, 5 N. H. 249; Nat'l Bank *v.* Sprague, 20 N. J. Eq. 13 (reversed on other points, 21 id. 530); Potts *v.* Blackwell, 3 Jones (N. Ca.), Eq. 449; 4 id. 58; Anderson *v.* Norton, 15 Lea, 14, 32; DeCaussey *v.* Bailly, 57 Tex. 665; Churchill *v.* Bowman, 39 Vt. 518; Camp *v.* Page, 42 Vt. 739. See the criticisms upon Jones *v.* Lusk, Schmidlapp *v.* Currie, and Whitney *v.* Dean, and other

In *In re* Kahley, 2 Biss. 383, the partners gave their notes and mortgage to a person for an interest in their business sold by the payee to one partner, and for money consideration put into the business for another partner. The bankruptcy proceedings were begun eight months afterwards and the mortgage was sustained.

In Fargo *v.* Adams, 45 Iowa, 491, after a mortgage had been given by one partner on the whole partnership stock to secure his individual debt, his copartner released to him all his interest in the stock. The mortgage was held to become valid on the entire stock and to be superior to a later attachment for a joint debt.

In Woodward *v.* Horst, 10 Iowa, 120, H. & S. furnished goods to defendant in payment of his claim against S. H. & S. afterward dissolved, S. conveying his interest in the firm to H., who subsequently assigned for benefit of creditors. The assignee cannot recover the value of the goods from defendant.

Where B., of D. & B., a firm, died indebted on individual account to C., and his surviving partner, B., supposing the firm to be solvent, paid C. with partnership assets and took a receipt from D.'s administratrix, and she took one from C., B.'s remedy to recover back the money is against D.'s administratrix and not against C.[1]

In Potts *v.* Blackwell, 3 Jones, Eq. 449 (and on rehearing, 4 id. 58), one partner conveyed to the other by mortgage all the effects for alleged debts due between them, and the mortgagee assigned the mortgage and effects to *bona fide* creditors of his. This was held valid as against creditors of the firm.

Anderson *v.* Norton, 15 Lea, 14, held that a note by a partner in his own name for his individual debt, with the other partners as sureties, and secured by a mortgage, signed by all, upon real estate of the firm, created a valid lien prior to the claims of joint creditors.

Churchill *v.* Bowman, 39 Vt. 518, that the offset of a claim due from one partner against a claim due to the firm, if consented to by all the partners, was binding; but here there were no rights of joint creditors involved.[2]

cases, in § 568. In a court of law, an assignment by partners of choses in action to the separate creditor of one will convey a valid title as against creditors: their remedy is in equity. Morris *v.* Vernon, 8 Rich. L. 13.

[1] Bailey *v.* Clark, 6 Pick. 372.

[2] And so in Camp *v.* Page, 42 Vt. 739, where the same agreement was made and the contest was between the partners.

In Saunders *v.* Reilly, 105 N. Y. 12, a judgment against all the partners on a joint debt owed by them as individuals, not a partnership debt, was levied upon the partnership property, which was sold, and the buyer was held to acquire a good title, for general creditors have no lien, and can only acquire a lien when the partners have preserved their equity, and cannot therefore forbid a sale by the sheriff when they have no judgment or execution.[1]

§ 566. Same when a fraud on creditors.— On the other hand, however, a partnership has no greater right to make voluntary conveyances of its property, or, what is the same thing, use its property to pay or secure debts not its own, when it is insolvent, or when such payment will leave it insolvent, or hinder or delay existing creditors, than an individual of his separate property. A partner using his private property to pay a joint debt is paying his own debt, though in so doing he may prejudice his separate creditors; but a partnership paying the private debt of one of its members is paying what it is not liable for in law, equity or morals, and is in effect giving away its property, and such conveyance, no *bona fide* rights intervening, is fraudulent and void as to existing creditors if they are prejudiced thereby, as well as to the separate creditors of the other partner whose individual interest in the firm is thus given away.[2]

[1] See, also, Marks *v.* Hill, 15 Gratt. 400, cited in § 567.

[2] Anderson *v.* Maltby, 2 Ves. Jr. 244; *Ex parte* Snowball, L. R. 7 Ch. App. 534; Brecher *v.* Fox, 1 Fed. Rep. 273; *Re* Lane, 2 Low. 333; 10 Bankr. Reg. 135; *Re* Sauthoff, 16 Bankr. Reg. 316; Goodbar *v.* Cary, 4 Woods, 663; 16 Fed. Rep. 316; Edwards *v.* Entwisle, 2 Mackey (D. Col.), 43, 61; Keith *v.* Fink, 47 Ill. 272; Patterson *v.* Seaton, 70 Iowa, 689; Saoly *v.* Albrecht, 17 La. Ann. 75; Carter *v.* Galloway, 36 id. 473; Flack *v.* Charron, 29 Md. 311; Phillips *v.* Ames, 5 Allen, 183; Heineman *v.* Hart, 55 Mich. 64; Cron *v.* Cron, 56 id. 8; Kitchen *v.* Reinsky, 42 Mo. 427; Rhodes *v.* Williams, 12 Nev. 20; French *v.* Lovejoy, 12 N. H. 458; Ferson *v.* Monroe, 21 id. 462; Elliot *v.* Stevens, 38 id. 311; Kidder *v.* Page, 48 id. 380; Farwell *v.* Metcalf, 63 id. 276; Blackwell *v.* Rankin, 7 N. J. Eq. 152, 165; National Bank *v.* Sprague, 21 id. 530, 544; Clements *v.* Jessup, 36 id. 569, 572; Kirby *v.* Schoonmaker, 3 Barb. Ch. 46, 51; Geortner *v.* Canajoharie, 2 Barb. 625; Burtus *v.* Tisdall, 4 id. 571; Dart *v.* Farmers' Bank, 27 id. 337; Cox *v.* Platt, 32 id. 126; 19 How. Pr. 121; Knauth *v.* Bassett, 34 Barb. 31; Walsh *v.* Kelly, 42 id. 98; 27 How. Pr. 359; Lester *v.* Pollock, 3 Robt. 691; 28 How. Pr. 488; O'Neil *v.* Salmon, 25 How. Pr. 246;

And an assignment for benefit of creditors by a firm preferring individual creditors is fraudulent at least to that extent.[1]

And the same principle governs the appropriation of partnership funds to such individual purposes as place it out of the reach of creditors, such as improving the homestead of a partner, or his wife's property, or to purchase property in the name of his wife, if the firm is insolvent.[2]

Where, however, a firm borrowed money to pay the private debt of one partner, as the lender well knew, but did not know that the firm was insolvent, and gave the lender a chattel mortgage to secure the loan, the chattel mortgage is valid against the firm's assignee for the benefit of creditors.[3]

An appropriation of firm assets to pay the debt of one partner is invalid only against existing creditors, and is valid against subsequent liabilities of the firm.[4]

In George *v.* Wamsley, 64 Iowa, 175, the firm paid a debt of one partner, in consideration of his continuing to contribute peculiar skill to the firm, instead of withdrawing as he desired. The consideration was held sufficient against a garnishment, by creditors of the firm, of the money in the hands of the separate creditor.

§ 567. Assumption of debt on moral consideration.—If, however, the debt, although contracted by a single partner, be one of which the firm got the benefit, and equitably should pay, a payment or securing of such debt by the firm

Ruhl *v.* Phillips, 2 Daly, 45; Heye *v.* Bolles, 2 id. 231; 33 How. Pr. 266; Wilson *v.* Robertson, 21 N. Y. 587; Hurlbert *v.* Dean, 2 Keyes, 97; 2 Abb. App. 428; Menagh *v.* Whitwell, 52 N. Y. 146 (11 Am. Rep. 683); Walker *v.* Marine Nat'l B'k of Erie, 98 Pa. St. 574; Henderson *v.* Haddon, 12 Rich. Eq. 393; Snyder *v.* Lunsford, 9 W. Va. 223, 228; Keith *v.* Armstrong, 65 Wis. 225. And an improper increasing of claims is as illegal as an improper diminution of assets; hence, signing the firm name as surety for the existing debt of one partner, or giving a mortgage to secure it, will not be effectual against existing partnership creditors. Kidder *v.* Page, 48 N. H. 380.

[1] Jackson *v.* Cornell, 1 Sandf. Ch. 348; Schiele *v.* Healy, 61 How. Pr. 73; Vernon *v.* Upson, 60 Wis. 418; Willis *v.* Bremner, id. 622.

[2] Place *v.* Sedgwick, 95 U. S. 3; Rhodes *v.* Williams, 12 Nev. 20; *Re* Sauthoff, 16 Bankr. Reg. 181; Edwards *v.* Entwisle, 2 Mackey (D. C.), 43, 61; Bishop *v.* Hubbard, 23 Cal. 514; Stegall *v.* Coney, 49 Mo. 761.

[3] Assignment of Stewart, 62 Iowa, 614.

[4] Farwell *v.* Metcalf, 63 N. H. 276.

has been held by some highly respectable authorities not to be in fraud of creditors, though the principle on which this rests seems rather nebulous.[1]

In Blackwell *v.* Rankin, 7 N. J. Eq. 152, 154, a confession of judgment by a firm of R. & W. L., for a debt of an antecedent firm of R. & W. L., was held to be the same as a confession of judgment for the separate debt of one partner, and fraudulent; and in Hilliker *v.* Francisco, 65 Mo. 598, it was held that a partner could not appropriate the assets of the firm to pay debts due from the two partners as individuals and not as a firm.

It may be stated generally that if funds are taken from one firm and put into another, or where a new firm succeeds a former one, and the new firm has its own creditors, they have priority in distribution of the assets over creditors of the old.[2]

§ 568. Important cases which rest on no principle whatever.— The following cases, which are too important not to deserve specific notice, are in part contrary to the above principle and allow the partners to use their property to pay

[1] Gwin *v.* Selby, 5 Oh. St. 96, where one partner made a purchase or loan for the firm on his own credit, and his surety had to pay the debt; S. P. Siegel *v.* Chidsey, 28 Pa. St. 279; Haben *v.* Hershaw, 49 Wis. 379, a debt for supplies furnished to one partner, but consumed by all the partners, who constituted one family. In Coffin's Appeal, 106 Pa. St. 280, 286, this principle was said to apply where a firm assumed the debt of a partner, incurred in borrowing his agreed capital; Head *v.* Horn, 18 Cal. 211. But the contrary was held in Elliot *v.* Stevens, 38 N. H. 311, following Ferson *v.* Monroe, 21 id. 462, and in McNaughton's Appeal, 101 Pa. St. 550. And so in Rose *v.* Keystone Shoe Co. (Supr. Ct. Pa. 1886) 18 Weekly Notes, 565, a firm confessed judgment in favor of the wife of a partner, from whom her husband borrowed money, which had gone to the use of the firm, and this was sustained. Walker *v.* Marine Nat'l B'k of Erie, 98 Pa. St. 574, where a partner, after giving his daughter a lot, and promising her a deed for it, sold the lot and put the proceeds into the firm, and the firm while insolvent gave a judgment note for the debt; S. P. Siegel *v.* Chidsey, 28 Pa. St. 279; Marks *v.* Hill, 15 Gratt. 400, where all the capital was borrowed by each individually, and the partners, finding themselves failing, agree that both debts shall be paid out of the joint fund; S. P. Saunders *v.* Reilly, 105 N. Y. 12, 18.

[2] Coffin *v.* McCullough, 30 Ala. 107; McCauly *v.* McFarlane, 2 Desaus. (S. Ca.) 239; Menagh *v.* Whitwell, 52 N. Y. 146; Crane *v.* Morrison, 4 Sawy. 138; 17 Bank. Reg. 393. See Lester *v.* Pollock, 3 Robt. (N. Y.) 691; and §§ 555–558.

the debt of one of their number, leaving partnership creditors unable to obtain payment. Granting that the partners have the same right of absolute disposition that an individual has, and that insolvency or inability to pay is too uncertain a test to mark the point where they should be deprived of that right; granting further that one partner may sell out his interest to the other, who then holds the assets as his individual property and can assign it for the benefit of creditors without distinction of class, letting the separate creditors in *pari passu* with the joint creditors, or can pay them preferentially, yet even here the retiring partner has not given away his property, but has sold it to his copartner and received value, and in legal contemplation the value he has received can be reached by creditors, though subject to homestead or exemption laws. But the class of cases below ought not to have been decided as belonging to the above categories, for they sustain the voluntary use of one partner's property in the firm to pay the separate debts of the other partner at the expense not only of his own separate creditors, but of the partnership creditors. The statements that there was no fraud and that a fair price was given are but a juggle of words. No price was given to the person whose property was placed beyond the reach of his creditors. As to him it was a gift, and not a sale, and, if so, is fraudulent in law, independent of motive, and should be governed by the statutes as to voluntary conveyances, namely, that a gift by a person in debt is valid if he have sufficient property left to warrant his being generous before he is just, and if not, not. The mere fact that no benefit was reserved should not determine the validity of the transaction.

In Sigler *v.* Knox County Bank, 8 Oh. St. 511, the facts, somewhat simplified, are as follows: Wm. H. and S. A. Sigler were partners, having a stock of goods which invoiced at full value $3,230.94 W. H. Sigler was indebted on his private account to his father, Jacob Sigler, for money loaned and as surety for him for over $1,200. The firm was indebted to A., H. & Co. for $1,000 and to the Wayne County Bank for $1,000, for both of which debts Jacob

was surety. The firm also owed the Knox County Bank $500. The two partners sold and delivered to Jacob their entire assets at the full value of $3,230.94, to be paid for by him by paying, first, his own claim; second, the firm's debt to A., H. & Co.; and, third, the firm's debt to the Wayne County Bank. The Knox County Bank, having obtained judgment against the firm on its debt, now seeks to subject the assets in the hands of Jacob to payment. The court found that there was no actual fraud in the transfer, and that Jacob, being apprehensive of the solvency of the firm, desired merely to secure himself. The court state the general doctrine that creditors have no lien; that the right to have assets applied to debts is a personal right of the partners themselves, and that when the partners have parted with this right the priority worked out by courts to the creditors is also extinguished. That the partners, by unanimous consent, can appropriate the assets to pay the debt of one of their number. They deny that this right of appropriation can be exercised only while the firm is actually solvent and carrying on its business, and hold that mere insolvency, no fraud intervening, will not deprive the partners of their right to sell and dispose of the property as they deem just and proper. That it would never do to adopt a rule so uncertain as that the power of the partners over the joint property is to cease whenever the assets for the time being are insufficient to discharge their liabilities, for such a rule would be productive of much inconvenience, injustice and uncertainty. That the true rule should be that the power of partners thus to act ceases upon the issuing of a commission of insolvency, but not from mere inability at the time to pay debts; and the court reversed the decree of the lower court, which had awarded a recovery against Jacob as a trustee to the creditors.

In McDonald *v.* Beach, 2 Blackf. 55, a somewhat similar transaction was sustained on the same ground.

In Schmidlapp *v.* Currie, 55 Miss. 597 (30 Am. Rep. 530), two partners in the liquor business assented to the transfer by one of them of the entire stock to pay an individual debt of such member. The court sustained the transaction because joint creditors have no lien, and the partners have a right of disposition and reserved no benefit to themselves.

So in Whitney *v.* Dean, 5 N. H. 249, two of three partners, with the assent of the third, pledged partnership property to pay a note

of the two, and the firm failed two or three days afterwards. The transaction was held valid.

In Woodmansie *v.* Holcomb, 34 Kan. 35, the entire stock was sold to the father of one of the partners, the consideration consisting chiefly in debts due him from the son. A refusal to charge that a transfer of partnership property to pay a separate creditor is fraudulent as to creditors if no property is found for them to levy upon was held properly refused because it would include a transfer by a solvent partnership. The court say that by the weight of authority, mere insolvency, where no actual fraud intervenes, will not deprive the partners of their legal control and right of disposition, and if the separate creditor purchases from the firm in good faith and for a fair price, such purchase is not *per se* fraudulent as against separate creditors.

In Schæffer *v.* Fithian, 17 Ind. 463; Jones *v.* Lusk, 2 Met. (Ky.) 356, and Nat'l Bank of the Metropolis *v.* Sprague, 20 N. J. Eq. 13, both partners were indebted as individuals to the person to whom they conveyed or mortgaged property of the firm to pay or secure the debt to the prejudice of partnership creditors; but the courts upholding the transaction do not do so upon the ground that this may have relieved the cases from being the use of the property of one man to pay the debts of another, for the relative interest of each partner in the firm is not disclosed, but the cases are put upon the ground of absolute right of disposition.

But in Day *v.* Wetherby, 29 Wis. 363, A. & B., a firm indebted to a bank, dissolved and took in C., forming a new firm, which purchased property chiefly with the assets of the old firm, and conveyed the property to secure the debt due the bank by the old firm, and this conveyance was held valid against creditors of the new firm; or if C. intended the conveyance to secure a debt due from the new firm, this effect will not be given to it beyond the extent of his interest. And see Fisher *v.* Syfers, 109 Ind. 514.

§ 569. Conveyances of separate property.— A conveyance or application by a partner of his individual property to pay a partnership debt is not regarded as fraudulent towards his separate creditors, for he is merely making preferences among his own creditors.[1]

[1] Elgin National Watch Co. *v.* Loan Soc. *v.* Gibb, 21 Cal. 595; Utley Meyer, 30 Fed. Rep. 659; Savings & *v.* Smith, 24 Conn. 290; Evans *v.*

In Utley *v.* Smith, 24 Conn. 290, C., the owner of a business, took in as partners two of his principal creditors, they believing that the profits would be such as to pay or secure their claims, and acting in good faith, and this was held not to be a fraud on other creditors. After dissolution and an assignment by C. for benefit of creditors, one of the partners paid certain debts of the firm out of funds conveyed by C. to the firm. This was held to be a proper application of the funds, because they are partnership property.

In states where the creditors of the individual partner are preferred to the joint creditors in the distribution of the separate estate, an assignment by a partner of his separate property for the benefit of or preferring his separate creditors is valid,[1] and the instrument will be construed, if possible, as intended to avoid the appropriation of either kind of property to the other set of creditors, but will devote each to its own class, even though no distinction has been made by the assignor;[2] and an assignment of the separate property for the benefit of joint creditors is either void or inures to the separate creditors.[3]

Hawley, 35 Ind. 83; Hardy *v.* Overman, 36 Ind. 549; Talbot *v.* Pierce, 14 B. Mon. 158; Newman *v.* Bagley, 16 Pick. 570; Kirby *v.* Schoonmaker, 3 Barb. Ch. 46, 50; Crook *v.* Rindskopf, 105 N. Y. 476 (rev. s. c. 34 Hun, 457); Auburn Exchange Bank *v.* Fitch, 48 Barb. 344; Evans *v.* Howell, 84 N. Ca. 460; Gadsden *v.* Carson, 9 Rich. Eq. 252; Gallagher's Appeal (Pa.), 7 Atl. Rep. 237; Whitmore *v.* Parks, 3 Humph. 95; Straus *v.* Kerngood, 21 Gratt. 584, 590; Morris *v.* Morris, 4 Gratt. 293; Stewart *v.* Slater, 6 Duer, 83, but this case seems to say that the separate creditors, as a class, could successfully attack the conveyance, though it is held not to be void.

[1] Evans *v.* Winston, 74 Ala. 349; Lord *v.* Devendorf, 54 Wis. 491; Holton *v.* Holton, 40 N. H. 77, and earlier N. H. cases therein cited.

[2] Bank of Mobile *v.* Dunn, 67 Ala. 381; Murrill *v.* Neill, 8 How. (U. S.) 414; Eyre *v.* Beebe, 28 How. Pr. 333; Friend *v.* Michaelis, 15 Abb. N. Cas. 354; Crook *v.* Rindskopf, 105 N. Y. 476; Andress *v.* Miller, 15 Pa. St. 316; McCullough *v.* Sommerville, 8 Leigh, 415.

[3] Holton *v.* Holton, 40 N. H. 77; Jackson *v.* Cornell, 1 Sandf. Ch. 348; O'Neil *v.* Salmon, 25 How. Pr. 246; Pennington *v.* Bell, 4 Sneed, 200, though a firm debt is joint and several. In Collomb *v.* Caldwell, 16 N. Y. 484, it was held that if an assignment for the benefit of partnership creditors include separate property, leaving out separate creditors, it is void. And see Stewart *v.* Slater, 6 Duer, 83; Smith *v.* Howard, 20 How. Pr. 121; Averill *v.* Loucks, 6 Barb. 470; Van Rossum *v.* Walker, 11 id. 237. *Contra*, that the separate cred-

A voluntary conveyance by a partner of his individual estate may be attacked by a partnership creditor as well as by an individual creditor. Whether a judgment and execution must first be had depends on the practice in each state governing fraudulent conveyances.[1]

itors have not such an exclusive claim upon the separate property that an assignment of it for the benefit of partnership creditors is void, Newman v. Bagley, 16 Pick. 570; Gadsden v. Carson, 9 Rich. Eq. 252. In Morris v. Morris, 4 Gratt. 293, it was held that if a partner by will subjects his real estate to the payment of his debts the joint creditors could share with the separate creditors. See, also, Straus v. Kerngood, 21 Gratt. 584, 590. In Goddard v. Hapgood, 25 Vt. 351 (60 Am. Dec. 272), it was said that an assignment of separate property to pay individual debts and return the residuum to the assignor, if it means the exclusion of partnership debts, is void.

[1] Randolph v. Daly, 16 N. J. Eq. 313 (holding, also, that the other partner is not a necessary party); Forbes v. Davison, 11 Vt. 660; Barhydt v. Perry, 57 Iowa, 416 (holding, also, that subsequent creditors whose property had gone to pay off prior creditors would be subrogated to their right to attack the conveyance). Hardy v. Mitchell, 67 Ind. 485, holds that the partnership creditor must aver that there are no separate debts, or that there would be a surplus after payment of them. Also, that both sets of creditors could join in setting aside the conveyance.